Date and Time: Thursday, November 9, 2023 4:27:00 PM CST

Job Number: 210088958

Documents (35)

1. Hartford Fire Ins. Co. v. Cal., 509 U.S. 764

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

2. United States v. Lopez, 514 U.S. 549

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

3. Brown v. Pro Football, 518 U.S. 231

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

4. Klehr v. A.O. Smith Corp., 521 U.S. 179

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

5. State Oil Co. v. Khan, 522 U.S. 3

Client/Matter: -None-

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Search Type: Natural Language

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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

6. Nynex Corp. v. Discon, 525 U.S. 128

Client/Matter: -None-

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Search Type: Natural Language

Narrowed by:

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Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

7. AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

8. Cal. Dental Ass'n v. Ftc, 526 U.S. 756

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

9. BE&K Constr. Co. v. NLRB, 536 U.S. 516

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

10. Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

11. *United States Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

12. *F. Hoffmann-La Roche Ltd v. Empagran S.A., 542 U.S. 155*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

13. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

14. *Texaco Inc. v. Dagher, 547 U.S. 1*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

15. *Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

16. [Anza v. Ideal Steel Supply Corp., 547 U.S. 451]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

17. [Bell Atl. Corp. v. Twombly, 550 U.S. 544]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

18. [Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

19. [Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

20. [Pac. Bell Tel. Co. v. linkLine Communs., Inc., 555 U.S. 438]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	**Narrowed by**
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

21. [Hemi Group, LLC v. City of New York, 559 U.S. 1]

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

22. Am. Needle, Inc. v. NFL, 560 U.S. 183

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

23. FTC v. Phoebe Putney Health Sys., 568 U.S. 216

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

24. Comcast Corp. v. Behrend, 569 U.S. 27

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

25. FTC v. Actavis, Inc., 570 U.S. 136

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

26. Octane Fitness, LLC v. ICON Health & Fitness, Inc., 572 U.S. 545

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

27. *N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

28. *Oneok, Inc. v. Learjet, Inc., 575 U.S. 373*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

29. *Kimble v. Marvel Entm't, LLC, 576 U.S. 446*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

30. *RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

31. *Animal Sci. Prods. v. Hebei Welcome Pharm. Co., 138 S. Ct. 1865*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

32. *Ohio v. Am. Express Co., 138 S. Ct. 2274*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

33. *Apple Inc. v. Pepper, 139 S. Ct. 1514*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

34. *NFL v. Ninth Inning, Inc., 141 S. Ct. 56*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

35. *NCAA v. Alston, 141 S. Ct. 2141*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

Narrowed by:

Content Type	Narrowed by
Cases	Timeline: Jan 01, 1950 to Dec 31, 2022; Practice Areas & Topics: Antitrust & Trade Law; Court: Supreme Court

Hartford Fire Ins. Co. v. Cal.

Supreme Court of the United States

February 23, 1993, Argued ; June 28, 1993 * , Decided

No. 91-1111

Reporter

509 U.S. 764 *; 113 S. Ct. 2891 **; 125 L. Ed. 2d 612 ***; 1993 U.S. LEXIS 4404 ****; 61 U.S.L.W. 4855; 1993-1 Trade Cas. (CCH) P70,280; 93 Cal. Daily Op. Service 4830; 93 Daily Journal DAR 8186; 7 Fla. L. Weekly Fed. S 638

HARTFORD FIRE INSURANCE CO., ET AL., PETITIONERS 91-1111 V. CALIFORNIA ET AL.; AND MERRETT UNDERWRITING AGENCY MANAGEMENT LIMITED, ET AL., PETITIONERS 91-1128 V. CALIFORNIA ET AL.

Prior History: [**1]** ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *938 F.2d 919*, affirmed in part, reversed in part, and remanded.

Core Terms

reinsurers, boycott, primary insurer, terms, Sherman Act, regulated, insurers, domestic, coverage, claim for relief, McCarran-Ferguson Act, conspiracy, comity, risks, concerted, cases, claims-made, complaints, extraterritorial, pollution, insurance business, exemption, occurrence, changes, reinsurance contract, district court, Underwriters, antitrust, policies, parties

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Commerce With Foreign Nations

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN1[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. *15 U.S.C.S. § 1*.

* Together with No. 91-1128, Merrett Underwriting Agency Management Ltd. et al. v. California et al., also on certiorari to the same court.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

HN2[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act declares every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, to be illegal. *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

Criminal Law & Procedure > ... > Crimes Against Persons > Coercion & Harassment > Elements

Insurance Law > Industry Practices > General Overview

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

HN3[] **Higher Education & Professional Associations, Professional Associations**

The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, *15 U.S.C.S. § 1012(a)*, and that no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, *15 U.S.C.S. § 1012(b)*. *Section 2(b)* of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act, *15 U.S.C.S. § 1*, applies to the business of insurance to the extent that such business is not regulated by State Law, *15 U.S.C.S. § 1012(b)*. Section 3(b) provides that nothing in the McCarran-Ferguson Act shall render the Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation, *15 U.S.C.S. § 1013(b)*.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN4[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

By its terms, the antitrust exemption of *§ 2(b)* of the McCarran-Ferguson Act applies to the business of insurance to the extent that such business is regulated by state law. Business as used in *§ 2(b)* is most naturally read to refer to mercantile transactions, buying and selling, and traffic.

Antitrust & Trade Law > Exemptions & Immunities > McCarran-Ferguson Act Exemption

Business & Corporate Compliance > ... > Industry Practices > Federal Regulations > Antitrust Regulations

HN5[] **Exemptions & Immunities, McCarran-Ferguson Act Exemption**

The business of insurance should be read to single out one activity from others, not to distinguish one entity from another.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **International Aspects, International Application of US Law**

The Sherman Act, *15 U.S.C.S. § 1*, applies to foreign conduct that is meant to produce and did in fact produce some substantial effect in the United States.

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Public Enforcement > State Civil Actions

HN7[] **International Aspects, International Application of US Law**

The fact that conduct is lawful in the state in which it took place will not, of itself, bar application of the United States antitrust laws, even where the foreign state has a strong policy to permit or encourage such conduct.

Lawyers' Edition Display

Decision

Conspiracy claims under Sherman Act against domestic and foreign insurers held (1) cognizable as within McCarran-Ferguson Act's boycott exception; and (2) not barred by international comity.

Summary

According to complaints filed in multiple federal actions by 19 states and many private plaintiffs, certain members of the insurance industry had conspired to restrict the terms of coverage of commercial general liability (CGL) insurance available in the United States, in violation of 1 of the Sherman Act (*15 USCS 1*). Among the allegations made in the complaints, it was claimed that four domestic primary insurers had conspired with domestic and foreign reinsurers, insurance brokers, and insurance associations to procure desired changes with respect to insurance coverage in the terms of the standard CGL forms used in the United States, and in particular that (1) some reinsurers had threatened to withdraw from reinsuring primary insurers who used a CGL form which the reinsurers disfavored; (2) reinsurers had threatened to boycott reinsuring North American CGL risks; (3) foreign and domestic reinsurers had presented positions at an insurance association meeting that the standard CGL forms had to be changed or else there would be no reinsurance; (4) insurers and reinsurers had told insurance brokers and agents that a reinsurance boycott would ensue if revised CGL forms were not approved; (5) the largest domestic reinsurer had agreed either to coerce the adoption of demands for changes in CGL forms or to derail the forms program; and (6) domestic reinsurers had agreed to boycott the CGL forms unless certain terms were added. The complaints also alleged that (1) a group of reinsurers and brokers based in London, England, had conspired to coerce primary insurers in the United States to offer CGL coverage only for claims made during the policy period; (2) a group of London reinsurers had conspired to withhold reinsurance for certain coverage; (3) a group of domestic primary insurers, the association which issued the CGL forms, and foreign reinsurers had conspired to restrain trade in the markets for excess and "umbrella" insurance; and (4) a group of London and domestic retrocessional reinsurers--that is, insurers of the risks of reinsurers--had conspired to withhold retrocessional reinsurance for certain risks. The actions were consolidated for litigation in the United States District Court for the Northern District of California. The

District Court granted the defendants' motions to dismiss the Sherman Act claims for failure to state a cause of action (*723 F Supp 464*). On appeal, the United States Court of Appeals for the Ninth Circuit, reversing, expressed the view that (1) the domestic defendants were not exempt from federal antitrust liability under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), which provides that the Sherman Act applies to the business of insurance to the extent that such business is not regulated by state law, because the domestic defendants forfeited their exemption when they conspired with the foreign reinsurers, who were not exempt; (2) even if the defendants' alleged conduct was exempt from Sherman Act liability under 2(b), such conduct was within the exception to immunity under the McCarran-Ferguson Act provided by 3(b) (*15 USCS 1013(b)*) for any "act of boycott, coercion, or intimidation"; and (3) the principle of international comity did not bar the exercise of federal jurisdiction against the foreign defendants (*938 F2d 919*).

On certiorari, the United States Supreme Court affirmed in part, reversed in part, and remanded the case for further proceedings. It was held, with different majorities of the Justices for each holding, that (1) the domestic insurers were immune from antitrust liability under 2(b); (2) there were sufficient allegations of a "boycott" under 3(b)--defined as the refusal to deal with another in unrelated transactions in order to achieve the terms desired in a targeted transaction--to sustain several counts of complaint against a motion to dismiss; and (3) international comity did not counsel against exercising jurisdiction over the London-based reinsurers.

In those portions of the opinion of Souter, J., which constituted the opinion of the court, it was held in pertinent part (1) in a portion (Part II-A) expressing the unanimous view of the court, that domestic insurers did not lose their immunity from antitrust liability under 2(b) by acting in concert with foreign insurers that were assumed for the sake of argument not to be regulated by state law within the meaning of 2(b); and (2) in a portion (Part III) joined by Rehnquist, Ch. J., and White, Blackmun, and Stevens, JJ., that, even assuming that in a proper case a court could decline to exercise Sherman Act jurisdiction over foreign conduct, the principle of international comity did not counsel against exercising jurisdiction with respect to allegations that the London-based reinsurers had engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact had produced substantial effect, because there was no conflict with British law, where the London reinsurers did not claim that (a) British law required them to act in some fashion prohibited by the law of the United States, or (b) their compliance with the laws of both countries was otherwise impossible. Also, Souter, J., in a portion (Part II-B) joined by White, Blackmun, and Stevens, J., expressed the view that (1) neither the Supreme Court's precedents nor 3(b) warranted a definition of "boycott" which was confined to refusals to deal that were unrelated or collateral to the objective sought by those refusing to deal; and (2) those claims which asserted a conspiracy among the primary insurers, reinsurers, brokers, and associations to procure changes in the CGL forms alleged one or more acts of "boycott" under 3(b) and were thus sufficient to survive a motion to dismiss.

In that portion (Part I) of the opinion of Scalia, J., which constituted the opinion of the court, it was held by Scalia, J., joined by Rehnquist, Ch. J., and O'Connor, Kennedy, and Thomas, JJ., that (1) for purposes of 3(b), a "boycott" meant the refusal to deal with another in unrelated transactions in order to achieve the terms desired in a targeted transaction; and (2) there were sufficient allegations of a "boycott" under such standard to sustain counts of complaint against a motion to dismiss, with respect to those claims asserting a conspiracy to procure changes in the CGL forms. Also, Scalia, J., in a dissenting portion (Part II) joined by O'Connor, Kennedy, and Thomas, JJ., expressed the view that in the case at hand (1) there was a conflict of laws with respect to the extraterritorial application of the Sherman Act to British corporations and other British subjects; and (2) application of the Sherman Act to the British defendants was unreasonable, since (a) the relevant activity took place primarily in the United Kingdom, (b) the defendants had their principal places of business and residence outside the United States, (c) England had comprehensive regulations governing reinsurance and a heavy interest in regulating such activity, and (d) the fact that 2(b) generally allowed states to override the Sherman Act in the insurance field suggested that the importance of regulation to the United States was slight.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

Domestic insurers do not lose their immunity from antitrust liability under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), which immunity applies to the business of insurance to the extent that such business is regulated by state law, by acting in concert with foreign insurers that are assumed for the sake of argument not to be regulated by state law within the meaning of 2(b).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- McCarran-Ferguson Act -- "boycott" -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]***LEdHN[2D]***[] [2D]***LEdHN[2E]***[] [2E]

For purposes of 3(b) of the McCarran-Ferguson Act (*15 USCS 1013(b)*), which provides that nothing in such Act--under which the business of insurance generally is exempt from antitrust liability to the extent that such business is regulated by state law--renders the Sherman Act (*15 USCS 1 et seq.*) inapplicable to any act of "boycott," a "boycott" means the refusal to deal with another in unrelated transactions in order to achieve the terms desired in a targeted transaction; the parties to a concerted agreement to terms--that is, a cartelization--are not engaging in a conditional boycott within the meaning of 3(b) because such parties are not coercing anyone in the usual sense of the word; accordingly, there are sufficient allegations of a "boycott" under such standard to sustain several counts of complaint against a motion to dismiss, in a consolidated action alleging a conspiracy in unreasonable restraint of commerce among members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), insofar as such counts contain allegations that (1) reinsurers threatened to withdraw from reinsuring primary insurers who used a certain commercial general liability (CGL) form which the reinsurers disfavored, (2) reinsurers threatened to boycott reinsuring North American CGL risks, (3) foreign and domestic reinsurers presented positions at an insurance association meeting that the standard CGL forms had to be changed or else there would be no reinsurance, (4) insurers and reinsurers told insurance brokers and agents that a reinsurance boycott would ensue if revised CGL forms were not approved, (5) the largest domestic reinsurer agreed either to coerce the adoption of demands for changes in CGL forms or to derail the forms program, and (6) domestic reinsurers agreed to boycott the CGL forms unless certain terms were added. (Souter, White, Blackmun, and Stevens, JJ., dissented in part from this holding.)

CONFLICT OF LAWS §45 > comity -- Sherman Act -- foreign reinsurers -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]***LEdHN[3D]***[] [3D]

Even assuming that, in a proper case a court may decline to exercise jurisdiction under the Sherman Act (*15 USCS 1 et seq.*) over foreign conduct, the principle of international comity does not counsel against exercising jurisdiction with respect to Sherman Act allegations that reinsurers based in London, England, engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect, because there is no conflict with British law, where the London reinsurers do not claim that (1) British law requires them to act in some fashion prohibited by the law of the United States, or (2) their compliance with the laws of both countries is otherwise impossible. (Scalia, O'Connor, Kennedy, and Thomas, JJ., dissented from this holding.)

APPEAL §1293 > complaint -- acceptance of allegations -- > Headnote:
LEdHN[4][] [4]

On certiorari to review a Federal Court of Appeals' judgment reversing a Federal District Court's grant of motions to dismiss complaints in a consolidated action alleging a conspiracy among members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), the United States Supreme Court will take the allegations of the complaints as true.

APPEAL §1293 > model complaint -- assumptions -- consideration on remand -- > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

On certiorari to review a Federal Court of Appeals' judgment reversing a Federal District Court's grant of motions to dismiss complaints by states and private parties in a consolidated action alleging a conspiracy among members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), the United States Supreme Court will assume that where the private parties have chosen in their brief to use one state's complaint as a representative model of their claims, the private parties' complaints track that state's complaint; upon the Supreme Court's remand of such case, the courts below will be free to take into account any relevant differences among the complaints that the parties may bring to their attention.

APPEAL §1293 > complaints -- assumptions -- > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

With respect to complaints in a consolidated action against members of the insurance industry in violation of 1 of the Sherman Act (*15 USCS 1*), the United States Supreme Court, on certiorari to review a Federal Court of Appeals' judgment reversing a Federal District Court's grant of motions to dismiss such complaints, will assume that domestic reinsurers alleged to be involved in a conspiracy to withhold retrocessional insurance--that is, insurers of the risks of reinsurers--for certain risks are among the unnamed coconspirators mentioned in the complaints where (1) the complaints' statements of facts describe the conspiracy as involving reinsurers in "London and the United States"; but (2) the claims for relief name only the London reinsurers.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- > Headnote:
LEdHN[7][] [7]

With respect to the provision of 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*) that "the business of insurance" is exempt from antitrust liability to the extent that such business is regulated by state law, the definite article before the word "business" shows that such word is most naturally read to refer to mercantile transactions, buying and selling, and traffic; for purposes of 2(b), "the business of insurance" is not meant to refer to a single entity and should be read to single out one activity from others, rather than to distinguish one entity from another.

EVIDENCE §343.5 > antitrust -- assumption -- > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

The grant of immunity, under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*), from liability under the Sherman Act (*15 USCS 1 et seq.*), the Clayton Act (*15 USCS 12 et seq.*), or the Federal Trade Commission Act (*15 USCS 41 et seq.*) for acts constituting "the business of insurance" to the extent that such business is regulated by state law assumes that acts which, but for that grant, would violate such federal statutes are part of "the business of insurance."

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §13 > labor unions -- > Headnote:
LEdHN[9A][] [9A]***LEdHN[9B]***[] [9B]

Labor unions are not immune from federal antitrust liability for certain types of agreements with employers, such as agreements to impose a certain wage scale on other bargaining units.

APPEAL §1750 > question left open on remand -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

Upon reversing a Federal Court of Appeals' judgment to the extent that such judgment held that domestic primary insurers, reinsurers, insurance trade associations, and a reinsurance broker lost their exemption from antitrust liability under 2(b) of the McCarran-Ferguson Act (*15 USCS 1012(b)*) because they acted in concert with foreign reinsurers, the United States Supreme Court will leave to the Court of Appeals on remand the question whether the activities of the domestic reinsurers were "regulated by state law" within the meaning of 2(b).

CONFLICT OF LAWS §97.5 > INTERNATIONAL LAW §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §21 > comity -- > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]***LEdHN[11C]***[] [11C]

The Sherman Act (*15 USCS 1 et seq.*) applies to foreign conduct which produces a substantial intended effect in the United States; concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction.

COURTS §530 > jurisdiction -- Congress -- > Headnote:
LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

Congress has exercised prescriptive jurisdiction under the Sherman Act (*15 USCS 1 et seq.*).

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > statutory exemption -- > Headnote:
LEdHN[13A][] [13A]***LEdHN[13B]***[] [13B]

The alleged conduct of reinsurers based in London, England, in engaging in unlawful conspiracies which substantially affected the market for insurance in the United States meets the requirements of the exception to 402 of the Foreign Trade Antitrust Improvements Act of 1982 (*15 USCS 6a*)--which generally makes the Sherman Act (*15 USCS 1 et seq.*) inapplicable to conduct involving nonimport foreign trade or commerce--for conduct which has a direct, substantial, and reasonably forseeable effect on domestic or import commerce.

CONFLICT OF LAWS §97.5 > INTERNATIONAL LAW §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §21 > foreign conduct -- > Headnote:
LEdHN[14][] [14]

The fact that conduct is lawful in the foreign state in which it took place will not, of itself, bar application of the United States antitrust laws, even where such foreign state has a strong policy to permit or encourage such conduct; no conflict of law exists, for these purposes, where a person subject to regulation by two states can comply with the laws of both. (Scalia, O'Connor, Kennedy, and Thomas, JJ., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > license refusal -- employment -- > Headnote:
LEdHN[15][] [15]

Although both an agreement among competing motion picture distributors under which they refuse to license films to exhibitors except on standardized terms, and an attempt by an association of employers to establish industrywide terms of employment, are unreasonable restraints of trade under the Sherman Act (*15 USCS 1 et seq.*), neither of such concerted actions are properly characterized as boycotts as far as the Sherman Act is concerned.

BOYCOTT §1 > activities -- > Headnote:
LEdHN[16A][] [16A]***LEdHN[16B]***[] [16B]

"Boycott" is a multifaceted phenomenon that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, and social boycotts, but it does not include refusals to deal because of objections to proposed terms.

LABOR §123 > boycott -- > Headnote:
LEdHN[17][] [17]

A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer which is unrelated to the employment contract.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- McCarran-Ferguson Act -- > Headnote:
LEdHN[18A][] [18A]***LEdHN[18B]***[] [18B]***LEdHN[18C]***[] [18C]

For purposes of 3(b) of the McCarran-Ferguson Act (*15 USCS 1013(b)*)--which provides that nothing in such Act, under which the business of insurance generally is exempt from antitrust liability to the extent that such business is regulated by state law, renders the Sherman Act (*15 USCS 1 et seq.*) inapplicable to any act of "boycott, coercion, or intimidation"--the alleged insistence by a number of reinsurers upon certain primary insurance terms as a condition of writing reinsurance is a concerted agreement to terms and not a "boycott," since the terms of primary insurance policies are the subject matter insured by reinsurance; furthermore, it follows from such determination that the reinsurers' alleged actions do not constitute "coercion" or "intimidation" within the meaning of 3(b). (Souter, White, Blackmun, and Stevens, JJ., dissented from this holding.)

PLEADING §103 > dismissal -- > Headnote:
LEdHN[19][] [19]

A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.7 > insurance exemption -- McCarran-Ferguson Act -- > Headnote:
LEdHN[20A][] [20A]***LEdHN[20B]***[] [20B]

Claims for relief made in complaints in a consolidated action in Federal District Court fail to allege any boycotts within the meaning of 3(b) of the McCarran-Ferguson Act (*15 USCS 1013(b)*)--which provides that nothing in such Act, under which the business of insurance generally is exempt from antitrust liability to the extent that such business is regulated by state law, renders the Sherman Act (*15 USCS 1 et seq.*) inapplicable to any act of boycott--where such claims allege a conspiracy among a group of domestic primary insurers, some foreign insurers, and an association of domestic insurers, to draft restrictive model forms and policy language for "umbrella" and "excess" insurance.

Syllabus

Nineteen States and many private plaintiffs filed complaints alleging that the defendants -- four domestic primary insurers, domestic companies who sell reinsurance to insurers, two domestic trade associations, a domestic reinsurance broker, and reinsurers based in London -- violated the Sherman Act by engaging in various conspiracies aimed at forcing certain other primary insurers to change the terms of their standard domestic commercial general liability insurance policies to conform with the policies the defendant insurers wanted to sell. After the actions were consolidated for litigation, the District Court granted the defendants' motions to dismiss. The Court of Appeals reversed, rejecting the District Court's **[****2]** conclusion that the defendants were entitled to antitrust immunity under *§ 2(b)* of the McCarran-Ferguson Act, which exempts from federal regulation "the business of insurance," except "to the extent that such business is not regulated by State Law." Although it held the conduct involved to be "the business of insurance," the Court of Appeals ruled that the foreign reinsurers did not fall within *§ 2(b)*'s protection because their activities could not be "regulated by State Law," and that the domestic insurers had forfeited their *§ 2(b)* exemption when they conspired with the nonexempt foreign reinsurers. Furthermore, held the court, most of the conduct in question fell within § 3(b), which provides that nothing in the McCarran-Ferguson Act "shall render the . . . Sherman Act inapplicable to any . . . act of boycott . . . ." Finally, the court rejected the District Court's conclusion that the principle of international comity barred it from exercising Sherman Act jurisdiction over the three claims brought solely against the London reinsurers.

Held: The judgment is affirmed in part and reversed in part, and the cases are remanded.

JUSTICE SOUTER delivered the opinion **[****3]** of the Court with respect to Parts I, II-A, III, and IV, concluding that:

1. The domestic defendants did not lose their *§ 2(b)* immunity by conspiring with the foreign defendants. The Court of Appeals's conclusion to the contrary was based in part on the statement, in *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 231, 59 L. Ed. 2d 261, 99 S. Ct. 1067*, that, "in analogous contexts, the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." Even assuming that foreign reinsurers were "not regulated by State Law," the Court of Appeals's reasoning fails because the analogy drawn by the *Royal Drug* Court was a loose one. Following that language, the *Royal Drug* Court cited two cases dealing with the Capper-Volstead Act, which immunizes certain "persons" from Sherman Act liability. *Ibid.* Because, in contrast, the McCarran-Ferguson Act immunizes activities rather than entities, an entity-based analysis of *§ 2(b)* immunity is inappropriate. See *id., at 232-233*. Moreover, the agreements at issue in *Royal Drug Co.* were made with "parties wholly outside the insurance **[****4]** industry," *id., at 231*, whereas the alleged agreements here are with foreign reinsurers and admittedly concern "the business of insurance." Pp. 781-784.

2. Even assuming that a court may decline to exercise Sherman Act jurisdiction over foreign conduct in an appropriate case, international comity would not counsel against exercising jurisdiction in the circumstances alleged here. The only substantial question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 96 L. Ed. 2d 461, 107 S. Ct. 2542* (BLACKMUN, J., concurring in part and dissenting in part). That question must be answered in the negative, since the London reinsurers do not argue that British law requires them to act in some fashion prohibited by United States law or claim that their compliance with the laws of both countries is otherwise impossible. Pp. 794-799.

JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, concluding that a "boycott" for purposes of § 3(b) of the Act occurs where, **[****5]** in order to coerce a target into certain terms on one transaction, parties refuse to engage in other, unrelated transactions with the target. It is not a "boycott" but rather a concerted agreement to terms (a "cartelization") where parties refuse to engage in a particular transaction until the terms of that transaction are agreeable. Under the foregoing test, the allegations of a "boycott" in this litigation, construed most favorably to the respondents, are sufficient to sustain most of the relevant counts of complaint against a motion to dismiss. Pp. 800-811.

Counsel: Stephen M. Shapiro argued the cause for petitioners in No. 91-1111. With him on the briefs were Kenneth S. Geller, Mark I. Levy, Roy T. Englert, Jr., Timothy S. Bishop, Ronald A. Jacks, Richard E. Sherwood, William A. Montgomery, William M. Hannay, John G. Harkins, Jr., Eleanor Morris Illoway, Bartlett H. McGuire, Douglas I. Brandon, James S. Greenan, Raoul D. Kennedy, Alan H. Silberman, Stuart Altschuler, Peter O. Glaessner, David L. Foster, Gregory L. Harris, Frank Rothman, Timothy E. Carr, Kent E. Keller, Lewis A. Kaplan, Allan Blumstein, Ronald C. Redcay, Michael M. Uhlmann, Robert B. Green, Stephen M. Axinn, Michael **[****6]** L. Weiner, James M. Burns, Eugene F. Bannigan, Christine C. Burgess, Robert M. Mitchell, Philip H. Curtis, Zoe Baird, Jane Kelly, Joseph P. Giasi, Jr., Joseph A. Gervasi, Debra J. Anderson, Michael S. Wilder, Jeffrey L. Morris, Edmond F. Rondepierre, and John J. Hayden. Molly S. Boast argued the cause for petitioners in No. 91-1128. With her on the briefs for petitioners Merrett Underwriting Agency Management Ltd. et al. were Lawrence W. Pollack, Andreas F. Lowenfeld, Barry L. Bunshoft, Eric J. Sinrod, David W. Slaby, Michael L. McCluggage, James T. Nyeste, Michael R. Blankshain, Jerome N. Lerch, Paul R. Haerle, Martin Frederic Evans, Donald Francis Donovan, and Colby A. Smith. Barry R. Ostrager, Eleanor M. Fox, Mary Kay Vyskocil, and Kathryn A. Clokey filed briefs for petitioner Sturge Reinsurance Syndicate Management Ltd.

Laurel A. Price, Deputy Attorney General of New Jersey, argued the cause for respondents in both cases. With her on the brief for state respondents in No. 91-1111 and on the brief for state respondents in No. 91-1128 were J. Joseph Curran, Jr., Attorney General of Maryland, Ellen S. Cooper, Assistant Attorney General, James H. Evans, Attorney General of Alabama, **[****7]** Charles E. Cole, Attorney General of Alaska, Jim Forbes, Assistant Attorney General, Grant Woods, Attorney General of Arizona, Suzanne M. Dallimore, Assistant Attorney General, Daniel E. Lungren, Attorney General of California, Roderick E. Walston, Chief Assistant Attorney General, Sanford N. Gruskin, Assistant Attorney General, Thomas Greene, Supervising Deputy Attorney General, Kathleen E. Foote, Deputy Attorney General, Gale A. Norton, Attorney General of Colorado, James R. Lewis, Assistant Attorney General, Richard Blumenthal, Attorney General of Connecticut, Robert M. Langer and William M. Rubenstein, Assistant Attorneys General, Richard T. Ieyoub, Attorney General of Louisiana, Jenifer Schaye, Assistant Attorney General, Scott Harshbarger, Attorney General of Massachusetts, Thomas M. Alpert and George K. Weber, Assistant Attorneys General, Frank J. Kelley, Attorney General of Michigan, Hubert H. Humphrey III, Attorney General of Minnesota, Thomas F. Pursell, Deputy Attorney General, Lisa Tiegel, Special Assistant Attorney General, Marc Racicot, Attorney General of Montana, Paul Johnson, Assistant Attorney General, Robert J. Del Tufo, Attorney General of New Jersey, Robert Abrams, **[****8]** Attorney General of New York, Jerry Boone, Solicitor General, George Sampson, Richard L. Schwartz and Gary J. Malone, Assistant Attorneys General, Lee Fisher, Attorney General of Ohio, Doreen C. Johnson and Marc B. Bandman, Assistant Attorneys General, Ernest D. Preate, Jr., Attorney General of Pennsylvania, Thomas L. Welch and David R. Weyl, Deputy Attorneys General, Kenneth O. Eikenberry, Attorney General of Washington, John R. Ellis, Deputy Attorney General, Tina E. Kondo, Assistant Attorney General, Mario J. Palumbo, Attorney General of West Virginia, Donald L. Darling, Deputy Attorney General, Donna S. Quesenberry, Senior Assistant Attorney General, James E. Doyle, Attorney General of Wisconsin, and Kevin J. O'Connor, Assistant Attorney General. H. Laddie Montague, Jr., Howard Langer, Nicholas E. Chimicles, Eugene Gressman, Jerry S. Cohen, and Robert Miller filed a brief for private respondents in both cases.

Deputy Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Acting Solicitor General Bryson, Acting Assistant Attorney General Clark, Robert A. Long, Jr., Robert B. Nicholson, Marion L. Jetton, **[****9]** Charles S. Stark, and Edward T. Hand. [+]

[+] Briefs of amici curiae urging reversal were filed for the Government of Canada by Douglas E. Rosenthal; for the Government of the United Kingdom of Great Britain and Northern Ireland by Mark R. Joelson; for the American Insurance Association et al. by John E. Nolan, Jr., Craig A. Berrington, and Patrick J. McNally; for the National Association of Casualty & Surety Agents et al. by Anthony C. Epstein and Ann M. Kappler; for the National Conference of Insurance Legislators by Stephen W. Schwab, Seymour Simon, and Reuben A. Bernick; and for the Washington Legal Foundation by Daniel J. Popeo and Richard A. Samp.

Briefs of amici curiae urging affirmance were filed for the State of Texas et al. by Dan Morales, Attorney General of Texas, Will Pryor, First Assistant Attorney General, Mary F. Keller, Deputy Attorney General, and Thomas P. Perkins, Jr., Mark Tobey, Katherine D. Farroba, and Floyd Russell Ham, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, John J. Polk, Deputy Attorney General, Robert A. Butterworth, Attorney General of Florida, Scott E. Clodfelter, Assistant Attorney General, Robert A. Marks, Attorney General of Hawaii, Larry EchoHawk, Attorney General of Idaho, Brett T. DeLange, Deputy Attorney General, Bonnie J. Campbell, Attorney General of Iowa, John R. Perkins, Deputy Attorney General, Chris Gorman, Attorney General of Kentucky, Robert V. Bullock, Assistant Attorney General, Mike Moore, Attorney General of Mississippi, Jim Steele, Special Assistant Attorney General, William L. Webster, Attorney General of Missouri, Henry T. Herschel, Tom Udall, Attorney General of New Mexico, Frankie Sue Del Papa, Attorney General of Nevada, Lacy H. Thornburg, Attorney General of North Carolina, James C. Gulick, Special Deputy Attorney General, and K. D. Sturgis, Assistant Attorney General, Nicholas J. Spaeth, Attorney General of North Dakota, David W. Huey, Assistant Attorney General, James E. O'Neil, Attorney General of Rhode Island, Maureen G. Glynn, Special Assistant Attorney General, T. Travis Medlock, Attorney General of South Carolina, Mark Barnett, Attorney General of South Dakota, Jeffrey P. Hallem, Assistant Attorney General, R. Paul Van Dam, Attorney General of Utah, Patrice Arent and Cy H. Castle, Assistant Attorneys General, Jeffrey L. Amestoy, Attorney General of Vermont, Julie Brill, Assistant Attorney General, and Mary Sue Terry, Attorney General of Virginia; for the National League of Cities et al. by Lawrence Kill and Anthony P. Coles; and for the Service Station Dealers of America by Dimitri G. Daskalopoulos.

Richard I. Fine filed a brief for the Service Industry Council et al. as amicus curiae.

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Judges: SOUTER, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and II-A, the opinion of the Court with respect to Parts III and IV, in which REHNQUIST, C. J., and WHITE, BLACKMUN, and STEVENS, JJ., joined, and an opinion concurring in the judgment with respect to Part II-B, in which WHITE, BLACKMUN, and STEVENS, JJ., joined. SCALIA, J., delivered the opinion of the Court with respect to Part I, in which REHNQUIST, C.J., and O'CONNOR, KENNEDY, and THOMAS, JJ., joined, and a dissenting opinion with respect to Part II, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined, post, p. 800.

Opinion by: SOUTER

Opinion

[*769] **[***621]** **[**2895]** JUSTICE SOUTER announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II-A, III, and IV, and an opinion concurring in the judgment with respect to Part II-B. [*]

[**11]** ***LEdHN[1A]***[] [1A] ***LEdHN[2A]***[] [2A] ***LEdHN[3A]***[] [3A]***HN1***[] The Sherman Act makes every contract, combination, or conspiracy in unreasonable restraint of interstate or foreign commerce illegal. 26 Stat. 209, as amended, *15 U.S.C. § 1*. These consolidated cases present questions about the application of that Act to the insurance industry, both here and abroad. The plaintiffs (respondents here) allege that both domestic and foreign defendants (petitioners here) violated the Sherman Act by engaging in various conspiracies to affect the American insurance market. A group of domestic **[***622]** defendants argues that the McCarran-Ferguson Act, 59 Stat. 33, as amended, *15 U.S.C. § 1011 et seq.*, precludes application of the Sherman Act to the conduct alleged; a group of foreign defendants argues that the principle of international comity requires the District Court to refrain **[****12]** from exercising jurisdiction over certain claims against it. We hold that most of the domestic defendants' alleged conduct is not immunized **[*770]** from antitrust liability by the McCarran-Ferguson Act, and that, even assuming it applies, the principle of international comity does not preclude District Court jurisdiction over the foreign conduct alleged.

I

LEdHN[4][] [4] ***LEdHN[5A]***[] [5A]The two petitions before us stem from consolidated litigation comprising the complaints of 19 States and many private plaintiffs alleging that the defendants, members of the insurance industry, conspired in violation of *§ 1* of the Sherman Act to restrict the terms of coverage of commercial general liability (CGL) insurance [1] available in the United States. Because the cases come to us on motions to dismiss, we take the allegations of the complaints as true. [2]

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[*] JUSTICE WHITE, JUSTICE BLACKMUN, and JUSTICE STEVENS join this opinion in its entirety, and THE CHIEF JUSTICE joins Parts I, II-A, III, and IV.

[1] CGL insurance provides "coverage for third party casualty damage claims against a purchaser of insurance (the 'insured')." App. 8 (Cal. Complaint P4.a).

[2] Following the lower courts and the parties, see *In re Insurance Antitrust Litigation, 938 F.2d 919, 924, 925 (CA9 1991)*, we will treat the complaint filed by California as representative of the claims of Alabama, Arizona, California, Massachusetts, New York, West Virginia, and Wisconsin, and the complaint filed by Connecticut as representative of the claims of Alaska, Colorado, Connecticut, Louisiana, Maryland, Michigan, Minnesota, Montana, New Jersey, Ohio, Pennsylvania, and Washington. As will become apparent, the California and Connecticut Complaints differ slightly in their presentations of background information and their claims for relief; their statements of facts are identical. Because the private party plaintiffs have chosen in their brief in this Court to use the California Complaint as a "representative model" of their claims, Brief for Respondents (Private Party Plaintiffs)

[**13]** *LEdHN[5B]*[] [5B]

[**14]** A

According to the complaints, the object of the conspiracies was to force certain primary **[**2896]** insurers (insurers who sell insurance directly to consumers) to change the terms of their **[*771]** standard CGL insurance policies to conform with the policies the defendant insurers wanted to sell. The defendants wanted four changes. [3]

First, CGL insurance has traditionally been sold in the United States on an "occurrence" basis, through a policy obligating the insurer "to pay or defend claims, whenever made, resulting from an accident **[****15]** or 'injurious exposure to conditions' that occurred during the [specific time] period the policy was in effect." App. 22 (Cal. Complaint P52). In place of this traditional "occurrence" trigger of coverage, the **[***623]** defendants wanted a "claims-made" trigger, obligating the insurer to pay or defend only those claims made during the policy period. Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability. Second, the defendants wanted the "claims-made" policy to have a "retroactive date" provision, which would further restrict coverage to claims based on incidents that occurred after a certain date. Such a provision eliminates the risk that an insurer, by issuing a claims-made policy, would assume liability arising from incidents that occurred before the policy's effective date, but remained undiscovered or caused no immediate harm. Third, CGL insurance has traditionally covered "sudden and accidental" pollution; the defendants wanted to eliminate that coverage. Finally, CGL insurance has traditionally provided that the insurer **[****16]** would bear the legal costs of defending covered claims against the insured without regard to the policy's stated limits of coverage; the defendants **[*772]** wanted legal defense costs to be counted against the stated limits (providing a "legal defense cost cap").

To understand how the defendants are alleged to have pressured the targeted primary insurers to make these changes, one must be aware of two important features of the insurance industry. First, most primary insurers rely on certain outside support services for the type of insurance coverage they wish to sell. Defendant Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers (including the primary insurer defendants, Hartford Fire Insurance Company, Allstate Insurance Company, CIGNA Corporation, and Aetna Casualty and Surety Company), is the almost exclusive source of support services in this country for CGL insurance. See *id.*, at 19 (Cal. Complaint P38). ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. *Ibid.* (Cal. Complaint P39); **[****17]** *id.*, at 74 (Conn. Complaint P50). All of the "traditional" features of CGL insurance relevant to this litigation were embodied in the ISO standard CGL insurance form that had been in use since 1973 (1973 ISO CGL form). *Id.*, at 22 (Cal. Complaint PP51-54); *id.*, at 75 (Conn. Complaint **[**2897]** PP56-58). For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates, interprets, and distributes data on the premiums charged, claims filed and paid, and defense costs expended with respect to each form, *id.*, at 19 (Cal. Complaint P39); *id.*, at 74 (Conn. Complaint PP51-52), and on the basis of these data it predicts future loss trends and calculates advisory premium rates, *id.*, at 19 (Cal. Complaint P39); *id.*, at 74 (Conn. Complaint P53). Most ISO members cannot afford to continue to use a form if ISO withdraws these support services. See *id.*, at 32-33 (Cal. Complaint PP97, 99).

Second, primary insurers themselves usually purchase insurance to cover a portion of the risk they assume from the **[*773]** consumer. This so-called "reinsurance" may serve at least two purposes, protecting the primary insurer **[****18]** from catastrophic **[***624]** loss, and allowing the primary insurer to sell more insurance than its own financial capacity might otherwise permit. *Id.*, at 17 (Cal. Complaint P29). Thus, "the availability of reinsurance

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3, n.6, we will assume that their complaints track that complaint. On remand, the courts below will of course be free to take into account any relevant differences among the complaints that the parties may bring to their attention.

[3] The First Claim for Relief in the Connecticut Complaint, App. 88-90 (PP115-119), charges all the defendants with an overarching conspiracy to force all four of these changes on the insurance market. The eight federal-law Claims for Relief in the California Complaint, *id.*, at 36-49 (PP111-150), charge various subgroups of the defendants with separate conspiracies that had more limited objects; not all of the defendants are alleged to have desired all four changes.

affects the ability and willingness of primary insurers to provide insurance to their customers." *Id.*, at 18 (Cal. Complaint P34); *id.*, at 63 (Conn. Complaint P4(p)). Insurers who sell reinsurance themselves often purchase insurance to cover part of the risk they assume from the primary insurer; such "retrocessional reinsurance" does for reinsurers what reinsurance does for primary insurers. See *ibid.* (Conn. Complaint P4(r)). Many of the defendants here are reinsurers or reinsurance brokers, or play some other specialized role in the reinsurance business; defendant Reinsurance Association of America (RAA) is a trade association of domestic reinsurers.

B

The prehistory of events claimed to give rise to liability starts in 1977, when ISO began the process of revising its 1973 CGL form. *Id.*, at 22 (Cal. Complaint P55). For the first time, it proposed two CGL forms (1984 ISO CGL forms), one the traditional "occurrence" type, the other "with a new **[****19]** 'claims-made' trigger." *Id.*, at 22-23 (Cal. Complaint P56). The "claims-made" form did not have a retroactive date provision, however, and both 1984 forms covered "'sudden and accidental' pollution" damage and provided for unlimited coverage of legal defense costs by the insurer. *Id.*, at 23 (Cal. Complaint PP59-60). Within the ISO, defendant Hartford Fire Insurance Company objected to the proposed 1984 forms; it desired elimination of the "occurrence" form, a retroactive date provision on the "claims-made" form, elimination of sudden and accidental pollution coverage, and a legal defense cost cap. Defendant Allstate Insurance Company also expressed its desire for a retroactive date provision on **[*774]** the "claims-made" form. *Id.*, at 24 (Cal. Complaint P61). Majorities in the relevant ISO committees, however, supported the proposed 1984 CGL forms and rejected the changes proposed by Hartford and Allstate. In December 1983, the ISO Board of Directors approved the proposed 1984 forms, and ISO filed or lodged the forms with state regulators in March 1984. *Ibid.* (Cal. Complaint P62).

Dissatisfied with this state of affairs, the defendants began to take other steps **[****20]** to force a change in the terms of coverage of CGL insurance generally available, steps that, the plaintiffs allege, implemented a series of conspiracies in violation of *§ 1* of the Sherman Act. The plaintiffs recount these steps as a number of separate episodes corresponding to different claims for relief in their complaints; [4] because it will become important to distinguish among these counts and the acts and defendants associated with them, we will note these correspondences.

The first four Claims for Relief in the California Complaint, *id.*, at 36-43 (PP111-130), **[**2898]** and the Second Claim for Relief in the Connecticut Complaint, *id.*, at 90-92 (PP120-124), charge **[***625]** the four domestic primary insurer defendants and varying groups of domestic and foreign **[****21]** reinsurers, brokers, and associations with conspiracies to manipulate the ISO CGL forms. In March 1984, primary insurer Hartford persuaded General Reinsurance Corporation (General Re), the largest American reinsurer, to take steps either to procure desired changes in the ISO CGL forms, or "failing that, [to] 'derail' the entire ISO CGL forms program." *Id.*, at 24 (Cal. Complaint P64). General Re took up the matter with its trade association, RAA, which created a special committee that met and agreed to "boycott" the 1984 ISO CGL forms unless a retroactive-date provision was added to the **[*775]** claims-made form, and a pollution exclusion and defense cost cap were added to both forms. *Id.*, at 24-25 (Cal. Complaint PP65-66). RAA then sent a letter to ISO "announcing that its members would not provide reinsurance for coverages written on the 1984 CGL forms," *id.*, at 25 (Cal. Complaint P67), and Hartford and General Re enlisted a domestic reinsurance broker to give a speech to the ISO Board of Directors, in which he stated that no reinsurers would "break ranks" to reinsure the 1984 ISO CGL forms. *Ibid.* (Cal. Complaint P68).

The four primary insurer defendants (Hartford, **[****22]** Aetna, CIGNA, and Allstate) also encouraged key actors in the London reinsurance market, an important provider of reinsurance for North American risks, to withhold reinsurance for coverages written on the 1984 ISO CGL forms. *Id.*, at 25-26 (Cal. Complaint PP69-70). As a consequence, many London-based underwriters, syndicates, brokers, and reinsurance companies informed ISO of their intention to withhold reinsurance on the 1984 forms, *id.*, at 26-27 (Cal. Complaint PP71-75), and at least some

[4] The First Claim for Relief in the Connecticut Complaint, *id.*, at 88-90 (PP115-119), charging an overarching conspiracy encompassing all of the defendants and all of the conduct alleged, is a special case. See n. 18, *infra*.

of them told ISO that they would withhold reinsurance until ISO incorporated all four desired changes, see *supra, at 771*, and n. 3, into the ISO CGL forms. App. 26 (Cal. Complaint P74).

For the first time ever, ISO invited representatives of the domestic and foreign reinsurance markets to speak at an ISO Executive Committee meeting. *Id.*, at 27-28 (Cal. Complaint P78). At that meeting, the reinsurers "presented their agreed upon positions that there would be changes in the CGL forms or no reinsurance." *Id.*, at 29 (Cal. Complaint P82). The ISO Executive Committee then voted to include a retroactive-date provision in the claims-made form, and to exclude all pollution coverage from **[****23]** both new forms. (But it neither eliminated the occurrence form, nor added a legal defense cost cap.) The 1984 ISO CGL forms were then withdrawn from the marketplace, and replaced with forms (1986 ISO CGL forms) containing the new provisions. *Ibid.* **[*776]** (Cal. Complaint P84). After ISO got regulatory approval of the 1986 forms in most States where approval was needed, it eliminated its support services for the 1973 CGL form, thus rendering it impossible for most ISO members to continue to use the form. *Id.*, at 32-33 (Cal. Complaint PP97, 99).

The Fifth Claim for Relief in the California Complaint, *id.*, at 43-44 (PP131-135), and the virtually identical Third Claim for Relief in the Connecticut Complaint, *id.*, at 92-94 (PP125-129), charge a conspiracy among a **[***626]** group of London reinsurers and brokers to coerce primary insurers in the United States to offer CGL coverage only on a claims-made basis. The reinsurers collectively refused to write new reinsurance contracts for, or to renew longstanding contracts with, "primary . . . insurers unless they were prepared to switch from the occurrence to the claims-made form," *id.*, at 30 (Cal. Complaint P88); **[****24]** they also amended their reinsurance contracts to cover only claims made before a "'sunset date,'" thus eliminating reinsurance for claims made on occurrence policies after that date, *id.*, at 31 (Cal. Complaint PP90-92).

[2899]** The Sixth Claim for Relief in the California Complaint, *id.*, at 45-46 (PP136-140), and the nearly identical Fourth Claim for Relief in the Connecticut Complaint, *id.*, at 94-95 (PP130-134), charge another conspiracy among a somewhat different group of London reinsurers to withhold reinsurance for pollution coverage. The London reinsurers met and agreed that all reinsurance contracts covering North American casualty risks, including CGL risks, would be written with a complete exclusion for pollution liability coverage. *Id.*, at 32 (Cal. Complaint PP94-95). In accordance with this agreement, the parties have in fact excluded pollution liability coverage from CGL reinsurance contracts since at least late 1985. *Ibid.* (Cal. Complaint P94).

[*777] The Seventh Claim for Relief in the California Complaint, *id.*, at 46-47 (PP141-145), and the closely similar Sixth Claim for Relief in the Connecticut Complaint, *id.*, at 97-98 (PP140-144), **[****25]** charge a group of domestic primary insurers, foreign reinsurers, and the ISO with conspiring to restrain trade in the markets for "excess" and "umbrella" insurance by drafting model forms and policy language for these types of insurance, which are not normally offered on a regulated basis. *Id.*, at 33 (Cal. Complaint P101). The ISO Executive Committee eventually released standard language for both "occurrence" and "claims-made" umbrella and excess policies; that language included a retroactive date in the claims-made version, and an absolute pollution exclusion and a legal defense cost cap in both versions. *Id.*, at 34 (Cal. Complaint P105).

LEdHN[6A][] [6A]Finally, the Eighth Claim for Relief in the California Complaint, *id.*, at 47-49 (PP146-150), and its counterpart in the Fifth Claim for Relief in the Connecticut Complaint, *id.*, at 95-97 (PP135-139), charge a group of London and domestic retrocessional reinsurers [5] with conspiring to withhold retrocessional reinsurance for North American seepage, pollution, and property contamination risks. Those retrocessional reinsurers signed, and have implemented, **[****26]** an agreement to use their "'best **[***627]** endeavors'" to ensure that they would provide

[5] The California and Connecticut Complaints' Statements of Facts describe this conspiracy as involving "specialized reinsurers in London and the United States." App. 34 (P106); *id.*, at 87 (Conn. Complaint P110). The claims for relief, however, name only London reinsurers; they do not name any of the domestic defendants who are the petitioners in No. 91-1111. See *id.*, at 48 (P147); *id.*, at 96 (Conn. Complaint P136). Thus, we assume that the domestic reinsurers alleged to be involved in this conspiracy are among the "unnamed co-conspirators" mentioned in the complaints. See *id.*, at 48 (Cal. Complaint P147); *id.*, at 96 (Conn. Complaint P136).

such reinsurance for North American risks "'only . . . where the original business includes a seepage and pollution exclusion **[*778]** wherever legal and applicable.'" *Id.*, at 35 (Cal. Complaint P108). [6]

LEdHN[6B][] [6B]

[**27]** C

Nineteen States and a number of private plaintiffs filed 36 complaints against the insurers involved in this course of events, charging that the conspiracies described above violated *§ 1* of the Sherman Act, *15 U.S.C. § 1*. After the actions had been consolidated for litigation in the Northern District of California, the defendants moved to dismiss for failure to state a cause of action, or, in the alternative, for summary judgment. The District Court granted the motions to dismiss. *In re Insurance Antitrust Litigation, 723 F. Supp. 464 (1989)*. It held that the conduct alleged fell within the grant of antitrust immunity contained in *§ 2(b)* of the McCarran-Ferguson Act, *15 U.S.C. § 1012(b)*, because it amounted to "the business of insurance" and was "regulated by **[**2900]** State Law" within the meaning of that section; none of the conduct, in the District Court's view, amounted to a "boycott" within the meaning of the § 3(b) exception to that grant of immunity. *15 U.S.C. § 1013(b)*. The District Court also dismissed the three claims that named only certain London-based defendants, [7] invoking **[****28]** international comity and applying the Ninth Circuit's decision in *Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597 (1976)*.

The Court of Appeals reversed. *In re Insurance Antitrust Litigation, 938 F.2d 919 (CA9 1991)*. Although it held the conduct involved to be "the business of insurance" within the meaning of *§ 2(b)*, it concluded that the defendants could **[*779]** not claim McCarran-Ferguson Act antitrust immunity for two independent reasons. First, it held, the foreign reinsurers were beyond the regulatory jurisdiction of the States; because their activities could not be "regulated by State Law" within the meaning of *§ 2(b)*, they did not fall within that section's grant of immunity. Although the domestic insurers were "regulated by State Law," the court held, they **[****29]** forfeited their *§ 2(b)* exemption when they conspired with the nonexempt foreign reinsurers. Second, the Court of Appeals held that, even if the conduct alleged fell within the scope of *§ 2(b)*, it also fell within the § 3(b) exception for "act[s] of boycott, coercion, or intimidation." Finally, as to the three claims brought solely against foreign defendants, the court applied its *Timberlane* analysis, but concluded that the principle of international comity was no bar to exercising Sherman Act jurisdiction.

We granted certiorari in No. 91-1111 to address two narrow questions about the scope of McCarran-Ferguson **[***628]** Act antitrust immunity, [8] **[****30]** and in No. 91-1128 to address the application of the Sherman Act to the foreign conduct at issue. [9] *506 U.S. 814 (1992)*. We now affirm in part, reverse in part, and remand.

[*780] II

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[6] The Ninth, Tenth, and Eleventh Claims for Relief in the California Complaint, *id.*, at 49-50 (PP151-156), and the Seventh Claim for Relief in the Connecticut Complaint, *id.*, at 98 (PP145-146), allege state-law violations not at issue here.

[7] These are the Fifth, Sixth, and Eighth Claims for Relief in the California Complaint, and the corresponding Third, Fourth, and Fifth Claims for Relief in the Connecticut Complaint.

[8] We limited our grant of certiorari in No. 91-1111 to these questions: "1. Whether domestic insurance companies whose conduct otherwise would be exempt from the federal antitrust laws under the McCarran-Ferguson Act lose that exemption because they participate with foreign reinsurers in the business of insurance," and "2. Whether agreements among primary insurers and reinsurers on such matters as standardized advisory insurance policy forms and terms of insurance coverage constitute a 'boycott' outside the exemption of the McCarran-Ferguson Act." Pet. for Cert. in No. 91-1111, p. i; see ***506 U.S. 814 (1992)***.

[9] The question presented in No. 91-1128 is: "Did the court of appeals properly assess the extraterritorial reach of the U.S. antitrust laws in light of this Court's teachings and contemporary understanding of international law when it held that a U.S. district court may apply U.S. law to the conduct of a foreign insurance market regulated abroad?" Pet. for Cert. in No. 91-1128, p. i.

The petition in No. 91-1111 touches on the interaction of two important pieces of economic legislation. ***HN2***[] The Sherman Act declares "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, . . . to be illegal." *15 U.S.C. § 1*. ***HN3***[] The McCarran-Ferguson Act provides that regulation of the insurance industry is generally a matter for the States, *15 U.S.C. § 1012(a)*, and (again, **[****31]** generally) that "no Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance," *§ 1012(b)*. *Section 2(b)* of the McCarran-Ferguson Act makes it clear nonetheless that the Sherman Act applies "to the business of insurance to the extent that such business is not regulated by State Law," *§ 1012(b)*, and § 3(b) provides that nothing in the McCarran-Ferguson Act "shall render the . . . Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation," *§ 1013(b)*.

[2901]** Petitioners in No. 91-1111 are all of the domestic defendants in the consolidated cases: the four domestic primary insurers, the domestic reinsurers, the trade associations ISO and RAA, and the domestic reinsurance broker Thomas A. Greene & Company, Inc. They argue that the Court of Appeals erred in holding, first, that their conduct, otherwise immune from antitrust liability under *§ 2(b)* of the McCarran-Ferguson Act, lost its immunity when they conspired with the foreign defendants, and, second, that their conduct amounted to "act[s] of boycott" falling within **[****32]** the exception to antitrust immunity set out in § 3(b). We conclude that the Court of Appeals did err about the effect of conspiring with foreign defendants, but correctly decided that all but one of the complaints' relevant Claims for Relief are fairly read to allege conduct falling within the "boycott" exception to McCarran-Ferguson Act antitrust immunity. We therefore **[*781]** affirm the Court of Appeals's judgment that it was error for the District Court to dismiss the complaints on grounds of McCarran-Ferguson Act **[***629]** immunity, except as to the one claim for relief that the Court of Appeals correctly found to allege no boycott.

A

LEdHN[7][] [7]***HN4***[] By its terms, the antitrust exemption of *§ 2(b)* of the McCarran-Ferguson Act applies to "the business of insurance" to the extent that such business is regulated by state law. While "business" may mean "[a] commercial or industrial establishment or enterprise," Webster's New International Dictionary 362 (2d ed. 1942), the definite article before "business" in *§ 2(b)* **[****33]** shows that the word is not used in that sense, the phrase "the business of insurance" obviously not being meant to refer to a single entity. Rather, "business" as used in *§ 2(b)* is most naturally read to refer to "mercantile transactions; buying and selling; [and] traffic." *Ibid.*

The cases confirm that ***HN5***[] "the business of insurance" should be read to single out one activity from others, not to distinguish one entity from another. In *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*, for example, we held that *§ 2(b)* did not exempt an insurance company from antitrust liability for making an agreement fixing the price of prescription drugs to be sold to Blue Shield policyholders. Such activity, we said, "would be exempt from the antitrust laws if Congress had extended the coverage of the McCarran-Ferguson Act to the 'business of insurance companies.' But that is precisely what Congress did not do." *Id., at 233* (footnote omitted); see *SEC v. National Securities, Inc., 393 U.S. 453, 459, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)* **[****34]** (the McCarran-Ferguson Act's "language refers not to the persons or companies who are subject to state regulation, but to laws 'regulating the *business* of insurance'") (emphasis in original). And in *Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 73 L. Ed. 2d 647, 102 S. Ct. 3002 (1982)*, we explicitly framed the question as whether "a particular *practice* is part of the 'business of insurance' exempted from the antitrust **[*782]** laws by *§ 2(b)*," *id., at 129* (emphasis added), and each of the three criteria we identified concerned a quality of the practice in question: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry," *ibid.* (emphasis in original).

LEdHN[1B][] [1B]***LEdHN[8A]***[] [8A]The Court of Appeals did not hold that, under these criteria, the domestic **[****35]** defendants' conduct fell outside "the business of insurance"; to the contrary, it held that that condition was met. [10] See *938 F.2d at 927*. **[**2902]** Nor did it hold the domestic defendants' conduct to be "[un]regulated by State Law." Rather, it constructed an altogether different **[***630]** chain of reasoning, the middle link of which comes from a sentence in our opinion in *Royal Drug Co.* "Regulation . . . of foreign reinsurers," the Court of Appeals explained, "is beyond the jurisdiction of the states," *938 F.2d at 928*, and hence *§ 2(b)* does not exempt foreign reinsurers from antitrust liability, because their activities are not "regulated by State Law." Under *Royal Drug Co.*, "an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *440 U.S. at 231*. Therefore, the domestic insurers, by acting in concert with the nonexempt foreign insurers, lost their McCarran-Ferguson Act antitrust immunity. See *938 F.2d at 928*. This reasoning fails, however, because even if we were to agree that foreign reinsurers were not subject to state regulation (a point on which we express no opinion), **[****36]** the quoted language from *Royal Drug Co.*, read **[*783]** in context, does not state a proposition applicable to this litigation.

LEdHN[8B][] [8B]

LEdHN[1C][] [1C]***LEdHN[9A]***[] [9A]***LEdHN[10A]***[] [10A]The full sentence from *Royal Drug Co.* places the quoted fragment in a different light. "In analogous contexts," we stated, "the Court has held that an exempt entity **[****37]** forfeits antitrust exemption by acting in concert with nonexempt parties." *440 U.S. at 231*. We then cited two cases dealing with the Capper-Volstead Act, which immunizes from liability under *§ 1* of the Sherman Act particular activities of certain persons "engaged in the production of agricultural products." [11] Capper-Volstead Act, *§ 1*, 42 Stat. 388, *7 U.S.C. § 291*; see *Case- Swayne Co. v. Sunkist Growers, Inc., 389 U.S. 384, 19 L. Ed. 2d 621, 88 S. Ct. 528 (1967)*; *United States v. Borden Co., 308 U.S. 188, 84 L. Ed. 181, 60 S. Ct. 182 (1939)*. Because these cases relied on statutory language referring to certain "persons," whereas we specifically acknowledged in *Royal Drug Co.* that the McCarran-Ferguson Act immunizes activities rather than entities, see *440 U.S. at 232-233*, the analogy we were drawing was of course a loose one. The agreements that insurance companies made with "parties wholly outside the insurance industry," *id., at 231*, we noted, such as the retail pharmacists involved in *Royal Drug Co.* itself, or "automobile body repair shops or landlords," **[****38]** *id., at 232* (footnote omitted), are unlikely **[*784]** to be about anything that could be called "the business of insurance," as distinct from the broader "'business of insurance companies,'" *id., at 233*. The alleged agreements **[***631]** at issue in the instant litigation, of course, are entirely different; the foreign reinsurers are hardly "wholly outside the insurance industry," and respondents do not contest the Court of Appeals's holding that the agreements concern "the business of insurance." These facts neither support even the rough analogy we drew in *Royal Drug Co.* nor fall within the rule about acting in concert with nonexempt parties, which derived from a statute inapplicable here. Thus, we think it was error for **[**2903]** the Court of Appeals to hold the domestic insurers bereft of their McCarran-Ferguson Act

[10] The activities in question here, of course, are alleged to violate federal law, and it might be tempting to think that unlawful acts are implicitly excluded from "the business of insurance." Yet *§ 2(b)*'s grant of immunity assumes that acts which, but for that grant, would violate the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, are part of "the business of insurance."

[11] We also cited two cases dealing with the immunity of certain agreements of labor unions under the Clayton and Norris-LaGuardia Acts. See *440 U.S. at 231-232*. These cases, however, did not hold that labor unions lose their immunity whenever they enter into agreements with employers; to the contrary, we acknowledged in one of the cases that "the law contemplates agreements on wages not only between individual employers and a union but agreements between the union and employers in a multi-employer bargaining unit." *Mine Workers v. Pennington, 381 U.S. 657, 664, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. Because the cases stand only for the proposition that labor unions are not immune from antitrust liability for certain types of agreements with employers, such as agreements "to impose a certain wage scale on other bargaining units," *id., at 665*, they do not support the far more general statement that exempt entities lose immunity by conspiring with nonexempt entities.

exemption simply because they agreed or acted with foreign reinsurers that, we assume for the sake of argument, were "not regulated by State Law." [12]

LEdHN[9B][] [9B]

[**39]** *LEdHN[10B]*[] [10B]

[*794] **[***638]** **[**2908]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published opinion.]

III

Finally, we take up the question presented by No. 91-1128, whether certain claims against the London reinsurers should have been dismissed as improper applications of the Sherman **[*795]** Act to foreign conduct. The Fifth Claim for Relief in the California Complaint alleges a violation of *§ 1* of the Sherman Act by certain London reinsurers who conspired to coerce primary insurers in the United States to offer CGL coverage on a claims-made basis, thereby making "occurrence CGL coverage . . . unavailable in the State of California for many risks." App. 43-44 (PP131-135). The Sixth Claim **[****40]** for Relief in the California Complaint alleges that the London reinsurers violated *§ 1* by a conspiracy to limit coverage of pollution risks in North America, thereby rendering "pollution liability coverage . . . almost entirely unavailable for the vast majority of casualty insurance purchasers in the State of California." *Id.*, at 45-46 (PP136-140). The Eighth Claim for Relief in the California Complaint alleges a further *§ 1* violation by the London reinsurers who, along with domestic retrocessional reinsurers, conspired to limit coverage of seepage, pollution, and property contamination risks in North America, thereby eliminating such coverage in the State of California. [20] *Id.*, at 47-48 (PP146-150).

[**41]**

[2909]** *LEdHN[3B]*[] [3B]*LEdHN[11A]*[] [11A]*LEdHN[12A]*[] [12A]*LEdHN[13A]*[] [13A]At the outset, we note that the District Court undoubtedly had jurisdiction of these Sherman Act claims, as the London reinsurers apparently concede. See Tr. of Oral Arg. 37 ("Our position is not that the Sherman Act does not apply in the sense that a minimal basis for the exercise of jurisdiction doesn't exist here. Our position is that there are certain circumstances, and that this is one of them, in which the interests of another State are sufficient that the exercise of that jurisdiction should be restrained"). [21] Although the **[*796]** proposition was perhaps not always free from doubt, see *American Banana Co. v. United Fruit Co., 213 U.S. 347, 53 L. Ed. 826, 29 S. Ct. 511 (1909)*, it is well established by now that *HN6*[] the Sherman Act **[****42]** applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *United States v. Aluminum Co. of*

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[12] The Court of Appeals's assumption that "the American reinsurers . . . are subject to regulation by the states and therefore prima facie immune," *938 F.2d at 928*, appears to rest on the entity-based analysis we have rejected. As with the foreign reinsurers, we express no opinion whether the activities of the domestic reinsurers were "regulated by State Law" and leave that question to the Court of Appeals on remand.

[20] As we have noted, see *supra, at 776-777*, each of these claims has a counterpart in the Connecticut Complaint. The claims each name different groups of London reinsurers, and not all of the named defendants are petitioners in No. 91-1128; but nothing in our analysis turns on these variations.

[21] One of the London reinsurers, Sturge Reinsurance Syndicate Management Limited, argues that the Sherman Act does not apply to its conduct in attending a single meeting at which it allegedly agreed to exclude all pollution coverage from its reinsurance contracts. Brief for Petitioner Sturge Reinsurance Syndicate Management Ltd. in No. 91-1128, p. 22. Sturge may have attended only one meeting, but the allegations, which we are bound to credit, remain that it participated in conduct that was intended to and did in fact produce a substantial effect on the American insurance market.

America, 148 F.2d 416, 444 (CA2 1945) (L. Hand, J.); Restatement (Third) of Foreign Relations Law of the United States § 415, and Reporters' Note 3 (1987) (hereinafter Restatement (Third) Foreign Relations Law); 1 P. Areeda & D. Turner, ***Antitrust* [***639] *Law*** P236 (1978); cf. Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962); Steele v. Bulova Watch Co., 344 U.S. 280, 288, 97 L. Ed. 319, 73 S. Ct. 252 (1952); United States v. Sisal Sales Corp., 274 U.S. 268, 275-276, 71 L. Ed. 1042, 47 S. Ct. 592 (1927). [22] Such is the conduct alleged here: that the London reinsurers engaged in unlawful conspiracies to affect the market for insurance in the United States and that their conduct in fact produced substantial effect. [23] See 938 F.2d at 933. **[****43]**

LEdHN[12B][] [12B]

[**44]** ***LEdHN[13B]***[] [13B]

[**45]**

[*797] ***LEdHN[11B]***[] [11B]According to the London reinsurers, the District Court should have declined to exercise such jurisdiction under the principle of international comity. [24] The Court of **[**2910]** Appeals agreed that courts should look to that principle in deciding whether to exercise jurisdiction under the Sherman Act. *Id.*, at 932. This availed the London reinsurers nothing, however. To be sure, the Court of Appeals believed that "application of [American] antitrust laws to the London reinsurance market 'would lead to significant conflict with English law and policy,'" and that "[s]uch a conflict, unless out-weighed by other factors, would by itself be reason to decline **[*798]** exercise of jurisdiction." *Id., at 933* (citation omitted). **[***640]** But other factors, in the court's view, including the London reinsurers' express purpose to affect United States commerce and the substantial nature of the effect produced, out-weighed the supposed conflict and required the exercise of jurisdiction in this litigation. *Id., at 934*.

LEdHN[11C][] [11C] **[****46]**

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[22] JUSTICE SCALIA believes that what is at issue in this litigation is prescriptive, as opposed to subject-matter, jurisdiction. *Post*, at 813-814. The parties do not question prescriptive jurisdiction, however, and for good reason: it is well established that Congress has exercised such jurisdiction under the Sherman Act. See G. Born & D. Westin, International Civil Litigation in United States Courts 542, n. 5 (2d ed. 1992) (Sherman Act is a "prime example of the simultaneous exercise of prescriptive jurisdiction and grant of subject matter jurisdiction").

[23] Under § 402 of the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA), 96 Stat. 1246, 15 U.S. C. § 6a, the Sherman Act does not apply to conduct involving foreign trade or commerce, other than import trade or import commerce, unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on domestic or import commerce. § 6a(1)(A). The FTAIA was intended to exempt from the Sherman Act export transactions that did not injure the United States economy, see H. R. Rep. No. 97-686, pp. 2-3, 9-10 (1982); P. Areeda & H. Hovenkamp, ***Antitrust Law*** P236'a, pp. 296-297 (Supp. 1992), and it is unclear how it might apply to the conduct alleged here. Also unclear is whether the Act's "direct, substantial, and reasonably foreseeable effect" standard amends existing law or merely codifies it. See *id., P236*'a, p. 297. We need not address these questions here. Assuming that the FTAIA's standard affects this litigation, and assuming further that that standard differs from the prior law, the conduct alleged plainly meets its requirements.

[24] JUSTICE SCALIA contends that comity concerns figure into the prior analysis whether jurisdiction exists under the Sherman Act. *Post*, at 817-818. This contention is inconsistent with the general understanding that the Sherman Act covers foreign conduct producing a substantial intended effect in the United States, and that concerns of comity come into play, if at all, only after a court has determined that the acts complained of are subject to Sherman Act jurisdiction. See United States v. Aluminum Co. of America, 148 F.2d 416, 444 (CA2 1945) ("It follows from what we have . . . said that [the agreements at issue] were unlawful [under the Sherman Act], though made abroad, if they were intended to affect imports and did affect them"); Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294 (CA3 1979) (once court determines that jurisdiction exists under the Sherman Act, question remains whether comity precludes its exercise); H. R. Rep. No. 97-686, ***supra, at 13***. But cf. Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 613 (CA9 1976); 1 J. Atwood & K. Brewster, Antitrust and American Business Abroad 166 (1981). In any event, the parties conceded jurisdiction at oral argument, see *supra, at 795*, and we see no need to address this contention here.

[**47]**

LEdHN[3C][] [3C]When it enacted the FTAIA, Congress expressed no view on the question whether a court with Sherman Act jurisdiction should ever decline to exercise such jurisdiction on grounds of international comity. See H. R. Rep. No. 97-686, p. 13 (1982) ("If a court determines that the requirements for subject matter jurisdiction are met, [the FTAIA] would have no effect on the court['s] ability to employ notions of comity . . . or otherwise to take account of the international character of the transaction") (citing *Timberlane*). We need not decide that question here, however, for even assuming that in a proper case a court may decline to exercise Sherman Act jurisdiction over foreign conduct (or, as JUSTICE SCALIA would put it, may conclude by the employment of comity analysis in the first instance that there is no jurisdiction), international comity would not counsel against exercising jurisdiction in the circumstances alleged here.

LEdHN[3D][] [3D]*LEdHN[14]*[] [14]The only substantial **[****48]** question in this litigation is whether "there is in fact a true conflict between domestic and foreign law." *Societe Nationale Industrielle Aerospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U.S. 522, 555, 96 L. Ed. 2d 461, 107 S. Ct. 2542 (1987)* (BLACKMUN, J., concurring in part and dissenting in part). The London reinsurers contend that applying the Act to their conduct would conflict significantly with British law, and the British Government, appearing before us as *amicus curiae*, concurs. See Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91-1128, pp. 22-27; Brief for Government of United Kingdom of Great Britain and Northern Ireland as *Amicus Curiae* 10-14. They assert that Parliament has established a comprehensive **[*799]** regulatory regime over the London reinsurance market and that the conduct alleged here was perfectly consistent with British law and policy. But this is not to state a conflict. *HN7*[] "The fact that conduct is lawful in the state in which it took place will not, of itself, bar application **[****49]** of the United States antitrust laws," even where the foreign state has a strong policy to permit or encourage such conduct. *Restatement (Third) Foreign Relations Law § 415, Comment j*; see *Continental Ore Co., supra, at 706-707*. No conflict exists, for these purposes, "where a person subject to regulation by two states can comply with the laws of both." *Restatement (Third) Foreign Relations Law § 403, Comment e*. [25] Since the London reinsurers **[**2911]** do not argue that British law requires them to act in some fashion prohibited by the law of the United States, see Reply Brief for Petitioners Merrett Underwriting Agency Management Ltd. et al. in No. 91-1128, pp. 7-8, or claim that their compliance with the laws of both countries is otherwise impossible, **[***641]** we see no conflict with British law. See *Restatement (Third) Foreign Relations Law § 403, Comment e*, *§ 415, Comment j*. We have no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on grounds of international comity.

[**50]** IV

The judgment of the Court of Appeals is affirmed in part and reversed in part, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

[*800] JUSTICE SCALIA delivered the opinion of the Court with respect to Part I, and delivered a dissenting opinion with respect to Part II. [*]

With respect to the petition in No. 91-1111, I join the Court's judgment and Parts I and II-A of its opinion. I write separately because I do not agree with JUSTICE SOUTER's analysis, set forth in Part II-B of his opinion, of what

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[25] JUSTICE SCALIA says that we put the cart before the horse in citing this authority, for he argues it may be apposite only after a determination that jurisdiction over the foreign acts is reasonable. *Post*, at 821. But whatever the order of cart and horse, conflict in this sense is the only substantial issue before the Court.

[*] JUSTICE O'CONNOR, JUSTICE KENNEDY, and JUSTICE THOMAS join this opinion in its entirety, and THE CHIEF JUSTICE joins Part I of this opinion.

constitutes a "boycott" for purposes of § 3(b) of the McCarran-Ferguson Act, *15 U.S.C. § 1013(b)*. With respect to the petition in No. 91-1128, I dissent from the Court's ruling concerning the extraterritorial application of the Sherman Act. Part I below discusses the boycott issue; Part **[****51]** II extraterritoriality.

I

LEdHN[2B][] [2B]Determining proper application of § 3(b) of the McCarran-Ferguson Act to the present cases requires precise definition of the word "boycott." [1] It is a relatively new word, little more than a century old. It was first used in 1880, to describe the collective action taken against Captain Charles Boycott, an English agent managing various estates in Ireland. The Land League, an Irish organization formed the previous year, had demanded that landlords reduce their rents and had urged tenants to avoid dealing with those who failed to do so. Boycott did not bend to the demand and instead ordered evictions. In retaliation, the tenants "sent Captain Boycott to Coventry in a very thorough manner." J. McCarthy, England Under Gladstone 108 (1886). "The population of the region for miles round resolved not to have anything to do with him, and, as far as they could prevent **[*801]** it, not to allow any one else to have anything to do with him. . . . The awful sentence of excommunication could hardly have rendered him more helplessly alone for a time. No one would work for him; no one **[****52]** would supply him with food." *Id., at 108-109*; see also H. Laidler, Boycotts and the Labor Struggle 23-27 (1968). Thus, the verb made from the unfortunate Captain's name has had from the outset the meaning it continues to carry today. To "boycott" means "to combine **[***642]** in refusing to hold relations of any kind, social or commercial, public or private, with (a neighbour), on account of political or other differences, so as to punish him for the position he has taken up, or coerce him into abandoning it." 2 Oxford English Dictionary 468 (2d ed. 1989).

Petitioners have suggested that a boycott ordinarily requires "an absolute refusal to deal on any terms," which was concededly not the case here. Brief for Petitioners **[**2912]** **[****53]** in No. 91-1111, p. 31; see also Reply Brief for Petitioners in No. 91-1111, pp. 12-13. We think not. As the definition just recited provides, the refusal may be imposed "to punish [the target] for the position he has taken up, or *coerce him into abandoning it*." The refusal to deal may, in other words, be *conditional*, offering its target the incentive of renewed dealing if and when he mends his ways. This is often the case -- and indeed seems to have been the case with the original Boycott boycott. Cf. McCarthy, *supra*, at 109 (noting that the Captain later lived "at peace" with his neighbors). Furthermore, other dictionary definitions extend the term to include a *partial* boycott -- a refusal to engage in some, but not all, transactions with the target. See Webster's New International Dictionary 321 (2d ed. 1950) (defining "boycott" as "to withhold, wholly *or in part*, social or business inter-course from, as an expression of disapproval or means of coercion" (emphasis added)).

It is, however, important -- and crucial in the present cases -- to distinguish between a conditional boycott and a concerted agreement to seek particular terms in particular **[*802]** **[****54]** transactions. A concerted agreement to terms (a "cartelization") is "a way of obtaining and exercising market power by concertedly exacting terms like those which a monopolist might exact." L. Sullivan, Law of Antitrust 257 (1977). The parties to such an agreement (the members of a cartel) are not engaging in a boycott, because:

> "They are not coercing anyone, at least in the usual sense of that word; they are merely (though concertedly) saying '*we will deal with you only on the following trade terms*.'
>
> ". . . Indeed, if a concerted agreement, say, to include a security deposit in all contracts is a 'boycott' because it excludes all buyers who won't agree to it, then by parity of reasoning every price fixing agreement would be a boycott also. The use of the single concept, boycott, to cover agreements so varied in nature can only add to confusion." *Ibid.* (emphasis added).

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[1] Section 3(b) of the McCarran-Ferguson Act, *15 U.S.C. § 1013(b)*, provides:

"Nothing contained in this Act shall render the said Sherman Act in-applicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation."

Thus, if Captain Boycott's tenants had agreed among themselves that they would refuse to renew their leases unless he reduced his rents, that would have been a concerted agreement on the terms of the leases, but not a boycott. [2] The tenants, of course, did more than that; **[***643]** they refused **[****55]** to engage in other, unrelated transactions with Boycott -- *e.g.*, selling him food -- unless he agreed to their terms on rents. It is **[*803]** this expansion of the refusal to deal beyond the targeted transaction that gives great coercive force to a commercial boycott: unrelated transactions are used as leverage to achieve the terms desired.

[**56]** The proper definition of "boycott" is evident from the Court's opinion in *Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 58 L. Ed. 1490, 34 S. Ct. 951 (1914)*, which is recognized in the antitrust field as one of the "leading case[s] involving commercial boycotts." Barber, Refusals to Deal under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 873 (1955). The associations of retail lumber dealers in that case refused to buy lumber from wholesale lumber dealers who sold directly to consumers. The boycott attempted "to impose as a condition . . . on [the wholesale dealers'] trade that they shall not sell in such manner that a local retailer may regard such sale as **[**2913]** an infringement of his exclusive right to trade." *234 U.S. at 611*. We held that to be an "'artificial condition,'" since "the trade of the wholesaler with strangers was directly affected, not because of any supposed wrong which he had done to them, but because of the grievance of a member of one of the associations." *Id., at 611-612*. In other words, the associations' activities were a boycott because they sought **[****57]** an objective -- the wholesale dealers' forbearance from retail trade -- that was collateral to their transactions with the wholesalers.

LEdHN[2C][] [2C]***LEdHN[15]***[] [15]***LEdHN[16A]***[] [16A]Of course as far as the Sherman Act (outside the exempted insurance field) is concerned, concerted agreements on contract terms are as unlawful as boycotts. For example, in *Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 75 L. Ed. 145, 51 S. Ct. 42 (1930)*, and *United States v. First Nat. Pictures, Inc., 282 U.S. 44, 75 L. Ed. 151, 51 S. Ct. 45 (1930)*, we held unreasonable an agreement among competing motion picture distributors under which they refused to license films to exhibitors except on standardized terms. We also found unreasonable the restraint of trade in *Anderson v. Shipowners Assn. of Pacific Coast, 272 U.S. 359, 71 L. Ed. 298, 47 S. Ct. 125 (1926)*, which involved an attempt by an association of **[*804]** employers to establish **[****58]** industry-wide terms of employment. These sorts of concerted actions, similar to what is alleged to have occurred here, are not properly characterized as "boycotts," and the word does not appear in the opinions. [3] **[****59]** In fact, in the 65 **[***644]** years between the coining of the word and enactment of the McCarran-Ferguson Act in 1945, "boycott" appears in only seven opinions of this Court involving commercial (nonlabor) antitrust matters, and *not once* is it used as JUSTICE SOUTER uses it -- to describe a concerted refusal to engage in particular transactions until the terms of those transactions are agreeable. [4]

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[2] Under the Oxford English Dictionary definition, of course, this example would not be a "boycott" because the tenants had not suspended *all* relations with the Captain. But if one recognizes partial boycotts (as we and JUSTICE SOUTER do), and if one believes (as JUSTICE SOUTER does but we do not) that the purpose of a boycott can be to secure different terms in the very transaction that is the supposed subject of the boycott, then it is impossible to explain why this is not a boycott. Under JUSTICE SOUTER's reasoning, it *would* be a boycott, at least if the tenants acted "at the behest of" (whatever *that* means), *ante*, at 792, the Irish Land League. This hypothetical shows that the problems presented by partial boycotts (which we agree fall within § 3(b)) make more urgent the need to distinguish boycotts from concerted agreements on terms.

[3] JUSTICE SOUTER points out that the Court in *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)*, found the term "boycott" "does not refer to '"a unitary phenomenon,"'" *ante*, at 788 (quoting *Barry, supra, at 543* (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974))), and asserts that our position contradicts this. *Ante*, at 793-794. But to be not a "unitary phenomenon" is different from being an all-encompassing one. "Boycott" is a multifaceted "phenomenon" that includes conditional boycotts, punitive boycotts, coercive boycotts, partial boycotts, labor boycotts, political boycotts, social boycotts, etc. It merely does *not* include refusals to deal because of objections to proposed terms.

[4] See *United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 295-296, 298, 89 L. Ed. 951, 65 S. Ct. 661 (1945)* (refusal to engage in *all* transactions with targeted companies unless they agreed to defendants' price-fixing scheme); *United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 535, 536, 562, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)* (discussed *infra*, at 808-809); *United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722, 88 L. Ed. 1024, 64 S. Ct. 805 (1944)* (word used in

LEdHN[16B][] [16B]

[**60]**

LEdHN[17][] [17]In addition to its use in the antitrust field, the concept of "boycott" frequently appears in labor law, and in this context as well there is a clear distinction between boycotts and concerted agreements seeking terms. The ordinary strike **[*805]** seeking better contract terms is a "refusal to deal" -- *i.e.*, union members refuse to sell their labor until the employer capitulates to their contract demands. But no one would call this a boycott, because the conditions of the "refusal to deal" relate directly to the terms of the refused transaction (the employment contract). A refusal to work changes from strike to boycott only when it seeks to obtain action from the employer unrelated to the employment contract. This distinction is well illustrated by the **[**2914]** famous boycott of Pullman cars by Eugene Debs' American Railway Union in 1894. The incident began when workers at the Pullman Palace Car Company called a strike, but the "boycott" occurred only when other members of the American Railway Union, not Pullman employees, supported the strikers by refusing to work on any train drawing **[****61]** a Pullman car. See *In re Debs, 158 U.S. 564, 566-567, 39 L. Ed. 1092, 15 S. Ct. 900 (1895)* (statement of the case); H. Laidler, Boycotts and the Labor Struggle 100-108 (1968). The refusal to handle Pullman cars had nothing to do with Pullman cars themselves (working on Pullman cars was no more difficult or dangerous than working on other cars); rather, it was in furtherance of the collateral objective of obtaining better employment terms for the Pullman workers. In other labor cases as well, the term "boycott" invariably holds the meaning that we ascribe to it: Its goal is to alter, not the terms of the refused transaction, but the terms of workers' employment. [5]

[**62]** **[*806]** **[***645]** The one case in which we have found an activity to constitute a "boycott" within the meaning of the McCarran-Ferguson Act is *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)*. There the plaintiffs were licensed physicians and their patients, and the defendant (St. Paul) was a malpractice insurer that had refused to renew the physicians' policies on an "occurrence" basis, but insisted upon a "claims made" basis. The allegation was that, at the instance of St. Paul, the three other malpractice insurers in the State had collectively refused to write insurance for St. Paul's customers, thus forcing them to accept St. Paul's renewal terms. Unsurprisingly, we held the allegation sufficient to state a cause of action. The insisted-upon condition of the boycott (not being a former St. Paul policyholder) was "artificial": it bore no relationship (or an "artificial" relationship) to the proposed contracts of insurance that the physicians wished to conclude with St. Paul's competitors.

LEdHN[18A][] [18A]Under the standard described, **[****63]** it is obviously not a "boycott" for the reinsurers to "refuse to reinsure coverages written on the ISO CGL forms until the desired changes were made," *ante*, at 788, because the terms of the primary coverages are central elements of the reinsurance contract -- they are *what* is reinsured. See App. 16-17 (Cal. Complaint PP26-27). The "primary policies are . . . the basis of the losses that are shared in the reinsurance agreements." 1 B. Webb, H. Anderson, J. Cookman, & P. Kensicki, Principles of

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reference to a refusal to deal as means of enforcing resale price maintenance); *Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 461, 465, 467, 85 L. Ed. 949, 61 S. Ct. 703 (1941)* (boycott of retailers who sold competitors' products); *United States v. American Livestock Commission Co., 279 U.S. 435, 436-438, 73 L. Ed. 787, 49 S. Ct. 425 (1929)* (absolute boycott of a competing livestock association, intended to drive it out of business); *Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600, 610-611, 58 L. Ed. 1490, 34 S. Ct. 951 (1914)* (discussed *supra, at 803*); *Nash v. United States, 229 U.S. 373, 376, 57 L. Ed. 1232, 33 S. Ct. 780 (1913)* (word used in passing).

[5] See, *e.g., Bedford Cut Stone Co. v. Stone Cutters', 274 U.S. 37, 47, 49, 71 L. Ed. 916, 47 S. Ct. 522 (1927)* (refusal to work on stone received from nonunion quarries); *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 462-463, 65 L. Ed. 349, 41 S. Ct. 172 (1921)* (boycott of target's product until it agreed to union's employment demands); *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 55 L. Ed. 797, 31 S. Ct. 492 (1911)* (boycott of company's products because of allegedly unfair labor practices); *Loewe v. Lawlor, 208 U.S. 274, 52 L. Ed. 488, 28 S. Ct. 301 (1908)* (boycott of fur hats made by a company that would not allow its workers to be unionized). See also *Apex Hosiery Co. v. Leader, 310 U.S. 469, 503-505, 84 L. Ed. 1311, 60 S. Ct. 982 (1940)* (distinguishing between ordinary strikes and boycotts).

Reinsurance 87 (1990); see also *id., at 55*; Gurley, Regulation of Reinsurance in the United States, *19 Forum 72, 73 (1983)*. Indeed, reinsurance is so closely tied to the terms of the primary insurance contract that one of the two categories of reinsurance (assumption reinsurance) substitutes the reinsurer for the primary or "ceding" insurer and places the reinsurer into contractual privity with the primary insurer's policyholders. See *id.*, at 73-74; *Colonial American Life Ins. Co. v. Commissioner, 491 U.S. 244, 247, 105 L. Ed. 2d 199, 109 S. Ct. 2408 (1989)*; B. Ostrager & T. Newman, Handbook on Insurance Coverage **[*807]** Disputes **[****64]** chs. 15-16 (5th ed. 1992). And in the other category of reinsurance (indemnity reinsurance), either the terms of the underlying insurance policy are incorporated **[**2915]** by reference (if the reinsurance is written under a facultative agreement), see J. Butler & R. Merkin, Reinsurance Law B.1.1-04 (1992); R. Carter, Reinsurance 235 (1979), or (if the reinsurance is conducted on a treaty basis) the reinsurer will require full disclosure of the terms of the underlying insurance policies and usually require that the primary insurer not vary those terms without prior approval, see *id., at 256, 297*.

JUSTICE SOUTER simply disregards this integral relationship between the terms of the primary insurance **[***646]** form and the contract of reinsurance. He describes the reinsurers as "individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it." *Ante*, at 788. While this factual assumption is crucial to JUSTICE SOUTER's reasoning (because otherwise he would not be able to distinguish permissible agreements among primary insurers), he offers **[****65]** no support for the statement. But even if it happens to be true, he does not explain why it *must* be true -- that is, why the law must exclude reinsurers from full membership and participation. The realities of the industry may make explanation difficult:

> "Reinsurers also benefit from the services by ISO and other rating or service organizations. The underlying rates and policy forms are the basis for many reinsurance contracts. Reinsurers may also subscribe to various services. For example, a facultative reinsurer may subscribe to the rating service, so that they have the rating manuals available, or purchase optional services, such as a sprinkler report for a specific property location." 2 R. Reinarz, J. Schloss, G. Patrik, & P. Kensicki, Reinsurance Practices 18 (1990).

[*808] ***LEdHN[18B]***[] [18B]JUSTICE SOUTER also describes reinsurers as being "outside the primary insurance industry." *Ante*, at 789. That is technically true (to the extent the two symbiotic industries can be separated) but quite irrelevant. What matters is that the scope and predictability of the risks assumed in a reinsurance **[****66]** contract depend entirely upon the terms of the primary policies that are reinsured. The terms of the primary policies are the "subject-matter insured" by reinsurance, Carter, *supra*, at 4, so that to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way "artificial"; and hence for a number of reinsurers to insist upon such terms jointly is in no way a "boycott." [6]

LEdHN[18C][] [18C]

JUSTICE SOUTER seems **[****67]** to believe that a nonboycott is converted into a boycott by the fact that it occurs "at the behest of," *ante*, at 789, or is "solicited" by, *ibid.*, competitors of the target. He purports to find support for this implausible proposition in *United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944)*, which involved a classic boycott, by primary insurers, of competitors who refused to join their price-fixing conspiracy, the South-Eastern Underwriters Association (S. E. U. A.). The conspirators would not deal with independent agents who wrote for such companies, and would not write policies for customers who insured with them. See *id., at 535-536*. Moreover, Justice Black's opinion for the Court noted cryptically, "companies not members of S. E. U. A. were cut off from the opportunity to reinsure their risks." *Id., at **[***647]** 535*. JUSTICE SOUTER speculates **[*809]** that "the *[S. E. U. A.]* defendants could have [managed to cut the targets off from reinsurance] by prompting reinsurance companies to refuse to deal with nonmembers." *Ante*, at 789. Even assuming that **[****68]** is what happened, all that can be derived from *S. E. U. A.* is the **[**2916]** proposition that one who prompts *a boycott* is a co-conspirator with the boycotters. For *with or without the defendants' prompting*,

[6] Once it is determined that the actions of the reinsurers did not constitute a "boycott," but rather a concerted agreement to terms, it follows that their actions do not constitute "coercion" or "intimidation" within the meaning of the statute. That is because, as previously mentioned, such concerted agreements do "not coerce anyone, at least in the usual sense of that word," L. Sullivan, Law of Antitrust 257 (1977), and because they are precisely what is protected by McCarran-Ferguson immunity.

the reinsurers' refusal to deal in *S. E. U. A.* was a boycott, membership in the association having no discernible bearing upon the terms of the refused reinsurance contracts.

JUSTICE SOUTER suggests that we have somehow mistakenly "posited . . . autonomy on the part of the reinsurers." *Ante*, at 792. We do not understand this. Nothing in the complaints alleges that the reinsurers were deprived of their "autonomy," which we take to mean that they were coerced by the primary insurers. (Given the sheer size of the Lloyd's market, such an allegation would be laughable.) That is not to say that we disagree with JUSTICE SOUTER's contention that, according to the allegations, the reinsurers would not "have taken exactly the same course of action without the intense efforts of the four primary insurers." *Ibid.* But the same could be said of the participants in virtually all conspiracies: If they had not been enlisted by the "intense efforts" of the leaders, their **[****69]** actions would not have been the same. If this factor renders otherwise lawful conspiracies (under McCarran-Ferguson) illegal, then the Act would have a narrow scope indeed.

Perhaps JUSTICE SOUTER feels that it is undesirable, as a policy matter, to allow insurers to "prompt" reinsurers not to deal with the insurers' competitors -- *whether or not* that refusal to deal is a boycott. That feeling is certainly understandable, since under the normal application of the Sherman Act the reinsurers' concerted refusal to deal would be an unlawful conspiracy, and the insurers' "prompting" could make them part of that conspiracy. The McCarran-Ferguson **[*810]** Act, however, makes that conspiracy lawful (assuming reinsurance is state regulated), unless the refusal to deal is a "boycott."

LEdHN[2D][] [2D]Under the test set forth above, there are sufficient allegations of a "boycott" to sustain the relevant counts of complaint against a motion to dismiss. For example, the complaints allege that some of the defendant reinsurers threatened to "withdraw entirely from the business of reinsuring primary U.S. insurers who wrote **[****70]** on the occurrence form." App. 31 (Cal. Complaint P89), *id.*, at 83 (Conn. Complaint P93). Construed most favorably to respondents, that allegation claims that primary insurers who wrote insurance on disfavored forms would be refused all reinsurance, *even* as to risks written on *other forms*. If that were the case, the reinsurers might have been engaging in a boycott -- they would, that is, unless the primary insurers' other business were relevant to the proposed reinsurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses). Cf. Gonye, Underwriting the Reinsured, in Reinsurance 439, 463-466 (R. Strain ed. 1980); 2 R. Reinarz, J. Schloss, G. **[***648]** Patrik, & P. Kensicki, Reinsurance Practices 21-23 (1990) (same). Other allegations in the complaints could be similarly construed. For example, the complaints also allege that the reinsurers "threatened a boycott of North American CGL risks," not just CGL risks containing dissatisfactory terms, App. 26 (Cal. Complaint P74), *id.*, at 79 (Conn. Complaint P78); that "the foreign and domestic reinsurer representatives presented their agreed upon positions that **[****71]** there would be changes in the CGL forms or no reinsurance," *id.*, at 29 (Cal. Complaint P82), *id.*, at 81-82 (Conn. Complaint P86); that some of the defendant insurers and reinsurers told "groups of insurance brokers and agents . . . that a reinsurance boycott, and thus loss of income to the agents and brokers who would be unable to find available markets for their customers, would ensue if the [revised] ISO forms were not approved," **[*811]** *id.*, at 29 (Cal. Complaint P85), *id.*, at 82 (Conn. Complaint P89).

LEdHN[2E][] [2E] ***LEdHN[19]***[] [19] ***LEdHN[20A]***[] [20A]Many other allegations in the complaints describe conduct that may amount to **[**2917]** a boycott if the plaintiffs can prove certain additional facts. For example, General Re, the largest American reinsurer, is alleged to have "agreed to either coerce ISO to adopt [the defendants'] demands or, failing that, 'derail' the entire CGL forms program." *Id.*, at 24 (Cal. Complaint P64), *id.*, at 77 (Conn. Complaint P68). **[****72]** If this means that General Re intended to withhold all reinsurance on all CGL forms -- even forms having no objectionable terms -- that might amount to a "boycott." Also, General Re and several other domestic reinsurers are alleged to have "agreed to boycott the 1984 ISO forms unless a retroactive date was added to the claims-made form, and a pollution exclusion and a defense cost cap were added to both [the occurrence and claims made] forms." *Id.*, at 25 (Cal. Complaint P66), *id.*, at 78 (Conn. Complaint P70). Liberally construed, this allegation may mean that the defendants had linked their demands so that they would continue to refuse to do business on *either* form until *both* were changed to their liking. Again, that might amount to a boycott. "[A] complaint should not be dismissed unless 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S.*

232, 246, 62 L. Ed. 2d 441, 100 S. Ct. 502 (1980) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). Under that standard, **[****73]** these allegations are sufficient to sustain the First, Second, Third, and Fourth Claims for Relief in the California Complaint and the First and Second Claims for Relief in the Connecticut Complaint. [7]

LEdHN[20B][] [20B]

Concur by: SOUTER

Concur

[*784contd] **[***631contd]** **[**2903contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

SOUTER, J., delivered an opinion concurring in the judgment with respect to Part II-B, in which WHITE, BLACKMUN, and STEVENS, JJ., joined.

B

That the domestic defendants did not lose their § 2(b) exemption by acting together with foreign reinsurers, however, is not enough reason **[****74]** to reinstate the District Court's dismissal order, for the Court of Appeals reversed that order on two independent grounds. Even if the participation of foreign reinsurers did not affect the § 2(b) exemption, the Court of Appeals held, the agreements and acts alleged by the plaintiffs constitute "agreement[s] to boycott" and "act[s] of boycott [and] coercion" within the meaning of § 3(b) of the McCarran-Ferguson Act, which makes it clear that the Sherman Act applies to such agreements and acts regardless of the § 2(b) exemption. See 938 F.2d, at 928. I agree with **[*785]** the Court that, construed in favor of the plaintiffs, the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the First and Second Claims for Relief in the Connecticut Complaint, allege one or more § 3(b) "act[s] of boycott," and are thus sufficient to survive a motion to dismiss. See *infra*, at 789-790; *post*, at 811.

In reviewing the motions to dismiss, however, the Court has decided to use what I believe to be an overly narrow definition of the term "boycott" as used in § 3(b), confining it to those refusals to deal that are "unrelated" or "collateral" **[****75]** to the objective sought by those refusing to deal. *Post*, at 803. I do not believe that the McCarran-Ferguson Act or our precedents warrant such a cramped reading of the term.

The majority and I find common ground in four propositions concerning § 3(b) boycotts, as established in our decisions in St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978), and United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 88 L. Ed. 1440, 64 S. Ct. 1162 (1944). First, as we noted in *St. Paul*, our only prior decision construing "boycott" as it appears in § 3(b), only those refusals to deal involving the coordinated action of multiple actors constitute § 3(b) boycotts: "conduct by individual actors falling short of concerted activity is simply not a 'boycott' within [the meaning of] § 3(b)." **[***632]** 438 U.S. at 555; see *post*, at 800 ("'boycott'" used "to describe . . . collective action"); *post*, at 801 ("To 'boycott' means 'to combine in refusing to hold relations'" (citation omitted)).

Second, a § 3(b) boycott need not involve an absolute refusal to deal. [13] A primary goal **[****76]** of the alleged conspirators in *South-Eastern Underwriters*, as we described it, was "to force nonmember insurance companies

[7] We agree with JUSTICE SOUTER's conclusion, *ante*, at 790-791, n. 18, that the Seventh Claim for Relief in the California Complaint and the Sixth Claim for Relief in the Connecticut Complaint fail to allege any § 3(b) boycotts.

[13] Petitioners correctly concede this point. See Brief for Petitioners in No. 91-1111, p. 32, n. 14.

into the conspiracies." [14] *322 U.S. at 535*; **[**2904]** cf. Joint Hearing on S. 1362, H. R. **[*786]** 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 335 (1943) (statement of Edward L. Williams, President, Insurance Executives Association) ("The companies that want to come into the Interstate Underwriters Board can come in there. I do not know of any company that is turned down"). Thus, presumably, the refusals to deal orchestrated by the defendants would cease if the targets agreed to join the association and abide by its terms. See *post*, at 801 ("The refusal to deal may . . . be conditional" (emphasis omitted)).

[**77]** Third, contrary to petitioners' contentions, see Brief for Petitioners in No. 91-1111, pp. 32, n. 14, 34, 38-39, a § 3(b) boycott need not entail unequal treatment of the targets of the boycott and its instigators. Some refusals to deal (those, perhaps, which are alleged to violate only *§ 2* of the Sherman Act [15]) may have as their object the complete destruction of the business of competitors; these may well involve unconditional discrimination against the targets. Other refusals to deal, however, may seek simply to prevent competition as to the price or features of the product sold; and these need not depend on unequal treatment of the targets. Assuming, **[*787]** as the *South-Eastern Underwriters* Court appears to have done, that membership in the defendant association was open to all insurers, the association is most readily seen as having intended to treat all insurers equally: they all had the choice either to join the association and abide by its rules, or to be subjected to the "boycotts," **[***633]** and acts of coercion and intimidation, alleged in that case. See *post*, at 808 (describing *South-Eastern Underwriters* as involving a "boycott, by primary insurers, **[****78]** of competitors who refused to join their price-fixing conspiracy").

Fourth, although a necessary element, "concerted activity" is not, by itself, sufficient for a finding of "boycott" under § 3(b). Were this the case, we recognized in *Barry*, § 3(b) might well "'devour the broad antitrust immunity bestowed by *§ 2(b)*,'" *438 U.S. at 545, n. 18* (quoting *id., at 559* (Stewart, J., dissenting)), since every "contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce," *15 U.S. C. § 1*, involves "concerted activity." Thus, we suggested, simple price fixing has been treated neither as a boycott nor as coercion "in the absence of any additional enforcement activity. **[****79]** " *438 U.S. at 545, n. 18*; see *post*, at 804 (contending that simple concerted agreements on contract terms are not properly characterized as boycotts).

Contrary to the majority's view, however, our decisions have suggested that "enforcement activity" is a multifarious concept. The *South-Eastern Underwriters* Court, which coined the phrase "boycotts[,] . . . coercion and intimidation," *322 U.S. at 535*; see n. 14, *supra*, provides us with a list of actions that, it finds, are encompassed by these terms. "Companies not members of [the association]," it states, "were cut off from the opportunity to reinsure their risks, and their services and facilities were disparaged; independent sales agencies who defiantly represented non-[association] companies were punished by a withdrawal of the right to represent the members of [the association]; and persons needing insurance who purchased from non-[association] **[*788]** companies **[**2905]** were threatened with boycotts and withdrawal of all patronage." *322 U.S. at 535-536*. Faced with such a list, and with all of the other instances in which we have used the term "boycott," we **[****80]** rightly came to the conclusion in *Barry* that, as used in our cases, the term does not refer to a "'unitary phenomenon.'" *438 U.S. at 543* (quoting P. Areeda, Antitrust Analysis 381 (2d ed. 1974)).

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[14] As we have noted before, see *Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 217, 59 L. Ed. 2d 261, 99 S. Ct. 1067 (1979)*; *SEC v. National Securities, Inc., 393 U.S. 453, 458, 21 L. Ed. 2d 668, 89 S. Ct. 564 (1969)*, the McCarran-Ferguson Act was precipitated by our holding in *South-Eastern Underwriters* that the business of insurance was interstate commerce and thus subject generally to federal regulation under the *Commerce Clause*, and to scrutiny under the Sherman Act specifically. Congress responded, both to "ensure that the States would continue to have the ability to tax and regulate the business of insurance," *Royal Drug Co., 440 U.S. at 217-218* (footnote omitted), and to limit the application of the antitrust laws to the insurance industry, *id., at 218*. In drafting the § 3(b) exception to the *§ 2(b)* grant of antitrust immunity, Congress borrowed language from our description of the indictment in *South-Eastern Underwriters* as charging that "the conspirators not only fixed premium rates and agents' commissions, but employed boycotts together with other types of coercion and intimidation to force nonmember insurance companies into the conspiracies." *322 U.S. at 535*.

[15] *Section 2* of the Sherman Act, 26 Stat. 209, as amended, *15 U.S. C. § 2*, prohibits monopolization of, or attempts or conspiracies to monopolize, "any part of the trade or commerce among the several States, or with foreign nations."

The question in this litigation is whether the alleged activities of the domestic defendants, acting together with the foreign defendants who are not petitioners here, include "enforcement activities" that would raise the claimed attempts to fix terms to the level of § 3(b) boycotts. I believe they do. The core of the plaintiffs' allegations against the domestic defendants concern those activities that form the basis of the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the Second Claim for Relief in the Connecticut Complaint: the conspiracies involving both the primary insurers and domestic and foreign brokers and reinsurers to force changes in the ISO CGL forms. According to the complaints, primary insurer defendants Hartford and Allstate first tried to convince other members of the ISO that the ISO CGL forms should be changed to limit coverage in the manner we **[***634]** have detailed above, see *supra, at 773-774*; but they failed **[****81]** to persuade a majority of members of the relevant ISO committees, and the changes were not made. Unable to persuade other primary insurers to agree voluntarily to their terms, Hartford and Allstate, joined by Aetna and CIGNA, sought the aid of other individuals and entities who were not members of ISO, and who would not ordinarily be parties to an agreement setting the terms of primary insurance, not being in the business of selling it. The four primary insurers convinced these individuals and entities, the reinsurers, to put pressure on ISO and its members by refusing to reinsure coverages written on the ISO CGL forms until the desired changes were made. Both domestic and foreign reinsurers, acting at the behest of the four primary **[*789]** insurers, announced that they would not reinsure under the ISO CGL forms until changes were made. As an immediate result of this pressure, ISO decided to include a retroactive-date provision in its claims-made form, and to exclude all pollution coverage from both its claims-made and occurrence forms. In sum, the four primary insurers solicited refusals to deal from outside the primary insurance industry as a means of forcing their fellow primary **[****82]** insurers to agree to their terms; the outsiders, acting at the behest of the four, in fact refused to deal with primary insurers until they capitulated, which, in part at least, they did.

This pattern of activity bears a striking resemblance to the first act of boycott listed by the *South-Eastern Underwriters* Court; although neither the *South-Eastern Underwriters* opinion, nor the underlying indictment, see Transcript of Record, O. T. 1943, No. 354, p. 11 (P22(e)), details exactly how the defendants managed to "cut off [nonmembers] from the opportunity to reinsure their risks," *322 U.S. at 535*, the defendants could have done so by prompting reinsurance companies to refuse to deal with nonmembers, just as is alleged here. [16] **[****84]** Moreover, the activity falls squarely **[*790]** **[**2906]** within even the narrow theory of the § 3(b) exception Justice Stewart advanced in dissent in *Barry*. Under that theory, [17] **[****85]** the **[***635]** § 3(b) exception should be limited to "attempts by members of the insurance business to force other members to follow the industry's private rules and practices." *438 U.S. at 565*. I can think of no better description of **[****83]** the four primary insurers' activities in this

[16] The majority claims that this refusal to deal was a boycott only because "membership in the association [had] no discernible bearing upon the terms of the refused reinsurance contracts." *Post*, at 809. Testimony at the hearings on the bill that became the McCarran-Ferguson Act indicates that the insurance companies thought otherwise. "We say 'You do not issue insurance to a company that does not do business the way we think it should be done and belong to our association.' . . . It is for the protection of the public, the stockholders, and the companies . . . . You know when those large risks are taken that they have to be reinsured. We do not want to have to take a risk that is bad, or at an improper rate, or an excessive commission, we do not want our agents to take that, nor do we want to reinsure part of the risk that is written that way. We feel this way -- that some groups are doing business in what is not the proper way, we feel it is not in the interest of the companies and it is not in the interest of the public, and we just do not want to do business with them." Joint Hearing on S. 1362, H. R. 3269, and H. R. 3270 before the Subcommittees of the Senate Committee on the Judiciary, 78th Cong., 1st Sess., pt. 2, p. 333 (1943) (statement of Edward L. Williams, President, Insurance Executives Association).

[17] In passing the McCarran-Ferguson Act, Justice Stewart argued, "Congress plainly wanted to allow the States to authorize anticompetitive practices which they determined to be in the public interest." *St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 565, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978)* (dissenting opinion). Hence, *§ 2(b)* provides that the federal antitrust laws will generally not be applicable to those insurance business practices "regulated by State law," and presumably state law could, for example, either mandate price fixing, or specifically authorize voluntary price-fixing agreements. On the other hand, Congress intended to delegate regulatory power only to the States; nothing in the McCarran-Ferguson Act suggests that Congress wanted one insurer, or a group of insurers, to be able to formulate and enforce policy for other insurers. Thus, the enforcement activities that distinguish § 3(b) "boycotts" from other concerted activity include, in this context, "*private enforcement* . . . of industry rules and practices, even if those rules and practices are permitted by state law." *Id., at 565-566* (emphasis in original) (footnote omitted).

litigation. For these reasons, I agree with the Court's ultimate conclusion that the Court of Appeals was correct in reversing the District Court's dismissal of the First, Second, Third, and Fourth Claims for Relief in the California Complaint, and the Second Claim for Relief in the Connecticut Complaint. [18]

[**86]** **[*791]** The majority concludes that, so long as the reinsurers' role in this course of action was limited to "a concerted agreement to seek particular terms in particular transactions," *post*, at 801-802, the course of action could never constitute a § 3(b) boycott. The majority's emphasis on this conclusion assumes **[**2907]** an artificial segmentation of the course of action, and a **[***636]** false perception of the unimportance of the elements of that course of action other than the reinsurers' agreement. The majority concedes that the complaints allege, not just implementation of a horizontal agreement, but refusals to deal that occurred "at the behest of," or were "solicited by," the four primary insurers, who were "competitors of the target[s]." **[*792]** *Post*, at 808 (citations and internal quotation marks omitted). But it fails to acknowledge several crucial features of these events that bind them into a single course of action recognizable as a § 3(b) boycott.

First, the allegation that the reinsurers acted at the behest of the four primary insurers excludes the possibility that the reinsurers acted entirely in their own independent self-interest, **[****87]** and would have taken exactly the same course of action without the intense efforts of the four primary insurers. Although the majority never explicitly posits such autonomy on the part of the reinsurers, this would seem to be the only point of its repeated emphasis on the fact that "the scope and predictability of the risks assumed in a reinsurance contract depend entirely upon the terms of the primary policies that are reinsured." *Ibid*. If the encouragement of the four primary insurers played no role in the reinsurers' decision to act as they did, then it is difficult to see how one could describe the reinsurers as acting at the behest of the primary insurers, an element I find crucial to the § 3(b) boycott alleged here. From the vantage point of a ruling on motions to dismiss, however, I discern sufficient allegations in the complaints that this is not the case. In addition, according to the complaints, the four primary insurers were not acting out of concern for the reinsurers' financial health when they prompted the reinsurers to refuse reinsurance for certain risks; rather, they simply wanted to ensure that no other primary insurer would be able to sell insurance policies **[****88]** that they did not want to sell. Finally, as the complaints portray the business of insurance, reinsurance is a separate, specialized product, "the availability [of which] affects the ability and willingness of primary insurers to provide insurance to their customers." App. 18 (Cal. Complaint P34). Thus, contrary to the majority's assertion, the boundary between the primary insurance industry and the reinsurance industry is not merely "technical." *Post*, at 808.

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[18] The First and Sixth Claims for Relief in the Connecticut Complaint, and the Seventh Claim for Relief in the California Complaint, which also name some or all of the petitioners, present special cases. The First Claim for Relief in the Connecticut Complaint alleges an overarching conspiracy involving all of the defendants named in the complaint and all of the conduct alleged. As such, it encompasses "boycott" activity, and the Court of Appeals was correct to reverse the District Court's order dismissing it. As currently described in the complaint's statement of facts, however, some of the actions of the reinsurers and the retrocessional reinsurers appear to have been taken independently, rather than at the behest of the primary insurer defendants. I express no opinion as to whether those acts, if they were indeed taken independently, could amount to § 3(b) boycotts; but I note that they lack the key element on which I rely in this litigation to find a sufficient allegation of boycott.

The Seventh Claim for Relief in the California Complaint, and the virtually identical Sixth Claim for Relief in the Connecticut Complaint, allege a conspiracy among a group of domestic primary insurers, foreign reinsurers, and the ISO to draft restrictive model forms and policy language for "umbrella" and "excess" insurance. On these claims, the Court of Appeals reversed the District Court's order of dismissal as to the domestic defendants solely because those defendants "acted in concert" with nonexempt foreign defendants, *938 F.2d, at 931*, relying on reasoning that the Court has found to be in error, see *supra, at 781-784*. The Court of Appeals found that "no boycotts [were] alleged as the defendants' modus operandi in respect to [excess and umbrella] insurance." *938 F.2d, at 930*. I agree; even under a liberal construction of the complaints in favor of plaintiffs, I can find no allegation of any refusal to deal in connection with the drafting of the excess and umbrella insurance language. Therefore I conclude that neither the participation of unregulated parties nor the application of § 3(b) furnished a basis to reverse the District Court's dismissal of these claims as against the domestic insurers, and I would reverse the judgment of the Court of Appeals in this respect. The Fifth, Sixth, and Eighth Claims for Relief in the California Complaint and the Third, Fourth, and Fifth Claims for Relief in the Connecticut Complaint also allege concerted refusals to deal; but because they do not name any of the petitioners in No. 91-1111, the Court has no occasion to consider whether they allege § 3(b) boycotts.

[*793] The majority insists that I "disregard the integral relationship between the terms of the primary insurance form and the contract of reinsurance," *post*, at 807, a fact which it seems to believe makes it impossible to draw any distinction whatsoever between primary insurers and reinsurers. Yet it is the majority that fails to see that, in spite of such an "integral relationship," the interests of primary insurer and reinsurer will almost certainly differ in some cases. For example, the complaints allege that reinsurance contracts often "layer" risks, "in the sense that [a] reinsurer may have to respond only to claims above a certain amount . . . ." App. 10 (Cal. Complaint P4.q); *id., at 61* (Conn. **[****89]** Complaint P4(f)). Thus, a primary insurer might be much more concerned than its reinsurer about a risk that resulted in a high number of relatively small **[***637]** claims. Or the primary insurer might simply perceive a particular risk differently from the reinsurer. The reinsurer might be indifferent as to whether a particular risk was covered, so long as the reinsurance premiums were adjusted to its satisfaction, whereas the primary insurer might decide that the risk was "too hot to handle," on a standardized basis, at any cost. The majority's suggestion that "to insist upon certain primary-insurance terms as a condition of writing reinsurance is in no way 'artificial,'" *post*, at 808; see *post*, at 806, simply ignores these possibilities; the conditions could quite easily be "artificial," in the sense that they are not motivated by the interests of the reinsurers themselves. Because the parties have had no chance to flesh out the facts of this case, because I have no *a priori* knowledge of those facts, and because I do not believe I can locate them in the **[**2908]** pages of insurance treatises, I would not rule out these possibilities on a motion to dismiss.

Believing **[****90]** that there is no other principled way to narrow the § 3(b) exception, the majority decides that "boycott" encompasses just those refusals to deal that are "unrelated" or "collateral" to the objective sought by those refusing to deal. *Post*, at 803. This designation of a single "'unitary phenomenon,'" **[*794]** *Barry, 438 U.S. at 543*, to which the term "boycott" will henceforth be confined, is of course at odds with our own description of our Sherman Act cases in *Barry*. [19] See *ibid*. Moreover, the limitation to "collateral" refusals to deal threatens to shrink the § 3(b) exception far more than the majority is willing to admit. Even if the reinsurers refused all reinsurance to primary insurers "who wrote insurance on disfavored forms," including insurance "as to risks written on other forms," the majority states, the reinsurers would not be engaging in a § 3(b) boycott if "the primary insurers' other business were relevant to the proposed insurance contract (for example, if the reinsurer bears greater risk where the primary insurer engages in riskier businesses)." *Post*, at 810 (emphasis deleted). Under this standard, and under facts comparable **[****91]** to those in this litigation, I assume that reinsurers who refuse to deal at all with a primary insurer unless it ceases insuring a particular risk would not be engaging in a § 3(b) boycott if they could show that (1) insuring the risk in question increases the probability that the primary insurer will become insolvent, and that (2) it costs more to administer the reinsurance contracts of a bankrupt primary insurer (including those unrelated to the risk that caused the primary insurer to declare bankruptcy). One can only imagine the variety of similar arguments that may slowly plug what remains of the § 3(b) exception. For these reasons, I cannot agree with the majority's narrow theory of § 3(b) boycotts.

[**92]**

Dissent by: SCALIA

Dissent

[*812] **[***648contd]** **[**2917contd]** [EDITOR'S NOTE: The page numbers of this document may appear to be out of sequence; however, this pagination accurately reflects the pagination of the original published documents.]

SCALIA, J., delivered a dissenting opinion with respect to Part II, in which O'CONNOR, KENNEDY, and THOMAS, JJ., joined post, p. 800.

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[19] The majority contends that its concept of boycott is still "multifaceted" because it can be modified by such adjectives as "punitive," "labor," "political," and "social." *Post*, at 804, n. 3. This does not hide the fact that it is attempting to concoct a "precise definition" of the term, *post*, at 800, composed of a simple set of necessary and sufficient conditions.

II

Petitioners in No. 91-1128, various British corporations and other British subjects, argue that certain of the claims against them constitute an inappropriate extraterritorial application of the Sherman **[***649]** Act. [8] It is important to distinguish two distinct questions raised by this petition: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested). Respondents asserted nonfrivolous claims under the Sherman Act, and 28 U.S.C. § 1331 vests district courts with subject-matter jurisdiction over cases "arising under" federal statutes. As precedents such as *Lauritzen v. Larsen, 345 U.S. 571, 97 L. Ed. 1254, 73 S. Ct. 921 (1953)*, make clear, that is sufficient to establish the District Court's jurisdiction over these claims. *Lauritzen* involved **[****93]** a Jones Act claim brought by a foreign sailor against a foreign shipowner. The shipowner contested the District Court's jurisdiction, see *id., at 573*, apparently on the grounds that the Jones Act did not govern the dispute between the foreign parties to the action. Though ultimately agreeing with the shipowner that the Jones Act did not apply, see discussion *infra*, at 816, the Court held that the District Court had jurisdiction.

> "As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact." *345 U.S. at 575*.

[*813] See also *Romero v. International Terminal Operating Co., 358 U.S. 354, 359, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)*.

[**94]** **[**2918]** The second question -- the extraterritorial reach of the Sherman Act -- has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct. See *EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991)* (*Aramco*) ("It is our task to determine whether Congress intended the protections of Title VII to apply to United States citizens employed by American employers outside of the United States"). If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction -- want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute. See *Romero, supra, at 384* (holding no claim available under the Jones Act); *American Banana Co. v. United Fruit Co., 213 U.S. 347, 359, 53 L. Ed. 826, 29 S. Ct. 511 (1909)* (holding that complaint based upon foreign conduct "alleges no case under the [Sherman Act]").

There **[****95]** is, however, a type of "jurisdiction" relevant to determining the extraterritorial reach of a statute; it **[***650]** is known as "legislative jurisdiction," *Aramco, supra*, at 253; *Restatement (First) Conflict of Laws § 60* (1934), or "jurisdiction to prescribe," 1 Restatement (Third) of Foreign Relations Law of the United States 235 (1987) (hereinafter Restatement (Third)). This refers to "the authority of a state to make its law applicable to persons or activities," and is quite a separate matter from "jurisdiction to adjudicate," see *id., at 231*. There is no doubt, of course, that Congress possesses legislative jurisdiction over the acts alleged in this complaint: Congress has broad power under Article I, § 8, cl. 3, "to regulate Commerce with foreign Nations," and this Court has repeatedly upheld its power to make laws applicable to persons or activities beyond our territorial boundaries where United **[*814]** States interests are affected. See *Ford v. United States, 273 U.S. 593, 621-623, 71 L. Ed. 793, 47 S. Ct. 531 (1927)*; *United States v. Bowman, 260 U.S. 94, 98-99, 67 L. Ed. 149, 43 S. Ct. 39 (1922)*; *American Banana, supra, at 356*. **[****96]** But the question in this litigation is whether, and to what extent, Congress *has* exercised that undoubted legislative jurisdiction in enacting the Sherman Act.

Two canons of statutory construction are relevant in this inquiry. The first is the "longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial

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[8] The counts at issue in this litigation are the Fifth, Sixth, and Eighth Claims for Relief in the California Complaint. See App. 43-46 (PP131-140), *id., at 47-49 (PP146-150)*.

jurisdiction of the United States."' *Aramco, supra*, at 248 (quoting *Foley Bros., Inc. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949))*. Applying that canon in *Aramco*, we held that the version of Title VII of the Civil Rights Act of 1964 then in force, *42 U.S.C. §§ 2000e to 2000e-17 (1988 ed.)*, did not extend outside the territory of the United States even though the statute contained broad provisions extending its prohibitions to, for example, "'any activity, business, or industry in commerce.'" *Id., at 249* (quoting *42 U.S.C. § 2000e(h)*). We held such "boilerplate language" to be an insufficient indication to override the presumption against extraterritoriality. *Id., at 251*; see also **[****97]** *id., at 251-253*. The Sherman Act contains similar "boilerplate language," and if the question were not governed by precedent, it would be worth considering whether that presumption controls the outcome here. We have, however, found the presumption to be overcome with respect to our antitrust laws; it is now well established that the Sherman Act applies extraterritorially. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 582, n. 6, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*; *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 704, 8 L. Ed. 2d 777, 82 S. Ct. 1404 (1962)*; see also *United States v. Aluminum **[**2919]** Co. of America, 148 F.2d 416 (CA2 1945)*.

But if the presumption against extraterritoriality has been overcome or is otherwise inapplicable, a second canon of statutory construction becomes relevant: "An act of congress **[*815]** ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy, 6 U.S. 64, 2 Cranch 64, 118, 2 L. Ed. 208 **[***651]** (1804)* (Marshall, **[****98]** C.J.). This canon is "wholly independent" of the presumption against extraterritoriality. *Aramco, supra*, at 264 (Marshall, J., dissenting). It is relevant to determining the substantive reach of a statute because "the law of nations," or customary international law, includes limitations on a nation's exercise of its jurisdiction to prescribe. See Restatement (Third) §§ 401-416. Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe.

Consistent with that presumption, this and other courts have frequently recognized that, even where the presumption against extraterritoriality does not apply, statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law. For example, in *Romero v. International Terminal Operating Co., 358 U.S. 354, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)*, the plaintiff, a Spanish sailor who had been injured while working aboard a Spanish-flag and Spanish-owned vessel, filed a Jones Act claim against his Spanish employer. The presumption against **[****99]** extraterritorial application of federal statutes was inapplicable to the case, as the actionable tort had occurred in American waters. See *id., at 383*. The Court nonetheless stated that, "in the absence of a contrary congressional direction," it would apply "principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community." *Id., at 382-383*. "The controlling considerations" in this choice-of-law analysis were "the interacting interests of the United States and of foreign countries." *Id., at 383*.

[*816] *Romero* referred to, and followed, the choice-of-law analysis set forth in *Lauritzen v. Larsen, 345 U.S. 571, 97 L. Ed. 1254, 73 S. Ct. 921 (1953)*. As previously mentioned, *Lauritzen* also involved a Jones Act claim brought by a foreign sailor against a foreign employer. The *Lauritzen* Court recognized the basic problem: "If [the Jones Act were] read literally, **[****100]** Congress has conferred an American right of action which requires nothing more than that plaintiff be 'any seaman who shall suffer personal injury in the course of his employment.'" *Id., at 576*. The solution it adopted was to construe the statute "to apply only to areas and transactions in which *American law would be considered operative under prevalent doctrines of international law.*" *Id., at 577* (emphasis added). To support application of international law to limit the facial breadth of the statute, the Court relied upon -- of course -- Chief Justice Marshall's statement in *Schooner Charming Betsy*, quoted *supra, at 814-815*. It then set forth "several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim." *345 U.S. at 583*; see *id., at 583-593* (discussing factors). See also *McCulloch v. Sociedad Nacional de* ***[***652]*** *Marineros de Honduras, 372 U.S. 10, 21-22, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963)* (applying *Schooner Charming Betsy* principle to restrict application of National Labor Relations Act to foreign-flag vessels).

[**101]** *Lauritzen, Romero*, and *McCulloch* were maritime cases, but we have recognized the principle that the scope of generally worded **[**2920]** statutes must be construed in light of international law in other areas as well.

See, *e.g., Sale* v. *Haitian Centers Council, Inc., ante*, at 178, n. 35; *Weinberger v. Rossi, 456 U.S. 25, 32, 71 L. Ed. 2d 715, 102 S. Ct. 1510 (1982)*. More specifically, the principle was expressed in *United States v. Aluminum Co. of America, 148 F.2d 416 (CA2 1945)*, the decision that established the extraterritorial reach of the Sherman Act. In his opinion for the court, Judge Learned Hand cautioned "we are not to read general words, such as those in [the Sherman] **[*817]** Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations which generally correspond to those fixed by the 'Conflict of Laws.'" *Id., at 443*.

More recent lower court precedent has also tempered the extraterritorial application of the Sherman Act with considerations of "international comity." See *Timberlane Lumber Co. v. Bank of America, N. T. & S. A., 549 F.2d 597, 608-615 (CA9 1976)*; **[****102]** *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-1298 (CA3 1979)*; *Montreal Trading Ltd. v. Amax Inc., 661 F.2d 864, 869-871 (CA10 1981)*; *Laker Airways Limited v. Sabena, Belgian World Airlines, 235 U.S. App. D.C. 207, 236, 731 F.2d 909*, and n. 109, *235 U.S. App. D.C. 207, 731 F.2d 909, 731 F.2d 909, 938, and n. 109 (1984)*; see also *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc., 131 U.S. App. D.C. 226, 236, 404 F.2d 804*, and n. 31, *131 U.S. App. D.C. 226, 404 F.2d 804, 404 F.2d 804, 814, and n. 31 (1968)*. The "comity" they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed "prescriptive comity": the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted. It is a traditional component of choice-of-law theory. See J. Story, Commentaries on the Conflict **[****103]** of Laws § 38 (1834) (distinguishing between the "comity of the courts" and the "comity of nations," and defining the latter as "the true foundation and extent of the obligation of the laws of one nation within the territories of another"). Comity in this sense includes the choice-of-law principles that, "in the absence of contrary congressional direction," are assumed to be incorporated into our substantive laws having extraterritorial reach. *Romero, supra, at 382-383*; see also *Lauritzen, supra, at 578-579*; *Hilton v. Guyot, 159 U.S. 113, 162-166, 40 L. Ed. 95, 16 S. Ct. 139 (1895)*. Considering comity in **[*818]** this way is just part of determining whether the Sherman Act prohibits the conduct at issue. [9]

[**104]** **[***653]** In sum, the practice of using international law to limit the extraterritorial reach of statutes is firmly established in our jurisprudence. In proceeding to apply that practice to the present cases, I shall rely on the Restatement (Third) for the relevant principles of international law. Its standards appear fairly supported in the decisions of this Court construing international choice-of-law principles (*Lauritzen, Romero*, and *McCulloch*) and in the decisions of other federal courts, especially *Timberlane*. Whether the Restatement precisely reflects international law in every detail matters little here, as I believe this litigation would be resolved the same way under virtually any conceivable **[**2921]** test that takes account of foreign regulatory interests.

Under the Restatement, a nation having some "basis" for jurisdiction to prescribe law should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable." *Restatement (Third) § 403(1)*. The "reasonableness" inquiry turns on a number of factors including, but not limited to: "the **[****105]** extent to which the activity takes place within the territory [of the regulating state]," *id.*, *§ 403(2)(a)*; "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the **[*819]** activity to be regulated," *id.*, *§ 403(2)(b)*; "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted," *id.*, *§ 403(2)(c)*; "the extent to which another state may have an interest in regulating the activity," *id.*, *§ 403(2)(g)*; and "the likelihood of conflict with regulation by another state," *id.*, *§ 403(2)(h)*. Rarely would these factors point more clearly against application of United States law. The activity relevant to the counts at

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[9] Some antitrust courts, including the Court of Appeals in the present cases, have mistaken the comity at issue for the "comity of courts," which has led them to characterize the question presented as one of "abstention," that is, whether they should "exercise or decline jurisdiction." *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294, 1296 (CA3 1979)*; see also *In re Insurance Antitrust Litigation, 938 F.2d 919, 932 (CA9 1991)*. As I shall discuss, that seems to be the error the Court has fallen into today. Because courts are generally reluctant to refuse the exercise of conferred jurisdiction, confusion on this seemingly theoretical point can have the very practical consequence of greatly expanding the extraterritorial reach of the Sherman Act.

issue here took place primarily in the United Kingdom, and the defendants in these counts are British corporations and British subjects having their principal place of business or residence outside the United States. [10] Great Britain has established a comprehensive regulatory scheme **[****106]** governing the London reinsurance markets, and clearly has a heavy "interest in regulating the activity," *id.*, *§ 403(2)(g)*. See *938 F.2d at 932-933*; *In re Insurance Antitrust Litigation, 723 F. Supp. 464, 487-488 (ND Cal. 1989)*; see also J. Butler & R. Merkin, Reinsurance Law A.1.1-02 (1992). Finally, *§ 2(b)* of the McCarran-Ferguson Act allows state regulatory statutes to override the Sherman Act in the insurance field, subject only to the narrow "boycott" exception set forth in § 3(b) -- suggesting that "the importance **[***654]** of regulation to the [United States]," *Restatement (Third) § 403(2)(c)*, is slight. Considering these factors, I think it unimaginable that an assertion of legislative jurisdiction by the United States would be considered reasonable, and therefore it is inappropriate to assume, in the absence of statutory indication to the contrary, that Congress has made such an assertion.

[**107]** **[*820]** It is evident from what I have said that the Court's comity analysis, which proceeds as though the issue is whether the courts should "decline to exercise . . . jurisdiction," *ante*, at 798, rather than whether the Sherman Act covers this conduct, is simply misdirected. I do not at all agree, moreover, with the Court's conclusion that the issue of the substantive scope of the Sherman Act is not in the cases. See *ante*, at 796, n. 22; *ante*, at 797, n. 24. To be sure, the parties did not make a clear distinction between adjudicative jurisdiction and the scope of the statute. Parties often do not, as we have observed (and have declined to punish with procedural default) before. See the excerpt from *Lauritzen* quoted *supra*, at 812; see also *Romero, 358 U.S. at 359*. It is not realistic, and also not helpful, to pretend that the only really relevant issue in this litigation is not before us. In any event, if one erroneously chooses, as the Court does, to make adjudicative jurisdiction (or, more precisely, abstention) the vehicle for taking account of the needs of prescriptive comity, the Court still gets it wrong. It concludes that no "true **[****108]** conflict " counseling nonapplication of United States law (or rather, as it thinks, United States judicial jurisdiction) exists unless compliance with United States law would constitute a *violation* of another country's law. *Ante*, at 798-799. **[**2922]** That breathtakingly broad proposition, which contradicts the many cases discussed earlier, will bring the Sherman Act and other laws into sharp and unnecessary conflict with the legitimate interests of other countries -- particularly our closest trading partners.

In the sense in which the term "conflict" was used in *Lauritzen, 345 U.S. at 582, 592*, and is generally understood in the field of conflicts of laws, there is clearly a conflict in this litigation. The petitioners here, like the defendant in *Lauritzen*, were not compelled by any foreign law to take their allegedly wrongful actions, but that no more precludes a conflict-of-laws analysis here than it did there. See *id., at 575-576* (detailing the differences between foreign and **[*821]** United States law). Where applicable foreign and domestic law provide different substantive rules of decision to govern the parties' dispute, **[****109]** a conflict-of-laws analysis is necessary. See generally R. Weintraub, Commentary on Conflict of Laws 2-3 (1980); *Restatement (First) of Conflict of Laws § 1, Comment c* and Illustrations (1934).

Literally the *only* support that the Court adduces for its position is *§ 403 of the Restatement (Third)* -- or more precisely Comment *e* to that provision, which states:

> "Subsection (3) [which says that a State should defer to another state if that State's interest is clearly **[***655]** greater] applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both . . . ."

The Court has completely misinterpreted this provision. Subsection (3) of *§ 403* (requiring one State to defer to another in the limited circumstances just described) comes into play only after subsection (1) of *§ 403* has been complied with -- *i.e.*, after it has been determined that the exercise of jurisdiction by *both* of the two States is not

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[10] Some of the British corporations are subsidiaries of American corporations, and the Court of Appeals held that "the interests of Britain are at least diminished where the parties are subsidiaries of American corporations." *Id., at 933*. In effect, the Court of Appeals pierced the corporate veil in weighing the interests at stake. I do not think that was proper.

"unreasonable. **[****110]** " That prior question is answered by applying the factors (*inter alia*) set forth in subsection (2) of *§ 403*, that is, precisely the factors that I have discussed in text and that the Court rejects. [11]

[*822] * * *

I would reverse the judgment of the Court of Appeals on this issue, and remand to the District Court with instructions to dismiss for failure to state a claim on the three counts at issue in No. 91-1128.

References

Supreme Court's views as to validity, construction, and application of McCarran-Ferguson Act (15 USCS 1011-1015), concerning regulation of business of insurance by state or federal law

43 Am Jur 2d, Insurance 37; *54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 11*, *225-227*

24 Federal Procedure, L Ed, Monopolies and Restraints of Trade 54:11, 54:115

24 Am Jur Trials 1, Defending Antitrust Lawsuits

15 USCS 1, *1012(b)*, *1013(b)*

L Ed Digest, Conflict of Laws 45, 97.5; Restraints of Trade, Monopolies, and Unfair Trade Practices 9.7

L Ed Index, Boycotts; Comity; McCarran-Ferguson Act; Sherman Act

ALR Index, Boycotts; Comity; McCarran-Ferguson Act; Restraints of Trade and Monopolies

Annotation References:

Union activities violating the federal antitrust laws--federal cases. *9 L Ed 2d 998, 20 L Ed 2d 1528*.

What constitutes **[****112]** "boycott, coercion, or intimidation" for purposes of 3(b) of McCarran-Ferguson Act (*15 USCS 1013(b)*). 52 ALR Fed 255.

Refusals to deal as violations of the federal antitrust laws (*15 USCS 1*, *2*, *13*). 41 ALR Fed 175.

Extraterritorial application of federal antitrust laws to acts occurring in foreign commerce. 40 ALR Fed 343.

Nonlabor picketing or boycott. 93 ALR2d 1284.

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[11] The Court skips directly to subsection (3) of *§ 403*, apparently on the authority of Comment *j* to *§ 415 of the Restatement (Third)*. See *ante*, at 799. But the preceding commentary to *§ 415* makes clear that "any exercise of [legislative] jurisdiction under this section is subject to the requirement of reasonableness" set forth in *§ 403(2)*. *Restatement (Third) § 415, Comment a*. Comment *j* refers back to the conflict analysis set forth in *§ 403(3)*, which, as noted above, comes after the reasonableness analysis of *§ 403(2)*.

United States v. Lopez

Supreme Court of the United States

November 8, 1994, Argued ; April 26, 1995, Decided

No. 93-1260

Reporter

514 U.S. 549 *; 115 S. Ct. 1624 **; 131 L. Ed. 2d 626 ***; 1995 U.S. LEXIS 3039 ****; 63 U.S.L.W. 4343; 95 Cal. Daily Op. Service 3074; 8 Fla. L. Weekly Fed. S 752

UNITED STATES, PETITIONER v. ALFONSO LOPEZ, JR.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Disposition: *2 F.3d 1342*, affirmed.

Core Terms

commerce, interstate commerce, regulation, schools, manufacturing, cases, commercial power, guns, federal government, interstate, violence, matters, Skills, substantial effect, intrastate, wheat, agriculture, federal power, Training, limits, powers, power of congress, Resources, gun possession, deference, power to regulate, rational basis, violent crime, school zone, principles

LexisNexis® Headnotes

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Governments > Native Americans > Authority & Jurisdiction

International Trade Law > Authority to Regulate > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > Commerce With Other Nations

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

International Trade Law > General Overview

Transportation Law > Interstate Commerce > Federal Powers

HN1[] **Interstate Commerce, Prohibition of Commerce**

See *U.S. Const. art. I, § 8, cl. 3*.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > Congressional Duties & Powers > General Overview

HN2[] **Congressional Duties & Powers, Commerce Clause**

The commerce power, *U.S. Const. art. I, § 8, cl. 3*, is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > Intrastate Commerce

HN3[] **Congressional Duties & Powers, Commerce Clause**

Where the interstate and intrastate aspects of commerce are so mingled together that full regulation of interstate commerce requires incidental regulation of intrastate commerce, the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*, authorizes such regulation.

Business & Corporate Compliance > ... > Transportation Law > Interstate Commerce > State Powers

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

HN4[] **Interstate Commerce, State Powers**

The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN5[] **Congressional Duties & Powers, Commerce Clause**

Even if an activity is local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as direct or indirect.

Governments > Federal Government > US Congress

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN6[] **Federal Government, US Congress**

The scope of the interstate commerce power, U.S. Const. art. I, § 8, cl. 3, must be considered in the light of the dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce and activity that exerts a substantial economic effect on interstate commerce. The court decides whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Governments > Federal Government > US Congress

Transportation Law > Interstate Commerce > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Transportation Law > ... > Federal Powers > Powers of Congress > Channels of Commerce

Transportation Law > Interstate Commerce > Federal Powers

Transportation Law > ... > Federal Powers > Powers of Congress > Instrumentalities of Commerce

Transportation Law > ... > Federal Powers > Powers of Congress > Substantial Relations

HN7[] **Commerce Clause, Interstate Commerce**

There are three broad categories of activity that Congress may regulate under its commerce power, U.S. Const. art. I, § 8, cl. 3. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Tests

Governments > Federal Government > US Congress

Transportation Law > Interstate Commerce > Federal Powers

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > General Overview

Constitutional Law > ... > Commerce Clause > Interstate Commerce > Prohibition of Commerce

Transportation Law > ... > Federal Powers > Powers of Congress > Channels of Commerce

HN8[] **Interstate Commerce, Tests**

The proper test of whether an activity affects interstate commerce sufficiently to be within Congress' power to regulate under the *Commerce Clause* requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN9[] **Congressional Duties & Powers, Commerce Clause**

The Gun-Free School Zones Act of 1990 (GFSZA), *18 U.S.C.S. § 922(q)* is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly one might define those terms. The GFSZA is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained as a regulation of activity that arises out of or is connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

Criminal Law & Procedure > ... > Weapons Offenses > Possession of Weapons > General Overview

HN10[] **Congressional Duties & Powers, Commerce Clause**

The Gun-Free School Zones Act of 1990, *18 U.S.C.S. § 922(q)* contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce.

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Criminal Law & Procedure > ... > Possession of Weapons > Unregistered Firearm > Elements

Governments > Legislation > Interpretation

HN11[] **Congressional Duties & Powers, Commerce Clause**

As part of the Supreme Court's independent evaluation of constitutionality under the *Commerce Clause, U.S. Const*. *amend. I*, § 8, cl. 3, the court considers legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce.

Lawyers' Edition Display

Decision

Gun-Free School Zones Act of 1990 (*18 USCS 922(q)(1)(A)*), prohibiting possession of firearm in school zone, held to exceed authority of Congress to regulate commerce under *Federal Constitution's commerce clause (Art I, 8, cl 3)*.

Summary

An accused, who was then a 12th-grade student, was charged in a federal grand jury indictment with the knowing possession of a firearm at a school zone, in violation of *18 USCS 922(q)(1)(A)*, the Gun-Free School Zones Act of 1990, which prohibits any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone (defined as in, or on the grounds of, a public, parochial, or private school or within a distance of 1,000 feet from the grounds of such a school). The United States District Court for the Western District of Texas, denying the accused's motion to dismiss the indictment, concluded that the Act was a constitutional exercise of Congress' power to regulate activities in and affecting commerce, and that the business of elementary, middle, and high schools affects interstate commerce. The accused was then tried in the District Court and convicted of violating the Act. The accused appealed, claiming that the Act exceeded the power of Congress to legislate under the *commerce clause of the Federal Constitution, Art I, 8, cl 3*. The United States Court of Appeals for the Fifth Circuit agreed and reversed, holding that in light of what the court characterized as insufficient congressional findings and legislative history, the Act, in the full reach of its terms, was invalid as beyond the power of Congress under the *commerce clause* (*2 F3d 1342*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Rehnquist, Ch. J., joined by O'Connor, Scalia, Kennedy, and Thomas, JJ., it was held that the Act exceeded the authority of Congress to regulate commerce among the several states under the *commerce clause* and that the Act could not be sustained as a regulation of an activity that substantially affects interstate commerce, because (1) the Act is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise, and--since possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce--the Act could not be sustained under prior Supreme Court cases upholding regulations of intrastate activities that arose out of or were connected with a commercial transaction which viewed in the aggregate substantially affected interstate commerce, (2) the Act contains no jurisdictional element which would insure that the firearm possession in question affected interstate commerce, that is, the Act has no express jurisdictional element which might limit the Act's reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce, (3) while Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, to the extent that congressional findings would have enabled the Supreme Court to evaluate the legislative judgment that the possession of a firearm in a local school zone substantially affected interstate commerce, such findings were lacking in the case at hand, and (4) the Supreme Court would not (a) pile inference upon inference in a manner that would bid fair to convert congressional authority under the *commerce clause* to a general police power of the sort retained by the states, and (b) conclude that there will never be a distinction between what is truly national and what is truly local.

Kennedy, J., joined by O'Connor, J., concurring, expressed the view that the Act upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, in that (1) neither the actors nor their conduct in the case at hand had a commercial character, and neither the purpose nor the design of the Act have an evident commercial nexus, and (2) the Act intrudes upon an area of traditional state concern, because (a) education is a traditional concern of the states, and if a state or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the states are sufficient to enact those measures, and (b) the Act forecloses the states from experimenting and exercising their own judgment in an area to which states lay claim by right of history and expertise, and does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term.

Thomas, J., concurring, expressed the view that the Supreme Court, in an appropriate case, should reconsider the "substantial effects" test, which is far removed from both the Constitution and the Supreme Court's early case law, and that the Constitution does not support the proposition that Congress has authority over all activities that substantially affect interstate commerce.

Stevens, J., dissenting, expressed the view that Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use, and that it follows that Congress may also prohibit their possession in particular markets, such as that of school-age children.

Souter, J., dissenting, expressed the view that (1) the court, in reviewing legislation under the *commerce clause*, defers to the congressional judgment that Congress' regulation addresses a subject substantially affecting interstate commerce if there is any rational basis for such finding and, if so, considers whether the means chosen by Congress are reasonably adapted to the end permitted by the Constitution, (2) a connection between commerce and the subjects of the Act, education and enforcement of criminal law, is not remote, and (3) if Congress had made explicit findings that guns in schools had a substantial effect on interstate commerce, such findings might not have allowed a court to subject the legislation to less scrutiny or to defer to such findings, as the only question is whether the legislative judgment was within the realm of reason.

Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., dissenting, expressed the view that (1) Congress could have had a rational basis for finding a significant or substantial connection between (a) gun-related school violence, which poses a widespread, serious, and substantial physical threat to teaching and learning, and (b) interstate commerce, to which such teaching and learning are inextricably tied, and (2) the court's holding creates serious legal problems in that (a) the holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence, (b) the court's distinction between commercial and noncommercial transactions results in a question of the power of Congress turning upon a formula which gives controlling force to nomenclature rather to consideration of the actual effects of the activity upon interstate commerce, and (c) the court's holding threatens legal uncertainty in an area of law that had seemed reasonably well settled.

Headnotes

COMMERCE §78 > regulation by Congress -- crimes -- possession of firearms in school zone -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]

The Gun-Free School Zones Act of 1990, *18 USCS 922(q)(1)(A)*--which prohibits an individual's knowing possession of a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone--exceeds the authority of Congress to regulate commerce among the several states under the *Federal Constitution's commerce clause, Art I, 8, cl 3*, in that the Act (1) is neither a regulation of the use of the channels of interstate commerce nor an attempt to prohibit the interstate transportation of a commodity through the channels of commerce, (2) cannot be justified as a regulation by which Congress has sought to protect an instrumentality of interstate commerce or a thing in interstate commerce, and (3) cannot be sustained as a regulation of an activity that substantially affects interstate commerce, because (a) the Act is a criminal statute that by its terms has nothing to do with commerce or any sort of economic enterprise and is not an essential part of a larger regulation of economic activity in which the regulatory scheme could be undercut unless the intrastate activity were regulated, possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce, and the Act, therefore, may not be sustained under prior United States Supreme Court cases upholding regulations of activities that arise out of or are connected with a commercial transaction which viewed in the aggregate substantially affects interstate commerce, (b) the Act contains no jurisdictional element which would insure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce, that is, the Act has no express jurisdictional element which might limit the

Act's reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce, (c) while Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, to the extent that congressional findings would enable the Supreme Court to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, such findings are lacking in the case at hand, and (d) the Supreme Court will not (i) pile inference upon inference in a manner that would bid fair to convert congressional authority under the *commerce clause* to a general police power of the sort retained by the states, and (ii) conclude that there will never be a distinction between what is truly national and what is truly local. (Breyer, Stevens, Souter, and Ginsburg, JJ., dissented from this holding.)

COMMERCE §61 > regulation by Congress -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

Congress, under the *Federal Constitution's commerce clause, Art I, 8, cl 3*, may regulate three broad areas of activity: (1) the use of the channels of interstate commerce, (2) the protection of the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities, and (3) those activities that substantially affect interstate commerce; where economic activity substantially affects interstate commerce, congressional legislation regulating that activity will be sustained.

STATES, TERRITORIES, AND POSSESSIONS §47 > federalism -- criminal law -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

Under the federal system, the states possess primary authority for defining and enforcing the criminal law; when Congress criminalizes conduct already denounced as criminal by the states, it effects a change in the sensitive relation between federal and state criminal jurisdiction.

COMMERCE §78 > regulation by Congress -- firearms -- > Headnote:
LEdHN[4][] [4]

The importation of congressional findings regarding the regulation of firearms through previous enactments is especially inappropriate to justify the validity--under the *Federal Constitution's commerce clause, Art I, 8, cl 3*--of the Gun-Free School Zones Act, *18 USCS 922(q)(1)(A)*, where (1) the prior federal enactments or congressional findings do not speak to the subject matter of the Act--the prohibition of the possession of firearms in or near schools--or its relationship to interstate commerce, and (2) the Act represents a sharp break with the long-standing pattern of federal firearms legislation.

COMMERCE §61 > regulation by Congress -- local schools -- > Headnote:
LEdHN[5][] [5]

While Congress has authority under the *Federal Constitution's commerce clause, Art I, 8, cl 3*, to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process, that authority, though broad, does not include the authority to regulate each and every aspect of local schools.

COMMERCE §61 > regulation by Congress -- > Headnote:
LEdHN[6][] [6]

Although a determination whether an intrastate activity is commercial or noncommercial, in respect to the validity--under the *Federal Constitution's commerce clause, Art I, 8, cl 3*--of congressional regulation of the activity, may in some cases result in legal uncertainty; and although, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the *commerce clause* always will engender legal uncertainty, this uncertainty is mandated by the Constitution by the withholding from Congress of a plenary police power that would authorize enactment of every type of legislation.

Syllabus

After respondent, then a 12th-grade student, carried a concealed handgun into his high school, he was charged with violating the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that [he] knows . . . is a school zone," *18 U.S.C. § 922(q)(1)(A)*. The District Court denied his motion to dismiss the indictment, concluding that *§ 922(q)* is a constitutional exercise of Congress' power to regulate activities in and affecting commerce. In reversing, the Court of Appeals held that, in light of what it characterized as insufficient congressional findings and legislative history, *§ 922(q)* is invalid as beyond Congress' power under the *Commerce Clause*.

Held: The Act exceeds Congress' *Commerce Clause* authority. First, although this Court has upheld a wide variety **[****2]** of congressional Acts regulating intrastate economic activity that substantially affected interstate commerce, the possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, have such a substantial effect on interstate commerce. *Section 922(q)* is a criminal statute that by its terms has nothing to do with "commerce" or any sort of economic enterprise, however broadly those terms are defined. Nor is it an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under the Court's cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which, viewed in the aggregate, substantially affects interstate commerce. Second, *§ 922(q)* contains no jurisdictional element that would ensure, through case-by-case inquiry, that the firearms possession in question has the requisite nexus with interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement **[****3]** that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contention that *§ 922(q)* is justified because firearms possession in a local school zone does indeed substantially affect interstate commerce would require this Court to pile inference upon inference in a manner that would bid fair to convert congressional *Commerce Clause* authority to a general police power of the sort held only by the States. Pp. 552-568.

Counsel: Solicitor General Days argued the cause for the United States. With him on the briefs were Assistant Attorney General Harris, Deputy Solicitor General Wallace, Malcolm L. Stewart, and John F. De Pue.

John R. Carter argued the cause for respondent. With him on the brief were Lucien B. Campbell, Henry J. Bemporad, Carter G. Phillips, and Adam D. Hirsh. *

Judges: REHNQUIST, C. J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, KENNEDY, and THOMAS, JJ., joined. KENNEDY, J., filed a concurring opinion, in which O'CONNOR, J., joined, post, p. 568. THOMAS, J., filed a concurring opinion, post, p. 584. STEVENS, J., post, p. 602, and SOUTER, J., post, p. 603, filed dissenting opinions. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, post, p. 615.

Opinion by: REHNQUIST

Opinion

[*551] [1626] [***632]** CHIEF JUSTICE **REHNQUIST** delivered the opinion of the Court.

LEdHN[1A][] [1A]In the Gun-Free School Zones Act of 1990, Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." *18 U.S.C. § 922* **[****4]** *(q)(1)(A) (1988 ed., Supp. V)*. The Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce. We hold that the Act exceeds the authority of Congress "to regulate Commerce . . . among the several States . . . ." *U.S. Const., Art. I, § 8, cl. 3*.

On March 10, 1992, respondent, who was then a 12th-grade student, arrived at Edison High School in San Antonio, Texas, carrying a concealed .38 caliber handgun and five bullets. Acting upon an anonymous tip, school authorities confronted respondent, who admitted that he was carrying the weapon. He was arrested and charged under Texas law with firearm possession on school premises. See *Tex. Penal Code Ann. § 46.03(a)(1)* (Supp. 1994). The next day, the state charges were dismissed after federal agents charged respondent by complaint with violating the Gun-Free School Zones Act of 1990. *18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)*. [1]

[**5]** A federal grand jury indicted respondent on one count of knowing possession of a firearm at a school zone, in violation of *§ 922(q)*. Respondent moved to dismiss his federal indictment on the ground that *§ 922(q)* "is unconstitutional as it is beyond the power of Congress to legislate control over our public schools." The District Court denied the motion, concluding that *§ 922(q)* "is a constitutional exercise of Congress' well-defined power to regulate activities in and affecting **[*552]** commerce, and the 'business' of elementary, middle and high schools . . . affects interstate commerce." App. to Pet. for Cert. 55a. Respondent waived his right to a jury trial. The District

* Briefs of amici curiae urging reversal were filed for 16 Members of the United States Senate et al. by Debra A. Valentine, Brady C. Williamson, and Jeffrey J. Kassel; for the State of Ohio et al. by Lee Fisher, Attorney General of Ohio, John P. Ware, Assistant Attorney General, Richard A. Cordray, State Solicitor, Simon B. Karas, G. Oliver Koppell, Attorney General of New York, and Vanessa Ruiz; for the Center to Prevent Handgun Violence et al. by Erwin N. Griswold, Dennis A. Henigan, and Gail A. Robinson; for Children NOW et al. by William F. Abrams; for the Clarendon Foundation by Ronald D. Maines; for the Coalition to Stop Gun Violence et al. by Brian J. Benner; and for the National School Safety Center et al. by James A. Rapp.

Briefs of amici curiae urging affirmance were filed for the National Conference of State Legislatures et al. by Richard Ruda and Barry Friedman; and for the Pacific Legal Foundation by Ronald A. Zumbrun and Anthony T. Caso.

Briefs of amici curiae were filed for Academics for the *Second Amendment* et al. by Patrick J. Basial, Don B. Kates, Robert Carter, Henry Mark Holzer, Nicholas J. Johnson, Joseph E. Olson, Daniel Polsby, Charles E. Rice, Wallace Rudolph, Justin Smith, Robert B. Smith, George Strickler, Richard Warner, and Robert Weisberg; and for the Texas Justice Foundation by Clayton Trotter.

[1] The term "school zone" is defined as "in, or on the grounds of, a public, parochial or private school" or "within a distance of 1,000 feet from the grounds of a public, parochial or private school." § 921(a)(25).

Court conducted a bench trial, found him guilty of violating *§ 922(q)*, and sentenced him to six months' imprisonment **[***633]** and two years' supervised release.

On appeal, respondent challenged his conviction based on his claim that *§ 922(q)* exceeded Congress' power to legislate under the *Commerce Clause*. The Court of Appeals for the Fifth Circuit agreed and reversed respondent's conviction. It held that, in light of what it characterized as insufficient congressional findings and legislative history, "*section 922(q)*, in the full **[****6]** reach of its terms, is invalid as beyond the power of Congress under the *Commerce Clause*." *2 F.3d 1342, 1367-1368 (1993)*. Because of the importance of the issue, we granted certiorari, *511 U.S. 1029 (1994)*, and we now affirm.

We start with first principles. The Constitution creates a Federal Government of enumerated powers. See Art. I, § 8. As James Madison wrote, "the powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist No. 45, pp. 292-293 (C. Rossiter ed. 1961). This constitutionally mandated division of authority "was adopted by the Framers to ensure protection of our fundamental liberties." *Gregory v. Ashcroft, 501 U.S. 452, 458, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)* (internal quotation marks omitted). "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." **[****7]** *Ibid.*

The Constitution delegates to Congress the power ***HN1***[] "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Art. I, § 8, **[*553]** cl. 3. The Court, through Chief Justice Marshall, first defined the nature of Congress' **[**1627]** commerce power in *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189-190, 6 L. Ed. 23 (1824)*:

> "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

HN2[] The commerce power "is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Id., at 196*. The *Gibbons* Court, however, acknowledged that limitations on the commerce power are inherent in the very language of the *Commerce Clause*.

> "It is not intended to say that these words comprehend that commerce, which is completely internal, **[****8]** which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.
>
> "Comprehensive as the word 'among' is, it may very properly be restricted to that commerce which concerns more States than one. . . . The enumeration presupposes **[***634]** something not enumerated; and that something, if we regard the language, or the subject of the sentence, must be the exclusively internal commerce of a State." *Id., at 194-195*.

For nearly a century thereafter, the Court's *Commerce Clause* decisions dealt but rarely with the extent of Congress' power, and almost entirely with the *Commerce Clause* as a limit on state legislation that discriminated against interstate commerce. See, *e. g., Veazie v. Moor, 55 U.S. 568, 14 How. 568, 573-575, 14 L. Ed. 545 (1853)* (upholding a state-created steamboat monopoly **[*554]** because it involved regulation of wholly internal commerce); *Kidd v. Pearson, 128 U.S. 1, 17, 20-22, 32 L. Ed. 346, 9 S. Ct. 6 (1888)* (upholding a state prohibition on the manufacture of intoxicating liquor because the commerce power "does not comprehend the purely internal domestic **[****9]** commerce of a State which is carried on between man and man within a State or between different parts of the same State"); see also L. Tribe, American Constitutional Law 306 (2d ed. 1988). Under this line of precedent, the Court held that certain categories of activity such as "production," "manufacturing," and "mining" were within the province of state governments, and thus were beyond the power of Congress under the

Commerce Clause. See Wickard v. Filburn, 317 U.S. 111, 121, 87 L. Ed. 122, 63 S. Ct. 82 (1942) (describing development of Commerce Clause jurisprudence).

In 1887, Congress enacted the Interstate Commerce Act, 24 Stat. 379, and in 1890, Congress enacted the Sherman Antitrust Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 et seq. These laws ushered in a new era of federal regulation under the commerce power. When cases involving these laws first reached this Court, we imported from our negative Commerce Clause cases the approach that Congress could not regulate activities such as "production," "manufacturing," and "mining." See, *e. g.,* United States v. E. C. Knight Co., 156 U.S. 1, 12, 39 L. Ed. 325, 15 S. Ct. 249 (1895) ("Commerce **[****10]** succeeds to manufacture, and is not part of it"); Carter v. Carter Coal Co., 298 U.S. 238, 304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936) ("Mining brings the subject matter of commerce into existence. Commerce disposes of it"). Simultaneously, however, the Court held that, **HN3**[] where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation. See, *e. g.,* Shreveport Rate Cases, 234 U.S. 342, 58 L. Ed. 1341, 34 S. Ct. 833 (1914).

In A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550, 79 L. Ed. 1570, 55 S. Ct. 837 (1935), the Court struck down regulations that **[*555]** fixed the hours and wages of individuals employed by an intrastate business because the activity being regulated related to interstate commerce only indirectly. In doing so, the Court characterized the distinction between **[**1628]** direct and indirect effects of intrastate transactions upon interstate commerce as "a fundamental one, essential to the maintenance of our constitutional system." Id., at 548. **[****11]** Activities that affected interstate commerce directly were within Congress' power; activities that affected interstate commerce indirectly **[***635]** were beyond Congress' reach. Id., at 546. The justification for this formal distinction was rooted in the fear that otherwise "there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government." Id., at 548.

Two years later, in the watershed case of NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937), the Court upheld the National Labor Relations Act against a Commerce Clause challenge, and in the process, departed from the distinction between "direct" and "indirect" effects on interstate commerce. Id., at 36-38 ("The question [of the scope of Congress' power] is necessarily one of degree"). The Court held that intrastate activities that "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions" are within Congress' power to regulate. Id., at 37.

[**12]** In United States v. Darby, 312 U.S. 100, 85 L. Ed. 609, 61 S. Ct. 451 (1941), the Court upheld the Fair Labor Standards Act, stating:

> **HN4**[] "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce." Id., at 118.

[*556] See also United States v. Wrightwood Dairy Co., 315 U.S. 110, 119, 86 L. Ed. 726, 62 S. Ct. 523 (1942) (the commerce power "extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power").

In *Wickard* v. *Filburn*, the Court upheld the application of amendments to the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. 317 U.S. at 128-129. The *Wickard* Court explicitly rejected earlier distinctions between direct and indirect effects on interstate commerce, **[****13]** stating:

> **HN5**[] "Even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'" Id., at 125.

The *Wickard* Court emphasized that although Filburn's own contribution to the demand for wheat may have been trivial by itself, that was not "enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." *Id., at 127-128*.

Jones & Laughlin Steel, Darby, and *Wickard* ushered in an era of *Commerce Clause* jurisprudence that greatly expanded the previously defined **[***636]** authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change **[****14]** also reflected a view that earlier *Commerce Clause* cases artificially had constrained the authority of Congress to regulate interstate commerce.

But even these modern-era precedents which have expanded congressional power under the *Commerce Clause* **[*557]** confirm that this power is subject to outer limits. In *Jones & Laughlin Steel*, the Court warned that ***HN6***[] the scope of the interstate commerce power "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that **[**1629]** to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *301 U.S. at 37*; see also *Darby, supra, at 119-120* (Congress may regulate intrastate activity that has a "substantial effect" on interstate commerce); *Wickard, supra, at 125* (Congress may regulate activity that "exerts a substantial economic effect on interstate commerce"). Since that time, the Court has heeded that warning and undertaken to decide whether a rational basis existed for concluding that a **[****15]** regulated activity sufficiently affected interstate commerce. See, *e. g., Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276-280, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*; *Perez v. United States, 402 U.S. 146, 155-156, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*; *Katzenbach v. McClung, 379 U.S. 294, 299-301, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*; *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252-253, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*. [2]

[**16]** Similarly, in *Maryland v. Wirtz, 392 U.S. 183, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*, the Court reaffirmed that "the power to regulate commerce, though broad indeed, has limits" that "the Court has ample power" to enforce. *Id., at 196*, overruled on other grounds, *National League of Cities v. Usery, 426 U.S. 833, 49 L. Ed. 2d 245, 96 S. Ct. 2465 (1976)*, overruled by *Garcia v. San Antonio Metropolitan Transit **[*558]** Authority, 469 U.S. 528, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)*. In response to the dissent's warnings that the Court was powerless to enforce the limitations on Congress' commerce powers because "all activities affecting commerce, even in the minutest degree, *[Wickard]*, may be regulated and controlled by Congress," *392 U.S. at 204* (Douglas, J., dissenting), the *Wirtz* Court replied that the dissent had misread precedent as "neither here nor in *Wickard* has the Court declared that **[***637]** Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities," *id., at 197, n. 27*. Rather, "the Court has said only that where **[****17]** *a general regulatory statute bears a substantial relation to commerce*, the *de minimis* character of individual instances arising under that statute is of no consequence." *Ibid.* (first emphasis added).

LEdHN[2A][] [2A]Consistent with this structure, we have identified ***HN7***[] three broad categories of activity that Congress may regulate under its commerce power. *Perez, supra, at 150*; see also *Hodel, supra, at 276-277*. First, Congress may regulate the use of the channels of interstate commerce. See, *e. g., Darby, 312 U.S. at 114*; *Heart of Atlanta Motel, supra, at 256* ("'The authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question'" (quoting *Caminetti v. United States, 242 U.S. 470, 491, 61 L. Ed. 442, 37 S. Ct. 192 (1917)*)). Second, Congress is empowered to

[2] See also *Hodel, 452 U.S. at 311* ("Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so") (REHNQUIST, J., concurring in judgment); *Heart of Atlanta Motel, 379 U.S. at 273* ("Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court") (Black, J., concurring).

regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only **[****18]** from intrastate activities. See, *e. g., Shreveport Rate Cases, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914)*; *Southern R. Co. v. United States, 222 U.S. 20, 56 L. Ed. 72, 32 S. Ct. 2 (1911)* (upholding amendments to Safety Appliance Act as applied to vehicles used in intrastate commerce); *Perez, supra, at 150* ("For example, the destruction of an aircraft (*18 U.S.C. § 32*), or . . . thefts from interstate shipments (*18 U.S.C. § 659*)"). Finally, Congress' commerce authority includes the power to regulate those activities **[*559]** having a substantial **[**1630]** relation to interstate commerce, *Jones & Laughlin Steel, 301 U.S. at 37*, *i. e.*, those activities that substantially affect interstate commerce, *Wirtz, supra, at 196, n. 27*.

Within this final category, admittedly, our case law has not been clear whether an activity must "affect" or "substantially affect" interstate commerce in order to be within Congress' power to regulate it under the *Commerce Clause*. Compare *Preseault v. ICC, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990)*, with *Wirtz, supra, at 196, **[****19]** n. 27* (the Court has never declared that "Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities"). We conclude, consistent with the great weight of our case law, that ***HN8***[] the proper test requires an analysis of whether the regulated activity "substantially affects" interstate commerce.

LEdHN[1B][] [1B]We now turn to consider the power of Congress, in the light of this framework, to enact *§ 922(q)*. The first two categories of authority may be quickly disposed of: *§ 922(q)* is not a regulation of the use of the channels of interstate commerce, nor is it an attempt to prohibit the interstate transportation of a commodity through the channels of commerce; nor can *§ 922(q)* be justified as a regulation by which Congress has sought to protect an instrumentality **[***638]** of interstate commerce or a thing in interstate commerce. Thus, if *§ 922(q)* is to be sustained, it must be under the third category as a regulation of an activity that substantially affects interstate commerce.

LEdHN[2B][] [2B]First, we have upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate **[****20]** commerce. Examples include the regulation of intrastate coal mining; *Hodel, supra*, intrastate extortionate credit transactions, *Perez, supra*, restaurants utilizing substantial interstate supplies, *McClung, supra*, inns and hotels catering to interstate guests, *Heart of Atlanta Motel, supra*, and production **[*560]** and consumption of homegrown wheat, *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*.These examples are by no means exhaustive, but the pattern is clear. Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained.

Even *Wickard*, which is perhaps the most far reaching example of *Commerce Clause* authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not. Roscoe Filburn operated a small farm in Ohio, on which, in the year involved, he raised 23 acres of wheat. It was his practice to sow winter wheat in the fall, and after harvesting it in July to sell a portion of the crop, to feed part of it to poultry and livestock on the farm, to use some in making flour for home consumption, and to keep the **[****21]** remainder for seeding future crops. The Secretary of Agriculture assessed a penalty against him under the Agricultural Adjustment Act of 1938 because he harvested about 12 acres more wheat than his allotment under the Act permitted. The Act was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages, and concomitant fluctuation in wheat prices, which had previously obtained. The Court said, in an opinion sustaining the application of the Act to Filburn's activity:

> "One of the primary purposes of the Act in question was to increase the market price of wheat and to that end to limit the volume thereof that could affect the market. It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. This may arise because being in marketable condition such wheat overhangs the market and, if induced by rising prices, tends to flow into the market and check price increases. But if we assume that it is never marketed, it

supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. **[*561]** **[****22]** Home-grown wheat in this sense competes with wheat in commerce." *317 U.S. at 128*.

LEdHN[1C][] [1C] ***LEdHN[3A]***[] [3A]*Section 922(q)* ***HN9***[] is a criminal statute that by its terms has nothing to do with **[**1631]** "commerce" or any sort of economic enterprise, however broadly one might define those terms. [3] *Section 922(q)* is not an essential **[***639]** part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated. It cannot, therefore, be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.

LEdHN[3B][] [3B]

[**23]** ***LEdHN[1D]***[] [1D]Second, *§ 922(q)* ***HN10***[] contains no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce. For example, in *United States v. Bass, 404 U.S. 336, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)*, the Court interpreted former *18 U.S.C. § 1202(a)*, which made it **[*562]** a crime for a felon to "receive, posses[s], or transport in commerce or affecting commerce . . . any firearm." *404 U.S. at 337*. The Court interpreted the possession component of *§ 1202(a)* to require an additional nexus to interstate commerce both because the statute was ambiguous and because "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." *Id., at 349*. The *Bass* Court set aside the conviction because although the Government had demonstrated that Bass had possessed a firearm, it had failed "to show the requisite nexus with interstate commerce." *Id., at 347*. The Court thus interpreted the statute to reserve the constitutional question whether Congress could **[****24]** regulate, without more, the "mere possession" of firearms. See *id., at 339, n. 4*; see also *United States v. Five Gambling Devices, 346 U.S. 441, 448, 98 L. Ed. 179, 74 S. Ct. 190 (1953)* (plurality opinion) ("The principle is old and deeply imbedded in our jurisprudence that this Court will construe a statute in a manner that requires decision of serious constitutional questions only if the statutory language leaves no reasonable alternative"). Unlike the statute in *Bass*, *§ 922(q)* has no express jurisdictional element which might limit its reach to a discrete set of firearm possessions that additionally have an explicit connection with or effect on interstate commerce.

Although ***HN11***[] as part of our independent evaluation of constitutionality under the *Commerce Clause* we of course consider legislative findings, and indeed even congressional committee findings, regarding effect on interstate commerce, see, *e. g., Preseault v.* ***[***640]*** *ICC, 494 U.S. at 17*, the Government concedes that "neither the statute nor its legislative history contain[s] express congressional findings regarding the effects upon interstate commerce of **[****25]** gun possession in a school zone." Brief for United States 5-6. We agree with the Government that Congress normally is not required to make formal findings as to the substantial burdens that an

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[3] Under our federal system, the "'States possess primary authority for defining and enforcing the criminal law.'" *Brecht v. Abrahamson, 507 U.S. 619, 635, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993)* (quoting *Engle v. Isaac, 456 U.S. 107, 128, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982))*; see also *Screws v. United States, 325 U.S. 91, 109, 89 L. Ed. 1495, 65 S. Ct. 1031 (1945)* (plurality opinion) ("Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States"). When Congress criminalizes conduct already denounced as criminal by the States, it effects a "'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Enmons, 410 U.S. 396, 411-412, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973)* (quoting *United States v. Bass, 404 U.S. 336, 349, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971))*. The Government acknowledges that *§ 922(q)* "displace[s] state policy choices in . . . that its prohibitions apply even in States that have chosen not to outlaw the conduct in question." Brief for United States 29, n. 18; see also Statement of President George Bush on Signing the Crime Control Act of 1990, 26 Weekly Comp. of Pres. Doc. 1944, 1945 (Nov. 29, 1990) ("Most egregiously, *section [922(q)*] inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress").

activity has on interstate commerce. See *McClung, 379 U.S. at 304*; **[*563]** see also *Perez, 402 U.S. at 156* ("Congress need [not] make particularized findings in order to legislate"). But to the **[**1632]** extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here. [4]

[**26]** ***LEdHN[4]***[] [4]The Government argues that Congress has accumulated institutional expertise regarding the regulation of firearms through previous enactments. Cf. *Fullilove v. Klutznick, 448 U.S. 448, 503, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)* (Powell, J., concurring). We agree, however, with the Fifth Circuit that importation of previous findings to justify *§ 922(q)* is especially inappropriate here because the "prior federal enactments or Congressional findings [do not] speak to the subject matter of *section 922(q)* or its relationship to interstate commerce. Indeed, *section 922(q)* plows thoroughly new ground and represents a sharp break with the long-standing pattern of federal firearms legislation." *2 F.3d at 1366*.

The Government's essential contention, *in fine*, is that we may determine here that *§ 922(q)* is valid because possession of a firearm in a local school zone does indeed substantially affect interstate commerce. Brief for United States 17. The Government argues that possession of a firearm in a school zone may result in violent crime and that violent crime can be expected to affect the functioning of the national economy in two ways. First, the costs **[****27]** of violent **[*564]** crime are substantial, and, through the mechanism of insurance, those costs are spread throughout the population. See *United States v. Evans, 928 F.2d 858, 862 (CA9 1991)*. Second, violent crime reduces the willingness of individuals to travel to areas within the country that are perceived to be unsafe. Cf. *Heart of Atlanta Motel, 379 U.S. at 253*. The Government also argues that the presence of guns in schools poses a substantial threat to the educational process by threatening the learning environment. A handicapped educational process, in turn, will result in a less productive citizenry. That, in turn, would have an adverse effect on the Nation's economic well-being. As a result, the Government argues that Congress could rationally have **[***641]** concluded that *§ 922(q)* substantially affects interstate commerce.

We pause to consider the implications of the Government's arguments. The Government admits, under its "costs of crime" reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See **[****28]** Tr. of Oral Arg. 8-9. Similarly, under the Government's "national productivity" reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of *§ 922(q)*, it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.

Although JUSTICE BREYER argues that acceptance of the Government's rationales would not authorize a general federal police power, he is unable to identify any activity that the States may regulate but Congress may not. JUSTICE BREYER posits that there might be some limitations on Congress' **[*565]** commerce power, such as family law or certain aspects of education. *Post*, at 624. These suggested limitations, when viewed in light of the dissent's expansive analysis, are devoid of substance.

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[4] We note that on September 13, 1994, President Clinton signed into law the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796. Section 320904 of that Act, *id.*, at 2125, amends *§ 922(q)* to include congressional findings regarding the effects of firearm possession in and around schools upon interstate and foreign commerce. The Government does not rely upon these subsequent findings as a substitute for the absence of findings in the first instance. Tr. of Oral Arg. 25 ("We're not relying on them in the strict sense of the word, but we think that at a very minimum they indicate that reasons can be identified for why Congress wanted to regulate this particular activity").

JUSTICE BREYER focuses, for the **[****29]** most part, on the threat that firearm possession in **[**1633]** and near schools poses to the educational process and the potential economic consequences flowing from that threat. *Post*, at 619-624. Specifically, the dissent reasons that (1) gun-related violence is a serious problem; (2) that problem, in turn, has an adverse effect on classroom learning; and (3) that adverse effect on classroom learning, in turn, represents a substantial threat to trade and commerce. *Post, at 623*. This analysis would be equally applicable, if not more so, to subjects such as family law and direct regulation of education.

For instance, if Congress can, pursuant to its *Commerce Clause* power, regulate activities that adversely affect the learning environment, then, *a fortiori*, it also can regulate the educational process directly. Congress could determine that a school's curriculum has a "significant" effect on the extent of classroom learning. As a result, Congress could mandate a federal curriculum for local elementary and secondary schools because what is taught in local schools has a significant "effect on classroom learning," cf. *ibid.*, and that, in turn, has a substantial effect on interstate **[****30]** commerce.

LEdHN[5][] [5]JUSTICE BREYER rejects our reading of precedent and argues that "Congress . . . could rationally conclude that schools fall on the commercial side of the line." *Post*, at 629. Again, JUSTICE BREYER's rationale lacks any real limits because, depending on the level of generality, any activity can be looked upon as commercial. Under the dissent's rationale, Congress could just as easily look at child rearing as "falling on the commercial **[***642]** side of the line" because it provides a "valuable service -- namely, to equip [children] with the skills they need to survive in life and, more specifically, in the workplace." *Ibid.* We do not doubt that Congress **[*566]** has authority under the *Commerce Clause* to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local schools.

LEdHN[6][] [6]Admittedly, a determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty. But, so long as Congress' authority is limited to those powers enumerated in the Constitution, and so long as those **[****31]** enumerated powers are interpreted as having judicially enforceable outer limits, congressional legislation under the *Commerce Clause* always will engender "legal uncertainty." *Post, at 630*. As Chief Justice Marshall stated in *McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L. Ed. 579 (1819)*:

> "The [federal] government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it . . . is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist." *Id., at 405*.

See also *Gibbons v. Ogden, 9 Wheat., at 195* ("The enumeration presupposes something not enumerated"). The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation. See Art. I, § 8. Congress has operated within this framework of legal uncertainty ever since this Court determined that it was the Judiciary's duty "to say what the law is." *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 177, 2 L. Ed. 60 (1803)* **[****32]** (Marshall, C. J.). Any possible benefit from eliminating this "legal uncertainty" would be at the expense of the Constitution's system of enumerated powers.

In *Jones & Laughlin Steel, 301 U.S. at 37*, we held that the question of congressional power under the *Commerce Clause* "is necessarily one of degree." To the same effect **[*567]** is the concurring opinion of Justice Cardozo in *Schechter Poultry:*

> "There is a view of causation that would obliterate the distinction between what is national and what is local in the activities of commerce. Motion at the outer rim is communicated perceptibly, though minutely, to recording instruments at the center. A society such as ours 'is an elastic medium which transmits all tremors throughout its territory; the only question is of their size.'" *295 U.S. at 554* **[**1634]** (quoting *United States v. A. L. A. Schechter Poultry Corp., 76 F.2d 617, 624 (CA2 1935)* (L. Hand, J., concurring)).

LEdHN[1E][] [1E]These are not precise formulations, and in the nature of things they cannot be. But we think they point the way to a correct decision of this case. The possession of a gun in a local school **[****33]** zone is in no sense an economic activity that might, through repetition elsewhere, substantially **[***643]** affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no requirement that his possession of the firearm have any concrete tie to interstate commerce.

To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the *Commerce Clause* to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. See *supra, at 556-558*. The broad language in these opinions has suggested the possibility of additional expansion, but we decline here to proceed any further. To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, cf. *Gibbons v. Ogden, supra, at 195*, and that there never will be a distinction between what is **[*568]** truly national and what is truly local, **[****34]** cf. *Jones & Laughlin Steel, supra, at 30*. This we are unwilling to do.

For the foregoing reasons the judgment of the Court of Appeals is

Affirmed.

Concur by: KENNEDY; THOMAS

Concur

JUSTICE **KENNEDY**, with whom JUSTICE **O'CONNOR** joins, concurring.

The history of the judicial struggle to interpret the *Commerce Clause* during the transition from the economic system the Founders knew to the single, national market still emergent in our own era counsels great restraint before the Court determines that the Clause is insufficient to support an exercise of the national power. That history gives me some pause about today's decision, but I join the Court's opinion with these observations on what I conceive to be its necessary though limited holding.

Chief Justice Marshall announced that the national authority reaches "that commerce which concerns more States than one" and that the commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 194, 196, 6 L. Ed. 23 (1824)*. His statements can be understood now as an early and authoritative recognition that the **[****35]** *Commerce Clause* grants Congress extensive power and ample discretion to determine its appropriate exercise. The progression of our *Commerce Clause* cases from *Gibbons* to the present was not marked, however, by a coherent or consistent course of interpretation; for neither the course of technological advance nor the foundational principles for the jurisprudence itself were self-evident to the courts that sought to resolve contemporary disputes by enduring principles.

Furthermore, for almost a century after the adoption of the Constitution, the Court's *Commerce Clause* decisions did not concern the authority of Congress to legislate. Rather, **[*569]** the Court faced the related but quite distinct question of the authority of the States to regulate matters that would be within the commerce power **[***644]** had Congress chosen to act. The simple fact was that in the early years of the Republic, Congress seldom perceived the necessity to exercise its power in circumstances where its authority would be called into question. The Court's initial task, therefore, was to elaborate the theories that would permit the States to act where Congress had not done so. Not the least part of the problem was the unresolved **[****36]** question whether the congressional power was exclusive, a question reserved by Chief Justice Marshall in *Gibbons v. Ogden, supra, at 209-210*.

At the midpoint of the 19th century, the Court embraced the principle that the States and the National Government both have authority to regulate certain matters absent the **[**1635]** congressional determination to displace local law or the necessity for the Court to invalidate local law because of the dormant national power. *Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots, 53 U.S. 299, 12 HOW 299, 318-321, 13 L. Ed. 996 (1852)*. But the utility of that solution was not at once apparent, see generally F. Frankfurter, The *Commerce Clause* under Marshall, Taney and Waite (1937) (hereinafter Frankfurter), and difficulties of application persisted, see *Leisy v. Hardin, 135 U.S. 100, 122-125, 34 L. Ed. 128, 10 S. Ct. 681 (1890)*.

One approach the Court used to inquire into the lawfulness of state authority was to draw content-based or subject-matter distinctions, thus defining by semantic or formalistic categories those activities that were commerce and those that were not. For instance, in deciding that a State could prohibit the in-state **[****37]** manufacture of liquor intended for out-of-state shipment, it distinguished between manufacture and commerce. "No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce. Manufacture is transformation -- the fashioning of raw materials **[*570]** into a change of form for use. The functions of commerce are different." *Kidd v. Pearson, 128 U.S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6 (1888)*. Though that approach likely would not have survived even if confined to the question of a State's authority to enact legislation, it was not at all propitious when applied to the quite different question of what subjects were within the reach of the national power when Congress chose to exercise it.

This became evident when the Court began to confront federal economic regulation enacted in response to the rapid industrial development in the late 19th century. Thus, it relied upon the manufacture-commerce dichotomy in *United States v. E. C. Knight Co., 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895)*, where a manufacturers' combination controlling some 98% of the Nation's domestic sugar refining capacity was **[****38]** held to be outside the reach of the Sherman Act. Conspiracies to control manufacture, agriculture, mining, production, wages, or prices, the Court explained, had too "indirect" an effect on interstate commerce. *Id., at 16*. And in *Adair v. United States, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908)*, the Court rejected the view that the commerce power might extend to activities that, although local in the sense of having originated within a single State, nevertheless had a practical effect on interstate commercial activity. The Court concluded that **[***645]** there was not a "legal or logical connection . . . between an employe's membership in a labor organization and the carrying on of interstate commerce," *id., at 178*, and struck down a federal statute forbidding the discharge of an employee because of his membership in a labor organization. See also *The Employers' Liability Cases, 207 U.S. 463, 497, 52 L. Ed. 297, 28 S. Ct. 141 (1908)* (invalidating statute creating negligence action against common carriers for personal injuries of employees sustained in the course of employment, because the statute "regulates the persons **[****39]** because they engage in interstate commerce and does not alone regulate the business of interstate commerce").

[*571] Even before the Court committed itself to sustaining federal legislation on broad principles of economic practicality, it found it necessary to depart from these decisions. The Court disavowed *E. C. Knight*'s reliance on the manufacturing-commerce distinction in *Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 68-69, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*, declaring that approach "unsound." The Court likewise rejected the rationale of *Adair* when it decided, in *Texas & New Orleans R. Co. v. Railway Clerks, 281 U.S. 548, 570-571, 50 S. Ct. 427, 74 L. Ed. 1034 (1930)*, that Congress had the power to regulate matters pertaining to the organization of railroad workers.

In another line of cases, the Court addressed Congress' efforts to impede local activities it considered undesirable by prohibiting the interstate movement of some essential element. In the *Lottery Case, 188 U.S. 321, 47 L. Ed. 492, 23 S. Ct. 321 (1903)*, the Court rejected the argument that Congress lacked power to prohibit the interstate movement of lottery tickets because it had power only **[****40]** to regulate, not to prohibit. See also **[**1636]** *Hipolite Egg Co. v. United States, 220 U.S. 45, 55 L. Ed. 364, 31 S. Ct. 364 (1911)*; *Hoke v. United States, 227 U.S. 308, 57 L. Ed. 523, 33 S. Ct. 281 (1913)*. In *Hammer v. Dagenhart, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918)*, however, the Court insisted that the power to regulate commerce "is directly the contrary of the assumed right to forbid commerce from moving," *id., at 269-270*, and struck down a prohibition on the interstate transportation of goods manufactured in violation of child labor laws.

Even while it was experiencing difficulties in finding satisfactory principles in these cases, the Court was pursuing a more sustainable and practical approach in other lines of decisions, particularly those involving the regulation of railroad rates. In the *Minnesota Rate Cases, 230 U.S. 352, 57 L. Ed. 1511, 33 S. Ct. 729 (1913)*, the Court upheld a state rate order, but observed that Congress might be empowered to regulate in this area if "by reason of the interblending of the interstate and intrastate operations of interstate carriers" the regulation of interstate rates could not be maintained **[****41]** without restrictions on "intrastate **[*572]** rates which substantially affect the former." *Id., at 432-433*. And in the *Shreveport Rate Cases, 234 U.S. 342, 34 S. Ct. 833, 58 L. Ed. 1341 (1914)*, the Court upheld an Interstate Commerce Commission order fixing railroad rates with the explanation that congressional authority, "extending to these interstate carriers as instruments of interstate commerce, necessarily embraces the **[***646]** right to control their operations in all matters having such a close and substantial relation to interstate traffic that the control is essential or appropriate to the security of that traffic, to the efficiency of the interstate service, and to the maintenance of conditions under which interstate commerce may be conducted upon fair terms and without molestation or hindrance." *Id., at 351*.

Even the most confined interpretation of "commerce" would embrace transportation between the States, so the rate cases posed much less difficulty for the Court than cases involving manufacture or production. Nevertheless, the Court's recognition of the importance of a practical conception of the commerce power was not altogether confined to the rate **[****42]** cases. In *Swift & Co. v. United States, 196 U.S. 375, 49 L. Ed. 518, 25 S. Ct. 276 (1905)*, the Court upheld the application of federal ***antitrust law*** to a combination of meat dealers that occurred in one State but that restrained trade in cattle "sent for sale from a place in one State, with the expectation that they will end their transit . . . in another." *Id., at 398*. The Court explained that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Ibid.* Chief Justice Taft followed the same approach in upholding federal regulation of stockyards in *Stafford v. Wallace, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922)*. Speaking for the Court, he rejected a "nice and technical inquiry," *id., at 519*, when the local transactions at issue could not "be separated from the movement to which they contribute," *id., at 516*.

Reluctance of the Court to adopt that approach in all of its cases caused inconsistencies in doctrine to persist, however. In addressing New Deal legislation the Court **[****43]** resuscitated **[*573]** the abandoned abstract distinction between direct and indirect effects on interstate commerce. See *Carter v. Carter Coal Co., 298 U.S. 238, 309, 80 L. Ed. 1160, 56 S. Ct. 855 (1936)* (Act regulating price of coal and wages and hours for miners held to have only "secondary and indirect" effect on interstate commerce); *Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330, 368, 79 L. Ed. 1468, 55 S. Ct. 758 (1935)* (compulsory retirement and pension plan for railroad carrier employees too "remote from any regulation of commerce as such"); *A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935)* (wage and hour law provision of National Industrial Recovery Act had "no direct relation to interstate commerce").

The case that seems to mark the Court's definitive commitment to the practical conception of the commerce power is *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615 (1937)*, where the Court sustained labor laws that applied to **[**1637]** manufacturing facilities, making no real attempt to distinguish *Carter, supra*, and *Schechter, supra. 301 U.S. at 40-41*. **[****44]** The deference given to Congress has since been confirmed. *United States v. Darby, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941)*, overruled **[***647]** *Hammer v. Dagenhart, supra.* And in *Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*, the Court disapproved *E. C. Knight* and the entire line of direct-indirect and manufacture-production cases, explaining that "broader interpretations of the *Commerce Clause* [were] destined to supersede the earlier ones," *317 U.S. at 122*, and "whatever terminology is used, the criterion is necessarily one of degree and must be so defined. This does not satisfy those who seek mathematical or rigid formulas. But such formulas are not provided by the great concepts of the Constitution," *id., at 123, n. 24*. Later examples of the exercise of federal power where commercial transactions were the subject of regulation include *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*, *Katzenbach v. McClung, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*, and *Perez v. United States, 402 U.S. 146, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*. **[****45]** These and like authorities are within the fair ambit **[*574]** of the Court's practical conception of commercial regulation and are not called in question by our decision today.

The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point. *Stare decisis* operates with great force in counseling us not to call in question the essential principles now in place respecting the congressional power to regulate transactions of a commercial nature. That fundamental restraint on our power forecloses us from reverting to an understanding of commerce that would serve only an 18th-century economy, dependent then upon production and trading practices that had changed but little over the preceding centuries; it also mandates against returning to the time when congressional authority **[****46]** to regulate undoubted commercial activities was limited by a judicial determination that those matters had an insufficient connection to an interstate system. Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy.

In referring to the whole subject of the federal and state balance, we said this just three Terms ago:

> "This framework has been sufficiently flexible over the past two centuries to allow for enormous changes in the nature of government. The Federal Government undertakes activities today that would have been unimaginable to the Framers in two senses: first, because the Framers would not have conceived that any government would conduct such activities; and second, because the Framers would not have believed that the Federal Government, rather than the States, would assume such **[*575]** responsibilities. Yet the powers conferred upon the Federal Government by the Constitution were phrased in language broad enough to allow for the expansion of the Federal Government's role." *New York v. United States, 505 U.S. 144, 157,* ***[***648]*** *120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)* (emphasis deleted).

It does **[****47]** not follow, however, that in every instance the Court lacks the authority and responsibility to review congressional attempts to alter the federal balance. This case requires us to consider our place in the design of the Government and to appreciate the significance of federalism in the whole structure of the Constitution.

Of the various structural elements in the Constitution, separation of powers, checks and balances, judicial review, and federalism, only concerning the last does there seem to be much uncertainty respecting the existence, and the content, of standards that allow the Judiciary to play a significant role **[**1638]** in maintaining the design contemplated by the Framers. Although the resolution of specific cases has proved difficult, we have derived from the Constitution workable standards to assist in preserving separation of powers and checks and balances. See, *e. g., Prize Cases, 67 U.S. 635, 2 Black 635, 17 L. Ed. 459 (1863)*; *Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 96 L. Ed. 1153, 72 S. Ct. 863 (1952)*; *United States v. Nixon, 418 U.S. 683, 41 L. Ed. 2d 1039, 94 S. Ct. 3090 (1974)*; *Buckley v. Valeo, 424 U.S. 1, 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976)*; **[****48]** *INS v. Chadha, 462 U.S. 919, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983)*; *Bowsher v. Synar, 478 U.S. 714, 92 L. Ed. 2d 583, 106 S. Ct. 3181 (1986)*; *Plaut v. Spendthrift Farm, Inc., 514 U.S. 211*. These standards are by now well accepted. Judicial review is also established beyond question, *Marbury v. Madison, 5 U.S. 137, 1 Cranch 137, 2 L. Ed. 60 (1803)*, and though we may differ when applying its principles, see, *e. g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992)*, its legitimacy is undoubted. Our role in preserving the federal balance seems more tenuous.

There is irony in this, because of the four structural elements in the Constitution just mentioned, federalism was the unique contribution of the Framers to political science and political theory. See Friendly, Federalism: A Foreword, 86 **[*576]** Yale L. J. 1019 (1977); G. Wood, The Creation of the American Republic, 1776-1787, pp. 524-532, 564 (1969). Though on the surface the idea may seem counter-intuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one. "In the compound republic of America, the power **[****49]** surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself." The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison). See also *Gregory v. Ashcroft, 501 U.S. 452, 458-459, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)* ("Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front. . . . In the tension between federal and state power lies the promise of liberty"); *New York v. United States, supra, at 181* ("The Constitution **[***649]** divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: 'Rather, federalism secures to citizens the liberties that derive **[****50]** from the diffusion of sovereign power'") (quoting *Coleman v. Thompson, 501 U.S. 722, 759, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991)* (Blackmun, J., dissenting)).

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, see The Federalist No. 51, and hold each other in check by competing for the affections of the people, see The Federalist No. 46, those citizens must have some means of knowing which of **[*577]** the two governments to hold accountable for the failure to perform a given function. "Federalism serves to assign political responsibility, not to obscure it." *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 119 L. Ed. 2d 410, 112 S. Ct. 2169 (1992)*. Were the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political **[****51]** responsibility would become illusory. Cf. *New York v. United States, supra, at 155-169*; *FERC v. Mississippi, 456 U.S. 742, 787, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982)* (O'CONNOR, J., concurring in judgment in part and dissenting in part). The resultant inability to hold either branch of the government answerable **[**1639]** to the citizens is more dangerous even than devolving too much authority to the remote central power.

To be sure, one conclusion that could be drawn from The Federalist Papers is that the balance between national and state power is entrusted in its entirety to the political process. Madison's observation that "the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due," The Federalist No. 46, p. 295 (C. Rossiter ed. 1961), can be interpreted to say that the essence of responsibility for a shift in power from the State to the Federal Government rests upon a political judgment, though he added assurance that "the State governments could have little to apprehend, because it is only within a certain sphere that the federal power can, in the nature of things, be advantageously administered, **[****52]** " *ibid.* Whatever the judicial role, it is axiomatic that Congress does have substantial discretion and control over the federal balance.

For these reasons, it would be mistaken and mischievous for the political branches to forget that the sworn obligation to preserve and protect the Constitution in maintaining the federal balance is their own in the first and primary instance. In the Webster-Hayne Debates, see The Great Speeches and **[*578]** Orations of Daniel Webster 227-272 (E. Whipple ed. 1879), and the debates over the Civil Rights Acts, see Hearings on S. 1732 before the Senate Committee on Commerce, 88th Cong., 1st Sess., pts. 1-3 (1963), some Congresses have accepted responsibility to confront the great questions of the proper **[***650]** federal balance in terms of lasting consequences for the constitutional design. The political branches of the Government must fulfill this grave constitutional obligation if democratic liberty and the federalism that secures it are to endure.

At the same time, the absence of structural mechanisms to require those officials to undertake this principled task, and the momentary political convenience often attendant upon their failure to do so, argue against a complete **[****53]** renunciation of the judicial role. Although it is the obligation of all officers of the Government to respect the constitutional design, see *Public Citizen v. Department of Justice, 491 U.S. 440, 466, 105 L. Ed. 2d 377, 109 S. Ct. 2558 (1989)*; *Rostker v. Goldberg, 453 U.S. 57, 64, 69 L. Ed. 2d 478, 101 S. Ct. 2646 (1981)*, the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of Government has tipped the scales too far.

In the past this Court has participated in maintaining the federal balance through judicial exposition of doctrines such as abstention, see, *e. g., Younger v. Harris, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971)*; *Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 85 L. Ed. 971, 61 S. Ct. 643 (1941)*; *Burford v. Sun Oil Co., 319 U.S. 315, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943)*, the rules for determining the primacy of state law, see, *e. g., Erie R. Co.*

v. Tompkins, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 (1938), the doctrine of adequate and independent state grounds, see, *e. g.,* Murdock v. Memphis, 87 U.S. 590, 20 Wall. 590, 22 L. Ed. 429 (1875); **[****54]** Michigan v. Long, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983), the whole jurisprudence of pre-emption, see, *e. g.,* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947); Cipollone v. Liggett Group, Inc., 505 U.S. 504, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), and many of the rules governing our habeas jurisprudence, see, *e. g.,* Coleman v. Thompson, 501 U.S. 722, 115 L. Ed. 2d 640, 111 S. Ct. 2546 (1991); McCleskey **[*579]** v. Zant, 499 U.S. 467, 113 L. Ed. 2d 517, 111 S. Ct. 1454 (1991); Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989); Rose v. Lundy, 455 U.S. 509, 71 L. Ed. 2d 379, 102 S. Ct. 1198 (1982); Wainwright v. Sykes, 433 U.S. 72, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977).

Our ability to preserve this principle under the Commerce Clause has presented a much greater challenge. See supra, at 568-574. "This clause has throughout the Court's history been the chief source of its adjudications regarding federalism," and "no other body of opinions affords a fairer or more revealing test of judicial qualities." Frankfurter 66-67. But as the branch whose distinctive duty it is to declare "what the law is," Marbury v. **[**1640]** Madison, 1 Cranch, at 177, **[****55]** we are often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear lines. The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes. See County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 630, 106 L. Ed. 2d 472, 109 S. Ct. **[***651]** 3086 (1989) (O'CONNOR, J., concurring in part and concurring in judgment) ("We cannot avoid the obligation to draw lines, often close and difficult lines" in adjudicating constitutional rights). But our cases do not teach that we have no role at all in determining the meaning of the Commerce Clause.

Our position in enforcing the dormant Commerce Clause is instructive. The Court's doctrinal approach in that area has likewise "taken some turns." Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 115 S. Ct. 1331, 131 L. Ed. 2d 261. Yet in contrast to the prevailing skepticism that surrounds our ability to give meaning to the **[****56]** explicit text of the Commerce Clause, there is widespread acceptance of our authority to enforce the dormant Commerce Clause, which we have but inferred from the constitutional structure as a limitation on the power of the States. One element of our dormant Commerce Clause jurisprudence has been the principle that the States may not **[*580]** impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses. See Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 579, 90 L. Ed. 2d 552, 106 S. Ct. 2080 (1986) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970)). Distinguishing between regulations that do place an undue burden on interstate commerce and regulations that do not depends upon delicate judgments. True, if we invalidate a state law, Congress can in effect overturn our judgment, whereas in a case announcing that Congress has transgressed its authority, the decision is more consequential, for it stands unless Congress can revise its law to demonstrate its commercial character. This difference no doubt informs the circumspection **[****57]** with which we invalidate an Act of Congress, but it does not mitigate our duty to recognize meaningful limits on the commerce power of Congress.

The statute before us upsets the federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. As THE CHIEF JUSTICE explains, unlike the earlier cases to come before the Court here neither the actors nor their conduct have a commercial character, and neither the purposes nor the design of the statute have an evident commercial nexus. See *ante*, at 559-561. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.

An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the States. Milliken v. Bradley, 418 U.S. 717, 741-742, 41 L. Ed. 2d 1069, 94 S. Ct. 3112 (1974); **[*581]** **[****58]** Epperson v. Arkansas, 393 U.S. 97, 104, 21 L. Ed. 2d 228, 89 S. Ct. 266 (1968). The proximity to schools, including of course schools owned and operated by the States or their subdivisions, is **[***652]** the very premise for making the conduct criminal. In these circumstances, we have a particular duty to ensure that the federal-state balance is not destroyed. Cf. *Rice, supra, at 230* ("We start with the assumption that the historic police powers of the States" are not displaced by a federal statute "unless that was the clear and manifest purpose of Congress"); *Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146, 10 L. Ed. 2d 248, 83 S. Ct. 1210 (1963)*.

[1641]** While it is doubtful that any State, or indeed any reasonable person, would argue that it is wise policy to allow students to carry guns on school premises, considerable disagreement exists about how best to accomplish that goal. In this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear. See *San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 49-50, 36 L. Ed. 2d 16, 93 S. Ct. 1278 (1973)*; **[****59]** *New State Ice Co. v. Liebmann, 285 U.S. 262, 311, 76 L. Ed. 747, 52 S. Ct. 371 (1932)* (Brandeis, J., dissenting).

If a State or municipality determines that harsh criminal sanctions are necessary and wise to deter students from carrying guns on school premises, the reserved powers of the States are sufficient to enact those measures. Indeed, over 40 States already have criminal laws outlawing the possession of firearms on or near school grounds. See, *e. g.*, *Alaska Stat. Ann. §§ 11.61.195(a)(2)(A)*, *11.61.220(a)(4)(A)* (Supp. 1994); *Cal. Penal Code Ann. § 626.9* (West Supp. 1994); Mass. Gen. Laws § 269:10(j) (1992); *N. J. Stat. Ann. § 2C:39-5(e)* (West Supp. 1994); *Va. Code Ann. § 18.2-308.1* (1988); *Wis. Stat. § 948.605* (1991-1992).

Other, more practicable means to rid the schools of guns may be thought by the citizens of some States to be preferable for the safety and welfare of the schools those States are **[*582]** charged with maintaining. See Brief for National Conference of State Legislatures et al. as *Amici Curiae* 26-30 (injection of federal officials into local problems causes friction and diminishes political accountability of state and local governments). These might include **[****60]** inducements to inform on violators where the information leads to arrests or confiscation of the guns, see Lima, Schools May Launch Weapons Hot Line, Los Angeles Times, Ventura Cty. East ed., Jan. 13, 1995, p. B1, col. 5; Reward for Tips on Guns in Tucson Schools, The Arizona Republic, Jan. 7, 1995, p. B2; programs to encourage the voluntary surrender of guns with some provision for amnesty, see Zaidan, Akron Rallies to Save Youths, The Plain Dealer, Mar. 2, 1995, p. 1B; Swift, Legislators Consider Plan to Get Guns Off Streets, Hartford Courant, Apr. 29, 1992, p. A4; penalties imposed on parents or guardians for failure to supervise the child, see, *e. g.*, *Okla. Stat., Tit. 21, § 858* (Supp. 1995) (fining parents who allow students to possess firearm at school); *Tenn. Code Ann. § 39-17-1312* (Supp. 1992) (misdemeanor for parents to allow student to possess firearm at school); Straight Shooter: Gov. Casey's Reasonable Plan to Control Assault Weapons, Pittsburgh Post-Gazette, Mar. 14, 1994, p. B2 (proposed bill); Bailey, Anti-Crime Measures Top Legislators' Agenda, Los Angeles Times, Orange Cty. ed., Mar. 7, 1994, p. B1, col. 2 (same); Krupa, New Gun-Control **[***653]** Plans Could Tighten Local Law, The Boston Globe, **[****61]** June 20, 1993, p. 29; laws providing for suspension or expulsion of gun-toting students, see, *e. g.*, *Ala. Code § 16-1-24.1* (Supp. 1994); Ind. Code § 20-8.1-5-4(b)(1)(D) (1993); *Ky. Rev. Stat. Ann. § 158.150(1)(a)* (Michie 1992); *Wash. Rev. Code § 9.41.280* (1994), or programs for expulsion with assignment to special facilities, see Martin, Legislators Poised to Take Harsher Stand on Guns in Schools, The Seattle Times, Feb. 1, 1995, p. B1 (automatic year-long expulsion for students with guns and intense semester-long reentry program).

[*583] The statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise, and it does so by regulating an activity beyond the realm of commerce in the ordinary and usual sense of that term. The tendency of this statute to displace state regulation in areas of traditional state concern is evident from its territorial operation. There are over 100,000 elementary and secondary schools in the United States. See U.S. Dept. of Education, National Center for Education Statistics, Digest of Education Statistics 73, 104 (NCES 94-115, 1994) (Tables 63, 94). Each **[****62]** of these now has an invisible federal zone extending 1,000 feet beyond the (often irregular) boundaries of the school property. In some communities no doubt it would be difficult to navigate without infringing on those zones. Yet throughout these areas, school officials would find their own programs for the prohibition **[**1642]** of guns in danger of displacement by the federal authority unless the State chooses to enact a parallel rule.

This is not a case where the etiquette of federalism has been violated by a formal command from the National Government directing the State to enact a certain policy, cf. *New York v. United States, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)*, or to organize its governmental functions in a certain way, cf. *FERC v. Mississippi, 456 U.S. at 781* (O'CONNOR, J., concurring in judgment in part and dissenting in part). While the intrusion on state sovereignty may not be as severe in this instance as in some of our recent *Tenth Amendment* cases, the intrusion is nonetheless significant. Absent a stronger connection or identification with commercial concerns that are central to the *Commerce Clause*, that interference contradicts the federal balance **[****63]** the Framers designed and that this Court is obliged to enforce.

For these reasons, I join in the opinion and judgment of the Court.

[*584] JUSTICE THOMAS, concurring.

The Court today properly concludes that the *Commerce Clause* does not grant Congress the authority to prohibit gun possession within 1,000 feet of a school, as it attempted to do in the Gun-Free School Zones Act of 1990, Pub. L. 101-647, 104 Stat. 4844. Although I join the majority, I write separately to observe that our case law has drifted far from the original understanding of the *Commerce Clause*. In a future case, we ought to temper our *Commerce Clause* jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause.

[*654]** We have said that Congress may regulate not only "Commerce . . . among the several States," *U.S. Const., Art. I, § 8, cl. 3*, but also anything that has a "substantial effect" on such commerce. This test, if taken to its logical extreme, would give Congress a "police power" over all aspects of American life. Unfortunately, we have never come to grips with this implication of our substantial effects formula. Although we have supposedly **[****64]** applied the substantial effects test for the past 60 years, we *always* have rejected readings of the *Commerce Clause* and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. See *New York v. United States, 505 U.S. 144, 155, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992)* ("No one disputes the proposition that 'the Constitution created a Federal Government of limited powers'") (quoting *Gregory v. Ashcroft, 501 U.S. 452, 457, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)*; *Maryland v. Wirtz, 392 U.S. 183, 196, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*; *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615 (1937)*. Cf. *Chisholm v. Georgia, 2 U.S. 419, 2 Dall. 419, 435, 1 L. Ed. 440 (1793)* (Iredell, J.) ("Each State in the Union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the States have surrendered to them") (emphasis deleted). Indeed, on this crucial point, the majority and JUSTICE BREYER agree in principle: The Federal **[*585]** Government has nothing approaching a police power. Compare *ante, **[****65]** at 556-558,* with *post, at 624*.

While the principal dissent concedes that there are limits to federal power, the sweeping nature of our current test enables the dissent to argue that Congress can regulate gun possession. But it seems to me that the power to regulate "commerce" can by no means encompass authority over mere gun possession, any more than it empowers the Federal Government to regulate marriage, littering, or cruelty to animals, throughout the 50 States. Our Constitution quite properly leaves such matters to the individual States, notwithstanding these activities' effects on interstate commerce. Any interpretation of the *Commerce Clause* that even suggests that Congress could regulate such matters is in need of reexamination.

In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the *Commerce Clause* without totally rejecting **[**1643]** our more recent *Commerce Clause* jurisprudence.

Today, however, I merely support the Court's conclusion with a discussion of the text, structure, and history of the *Commerce Clause* and an analysis of our early case law. My goal is **[****66]** simply to show how far we have departed from the original understanding and to demonstrate that the result we reach today is by no means "radical," see *post, at 602* (STEVENS, J., dissenting). I also want to point out the necessity of refashioning a coherent test that does not tend to "obliterate the distinction between what is national and what is local and create a completely centralized government." *Jones & Laughlin Steel Corp., supra, at 37*.

[*655]** I

At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes. See 1 S. Johnson, A Dictionary **[*586]** of the English Language 361 (4th ed. 1773) (defining commerce as "Intercour[s]e; exchange of one thing for another; interchange of any thing; trade; traffick"); N. Bailey, An Universal Etymological English Dictionary (26th ed. 1789) ("trade or traffic"); T. Sheridan, A Complete Dictionary of the English Language (6th ed. 1796) ("Exchange of one thing for another; trade, traffick"). This understanding finds support in the etymology of the word, which literally means "with merchandise." See 3 Oxford English Dictionary 552 (2d ed. 1989) (com -- "with"; merci -- "merchandise **[****67]** "). In fact, when Federalists and Anti-Federalists discussed the *Commerce Clause* during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably. See The Federalist No. 4, p. 22 (J. Jay) (asserting that countries will cultivate our friendship when our "trade" is prudently regulated by Federal Government); [1] *id.*, No. 7, at 39-40 (A. Hamilton) (discussing "competitions of commerce" between States resulting from state "regulations of trade"); *id.*, No. 40, at 262 (J. Madison) (asserting that it was an "acknowledged object of the Convention . . . that the regulation of trade should be submitted to the general government"); Lee, Letters of a Federal Farmer No. 5, in Pamphlets on the Constitution of the United States 319 (P. Ford ed. 1888); Smith, An Address to the People of the State of New-York, in *id., at 107*.

As one would expect, the term "commerce" was used in contradistinction to productive **[****68]** activities such as manufacturing and agriculture. Alexander Hamilton, for example, repeatedly treated commerce, agriculture, and manufacturing as three separate endeavors. See, *e. g.*, The Federalist No. 36, at 224 (referring to "agriculture, commerce, manufactures"); *id.*, No. 21, at 133 (distinguishing commerce, arts, and industry); *id.*, No. 12, at 74 (asserting that commerce and agriculture have shared interests). The same distinctions **[*587]** were made in the state ratification conventions. See, *e. g.*, 2 Debates in the Several State Conventions on the Adoption of the Federal Constitution 57 (J. Elliot ed. 1836) (hereinafter Debates) (T. Dawes at Massachusetts convention); *id., at 336* (M. Smith at New York convention).

Moreover, interjecting a modern sense of commerce into the Constitution generates significant textual and structural problems. For example, one cannot replace "commerce" with a different type of enterprise, such as manufacturing. When a manufacturer produces a car, assembly cannot take place "with a foreign nation" or "with the Indian Tribes." Parts may come from different States or other nations and hence may have been in the flow of commerce at one time, **[****69]** but manufacturing takes place at a discrete site. Agriculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.

The Port Preference Clause also suggests that the term "commerce" denoted sale and/or transport rather than business generally. According **[***656]** to that Clause, "no Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another." *U.S. Const., Art. I, § 9, cl. 6*. Although it is possible to **[**1644]** conceive of regulations of manufacturing or farming that prefer one port over another, the more natural reading is that the Clause prohibits Congress from using its commerce power to channel commerce through certain favored ports.

The Constitution not only uses the word "commerce" in a narrower sense than our case law might suggest, it also does not support the proposition that Congress has authority over all activities that "substantially affect" interstate commerce. The *Commerce Clause* [2] does not state that Congress may **[*588]** "regulate matters that substantially

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[1] All references to The Federalist are to the Jacob E. Cooke 1961 edition.

[2] Even to speak of "the *Commerce Clause*" perhaps obscures the actual scope of that Clause. As an original matter, Congress did not have authority to regulate all commerce; Congress could only "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." *U.S. Const., Art. I, § 8, cl. 3*. Although the precise line between interstate/foreign

affect commerce with foreign Nations, and among the several States, and with the Indian Tribes." In contrast, the Constitution itself temporarily **[****70]** prohibited amendments that would "affect" Congress' lack of authority to prohibit or restrict the slave trade or to enact unproportioned direct taxation. Art. V. Clearly, the Framers could have drafted a Constitution that contained a "substantially affects interstate commerce" Clause had that been their objective.

In addition to its powers under the *Commerce Clause*, Congress has the authority to enact such laws as are "necessary and proper" to carry into execution its power **[****71]** to regulate commerce among the several States. *U.S. Const., Art. I, § 8, cl. 18*. But on this Court's understanding of congressional power under these two Clauses, many of Congress' other enumerated powers under Art. I, § 8, are wholly superfluous. After all, if Congress may regulate all matters that substantially affect commerce, there is no need for the Constitution to specify that Congress may enact bankruptcy laws, cl. 4, or coin money and fix the standard of weights and measures, cl. 5, or punish counterfeiters of United States coin and securities, cl. 6. Likewise, Congress would not need the separate authority to establish post offices and post roads, cl. 7, or to grant patents and copyrights, cl. 8, or to "punish Piracies and Felonies committed on the high Seas," cl. 10. It might not even need the power to raise and support an Army and Navy, cls. 12 and 13, for fewer people would engage in commercial shipping if they thought that a foreign power could expropriate their property with ease. Indeed, if Congress could regulate matters that substantially affect interstate commerce, there would have been no need to specify **[*589]** that Congress can regulate international trade and commerce **[****72]** with the Indians. As the Framers surely understood, these other branches of trade substantially affect interstate commerce.

Put simply, much if not all of Art. I, § 8 (including portions of the *Commerce Clause* itself), would be surplusage if Congress had been given authority over matters that substantially affect interstate commerce. An **[***657]** interpretation of cl. 3 that makes the rest of § 8 superfluous simply cannot be correct. Yet this Court's *Commerce Clause* jurisprudence has endorsed just such an interpretation: The power we have accorded Congress has swallowed Art. I, § 8. [3]

[**73]** Indeed, if a "substantial effects" test can be appended to the *Commerce Clause*, why not to every other power of the Federal Government? There is no reason for singling out the *Commerce Clause* for special treatment. Accordingly, Congress could regulate all matters that "substantially affect" the Army and Navy, bankruptcies, tax collection, expenditures, and so on. In that case, the Clauses of § 8 all mutually overlap, something we can assume the Founding Fathers never intended.

[1645]** Our construction of the scope of congressional authority has the additional problem of coming close to turning the *Tenth Amendment* on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution. Taken together, these fundamental textual problems should, at the very least, convince us that the "substantial effects" test should be reexamined.

[*590] II

The exchanges during the ratification campaign reveal the relatively limited reach of the *Commerce Clause* and of federal power generally. The Founding Fathers confirmed that most areas of life (even many matters that would have substantial effects on commerce) would remain outside the reach of the Federal **[****74]** Government. Such affairs would continue to be under the exclusive control of the States.

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commerce and purely intrastate commerce was hard to draw, the Court attempted to adhere to such a line for the first 150 years of our Nation. See *infra, at 593-599*.

[3] There are other powers granted to Congress outside of Art. I, § 8, that may become wholly superfluous as well due to our distortion of the *Commerce Clause*. For instance, Congress has plenary power over the District of Columbia and the territories. See *U.S. Const., Art. I, § 8, cl. 17*, and Art. IV, § 3, cl. 2. The grant of comprehensive legislative power over certain areas of the Nation, when read in conjunction with the rest of the Constitution, further confirms that Congress was not ceded plenary authority over the *whole* Nation.

Early Americans understood that commerce, manufacturing, and agriculture, while distinct activities, were intimately related and dependent on each other -- that each "substantially affected" the others. After all, items produced by farmers and manufacturers were the primary articles of commerce at the time. If commerce was more robust as a result of federal superintendence, farmers and manufacturers could benefit. Thus, Oliver Ellsworth of Connecticut attempted to convince farmers of the benefits of regulating commerce. "Your property and riches depend on a ready demand and generous price for the produce you can annually spare," he wrote, and these conditions exist "where trade flourishes and when the merchant can freely export the produce of the country" to nations that will pay the highest price. A Landholder No. 1, Connecticut Courant, Nov. 5, 1787, in 3 Documentary History of the Ratification of the Constitution 399 (M. Jensen ed. 1978) (hereinafter Documentary History). See also The Federalist No. 35, at 219 (A. Hamilton) ("Discerning citizens are well aware that the mechanic and manufacturing **[****75]** arts furnish the materials of mercantile enterprise and industry. Many of them indeed are immediately connected with the operations of commerce. They know that **[***658]** the merchant is their natural patron and friend"); *id., at 221* ("Will not the merchant . . . be disposed to cultivate . . . the interests of the mechanic and manufacturing arts to which his commerce is so nearly allied?"); A Jerseyman: To the Citizens of New Jersey, Trenton Mercury, Nov. 6, 1787, in 3 Documentary History 147 (noting that agriculture will serve as **[*591]** a "source of commerce"); Marcus, The New Jersey Journal, Nov. 14, 1787, *id., at 152* (both the mechanic and the farmer benefit from the prosperity of commerce). William Davie, a delegate to the North Carolina Convention, illustrated the close link best: "Commerce, sir, is the nurse of [agriculture and manufacturing]. The merchant furnishes the planter with such articles as he cannot manufacture himself, and finds him a market for his produce. Agriculture cannot flourish if commerce languishes; they are mutually dependent on each other." 4 Debates 20.

Yet, despite being well aware that agriculture, manufacturing, and other matters substantially affected commerce, **[****76]** the founding generation did not cede authority over all these activities to Congress. Hamilton, for instance, acknowledged that the Federal Government could not regulate agriculture and like concerns:

> "The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things in short which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction." The Federalist No. 17, at 106.

In the unlikely event that the Federal Government would attempt to exercise authority over such matters, its effort "would be as troublesome as it would be nugatory." *Ibid.* [4]

[*592] [**77] [**1646]** The comments of Hamilton and others about federal power reflected the well-known truth that the new Government would have only the limited and enumerated powers found in the Constitution. See, *e. g.*, 2 Debates 267-268 (A. Hamilton at New York convention) (noting that there would be just cause for rejecting the Constitution if it would enable the Federal Government to "alter, or abrogate . . . [a State's] civil and criminal institutions [or] penetrate the recesses of domestic life, and control, in all respects, the private conduct of individuals"); The Federalist No. 45, at 313 (J. Madison); 3 Debates 259 (J. Madison) (Virginia convention); R. Sherman & O. Ellsworth, Letter to Governor Huntington, Sept. 26, 1787, in 3 Documentary History 352; J. Wilson, Speech in the State House Yard, Oct. 6, 1787, in 2 *id., at 167-168*. Agriculture and manufacture, since they were not surrendered to the Federal Government, were state concerns. See The Federalist No. 34, at 212-213 (A. Hamilton) (observing that the " **[***659]** internal encouragement of agriculture and manufactures" was an object of *state* expenditure). Even before the passage of the *Tenth Amendment*, it was apparent that Congress would **[****78]** possess only those powers "herein granted" by the rest of the *Constitution. Art. I, § 1*.

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[4] Cf. 3 Debates 40 (E. Pendleton at the Virginia convention) (The proposed Federal Government "does not intermeddle with the local, particular affairs of the states. Can Congress legislate for the state of Virginia? Can [it] make a law altering the form of transferring property, or the rule of descents, in Virginia?"); *id., at 553* (J. Marshall at the Virginia convention) (denying that Congress could make "laws affecting the mode of transferring property, or contracts, or claims, between citizens of the same state"); The Federalist No. 33, at 206 (A. Hamilton) (denying that Congress could change laws of descent or could pre-empt a land tax); A Native of Virginia: Observations upon the Proposed Plan of Federal Government, Apr. 2, 1788, in 9 Documentary History 692 (States have sole authority over "rules of property").

Where the Constitution was meant to grant federal authority over an activity substantially affecting interstate commerce, the Constitution contains an enumerated power over that particular activity. Indeed, the Framers knew that many of the other enumerated powers in § 8 dealt with matters that substantially affected interstate commerce. Madison, for instance, spoke of the bankruptcy power as being "intimately connected with the regulation of commerce." The Federalist No. 42, at 287. Likewise, Hamilton urged that "if we mean to be a commercial people or even to be secure on our Atlantic side, we must endeavour as soon as possible to have a navy." *Id.*, No. 24, at 157.

In short, the Founding Fathers were well aware of what the principal dissent calls "'economic . . . realities.'" See **[*593]** *post, at 625* (BREYER, J.) (quoting *North American Co. v. SEC, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946))*. Even though the boundary between commerce and other matters may ignore "economic reality" and thus seem arbitrary or artificial to some, we must nevertheless **[****79]** respect a constitutional line that does not grant Congress power over all that substantially affects interstate commerce.

III

If the principal dissent's understanding of our early case law were correct, there might be some reason to doubt this view of the original understanding of the Constitution. According to that dissent, Chief Justice Marshall's opinion in *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 6 L. Ed. 23 (1824)*, established that Congress may control all local activities that "significantly affect interstate commerce," *post, at 615*. And, "with the exception of one wrong turn subsequently corrected," this has been the "traditional" method of interpreting the *Commerce Clause*. *Post, at 631* (citing *Gibbons* and *United States v. Darby, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941))*.

In my view, the dissent is wrong about the holding and reasoning of *Gibbons*. Because this error leads the dissent to characterize the first 150 years of this Court's case law as a "wrong turn," I feel compelled to put the last 50 years in proper perspective.

A

In *Gibbons*, the Court examined whether a federal law that licensed ships to engage in the "coasting **[****80]** trade" pre-empted a New York law granting a 30-year monopoly to Robert Livingston and Robert Fulton to navigate the State's waterways by steamship. In concluding that it did, the Court noted that Congress could regulate "navigation" because "all America . . . has uniformly understood, the **[**1647]** word 'commerce,' to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed." 9 Wheat., at 190. The Court also observed **[*594]** that federal power over commerce "among the several States" meant that Congress could regulate commerce **[***660]** conducted partly within a State. Because a portion of interstate commerce and foreign commerce would almost always take place within one or more States, federal power over interstate and foreign commerce necessarily would extend into the States. *Id., at 194-196*.

At the same time, the Court took great pains to make clear that Congress could *not* regulate commerce "which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States." *Id., at 194*. **[****81]** Moreover, while suggesting that the Constitution might not permit States to regulate interstate or foreign commerce, the Court observed that "inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State" were but a small part "of that immense mass of legislation . . . not surrendered to a general government." *Id., at 203*. From an early moment, the Court rejected the notion that Congress can regulate everything that affects interstate commerce. That the internal commerce of the States and the numerous state inspection, quarantine, and health laws had substantial effects on interstate commerce cannot be doubted. Nevertheless, they were not "surrendered to the general government."

Of course, the principal dissent is not the first to misconstrue *Gibbons*. For instance, the Court has stated that *Gibbons* "described the federal commerce power with a breadth never yet exceeded." *Wickard v. Filburn, 317 U.S. 111, 120, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*. See also *Perez v. United States, 402 U.S. 146, 151, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)* (claiming that with *Darby* and **[****82]** *Wickard*, "the broader view of the *Commerce Clause* announced by Chief Justice Marshall had been restored"). I believe that this misreading stems from two statements in *Gibbons*.

First, the Court made the uncontroversial claim that federal power does not encompass "*commerce*" that "does **[*595]** not extend to or affect other States." *9 Wheat., at 194* (emphasis added). From this statement, the principal dissent infers that whenever an activity affects interstate commerce, it necessarily follows that Congress can regulate such activities. Of course, Chief Justice Marshall said no such thing and the inference the dissent makes cannot be drawn.

There is a much better interpretation of the "affect[s]" language: Because the Court had earlier noted that the commerce power did not extend to wholly intrastate commerce, the Court was acknowledging that although the line between intrastate and interstate/foreign commerce would be difficult to draw, federal authority could not be construed to cover purely intrastate commerce. Commerce that did not affect another State could *never* be said to be commerce "among the several States."

But even if one were to adopt the dissent's **[****83]** reading, the "affect[s]" language, at most, permits Congress to regulate only intrastate *commerce* that substantially affects interstate and foreign commerce. There is no reason to believe that Chief Justice Marshall was asserting that Congress could regulate *all* activities that affect interstate commerce. See *ibid.*

[*661]** The second source of confusion stems from the Court's praise for the Constitution's division of power between the States and the Federal Government:

> "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Id., at 195*.

[*596] In this passage, the Court merely was making the well understood point that the Constitution commits matters of "national" concern to Congress and leaves "local" matters **[**1648]** to the States. The Court was *not* saying that whatever Congress believes **[****84]** is a national matter becomes an object of federal control. The matters of national concern are enumerated in the Constitution: war, taxes, patents, and copyrights, uniform rules of naturalization and bankruptcy, types of commerce, and so on. See generally Art. I, § 8. *Gibbons'* emphatic statements that Congress could not regulate many matters that affect commerce confirm that the Court did not read the *Commerce Clause* as granting Congress control over matters that "affect the States generally." [5] *Gibbons* simply cannot be construed as the principal dissent would have it.

B

I am aware of no cases prior to **[****85]** the New Deal that characterized the power flowing from the *Commerce Clause* as sweepingly as does our substantial effects test. My review of the case law indicates that the substantial effects test is but an innovation of the 20th century.

Even before *Gibbons*, Chief Justice Marshall, writing for the Court in *Cohens v. Virginia, 19 U.S. 264, 6 Wheat. 264, 5 L. Ed. 257 (1821)*, noted that Congress had "no general right to punish murder committed within any of the States," *id., at 426*, and that it was "clear that congress cannot punish felonies generally," *id., at 428*. The Court's only qualification was that Congress could enact such laws for places where it enjoyed plenary powers -- for instance, over the District of Columbia. *Id., at 426*. Thus, whatever effect ordinary murders, or robbery, or gun

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[5] None of the other *Commerce Clause* opinions during Chief Justice Marshall's tenure, which concerned the "dormant" *Commerce Clause*, even suggested that Congress had authority over all matters substantially affecting commerce. See *Brown v. Maryland, 25 U.S. 419, 12 Wheat. 419, 6 L. Ed. 678 (1827)*; *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245 (1829).

possession might have on interstate commerce (or on any **[*597]** other subject of federal concern) was irrelevant to the question of congressional power. [6]

[**86]** *United States v. Dewitt, 76 U.S. 41, 9 Wall. 41, 19 L. Ed. 593 (1870)*, marked the first **[***662]** time the Court struck down a federal law as exceeding the power conveyed by the *Commerce Clause*. In a two-page opinion, the Court invalidated a nationwide law prohibiting all sales of naphtha and illuminating oils. In so doing, the Court remarked that the *Commerce Clause* "has always been understood as limited by its terms; and as a virtual denial of any power to interfere with the internal trade and business of the separate States." *Id., at 44*. The law in question was "plainly a regulation of police," which could have constitutional application only where Congress had exclusive authority, such as the territories. *Id., at 44-45*. See also *License Tax Cases, 72 U.S. 462, 5 Wall. 462, 470-471, 18 L. Ed. 497 (1867)* (Congress cannot interfere with the internal commerce and business of a State); *Trade-Mark Cases, 100 U.S. 82, 25 L. Ed. 550 (1879)* (Congress **[*598]** cannot regulate internal commerce and thus may not establish national trademark registration).

In *United States v. E. C. Knight Co., 156 U.S. 1, 39 L. Ed. 325, 15 S. Ct. 249 (1895)*, **[****87]** this Court held that mere attempts to monopolize the manufacture of sugar could not be regulated pursuant to the *Commerce Clause*. **[**1649]** Raising echoes of the discussions of the Framers regarding the intimate relationship between commerce and manufacturing, the Court declared that "commerce succeeds to manufacture, and is not a part of it." *Id., at 12*. The Court also approvingly quoted from *Kidd v. Pearson, 128 U.S. 1, 20, 32 L. Ed. 346, 9 S. Ct. 6 (1888)*:

> "'No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacture and commerce . . . . If it be held that the term [commerce] includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested . . . with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, mining -- in short, every branch of human industry.'" *E. C. Knight, supra, at 14*.

[**88]** If federal power extended to these types of production "comparatively little of business operations and affairs would be left for state control." *Id., at 16*. See also *Newberry v. United States, 256 U.S. 232, 257, 65 L. Ed. 913, 41 S. Ct. 469 (1921)* ("It is settled . . . that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc., commerce could not exist, but this fact does not suffice to subject them to the control of Congress **[***663]** "). Whether or not manufacturing, agriculture, or other matters substantially affected interstate commerce was irrelevant.

[*599] As recently as 1936, the Court continued to insist that the *Commerce Clause* did not reach the wholly internal business of the States. See *Carter v. Carter Coal Co., 298 U.S. 238, 308, 80 L. Ed. 1160, 56 S. Ct. 855 (1936)* (Congress may not regulate mine labor because "the relation of employer and employee is a local relation"); see also *A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 543-550, 79 L. Ed. 1570, 55 S. Ct. 837 (1935)* (holding that Congress may not regulate intrastate sales **[****89]** of sick chickens or the labor of employees

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[6] It is worth noting that Congress, in the first federal criminal Act, did not establish nationwide prohibitions against murder and the like. See Act of Apr. 30, 1790, ch. 9, 1 Stat. 112. To be sure, Congress outlawed murder, manslaughter, maiming, and larceny, but only when those acts were either committed on United States territory not part of a State or on the high seas. *Ibid.* See *U.S. Const., Art. I, § 8, cl. 10* (authorizing Congress to outlaw piracy and felonies on high seas); Art. IV, § 3, cl. 2 (plenary authority over United States territory and property). When Congress did enact nationwide criminal laws, it acted pursuant to direct grants of authority found in the Constitution. Compare Act of Apr. 30, 1790, *supra*, §§ 1 and 14 (prohibitions against treason and the counterfeiting of U.S. securities), with *U.S. Const., Art. I, § 8, cl. 6* (counterfeiting); Art. III, § 3, cl. 2 (treason). Notwithstanding any substantial effects that murder, kidnaping, or gun possession might have had on interstate commerce, Congress understood that it could not establish nationwide prohibitions.

Likewise, there were no laws in the early Congresses that regulated manufacturing and agriculture. Nor was there *any* statute that purported to regulate activities with "substantial effects" on interstate commerce.

involved in intrastate poultry sales). The Federal Government simply could not reach such subjects regardless of their effects on interstate commerce.

These cases all establish a simple point: From the time of the ratification of the Constitution to the mid-1930's, it was widely understood that the Constitution granted Congress only limited powers, notwithstanding the *Commerce Clause*. [7] Moreover, there was no question that activities wholly separated from business, such as gun possession, were beyond the reach of the commerce power. If anything, the "wrong turn" was the Court's dramatic departure in the 1930's from a century and a half of precedent.

[**90]** IV

Apart from its recent vintage and its corresponding lack of any grounding in the original understanding of the Constitution, the substantial effects test suffers from the further **[*600]** flaw that it appears to grant Congress a police power over the Nation. When asked at oral argument if there were *any* limits to the *Commerce Clause*, the Government was at a loss for words. Tr. of Oral Arg. 5. Likewise, the principal dissent insists that there are limits, but it cannot muster even one example. *Post, at 624*. Indeed, the dissent implicitly concedes that its reading has no limits when it criticizes the Court for "threatening legal uncertainty in **[**1650]** an area of law that . . . seemed reasonably well settled." *Post, at 630*. The one advantage of the dissent's standard is certainty: It is certain that under its analysis everything may be regulated under the guise of the *Commerce Clause*.

The substantial effects test suffers from this flaw, in part, because of its "aggregation principle." Under so-called "class of activities" statutes, Congress can regulate whole categories of activities that are not themselves either "interstate" or "commerce." In applying the effects test, we ask whether **[****91]** the class of activities *as a whole* substantially affects interstate commerce, not whether **[***664]** any specific activity within the class has such effects when considered in isolation. See *Maryland v. Wirtz, 392 U.S. at 192-193* (if class of activities is "'within the reach of federal power,'" courts may not excise individual applications as trivial) (quoting *Darby, 312 U.S. at 120-121*).

The aggregation principle is clever, but has no stopping point. Suppose all would agree that gun possession within 1,000 feet of a school does not substantially affect commerce, but that possession of weapons generally (knives, brass knuckles, nunchakus, etc.) does. Under our substantial effects doctrine, even though Congress cannot single out gun possession, it can prohibit weapon possession generally. But one *always* can draw the circle broadly enough to cover an activity that, when taken in isolation, would not have substantial effects on commerce. Under our jurisprudence, if Congress passed an omnibus "substantially affects interstate commerce" statute, purporting to regulate every aspect of human existence, the Act apparently **[****92]** would be constitutional. **[*601]** Even though particular sections may govern only trivial activities, the statute in the aggregate regulates matters that substantially affect commerce.

V

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[7] To be sure, congressional power pursuant to the *Commerce Clause* was alternatively described less narrowly or more narrowly during this 150-year period. Compare *United States* v. *Coombs*, 12 Pet. 72, 78 (1838) (commerce power "extends to such acts, done on land, which interfere with, obstruct, or prevent the due exercise of the power to regulate [interstate and international] commerce" such as stealing goods from a beached ship), with *United States v. E. C. Knight Co., 156 U.S. 1, 13, 39 L. Ed. 325, 15 S. Ct. 249 (1895)* ("Contracts to buy, sell, or exchange goods to be transported among the several States, the transportation and its instrumentalities . . . may be regulated, but this is because they form part of interstate trade or commerce"). During this period, however, this Court never held that Congress could regulate everything that substantially affects commerce.

This extended discussion of the original understanding and our first century and a half of case law does not necessarily require a wholesale abandonment of our more recent opinions. [8] It simply reveals that our substantial effects test is far removed from both the Constitution and from our early case law and that the Court's opinion should not be viewed as "radical" or another "wrong turn" that must be corrected in the future. [9] The analysis also suggests that we ought to temper our *Commerce Clause* jurisprudence.

[*602] **[****93]** Unless the dissenting Justices are willing to repudiate our long-held understanding of the limited nature of federal power, I would think that they, too, must be willing to reconsider **[***665]** the substantial effects test in a future case. If we wish to be true to a Constitution that does not cede a police power to the Federal Government, our *Commerce Clause*'s boundaries simply cannot be "defined" as being "'commensurate with the national needs'" or self-consciously intended **[**1651]** to let the Federal Government "'defend itself against economic forces that Congress decrees inimical or destructive of the national economy.'" See *post, at 625* (BREYER, J., dissenting) (quoting *North American Co. v. SEC, 327 U.S. at 705*). Such a formulation of federal power is no test at all: It is a blank check.

At an appropriate juncture, I think we must modify our *Commerce Clause* jurisprudence. Today, it is easy enough to say that the Clause certainly does not empower Congress to ban gun possession within 1,000 feet of a school.

Dissent by: STEVENS; SOUTER; BREYER

Dissent

JUSTICE **STEVENS**, dissenting.

The welfare of our future "Commerce with foreign Nations, and among the several States, **[****94]** " *U.S. Const., Art. I, § 8, cl. 3*, is vitally dependent on the character of the education of our children. I therefore agree entirely with JUSTICE BREYER's explanation of why Congress has ample power to prohibit the possession of firearms in or near schools -- just as it may protect the school environment from harms posed by controlled substances such as asbestos or alcohol. I also agree with JUSTICE SOUTER's exposition of the radical character of the Court's holding and its kinship with the discredited, pre-Depression version of substantive due process. Cf. *Dolan v. City of Tigard, 512 U.S. 374, 405-411, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (1994)* (STEVENS, J., dissenting). I believe, however, that the Court's extraordinary decision merits this additional comment.

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[8] Although I might be willing to return to the original understanding, I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of *stare decisis* and reliance interests may convince us that we cannot wipe the slate clean.

[9] Nor can the majority's opinion fairly be compared to *Lochner v. New York, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905)*. See *post, at 604-609* (SOUTER, J., dissenting). Unlike *Lochner* and our more recent "substantive due process" cases, to-day's decision enforces only the Constitution and not "judicial policy judgments." See *post, at 607*. Notwithstanding JUSTICE SOUTER's discussion, "'commercial' character" is not only a natural but an inevitable "ground of *Commerce Clause* distinction." See *post, at 608* (emphasis added). Our invalidation of the Gun-Free School Zones Act therefore falls comfortably within our proper role in reviewing federal legislation to determine if it exceeds congressional authority as defined by the Constitution itself. As John Marshall put it: "If [Congress] were to make a law not warranted by any of the powers enumerated, it would be considered by the judges as an infringement of the Constitution which they are to guard . . . . They would declare it void." 3 Debates 553 (before the Virginia ratifying convention); see also The Federalist No. 44, at 305 (J. Madison) (asserting that if Congress exercises powers "not warranted by [the Constitution's] true meaning" the judiciary will defend the Constitution); *id.*, No. 78, at 526 (A. Hamilton) (asserting that the "courts of justice are to be considered as the bulwarks of a limited constitution against legislative encroachments"). Where, as here, there is a case or controversy, there can be no "misstep," *post, at 614*, in enforcing the Constitution.

Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, **[*603]** either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use; it necessarily follows that Congress may also prohibit their possession in particular markets. The **[****95]** market for the possession of handguns by school-age children is, distressingly, substantial. [*] Whether or not the national interest in eliminating that market would have justified federal legislation in 1789, it surely does today.

JUSTICE SOUTER, dissenting.

In reviewing congressional legislation under the *Commerce Clause*, we defer to what is often a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce "if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*; *Preseault **[***666]** v. ICC, 494 U.S. 1, 17, 108 L. Ed. 2d 1, 110 S. Ct. 914 (1990)*; **[****96]** see *Maryland v. Wirtz, 392 U.S. 183, 190, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)*, quoting *Katzenbach v. McClung, 379 U.S. 294, 303-304, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*. If that congressional determination is within the realm of reason, "the only remaining question for judicial inquiry is whether 'the means chosen by Congress [are] reasonably adapted to the end permitted by the Constitution.'" *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra, at 276*, quoting *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 262, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*; see also *Preseault v. ICC, supra, at 17*. [1]

[*604] The practice of deferring to rationally based legislative judgments "is a paradigm of judicial restraint." *FCC v. Beach Communications, Inc., 508 U.S. 307, 314, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (1993)*. In judicial review under the *Commerce Clause*, it reflects our respect for the institutional competence of the Congress on a subject expressly assigned to it by the Constitution and our appreciation of the legitimacy that comes **[**1652]** from Congress's political accountability in dealing with matters open to a wide range of possible choices. **[****97]** See *id., at 313-316*; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra, at 276*; *United States v. Carolene Products Co., 304 U.S. 144, 147, 151-154, 82 L. Ed. 1234, 58 S. Ct. 778 (1938)*; cf. *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 99 L. Ed. 563, 75 S. Ct. 461 (1955)*.

It was not ever thus, however, as even a brief overview of *Commerce Clause* history during the past century reminds us. The modern respect for the competence and primacy of Congress in matters affecting commerce developed only after one of this Court's most chastening experiences, when it perforce repudiated an earlier and untenably expansive conception of judicial review in derogation of congressional commerce power. A look at history's sequence will serve to show how today's **[****98]** decision tugs the Court off course, leading it to suggest opportunities for further developments that would be at odds with the rule of restraint to which the Court still wisely states adherence.

I

Notwithstanding the Court's recognition of a broad commerce power in *Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 196-197, 6 L. Ed. 23 (1824)* (Marshall, C. J.), Congress saw few occasions to exercise that power prior to Reconstruction, see generally 2 C. Warren, The Supreme Court in United States History 729-739 (rev. ed. 1935), and it was really the passage of the Interstate Commerce Act of 1887 that opened a new age of congressional reliance on the *Commerce Clause* for authority to exercise general police powers at the national level, see *id., at **[*605]** 729-730*. Although the Court upheld a fair amount of the ensuing legislation as being within the commerce power, see, *e. g., Stafford v. Wallace, 258 U.S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922)* (upholding an Act

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[*] Indeed, there is evidence that firearm manufacturers -- aided by a federal grant -- are specifically targeting schoolchildren as consumers by distributing, at schools, hunting-related videos styled "educational materials for grades four through 12," Herbert, Reading, Writing, Reloading, N. Y. Times, Dec. 14, 1994, p. A23, col. 1.

[1] In this case, no question has been raised about means and ends; the only issue is about the effect of school zone guns on commerce.

regulating trade practices in the meat packing industry); *Shreveport Rate Cases, 234 U.S. 342,* **[***667]** *34 S. Ct. 833, 58 L. Ed. 1341 (1914)* (upholding Interstate Commerce Commission order to equalize interstate and intrastate rail rates); see generally **[****99]** Warren, *supra*, at 729-739, the period from the turn of the century to 1937 is better noted for a series of cases applying highly formalistic notions of "commerce" to invalidate federal social and economic legislation, see, *e. g., Carter v. Carter Coal Co., 298 U.S. 238, 303-304, 80 L. Ed. 1160, 56 S. Ct. 855 (1936)* (striking Act prohibiting unfair labor practices in coal industry as regulation of "mining" and "production," not "commerce"); *A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 545-548, 79 L. Ed. 1570, 55 S. Ct. 837 (1935)* (striking congressional regulation of activities affecting interstate commerce only "indirectly"); *Hammer v. Dagenhart, 247 U.S. 251, 62 L. Ed. 1101, 38 S. Ct. 529 (1918)* (striking Act prohibiting shipment in interstate commerce of goods manufactured at factories using child labor because the Act regulated "manufacturing," not "commerce"); *Adair v. United States, 208 U.S. 161, 52 L. Ed. 436, 28 S. Ct. 277 (1908)* (striking protection of labor union membership as outside "commerce").

These restrictive views of commerce subject to congressional power complemented the Court's activism in limiting the enforceable scope **[****100]** of state economic regulation. It is most familiar history that during this same period the Court routinely invalidated state social and economic legislation under an expansive conception of *Fourteenth Amendment* substantive due process. See, *e. g., Louis K. Liggett Co. v. Baldridge, 278 U.S. 105, 73 L. Ed. 204, 49 S. Ct. 57 (1928)* (striking state law requiring pharmacy owners to be licensed as pharmacists); *Coppage v. Kansas, 236 U.S. 1, 59 L. Ed. 441, 35 S. Ct. 240 (1915)* (striking state law prohibiting employers from requiring their employees to agree not to join labor organizations); *Lochner v. New York, 198 U.S. 45, 49 L. Ed. 937, 25 S. Ct. 539 (1905)* (striking state law establishing maximum working hours for bakers). See generally L. Tribe, American Constitutional **[*606]** Law 568-574 (2d ed. 1988). The fulcrums of judicial review in these cases were the notions of liberty and property characteristic of laissez-faire economics, whereas the *Commerce Clause* cases turned on what was ostensibly a structural limit of federal power, but under each conception of judicial review the Court's character for the **[**1653]** first third of the century showed itself in exacting judicial scrutiny **[****101]** of a legislature's choice of economic ends and of the legislative means selected to reach them.

It was not merely coincidental, then, that sea changes in the Court's conceptions of its authority under the Due Process and *Commerce Clauses* occurred virtually together, in 1937, with *West Coast Hotel Co. v. Parrish, 300 U.S. 379, 81 L. Ed. 703, 57 S. Ct. 578*, and *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 81 L. Ed. 893, 57 S. Ct. 615*. See Stern, The *Commerce Clause* and the National Economy, 1933-1946, 59 Harv. L. Rev. 645, 674-682 (1946). In *West Coast Hotel*, the Court's rejection of a due process challenge to a state law fixing minimum wages for women and children marked the abandonment of its expansive protection of contractual freedom. Two weeks later, *Jones & Laughlin* affirmed congressional commerce power to authorize NLRB injunctions against unfair labor practices. **[***668]** The Court's finding that the regulated activity had a direct enough effect on commerce has since been seen as beginning the abandonment, for practical purposes, of the formalistic distinction between direct and indirect effects.

In the years following these decisions, **[****102]** deference to legislative policy judgments on commercial regulation became the powerful theme under both the Due Process and *Commerce Clauses*, see *United States v. Carolene Products Co., 304 U.S. at 147-148, 152*; *United States v. Darby, 312 U.S. 100, 119-121, 85 L. Ed. 609, 61 S. Ct. 451 (1941)*; *United States v. Wrightwood Dairy Co., 315 U.S. 110, 118-119, 86 L. Ed. 726, 62 S. Ct. 523 (1942)*, and in due course that deference became articulate in the standard of rationality review. In due process litigation, the Court's statement of a rational **[*607]** basis test came quickly. See *United States v. Carolene Products Co., supra, at 152*; see also *Williamson v. Lee Optical Co., supra, at 489-490*. The parallel formulation of the *Commerce Clause* test came later, only because complete elimination of the direct/indirect effects dichotomy and acceptance of the cumulative effects doctrine, *Wickard v. Filburn, 317 U.S. 111, 125, 127-129, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*; *United States v. Wrightwood Dairy Co., supra, at 124-126*, so far **[****103]** settled the pressing issues of congressional power over commerce as to leave the Court for years without any need to phrase a test explicitly deferring to rational legislative judgments. The moment came, however, with the challenge to congressional *Commerce Clause* authority to prohibit racial discrimination in places of public accommodation, when the Court simply made explicit what the earlier cases had implied: "where we find that the legislators, in light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end." *Katzenbach v. McClung, 379 U.S. at 303-304*, discussing *United States v. Darby, supra;* see *Heart of Atlanta Motel, Inc. v. United States, 379 U.S. at 258-259*. Thus, under commerce, as under due process, adoption of rational basis review expressed the recognition that the Court had no sustainable basis for subjecting economic regulation as such to judicial policy judgments, and for the past half century the Court has no more turned back **[****104]** in the direction of formalistic *Commerce Clause* review (as in deciding whether regulation of commerce was sufficiently direct) than it has inclined toward reasserting the substantive authority of *Lochner* due process (as in the inflated protection of contractual autonomy). See, *e. g., Maryland v. Wirtz, 392 U.S. at 190, 198*; *Perez v. United States, 402 U.S. 146, 151-157, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*; *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. at 276, 277*.

[*608] II

There is today, however, a backward glance at both the old pitfalls, as the Court treats deference under the rationality rule as subject to gradation according to the commercial or noncommercial nature of the immediate subject of the challenged **[***669]** regulation. **[**1654]** See *ante, at 558-561*. The distinction between what is patently commercial and what is not looks much like the old distinction between what directly affects commerce and what touches it only indirectly. And the act of calibrating the level of deference by drawing a line between what is patently commercial and what is less purely so will probably resemble the **[****105]** process of deciding how much interference with contractual freedom was fatal. Thus, it seems fair to ask whether the step taken by the Court today does anything but portend a return to the untenable jurisprudence from which the Court extricated itself almost 60 years ago. The answer is not reassuring. To be sure, the occasion for today's decision reflects the century's end, not its beginning. But if it seems anomalous that the Congress of the United States has taken to regulating school yards, the Act in question is still probably no more remarkable than state regulation of bake shops 90 years ago. In any event, there is no reason to hope that the Court's qualification of rational basis review will be any more successful than the efforts at substantive economic review made by our predecessors as the century began. Taking the Court's opinion on its own terms, JUSTICE BREYER has explained both the hopeless porosity of "commercial" character as a ground of *Commerce Clause* distinction in America's highly connected economy, and the inconsistency of this categorization with our rational basis precedents from the last 50 years.

Further glosses on rationality review, moreover, may be in the **[****106]** offing. Although this case turns on commercial character, the Court gestures toward two other considerations that it might sometime entertain in applying rational basis **[*609]** scrutiny (apart from a statutory obligation to supply independent proof of a jurisdictional element): does the congressional statute deal with subjects of traditional state regulation, and does the statute contain explicit factual findings supporting the otherwise implicit determination that the regulated activity substantially affects interstate commerce? Once again, any appeal these considerations may have depends on ignoring the painful lesson learned in 1937, for neither of the Court's suggestions would square with rational basis scrutiny.

A

The Court observes that the Gun-Free School Zones Act operates in two areas traditionally subject to legislation by the States, education and enforcement of criminal law. The suggestion is either that a connection between commerce and these subjects is remote, or that the commerce power is simply weaker when it touches subjects on which the States have historically been the primary legislators. Neither suggestion is tenable. As for remoteness, it may or may not be wise for **[****107]** the National Government to deal with education, but JUSTICE BREYER has surely demonstrated that the commercial prospects of an illiterate State or Nation are not rosy, and no argument should be needed to show that hijacking interstate shipments of cigarettes can affect commerce substantially, even though the States have traditionally prosecuted robbery. And as for the notion that the commerce power diminishes the closer it gets to customary state concerns, that idea has been flatly rejected, and not long ago. The commerce power, we **[***670]** have often observed, is plenary. *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., supra, at 276*; *United States v. Darby, 312 U.S. at 114*; see *Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 549-550, 83 L. Ed. 2d 1016, 105 S. Ct. 1005 (1985)*; *Gibbons v. Ogden, 9 Wheat., at 196-197*. Justice Harlan put it this way in speaking for the Court in *Maryland* v. *Wirtz:*

> **[*610]** "There is no general doctrine implied in the Federal Constitution that the two governments, national and state, are each to exercise its powers so as **[****108]** not to interfere with the free and full exercise of the powers of the other. . . . It is clear that the Federal Government, when acting within a delegated power, may override countervailing state interests . . . . As long ago as [1925], the Court put to rest the contention that state concerns might constitutionally 'outweigh' the importance of an otherwise valid federal statute regulating commerce." **[**1655]** *392 U.S. at 195-196* (citations and internal quotation marks omitted).

See also *United States v. Darby, supra, at 114*; *Gregory v. Ashcroft, 501 U.S. 452, 460, 115 L. Ed. 2d 410, 111 S. Ct. 2395 (1991)*; *United States v. Carolene Products Co., 304 U.S. at 147*.

Nor is there any contrary authority in the reasoning of our cases imposing clear statement rules in some instances of legislation that would significantly alter the state-national balance. In the absence of a clear statement of congressional design, for example, we have refused to interpret ambiguous federal statutes to limit fundamental state legislative prerogatives, *Gregory v. Ashcroft, supra, at 460-464*, **[****109]** our understanding being that such prerogatives, through which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere," *501 U.S. at 460, 461*. Likewise, when faced with two plausible interpretations of a federal criminal statute, we generally will take the alternative that does not force us to impute an intention to Congress to use its full commerce power to regulate conduct traditionally and ably regulated by the States. See *United States v. Enmons, 410 U.S. 396, 411-412, 35 L. Ed. 2d 379, 93 S. Ct. 1007 (1973)*; *United States v. Bass, 404 U.S. 336, 349-350, 30 L. Ed. 2d 488, 92 S. Ct. 515 (1971)*; *Rewis v. United States, 401 U.S. 808, 812, 28 L. Ed. 2d 493, 91 S. Ct. 1056 (1971)*.

These clear statement rules, however, are merely rules of statutory interpretation, to be relied upon only when the **[*611]** terms of a statute allow, *United States v. Culbert, 435 U.S. 371, 379-380, 55 L. Ed. 2d 349, 98 S. Ct. 1112 (1978)*; see *Gregory v. Ashcroft, supra, at 470*; *United States v. Bass, supra, at 346-347*, and in cases implicating Congress's historical **[****110]** reluctance to trench on state legislative prerogatives or to enter into spheres already occupied by the States, *Gregory v. Ashcroft, supra, at 461*; *United States v. Bass, supra, at 349*; see *Rewis v. United States, supra, at 811-812*. They are rules for determining **[***671]** intent when legislation leaves intent subject to question. But our hesitance to presume that Congress has acted to alter the state-federal status quo (when presented with a plausible alternative) has no relevance whatever to the enquiry whether it has the commerce power to do so or to the standard of judicial review when Congress has definitely meant to exercise that power. Indeed, to allow our hesitance to affect the standard of review would inevitably degenerate into the sort of substantive policy review that the Court found indefensible 60 years ago. The Court does not assert (and could not plausibly maintain) that the commerce power is wholly devoid of congressional authority to speak on any subject of traditional state concern; but if congressional action is not forbidden absolutely when it touches such a **[****111]** subject, it will stand or fall depending on the Court's view of the strength of the legislation's commercial justification. And here once again history raises its objections that the Court's previous essays in overriding congressional policy choices under the *Commerce Clause* were ultimately seen to suffer two fatal weaknesses: when dealing with Acts of Congress (as distinct from state legislation subject to review under the theory of dormant commerce power) nothing in the Clause compelled the judicial activism, and nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with. There is no reason to expect the lesson would be different another time.

[*612] B

There remain questions about legislative findings. The Court of Appeals expressed the view, *2 F.3d 1342, 1363-1368 (CA5 1993)*, that the result in this case might well have been different if Congress had made explicit findings that guns in schools have a substantial effect on interstate commerce, and the Court today does not repudiate that position, see *ante, at 562-563*. Might a court aided by such findings have subjected this legislation to less exacting scrutiny **[****112]** (or, put another **[**1656]** way, should a court have deferred to such findings if Congress had made them)? [2] The answer to either question must be no, although as a general matter findings are important and to be hoped for in the difficult cases.

[**113]** It is only natural to look for help with a hard job, and reviewing a claim that Congress has exceeded the commerce power is much harder in some cases than in others. A challenge to congressional regulation of interstate garbage hauling would be easy to resolve; review of congressional **[***672]** regulation of gun possession in school yards is more difficult, both because the link to interstate commerce is less obvious and because of our initial ignorance of the relevant facts. In a **[*613]** case comparable to this one, we may have to dig hard to make a responsible judgment about what Congress could reasonably find, because the case may be close, and because judges tend not to be familiar with the facts that may or may not make it close. But while the ease of review may vary from case to case, it does not follow that the standard of review should vary, much less that explicit findings of fact would even directly address the standard.

The question for the courts, as all agree, is not whether as a predicate to legislation Congress in fact found that a particular activity substantially affects interstate commerce. The legislation implies such a finding, and there is no reason to entertain claims that Congress **[****114]** acted ultra vires intentionally. Nor is the question whether Congress was correct in so finding. The only question is whether the legislative judgment is within the realm of reason. See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. at 276-277*; *Katzenbach v. McClung, 379 U.S. at 303-304*; *Railroad Retirement Bd. v. Alton R. Co., 295 U.S. 330, 391-392, 79 L. Ed. 1468, 55 S. Ct. 758 (1935)* (Hughes, C. J., dissenting); cf. *FCC v. Beach Communications, Inc., 508 U.S. at 315* (in the equal protection context, "those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it[;] . . . it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature") (citations and internal quotation marks omitted); *Ferguson v. Skrupa, 372 U.S. 726, 731-733, 10 L. Ed. 2d 93, 83 S. Ct. 1028 (1963)*; *Williamson v. Lee Optical Co., 348 U.S. at 487*. Congressional findings do not, however, directly address **[****115]** the question of reasonableness; they tell us what Congress actually has found, not what it could rationally find. If, indeed, the Court were to make the existence of explicit congressional findings dispositive in some close or difficult cases something other than rationality review would be afoot. The resulting congressional obligation to justify its policy choices on the merits would imply **[*614]** either a judicial authority to review the justification (and, hence, the wisdom) of those choices, or authority to require Congress to act with some high degree of deliberateness, of which express findings would be evidence. But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function merely as an excuse for covert review of the merits of legislation under standards never expressed **[**1657]** and more or less arbitrarily applied. Under such a regime, in any case, the rationality standard of review would be a thing of the past.

On the other hand, to say that courts applying **[****116]** the rationality standard may not defer to findings is not, of course, to say that findings are **[***673]** pointless. They may, in fact, have great value in telling courts what to look for, in establishing at least one frame of reference for review, and in citing to factual authority. The research underlying JUSTICE BREYER's dissent was necessarily a major undertaking; help is welcome, and it not incidentally shrinks the risk that judicial research will miss material scattered across the public domain or buried under pounds of legislative record. Congressional findings on a more particular plane than this record illustrates

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[2] Unlike the Court, (perhaps), I would see no reason not to consider Congress's findings, insofar as they might be helpful in reviewing the challenge to this statute, even though adopted in later legislation. See the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, § 320904, 108 Stat. 2125 ("The occurrence of violent crime in school zones has resulted in a decline in the quality of education in our country; . . . this decline . . . has an adverse impact on interstate commerce and the foreign commerce of the United States; . . . Congress has power, under the *interstate commerce clause* and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection"). The findings, however, go no further than expressing what is obviously implicit in the substantive legislation, at such a conclusory level of generality as to add virtually nothing to the record. The Solicitor General certainly exercised sound judgment in placing no significant reliance on these particular afterthoughts. Tr. of Oral Arg. 24-25.

would accordingly have earned judicial thanks. But thanks do not carry the day as long as rational possibility is the touchstone, and I would not allow for the possibility, as the Court's opinion may, *ante*, at 563, that the addition of congressional findings could in principle have affected the fate of the statute here.

III

Because JUSTICE BREYER's opinion demonstrates beyond any doubt that the Act in question passes the rationality review that the Court continues to espouse, today's decision may be seen as only a misstep, its reasoning and its suggestions **[*615]** not quite in **[****117]** gear with the prevailing standard, but hardly an epochal case. I would not argue otherwise, but I would raise a caveat. Not every epochal case has come in epochal trappings. *Jones & Laughlin* did not reject the direct-indirect standard in so many words; it just said the relation of the regulated subject matter to commerce was direct enough. *301 U.S. at 41-43*. But we know what happened.

I respectfully dissent.

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, dissenting.

The issue in this case is whether the *Commerce Clause* authorizes Congress to enact a statute that makes it a crime to possess a gun in, or near, a school. *18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V)*. In my view, the statute falls well within the scope of the commerce power as this Court has understood that power over the last half century.

I

In reaching this conclusion, I apply three basic principles of *Commerce Clause* interpretation. First, the power to "regulate Commerce . . . among the several States," *U.S. Const., Art. I, § 8, cl. 3*, encompasses the power to regulate local activities insofar as they significantly **[****118]** affect interstate commerce. See, *e. g., Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 194-195, 6 L. Ed. 23 (1824)* (Marshall, C. J.); *Wickard v. Filburn, 317 U.S. 111, 125, 87 L. Ed. 122, 63 S. Ct. 82 (1942)*. As the majority points out, *ante, at 559*, the Court, in describing how much of an effect the Clause requires, sometimes has used the word "substantial" and sometimes has not. Compare, *e. g., Wickard, supra, at 125* ("substantial economic effect"), with *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 276, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)* ("affects interstate commerce"); see also *Maryland v. Wirtz, 392 U.S. 183, 196, n. 27, 20 L. Ed. 2d 1020, 88 S. Ct. 2017 (1968)* (cumulative effect must not be "trivial"); *NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, 81 L. Ed. 893, 57 S. Ct. 615* ***[***674]*** *(1937)* **[*616]** (speaking of "close and substantial *relation*" between activity and commerce, not of "substantial effect") (emphasis added); *Gibbons, supra*, at 194 (words of *Commerce Clause* do not "comprehend . . . commerce, which is completely internal . . . and which does not . . . affect other States"). And, as the majority **[****119]** also recognizes in quoting Justice Cardozo, the question of degree (how *much* effect) requires an estimate of the "size" of the effect that no verbal formulation can capture with precision. See *ante*, at 567. I use the word "significant" because the word "substantial" implies a somewhat narrower power than recent precedent suggests. See, *e. g., Perez v. United States, 402* ***[**1658]*** *U.S. 146, 154, 28 L. Ed. 2d 686, 91 S. Ct. 1357 (1971)*; *Daniel v. Paul, 395 U.S. 298, 308, 23 L. Ed. 2d 318, 89 S. Ct. 1697 (1969)*. But to speak of "substantial effect" rather than "significant effect" would make no difference in this case.

Second, in determining whether a local activity will likely have a significant effect upon interstate commerce, a court must consider, not the effect of an individual act (a single instance of gun possession), but rather the cumulative effect of all similar instances (*i. e.*, the effect of all guns possessed in or near schools). See, *e. g., Wickard, supra, at 127-128*. As this Court put the matter almost 50 years ago:

> "It is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that **[****120]** requires preventative regulation." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 92 L. Ed. 1328, 68 S. Ct. 996 (1948)* (citations omitted).

Third, the Constitution requires us to judge the connection between a regulated activity and interstate commerce, not directly, but at one remove. Courts must give Congress a degree of leeway in determining the existence of a significant factual connection between the regulated activity and interstate commerce -- both because the Constitution delegates the commerce power directly to Congress and because the **[*617]** determination requires an empirical judgment of a kind that a legislature is more likely than a court to make with accuracy. The traditional words "rational basis" capture this leeway. See *Hodel, supra, at 276-277*. Thus, the specific question before us, as the Court recognizes, is not whether the "regulated activity sufficiently affected interstate commerce," but, rather, whether Congress could have had "*a rational basis*" for so concluding. *Ante, at 557* (emphasis added).

I recognize that we must judge this matter independently. "Simply because Congress may conclude **[****121]** that a particular activity substantially affects interstate commerce does not necessarily make it so." *Hodel, supra, at 311* (REHNQUIST, J., concurring in judgment). And, I also recognize that Congress did not write specific "interstate commerce" findings into the law under which Lopez was convicted. Nonetheless, as I have already noted, the matter that we review independently (*i. e.*, whether there is a "rational basis") already has considerable leeway built into it. And, the absence of findings, at most, deprives a statute of the benefit of **[***675]** some *extra* leeway. This extra deference, in principle, might change the result in a close case, though, in practice, it has not made a critical legal difference. See, *e. g., Katzenbach v. McClung, 379 U.S. 294, 299, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)* (noting that "no formal findings were made, which of course are not necessary"); *Perez, supra, at 156-157*; cf. *Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994)* (opinion of KENNEDY, J.) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate **[****122]** judicial review"); *Fullilove v. Klutznick, 448 U.S. 448, 503, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980)* (Powell, J., concurring) ("After Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate . . ."). It would seem particularly unfortunate to make the validity of **[*618]** the statute at hand turn on the presence or absence of findings. Because Congress did make findings (though not until after Lopez was prosecuted), doing so would appear to elevate form over substance. See Pub. L. 103-322, §§ 320904 (2)(F), (G), 108 Stat. 2125, *18 U.S.C. §§ 922(q)(1)(F)*, *(G)*.

In addition, despite the Court of Appeals' suggestion to the contrary, see *2 F.3d 1342, 1365 (CA5 1993)*, there is no special need here for a clear indication of Congress' rationale. The statute does not interfere with the exercise of state or local authority. Cf., *e. g., Dellmuth v. Muth, 491 U.S. 223, 227-228, 105 L. Ed. 2d 181, 109 S. Ct. 2397 (1989)* (requiring clear statement for abrogation of *Eleventh Amendment* immunity). Moreover, any clear **[****123]** statement rule would **[**1659]** apply only to determine Congress' intended result, *not* to clarify the source of its authority or measure the level of consideration that went into its decision, and here there is no doubt as to which activities Congress intended to regulate. See *ibid.; id., at 233* (SCALIA, J., concurring) (to subject States to suits for money damages, Congress need only make that intent clear, and need not refer explicitly to the *Eleventh Amendment*); *EEOC v. Wyoming, 460 U.S. 226, 243, n. 18, 75 L. Ed. 2d 18, 103 S. Ct. 1054 (1983)* (Congress need not recite the constitutional provision that authorizes its action).

II

Applying these principles to the case at hand, we must ask whether Congress could have had a *rational basis* for finding a significant (or substantial) connection between gun-related school violence and interstate commerce. Or, to put the question in the language of the *explicit* finding that Congress made when it amended this law in 1994: Could Congress rationally have found that "violent crime in school zones," through its effect on the "quality of education," significantly (or substantially) affects "interstate" or "foreign **[****124]** commerce"? *18 U.S.C. §§ 922(q)(1)(F)*, *(G)*. As long as one views the commerce connection, not as a "technical legal conception," but as "a practical one," *Swift & Co. v. United States, 196 U.S. 375, 398, 49 L. Ed. 518, 25 S. Ct. 276* ***[*619]*** *(1905)* (Holmes, J.), the answer to this question must be yes. Numerous reports and studies -- generated both inside and outside government -- **[***676]** make clear that Congress could reasonably have found the empirical connection that its law, implicitly or explicitly, asserts. (See Appendix, *infra*, at 631, for a sample of the documentation, as well as for complete citations to the sources referenced below.)

For one thing, reports, hearings, and other readily available literature make clear that the problem of guns in and around schools is widespread and extremely serious. These materials report, for example, that four percent of American high school students (and six percent of inner-city high school students) carry a gun to school at least occasionally, Centers for Disease Control 2342; Sheley, McGee, & Wright 679; that 12 percent of urban high school students have had guns fired at them, *ibid.;* that **[****125]** 20 percent of those students have been threatened with guns, *ibid.;* and that, in any 6-month period, several hundred thousand schoolchildren are victims of violent crimes in or near their schools, U.S. Dept. of Justice 1 (1989); House Select Committee Hearing 15 (1989). And, they report that this widespread violence in schools throughout the Nation significantly interferes with the quality of education in those schools. See, *e. g.*, House Judiciary Committee Hearing 44 (1990) (linking school violence to dropout rate); U.S. Dept. of Health 118-119 (1978) (school-violence victims suffer academically); compare U.S. Dept. of Justice 1 (1991) (gun violence worst in inner-city schools), with National Center 47 (dropout rates highest in inner cities). Based on reports such as these, Congress obviously could have thought that guns and learning are mutually exclusive. Senate Labor and Human Resources Committee Hearing 39 (1993); U.S. Dept. of Health 118, 123-124 (1978). Congress could therefore have found a substantial educational problem -- teachers unable to teach, students unable to learn -- and concluded that guns near schools contribute substantially to the size and scope of that **[****126]** problem.

[*620] Having found that guns in schools significantly undermine the quality of education in our Nation's classrooms, Congress could also have found, given the effect of education upon interstate and foreign commerce, that gun-related violence in and around schools is a commercial, as well as a human, problem. Education, although far more than a matter of economics, has long been inextricably intertwined with the Nation's economy. When this Nation began, most workers received their education in the workplace, typically (like Benjamin Franklin) as apprentices. See generally Seybolt; Rorabaugh; U.S. Dept. of Labor (1950). As late as the 1920's, many workers still received general education directly from their employers -- from large corporations, such as General Electric, Ford, and Goodyear, which created schools **[**1660]** within their firms to help both the worker and the firm. See Bolino 15-25. (Throughout most of the 19th century fewer than one percent of all Americans received secondary education through attending a high school. See *id.*, at 11.) As public school enrollment grew in the early 20th century, see Becker 218 (1993), the need for industry to teach basic educational skills diminished. **[****127]** But, the direct economic link between basic education and industrial productivity remained. Scholars estimate that nearly a quarter of America's economic **[***677]** growth in the early years of this century is traceable directly to increased schooling, see Denison 243; that investment in "human capital" (through spending on education) exceeded investment in "physical capital" by a ratio of almost two to one, see Schultz 26 (1961); and that the economic returns to this investment in education exceeded the returns to conventional capital investment, see, *e. g.*, Davis & Morrall 48-49.

In recent years the link between secondary education and business has strengthened, becoming both more direct and more important. Scholars on the subject report that technological changes and innovations in management techniques have altered the nature of the workplace so that more jobs now demand greater educational skills. See, *e. g.*, MIT 32 **[*621]** (only about one-third of handtool company's 1,000 workers were qualified to work with a new process that requires high-school-level reading and mathematical skills); Cyert & Mowery 68 (gap between wages of high school dropouts and better trained workers increasing); U.S. **[****128]** Dept. of Labor 41 (1981) (job openings for dropouts declining over time). There is evidence that "service, manufacturing or construction jobs are being displaced by technology that requires a better-educated worker or, more likely, are being exported overseas," Gordon, Ponticell, & Morgan 26; that "workers with truly few skills by the year 2000 will find that only one job out of ten will remain," *ibid.;* and that

> "over the long haul the best way to encourage the growth of high-wage jobs is to upgrade the skills of the work force. . . . Better-trained workers become more productive workers, enabling a company to become more competitive and expand." Henkoff 60.

Increasing global competition also has made primary and secondary education economically more important. The portion of the American economy attributable to international trade nearly tripled between 1950 and 1980, and more than 70 percent of American-made goods now compete with imports. Marshall 205; Marshall & Tucker 33. Yet, lagging worker productivity has contributed to negative trade balances and to real hourly compensation that has fallen below wages in 10 other industrialized nations. See National Center 57; Handbook **[****129]** of Labor Statistics 561, 576 (1989); Neef & Kask 28, 31. At least some significant part of this serious productivity problem is attributable to students who emerge from classrooms without the reading or mathematical skills necessary to compete with their European or Asian counterparts, see, *e. g.*, MIT 28, and, presumably, to high school dropout rates of 20 to 25 percent (up to 50 percent in inner cities), see, *e. g.*, National Center 47; Chubb & Hanushek 215. Indeed, Congress has said, when writing other statutes, that **[*622]** "functionally or technologically illiterate" Americans in the work force "erode" our economic "standing in the international marketplace," Pub. L. 100-418, § 6002(a)(3), 102 Stat. 1469, and that "our Nation is . . . paying the price of scientific and technological illiteracy, with our productivity declining, our industrial base ailing, and our global competitiveness dwindling," H. R. Rep. No. 98-6, pt. 1, p. 19 (1983).

Finally, there is evidence that, today more than ever, many firms base their location decisions upon the presence, or absence, of a work **[***678]** force with a basic education. See MacCormack, Newman, & Rosenfield 73; Coffee 296. Scholars on the subject report, **[****130]** for example, that today, "high speed communication and transportation make it possible to produce most products and services anywhere in the world," National Center 38; that "modern machinery and production methods can therefore be combined with low wage workers to drive costs down," *ibid.;* that managers can perform "'back office functions anywhere in the world now,'" and say that if they "'can't get enough skilled **[**1661]** workers here'" they will "'move the skilled jobs out of the country,'" *id., at 41*; with the consequence that "rich countries need better education and retraining, to reduce the supply of unskilled workers and to equip them with the skills they require for tomorrow's jobs," Survey of Global Economy 37. In light of this increased importance of education to individual firms, it is no surprise that half of the Nation's manufacturers have become involved with setting standards and shaping curricula for local schools, Maturi 65-68, that 88 percent think this kind of involvement is important, *id., at 68*, that more than 20 States have recently passed educational reforms to attract new business, Overman 61-62, and that business magazines have begun to rank cities according **[****131]** to the quality of their schools, see Boyle 24.

The economic links I have just sketched seem fairly obvious. Why then is it not equally obvious, in light of those links, that a widespread, serious, and substantial physical **[*623]** threat to teaching and learning *also* substantially threatens the commerce to which that teaching and learning is inextricably tied? That is to say, guns in the hands of six percent of inner-city high school students and gun-related violence throughout a city's schools must threaten the trade and commerce that those schools support. The only question, then, is whether the latter threat is (to use the majority's terminology) "substantial." The evidence of (1) the *extent* of the gun-related violence problem, see *supra, at 619*, (2) the *extent* of the resulting negative effect on classroom learning, see *ibid.*, and (3) the *extent* of the consequent negative commercial effects, see *supra, at 620-622*, when taken together, indicate a threat to trade and commerce that is "substantial." At the very least, Congress could rationally have concluded that the links are "substantial."

Specifically, Congress could have found that gun-related violence **[****132]** near the classroom poses a serious economic threat (1) to consequently inadequately educated workers who must endure low paying jobs, see, *e. g.*, National Center 29, and (2) to communities and businesses that might (in today's "information society") otherwise gain, from a well-educated work force, an important commercial advantage, see, *e. g.*, Becker 10 (1992), of a kind that location near a railhead or harbor provided in the past. Congress might also have found these threats to be no different in kind from other threats that this Court has found within the commerce power, such as the threat that loan sharking poses to the "funds" of "numerous localities," *Perez v. United States, 402 U.S. at 157*, and that unfair labor practices pose **[***679]** to instrumentalities of commerce, see *Consolidated Edison Co. v. NLRB, 305 U.S. 197, 221-222, 83 L. Ed. 126, 59 S. Ct. 206 (1938)*. As I have pointed out, *supra, at 618*, Congress has written that "the occurrence of violent crime in school zones" has brought about a "decline in the quality of education" that "has an adverse impact on interstate commerce and the foreign commerce of the United States." *18 U.S.C. §§ 922* **[****133]** *(q)(1)(F)*, *(G)*. The violence-related facts, the educational **[*624]** facts, and the economic facts, taken together, make this conclusion rational. And, because under our case law, see *supra, at 615-617*; *infra, at 627-628*, the sufficiency of the constitutionally necessary *Commerce Clause* link between a crime of violence and interstate commerce turns simply upon size or degree, those same facts make the statute constitutional.

To hold this statute constitutional is not to "obliterate" the "distinction between what is national and what is local," *ante, at 567* (citation omitted; internal quotation marks omitted); nor is it to hold that the *Commerce Clause* permits the Federal Government to "regulate any activity that it found was related to the economic productivity of individual citizens," to regulate "marriage, divorce, and child custody," or to regulate any and all aspects of education. *Ante, at 564*. First, this statute is aimed at curbing a particularly acute threat to the educational process -- the possession (and use) of life-threatening firearms in, or near, the classroom. The empirical evidence that I have discussed above unmistakably documents the special way **[****134]** in which guns and education are incompatible. See *supra, at 619*. This Court has previously recognized the singularly disruptive potential **[**1662]** on interstate commerce that acts of violence may have. See *Perez, supra, at 156-157*. Second, the immediacy of the connection between education and the national economic well-being is documented by scholars and accepted by society at large in a way and to a degree that may not hold true for other social institutions. It must surely be the rare case, then, that a statute strikes at conduct that (when considered in the abstract) seems so removed from commerce, but which (practically speaking) has so significant an impact upon commerce.

In sum, a holding that the particular statute before us falls within the commerce power would not expand the scope of that Clause. Rather, it simply would apply pre-existing law to changing economic circumstances. See *Heart of Atlanta* ***[*625]*** *Motel, Inc. v. United States, 379 U.S. 241, 251, 13 L. Ed. 2d 258, 85 S. Ct. 348 (1964)*. It would recognize that, in today's economic world, gun-related violence near the classroom makes a significant difference to our economic, as **[****135]** well as our social, well-being. In accordance with well-accepted precedent, such a holding would permit Congress "to act in terms of economic . . . realities," would interpret the commerce power as "an affirmative power commensurate with the national needs," and would acknowledge that the "*commerce clause* does not operate so as to render the nation powerless to defend itself **[***680]** against economic forces that Congress decrees inimical or destructive of the national economy." *North American Co. v. SEC, 327 U.S. 686, 705, 90 L. Ed. 945, 66 S. Ct. 785 (1946)* (citing *Swift & Co. v. United States, 196 U.S. at 398* (Holmes, J.)).

III

The majority's holding -- that *§ 922* falls outside the scope of the *Commerce Clause* -- creates three serious legal problems. First, the majority's holding runs contrary to modern Supreme Court cases that have upheld congressional actions despite connections to interstate or foreign commerce that are less significant than the effect of school violence. In *Perez v. United States, supra*, the Court held that the *Commerce Clause* authorized a federal statute that makes it a crime to engage in loan **[****136]** sharking ("extortionate credit transactions") at a local level. The Court said that Congress may judge that such transactions, "though purely *intra*state, . . . affect *inter*state commerce." *402 U.S. at 154* (emphasis added). Presumably, Congress reasoned that threatening or using force, say with a gun on a street corner, to collect a debt occurs sufficiently often so that the activity (by helping organized crime) affects commerce among the States. But, why then cannot Congress also reason that the threat or use of force -- the frequent consequence of possessing a gun -- in or near a school occurs sufficiently often so that such activity (by inhibiting basic education) affects **[*626]** commerce among the States? The negative impact upon the national economy of an inability to teach basic skills seems no smaller (nor less significant) than that of organized crime.

In *Katzenbach v. McClung, 379 U.S. 294, 13 L. Ed. 2d 290, 85 S. Ct. 377 (1964)*, this Court upheld, as within the commerce power, a statute prohibiting racial discrimination at local restaurants, in part because that discrimination discouraged travel by African Americans and in part because that discrimination **[****137]** affected purchases of food and restaurant supplies from other States. See *id., at 300*; *Heart of Atlanta Motel, supra, at 274* (Black, J., concurring in *McClung* and in *Heart of Atlanta*). In *Daniel v. Paul, 395 U.S. 298, 23 L. Ed. 2d 318, 89 S. Ct. 1697 (1969)*, this Court found an effect on commerce caused by an amusement park located several miles down a country road in the middle of Alabama -- because some customers (the Court assumed), some food, 15 paddleboats, and a juke box had come from out of state. See *id., at 304-305, 308*. In both of these cases, the Court understood that the specific instance of discrimination (at a local place of accommodation) was part of a general practice that, considered as a whole, caused not only the most serious human and social harm, but had nationally significant economic dimensions as well. See *McClung, supra, at 301*; **[**1663]** *Daniel, supra, at 307, n. 10*. It is difficult to distinguish the case before us, for the same critical elements are present. Businesses are less likely to locate in communities where violence plagues the classroom. **[****138]** Families will hesitate to move to neighborhoods where students carry guns instead of books. (Congress expressly **[***681]** found in 1994 that "parents may decline to send their children to school" in certain areas "due to concern about violent crime and gun violence." 18 U.S.C. § 922(q)(1)(E).) And (to look at the matter in the most narrowly commercial manner), interstate publishers therefore will sell fewer books and other firms will sell fewer school supplies where the threat of violence disrupts learning. Most importantly, like the local racial discrimination at issue in *McClung* and *Daniel*, the local instances here, taken **[*627]** together and considered as a whole, create a problem that causes serious human and social harm, but also has nationally significant economic dimensions.

In Wickard v. Filburn, 317 U.S. 111, 87 L. Ed. 122, 63 S. Ct. 82 (1942), this Court sustained the application of the Agricultural Adjustment Act of 1938 to wheat that Filburn grew and consumed on his own local farm because, considered in its totality, (1) homegrown wheat may be "induced by rising prices" to "flow into the market and check price increases, **[****139]** " and (2) even if it never actually enters the market, homegrown wheat nonetheless "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market" and, in that sense, "competes with wheat in commerce." Id., at 128. To find both of these effects on commerce significant in amount, the Court had to give Congress the benefit of the doubt. Why would the Court, to find a significant (or "substantial") effect here, have to give Congress any greater leeway? See also United States v. Women's Sportswear Mfrs. Assn., 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949) ("If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze"); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. at 236 ("It is enough that the individual activity when multiplied into a general practice . . . contains a threat to the interstate economy that requires preventive regulation").

The second legal problem the Court creates comes from its apparent belief that it can reconcile its holding with earlier cases by making **[****140]** a critical distinction between "commercial" and noncommercial "transaction[s]." Ante, at 561. That is to say, the Court believes the Constitution would distinguish between two local activities, each of which has an identical effect upon interstate commerce, if one, but not the other, is "commercial" in nature. As a general matter, this approach fails to heed this Court's earlier warning not to turn "questions of the power of Congress" upon "formula[s]" that would give

> **[*628]** "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce." Wickard, supra, at 120.

See also United States v. Darby, 312 U.S. 100, 116-117, 85 L. Ed. 609, 61 S. Ct. 451 (1941) (overturning the Court's distinction between "production" and "commerce" in the child labor case, Hammer v. Dagenhart, 247 U.S. 251, 271-272, 62 L. Ed. 1101, 38 S. Ct. 529 (1918)); Swift & Co. v. United States, 196 U.S. at 398 **[***682]** (Holmes, J.) ("Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business"). Moreover, **[****141]** the majority's test is not consistent with what the Court saw as the point of the cases that the majority now characterizes. Although the majority today attempts to categorize *Perez, McClung*, and *Wickard* as involving intrastate "economic activity," ante, at 559, the Courts that decided each of those cases did *not* focus upon the economic nature of the activity regulated. Rather, they focused upon whether that activity *affected* interstate or foreign commerce. In fact, the *Wickard* Court expressly held that Filburn's consumption of homegrown wheat, "*though it may not be regarded* **[**1664]** *as commerce*," could nevertheless be regulated -- "*whatever its nature*" -- so long as "it exerts a substantial economic effect on interstate commerce." Wickard, supra, at 125 (emphasis added).

More importantly, if a distinction between commercial and noncommercial activities is to be made, this is not the case in which to make it. The majority clearly cannot intend such a distinction to focus narrowly on an act of gun possession standing by itself, for such a reading could not be reconciled with either the civil rights cases (*McClung* and *Daniel*) or *Perez* -- in **[****142]** each of those cases the specific transaction (the race-based exclusion, the use of force) was not itself "commercial." And, if the majority instead means to distinguish generally among broad categories of activities, differentiating what is educational from what is commercial, then, as a **[*629]** practical matter, the line becomes almost impossible to draw. Schools that teach reading, writing, mathematics, and related basic skills serve *both* social and commercial purposes, and one cannot easily separate the one from the other. American industry itself has been, and is again, involved in teaching. See *supra, at 620, 622*. When, and to what extent, does its involvement make education commercial? Does the number of vocational classes that train students directly for jobs make a difference? Does it matter if the school is public or private, nonprofit or profit seeking? Does it matter if a city or State adopts a voucher plan that pays private firms to run a school? Even if one were to ignore these practical questions, why should there be a theoretical distinction between education, when it significantly benefits commerce, and environmental pollution, when it causes economic harm? See *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 69 L. Ed. 2d 1, 101 S. Ct. 2352 (1981)*.

[**143]** Regardless, if there is a principled distinction that could work both here and in future cases, Congress (even in the absence of vocational classes, industry involvement, and private management) could rationally conclude that schools fall on the commercial side of the line. In 1990, the year Congress enacted the statute before us, primary and secondary schools spent $ 230 billion -- that is, nearly a quarter of a trillion dollars -- which accounts for a significant portion of our $ 5.5 trillion gross domestic product for that year. See Statistical Abstract 147, 442 (1993). The business of schooling requires expenditure of these funds on student transportation, food and custodial services, books, and teachers' **[***683]** salaries. See U.S. Dept. of Education 4, 7 (1993). These expenditures enable schools to provide a valuable service -- namely, to equip students with the skills they need to survive in life and, more specifically, in the workplace. Certainly, Congress has often analyzed school expenditure as if it were a commercial investment, closely analyzing whether schools are efficient, whether they justify the significant resources **[*630]** they spend, and whether they can be restructured to achieve **[****144]** greater returns. See, *e. g.*, S. Rep. No. 100-222, p. 2 (1987) (federal school assistance is "a prudent investment"); Senate Appropriations Committee Hearing (1994) (private sector management of public schools); cf. Chubb & Moe 185-229 (school choice); Hanushek 85-122 (performance based incentives for educators); Gibbs (decision in Hartford, Conn., to contract out public school system). Why could Congress, for *Commerce Clause* purposes, not consider schools as roughly analogous to commercial investments from which the Nation derives the benefit of an educated work force?

The third legal problem created by the Court's holding is that it threatens legal uncertainty in an area of law that, until this case, seemed reasonably well settled. Congress has enacted many statutes (more than 100 sections of the United States Code), including criminal statutes (at least 25 sections), that use the words "affecting commerce" to define their scope, see, *e. g.*, *18 U.S.C. § 844(i)* (destruction of buildings used in activity affecting interstate commerce), and other statutes that contain no jurisdictional language at all, see, *e. g.*, *18 U.S.C. § 922* **[****145]** (*o*)(1) (possession of machineguns). Do these, or similar, statutes regulate noncommercial activities? If so, would that alter the meaning of "affecting commerce" in a jurisdictional element? Cf. *United States v. Staszcuk, 517 F.2d 53, 57-58 (CA7 1975)* (en **[**1665]** banc) (Stevens, J.) (evaluation of Congress' intent "requires more than a consideration of the consequences of the particular transaction"). More importantly, in the absence of a jurisdictional element, are the courts nevertheless to take *Wickard, 317 U.S. at 127-128*, (and later similar cases) as inapplicable, and to judge the effect of a single noncommercial activity on interstate commerce without considering similar instances of the forbidden conduct? However these questions are eventually resolved, the legal uncertainty now created will restrict Congress' ability to enact criminal laws aimed at criminal behavior that, considered problem by problem rather **[*631]** than instance by instance, seriously threatens the economic, as well as social, well-being of Americans.

IV

In sum, to find this legislation within the scope of the *Commerce Clause* would permit "Congress . . . **[****146]** to act in terms of economic . . . realities." *North American Co. v. SEC, 327 U.S. at 705* (citing *Swift & Co. v. United States, 196 U.S. at 398* (Holmes, J.)). It would interpret the Clause as this Court has traditionally interpreted it, with the exception of one wrong turn subsequently corrected. See *Gibbons v. Ogden, 9 Wheat., at 195* (holding that the commerce power extends "to all the external concerns of the nation, and to those internal concerns which affect the States generally **[***684]** "); *United States v. Darby, 312 U.S. at 116-117* ("The conclusion is inescapable that *Hammer* v. *Dagenhart* [the child labor case] was a departure from the principles which have prevailed in the interpretation of the *Commerce Clause* both before and since the decision . . . . It should be and now is overruled").

Upholding this legislation would do no more than simply recognize that Congress had a "rational basis" for finding a significant connection between guns in or near schools and (through their effect on education) the interstate and foreign commerce **[****147]** they threaten. For these reasons, I would reverse the judgment of the Court of Appeals. Respectfully, I dissent.

APPENDIX TO OPINION OF BREYER, J.

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15A Am Jur 2d, Commerce 9, *16*, *78-80*; *79 Am Jur 2d, Weapons and Firearms 6*

USCS, Constitution, Art I, 8, cl 3; *18 USCS 922(q)(1)(A)*

L Ed Digest, Commerce 78

L Ed Index, Commerce; Weapons and Firearms

ALR Index, *Commerce Clause*; Police Power; Weapons and Firearms

Annotation References:

What constitutes receipt of firearm, under *18 USCS 922(h)*, prohibiting certain persons from receiving any firearm which has been shipped or transported **[****165]** in interstate or foreign commerce. 74 ALR Fed 486.

Receipt, possession, or transportation of multiple firearms as single or multiple offense under 18 USCS Appx 1202(a)(1), making it federal offense for convicted felon to receive ,possess, or transport any firearm. 62 ALR Fed 829.

Compliance with provision of Gun Control Act of 1968 (*18 USCS 922(e)*) regulating transportation of firearms on carrier. 60 ALR Fed 305.

Seizure and forfeiture of firearms or ammunition under *18 USCS 924(d)*. 57 ALR Fed 234.

Validity, construction, and application of *18 USCS 922(a)(6)*, making it unlawful to knowingly make any false or fictitious oral or written statement in connection with the acquisition or attempted acquisition of any firearm or ammunition. 43 ALR Fed 338.

[Brown v. Pro Football](#)

Supreme Court of the United States

March 27, 1996, Argued ; June 20, 1996, Decided

No. 95-388

Reporter

518 U.S. 231 *; 116 S. Ct. 2116 **; 135 L. Ed. 2d 521 ***; 1996 U.S. LEXIS 4047 ****; 64 U.S.L.W. 4554; 131 Lab. Cas. (CCH) P11,588; 1996-1 Trade Cas. (CCH) P71,445; 96 Cal. Daily Op. Service 4419; 152 L.R.R.M. 2513; 96 Daily Journal DAR 7174; 96 Daily Journal DAR 8318; 10 Fla. L. Weekly Fed. S 14

ANTONY BROWN, ET AL., PETITIONERS v. PRO FOOTBALL, INC., DBA WASHINGTON REDSKINS, ET AL.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Disposition: *50 F.3d 1041*, affirmed.

Core Terms

exemption, bargaining, antitrust, impasse, collective-bargaining, labor law, negotiations, collective bargaining, anti trust law, multiemployer, players, bargaining process, terms, parties, courts, nonstatutory, salaries, immunity, wages, anticompetitive, employees, squad, bargaining unit, policies, unilaterally, developmental, cases, antitrust liability, labor policy, club owner

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN1[] **Labor, Nonstatutory Exemptions**

An organization engaged in collective bargaining can claim a narrow immunity from an antitrust suit, resting upon a "nonstatutory" labor exemption from the antitrust laws. The exemption from federal labor statutes sets forth a national labor policy favoring free and private collective bargaining.

Antitrust & Trade Law > Exemptions & Immunities > Labor > Nonstatutory Exemptions

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > Statutory Exemptions

HN2[] **Labor, Nonstatutory Exemptions**

The implicit, "nonstatutory," exemption interprets the labor statutes in accordance with the intent of limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict.

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

HN3[] **Exemptions & Immunities, Labor**

The implicit exemption recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Bargaining Subjects

Labor & Employment Law > Collective Bargaining & Labor Relations > Impasse Resolution

HN4[] **Collective Bargaining & Labor Relations, Bargaining Subjects**

After impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN5[] **Collective Bargaining & Labor Relations, Duty to Bargain**

The collective-bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith.

Labor & Employment Law > Collective Bargaining & Labor Relations > Impasse Resolution

HN6[] **Collective Bargaining & Labor Relations, Impasse Resolution**

Impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process.

Business & Corporate Compliance > ... > Labor & Employment Law > Collective Bargaining & Labor Relations > Duty to Bargain

Labor & Employment Law > Collective Bargaining & Labor Relations > Impasse Resolution

HN7[] **Collective Bargaining & Labor Relations, Duty to Bargain**

Employers are not completely free at impasse to act independently. The multi-employer bargaining unit ordinarily remains intact; individual employers cannot withdraw.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > Regulated Industries > Sports > General Overview

Antitrust & Trade Law > Regulated Industries > Sports > Football

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

HN8[] **Higher Education & Professional Associations, Colleges & Universities**

The clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival. In certain contexts, however, that circumstance makes the league more like a single bargaining employer.

Lawyers' Edition Display

Decision

National Football League's unilateral implementation of developmental squad program after collective bargaining impasse held shielded from federal antitrust attack pursuant to nonstatutory labor exemption.

Summary

In 1987, a collective bargaining agreement between the National Football League (NFL) and the football players' union expired. In 1989, during the negotiations for a new contract, the NFL adopted a plan to permit each club in the league to establish a "developmental squad" of up to six players who would play in practice games and sometimes in regular games as substitutes for injured players. The NFL proposed a squad player salary of $ 1,000 per week. The union, however, insisted that the club owners give squad players benefits and protections similar to those provided regular players. After negotiations on the issue of developmental squad salaries reached an impasse, the NFL unilaterally implemented the developmental squad program by distributing to the clubs a uniform contract that embodied the terms of the program and the $ 1,000 proposed weekly salary. In 1990, 235 squad players brought suit in the United States District Court for the District of Columbia against the NFL and its member clubs, in which suit it was claimed that the employers' agreement to pay the squad players a $ 1,000 weekly salary violated the Sherman Act (*15 USCS 1 et seq.*). The District Court, denying the employers' claim of exemption from the antitrust laws, ultimately entered judgment on a jury treble-damage award that exceeded $ 30 million. The United States Court of Appeals for the District of Columbia Circuit, in reversing, interpreted federal labor law as

waiving antitrust liability for restraints on competition imposed through the collective bargaining process, so long as such restraints operated primarily in a labor market characterized by collective bargaining (*50 F3d 1041*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Breyer, J., joined by Rehnquist, Ch. J., and O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg, JJ., it was held that (1) the nonstatutory labor exemption shields from federal antitrust attack an agreement among several employers bargaining together to implement, after a collective bargaining impasse, the terms of the employers' last best good-faith wage offer; (2) with respect to the application of the nonstatutory labor exemption to multiemployer collective bargaining, there was no basis for distinguishing football players from other organized workers; and (3) in the case at hand, the nonstatutory labor exemption applied to the NFL's unilateral implementation of the developmental squad program.

Stevens, J., dissenting, expressed the view that (1) neither the policies underlying the labor and antitrust statutory schemes, nor the purpose of the nonstatutory exemption, provided a justification for exempting from antitrust scrutiny collective action initiated by employers to depress wages below the level that would be produced in a free market; and (2) given the unique features of the case at hand, the employers ought not have been entitled to a judicially crafted exemption from antitrust liability.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]

The nonstatutory labor exemption shields from federal antitrust attack an agreement among several employers bargaining together to implement, after a collective bargaining impasse, the terms of the employers' last best good-faith wage offer--on the assumption that such conduct is unobjectionable as a matter of labor law and policy--as (1) multiemployer bargaining itself is a well-established, important, and pervasive method of collective bargaining, offering advantages to both management and labor; (2) to subject the practice in question to ***antitrust law*** is to (a) require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours, and working conditions is to proceed--the very result that the implicit labor exemption seeks to avoid--and (b) place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve; and (3) to permit antitrust liability threatens to introduce instability and uncertainty into the collective bargaining process, for ***antitrust law*** often forbids or discourages the kinds of joint discussions and behavior that the collective bargaining process invites or requires. (Stevens, J., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- football league -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

With respect to a football league's "developmental squad" program, which permits each club in the league to establish a squad of nonregular players who each receive the same fixed salary per week, the implicit nonstatutory labor exemption from the federal antitrust laws applies to the league's unilateral implementation of the program after a collective bargaining impasse with the players' union, where the league's conduct--distributing to the clubs a uniform contract embodying the terms of the program and the proposed weekly salary--(1) takes place during and immediately after a collective bargaining negotiation; (2) grows out of, and is directly related to, the lawful operation of the bargaining process; (3) involves a matter that the parties were required to negotiate collectively; and (4) concerns only the parties to the collective bargaining relationship. (Stevens, J., dissented from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]

The legal existence of the nonstatutory labor exemption from the federal antitrust laws must be conceded; this exemption, which has been implied from federal labor statutes, (1) interprets the labor statutes as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a reasonable practice, (2) substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict, and (3) recognizes that, to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions.

LABOR §47 > federal statutes -- > Headnote:
LEdHN[4][] [4]

Federal labor statutes (1) set forth a national labor policy favoring free and private collective bargaining; (2) require good-faith bargaining over wages, hours, and working conditions; and (3) delegate related rule-making and interpretive authority to the National Labor Relations Board.

LABOR §24 > bargaining impasse -- > Headnote:
LEdHN[5][] [5]

In order for an employer to be permitted by federal labor law to impose unilaterally, after a collective bargaining impasse, proposed new employment terms concerning a mandatory subject of bargaining, (1) the new terms must be reasonably comprehended within the employer's preimpasse proposals--typically the last rejected proposals--so that the employer does not unfairly undermine the union's status by imposing more or less favorable terms; and (2) the collective bargaining proceeding itself must be free of any unfair labor practice, such as the employer's failure to have bargained in good faith.

APPEAL §1289 > presumptions -- > Headnote:
LEdHN[6][] [6]

In determining, on certiorari, whether the nonstatutory labor exemption shielded from federal antitrust attack an agreement among several employers bargaining together to implement, after a collective bargaining impasse, the terms of the employers' last best good-faith wage offer, the United States Supreme Court will proceed on the assumption that the joint implementation of proposed terms after impasse is a familiar practice in the context of multiemployer bargaining.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > labor law -- > Headnote:
LEdHN[7][] [7]

Unlike federal labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, federal ***antitrust law*** forbids all agreements among competitors-- such as competing employers--that unreasonably lessen competition among or between those competitors in virtually any respect whatsoever.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > factors -- > Headnote:
LEdHN[8][] [8]

Under some circumstances, federal ***antitrust law*** permits judges or juries to premise liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §13 > labor laws -- > Headnote:
LEdHN[9][] [9]

The federal labor laws give the National Labor Relations Board, not antitrust courts, primary responsibility for policing the collective bargaining process; one of the objectives of such laws is to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective bargaining policy.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

The application of the implicit nonstatutory labor exemption from the federal antitrust laws is not limited to labor-management agreements, as such a limitation does not reflect the exemption's rationale; with respect to a multiemployer bargaining process, which necessarily involves many procedural and substantive understandings among participating employers, the nonstatutory labor exemption applies not solely insofar as both labor and management consent to those understandings or to the multiemployer bargaining process itself, as (1) often labor will not, and should not, consent to certain common bargaining positions that employers intend to maintain; and (2) labor need not consent to certain tactics that have been approved by the United States Supreme Court as part of the multiemployer bargaining process, such as unitwide lockouts and the use of temporary replacements.

LABOR §21 > multiemployer bargaining -- > Headnote:
LEdHN[11][] [11]

A union's general consent to the multiemployer bargaining process is automatically present whenever multiemployer bargaining takes place.

LABOR §21 > multiemployer bargaining -- impasse -- > Headnote:
LEdHN[12][] [12]

Employers who have participated in a multiemployer collective bargaining process are not completely free, at impasse, to act independently, as (1) the multiemployer bargaining unit ordinarily remains intact, so that individual employers cannot withdraw; (2) the duty to bargain survives, so that employers must stand ready to resume collective bargaining; and (3) individual employers can negotiate individual interim agreements with the union only insofar as those agreements are consistent with the duty to abide by the results of group bargaining.

LABOR §21 > multiemployer bargaining -- impasse -- > Headnote:
LEdHN[13][] [13]

Labor law permits employers, after impasse in a multiemployer collective bargaining process, to engage in considerable joint behavior, including joint lockouts and replacement hiring; as a general matter, labor law often limits employers at such an impasse to the options of (1) maintaining the status quo, (2) implementing the employers' last offer, (3) locking out the workers and either (a) shutting down, or (b) hiring temporary replacements, or (4) negotiating separate interim agreements with the union.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- > Headnote:
LEdHN[14][] [14]

In determining the applicability of the nonstatutory labor exemption from the federal antitrust laws to an agreement, reached after a collective bargaining impasse, among several employers bargaining together, the United States Supreme Court will not adopt a rule that would (1) extend the exemption after impasse for such time as would be reasonable in the circumstances for employers to (a) consult with counsel, (b) confirm that impasse has occurred, and (c) adjust their business operations, (2) re-establish the exemption once there is a resumption of good-faith bargaining, and (3) look to ***antitrust law***'s "rule of reason" to shield, in some circumstances, such joint actions as the unitwide lockout or the concerted maintenance of previously established joint benefit or retirement plans.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- > Headnote:
LEdHN[15][] [15]

In determining the applicability of the nonstatutory labor exemption from the federal antitrust laws to an agreement, reached after a collective bargaining impasse, among several employers bargaining together, the United States Supreme Court will not adopt a rule that would exempt postimpasse agreement about bargaining "tactics," but not postimpasse agreement about substantive "terms."

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- football players -- > Headnote:
LEdHN[16][] [16]

With respect to the application of the nonstatutory labor exemption from the federal antitrust laws to multiemployer collective bargaining, there is no basis for distinguishing football players from other organized workers, and thus all must abide by the same legal rules, as (1) professional sports are not "special" in respect to labor law's antitrust exemption, and (2) the fact that football players often have special individual talents and often negotiate pay individually with the employers cannot make a critical legal difference in determining the underlying framework in which bargaining is to take place. (Stevens, J., dissented in part from this holding.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §46 > nonstatutory labor exemption -- > Headnote:
LEdHN[17][] [17]

With respect to the United States Supreme Court's holding that the nonstatutory labor exemption shields from federal antitrust attack an agreement among several employers bargaining together to implement, after a collective bargaining impasse, the terms of the employers' last best good-faith wage offer, such a holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process.

LABOR §21 > National Labor Relations Board -- > Headnote:
LEdHN[18][] [18]

Congress intends to leave to the National Labor Relations Board's specialized judgment many of the inevitable questions concerning multiemployer bargaining that are bound to arise in the future.

Syllabus

After their collective-bargaining agreement expired, the National Football League (NFL), a group of football clubs, and the NFL Players Association, a labor union, began to negotiate a new contract. The NFL presented a plan that would permit each club to establish a "developmental squad" of substitute players, each of whom would be paid the same $ 1,000 weekly salary. The union disagreed, insisting that individual squad members should be free to negotiate their own salaries. When negotiations reached an impasse, the NFL unilaterally implemented the plan. A number of squad players brought this antitrust suit, claiming that the employers' agreement to pay them $ 1,000 per week restrained trade in violation of the Sherman **[****2]** Act. The District Court entered judgment for the players on a jury treble-damages award, but the Court of Appeals reversed, holding that the owners were immune from antitrust liability under the federal labor laws.

Held: Federal labor laws shield from antitrust attack an agreement among several employers bargaining together to implement after impasse the terms of their last best good-faith wage offer. Pp. 235-250.

(a) This Court has previously found in the labor laws an implicit, "nonstatutory" antitrust exemption that applies where needed to make the collective-bargaining process work. See, *e. g.,* Connell Constr. Co. v. Plumbers, 421 U.S. 616, 622. The practice here at issue -- the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining -- is unobjectionable as a matter of labor law and policy, and, indeed, plays a significant role in the multiemployer collective-bargaining process that itself comprises an important part of the Nation's industrial relations system. Subjecting it to ***antitrust law*** would threaten to introduce instability and uncertainty into the collective-bargaining process, for antitrust **[****3]** often forbids or discourages the kinds of joint discussions and behavior that collective bargaining invites or requires. Moreover, if antitrust courts tried to evaluate particular kinds of employer understandings, there would be created a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert body, the National Labor Relations Board, to which the labor laws give primary responsibility for policing collective bargaining. Thus, the implicit exemption applies in this case. Pp. 235-242.

(b) Petitioners' claim that the exemption applies only to labor-management *agreements* is rejected, since it is based on inapposite authority, and an exemption limited by petitioners' labor-management-consent principle could not work. Pp. 243-244.

(c) Also rejected is the Solicitor General's argument that the exemption should terminate at the point of impasse. His rationale, that employers are thereafter free as a matter of labor law to negotiate individual arrangements on an interim basis with the union, is not completely accurate. More importantly, the simple "impasse" line would not solve the basic problem **[****4]** that labor law permits employers, after impasse, to engage in considerable joint behavior, while uniform employer conduct -- at least when accompanied by discussion -- invites antitrust attack. Pp. 244-247.

(d) Petitioners' alternative rule, which would exempt from antitrust's reach postimpasse agreements about bargaining "tactics," but not those about substantive "terms," is unsatisfactory because it would require antitrust courts, insulated from the bargaining process, to delve into the amorphous subject of employers' subjective motives in order to determine whether the exemption applied. Pp. 247-248.

(e) Petitioners' arguments relating to general "backdrop" statutes and the "special" nature of professional sports are also rejected. Pp. 248-250.

(f) The antitrust exemption applies to the employer conduct at issue here, which took place during and immediately after a collective-bargaining negotiation; grew out of, and was a directly related to, the lawful operation of the bargaining process; involved a matter that the parties were required to negotiate collectively; and concerned only the parties to the collective-bargaining relationship. The Court's holding is not **[****5]** intended to insulate from antitrust review every joint imposition of terms by employers, for an employer agreement could be sufficiently distant in time and in circumstances from the bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. The Court need not decide in this case whether, or where, to draw the line, particularly since it does not have the detailed views of the Board on the matter. P. 250.

Judges: BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, KENNEDY, SOUTER, THOMAS, and GINSBURG, JJ., joined. STEVENS, J., filed a dissenting opinion, post, p. 252.

Opinion by: BREYER

Opinion

[*528]** **[**2119]** **[*233]** JUSTICE BREYER delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A]The question in this case arises at the intersection of the Nation's labor and antitrust laws. A group of professional **[*234]** football players brought this antitrust suit against football club owners. The club owners had bargained with the players' union over a wage issue until they reached impasse. The owners then had agreed among themselves (but not with the union) to implement the terms of **[****6]** their own last best bargaining offer. The question before us is whether federal labor laws shield such an agreement from antitrust attack. We believe that they do. This Court has previously found in the labor laws an implicit antitrust exemption that applies where needed to make the collective-bargaining process work. Like the Court of Appeals, we conclude that this need makes the exemption applicable in this case.

I

We can state the relevant facts briefly. In 1987, a collective-bargaining agreement between the National Football League (NFL or League), a group of football clubs, and the NFL Players Association, a labor union, expired. The NFL and the Players Association began to negotiate a new contract. In March 1989, during the negotiations, the NFL adopted Resolution G-2, a plan that would permit each club to establish a "developmental squad" of up to six rookie or "first-year" players who, as free agents, had failed to secure a position on a regular player roster. See App. 42. Squad members would play in practice games and sometimes in regular games as substitutes for injured players. Resolution G-2 provided that the club owners would pay all squad members the same weekly salary.

[**7]** The next month, April, the NFL presented the developmental squad plan to the Players Association. The NFL proposed a squad player salary of $ 1,000 per week. The Players Association disagreed. It insisted that the club owners give developmental squad players benefits and protections similar to those provided regular players, and that they leave individual squad members free to negotiate their own salaries.

[*235] Two months later, in June, negotiations on the issue of developmental squad salaries reached an impasse. The NFL then unilaterally implemented the developmental squad program by distributing to the clubs a uniform contract that embodied the terms of Resolution G-2 and the $ 1,000 proposed weekly salary. The League advised club owners that paying developmental squad players more or less than $ 1,000 per week would result in disciplinary action, including the loss of draft choices.

In May 1990, 235 developmental squad players brought this antitrust suit against the League and its member clubs. The players claimed that their employers' agreement to pay them a $ 1,000 weekly salary violated **[***529]** the Sherman Act. See *15 U.S.C. § 1* (forbidding **[****8]** agreements in restraint of trade). The Federal District Court denied the employers' claim of exemption from the antitrust laws; it permitted the case to reach the jury; and it subsequently entered judgment on a jury treble-damages award that exceeded $ 30 million. The NFL and its member clubs appealed.

The Court of Appeals (by a split 2-to-1 vote) reversed. The majority interpreted the labor laws as "waiving anti-trust liability for restraints on competition imposed through the collective-bargaining process, so long as such restraints operate primarily in a labor market characterized by collective bargaining." *50 F.3d 1041, 1056 (CADC 1995)*. The court held, consequently, that the club owners were immune from antitrust liability. We granted certiorari to review that determination. Although we do not interpret the exemption as broadly as did the Appeals Court, we nonetheless find the exemption applicable, and we affirm that court's immunity conclusion.

[2120]** II

LEdHN[3A][] [3A] ***LEdHN[4]***[] [4]***HN1***[] The immunity before us rests upon what this Court has called the "nonstatutory" labor exemption from the antitrust laws. *Connell Constr. Co. v. Plumbers, 421 U.S. 616, 622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*; **[****9]** see also *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596* ***[*236]*** *(1965)*; *Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*. The Court has implied this exemption from federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining, see *29 U.S.C. § 151*; *Teamsters v. Oliver, 358 U.S. 283, 295, 3 L. Ed. 2d 312, 79 S. Ct. 297 (1959)*; which require goodfaith bargaining over wages, hours, and working conditions, see *29 U.S.C. §§ 158(a)(5)*, *158(d)*; *NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 348-349, 2 L. Ed. 2d 823, 78 S. Ct. 718 (1958)*; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board (Board), see *29 U.S.C. § 153*; *San Diego Building Trades Council v. Garmon, 359 U.S. 236, 242-245, 3 L. Ed. 2d 775, 79 S. Ct. 773 (1959)*.

LEdHN[3B][] [3B]This implicit exemption reflects both history and logic. As a matter of history, Congress intended the labor statutes **[****10]** (from which the Court has implied the exemption) in part to adopt the views of dissenting Justices in *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 65 L. Ed. 349, 41 S. Ct. 172 (1921)*, which Justices had urged the Court to interpret broadly a different *explicit* "statutory" labor exemption that Congress earlier (in 1914) had written directly into the antitrust laws. *Id., at 483-488* (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting) (interpreting § 20 of the Clayton Act, 38 Stat. 738, *29 U.S.C. § 52*); see also *United States v. Hutcheson, 312 U.S. 219, 230-236, 85 L. Ed. 788, 61 S. Ct. 463 (1941)* (discussing congressional reaction to *Duplex*). In the 1930's, when it subsequently enacted the labor statutes, Congress, as in 1914, hoped to prevent judicial use of ***antitrust law*** to resolve labor disputes -- a kind of dispute normally inappropriate for ***antitrust law*** resolution. See *Jewel Tea, supra, at 700-709* (opinion of Goldberg, J.); *Marine Cooks v. Panama S. S. Co., 362 U.S. 365, 370, n. 7, 4 L. Ed. 2d 797, 80 S. Ct. 779* ***[***530]*** *(1960)*; **[****11]** A. Cox, Law and the National Labor Policy 3-8 (1960); cf. *Duplex, supra, at 485* (Brandeis, J., dissenting) (explicit "statutory" labor exemption reflected view that "Congress, not the judges, was the body which should declare what public policy in regard to the industrial struggle demands"). ***HN2***[] The implicit ("nonstatutory") exemption interprets the labor statutes in **[*237]** accordance with this intent, namely, as limiting an antitrust court's authority to determine, in the area of industrial conflict, what is or is not a "reasonable" practice. It thereby substitutes legislative and administrative labor-related determinations for judicial antitrust-related determinations as to the appropriate legal limits of industrial conflict. See *Jewel Tea, supra, at 709-710*.

As a matter of logic, it would be difficult, if not impossible, to require groups of employers and employees to bargain together, but at the same time to forbid them to make among themselves or with each other *any* of the competition-restricting agreements potentially necessary to make the process work or its results mutually acceptable. Thus, ***HN3***[] the implicit exemption recognizes that, **[****12]** to give effect to federal labor laws and policies and to allow meaningful collective bargaining to take place, some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions. See *Connell, supra, at 622* (federal labor law's "goals" could "never" be achieved if ordinary anti-competitive effects of collective bargaining were held to violate the antitrust laws); *Jewel Tea, supra, at 711* (national labor law scheme would be "virtually destroyed" by the routine imposition of antitrust penalties upon parties engaged in collective bargaining); *Pennington, supra, at 665* (implicit exemption necessary to harmonize Sherman Act with "national policy . . . of promoting 'the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation'") (quoting *Fibreboard* **[**2121]** *Paper Products Corp. v. NLRB, 379 U.S. 203, 211, 13 L. Ed. 2d 233, 85 S. Ct. 398 (1964))*.

LEdHN[1B][] [1B] ***LEdHN[3C]***[] [3C]The petitioners and their supporters concede, as they must, the legal existence of the exemption we have described. They also concede that, where **[****13]** its application is necessary to make the statutorily authorized collective-bargaining process work as Congress intended, the exemption must apply both to employers and to employees. **[*238]** Accord, *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n, 390 U.S. 261, 287, n. 5, 19 L. Ed. 2d 1090, 88 S. Ct. 929 (1968)* (Harlan, J., concurring); *Jewel Tea, supra, at 729-732, 735* (opinion of Goldberg, J.); Brief for AFL-CIO as *Amicus Curiae* in *Associated Gen. Contractors of Cal., Inc.* v. *Carpenters*, O. T. 1981, No. 81-334, pp. 16-17; see also P. Areeda & H. Hovenkamp, ***Antitrust Law*** P229'd (1995 Supp.) (collecting recent Court of Appeals cases); cf. *H. A. Artists & Associates, Inc. v. Actors' Equity Assn., 451 U.S. 704, 717, n. 20, 68 L. Ed. 2d 558, 101 S. Ct. 2102 (1981)* (explicit "statutory" exemption applies only to "bona fide labor organization[s]"). Nor does the dissent take issue with these basic principles. See *post*, at 253-254. Consequently, the question before us is one of determining **[***531]** the exemption's scope: Does it apply to an agreement among several employers bargaining together **[****14]** to implement after impasse the terms of their last best good-faith wage offer? We assume that such conduct, as practiced in this case, is unobjectionable as a matter of labor law and policy. On that assumption, we conclude that the exemption applies.

LEdHN[5][] [5]Labor law itself regulates directly, and considerably, the kind of behavior here at issue -- the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining. Both the Board and the courts have held that, ***HN4***[] after impasse, labor law permits employers unilaterally to implement changes in pre-existing conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be "reasonably comprehended" within the employer's preimpasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status. *Storer Communications, Inc., 294 N. L. R. B. 1056, 1090 (1989)*; *Taft Broadcasting Co., 163 N. L. R. B. 475, 478 (1967)*, enf'd, *395 F.2d 622 (CADC 1968)*; see also *NLRB v. Katz, 369 U.S. 736, 745, 8 L. Ed. 2d 230, 82 S. Ct. 1107, and n. 12 (1962)*. **[****15]** ***HN5***[] The collective-bargaining proceeding itself must be free of **[*239]** any unfair labor practice, such as an employer's failure to have bargained in good faith. See *Akron Novelty Mfg. Co., 224 N. L. R. B. 998, 1002 (1976)* (where employer has not bargained in good faith, it may not implement a term of employment); 1 P. Hardin, The Developing Labor Law 697 (3d ed. 1992) (same). These regulations reflect the fact that ***HN6***[] impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process. See *Bonanno Linen Serv., Inc., 243 N. L. R. B. 1093, 1094 (1979)* (describing use of impasse as a bargaining tactic), enf'd, *630 F.2d 25 (CA1 1980)*, aff'd, *454 U.S. 404 (1982)*; *Colorado-Ute Elec. Assn., 295 N. L. R. B. 607, 609 (1989)*, enf. denied on other grounds, *939 F.2d 1392 (CA10 1991)*, cert. denied, *504 U.S. 955 (1992)*.

LEdHN[6][] [6]Although the case law we have cited focuses upon bargaining by a single employer, no one here has argued that labor law does, or should, treat multiemployer bargaining differently in this respect. Indeed, Board and court decisions **[****16]** suggest that the joint implementation of proposed terms after impasse is a familiar practice in the context of multiemployer bargaining. See, *e. g., El Cerrito Mill & Lumber Co., 316 N. L. R. B. 1005 (1995)*; *Paramount Liquor Co., 307 N. L. R. B. 676, 686 (1992)*; *NKS Distributors, Inc., 304 N. L. R. B. 338, 340-341 (1991)*, rev'd, *50 F.3d 18 (CA9 1995)*; *Sage Development Co., 301 N. L. R. B. 1173, 1175 (1991)*; *Walker Constr. Co., 297 N. L. R. B. 746, 748 (1990)*, enf'd, *928 F.2d 695 (CA5 1991)*; *Food Employers Council, Inc., 293 N. L. R. B. 333, 334, 345-346 (1989)*; *Tile, Terazzo & Marble Contractors Assn., 287 N. L. R. B. 769, 772 (1987)*, enf'd, *935 F.2d 1249 (CA11 1991)*, cert. denied, *502 U.S. 1031* ***[**2122]*** *(1992)*; *Salinas Valley Ford Sales, Inc., 279 N. L. R. B. 679, 686, 690 (1986)*; *Carlsen Porsche Audi, Inc., 266 N. L. R. B. 141, 152-153 (1983)*; *Typographic Service Co., 238 N. L. R. B. 1565 (1978)*; *United Fire Proof Warehouse Co. v. NLRB, 356 F.2d 494, 498-499 (CA7 1966)*; **[****17]** *Cuyamaca Meats, Inc. v. Butchers'* ***[*240]*** *and Food* ***[***532]*** *Employers' Pension Trust Fund, 638 F. Supp. 885, 887 (SD Cal. 1986)*, aff'd, *827 F.2d 491 (CA9 1987)*, cert. denied, *485 U.S. 1008 (1988)*. We proceed on that assumption.

LEdHN[1C][] [1C]Multiemployer bargaining itself is a well-established, important, pervasive method of collective bargaining, offering advantages to both management and labor. See Appendix, *infra*, p. 251 (multiemployer bargaining accounts for more than 40% of major collective-bargaining agreements, and is used in such industries as construction, transportation, retail trade, clothing manufacture, and real estate, as well as professional sports); *NLRB v. Truck Drivers, 353 U.S. 87, 95, 1 L. Ed. 2d 676, 77 S. Ct. 643 (1957)* *(Buffalo Linen)* (Congress saw multiemployer bargaining as "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining"); *Charles D. Bonanno Linen Service, Inc. v. NLRB, 454 U.S. 404, 409, n. 3, 70 L. Ed. 2d 656, 102 S. Ct. 720 (1982)* *(Bonanno Linen)* (multiemployer bargaining **[****18]** benefits both management and labor, by saving bargaining resources, by encouraging development of industry-wide worker benefits programs that smaller employers could not otherwise afford, and by inhibiting employer competition at the workers' expense); Brief for Respondent NLRB in *Bonanno Linen*, O. T. 1981, No. 80-931, p. 10, n. 7 (same); General Subcommittee on Labor, House Committee on Education and Labor, Multiemployer Association Bargaining and its Impact on the Collective Bargaining Process, 88th Cong., 2d Sess., 10-19, 32-33 (Comm. Print 1964) (same); see also C. Bonnett, Employers' Associations in the United States: A Study of Typical Associations (1922) (history). The upshot is that the practice at issue here plays a significant role in a collective-bargaining process that itself constitutes an important part of the Nation's industrial relations system.

LEdHN[1D][] [1D] ***LEdHN[7]***[] [7] ***LEdHN[8]***[] [8]In these circumstances, to subject the practice to ***antitrust law*** is to require antitrust courts to answer a host of important practical questions about how collective bargaining over **[*241]** wages, hours, and working conditions is to proceed -- the very result that the implicit labor exemption seeks to avoid. And it **[****19]** is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anticompetitive agreements conducive to industrial harmony, ***antitrust law*** forbids all agreements among competitors (such as competing employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever. See, *e.g., Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 75 L. Ed. 145, 51 S. Ct. 42 (1930)* (agreement to insert arbitration provisions in motion picture licensing contracts).

Antitrust law also sometimes permits judges or juries to premise antitrust liability upon little more than uniform behavior among competitors, preceded by conversations implying that later uniformity might prove desirable, see, *e.g., United States v. General Motors Corp., 384 U.S. 127, 142-143, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *United States v. Foley, 598 F.2d 1323, 1331-1332 (CA4 1979)*, cert. denied, *444 U.S. 1043, 62 L. Ed. 2d 728, 100 S. Ct. 727, 100 S. Ct. 728 (1980)*, or accompanied by other **[****20]** conduct that in context suggests that each competitor failed to make an independent decision, see, *e.g., American* **[***533]** *Tobacco Co. v. United States, 328 U.S. 781, 809-810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*; *United States v. Masonite Corp., 316 U.S. 265, 275, 86 L. Ed. 1461, 62 S. Ct. 1070 (1942)*; *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-227, 83 L. Ed. 610, 59 S. Ct. 467 (1939)*. See generally 6 P. Areeda, ***Antitrust Law*** PP1416-1427 (1986); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962).

LEdHN[1E][] [1E]If the antitrust laws apply, what are employers to do once impasse is reached? If all **[**2123]** impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair **[*242]** labor practice charge. Indeed, how can employers safely discuss their **[****21]** offers together even before a bargaining impasse occurs? A preimpasse discussion about, say, the practical advantages or disadvantages of a particular proposal invites a later antitrust claim that they agreed to limit the kinds of action each would later take should an impasse occur. The same is true of postimpasse discussions aimed at renewed negotiations with the union. Nor would adherence to the terms of an expired collective-bargaining agreement eliminate a potentially plausible antitrust claim charging that they had "conspired" or tacitly "agreed" to do so, particularly if maintaining the status quo were not in the immediate economic self-interest of some. Cf. *Interstate Circuit, supra, at 222-223*; 6 Areeda, *supra*, P1425. All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for ***antitrust law*** often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires.

LEdHN[9][] [9]We do not see any obvious answer to this problem. We recognize, as the Government suggests, that, in principle, antitrust courts might themselves **[****22]** try to evaluate particular kinds of employer understandings, finding them "reasonable" (hence lawful) where justified by collective-bargaining necessity. But any such evaluation means a web of detailed rules spun by many different nonexpert antitrust judges and juries, not a set of labor rules enforced by a single expert administrative body, namely the Board. The labor laws give the Board, not antitrust courts, primary responsibility for policing the collective-bargaining process. And one of their objectives was to take from antitrust courts the authority to determine, through application of the antitrust laws, what is socially or economically desirable collective-bargaining policy. See *supra, at 236-237*; see also *Jewel Tea, 381 U.S. at 716-719* (opinion of Goldberg, J.).

[*243] III

Both petitioners and their supporters advance several suggestions for drawing the exemption boundary line short of this case. We shall explain why we find them unsatisfactory.

A

LEdHN[10A][] [10A]Petitioners claim that the implicit exemption applies only to labor-management **[***534]** *agreements* -- a limitation that they deduce from case law language, see, *e.g., Connell, 421 U.S. at 622* **[****23]** (exemption for "some union-employer *agreements*") (emphasis added), and from a proposed principle -- that the exemption must rest upon labor-management consent. The language, however, reflects only the fact that the cases previously before the Court involved collective-bargaining agreements, see *id., at 619-620*; *Pennington, 381 U.S. at 660*; *Jewel Tea, supra, at 679-680*; the language does not reflect the exemption's rationale, see *50 F.3d, at 1050*.

Nor do we see how an exemption limited by petitioners' principle of labor-management consent could work. One cannot mean the principle literally -- that the exemption applies only to understandings embodied in a collective-bargaining agreement -- for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired. Yet a multiemployer bargaining process itself necessarily involves many procedural and substantive understandings among participating employers as well as with the union. Petitioners cannot rescue their principle by claiming that the exemption applies only insofar as *both* labor and management consent **[****24]** to those understandings. Often labor will not (and should not) consent to certain common bargaining positions that employers intend to maintain. Cf. Areeda & Hovenkamp, ***Antitrust Law*** P229'd, at 277 ("Joint employer preparation **[**2124]** and bargaining in the context of a formal multi-employer bargaining unit is clearly exempt"). Similarly, labor need not consent to certain tactics that this Court has approved as part of the multiemployer **[*244]** bargaining process, such as unit-wide lockouts and the use of temporary replacements. See *NLRB v. Brown, 380 U.S. 278, 284, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965)*; *Buffalo Linen*, 353 U.S. at 97.

LEdHN[10B][] [10B] ***LEdHN[11]***[] [11]Petitioners cannot save their consent principle by weakening it, as by requiring union consent only to the multiemployer bargaining process itself. This general consent is automatically present whenever multiemployer bargaining takes place. See *Hi-Way Billboards, Inc., 206 N. L. R. B. 22 (1973)* (multiemployer unit "based on consent" and "established by an unequivocal agreement by the parties"), enf. denied on other grounds, *500 F.2d 181 (CA5 1974)*; *Weyerhaeuser Co., 166 N. L. R. B. 299, 299-300 (1967)*. **[****25]** As so weakened, the principle cannot help decide *which* related practices are, or are not, subject to antitrust immunity.

B

The Solicitor General argues that the exemption should terminate at the point of impasse. After impasse, he says, "employers no longer have a duty under the labor laws to maintain the status quo," and "are free as a matter of labor law to negotiate individual arrangements on an interim basis with the union." Brief for United States et al. as *Amici Curiae* 17.

LEdHN[12][] [12]***HN7***[] Employers, however, are not completely free at impasse to act independently. The multiemployer bargaining unit ordinarily remains intact; individual employers cannot withdraw. *Bonanno Linen, 454 U.S. at 410-413*. The duty to bargain survives; **[***535]** employers must stand ready to resume collective bargaining. See, *e.g., Worldwide Detective Bureau, 296 N. L. R. B. 148, 155 (1989)*; *Hi-Way Billboards, Inc., supra*, at 23. And individual employers can negotiate individual interim agreements with the union only insofar as those agreements are consistent with "the duty to abide by the results of group bargaining." *Bonanno Linen, supra, at 416*. **[****26]** Regardless, the absence of a legal "duty" to act jointly is not determinative. This Court has implied antitrust immunities **[*245]** that extend beyond statutorily *required* joint action to joint action that a statute "expressly or impliedly allows or assumes must also be immune." 1 P. Areeda & D. Turner, ***Antitrust Law*** P224, p. 145 (1978); see, *e.g., Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 682-691, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)* (immunizing application of joint rule that securities law permitted, but did not require); *United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694, 720-730, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975)* (same).

LEdHN[13][] [13]More importantly, the simple "impasse" line would not solve the basic problem we have described above. *Supra, at 241-242*. Labor law permits employers, after impasse, to engage in considerable joint behavior, including joint lockouts and replacement hiring. See, *e.g., Brown, supra, at 289* (hiring of temporary replacement workers after lockout was "reasonably adapted to the achievement of a legitimate end -- preserving **[****27]** the integrity of the multiemployer bargaining unit"). Indeed, as a general matter, labor law often limits employers to four options at impasse: (1) maintain the status quo, (2) implement their last offer, (3) lock out their workers (and either shut down or hire temporary replacements), or (4) negotiate separate interim agreements with the union. See generally 1 Hardin, The Developing Labor Law, at 516-520, 696-699. What is to happen if the parties cannot reach an interim agreement? The other alternatives are limited. Uniform employer conduct is likely. Uniformity -- at least when accompanied by discussion of the matter -- invites antitrust attack. And such attack would ask antitrust courts to decide the lawfulness of activities intimately related to the bargaining process.

The problem is aggravated by the fact that "impasse" is often temporary, see *Bonanno Linen, supra, at 412* (approving Board's view of impasse as "a recurring feature in the bargaining process, . . . a **[**2125]** temporary deadlock or hiatus in negotiations which in almost all cases is eventually broken, through either a change of mind or the application of economic force") (internal quotation **[****28]** marks omitted); W. Simkin **[*246]** & N. Fidandis, Mediation and the Dynamics of Collective Bargaining 139-140 (2d ed. 1986); it may differ from bargaining only in degree, see 1 Hardin, *supra*, at 691-696; *Taft Broadcasting Co.*, 163 N. L. R. B., at 478; it may be manipulated by the parties for bargaining purposes, see *Bonanno Linen, supra, at 413, n. 8* (parties might, for strategic purposes, "precipitate an impasse"); and it may occur several times during the course of a single labor dispute, since the bargaining process is not over when the first impasse is reached, cf. J. Bartlett, Familiar Quotations 754:8 (16th ed. 1992). How are employers to discuss future bargaining positions **[***536]** during a temporary impasse? Consider, too, the adverse consequences that flow from failing to guess how an *antitrust* court would later draw the impasse line. Employers who erroneously concluded that impasse had *not* been reached would risk antitrust liability were they collectively to maintain the status quo, while employers who erroneously concluded that impasse *had* occurred would risk unfair labor practice charges for prematurely suspending **[****29]** multiemployer negotiations.

LEdHN[14][] [14]The Solicitor General responds with suggestions for softening an "impasse" rule by extending the exemption after impasse "for such time as would be reasonable in the circumstances" for employers to consult with counsel, confirm that impasse has occurred, and adjust their business operations, Brief for United States et al. as *Amici Curiae* 24; by reestablishing the exemption once there is a "resumption of goodfaith bargaining," *id., at 18, n. 5*; and by looking to ***antitrust law***'s "rule of reason" to shield -- "in some circumstances" -- such joint actions as the unit-wide lockout or the concerted maintenance of previously established joint benefit or retirement plans, *ibid.* But even as so modified, the impasserelated rule creates an exemption that can evaporate in the middle of the bargaining process, leaving later antitrust courts free to second-guess the parties' bargaining decisions **[*247]** and consequently forcing them to choose their collective-bargaining responses in light of what they predict or fear that antitrust courts, not labor law administrators, will eventually decide. Cf. *Dallas General Drivers, Warehousemen and Helpers, Local Union No. 745 v. NLRB, 122 U.S. App. D.C. 417, 355 F.2d 842, 844-845 (CADC 1966)* **[****30]** ("The problem of deciding when further bargaining . . . is futile is often difficult for the bargainers and is necessarily so for the Board. But in the whole complex of industrial relations few issues are less suited to appellate judicial appraisal . . . or better suited to the expert experience of a board which deals constantly with such problems").

C

LEdHN[15][] [15]Petitioners and their supporters argue in the alternative for a rule that would exempt postimpasse agreement about bargaining "tactics," but not postimpasse agreement about substantive "terms," from the reach of antitrust. See *50 F.3d, at 1066-1069* (Wald, J., dissenting). They recognize, however, that both the Board and the courts have said that employers can, and often do, employ the imposition of "terms" as a bargaining "tactic." See, *e.g., American Ship Building Co. v. NLRB, 380 U.S. 300, 316, 13 L. Ed. 2d 855, 85 S. Ct. 955 (1965)*; *Colorado-Ute Elec. Assn., Inc. v. NLRB, 939 F.2d 1392, 1404 (CA10 1991)*, cert. denied, *504 U.S. 955 (1992)*; *Circuit-Wise, Inc., 309 N. L. R. B. 905, 921 (1992)*; *Hi-Way Billboards*, 206 N. L. R. B., at 23; **[****31]** *Bonanno Linen*, 243 N. L. R. B., at 1094. This concession as to joint "tactical" implementation would turn the presence of an antitrust exemption upon a determination of the employers' primary purpose or motive. See, *e.g.*, *50 F.3d, at 1069* (Wald, J., dissenting). But to ask antitrust courts, insulated from the bargaining process, to investigate an employer group's subjective motive is to ask them to conduct an inquiry often more amorphous than those we have previously discussed. And, in our view, a labor/antitrust line drawn on such a basis would too often raise **[*248]** the same related (previously **[***537]** discussed) problems. See *supra, at 237, 241-242*; *Jewel Tea, 381 U.S. at 716* **[**2126]** (opinion of Goldberg, J.) (expressing concern about antitrust judges "roaming at large" through the bargaining process).

D

Petitioners make several other arguments. They point, for example, to cases holding applicable, in collective-bargaining contexts, general "backdrop" statutes, such as a state statute requiring a plant-closing employer to make employee severance payments, *Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987)*, **[****32]** and a state statute mandating certain minimum health benefits, *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985)*. Those statutes, however, "'neither encouraged nor discouraged the collective-bargaining processes that are the subject of the [federal labor laws].'" *Fort Halifax, supra, at 21* (quoting *Metropolitan Life, supra, at 755*). Neither did those statutes come accompanied with antitrust's labor-related history. Cf. *Oliver, 358 U.S. at 295-297* (state ***antitrust law*** interferes with collective bargaining and is not applicable to labor-management agreement).

LEdHN[16][] [16]Petitioners also say that irrespective of how the labor exemption applies elsewhere to multiemployer collective bargaining, professional sports is "special." We can understand how professional sports may be special in terms of, say, interest, excitement, or concern. But we do not understand how they are special in respect to labor law's antitrust exemption. We concede that **HN8**[] the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree **[****33]** of cooperation for economic survival. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 101-102, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*; App. 110-115 (declaration of NFL Commissioner). In the present context, however, that circumstance **[*249]** makes the league more like a single bargaining employer, which analogy seems irrelevant to the legal issue before us.

We also concede that football players often have special individual talents, and, unlike many unionized workers, they often negotiate their pay individually with their employers. See *post*, at 255 (STEVENS, J., dissenting). But this characteristic seems simply a feature, like so many others, that might give employees (or employers) more (or less) bargaining power, that might lead some (or all) of them to favor a particular kind of bargaining, or that might lead to certain demands at the bargaining table. We do not see how it could make a critical legal difference in determining the underlying framework in which bargaining is to take place. See generally Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971). **[****34]** Indeed, it would be odd to fashion an antitrust exemption that gave additional advantages to professional football players (by virtue of their superior bargaining power) that transport workers, coal miners, or meat packers would not enjoy.

The dissent points to other "unique features" of the parties' collective-bargaining relationship, which, in **[***538]** the dissent's view, make the case "atypical." *Post*, at 255. It says, for example, that the employers imposed the restraint simply to enforce compliance with league-wide rules, and that the bargaining consisted of nothing more than the sending of a "notice," and therefore amounted only to "so-called" bargaining. *Post*, at 256-257. Insofar as these features underlie an argument for looking to the employers' true purpose, we have already discussed them. See *supra, at 247-248*. Insofar as they suggest that there was not a genuine impasse, they fight the basic assumption upon which the District Court, the Court of Appeals, petitioners, and this Court rest the case. See *782 F. Supp. 125, 134 (DC 1991)*; *50 F.3d, at 1056-1057*; Pet. for Cert. i. Ultimately, we cannot find a satisfactory basis for distinguishing **[****35]** football players from **[*250]** other organized workers. We therefore conclude that all must abide by the same legal rules.

* * *

LEdHN[2B][] [2B] **[**2127]** For these reasons, we hold that the implicit ("nonstatutory") antitrust exemption applies to the employer conduct at issue here. That conduct took place during and immediately after a collective-bargaining negotiation. It grew out of, and was directly related to, the lawful operation of the bargaining process. It involved a matter that the parties were required to negotiate collectively. And it concerned only the parties to the collective-bargaining relationship.

LEdHN[17][] [17] **LEdHN[18]**[] [18]Our holding is not intended to insulate from antitrust review every joint imposition of terms by employers, for an agreement among employers could be sufficiently distant in time and in circumstances from the collective-bargaining process that a rule permitting antitrust intervention would not significantly interfere with that process. See, *e.g.*, *50 F.3d, at 1057* (suggesting that exemption lasts until collapse of the collective-bargaining relationship, as evidenced by decertification of the union); *El Cerrito Mill & Lumber Co.*, 316 N. L. R. B., at 1006-1007 **[****36]** (suggesting that "extremely long" impasse, accompanied by "instability" or "defunctness" of multiemployer unit, might justify union withdrawal from group bargaining). We need not decide in this case whether, or where, within these extreme outer boundaries to draw that line. Nor would it be appropriate for us to do so without the detailed views of the Board, to whose "specialized judgment" Congress "intended to leave" many of the "inevitable questions concerning multiemployer bargaining bound to arise in the future." *Buffalo Linen*, 353 U.S. at 96 (internal quotation marks omitted); see also *Jewel Tea, 381 U.S. at 710, n. 18*.

The judgment of the Court of Appeals is affirmed.

It is so ordered.

[*539]** **[*251]** APPENDIX TO OPINION OF THE COURT

TABLE A

MAJOR BARGAINING UNITS AND EMPLOYMENT IN PRIVATE

INDUSTRY, BY TYPE OF BARGAINING UNIT, 1994.

(Covers bargaining units of 1,000 or more workers.)

	Number		Percent	
Type	**Units**	**Employment**	**Units**	**Employment**
I	522	2,305,478	44	43
M&S	664	3,040,159	56	57
Total	1,186	5,345,637	100	100

I = Multiemployer.

M = One company, more than one location.

[**37]** S = One company, single location.

SOURCE: U.S. Dept. of Labor, Bureau of Labor Statistics, unpublished data (Feb. 14, 1996) (available in Clerk of Court's case file).

TABLE B

MAJOR MULTIEMPLOYER COLLECTIVE BARGAINING UNITS AND

EMPLOYMENT IN PRIVATE INDUSTRY, BY INDUSTRY, 1994.

(Covers bargaining units of 1,000 or more workers.)

	Number		Percent	
Type	**Units**	**Employment**	**Units**	**Employment**
All industries	522	2,305,478	100	100
Manufacturing	45	210,050	9	9
Food	13	50,750	2	2
Apparel	23	141,600	4	6
Other	9	17,700	2	1
Nonmanufacturing	477	2,095,428	91	91
Mining	2	267,500	(1)	3
Construction	337	995,443	65	43
Railroads	12	189,183	2	8
Other transportation	20	156,662	4	7
Wholesale trade	6	8,500	1	(1)
Retail trade	37	314,100	7	14
Real estate	11	85,800	2	4
Hotels and motels	11	79,200	2	3
Business services	13	63,200	2	3
Health services	8	65,100	2	3
Other	20	70,740	4	3

(1) = More than 0 and less than 0.05 percent.

SOURCE: U.S. Dept. of Labor, Bureau of Labor Statistics, unpublished data (Apr. 17, 1996) (available in Clerk of Court's case file). **[****38]**

Dissent by: STEVENS

Dissent

[*252] **[**2128]** JUSTICE STEVENS, dissenting.

In his classic dissent in *Lochner v. New York, 198 U.S. 45, 75, 49 L. Ed. 937, 25 S. Ct. 539 (1905)*, Justice Holmes reminded us that our disagreement with the economic theory embodied in legislation should not affect our judgment about its constitutionality. **[***540]** It is equally important, of course, to be faithful to the economic theory underlying broad statutory mandates when we are construing their impact on areas of the economy not specifically addressed by their texts. The unique features of this case lead me to conclude that the Court has reached a decision that conflicts with the basic purpose of both the antitrust laws and the national labor policy expressed in a series of congressional enactments.

I

The basic premise underlying the Sherman Act is the assumption that free competition among business entities will produce the best price levels. *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 695, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*. Collusion among competitors, it is believed, may produce prices that harm **[****39]** consumers. *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n. 59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. Similarly, the Court has held, a marketwide agreement among employers setting wages at levels that would not prevail in a free market may violate the Sherman Act. *Anderson v. Shipowners Assn. of Pacific Coast, 272 U.S. 359, 71 L. Ed. 298, 47 S. Ct. 125 (1926)*.

The jury's verdict in this case has determined that the marketwide agreement among these employers fixed the salaries of the replacement players at a dramatically lower level than would obtain in a free market. While the special characteristics of this industry may provide a justification for the agreement under the rule of reason, see *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 100-104, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*, at this stage of the proceeding our analysis of the exemption issue must accept the premise that the agreement is unlawful unless it is exempt.

[*253] The basic premise underlying our national labor policy is that unregulated competition among employees and applicants for employment **[****40]** produces wage levels that are lower than they should be. [1] **[****41]** Whether or not **[**2129]** the premise is true in fact, it is surely the basis for the statutes that encourage and protect the collective-bargaining process, including the express statutory exemptions from the antitrust laws that Congress enacted in order to protect union activities. [2] Those statutes were enacted to enable collective action by union

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[1] "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." *29 U.S.C. § 151*; R. Posner & F. Easterbrook, Antitrust 31 (2d ed. 1981) ("The main purpose of labor unions is to raise wages by suppressing competition among workers . . ."); see also *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 723, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)* (opinion of Goldberg, J.) ("The very purpose and effect of a labor union is to limit the power of an employer to use competition among workingmen to drive down wage rates and enforce substandard conditions of employment").

[2] "The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, *15 U.S.C. § 17* and *29 U.S.C. § 52*, and the Norris-LaGuardia Act, 47 Stat. 70, 71, and 73, *29 U.S.C. §§ 104*, *105*, and

members to achieve wage levels that are higher than would be **[***541]** available in a free market. See *Trainmen v. Chicago R. & I. R. Co., 353 U.S. 30, 40, 1 L. Ed. 2d 622, 77 S. Ct. 635 (1957)*.

The statutory labor exemption protects the right of workers to act collectively to seek better wages, but does not **[*254]** "exempt **[****42]** concerted action or agreements between unions and nonlabor parties." *Connell Constr. Co. v. Plumbers, 421 U.S. 616, 621-622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*. It is the judicially crafted, non-statutory labor exemption that serves to accommodate the conflicting policies of the antitrust and labor statutes in the context of action between employers and unions. *Ibid.*

The limited judicial exemption complements its statutory counterpart by ensuring that unions which engage in collective bargaining to enhance employees' wages may enjoy the benefits of the resulting agreements. The purpose of the labor laws would be frustrated if it were illegal for employers to enter into industrywide agreements providing supra-competitive wages for employees. For that reason, we have explained that "a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions." *Id., at 622*.

Consistent with basic labor law policies, I agree **[****43]** with the Court that the judicially crafted labor exemption must also cover some collective action that employers take in response to a collective-bargaining agent's demands for higher wages. Immunizing such action from antitrust scrutiny may facilitate collective bargaining over labor demands. So, too, may immunizing concerted employer action designed to maintain the integrity of the multiemployer bargaining unit, such as lockouts that are imposed in response to "a union strike tactic which threatens the destruction of the employers' interest in bargaining on a group basis." *NLRB v. Truck Drivers, 353 U.S. 87, 93, 1 L. Ed. 2d 676, 77 S. Ct. 643 (1957)*.

In my view, however, neither the policies underlying the two separate statutory schemes, nor the narrower focus on the purpose of the nonstatutory exemption, provides a justification for exempting from antitrust scrutiny collective action initiated by employers to depress wages below the level **[*255]** that would be produced in a free market. Nor do those policies support a rule that would allow employers to suppress wages by implementing noncompetitive agreements among themselves on matters that have not previously **[****44]** been the subject of either an agreement with labor or even a demand by labor for inclusion in the bargaining process. That, however, is what is at stake in this litigation.

II

In light of the accommodation that has been struck between antitrust and labor law policy, it would be most ironic to extend an exemption crafted to protect collective action by **[***542]** employees to protect employers acting jointly to deny employees the opportunity to negotiate their salaries individually in a competitive **[**2130]** market. Perhaps aware of the irony, the Court chooses to analyze this case as though it represented a typical impasse in an unexceptional multiemployer bargaining process. In so doing, it glosses over three unique features of the case that are critical to the inquiry into whether the policies of the labor laws require extension of the nonstatutory labor exemption to this atypical case.

First, in this market, unlike any other area of labor law implicated in the cases cited by the Court, player salaries are individually negotiated. The practice of individually negotiating player salaries prevailed even prior to collective bargaining. [3] The players did not challenge the prevailing **[****45]** **[*256]** practice because, unlike employees in

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113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States v. Hutcheson, 312 U.S. 219, 85 L. Ed. 788, 61 S. Ct. 463 (1941)*. They do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers v. Pennington, 381 U.S. 657, 662, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*." *Connell Constr. Co. v. Plumbers, 421 U.S. 616, 621-622, 44 L. Ed. 2d 418, 95 S. Ct. 1830 (1975)*.

most industries, they want their compensation to be determined by the forces of the free market rather than by the process of collective bargaining. Thus, although the majority professes an inability to understand anything special about professional sports that should affect the framework of labor negotiations, *ante* at 248-249, in this business it is the employers, not the employees, who seek to impose a noncompetitive uniform wage on a segment of the market and to put an end to competitive wage negotiations.

[**46]** Second, respondents concede that the employers imposed the wage restraint to force owners to comply with leaguewide rules that limit the number of players that may serve on a team, not to facilitate a stalled bargaining process, or to revisit any issue previously subjected to bargaining. Brief for Respondents 4. The employers could have confronted the culprits directly by stepping up enforcement of roster limits. They instead chose to address the problem by unilaterally forbidding players from individually competing in the labor market.

Third, although the majority asserts that the "club owners had bargained with the players' union over a wage issue until they reached impasse," *ante*, at 234, that hardly constitutes a complete description of what transpired. When the employers' representative advised the union that they proposed to pay the players a uniform wage determined by the owners, the union promptly and unequivocally responded that their proposal was inconsistent with the "principle" of individual salary negotiation that had been accepted in the past and that predated collective bargaining. [4] The so-called "bargaining" **[*257]** that followed amounted to nothing more **[****47]** than the employers' notice to the union that they had decided to implement a decision to replace individual salary negotiations **[***543]** with a uniform wage level for a specific group of players. [5]

[**48]** Given these features of the case, I do not see why the employers should be entitled to a judicially crafted exemption from antitrust liability. We have explained that "the nonstatutory exemption has its source in the strong labor policy favoring the association of employees to eliminate competition over **[**2131]** wages and working conditions." *Connell Constr. Co., 421 U.S. at 622*. I know of no similarly strong labor policy that favors the association of employers to eliminate a competitive method of negotiating wages that predates collective bargaining and that labor would prefer to preserve.

Even if some collective action by employers may justify an exemption because it is necessary to maintain the "integrity of the multiemployer bargaining unit," *NLRB v. Brown, 380 U.S. 278, 289, 13 L. Ed. 2d 839, 85 S. Ct. 980 (1965)*, no such justification exists here. The employers imposed a fixed wage even though there was no dispute over the pre-existing principle that player salaries should be individually negotiated. They sought only to prevent certain owners from evading roster limits and thereby gaining an unfair advantage. Because "the employer's **[****49]** interest is a competitive interest rather than an interest in regulating its own labor relations," *Mine Workers v. Pennington, 381 U.S. 657, 667, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965)*, there would seem to be

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[3] As the District Court explained: "The present case does not involve any change in preexisting wage terms of either an active or expired collective bargaining agreement. In fact, creation of the developmental squads added a novel category of players to each NFL club. These players were not treated under the salary terms applicable to regular NFL players. Under the 1982 Collective Bargaining Agreement, the NFL players were expressly given the right to negotiate the salary terms of their contracts. 1982 Collective Bargaining Agreement at Article XXII, Plaintiffs' Exhibits at 1. By contrast, the developmental squad contracts indicates that the prospective developmental squad players had no right to negotiate their own salary terms but instead were to receive a fixed non-negotiable salary of $ 1,000 per week. Plaintiffs' Exhibits at 8, 9, 15 & 28." *782 F. Supp. 125, 138 (DC 1991)*.

[4] In a memorandum summarizing his meeting with the union representative, the owners representative stated, in part:

"Gene [Upshaw] indicated he fully understood the developmental squad but could not agree to any arrangement that eliminated the right of any player to negotiate his individual salary. Upshaw said that no matter what salary level we proposed to pay developmental players, whether it was our $ 1,000 weekly or a higher number, the union would not 'in principle' permit two classes of players to exist, one with individual bargaining rights and one without." App. 19-20.

[5] The unique features of this case presumably explain why the National Labor Relations Board (Labor Board) can endorse the position of the players in this case without fearing the adverse impact on the bargaining process in the hypothetical cases that concern the Court. Brief for United States et al. as *Amici Curiae* 27, n. 10.

no **[*258]** more reason to exempt this concerted, anticompetitive employer action from the antitrust laws than the action held unlawful in *Radovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)*.

The point of identifying the unique features of this case is not, as the Court suggests, to make the case that professional football players, alone among workers, should be entitled to enforce the antitrust laws against anticompetitive collective employer action. *Ante*, at 249. Other employees, no less than well-paid athletes, are entitled to the protections of the antitrust laws when their employers unite to undertake anti-competitive action that causes them direct harm and alters the state of employer-employee relations that existed prior to unionization. Here that alteration occurred because the wage terms that the employers unilaterally imposed directly conflict with a pre-existing principle of **[****50]** agreement between the bargaining parties. In other contexts, the alteration may take other similarly anticompetitive and unjustifiable forms.

III

Although exemptions should be construed narrowly, and judicially crafted exemptions more narrowly still, the Court provides a sweeping **[***544]** justification for the exemption that it creates today. The consequence is a newly minted exemption that, as I shall explain, the Court crafts only by ignoring the reasoning of one of our prior decisions in favor of the views of the dissenting Justice in that case. Of course, the Court actually holds only that this new exemption applies in cases such as the present in which the parties to the bargaining process are affected by the challenged anticompetitive conduct. *Ante*, at 250. But that welcome limitation on its opinion fails to make the Court's explanation of its result in this case any more persuasive.

The Court explains that the nonstatutory labor exemption serves to ensure that "antitrust courts" will not end up substituting their views of labor policy for those of either the **[*259]** Labor Board or the bargaining parties. *Ante*, at 236-237. The Court concludes, therefore, that **[****51]** almost any concerted action by employers that touches on a mandatory subject of collective bargaining, no matter how obviously offensive to the policies underlying the Nation's antitrust statutes, should be immune from scrutiny so long as a collective-bargaining process is in place. It notes that a contrary conclusion would require "antitrust courts, insulated from the bargaining process, to investigate an employer group's subjective motive," a task that it believes too "amorphous" to be permissible. *Ante*, at 247.

The argument that "antitrust courts" should be kept out of the collective-bargaining process has a venerable lineage. See *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 483-488, 65 L. Ed. 349, 41 S. Ct. 172 (1921)* (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting). Our prior precedents subscribing to its basic point, however, do not justify the conclusion that employees have no recourse other than the Labor Board when employers collectively undertake anticompetitive action. In fact, they contradict it.

[2132]** We have previously considered the scope of the nonstatutory labor exemption only in cases involving challenges to anticompetitive **[****52]** *agreements* between unions and employers brought by other employers not parties to those agreements. *Ante*, at 243. Even then, we have concluded that the exemption does not always apply. See *Mine Workers v. Pennington, 381 U.S. at 663*.

As *Pennington* explained, the mere fact that an antitrust challenge touches on an issue, such as wages, that is subject to mandatory bargaining does not suffice to trigger the judicially fashioned exemption. *Id., at 664*. Moreover, we concluded that the exemption should not obtain in *Pennington* itself only after we examined the motives of one of the parties to the bargaining process. *Id., at 667*.

The Court's only attempt to square its decision with *Pennington* occurs at the close of its opinion. It concludes that **[*260]** the exemption applies because the employers' action "grew out of, and was directly related to, the lawful operation of the bargaining process," "it involved a matter that the parties were required to negotiate collectively," and that "concerned only the parties to the collective-bargaining relationship." *Ante*, at 250.

As to the first two qualifiers, **[****53]** the same could be said of *Pennington*. **[***545]** Indeed, the same was said *and rejected* in *Pennington*. "This is not to say that an agreement resulting from union-employer negotiations is automatically exempt from Sherman Act scrutiny simply because the negotiations involve a compulsory subject of bargaining, regardless of the subject or the form and content of the agreement." 381 U.S. at 664-665.

The final qualifier does distinguish *Pennington*, but only partially so. To determine whether the exemption applied in *Pennington*, we undertook a detailed examination into whether the policies of labor law so strongly supported the agreement struck by the bargaining parties that it should be immune from antitrust scrutiny. We concluded that because the agreement affected employers not parties to the bargaining process, labor law policies could not be understood to require the exemption.

Here, however, the Court does not undertake a review of labor law policy to determine whether it would support an exemption for the unilateral imposition of anticompetitive wage terms by employers on a union. The Court appears to conclude instead that the exemption should **[****54]** apply merely because the employers' action was implemented during a lawful negotiating process concerning a mandatory subject of bargaining. Thus, the Court's analysis would seem to constitute both an unprecedented expansion of a heretofore limited exemption, and an unexplained repudiation of the reasoning in a prior, nonconstitutional decision that Congress itself has not seen fit to override.

[*261] The Court nevertheless contends that the "rationale" of our prior cases supports its approach. *Ante*, at 243. As support for that contention, it relies heavily on the views espoused in Justice Goldberg's separate opinion in *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)*. At five critical junctures in its opinion, see *ante*, at 236, 237-238, 242, 247-248, the Court invokes that separate concurrence to explain why, for purposes of applying the nonstatutory labor exemption, labor law policy admits of no distinction between collective employer action taken in response to labor demands and collective employer action of the kind we consider here.

It should be remembered that **[***546]** *Jewel Tea* concerned only the **[****55]** question whether an *agreement* between employers and a union may be exempt, and that even then the Court did not accept the broad antitrust exemption that Justice Goldberg advocated. Instead, Justice White, the author of *Pennington*, writing for Chief Justice Warren and Justice Brennan, explained that even in disputes over the lawfulness of agreements about terms that are subject to mandatory bargaining, courts must examine the bargaining process to determine whether antitrust scrutiny should obtain. *Jewel Tea, 381 U.S. at 688-697*. "The crucial determinant is not the form of the agreement -- *e.g.*, prices or wages -- but its relative impact **[**2133]** on the product market *and the interests of union members*." *Id., at 690, n. 5* (emphasis added). Moreover, the three dissenters, Justices Douglas, Clark, and Black, concluded that the union was entitled to no immunity at all. *Id., at 735-738*.

It should also be remembered that Justice Goldberg used his separate opinion in *Jewel Tea* to explain his reasons for *dissenting* from the Court's opinion in *Pennington*. He explained that the Court's approach in **[****56]** *Pennington* was unjustifiable precisely because it permitted "antitrust courts" to reexamine the bargaining process. The Court fails to explain its apparent substitution in this case of Justice Goldberg's **[*262]** understanding of the exemption, an understanding previously endorsed by only two other Justices, for the one adopted by the Court in *Pennington*.

The Court's silence is all the more remarkable in light of the patent factual distinctions between *Jewel Tea* and the present case. It is not at all clear that Justice Goldberg himself understood his expansive rationale to require application of the exemption in circumstances such as those before us here. Indeed, the main theme of his opinion was that the antitrust laws should not be used to circumscribe bargaining over union demands. *Jewel Tea, 381 U.S. at 723-725*. Moreover, Justice Goldberg proved himself to be a most unreliable advocate for the sweeping position that the Court attributes to him.

Not long after leaving the Court, Justice Goldberg served as counsel for Curt Flood, a professional baseball player who contended that major league baseball's reserve clause violated the antitrust laws. **[****57]** *Flood v. Kuhn, 407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)*. Although the *Flood* case primarily concerned whether professional baseball should be exempt from ***antitrust law*** altogether, see *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U.S. 200, 66 L. Ed. 898, 42 S. Ct. 465 (1922)*; *Toolson v.*

New York Yankees, Inc., 346 U.S. 356, 98 L. Ed. 64, 74 S. Ct. 78 (1953), the labor law dimensions of the case did not go unnoticed.

The article that first advanced the expansive view of the nonstatutory labor exemption that the Court appears now to endorse was written shortly after this Court granted certiorari in *Flood*, see Jacobs & Winter, Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage, 81 Yale L. J. 1 (1971), and the parties to the case addressed the very questions now before us. Aware of both this commentary, and, of course, his own prior opinion in *Jewel Tea*, Justice Goldberg explained in his brief to this Court why baseball's reserve clause should not be protected from antitrust review by the nonstatutory **[****58]** labor exemption.

> **[*263]** "This Court has held that *even* a labor organization, the principal intended beneficiary of the so-called labor exemption, may not escape antitrust liability when it acts, not unilaterally and in the sole interest of its own members, but in concert with employers 'to prescribe labor standards outside the bargaining unit[.]' And this is so even when the issue is so central to bargaining as wages. *Mine Workers v. Pennington, 381 U.S. at 668*. Compare *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)*. See *Ramsey v. Mine Workers, 401 U.S. 302, 307, 28 L. Ed. 2d 64, 91 S. Ct. 658 (1971)*. . . .
>
> "The separate opinion on which respondents focus did express the view that 'collective bargaining activity on mandatory subjects of bargaining' is exempt from antitrust regulation, without regard to **[***547]** whether the union conduct involved is 'unilateral.' *Meat Cutters v. Jewel Tea Co., 381 U.S. at 732* (concurring opinion). But the author of that opinion agreed with the majority that agreements between unions and nonlabor groups **[****59]** on hard-core restraints like 'price-fixing and market allocation' were not exempt. *381 U.S. at 733*. And there is no support in any of the opinions filed in *Meat Cutters* for Baseball's essential, if tacit, contention that unilateral, hard-core anticompetitive activity by employers acting alone -- the present case -- is somehow exempt from antitrust regulation." Reply Brief for Petitioner in **[**2134]** *Flood* v. *Kuhn*, O. T. 1971, No. 71-32, pp. 13-14.

Moreover, Justice Goldberg explained that the extension of antitrust immunity to unilateral, anticompetitive employer action would be particularly inappropriate because baseball's reserve clause predated collective bargaining.

> "This case is in fact much clearer than *Pennington, Meat Cutters*, or *Ramsey*, for petitioner does not challenge the fruits of collective bargaining activity. He seeks relief from a scheme -- the reserve system -- which **[*264]** Baseball admits has been in existence for nearly a century, and which the trial court expressly found was 'created and imposed by the club owners long before the arrival of collective bargaining.'" *Id.*, at 14.

I would add only that **[****60]** this case is in fact much clearer than *Flood*, for there the owners sought only to *preserve* a restraint on competition to which the union had not agreed, while here they seek to *create* one.

Adoption of Justice Goldberg's views would mean, of course, that in some instances "antitrust courts" would have to displace the authority of the Labor Board. The labor laws do not exist, however, to ensure the perpetuation of the Board's authority. That is why we have not previously adopted the Court's position. That is also why in other contexts we have not thought the mere existence of a collective-bargaining agreement sufficient to immunize employers from background laws that are similar to the Sherman Act. See *Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 96 L. Ed. 2d 1, 107 S. Ct. 2211 (1987)*; *Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 85 L. Ed. 2d 728, 105 S. Ct. 2380 (1985)*. [6]

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[6] In *Teamsters v. Oliver, 358 U.S. 283, 3 L. Ed. 2d 312, 79 S. Ct. 297 (1959)*, we held that a state ***antitrust law*** could not be used to challenge an employer-union agreement. Justice White's opinion in *Jewel Tea* explains, however, that *Oliver* held only that "as the agreement did not embody a '"remote and indirect approach to the subject of wages" . . . but a direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract,' [358 U.S.], at 294, the paramount federal policy of encouraging collective bargaining proscribed application of the state law." *Jewel Tea Co., 381 U.S. at 690, n. 5*.

[**61]** **[*265]** IV

Congress is free to act to exempt the anticompetitive employer conduct **[***548]** that we review today. In the absence of such action, I do not believe it is for us to stretch the limited exemption that we have fashioned to facilitate the express statutory exemption created for labor's benefit so that unions must strike in order to restore a prior practice of individually negotiating salaries. I therefore agree with the position that the District Court adopted below.

> "Because the developmental squad salary provisions were a new concept and not a change in terms of the expired collective bargaining agreement, the policy behind continuing the nonstatutory labor exemption **[**2135]** for the terms of a collective bargaining agreement after expiration (to foster an atmosphere conducive to the negotiation of a new collective bargaining agreement) does not apply. To hold that the nonstatutory labor exemption extends to shield the NFL from antitrust liability for imposing restraints never before agreed to by the union would not only infringe on the union's freedom to contract, *H. K. Porter Co.* v. *NLRB*, 397 U.S. at 108 . . . (one of fundamental **[****62]** policies of NLRA is freedom of contract), but would also contradict the very purpose of the antitrust exemption by not promoting execution of a collective bargaining agreement with terms mutually **[*266]** acceptable to employer and labor union alike. Labor unions would be unlikely to sign collective bargaining agreements with employers if they believed that they would be forced to accept terms to which they never agreed." *782 F. Supp. 125, 139 (DC 1991)* (footnote omitted).

Accordingly, I respectfully dissent.

References

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Moreover, in the petition for certiorari in *Flood*, Justice Goldberg explained that *Oliver* was not controlling.

"Petitioner has not addressed the contention advanced by respondents at trial but not reached by the courts below, that the reserve system is a matter for collective bargaining and hence exempt from state and federal antitrust laws under *Teamsters Union v. Oliver, 358 U.S. 283, 3 L. Ed. 2d 312, 79 S. Ct. 297 (1959)*, and *Meat Cutters v. Jewel Tea Co., 381 U.S. 676, 14 L. Ed. 2d 640, 85 S. Ct. 1596 (1965)*. Neither of these decisions holds that an *employer* conspiracy to restrain trade is exempted from antitrust regulation where an employee group has been implicated in the scheme. No Justice participating in *Meat Cutters* dissented from the proposition that hard core 'anticompetitive commercial restraint[s]' like 'price-fixing and market allocation' -- and petitioner would add group boy-cotts -- were subject to antitrust regulation even where bargained about. *381 U.S. at 732* (concurring opinion). As this Court unanimously warned in 1949, 'Benefits to organized labor cannot be utilized as a cat's paw to pull employer's chestnuts out of antitrust fires.' *United States v. Women's Sportswear Mfr's Ass'n, 336 U.S. 460, 464, 93 L. Ed. 805, 69 S. Ct. 714 (1949)*. See also *Allen Bradley Co.* v. *Local No. 3*, 325 U.S. [797] (1945). Similar arguments by football were rejected by this Court in *Radovich* [v. *National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)*,] as 'without merit,' and the reserve systems of other sports are now regulated by state and federal antitrust laws." Pet. for Cert. in *Flood* v. *Kuhn*, O. T. 1971, No. 71-32, p. 21, n. 9.

Klehr v. A.O. Smith Corp.

Supreme Court of the United States

April 21, 1997, Argued ; June 19, 1997, Decided

No. 96-663

Reporter

521 U.S. 179 *; 117 S. Ct. 1984 **; 138 L. Ed. 2d 373 ***; 1997 U.S. LEXIS 3861 ****; 65 U.S.L.W. 4514; 97 Cal. Daily Op. Service 4621; 97 Daily Journal DAR 7638; 11 Fla. L. Weekly Fed. S 9

MARVIN KLEHR, ET UX., PETITIONERS v. A. O. SMITH CORPORATION AND A. O. SMITH HARVESTORE PRODUCTS, INC.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, Reported at: *1996 U.S. App. LEXIS 13401*.

Disposition: *87 F.3d 231*, affirmed.

Core Terms

accrual, limitations period, Clayton Act, predicate act, fraudulent concealment, antitrust, discovery, silo, statute of limitations, cause of action, diligence, tolling, feed, courts, limitations, racketeering activity, reasonable diligence, equitable, accrues, cases, accrued cause of action, antitrust case, discovery rule, four year, circumstances, borrowing, discovers, analogy, damages, reasons

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Criminal Law & Procedure > ... > Homicide, Manslaughter & Murder > Solicitation of Murder > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN1[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

The Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961* et al., makes it a crime to conduct an enterprise's affairs through a pattern of racketeering activity. *18 U.S.C.S. § 1962(c)*. The phrase "racketeering activity" is a term of art defined in terms of activity that violates other laws, including more than 50 specifically mentioned federal statutes, which forbid, for example, murder-for-hire, extortion, and various kinds of fraud. *18 U.S.C.S. § 1961(1)*. The word "pattern" is also a term of art defined to require at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act of racketeering activity. *18 U.S.C.S. § 1961(5)*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

Antitrust & Trade Law > Clayton Act > Penalties

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

Governments > Legislation > Statute of Limitations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN2[] **Remedies, Damages**

A special provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961* et al., commonly known as civil RICO, permits any person injured in his business or property by reason of a violation of RICO's criminal provisions to recover treble damages and attorney's fees. *18 U.S.C.S. § 1964(c)*. Civil RICO actions are subject to the four-year limitations period contained in § 4B of the Clayton Act (Antitrust), as added 69 Stat. 283, and amended, *15 U.S.C.S. § 15b*, the statute of limitations that governs private civil antitrust actions seeking treble damages.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Statute of Limitations

Governments > Legislation > Statute of Limitations > Extensions & Revivals

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

HN3[] **Racketeer Influenced & Corrupt Organizations, Statute of Limitations**

In the United States Court of Appeals for the Third Circuit, the limitations period for a civil claim pursuant to the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961* et al., starts to run when a plaintiff knew or should have known that the RICO claim (including a pattern of racketeering activity) existed. The Third Circuit has an important exception which states that if, as a part of the same pattern of racketeering activity, there is further injury to the plaintiff or further predicate acts occur, the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern. This exception is an improper interpretation of the law.

Antitrust & Trade Law > Regulated Practices > Private Actions > General Overview

Governments > Legislation > Statute of Limitations > Extensions & Revivals

HN4[] **Regulated Practices, Private Actions**

Antitrust law provides that in the case of a continuing violation, each overt act that is part of the violation and that injures the plaintiff starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times. But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > ... > Statute of Limitations > Tolling of Statute of Limitations > Fraudulent Concealment

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > General Overview

HN5[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

In the context of a civil claim under the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. § 1961* et al., a plaintiff who is not reasonably diligent may not assert fraudulent concealment as a defense to the statute of limitations.

Governments > Legislation > Statute of Limitations > Equitable Estoppel

Governments > Legislation > Statute of Limitations > General Overview

HN6[] **Statute of Limitations, Equitable Estoppel**

The fraudulent concealment doctrine allows a plaintiff to preclude a defendant from asserting the statute of limitations only if the plaintiff shows that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense.

Lawyers' Edition Display

Decision

"Last predicate act" accrual rule, for statute of limitations purposes, held improper in context of civil Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968) claim, and civil RICO plaintiff who is not reasonably diligent held unable to assert fraudulent concealment.

Summary

The plaintiffs, who operate a dairy farm, purchased in 1974 a silo which they used to store cattle feed. In 1993, the plaintiffs brought an action in Federal District Court against the sellers of the silo, claiming that (1) the sellers had committed several acts of mail and wire fraud, by having made false representations that the silo would limit the amount of oxygen in contact with the silage, thus preventing moldy and fermented feed, and (2) such acts violated the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968) and caused damage to the plaintiffs. The plaintiffs alleged that (1) the feed in the silo became moldy and fermented, (2) the cows ate bad feed, (3) milk production and profits went down, and (4) the sellers committed other acts consisting primarily of additional representations to the plaintiffs and to others over a period of many years after 1974. The plaintiffs also alleged that their late filing was due to the sellers' covering up their fraud in various ways, preventing the plaintiffs from noticing the silo's malfunction. The District Court, dismissing the action, found the lawsuit to be untimely. The United States Court of Appeals for the Eighth Circuit, affirming the dismissal, held that (1) a civil RICO action accrues as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern, (2) the plaintiffs had failed to satisfy this standard in that they should have discovered the existence and source of their injury, as well as any pattern, well before 1989, and (3) there was no fraudulent concealment because the plaintiffs had not been sufficiently diligent (*87 F3d 231*).

On certiorari, the United States Supreme Court affirmed. In an opinion by Breyer, J., joined by Rehnquist, Ch. J., and Stevens, O'Connor, Kennedy, Souter, and Ginsburg, JJ., and joined by Scalia and Thomas, J., as to point 3 below, it was held that (1) a so-called "last predicate act" rule used by the Court of Appeals for the Third Circuit--under which a plaintiff's claim for damages for a pattern of racketeering activity may accrue upon the occurrence of the last predicate act which is a part of the pattern of activity--is not a proper interpretation of the law and therefore is unavailable to the plaintiffs; (2) the case at hand did not present the issues involved in a manner that provided an opportunity for full argument in order that the Supreme Court could attempt to resolve the other differences between the circuits in the accrual rules that the circuits apply to RICO cases; and (3) reasonable diligence matters in the context of civil RICO cases, and a plaintiff who is not reasonably diligent may not assert fraudulent concealment to toll the limitations period or to estop the defendant from asserting a limitations defense.

Scalia, J., joined by Thomas, J., concurring in part and concurring in the judgment, expressed the view that (1) the court should have resolved the split in the circuits and adopted for civil RICO actions the "injury" rule of the Clayton Act, under which rule the cause of action accrues and the statute of limitations begins to run when a defendant commits an act that injures a plaintiff's business, (2) applying that rule, the plaintiffs' cause of action was untimely, and (3) the plaintiffs were not entitled to invoke the fraudulent concealment doctrine.

Headnotes

LIMITATION OF ACTIONS §153.5 > RICO civil action -- accrual of cause of action -- tolling -- fraudulent concealment -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]

For purposes of determining when the limitations period begins to run on a plaintiff's civil cause of action for damages brought for violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USCS 1961-1968), (1) the "last predicate act" rule used by the United States Court of Appeals for the Third Circuit--under which a plaintiff's claim for damages for a pattern of racketeering activity may accrue upon the occurrence of the last predicate act which is a part of the pattern of activity--is not a proper interpretation of the law in that such a rule (a) creates a limitations period that is longer than Congress could have contemplated, thereby conflicting with the basic objective of repose that underlies limitations periods, and (b) is inconsistent with the ordinary Clayton Act (*15 USCS 15b*) rule, applicable in private antitrust treble damage actions--under which a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business--which rule is a helpful analogy for civil RICO actions; and (2) the United States Supreme Court will not resolve the conflicts between the differing accrual rules of the various United States Courts of Appeals where, in the case at hand, the legal differences between the circuits' rules would not affect the outcome; a plaintiff who has not exercised reasonable diligence to discover his civil RICO claim may not rely upon the doctrine of fraudulent concealment to toll the limitations period or to estop the defendant from asserting a limitations defense. (Scalia and Thomas, JJ., dissented in part from this holding).

LIMITATION OF ACTIONS §153.5 > antitrust action -- accrual of cause of action -- > Headnote:
LEdHN[2][] [2]

In the case of a continuing violation of the federal antitrust laws, each overt act that is part of the violation and that injures the plaintiff starts the limitations period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times, but the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.

APPEAL §1087.7 > question not presented on certiorari -- review of facts -- > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

Where there is no reason to believe that there was any very obvious or exceptional error below, the United States Supreme Court will not go beyond purely legal questions presented by the court's writ of certiorari to re-examine fact-based questions respecting the application by a Federal Court of Appeals to the evidentiary materials before it of (1) a rule as to the accrual of a cause of action, for purposes of a statute of limitations, or (2) a requirement of due diligence for a plaintiff asserting fraudulent concealment of a cause of action.

Syllabus

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it a crime "to conduct" an "enterprise's affairs through a pattern of racketeering activity." *18 U.S.C. § 1962(c)*. A "pattern" requires at least two acts of racketeering activity, the last of which occurred within 10 years after the commission of a prior act. *§ 1961(5)*. A person injured by a violation of RICO's criminal provisions may recover treble damages and attorney's fees in a civil RICO action, *§ 1964(c)*, but civil actions are subject to the 4-year limitations period in § 4B of the Clayton Act--the statute of limitations governing private civil antitrust actions seeking treble damages, *Agency Holding Corp. v. Malley-Duff* ***[****2]*** *& Associates, Inc., 483 U.S. 143, 156, 97 L. Ed. 2d 121, 107 S. Ct. 2759*. The petitioners Klehr filed a civil RICO action against respondents (hereinafter Harvestore) in August 1993, claiming that their injury began in 1974, when they purchased a Harvestore-brand silo for their dairy farm based on Harvestore's false representations that it would prevent moldy and fermented cattle feed, thereby producing healthier cows, more milk, and higher profits. In fact, the feed became moldy and fermented and both milk production and profits declined. They added that Harvestore committed other predicate acts, consisting of repeated misrepresentations to the Klehrs and to others, and sales to others, over many years. Harvestore moved to dismiss on the ground that the limitations period had run because the Klehrs' claim had accrued before August 1989, and no special legal doctrine applied to toll the running of the limitations period or to estop Harvestore from asserting a statute of limitations defense. The Klehrs responded that because Harvestore had taken affirmative steps to conceal its fraud, they did not become sufficiently suspicious to investigate the silo and to discover the mold until 1991. The District Court found the **[****3]** Klehrs' lawsuit untimely. The Eighth Circuit affirmed, holding that a civil RICO action accrues as soon as the plaintiff discovers, or reasonably should discover, both the existence and source of his injury and that the injury is part of a pattern; and that the Klehrs had suffered one single, continuous injury sometime in the 1970s which they should have discovered well before August 1989. The Circuit refused to toll the running of the statute on a "fraudulent concealment" theory because, among other things, the Klehrs had not been sufficiently diligent in discovering their claim. Like the Eighth Circuit, some Circuits apply an "injury and pattern discovery" civil RICO accrual rule; others apply an "injury discovery" rule, under which the statute begins to run when the plaintiff knows or reasonably should know of his injury; and the Third Circuit applies a "last predicate act" rule, under which the statute begins to run when the plaintiff knows or reasonably should know of the last injury or last predicate act in the pattern, whether or not the plaintiff himself has suffered any injury from that last act.

Held:

1. The "last predicate act" rule is not an appropriate interpretation **[****4]** of RICO. Pp. 5-14.

(a) Only the Third Circuit's accrual rule can help the Klehrs. For purposes of assessing its lawfulness, this Court assumes that the rule means that as long as Harvestore committed one predicate act within the limitations period, the Klehrs can recover, not just for any harm caused by that late-committed act, but for all the harm caused by all the acts that make up the total "pattern"; that the Klehrs can show at least one such late-committed act; and that they are knowledgeable about the pattern. Pp. 5-6.

(b) The rule is unlawful for two reasons. First, because a series of predicate acts can continue indefinitely, it creates a longer limitations period than Congress could have contemplated, in conflict with a basic objective--repose--underlying limitations periods. See, *e.g., Wilson v. Garcia, 471 U.S. 261, 271, 85 L. Ed. 2d 254, 105 S. Ct. 1938*. Civil RICO has no compensatory objective warranting so significant an extension of the limitations period, and civil RICO's further purpose--encouraging potential private plaintiffs diligently to investigate, see *Malley-Duff, 483 U.S. at 151*--suggests the contrary. RICO's criminal limitations period, which runs from the most recent **[****5]** predicate act, does not provide an apt analogy for civil RICO actions. *Id., at 155-156*. Second, the rule is inconsistent with § 4B of the Clayton Act, under which "a cause of action accrues . . . when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795*. The Clayton Act analogy is generally useful in civil RICO cases, since Congress consciously patterned civil RICO after that Act, and since, by the time civil RICO was enacted, the Clayton Act's accrual rule was well-established. The Clayton Act accrual rule may not apply without modification in every civil RICO case. However, in this case the petitioners knew of the facts underlying their cause of action, and thus the Clayton Act rule makes clear precisely where, and how, the Third Circuit's rule goes too far. The Klehrs invoke the "separate accrual" civil RICO rule adopted by some Circuits, which is similar to the "continuing violation" doctrine in antitrust, in that the commission of a separate, new predicate act within the 4-year limitations period permits a plaintiff to recover for the additional damages that act caused. Under the separate **[****6]** accrual rule, however, the plaintiff cannot use an independent, new act as a bootstrap to recover for injuries caused by other predicate acts that took place outside the limitations period. See, *e.g., Grimmett v. Brown, 75 F.3d 506, 513*. Thus acts taking place after August 1989 do not help the Klehrs, for they have not shown any additional damages, and the Third Circuit rule is incorrect insofar as it would allow the presence of a new act to help them recover for injuries caused by pre-1989 acts. This case also does not present the kind of special circumstance in which courts might permit plaintiffs to recover for injuries that were so speculative or unprovable at the time of Harvestore's unlawful act that starting the limitations period when the act first caused injury would have left the Klehrs without relief. *Zenith, supra, at 339-340*, distinguished. Pp. 6-10.

(c) Resolving the conflicts among the various discovery accrual rules used by other Circuits would not affect the outcome of this case, as the petitioners' civil RICO claim is barred under the most liberal accrual rule, as applied by the Eighth Circuit. There is no clear or obvious error in the Eighth Circuit's **[****7]** application of its "injury and pattern discovery" rule and it is beyond the scope of the writ to reconsider whether the Klehrs reasonably should have discovered the silo's flaws before 1989. Pp. 11-13.

2. A plaintiff who is not reasonably diligent in trying to discover his civil RICO cause of action may not rely upon "fraudulent concealment" to toll the limitations period or to estop a defendant from asserting a limitations defense. This requirement is uniformly supported by relevant authority in the related antitrust context, where the "fraudulent concealment" doctrine is invoked fairly often. And while those courts that do not require "reasonable diligence" in contexts other than antitrust cases have said that the doctrine is concerned only with defendants' behavior, that is not the case with respect to antitrust or civil RICO. In both of these contexts private civil actions seek not only to compensate victims but also to encourage those victims diligently to investigate and thereby to uncover unlawful

activity. See *Malley-Duff, supra, at 151*. The Klehrs' fact-based question whether the Eighth Circuit properly applied the "due diligence" requirement to the evidentiary materials **[****8]** before it is beyond the scope of this Court's writ. Pp. 13-15.

87 F.3d 231, affirmed.

Counsel: Charles A. Bird argued the cause for petitioners.

Bruce J. Ennis, Jr. argued the cause for respondents.

Judges: BREYER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O'CONNOR, KENNEDY, SOUTER, and GINSBURG, JJ., joined. SCALIA, J., filed an opinion concurring in part and concurring in the judgment, in which THOMAS, J., joined.

Opinion by: BREYER

Opinion

[*182] **[**1987]** **[***378]** JUSTICE BREYER delivered the opinion of the Court.

LEdHN[1A][] [1A]The petition in this case asked us to consider two aspects of "statute of limitations" law. One concerns the date upon which a civil RICO action accrues and the limitations period starts to run. The other concerns "fraudulent concealment," a doctrine that extends the time for a plaintiff to file suit. In respect to the first, we focus upon, and disapprove, an accrual rule followed in the Third Circuit called the "last predicate act" rule. In respect to the second, we hold that a plaintiff may not rely upon "fraudulent concealment" unless he has been reasonably diligent in trying to discover his cause of action.

[*183] I

HN1[] The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961-1968*, among other things makes it a crime "to conduct" an "enterprise's affairs **[****9]** through a pattern of racketeering activity." *§ 1962(c)*. The phrase "racketeering activity" is a term of art defined in terms of activity that violates other laws, including more than 50 specifically mentioned federal statutes, which forbid, for example, murder-for-hire, extortion, **[***379]** and various kinds of fraud. *§ 1961(1)*. The word "pattern" is also a term of art defined to require "at least two acts of racketeering activity . . . the last of which occurred within ten years . . . after the commission of a prior act of racketeering activity." *§ 1961(5)*.

HN2[] A special RICO provision--commonly known as civil RICO--permits "any person injured in his business or property by reason of a violation" of RICO's criminal provisions to recover treble damages and attorney's fees. *§ 1964(c)*. RICO does not say what limitations period governs the filing of civil RICO claims. But in *Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156, 97 L. Ed. 2d 121, 107 S. Ct. 2759 (1987)*, this Court held that civil RICO actions are subject to the 4-year limitations period contained in § 4B of the Clayton Act (Antitrust), as added 69 Stat. 283, and amended, *15 U.S.C. § 15b*--the statute of limitations that governs private **[****10]** civil antitrust actions seeking treble damages.

[1988]** Marvin and Mary Klehr, the petitioners here, are dairy farmers. They filed this civil RICO action on August 27, 1993, claiming that A. O. Smith Corporation, and A. O. Smith Harvestore Products, Inc. (whom we shall simply call "Harvestore") had committed several acts of mail and wire fraud, *18 U.S.C. §§ 1341*, *1343*, thereby violating RICO and causing them injury. Their injury, they said, began in 1974, when Harvestore sold them a special "Harvestore"-brand silo, which they used for storing cattle feed. The Klehrs alleged that they bought the silo in reliance on Harvestore's representations, made through advertisements and a local **[*184]** dealer, that the silo would limit the amount of oxygen in contact with the silage, thus preventing moldy and fermented feed, and thereby producing healthier cows, more milk, and higher profits. The representations, they claim, were false; the silo did not keep oxygen away from the feed, the feed became moldy and fermented, the cows ate the bad feed, and milk production and profits went down. They add that Harvestore committed other acts--consisting primarily of additional representations made to them and to **[****11]** others and sales made to others--over a period of many years after 1974.

Harvestore, pointing out that the Klehrs had filed suit almost 20 years after they had bought the silo, moved to dismiss the lawsuit on the ground that the limitations period had long since run. The Klehrs could not file suit, Harvestore said, unless their claim had accrued within the four years prior to filing, *i.e.*, after August 25, 1989, or unless some special legal doctrine nonetheless tolled the running of the limitations period or estopped Harvestore from asserting a statute of limitations defense. See *Holmberg v. Armbrecht, 327 U.S. 392, 396-397, 90 L. Ed. 743, 66 S. Ct. 582 (1946)*; *Bailey v. Glover, 88 U.S. 342, 21 Wall. 342, 349-350, 22 L. Ed. 636 (1875)*; *Cada v. Baxter Healthcare Corp., 920 F.2d 446, 450-451 (CA7 1990)*, cert. denied, *501 U.S. 1261, 115 L. Ed. 2d 1079, 111 S. Ct. 2916 (1991)*.

The Klehrs responded by producing evidentiary material designed to support a legal justification for the late filing. Essentially they claimed that Harvestore had covered up its fraud--preventing them from noticing the silo's malfunction--for example, by means of an unloading device that hid the mold by chopping up the feed instantly as it emerged; through continued dealer misrepresentations; **[****12]** **[***380]** with advertisements that tried to convince farmers that warm, brown, molasses-smelling feed was not fermented feed, but good feed; and even by hanging on the silo itself a plaque that said:

"DANGER

DO NOT ENTER

NOT ENOUGH OXYGEN

TO SUPPORT LIFE"

[*185] Not until 1991, say the Klehrs, did they become sufficiently suspicious to investigate the silo, at which time, by opening the silo wall and chopping through the feed with an ice chisel, they discovered "'mold hanging all over the silage.'" Brief for Petitioners 16.

The District Court, after examining the Klehrs' evidence, found their lawsuit untimely. The Eighth Circuit affirmed the dismissal, and said that a civil RICO action accrues

> "'as soon as the plaintiff discovers, or reasonably should have discovered, both the existence and source of his injury and that the injury is part of a pattern.'" *87 F.3d 231, 238 (1996)* (quoting *Association of Commonwealth Claimants v. Moylan, 71 F.3d 1398, 1402 (CA8 1995))*.

After examining the Klehrs' evidence *de novo*, the Circuit held that they failed to satisfy the standard. It said they had suffered "one single, continuous injury . . . sometime **[****13]** in the 1970s"; and that they should have discovered "the existence and source of their injury," as well as any related "pattern," well before August 1989. *87 F.3d at 239*. The Circuit refused to find "fraudulent concealment" because, among other things, the Klehrs had not been sufficiently "diligent." *Id., at 238, 239, n. 11*.

We granted certiorari in this case to consider the Klehrs' claim in light of a split of authority among the Courts of Appeals. Two other Circuits, like the Eighth Circuit here, have applied forms of an "injury and pattern discovery" civil RICO accrual rule. *Bivens Gardens Office Building, Inc. v. Barnett **[**1989]** Bank, 906 F.2d 1546, 1554-1555 (CA11 1990)*, cert. denied, *500 U.S. 910, 114 L. Ed. 2d 89, 111 S. Ct. 1695 (1991)*; *Bath v. Bushkin, Gaims, Gaines & Jonas, 913 F.2d 817, 820 (CA10 1990)*. Other Circuits have applied forms of an "injury discovery" rule, *i.e.*, without the "pattern." See *Grimmett v. Brown, 75 F.3d 506, 511 (CA9 1996)*, cert. dism'd as improvidently granted, *519 U.S. __, 117 S. Ct. 759, 136 L. Ed. 2d 674 (1997)*; *McCool v. Strata Oil Co., 972 F.2d 1452, 1464-1465 (CA7 1992)*; *Rodriguez v. Banco Central Corp., 917 F.2d 664, 665-666 **[*186]** (CA1 1990)*; *Bankers Trust Co. **[****14]***

v. Rhoades, 859 F.2d 1096, 1102 (CA2 1988), cert. denied, *490 U.S. 1007, 104 L. Ed. 2d 158, 109 S. Ct. 1642 (1989)*; Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp., 828 F.2d 211, 220 (CA4 1987); see also Riddell v. Riddell Washington Corp., 275 U.S. App. D.C. 362, 866 F.2d 1480, 1489-1490 (CADC 1989) (assuming, but not deciding, that injury discovery rule applies). One court, the Third Circuit, has applied a "last predicate act" rule, which we shall discuss below. We also agreed to decide the Klehrs' argument that "reasonable diligence" is not a necessary component of the doctrine of "fraudulent concealment."

For reasons we shall describe, we affirm the judgment of the Court of Appeals.

II

A

We shall first discuss the Third **[***381]** Circuit's accrual rule--the "last predicate act" rule--for it is the only accrual rule that can help the Klehrs. Like the Eighth Circuit, ***HN3***[] the Third Circuit believes that the limitations period starts to run when a plaintiff knew or should have known that the RICO claim (including a "pattern of racketeering activity") existed, but the Third Circuit has added an important exception, which it states as follows:

"[If], as a part of the same pattern of racketeering activity, there is further **[****15]** injury to the plaintiff or further predicate acts occur, . . . the accrual period shall run from the time when the plaintiff knew or should have known of the last injury or the last predicate act which is part of the same pattern of racketeering activity. The last predicate act need not have resulted in injury to the plaintiff but must be part of the same pattern." Keystone Ins. Co. v. Houghton, 863 F.2d 1125, 1130 (CA3 1988).

For purposes of assessing the rule's lawfulness, we assume, as do the Klehrs, that this rule means that as long as **[*187]** Harvestore committed one predicate act within the limitations period (*i.e.*, the four years preceding suit), the Klehrs can recover, not just for any added harm caused them by that late-committed act, but for all the harm caused them by all the acts that make up the total "pattern." We also assume that they can show at least one such late-committed act. Finally, we note that the point of difference between the Third Circuit, and the other Circuits, has nothing to do with the plaintiff's state of mind or knowledge. It concerns only the accrual consequences of a late-committed act. Consequently, we can consider the merits of the rule **[****16]** on the simplifying assumption that the plaintiff is perfectly knowledgeable.

LEdHN[1B][] [1B]We conclude that the Third Circuit's rule is not a proper interpretation of the law. We have two basic reasons. First, as several other Circuits have pointed out, the last predicate act rule creates a limitations period that is longer than Congress could have contemplated. Because a series of predicate acts (including acts occurring at up to 10-year intervals) can continue indefinitely, such an interpretation, in principle, lengthens the limitations period dramatically. It thereby conflicts with a basic objective--repose--that underlies limitations periods. See Wilson v. Garcia, 471 U.S. 261, 271, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985) (citing Adams v. Woods, 6 U.S. 336, 2 Cranch 336, 342, 2 L. Ed. 297 (1805)); Crown, Cork & Seal Co. v. Parker, 462 U.S. 345, 352, 76 L. Ed. 2d 628, 103 S. Ct. 2392 (1983). Indeed, the rule would permit plaintiffs who know of the defendant's pattern of activity simply to wait, "sleeping on their rights," *ibid.*, as the pattern continues and treble damages accumulate, perhaps bringing suit only long after the "memories of witnesses have faded or evidence is lost." Wilson, supra, at 271. We cannot find in civil RICO **[**1990]** a compensatory objective **[****17]** that would warrant so significant an extension of the limitations period, and civil RICO's further purpose--encouraging potential private plaintiffs diligently to investigate, see Malley-Duff, 483 U.S. at 151--suggests the contrary.

[*188] We recognize that RICO's criminal statute of limitations runs from the last, *i.e.*, the most recent, predicate act. But there are significant differences between civil and criminal RICO actions, and this Court has **[***382]** held that criminal RICO does not provide an apt analogy. Id., at 155-156 (declining to apply criminal RICO's 5-year statute of limitations to civil RICO actions and noting "competing equities unique to civil RICO actions or, indeed, any other federal civil remedy").

Second, the Third Circuit rule is inconsistent with the ordinary Clayton Act rule, applicable in private antitrust treble damage actions, under which "a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)*; *Connors v. Hallmark & Son Coal Co., 290 U.S. App. D.C. 170, 935 F.2d 336, 342, n. 10 (CADC 1991)*; 1 C. Corman, Limitation of Actions **[****18]** § 6.5.5.1, p. 449 (1991) (hereinafter Corman); 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P338b, p. 145 (rev. ed. 1995) (hereinafter Areeda). We do not say that a pure injury accrual rule always applies without modification in the civil RICO setting in the same way that it applies in traditional antitrust cases. For example, civil RICO requires not just a single act, but rather a "pattern" of acts. Furthermore, there is some debate as to whether the running of the limitations period depends on the plaintiff's awareness of certain elements of the cause of action. As we said earlier, however, for purposes of evaluating the Third Circuit's rule we can assume *knowledgeable* parties. Hence the special problems associated with a discovery rule, see *infra*, Part II-B, are not at issue. And we believe, in these circumstances, the Clayton Act analogy is helpful.

In *Malley-Duff*, this Court indicated why the analogy is useful. It concluded

"that there is a need for a uniform statute of limitations for civil RICO, that the Clayton Act clearly provides a far closer analogy than any available state statute, and **[*189]** that the federal policies that lie behind RICO and the practicalities **[****19]** of RICO litigation make the selection of the 4-year statute of limitations for Clayton Act actions . . . the most appropriate limitations period for RICO actions." *483 U.S. at 156* (citing *15 U.S.C. § 15b*).

The Court left open the accrual question. But it did not rule out the use of a Clayton Act analogy. As the Court has explained, Congress consciously patterned civil RICO after the Clayton Act. 483 U.S. at 150-151 (comparing *15 U.S.C. § 15(a)* with *18 U.S.C. § 1964(c)*); see also *Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 489, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985)*. And by the time civil RICO was enacted, the Clayton Act's accrual rule was well established. See *Crummer Co. v. DuPont, 223 F.2d 238, 247-248* (CA5), cert. denied, *350 U.S. 848, 100 L. Ed. 755, 76 S. Ct. 85 (1955)*; *Foster & Kleiser Co. v. Special Site Sign Co., 85 F.2d 742, 750-751 (CA9 1936)*, cert. denied, *299 U.S. 613, 81 L. Ed. 452, 57 S. Ct. 315 (1937)*; *Bluefields S. S. Co. v. United Fruit Co., 243 F. 1, 20 (CA3 1917)*.

LEdHN[2][] [2]The Clayton Act helps here because it makes clear precisely where, and how, the Third Circuit's rule goes too far. ***HN4***[] ***Antitrust law*** provides that, in the case of a "continuing violation," say a price fixing conspiracy that brings about a **[****20]** series of unlawfully high priced sales over a period of years, "each overt act that is part of the violation and that **[***383]** injures the plaintiff," *e.g.*, each sale to the plaintiff, "starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." 2 Areeda, P338b, at 145 (footnote omitted); see also *Zenith, supra, at 338*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 502, n. 15, 20 L. Ed. 2d 1231, 88 S. Ct. 2224 (1968)*;*DXS, Inc. v. Siemens Medical Systems, Inc., 100 F.3d 462, 467 (CA6 1996)*.But the commission of a separate new overt **[**1991]** act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period. *Zenith, supra, at 338*; *Pennsylvania Dental Assn. v. Medical Serv. Assn., 815 F.2d 270, 278* (CA3), cert. denied, *484 U.S. 851, 98 L. Ed. 2d 109, 108 S. Ct. 153 (1987)*; *Hennegan v. Pacifico Creative Serv., Inc., 787 F.2d 1299, 1300* **[*190]** (CA9), cert. denied, *479 U.S. 886, 93 L. Ed. 2d 254, 107 S. Ct. 279 (1986)*; *National Souvenir Center v. Historic Figures, Inc., 234 U.S. App. D.C. 222, 728 F.2d 503, 509* (CADC), cert. denied *sub nom. C. M. Uberman Enterprises, Inc. v. Historical Figures, Inc., 469 U.S. 825, 83 L. Ed. 2d 48, 105 S. Ct. 103* ***[****21]*** *(1984)*; *Imperial Point Colonnades Condominium, Inc. v. Mangurian, 549 F.2d 1029, 1034-1035 (CA5 1977)*; *Crummer Co., supra, 247-248*. Compare 2 Areeda P338b, at 149.

Similarly, some Circuits have adopted a "separate accrual" rule in civil RICO cases, under which the commission of a separable, new predicate act within a 4-year limitations period permits a plaintiff to recover for the additional damages caused by that act. But, as in the antitrust cases, the plaintiff cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period. See, *e.g.*, Grimmett, 75 F.3d at 512-514; McCool v. Strata Oil Co., 972 F.2d at 1465-1466, and n.10; Bivens Gardens Office Building, Inc. v. Barnett Bank, 906 F.2d at 1552, n.9; State Farm Mut. Auto. Ins. Co. v. Ammann, 828 F.2d 4, 5 (CA9 1987) (Kennedy, J., concurring). But see Bingham v. Zolt, 66 F.3d 553, 560 (CA2 1995) (citing Bankers Trust, 859 F.2d at 1103). Thus the Klehrs may point to new predicate acts that took place after August 1989, such as sales to other farmers or the **[****22]** printing of new Harvestore advertisements. But that fact does not help them, for, as the Court of Appeals pointed out, they have not shown how any new act could have caused them harm over and above the harm that the earlier acts caused. 87 F.3d at 239. Nor can the presence of the new act help them recover for the injuries caused by pre-1989 acts, for it is in this respect that we find the Third Circuit's rule incorrect.

Plaintiffs also point to *Zenith*, a case in which this Court considered antitrust damages that were so "speculative" or "unprovable," 401 U.S. at 339, at the time of a defendant's unlawful act (and plaintiff's initial injury) that to follow the normal accrual rule (starting the limitations period at the **[*191]** point the act first causes injury) would have left the plaintiff without relief. This Court held that, in such a case, a claim for the injuries that had been speculative would accrue when those injuries occurred, even though the act that caused them had taken place more than four years earlier. Id., at 339-340. This case does not help the plaintiffs here, however, for their injuries--the harm to their farm-- **[***384]** have always been specific and calculable.

B

LEdHN[1C][] [1C]We **[****23]** recognize that our holding in Part II-A does not resolve other conflicts among the Circuits. For example, the Circuits have applied "discovery" accrual rules, which extend accrual periods for plaintiffs who could not reasonably obtain certain key items of information. The use of a discovery rule may reflect the fact that a high percentage of civil RICO cases, unlike typical antitrust cases, involve fraud claims. See Sedima, 473 U.S. at 499, n. 16 (most civil RICO claims involve underlying fraud offense); 1 A. Mathews, A. Weissman & J. Sturc, Civil RICO Litigation, p. 1-6 (2d ed. 1992) (citing Report of the Ad Hoc Civil RICO Task Force of the ABA Section of Corporation, Banking and Business Law 243 (1985)) (as of 1985, approximately 90% of civil RICO cases resulting in a published decision involved mail, wire, or securities fraud as a predicate offense); cf. Connors, 935 F.2d at 342 (federal courts generally apply discovery accrual rule when statute does not call for a different rule); 1 Corman § 6.5.5.1, at 449 (same). Moreover, different Circuits have applied discovery accrual rules that differ, one from the other, in important ways. Compare, *e.g.*, Bankers Trust, **[****24]** supra, at 1103 (civil RICO cause of action accrues when the plaintiff discovers or should have discovered his injury) with 87 F.3d at 238 (civil RICO cause of action accrues when, in addition, **[**1992]** plaintiff discovers or should have discovered the "source" of injury and a "pattern").

[*192] We further realize that, contrary to our assumption in Part II-A, *supra* (where we discussed a legal issue in respect to which knowledge was irrelevant), the Klehrs did claim that they lacked knowledge of the faulty silo--the "source" of their injury. But that particular "lack of knowledge" claim does not require us to consider the various "discovery rule" differences among the Circuits, because the Klehrs failed the "knowledge" test that favors them the most--the Eighth Circuit's "injury plus source plus pattern" rule. That rule would have found the Klehrs' action timely had it not been the case that the Klehrs reasonably "should have discovered" *all* of those elements prior to 1989. 87 F.3d at 239. If the Klehrs cannot fit their case through the Eighth Circuit's larger hole, they cannot squeeze it through a smaller one.

In addition, the major difference among the Circuits--whether a discovery **[****25]** rule includes knowledge about a "pattern"--is clearly not at issue here. Harvestore marketed and sold its "oxygen-limiting" silos for many years before the Klehrs purchased theirs, and the Klehrs have not claimed lack of knowledge of a "pattern." Nor has anyone argued any other legal differences among the Circuits' various tests that would affect the outcome in this case.

In these circumstances, we believe we should not consider differences among the various discovery accrual rules used by the Circuits. The legal questions involved may be subtle and difficult. Compare id., at 238 (claim accrues with discovery of existence *and source* of injury, plus pattern) with Bivens Gardens, 906 F.2d at 1554 (claim accrues with discovery of injury and pattern); see also Cada, 920 F.2d at 451 (describing differences among various discovery rules **[***385]** and doctrines of "equitable tolling" and "equitable estoppel"). And the facts of this case do not force focused argument as to how the traditional Clayton Act "injury" accrual rule, principles of equitable tolling, and doctrines of equitable estoppel should interact in circumstances where the application of one, or another, of these **[****26]** different limitations doctrines would **[*193]** make a significant legal difference. To say this is not, as the concurrence claims, to advocate a "mix-and-match" statute of limitations theory. Rather, it is to recognize that the Clayton Act's express statute of limitations does not necessarily provide all the answers. We shall, at the very least, wait for a case that clearly presents these, or related issues, providing an opportunity for full argument, before we attempt to resolve them.

LEdHN[3A][] [3A]Finally, the Klehrs have asked us to review the Eighth Circuit's application of its rule in this case. Doing so would involve examining an evidentiary record of several thousand pages to determine the validity of the independent conclusion of each of two lower courts that the Klehrs should reasonably have discovered the silo's flaws before 1989 (and that a reasonable factfinder could not conclude to the contrary). That conclusion is highly fact-based, depending not only upon how much mold the Klehrs noticed in their silage and when, but also upon such matters as the effect of the Klehrs' failure to consult the herd performance records they were continuously sent, and whether their having done so would have led **[****27]** them to tell veterinarians a more revealing story, to question Harvestore's representatives more fully, or to investigate the silo sooner. See 87 F.3d at 234.We have no reason to believe that there is any very obvious or exceptional error below. And our writ of certiorari commits us to decide only whether the purely legal question of whether or not a claim accrues "where the Respondent continues to commit predicate acts" in the 4-year period immediately preceding suit. Pet. for Cert. i. We have answered that question in Part II-A. And we shall not go beyond the writ's question to reexamine the fact-based rule-application issue that the Klehrs now raise, and which the Eighth Circuit decided in Harvestore's favor.

III

LEdHN[1D][] [1D]Our writ of certiorari contained one further question, namely whether

[*194] "affirmative continuing acts of fraud . . . coupled with active cover up of the fraud, **[**1993]** act to equitably toll the statute of limitations . . . *whether or not* Petitioners have exercised reasonable diligence to discover their claim." *Ibid.* (emphasis added).

This question refers to the doctrine of "fraudulent concealment," which some courts have said "equitably tolls" the running of **[****28]** a limitations period, see, *e.g.*, Grimmett, 75 F.3d at 514, while other courts have said it is a form of "equitable estoppel," see, *e.g.*, Wolin v. Smith Barney Inc., 83 F.3d 847, 852 (CA7 1996). Regardless, the question presented here focuses upon a relevant difference among the Circuits in respect to the requirement of "reasonable diligence" on the part of the plaintiff. Some Circuits have held that when a plaintiff does not, in fact, know of a defendant's unlawful activity, and when the defendant takes "affirmative steps" to conceal that unlawful activity, those circumstances are sufficient to toll the limitations period **[***386]** (or to "estop" the defendant from asserting a limitations defense) *irrespective of what the plaintiff should have known*. See, *e.g.*, Wolin, supra, at 852-853. Other courts have held that a plaintiff who has not exercised reasonable diligence may not benefit from the doctrine. See, *e.g.*, Wood v. Carpenter, 101 U.S. 135, 143, 25 L. Ed. 807 (1879); Bailey, 21 Wall. at 349-350; J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1252-1255 (CA1 1996) (diligence required for fraudulent concealment **[****29]** under federal law); Urland v. Merrell-Dow Pharmaceuticals, Inc., 822 F.2d 1268, 1273-1274 (CA3 1987) (same with respect to Pennsylvania law); see also 2 Corman § 9.7.1, at 56-57, 60-61, 64-66.

LEdHN[1E][] [1E]We limit our consideration of the question to the context of civil RICO. In that context, we conclude that "reasonable diligence" does matter, and ***HN5***[] a plaintiff who is not reasonably diligent may not assert "fraudulent concealment." We reach this conclusion for two reasons. First, in the related antitrust context, where the "fraudulent concealment" doctrine **[*195]** is invoked fairly often, relevant authority uniformly supports the requirement. Professor Areeda says, for example, that the "***HN6***[] the concealment requirement is satisfied only if the plaintiff shows that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense." 2 Areeda P338, at 152; see also I. Scher, Antitrust Adviser § 10.27, p. 10-62 (4th ed. 1995). We have found many antitrust cases that say the same, and none that says the contrary. See, *e.g.*, *Conmar Corp. v. Mitsui & Co., 858 F.2d 499, 502 (CA9 1988)*, cert. denied *sub nom. VSL Corp. v. Conmar Corp., 488 U.S. 1010, 102 L. Ed. 2d 786, 109 S. Ct. 795* ***[****30]*** *(1989)*; *Texas v. Allan Constr. Co., 851 F.2d 1526, 1533 (CA5 1988)*; *Pinney Dock & Transport Co. v. Penn Central Corp., 838 F.2d 1445, 1465* (CA6), cert. denied *sub nom. Pinney Dock & Transport Co. v. Norfolk & Western R. Co., 488 U.S. 880, 102 L. Ed. 2d 166, 109 S. Ct. 196 (1988)*; *New York v. Hendrickson Bros., Inc., 840 F.2d 1065, 1083* (CA2), cert. denied, *488 U.S. 848, 102 L. Ed. 2d 101, 109 S. Ct. 128 (1988)*; *Berkson v. Del Monte Corp., 743 F.2d 53, 56 (CA1 1984)*, cert. denied, *470 U.S. 1056, 84 L. Ed. 2d 826, 105 S. Ct. 1765 (1985)*; *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp., 546 F.2d 570, 574 (CA4 1976)*.

Second, those courts that do not require "reasonable diligence" have said that the "fraudulent concealment" doctrine seeks to punish defendants for affirmative, discrete acts of concealment; the behavior of plaintiffs is consequently irrelevant. See *Wolin, supra, at 852*; *Robertson v. Seidman & Seidman, 609 F.2d 583, 593 (CA2 1979)*; cf. *Urland, supra, at 1280-1281* (Becker, J., dissenting). Whether or not that is so in the legal contexts at issue in those cases (which were not antitrust cases), it is not so in respect either to antitrust or to civil RICO. Rather, in both of those latter contexts **[****31]** private civil actions seek not only to compensate victims but also to encourage those victims themselves diligently to investigate and thereby to uncover unlawful activity. See *Malley-Duff, 483 U.S. at 151*. That being so, we cannot say that the "fraudulent concealment" is concerned only with the behavior of defendants. For that reason, and in light of the **[*196]** consensus of authority, we conclude that "fraudulent concealment" in the context of civil RICO embodies a "due diligence" requirement.

[1994]** ***LEdHN[3B]***[] [3B] **[***387]** In their brief on the merits, petitioners have asked us to examine whether the Eighth Circuit properly applied the "due diligence" requirement to the evidentiary materials before it. That fact-based question, however, is beyond the scope of our writ; and for reasons similar to those discussed earlier, see *supra, at 12*, we shall not consider it.

The judgment of the Court of Appeals is

Affirmed.

Concur by: SCALIA (In Part)

Concur

JUSTICE SCALIA, with whom JUSTICE THOMAS joins, concurring in part and concurring in the judgment.

Twice this Term we have received full briefing and heard oral argument on the question of when a civil RICO cause of action accrues; when we rise for our summer recess, **[****32]** the question will remain unanswered. We did not reach it in *Grimmett v. Brown, 519 U.S. __, 117 S. Ct. 759, 136 L. Ed. 2d 674 (1997)*, because we dismissed the writ of certiorari as improvidently granted. And we do not reach it today for no particular reason except timidity--declining to say what the *correct* accrual rule is, but merely rejecting the only one of the four candidates [1] under which these

[1] The Court's opinion could be read to suggest that there are only three different possible accrual rules--last predicate act, injury discovery, and injury and pattern discovery. See *ante,* at 4-5, 10-12. In fact, as is alluded to in its rejection of the Third Circuit's last predicate act rule, see *ante,* at 7-8, there is a fourth accrual rule--the Clayton Act "injury" rule.

petitioners could recover. We thus leave reduced but unresolved the well-known split in authority that prompted us to take this case. There will remain in effect, in some Circuits, one of the three remaining accrual rules--the one that their Courts of Appeals or District Courts have adopted; in the remaining Circuits litigants will have to **[*197]** guess which of the three to follow; and in all of the Circuits no one will know for sure which rule is right--until, at some future date, we receive briefing and argument a third or fourth time, and finally summon up the courage to "unravel," as one commentator has put it, "the mess that characterizes civil RICO accrual decisions," Abrams, Crime Legislation and the Public Interest: Lessons from Civil RICO, *50 SMU L. Rev. 33, 70 (1996)*.

[**33]** Worse still, the reason the Court gives for regarding the accrual issue as too complex ("subtle and difficult," *ante,* at 12) to be decided on only the second try is a reason that implicates the merits, and that in my view gets the merits wrong. One cannot, the Court says, leap impetuously to the conclusion that the antitrust "injury" accrual rule applies, rather than a "discovery" accrual rule, because civil RICO cases are unlike antitrust cases, in that "a high percentage" of them "involve fraud claims." *Ante,* at 10. This erases, it seems to me, the one clear path back out of the current forest of confusion, which is the proposition that RICO *is similar to the Clayton Act*. This is the proposition that caused us to adopt the Clayton Act statute of limitations in the first place, *specifically rejecting* the argument the Court now finds plausible, that the preponderance of fraud claims under RICO makes the Clayton Act an inappropriate model. We said the similarity was close enough: "Although the large **[***388]** majority of civil RICO complaints use [fraud] as the required predicate offenses, a not insignificant number of complaints allege criminal activity of a type generally **[****34]** associated with professional crimes such as arson, bribery, theft and political corruption." *Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 149, 97 L. Ed. 2d 121, 107 S. Ct. 2759 (1987)* (rejecting for this reason the use of state-law fraud statutes of limitations). Elsewhere in today's opinion, curiously enough, the Court is quite willing to say that what is good for antitrust is good for RICO--even with respect to a matter much more intimately connected with fraud than the accrual rule, namely, whether **[*198]** invocation of the "fraudulent concealment" rule requires "reasonable diligence" on the plaintiff's part. On this point the Court finds arguments taken from "the related antitrust context" entirely persuasive. *Ante,* at 14-15. (Apart from that illogical reliance, it seems to me also illogical even to resolve the question of whether a statute should be tolled by fraudulent concealment without having resolved the **[**1995]** antecedent question of when the statute begins to run.) Similarly, the Court relies heavily on the antitrust injury accrual rule in its analysis rejecting the Third Circuit's last predicate act rule. *Ante,* at 7-10.

I would resolve the Circuit split we granted certiorari to **[****35]** consider, and would hold that, of the four main accrual rules (injury, injury discovery, injury and pattern discovery, and last predicate act), the appropriate accrual rule is the Clayton Act "injury" rule--the "cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business." *Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 338, 28 L. Ed. 2d 77, 91 S. Ct. 795 (1971)* (referring, of course, to "an act" that violates the governing statute) In *Malley-Duff,* we held that the appropriate statute of limitations for civil RICO actions is the 4-year limitations period found in the Clayton Act. We reasoned that "RICO was patterned after the Clayton Act," *483 U.S. at 150*, and that the purpose, structure, and aims of the two schemes were quite similar, *id., at 151-152*. [2] Although we expressly **[*199]** acknowledged in *Malley-Duff* that we "had no occasion to decide the appropriate time of accrual for a RICO claim," *id., at 157*, it takes no profound analysis to figure out what that decision must be. "Presumably the accrual standards developed by the lower federal courts in . . . civil antitrust litigation should be equally applicable to civil **[****36]** enforcement RICO actions." 1 C. Corman, Limitation of Actions § 6.5.5.1, pp. 447-448 (1991).

We have said that "any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action." *Johnson v. Railway Express **[***389]** Agency, Inc., 421 U.S. 454, 463, 44 L. Ed. 2d 295, 95 S. Ct. 1716 (1975)*. It is just as true, I think, that any period of limitation **[****37]** is utterly meaningless without specification of the event that starts it running. As a practical

[2] "Both RICO and the Clayton Act are designed to remedy economic injury by providing for the recovery of treble damages, costs, and attorney's fees. Both statutes bring to bear the pressure of 'private attorneys general' on a serious national problem for which public prosecutorial resources are deemed inadequate; the mechanism chosen to reach the objective in both the Clayton Act and RICO is the carrot of treble damages. Moreover, both statutes aim to compensate the same type of injury; each requires that a plaintiff show injury 'in his business or property by reason of' a violation." *483 U.S. at 151*.

matter, a 4-year statute of limitations means nothing at all unless one knows when the four years start running. If they start, for example, on the tenth anniversary of the injury, the 4-year statute is more akin to a 14-year statute than to the Clayton Act. We would thus have been foolish, in *Malley-Duff,* to speak of "adopting" the Clayton Act statute, and of "patterning" the RICO limitation period after the Clayton Act, if all we meant was using the Clayton Act number of years.

We have recognized this principle in our more established practice (first departed from in *DelCostello v. Teamsters, 462 U.S. 151, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983))* of borrowing state rather than federal statutes of limitations. We have consistently followed "state law . . . in a variety of cases that raised questions concerning the overtones and details of application of the state limitation period to the federal cause of action. *Auto Workers* v. *Hoosier Corp.,* 383 U.S. [696,] 706 [(1966)] (characterization of the cause of action); *Cope* v. *Anderson,* 331 U.S. [461,] 465-467 [(1947)] (place where cause **[****38]** of action arose); *Barney v. Oelrichs, 138 U.S. 529, 34 L. Ed. 1037, 11 S. Ct. 414 (1891)* (absence from State as a **[*200]** tolling circumstance)." *Johnson, supra, at 464*. See also, *e.g., Chardon v. Fumero Soto, 462 U.S. 650, 657, 662, 77 L. Ed. 2d 74, 103 S. Ct. 2611 (1983)*. "In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. Courts thus should not unravel state limitations rules unless their full application would defeat the goals of the federal statute at issue." *Hardin v. Straub, 490 U.S. 536, 539, 104 L. Ed. 2d 582, 109 S. Ct. 1998 (1989)* (internal quotation **[**1996]** marks and citation omitted). There is no conceivable reason why the same principle should not apply to the borrowing of an analogous federal, rather than state, limitations period.

Both the allurement and the vice of the "mix-and-match" approach to statutes-of-limitation borrowing (the possibility of which the Court today entertains) is that it provides broad scope for judicial lawmaking. We should have resisted that allurement today, [3] as we resisted it in the past: "We find no support in our cases for the practice of borrowing only a portion of an express statute of limitations. **[****39]** Indeed, *such a practice comes close to the type of judicial policymaking that our borrowing doctrine was intended to avoid.*" *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350, 362, n. 8, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991)* (emphasis added). It is, in other words, no wonder that the Court finds the question it has posed for itself today "subtle and difficult"; judicial policy working is endlessly demanding, and constructing a statute of limitations **[***390]** is much more complicated than adopting one. Finding the most analogous cause of action whose **[*201]** limitations provision can be adopted is relatively simple (for the cause of action before us, we did it in *Malley-Duff)*; but limiting the adoption to merely the term of years set forth in the limitations provision, and then selecting, to go with that term of years, the precise accrual rule, tolling rule, estoppel rule, etc. that will clothe the limitations-naked statute with an ensemble of policy perfection--well that is, I concede, a task that should not be attacked all at once, but rather undertaken piecemeal, over several decades, as the Court has chosen to do today. I prefer to stand by the ruder, humbler, but more efficient and predictable **[****40]** practice we have followed in the past: When we adopt a statute of limitations from an analogous federal cause of action we adopt it in whole, with all its accoutrements. Perhaps (though I am dubious) there is room for an exception similar to the one made in our state-borrowing practice, see *Hardin, supra,* that would permit rejection of an element that "would defeat the goals of the federal statute at issue," *490 U.S. at 539*. But unless this exception is to gobble up the rule, nothing so extreme is represented by the Clayton Act accrual rule.

[**41]** Applying the Clayton Act accrual rule, I agree with the Court that petitioners' cause of action accrued more than four years before the filing of this action on August 27, 1993. See *ante,* at 11. Since the Court of Appeals determined, under a more relaxed accrual rule, that petitioners should have *discovered* all of the RICO elements (which would include their injury) prior to 1989, it follows, *a fortiori,* that under the Clayton Act injury accrual rule, petitioners' cause of action is untimely.

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[3] The Court disclaims any intent to adopt a "mix-and-match" approach, *ante,* at 12, but that seems to me inconsistent with its repeated references to the possibility of a discovery accrual rule--which is (and has been thought to be) the antithesis of the Clayton Act injury accrual rule. If the Court merely means to say that it is not sure how the Clayton Act accrual rule would apply in this case, then it should simply say so--thereby going a long way towards resolving the Circuit split and rendering this concurrence unnecessary.

I also agree with the Court that petitioners are not entitled to invoke the fraudulent concealment doctrine. As the Court persuasively demonstrates, in the antitrust context "'the concealment requirement is satisfied only if the plaintiff shows that he neither knew nor, in the exercise of due diligence, could reasonably have known of the offense.'" **[*202]** *Ante,* at 14 (quoting 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P338b, p. 152 (rev. ed. 1995)). I therefore join Part III of the Court's opinion.

For the foregoing reasons, I concur in the judgment of the Court.

References

[**42]**

51 Am Jur 2d, Limitation of Actions 74, *107*, *147*

27 Federal Procedure, L Ed, Pleadings and Motions 62:92

4 Am Jur Trials 445, Solving Statutes of Limitations Problems

18 USCS 1961-1968

L Ed Digest, Limitation of Actions 153.5, 221

L Ed Index, Limitation of Actions; Racketeer Influenced and Corrupt Organizations Act

ALR Index, Limitation of Actions; Racketeer Influenced and Corrupt Organizations Act

Annotation References:

Commencement of limitation period for criminal prosecution under Racketeer Influenced and Corrupt Organizations Act (RICO), *18 USCS 1961* -1968. 89 ALR Fed 887.

Civil action for damages under *18 USCS 1964 (c)* of Racketeer Influenced and Corrupt Organizations Act (RICO, *18 USCS 1961 et seq.*) for injuries sustained by reason of racketeering activity. 70 ALR Fed 538.

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State Oil Co. v. Khan

Supreme Court of the United States

October 7, 1997, Argued ; November 4, 1997, Decided

No. 96-871

Reporter
522 U.S. 3 *; 118 S. Ct. 275 **; 139 L. Ed. 2d 199 ***; 1997 U.S. LEXIS 6705 ****; 66 U.S.L.W. 4001; 1997-2 Trade Cas. (CCH) P71,961; 97 Cal. Daily Op. Service 8447; 97 Daily Journal DAR 13619; 11 Fla. L. Weekly Fed. S 243

STATE OIL COMPANY, PETITIONER v. BARKAT U. KHAN AND KHAN & ASSOCIATES, INC.

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Disposition: *93 F.3d 1358*, vacated and remanded.

Core Terms

vertical, maximum price, fixing, dealers, per se rule, prices, decisions, suppliers, Sherman Act, restrictions, gasoline, territories, antitrust, maximum, anti trust law, rule of reason, resale price, consumers, manufacturers, station, distributors, newspaper, monopoly, suggested retail price, restraint of trade, per se violation, minimum price, stare decisis, price fixing, anticompetitive

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Energy & Utilities Law > Oil, Gas & Mineral Interests > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN1[] **Antitrust & Trade Law, Sherman Act**

Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998 (1968) is overruled.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN2[] **Per Se Rule & Rule of Reason, Sherman Act**

Although the Sherman Act, *15 U.S.C.S. § 1*, by its terms, prohibits every agreement in restraint of trade, Congress intended to outlaw only unreasonable restraints. As a consequence, most antitrust claims are analyzed under a "rule of reason," according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN3[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Some types of restraints of trade have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful per se. Per se treatment is appropriate once experience with a particular kind of restraint enables a court to predict with confidence that the rule of reason will condemn it.

Governments > Courts > Judicial Precedent

HN4[] **Courts, Judicial Precedent**

Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. It is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.

Governments > Courts > Judicial Precedent

HN5[] **Courts, Judicial Precedent**

Stare decisis concerns are at their acme in cases involving property and contract rights.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **Regulated Industries, Higher Education & Professional Associations**

Stare decisis is not an inexorable command. In the area of ***antitrust law***, there is a competing interest in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.

Lawyers' Edition Display

Decision

Vertical maximum price fixing held (1) not to be per se antitrust violation of 1 of Sherman Act (*15 USCS 1*), and (2) instead, to be subject to evaluation under rule of reason.

Summary

In *Albrecht v Herald Co. (1968) 390 US 145, 19 L Ed 2d 998, 88 S Ct 869*, which involved a newspaper publisher's alleged attempt to fix the maximum resale price of newspapers, the United States Supreme Court held that vertical maximum price fixing was a per se violation of 1 of the Sherman Act (*15 USCS 1*), which prohibits contracts, combinations, or conspiracies in restraint of trade. An individual and his corporation entered into an agreement with an oil company to lease and operate a gas station owned by the oil company. The agreement included a provision that if the retail price charged for gasoline sold was higher than a price suggested by the oil company, then the excess was to be rebated to the oil company. After a dispute arose, the individual and his corporation (1) sued the oil company in the United States District Court for the Northern District of Illinois, and (2) included a claim that the oil company had engaged in price fixing in violation of 1. However, the District Court found that the complaint's allegations did not state a per se violation of the Sherman Act. Subsequently, the District Court, on cross-motions, entered summary judgment for the oil company on the Sherman Act claim, as the court concluded that the individual and his corporation had failed to demonstrate antitrust injury or harm to competition (*907 F. Supp 1202, 1995 US Dist LEXIS 17068*). The United States Court of Appeals for the Seventh Circuit, in reversing in pertinent part, expressed the view that (1) the agreement fixed maximum prices by making it worthless to exceed the suggested retail price, and (2) under Albrecht v Herald Co., the oil company's maximum pricing scheme was a per se antitrust violation (*93 F.3d 1358, 1996 US App LEXIS 22504*).

On certiorari, the Supreme Court vacated and remanded. In an opinion by O'Connor, J., expressing the unanimous view of the court, it was held--expressly overruling Albrecht v Herald Co.--that (1) vertical maximum price fixing is not a per se violation of 1; (2) instead, vertical maximum price fixing is to be evaluated under the rule of reason; and (3) under the circumstances in the case at hand, the Court of Appeals ought to review in the first instance the question whether the individual and his corporation were entitled to recover damages on the basis of the oil company's conduct.

Headnotes

COURTS §776 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > vertical maximum price fixing -- per se violation -- overruling prior decision -- > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]

In a 1997 antitrust case involving an oil company's suggested retail price for gasoline, the United States Supreme Court will overrule *Albrecht v Herald Co. (1968) 390 US 145, 19 L Ed 2d 998, 88 S Ct 869*, and will hold that vertical maximum price fixing is not a per se violation of 1 of the Sherman Act (*15 USCS 1*), which prohibits contracts, combinations, or conspiracies in restraint of trade--and that, instead, vertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, is to be evaluated under the rule of reason, which will effectively identify those situations amounting to anticompetitive conduct--because (1) there is insufficient economic justification for per se invalidation of vertical maximum price fixing; (2) in the context of the case at hand, little meaning is to be inferred from the fact that Congress has not reacted legislatively to the Albrecht decision; (3) even though gasoline retailers are free to seek specific legislative protection from gasoline suppliers, the remedy for a retailer's dispute with an oil company should not come in the form of a per se rule affecting the conduct of the entire marketplace; (4) the inquiry which the Supreme Court must undertake requires considering the effect of the antitrust laws upon vertical distributional restraints in the American economy in 1997; and (5) even though stare decisis concerns as to statutory interpretation and as to property and contract rights are arguably relevant--and even though the Albrecht rule has been in effect for some time--the Albrecht decision does not deserve continuing respect under the doctrine of stare decisis.

APPEAL §1750 > question to be considered on remand -- > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]

Under the circumstances of the United States Supreme Court's certiorari review of a Federal Court of Appeals' decision against some gasoline retailers on their antitrust claim, under 1 of the Sherman Act (*15 USCS 1*), against an oil company with respect to its suggested retail price for gasoline, the Supreme Court--in vacating the Court of Appeals' judgment and in remanding the case for further proceedings consistent with the Supreme Court's opinion--will hold that the Court of Appeals should review in the first instance the question whether the retailers are entitled to recover damages on the basis of the oil company's conduct, where (1) in the case at hand, the Supreme Court overrules *Albrecht v Herald Co. (1968) 390 US 145, 19 L Ed 2d 998, 88 S Ct 869*, and holds that vertical maximum price fixing (a) is not a per se violation of 1, and (b) instead, is to be evaluated under the rule of reason; and (2) although the Court of Appeals had noted that the Federal District Court judge below had been right to conclude that if the rule of reason was applicable, then the oil company would lose, the Court of Appeals' consideration on the Albrecht decision's per se rule.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > rule of reason -- > Headnote:
LEdHN[3][] [3]

Under the rule of reason, according to which most antitrust claims under 1 of the Sherman Act (*15 USCS 1*) are analyzed, the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including (1) specific information about the relevant business, (2) its condition before and after the restraint was imposed, and (3) the restraint's history, nature, and effect.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > per se violations -- > Headnote:
LEdHN[4][] [4]

For purposes of analyzing antitrust claims under 1 of the Sherman Act (*15 USCS 1*), some types of restraints have such predictable and pernicious anticompetitive effect--and such limited potential for procompetitive benefit--that they are deemed unlawful per se; per se treatment is appropriate once experience with a particular kind of restraint enables the United States Supreme Court to predict with confidence that the rule of reason will condemn it.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > purpose -- > Headnote:
LEdHN[5][] [5]

In general, the primary purpose of the antitrust laws is to protect interbrand competition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > prices -- > Headnote:
LEdHN[6][] [6]

The United States Supreme Court's interpretation of the Sherman Act (*15 USCS 1 et seq.*) incorporates the notion that condemnation of practices resulting in lower prices to consumers is especially costly, because cutting prices in order to increase business often is the very essence of competition.

COURTS §776 > overruling decision -- > Headnote:
LEdHN[7][] [7]

In a case which presents a question whether a particular United States Supreme Court decision deserves continuing respect under the doctrine of stare decisis, a Federal Court of Appeals is correct in applying that principle despite disagreement with the decision, for it is the Supreme Court's prerogative alone to overrule one of its own precedents.

COURTS §775 > adherence to former decisions -- > Headnote:
LEdHN[8][] [8]

The United States Supreme Court approaches the reconsideration of its own decisions with the utmost caution.

COURTS §766 > stare decisis -- > Headnote:
LEdHN[9][] [9]

The doctrine of stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right; stare decisis is the preferred course, because it (1) promotes the evenhanded, predictable, and consistent development of legal principles, (2) fosters reliance on judicial decisions, and (3) contributes to the actual and perceived integrity of the judicial process.

COURTS §766 > stare decisis -- > Headnote:
LEdHN[10][] [10]

Stare decisis is not an inexorable command.

COURTS §141 > reconsideration of Sherman Act decision -- Congress -- > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]

In the area of ***antitrust law***, there is a competing interest to stare decisis--which competing interest is well-represented in the United States Supreme Court's decisions--in recognizing and adapting to changed circumstances and the lessons of accumulated experience; thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act (*15 USCS 1 et seq.*), in light of the accepted view that Congress expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition; however, the Supreme Court, in reconsidering one of its decisions construing the Sherman Act, does not lightly assume that (1) the economic realities underlying earlier decisions have changed, or (2) earlier judicial perceptions of those realities were in error.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §8 > term -- > Headnote:
LEdHN[12][] [12]

The term "restraint of trade," as used in 1 of the Sherman Act (*15 USCS 1*), invokes the common law itself, not merely the static content that the common law had assigned to the term in 1890.

Syllabus

Respondents' agreement to lease and operate a gas station obligated them to buy gasoline from petitioner State Oil Company at a price equal to a suggested retail price set by State Oil, less a specified profit margin, required them to rebate any excess to State Oil if they charged customers more than the suggested price, and provided that any decrease due to sales below the suggested price would reduce their margin. After they fell behind in their lease payments and State Oil commenced eviction proceedings, respondents brought this suit in federal court, alleging in part that, by preventing them from raising or lowering retail **[****2]** gas prices, State Oil had violated *§ 1* of the Sherman Act. The District Court entered summary judgment for State Oil on this claim, but the Seventh Circuit reversed on the basis of *Albrecht v. Herald Co., 390 U.S. 145, 152-154, 19 L. Ed. 2d 998, 88 S. Ct. 869*, in which this Court held that vertical maximum price fixing is a *per se* antitrust violation. Although the Court of Appeals characterized *Albrecht* as "unsound when decided" and "inconsistent with later decisions," it felt constrained to follow that decision.

Held: Albrecht is overruled. Pp. 3-16.

(a) Although most antitrust claims are analyzed under a "rule of reason," under which the court reviews a number of relevant factors, see, *e. g., Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 342-343, 73 L. Ed. 2d 48, 102 S. Ct. 2466*, some types of restraints on trade have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se,* see*, e. g., Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514*. A review of this Court's pertinent decisions is relevant in assessing the continuing validity of the *Albrecht per se* rule. See, *e. g., Kiefer-Stewart Co.* ***[****3]*** *v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213, 95 L. Ed. 219, 71 S. Ct. 259* (maximum resale price fixing illegal *per* se); United *States v. Arnold, Schwinn & Co., 388 U.S. 365, 379-380, 18 L. Ed. 2d 1249, 87 S. Ct. 1856* (vertical nonprice restrictions illegal *per se*); *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 47-49, 58-59, 53 L. Ed. 2d 568, 97 S. Ct. 2549* (overruling *Schwinn*). A number of this Court's later decisions have hinted that *Albrecht's* analytical underpinnings were substantially weakened by *GTE Sylvania* -- see, *e. g., Maricopa County,* *supra, at 348, n. 18*; *324* *Liquor Corp. v. Duffy, 479 U.S. 335, 341-342, 93 L. Ed. 2d 667, 107 S. Ct. 720*; *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 335, n. 5, 343, n. 13, 109 L. Ed. 2d 333, 110 S. Ct. 1884* -- and there is a considerable body of scholarship discussing the procompetitive effects of vertical maximum price fixing. Pp. 3-9.

(b) Informed by the foregoing decisions and scholarship, and guided by the general view that the antitrust laws' primary purpose is to protect interbrand competition, see, *e. g.*, *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 99 L. Ed. 2d 808, 108 S. Ct. 1515*, and that condemnation of practices resulting in lower consumer prices is disfavored, *Matsushita Elec. Industrial* ***[****4]*** *Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348*, this Court finds it difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation *Albrecht's* theoretical justifications for its *per se* rule -- that vertical maximum price fixing could interfere with dealer freedom, restrict dealers' ability to offer consumers essential or desired services, channel distribution through large or specially-advantaged dealers, or disguise minimum price fixing schemes -- have been abundantly criticized and can be appropriately recognized and punished under the rule of reason. Not only are they less serious than the *Albrecht* Court imagined, but other courts and antitrust scholars have noted that the *per se* rule could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers. For these reasons, and because *Albrecht* is irrelevant to ongoing Sherman Act enforcement, see *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 81 L. Ed. 2d 628, 104 S. Ct. 2731*, and n. 25, and there are apparently no cases in which enforcement efforts have been directed solely against **[****5]** the conduct condemned in *Albrecht,* there is insufficient economic justification for the *per se* rule. Respondents' arguments in favor of the rule -- that its elimination should require persuasive, expert testimony establishing that it has distorted the market, and that its retention is compelled by *Toolson v. New York Yankees, Inc., 346 U.S. 356, 98 L. Ed. 64, 74 S. Ct. 78*, and *Flood v. Kuhn, 407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099* -- are unavailing. Pp. 9-14.

(c) *Albrecht* does not deserve continuing respect under the doctrine of *stare decisis*. *Stare decisis* is not an inexorable command, particularly in the area of ***antitrust law***, where there is a competing interest in recognizing and adapting to changed circumstances and the lessons of accumulated experience. See, *e.g., National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688, 55 L. Ed. 2d 637, 98 S. Ct. 1355*. Accordingly, this Court has reconsidered its decisions construing the Sherman Act where, as here, the theoretical underpinnings of those decisions are called into serious question. See, *e.g.*, *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549*. Because *Albrecht* has been widely criticized since its inception, and the views underlying **[****6]** it have been eroded by this Court's precedent, there is not much of that decision to salvage. See, *e.g.*, *Neal v. United States, 516 U.S. 284, 295, 133 L. Ed. 2d 709, 116 S. Ct. 763*. In overruling *Albrecht*, the Court does not hold that all vertical maximum price fixing is *per se* lawful, but simply that it should be evaluated under the rule of reason, which can effectively identify those situations in which it amounts to anticompetitive conduct. The question whether respondents are entitled to recover damages in light of this Court's overruling of *Albrecht* should be reviewed by the Court of Appeals in the first instance. Pp. 14-16.

93 F.3d 1358, vacated and remanded.

Counsel: John Baumgartner argued the cause for petitioner.

Joel I. Klein argued the cause for the United States, as amici curiae, by special leave of court.

Anthony S. DiVincenzo argued the cause for respondents.

Pamela J. Harbour argued the cause for the state of New York, as amicus curiae, by special leave of court.

Judges: O'CONNOR, J., delivered the opinion for a unanimous Court.

Opinion by: O'CONNOR

Opinion

[278]** **[***205]** **[*7]** JUSTICE **O'CONNOR** delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A]Under *§ 1* of the Sherman Act, 26 Stat. 209, as amended, *15 U.S.C. § 1*, "every contract, combination . . . , or conspiracy, in restraint of trade" is illegal. In *Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968)*, this Court held that vertical maximum price fixing is a *per se* violation of that statute. In this case, we are asked to reconsider that decision in light of subsequent decisions **[****7]** of this Court. ***HN1***[] We conclude that *Albrecht* should be overruled.

I

Respondents, Barkat U. Khan and his corporation, entered into an agreement with petitioner, State Oil Company, to lease and operate a gas station and convenience store owned **[*8]** by State Oil. The agreement provided that respondents would obtain the station's gasoline supply from State Oil at a price equal to a suggested retail price set by State Oil, less a margin of 3.25 cents per gallon. Under the agreement, respondents could charge any amount for gasoline sold to the station's customers, but if the price charged was higher than State Oil's suggested retail price, the excess was to be rebated to State Oil. Respondents could sell gasoline for less than State Oil's suggested retail price, but any such decrease would reduce their 3.25 cents-per-gallon margin.

About a year after respondents began operating the gas station, they fell behind in lease payments. State Oil then gave notice of its intent to terminate the agreement and commenced a state court proceeding to evict respondents. At State Oil's request, the state court appointed a receiver to operate the gas station. The receiver operated the station for **[****8]** several months without being subject to the price restraints in respondents' agreement with State Oil. According to respondents, the receiver obtained an overall profit margin in excess of 3.25 cents per gallon by lowering the price of regular-grade gasoline and raising the price of premium grades.

Respondents sued State Oil in the United States District Court for the Northern District of Illinois, alleging in part that State Oil had engaged in price fixing in violation of *§ 1* of the Sherman Act by preventing respondents from raising or lowering retail gas prices. According to the complaint, but for the agreement with State Oil, respondents could have charged different prices based on the grades of gasoline, in the same way that the receiver had, thereby achieving increased sales and profits. State Oil responded that the agreement did not actually prevent respondents from setting gasoline prices, and that, in substance, respondents did not allege a violation of antitrust laws by their claim that State Oil's suggested retail price was not optimal.

[*9]

The District Court found that the allegations in the complaint did not state a *per se* violation of the Sherman Act because **[****9]** they did not establish the sort of "manifestly anticompetitive implications or pernicious effect on competition" that would justify *per se* prohibition of State Oil's conduct. App. 43-44. Subsequently, in ruling on cross-motions for summary judgment, the District Court concluded that respondents had failed to demonstrate antitrust injury or harm to competition. **[**279]** App. to Pet. for Cert. 37a. The District **[***206]** Court held that respondents had not shown that a difference in gasoline pricing would have increased the station's sales; nor had they shown that State Oil had market power or that its pricing provisions affected competition in a relevant market. *Id., at 37*a, 40a. Accordingly, the District Court entered summary judgment for State Oil on respondents' Sherman Act claim. *Id., at 40*a.

The Court of Appeals for the Seventh Circuit reversed. *93 F.3d 1358 (1996)*. The court first noted that the agreement between respondents and State Oil did indeed fix maximum gasoline prices by making it "worthless" for respondents to exceed the suggested retail prices. *Id., at 1360*. After reviewing legal and economic aspects of price fixing, the court concluded that State Oil's pricing scheme **[****10]** was a *per se* antitrust violation under *Albrecht v. Herald Co., supra.* Although the Court of Appeals characterized *Albrecht* as "unsound when decided" and "inconsistent with later decisions" of this Court, it felt constrained to follow that decision. *93 F.3d at 1363*. In light of *Albrecht* and *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 109 L. Ed. 2d 333, 110 S. Ct. 1884*

(1990) (*ARCO*), the court found that respondents could have suffered antitrust injury from not being able to adjust gasoline prices.

We granted certiorari to consider two questions, whether State Oil's conduct constitutes a *per se* violation of the Sherman Act and whether respondents are entitled to recover damages based on that conduct. 519 U.S. __ (1997).

[*10] II

A

LEdHN[3][] [3]***HN2***[] Although the Sherman Act, by its terms, prohibits every agreement "in restraint of trade," this Court has long recognized that Congress intended to outlaw only unreasonable restraints. See, *e.g.*, *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 342-343, 73 L. Ed. 2d 48, 102 S. Ct. 2466 (1982)* (citing *United States v. Joint Traffic Assn., 171 U.S. 505, 43 L. Ed. 259, 19 S. Ct. 25 (1898))*. As a consequence, most antitrust claims are analyzed under a "rule of reason," **[****11]** according to which the finder of fact must decide whether the questioned practice imposes an unreasonable restraint on competition, taking into account a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. *457 U.S. at 343*, and n. 13 (citing *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 62 L. Ed. 683, 38 S. Ct. 242 (1918))*.

LEdHN[4][] [4]***HN3***[] Some types of restraints, however, have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se*. *Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*.*Per se* treatment is appropriate "once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it." *Maricopa County, supra, at 344*; see also *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19, n. 33, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. Thus, we have expressed reluctance to adopt *per se* rules with regard to "restraints imposed in the context of business relationships where the economic **[****12]** impact of certain practices is **[***207]** not immediately obvious." *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-459, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*.

A review of this Court's decisions leading up to and beyond *Albrecht* is relevant to our assessment of the continuing validity of the *per se* rule established in *Albrecht*. Beginning **[*11]** with *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 55 L. Ed. 502, 31 S. Ct. 376 (1911)*, the Court recognized the illegality of agreements under which manufacturers or suppliers set the minimum resale prices to be charged by their distributors. By 1940, the Court broadly declared all business combinations "formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce" illegal *per se*. *United States v. Socony-Vacuum **[**280]** Oil Co., 310 U.S. 150, 223, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*. Accordingly, the Court condemned an agreement between two affiliated liquor distillers to limit the maximum price charged by retailers in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 95 L. Ed. 219, 71 S. Ct. 259 (1951)*, noting that agreements to fix maximum prices, "no less than those to fix minimum prices, cripple **[****13]** the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Id., at 213*.

In subsequent cases, the Court's attention turned to arrangements through which suppliers imposed restrictions on dealers with respect to matters other than resale price. In *White Motor Co. v. United States, 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)*, the Court considered the validity of a manufacturer's assignment of exclusive territories to its distributors and dealers. The Court determined that too little was known about the competitive impact of such vertical limitations to warrant treating them as *per se* unlawful. *Id., at 263*. Four years later, in *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*, the Court reconsidered the status of exclusive dealer territories and held that, upon the transfer of title to goods to a distributor, a supplier's imposition of territorial restrictions on the distributor was "so obviously destructive of competition" as to constitute a *per se* violation of the Sherman Act. *Id., at 379*. In *Schwinn*, the Court acknowledged that some vertical restrictions, such as the conferral of territorial rights or franchises, **[****14]** could have procompetitive benefits by allowing smaller enterprises to compete, and that **[*12]** such restrictions might avert vertical integration in the distribution process. *Id., at 379-380*. The Court drew the line, however, at permitting manufacturers to control product marketing once dominion over the goods had passed to dealers. *Id., at 380*.

Albrecht, decided the following Term, involved a newspaper publisher who had granted exclusive territories to independent carriers subject to their adherence to a maximum price on resale of the newspapers to the public. Influenced by its decisions in *Socony-Vacuum*, *Kiefer-Stewart*, and *Schwinn*, the Court concluded that it was *per se* unlawful for the publisher to fix the maximum resale price of its newspapers. *390 U.S. at 152-154*. The Court acknowledged that "maximum and minimum price fixing **[***208]** may have different consequences in many situations," but nonetheless condemned maximum price fixing for "substituting the perhaps erroneous judgment of a seller for the forces of the competitive market." *Id., at 152*.

Albrecht was animated in part by the fear that vertical maximum price fixing could allow suppliers **[****15]** to discriminate against certain dealers, restrict the services that dealers could afford to offer customers, or disguise minimum price fixing schemes. *Id., at 152-153*. The Court rejected the notion (both on the record of that case and in the abstract) that, because the newspaper publisher "granted exclusive territories, a price ceiling was necessary to protect the public from price gouging by dealers who had monopoly power in their own territories." *Id., at 153*.

In a vigorous dissent, Justice Harlan asserted that the majority had erred in equating the effects of maximum and minimum price fixing. *Id., at 156-168* (Harlan, J., dissenting). Justice Harlan pointed out that, because the majority was establishing a *per se* rule, the proper inquiry was "not whether dictation of maximum prices is *ever* illegal, but whether it is *always* illegal." *Id., at 165-166*. He also faulted the majority for conclusively listing "certain unfortunate consequences that maximum **[*13]** price dictation might have in other cases," even as it rejected evidence that the publisher's practice of fixing maximum prices counteracted potentially anticompetitive actions by its distributors. *Id., **[****16]** at 165*. Justice Stewart also dissented, asserting that the publisher's maximum price fixing scheme should be properly viewed as promoting competition, because it protected consumers from dealers such as Albrecht, who, as "the only person who could sell for home delivery the **[**281]** city's only daily morning newspaper," was "a monopolist within his own territory." *Id., at 168* (Stewart, J., dissenting).

Nine years later, in *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977)*, the Court overruled *Schwinn*, thereby rejecting application of a *per se* rule in the context of vertical nonprice restrictions. The Court acknowledged the principle of *stare decisis*, but explained that the need for clarification in the law justified reconsideration of *Schwinn*:

> "Since its announcement, *Schwinn* has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach. In our view, the experience of the past 10 years should **[****17]** be brought to bear on this subject of considerable commercial importance." *433 U.S. at 47-49* (footnotes omitted).

The Court considered the historical context of *Schwinn*, noting that *Schwinn*'s *per se* rule against vertical nonprice restrictions came only four years after the Court had refused to endorse a similar rule in *White Motor Co.*, and that the decision neither explained the "sudden change in position," nor referred to the accepted requirements for *per se* violations set forth in *Northern Pacific R. Co.,* 433 U.S. at 51-52. **[***209]** The Court then reviewed scholarly works supporting the economic utility of vertical nonprice restraints. See *id., **[*14]** at 54-57* (citing, *e.g.*, Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential

Competition Decisions, 75 Colum. L. Rev. 282 (1975); Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp. Prob. 506 (1965)). The Court concluded that, because "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than -- as in *Schwinn* -- upon formalistic line **[****18]** drawing," the appropriate course would be "to return to the rule of reason that governed vertical restrictions prior to *Schwinn*." *GTE Sylvania, supra, at 58-59*.

In *GTE Sylvania*, the Court declined to comment on *Albrecht's per se* treatment of vertical maximum price restrictions, noting that the issue "involved significantly different questions of analysis and policy." *433 U.S. at 51, n. 18*. Subsequent decisions of the Court, however, have hinted that the analytical underpinnings of *Albrecht* were substantially weakened by *GTE Sylvania*. We noted in *Maricopa County* that vertical restraints are generally more defensible than horizontal restraints. See *457 U.S. at 348, n. 18*. And we explained in *324 Liquor Corp. v. Duffy, 479 U.S. 335, 341-342, 93 L. Ed. 2d 667, 107 S. Ct. 720 (1987)*, that decisions such as *GTE Sylvania* "recognize the possibility that a vertical restraint imposed by a *single* manufacturer or wholesaler may stimulate interbrand competition even as it reduces intrabrand competition."

Most recently, in *ARCO, 495 U.S. 328, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*, although *Albrecht's* continuing validity was not squarely before the Court, some disfavor with that decision was signaled **[****19]** by our statement that we would "assume, *arguendo*, that *Albrecht* correctly held that vertical, maximum price fixing is subject to the *per se* rule." *495 U.S. at 335, n. 5*. More significantly, we specifically acknowledged that vertical maximum price fixing "may have procompetitive interbrand effects," and pointed out that, in the wake of *GTE Sylvania*, "the **[*15]** procompetitive potential of a vertical maximum price restraint is more evident . . . than it was when *Albrecht* was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful *per se* in 1968." *495 U.S. at 343, n. 13* (citing several commentators identifying procompetitive effects of vertical maximum price fixing, including, *e.g.*, P. Areeda & H. Hovenkamp, ***Antitrust Law*** P340.30b, p. 378, n. 24 (1988 Supp.); Blair & Harrison, Rethinking Antitrust Injury, *42 Vand. L. Rev. 1539, 1553 (1989)*; Easterbrook, Maximum Price Fixing, 48 U. Chi. L. Rev. 886, 887-890 (1981)).

[282]** B

LEdHN[5][] [5]***LEdHN[6]***[] [6]Thus, our reconsideration of *Albrecht's* continuing validity is informed by several of our decisions, as well as a considerable body of scholarship discussing the effects of vertical restraints. Our **[****20]** analysis is also guided by our general view that the primary purpose of the antitrust **[***210]** laws is to protect interbrand competition. See, *e.g.*, *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 726, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988)*. "Low prices," we have explained, "benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *ARCO, supra, at 340*. Our interpretation of the Sherman Act also incorporates the notion that condemnation of practices resulting in lower prices to consumers is "especially costly" because "cutting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*.

So informed, we find it difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation. As Chief Judge Posner wrote for the Court of Appeals in this case:

> "As for maximum resale price fixing, unless the supplier is a monopsonist he cannot squeeze his dealers' margins **[*16]** below a competitive level; the attempt to **[****21]** do so would just drive the dealers into the arms of a competing supplier. A supplier might, however, fix a maximum resale price in order to prevent his dealers from exploiting a monopoly position. . . . Suppose that State Oil, perhaps to encourage . . . dealer services . . . has spaced its dealers sufficiently far apart to limit competition among them (or even given each of

> them an exclusive territory); and suppose further that Union 76 is a sufficiently distinctive and popular brand to give the dealers in it at least a modicum of monopoly power. Then State Oil might want to place a ceiling on the dealers' resale prices in order to prevent them from exploiting that monopoly power fully. It would do this not out of disinterested malice, but in its commercial self-interest. The higher the price at which gasoline is resold, the smaller the volume sold, and so the lower the profit to the supplier if the higher profit per gallon at the higher price is being snared by the dealer." *93 F.3d at 1362*.

See also R. Bork, The Antitrust Paradox 281-282 (1978) ("There could, of course, be no anticonsumer effect from [the type of price fixing considered in *Albrecht*], and one suspects **[****22]** that the paper has a legitimate interest in keeping subscriber prices down in order to increase circulation and maximize revenues from advertising").

We recognize that the *Albrecht* decision presented a number of theoretical justifications for a *per se* rule against vertical maximum price fixing. But criticism of those premises abounds. The *Albrecht* decision was grounded in the fear that maximum price fixing by suppliers could interfere with dealer freedom. *390 U.S. at 152*. In response, as one commentator has pointed out, "the ban on maximum resale price limitations declared in *Albrecht* in the name of 'dealer freedom' has actually prompted many suppliers to integrate forward into distribution, thus eliminating the very independent trader for whom *Albrecht* professed solicitude." **[*17]** 7 P. Areeda, ***Antitrust Law***, P1635, p. 395 (1989). For example, integration in the newspaper industry since *Albrecht* has given rise to litigation between independent distributors and publishers. See P. Areeda & H. Hovenkamp, **[***211]** ***Antitrust Law*** P729.7, pp. 599-614 (1996 Supp.).

The *Albrecht* Court also expressed the concern that maximum prices may be set too low for dealers to offer **[****23]** consumers essential or desired services. *390 U.S. at 152-153*. But such conduct, by driving away customers, would seem likely to harm manufacturers as well as dealers and consumers, making it unlikely that a supplier would set such a price as a matter of business judgment. See, *e.g.*, Lopatka, Stephen Breyer and Modern Antitrust: A Snug Fit, 40 Antitrust Bull. 1, 60 (1995); Blair & Lang, *Albrecht* After *ARCO*: Maximum Resale **[**283]** Price Fixing Moves Toward the Rule of Reason, *44 Vand. L. Rev. 1007, 1034 (1991)*. In addition, *Albrecht* noted that vertical maximum price fixing could effectively channel distribution through large or specially-advantaged dealers. *390 U.S. at 153*. It is unclear, however, that a supplier would profit from limiting its market by excluding potential dealers. See, *e.g.*, Easterbrook, *supra*, at 905-908. Further, although vertical maximum price fixing might limit the viability of inefficient dealers, that consequence is not necessarily harmful to competition and consumers. See, *e.g.*, Easterbrook, *supra*, at 907; Lopatka, *supra*, at 60.

Finally, *Albrecht* reflected the Court's fear that maximum price fixing could be used to disguise **[****24]** arrangements to fix minimum prices, *390 U.S. at 153*, which remain illegal *per se*. Although we have acknowledged the possibility that maximum pricing might mask minimum pricing, see *Maricopa County, 457 U.S. at 348*, we believe that such conduct -- as with the other concerns articulated in *Albrecht* -- can be appropriately recognized and punished under the rule of reason. See, *e.g.*, Easterbrook, 48 U. Chi. L. Rev., at 901-904; see also Pitofsky, In Defense of Discounters: The No-Frills Case for a *Per Se* **[*18]** Rule Against Vertical Price Fixing, *71 Geo. L. J. 1487, 1490, n. 17 (1983)*.

Not only are the potential injuries cited in *Albrecht* less serious than the Court imagined, the *per se* rule established therein could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers. Indeed, both courts and antitrust scholars have noted that *Albrecht's* rule may actually harm consumers and manufacturers. See, *e.g.*, *Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 753 (CA1 1994)* (Breyer, C. J.); Areeda, *supra*, P1636a, at 395; G. Mathewson & R. Winter, Competition Policy and Vertical **[****25]** Exchange 13-14 (1985). Other commentators have also explained that *Albrecht's per se* rule has even more potential for deleterious effect on competition after our decision in *GTE Sylvania*, because, now that vertical nonprice restrictions are not unlawful *per se*, the likelihood of dealer monopoly power is increased. See, *e.g.*, Easterbrook, *supra*, at 890, n. 20; see also *ARCO, 495 U.S. at 343, n. 13*. We do not intend to suggest that dealers generally possess sufficient market power to exploit a monopoly situation. Such retail market power may in fact be uncommon. See, *e.g.*, *Business Electronics, 485 U.S. at 727, n. 2*; *GTE Sylvania, 433 U.S. at 54*. Nor do we hold that a ban on vertical maximum price fixing inevitably has anticompetitive consequences in the exclusive dealer context.

[*212]** ***LEdHN[1B]***[] [1B]After reconsidering *Albrecht's* rationale and the substantial criticism the decision has received, however, we conclude that there is insufficient economic justification for *per se* invalidation of vertical maximum price fixing. That is so not only because it is difficult to accept the assumptions underlying *Albrecht*, but also because *Albrecht* has **[****26]** little or no relevance to ongoing enforcement of the Sherman Act. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 777, 81 L. Ed. 2d 628, 104 S. Ct. 2731, and n. 25 (1984)*.Moreover, neither the parties nor any **[*19]** of the *amici curiae* have called our attention to any cases in which enforcement efforts have been directed solely against the conduct encompassed by *Albrecht's per se* rule.

Respondents argue that reconsideration of *Albrecht* should require "persuasive, expert testimony establishing that the *per se* rule has distorted the market." Brief for Respondents 7. Their reasoning ignores the fact that *Albrecht* itself relied solely upon hypothetical effects of vertical maximum price fixing. Further, *Albrecht's* dire predictions have not been borne out, even though manufacturers and suppliers appear to have fashioned schemes to get around the *per se* rule against vertical maximum price fixing. In these circumstances, it is the retention of the rule of *Albrecht*, and not, as respondents would have it, the rule's elimination, that lacks adequate justification. See, *e.g.*, *GTE Sylvania, supra, at 58-59*.

[284]** Respondents' reliance on *Toolson v. New York* ***[****27]*** *Yankees, Inc., 346 U.S. 356, 98 L. Ed. 64, 74 S. Ct. 78 (1953)* *(per curiam)*, and *Flood v. Kuhn, 407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)*, is similarly misplaced, because those decisions are clearly inapposite, having to do with the antitrust exemption for professional baseball, which this Court has described as "an aberration . . . resting on a recognition and an acceptance of baseball's unique characteristics and needs," *id., at 282*. In the context of this case, we infer little meaning from the fact that Congress has not reacted legislatively to *Albrecht*. In any event, the history of various legislative proposals regarding price fixing seems neither clearly to support nor to denounce the *per se* rule of *Albrecht*. Respondents are of course free to seek legislative protection from gasoline suppliers of the sort embodied in the Petroleum Marketing Practices Act, 92 Stat. 322, *15 U.S.C. § 2801 et seq.*. For the reasons we have noted, however, the remedy for respondents' dispute with State Oil should not come in the form of a *per se* rule affecting the conduct of the entire marketplace.

[*20] C

LEdHN[1C][] [1C]***LEdHN[7]***[] [7]Despite what Chief Judge Posner aptly described as *Albrecht's* "infirmities, [and] its increasingly wobbly, **[****28]** moth-eaten foundations," *93 F.3d at 1363*, there remains the question whether *Albrecht* deserves continuing respect under the doctrine of *stare decisis*. The Court of Appeals was correct in applying that principle despite disagreement with *Albrecht*, for it is this Court's prerogative alone to overrule one of its precedents.

LEdHN[1D][] [1D]***LEdHN[8]***[] [8]***LEdHN[9]***[] [9]We approach the reconsideration of decisions of this Court with the utmost caution. ***HN4***[] *Stare decisis* reflects "a policy judgment that 'in most matters it is more important that the applicable rule of law be **[***213]** settled than that it be settled right.'" *Agostini v. Felton, 1997 U.S. LEXIS 4000*, *58, *117 S. Ct. 1997, 138 L. Ed. 2d 391 (1997)* (quoting *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 76 L. Ed. 815, 52 S. Ct. 443 (1932)* (Brandeis, J., dissenting)). It "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee, 501 U.S. 808, 827, 115 L. Ed. 2d 720, 111 S. Ct. 2597 (1991)*. This Court has expressed its reluctance to overrule decisions involving statutory interpretation, see, *e.g.*, *Illinois Brick Co.* ***[****29]*** *v. Illinois, 431 U.S. 720, 736, 52 L. Ed. 2d 707, 97 S. Ct. 2061 (1977)*, and has acknowledged that ***HN5***[] *stare decisis* concerns are at their acme in cases involving property and contract rights, see, *e.g.*, Payne, 501 U.S. at 828. Both of those concerns are arguably relevant in this case.

LEdHN[10][] [10]**LEdHN[11A]**[] [11A]**LEdHN[12]**[] [12]But **HN6**[] "*stare decisis* is not an inexorable command." *Ibid*. In the area of ***antitrust law***, there is a competing interest, well-represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." **[*21]** *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*.As we have explained, the term "restraint of trade," as used in *§ 1*, also "invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890." *Business Electronics, 485 U.S. at 732*; see also *GTE Sylvania, 433 U.S. at 53, n. 21*; *McNally **[****30]** v. United States, 483 U.S. 350, 372-373, 97 L. Ed. 2d 292, 107 S. Ct. 2875 (1987)* (STEVENS, J., dissenting). Accordingly, this Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question. See, *e.g.*, *Copperweld Corp., supra, at 777*; *GTE Sylvania, supra, at 47-49*; *Tigner v. Texas, 310 U.S. 141, 147, 84 L. Ed. 1124, 60 S. Ct. 879 (1940)*.

[285]** **LEdHN[11B]**[] [11B]Although we do not "lightly assume that the economic realities underlying earlier decisions have changed, or that earlier judicial perceptions of those realities were in error," we have noted that "different sorts of agreements" may amount to restraints of trade "in varying times and circumstances," and "it would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics, supra, at 731-732*.Just as *Schwinn was* "the subject of continuing controversy and confusion" under the "great weight" of scholarly criticism, *GTE Sylvania, supra, at 47-48*, *Albrecht* has been widely criticized **[****31]** since its inception. With the views underlying *Albrecht* eroded by this Court's precedent, there is not much of that decision to salvage. See, *e.g.*, *Neal v. **[***214]** United States, 516 U.S. 284, 295, 133 L. Ed. 2d 709, 116 S. Ct. 763 (1996)*; *Patterson v. McLean Credit Union, 491 U.S. 164, 173, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989)*; *Rodriguez de Quijas v. Shearson/ American Express, Inc., 490 U.S. 477, 480-481, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)*.

LEdHN[1E][] [1E]Although the rule of *Albrecht* has been in effect for some time, the inquiry we must undertake requires considering "'the effect of the antitrust laws upon vertical distributional **[*22]** restraints in the American economy today.'" *GTE Sylvania, supra, at 53, n. 21* (quoting *Schwinn, 388 U.S. at 392* (Stewart, J., concurring in part and dissenting in part)). As the Court noted in *ARCO, 495 U.S. at 336, n. 6*, there has not been another case since *Albrecht* in which this Court has "confronted an unadulterated vertical, maximum-price-fixing arrangement." Now that we confront *Albrecht* directly, we find its conceptual foundations gravely weakened.

LEdHN[1F][] [1F]**LEdHN[2B]**[] [2B]In overruling *Albrecht*, we of course do not hold that all vertical maximum price fixing is *per se* lawful. Instead, vertical maximum price fixing, **[****32]** like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason. In our view, rule-of-reason analysis will effectively identify those situations in which vertical maximum price fixing amounts to anticompetitive conduct.

LEdHN[2C][] [2C]There remains the question whether respondents are entitled to recover damages based on State Oil's conduct. Although the Court of Appeals noted that "the district judge was right to conclude that if the rule of reason is applicable, Khan loses," *93 F.3d at 1362*, its consideration of this case was necessarily premised on *Albrecht*'s *per se* rule. Under the circumstances, the matter should be reviewed by the Court of Appeals in the first instance. We therefore vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

References

5 Am Jur 2d, Appellate Review 599, *600*; *54 Am Jur 2d, Monopolies,* ***[****33]*** *Restraints of Trade, and Unfair Trade Practices 70*, *71*, *77*, *85*

15 USCS 1

L Ed Digest, Courts 776; Restraints of Trade, Monopolies, and Unfair Trade Practices 41

L Ed Index, Overruling Decisions; Price Control or Discrimination

Annotation References:

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 USCS 1 et seq.*). *64 L Ed 2d 997*.

Federal Antitrust Act as applied to publishers of newspapers or other periodicals--federal cases. *19 L Ed 2d 1530*.

Liability in damages for price-fixing in violation of federal antitrust laws as affected by plaintiff 's passing excessive charges on to his own customers. 1 ALR Fed 500.

Nynex Corp. v. Discon

Supreme Court of the United States

October 5, 1998, Argued ; December 14, 1998, Decided

No. 96-1570

Reporter

525 U.S. 128 *; 119 S. Ct. 493 **; 142 L. Ed. 2d 510 ***; 1998 U.S. LEXIS 8080 ****; 67 U.S.L.W. 4031; 1998-2 Trade Cas. (CCH) P72,362; 98 Cal. Daily Op. Service 9071; 98 Daily Journal DAR 12676; 1998 Colo. J. C.A.R. 6231

NYNEX CORPORATION, ET AL. v. DISCON, INCORPORATED

Subsequent History: **[****1]** As Amended October 21, 1999.

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Disposition: *93 F.3d 1055*, vacated and remanded.

Core Terms

telephone, competitor, per se rule, removal, anti trust law, suppliers, group boycott, cases, boycott, anticompetitive, manufacturers, allegations, horizontal, purchasing, antitrust, vertical, motive, buyer, firms, conspiracy, retailer, reasons

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Contracts Law > Types of Contracts > General Overview

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Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Colleges & Universities

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] Practices Governed by Per Se Rule, Boycotts

The Sherman Act's prohibition of every agreement in restraint of trade, *15 U.S.C.S. § 1*, prohibits only agreements that unreasonably restrain trade. Yet certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. An agreement of such a kind is unlawful per se. The per se rule is applicable in certain group boycott cases.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > General Overview

Governments > Courts > Judicial Precedent

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints

Where an antitrust court is considering an agreement by a single buyer to purchase goods or services from one supplier rather than another should, after examining the buyer's reasons or justifications, the court should not apply the per se rule even if it finds no legitimate business reason for that purchasing decision. No boycott-related per se rule applies and the plaintiff seller must allege and prove harm, not just to a single competitor, but to the competitive process, i.e., to competition itself. This conclusion rests in large part upon precedent, for precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors.

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Governments > Courts > Judicial Precedent

Torts > Business Torts > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Torts > Business Torts > Unfair Business Practices > Remedies

HN3[] **Affirmative Defenses, Fraud & Misrepresentation**

A vertical restraint is not illegal per se unless it includes some agreement on price or price levels. This precedent makes the per se group boycott rule inapplicable, where a single buyer favors one seller over another, albeit for an improper reason, for such a case concerns only a vertical agreement and a vertical restraint, a restraint that takes the form of depriving a supplier of a potential customer. To apply the per se rule where the buyer's decision, though not made for competitive reasons, composes part of a regulatory fraud, would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases. And that per se rule would discourage firms from changing suppliers -- even where the competitive process itself does not suffer harm. The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. At the same time, other laws, for example, unfair competition laws, business tort laws, or regulatory laws, provide remedies for various competitive practices thought to be offensive to proper standards of business morality. Thus, courts have refused to apply per se reasoning in cases involving that kind of activity.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > Sherman Act

Antitrust & Trade Law > ... > Monopolies & Monopolization > Conspiracy to Monopolize > General Overview

HN4[] **Conspiracy to Monopolize, Sherman Act**

Unless the purchasing agreements by a single buyer harm the competitive process, they do not amount to a conspiracy to monopolize.

Lawyers' Edition Display

Decision

Rule that group boycotts are per se violations of 1 of Sherman Act (*15 USCS 1*) held not to apply to single buyer's decision, not justifiable in terms of ordinary competitive objectives, to buy from one supplier rather than another.

Summary

A local telephone company that had been buying obsolete telephone equipment removal services from a particular supplier switched its purchases of such services to a more expensive competitor of the supplier. The supplier then brought against the company an action alleging that the company's decision, not justifiable in terms of ordinary competitive objectives, to switch to the competitor were unfair, improper, and anticompetitive. After a Federal District Court dismissed the supplier's complaint for failure to state a claim, the United States Court of Appeals for the Second Circuit, affirming the dismissal with an exception (*93 F3d 1055*), determined that (1) the supplier had alleged a cause of action under the rule of reason and may have alleged a cause of action under the rule, set forth in *Klor's, Inc. v Broadway-Hale Stores, Inc. (1959) 359 US 207, 3 L Ed 2d 741, 79 S Ct 705*, that group boycotts are per se violations of 1 of the Sherman Act (*15 USCS 1*), and (2) the supplier's complaint stated a valid claim of conspiracy to monopolize under the Act's 2 (*15 USCS 2*).

On certiorari, the United States Supreme Court vacated the Court of Appeals judgment and remanded the case for further proceedings. In an opinion by Breyer, J., expressing the unanimous view of the court, it was held that the rule that group boycotts are per se violations of 1 did not apply to the telephone company's decision to buy removal services from the supplier's competitor, and thus the supplier had to allege and prove harm not just to itself, but to the competitive process, where (1) precedent limited the per se rule in the boycott context to cases involving horizontal agreements among direct competitors, (2) the instant case involved only a vertical agreement and a vertical restraint that deprived the supplier of a potential customer, and (3) the supplier's simple allegation of harm to itself did not automatically show injury to competition.

Headnotes

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §30.3 > -- group boycotts -- telephone equipment removal services -- decision to buy from particular supplier > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]

The rule that group boycotts are per se violations of 1 of the Sherman Act (*15 USCS 1*)--as set forth in *Klor's, Inc. v Broadway-Hale Stores, Inc. (1959) 359 US 207, 3 L Ed 2d 741, 79 S Ct 705*, which involved a vertical agreement between supplier and customer and a horizontal agreement among competitors--does not apply to a local telephone company's decision, not justifiable in terms of ordinary competitive objectives, to buy obsolete telephone equipment removal services from a removal services supplier's more expensive competitor, and thus the supplier must allege and prove harm not just to itself, but to the competitive process, as (1) precedent limits the per se rule in the boycott context to cases involving horizontal agreements among direct competitors, where the Supreme Court has held in a prior case that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels, (2) the instant case involves only a vertical agreement and a vertical restraint that deprives a supplier of a potential customer, (3) the freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage, (4) the telephone company's alleged special anticompetitive motive of driving the supplier out of the market to avoid the supplier's reporting to the relevant regulatory agency the telephone company's alleged scheme to overcharge its customers does not turn the telephone company's actions into a boycott within the meaning of the Supreme Court's precedents, and (5) the supplier's simple allegation of harm to itself does not automatically show injury to competition, where the complaint's description of the removal business suggests that entry into the business is easy.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §16 > -- reasonableness of restraint > Headnote:
LEdHN[2][] [2]

The prohibition under 1 of the Sherman Act (*15 USCS 1*) of "every" agreement in "restraint of trade" prohibits only agreements that unreasonably restrain trade.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §29 > -- unlawfulness per se > Headnote:
LEdHN[3][] [3]

With respect to the prohibition under 1 of the Sherman Act (*15 USCS 1*) of agreements in restraint of trade, certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof that an agreement of that kind is, in fact, anticompetitive in the particular circumstances; an agreement of such a kind is unlawful per se.

APPEAL §1087.7 > -- remand -- question not presented for certiorari -- misconception as to law -- reconsideration > Headnote: ***LEdHN[4]***[] [4]

On certiorari to review a Federal Court of Appeals judgment concerning a local telephone company's decision to buy obsolete telephone equipment removal services from a removal services supplier's more expensive competitor, which judgment is to the effect that the supplier may have alleged a cause of action under the rule that group boycotts are per se violations of 1 of the Sherman Act (*15 USCS 1*) and to the effect that the supplier's complaint stated a valid claim of conspiracy to monopolize under the Act's 2 (*15 USCS 2*), the United States Supreme Court will vacate the Court of Appeals judgment, remand the case for further proceedings, and allow the Court of Appeals to reconsider its finding of a 2 claim--where the Supreme Court, having determined that the rule that group boycotts are per se violations of 1 does not apply to a single buyer's decision, not justifiable in terms of ordinary competitive objectives, to buy from one supplier rather than another, has concluded that the supplier has not alleged a 1 per se violation--as (1) the Supreme Court does not see, on the basis of the facts alleged, how the supplier could succeed on its 2 claim without prevailing on its 1 claim, and (2) the telephone company, which asks the Supreme Court to reach beyond the per se issues and dismiss the case on the asserted basis that the supplier's complaint does not allege any harm to the competitive process, cannot raise this argument in the Supreme Court, because the matter lies outside the questions presented for certiorari, which are limited to the application of the per se rule.

Syllabus

Respondent Discon, Inc., sold "removal services" -- *i.e.,* the removal of obsolete telephone equipment -- through petitioner Materiel Enterprises Company, a subsidiary of petitioner NYNEX Corporation, for the use of petitioner New York Telephone Company, another NYNEX subsidiary. After Materiel Enterprises began buying such services from AT&T Technologies, rather than from Discon, Discon filed this suit, alleging that petitioners and others had engaged in unfair, improper, and anticompetitive activities. The District Court dismissed the complaint for failure to state a claim. The Second Circuit affirmed with an exception, holding that certain of Discon's allegations **[****2]** -- that Materiel Enterprises paid AT&T Technologies more than Discon would have charged because it could pass the higher prices on to New York Telephone, which could then pass them on to telephone consumers through higher regulatory-agency-approved service charges; that Materiel Enterprises would receive a year-end rebate from AT&T Technologies and share it with NYNEX; that Materiel Enterprises would not buy from Discon because it refused to participate in this fraudulent scheme; and that Discon therefore went out of business -- stated a claim under *§ 1* of the Sherman Act. Noting that the ordinary procompetitive rationale for discriminating in favor of one supplier over another was lacking in this case, and that, in fact, the complaint alleged that Materiel Enterprises' buying decision was anticompetitive, the court held that Discon may have alleged a cause of action under, *inter alia,* the antitrust rule set forth in *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705*, that group boycotts are illegal *per se.* For somewhat similar reasons the court believed the complaint stated a valid conspiracy to monopolize claim under *§ 2* of the Act.

Held: The **[****3]** *per se* group boycott rule does not apply to a single buyer's decision to buy from one seller rather than another. Pp. 4-11.

(a) Precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors. See, *e.g., Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 734, 99 L. Ed. 2d 808, 108 S. Ct. 1515*. The *per se* rule is inapplicable here because this case concerns only a vertical agreement and a vertical restraint, in the form of depriving a supplier of a potential customer. Nor is there a special feature that could distinguish this case from such precedent. Although petitioners' behavior hurt consumers by raising telephone service rates, that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power lawfully in the hands of a monopolist, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling the exercise of monopoly power. Applying the *per se* rule here would transform cases involving business behavior that is improper for various reasons into treble-damages antitrust cases and **[****4]** would discourage firms from changing suppliers -- even where the competitive process itself does not suffer harm. Moreover, special anticompetitive motive cannot be found in Discon's claim that Materiel Enterprises hoped to drive Discon from the market lest Discon reveal its behavior to New York Telephone or to the relevant regulatory agency. That motive does not turn Materiel Enterprises' actions into a "boycott" under this Court's precedents, and Discon's reasons why the motive's presence should lead to the application of the *per se* rule are unconvincing. Finally, Discon's allegations that New York Telephone (through Materiel Enterprises) was the largest buyer of removal services in the State, and that only AT&T Technologies competed for New York Telephone's business, are not sufficient to warrant application of a *per se* presumption of consequent harm to the competitive process itself, absent a horizontal agreement. Discon's complaint suggests that other actual or potential competitors might have provided roughly similar checks upon "equipment removal" prices and services with or without Discon, which argues against the likelihood of anticompetitive harm. Pp. 4-10.

(b) **[****5]** Unless petitioners' purchasing practices harmed the competitive process, they did not amount to a conspiracy to monopolize in violation of *§ 2*, and Discon cannot succeed on this claim without prevailing on its *§ 1* claim. Pp. 10-11.

(c) Petitioners' argument that Discon's complaint should be dismissed because it fails to allege that petitioners' purchasing decisions harmed the competitive process itself lies outside the questions presented for certiorari, which were limited to the application of the *per se* rule, and cannot be raised in this Court. P. 11.

93 F.3d 1055, vacated and remanded.

Counsel: James R. Young argued the cause for petitioners.

Lawrence G. Wallace argued the cause for the United States, as amicus curiae, by special leave of court.

Lawrence C. Brown argued the cause for respondent.

Judges: BREYER, J., delivered the opinion for a unanimous Court.

Opinion by: BREYER

Opinion

[*130] **[***514]** **[**495]** JUSTICE BREYER delivered the opinion of the Court.

LEdHN[1A][] [1A]In this case we ask whether the antitrust rule that group boycotts are illegal *per se* as set forth in *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*, applies to a buyer's decision to buy from one seller rather than another, when that decision cannot be justified in terms of ordinary competitive objectives. We hold that the *per se* group boycott rule does not apply.

I

Before 1984 American Telephone and Telegraph Company **[****6]** (AT&T) supplied most of the Nation's telephone service and, through wholly owned subsidiaries such as Western Electric, it also supplied much of the Nation's telephone equipment. In 1984 an antitrust consent decree took AT&T out of the *local* telephone service business and left AT&T a *long-distance* telephone service provider, competing with such firms as MCI and Sprint. See M.

Kellogg, J. **[***515]** Thorne, & P. Huber, Federal Telecommunications Law § 4.6, p. 221 **[*131]** (1992). The decree transformed AT&T's formerly owned local telephone companies into independent firms. At the **[**496]** same time, the decree insisted that those local firms help assure competitive long-distance service by guaranteeing long-distance companies physical access to their systems and to their local customers. See *United States v. American Telephone & Telegraph Co., 552 F. Supp. 131, 225, 227 (DC 1982)*, aff'd *sub nom. Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)*. To guarantee that physical access, some local telephone firms had to install new call-switching equipment; and to install new call-switching equipment, they often had to remove old call-switching equipment. This case involves the business of removing **[****7]** that old switching equipment (and other obsolete telephone equipment) -- a business called "*removal services.*"

Discon, Inc., the respondent, sold removal services used by New York Telephone Company, a firm supplying local telephone service in much of New York State and parts of Connecticut. New York Telephone is a subsidiary of NYNEX Corporation. NYNEX also owns Materiel Enterprises Company, a purchasing entity that bought removal services for New York Telephone. Discon, in a lengthy detailed complaint, alleged that the NYNEX defendants (namely, NYNEX, New York Telephone, Materiel Enterprises, and several NYNEX related individuals) engaged in unfair, improper, and anticompetitive activities in order to hurt Discon and to benefit Discon's removal services competitor, AT&T Technologies, a lineal descendant of Western Electric. The Federal District Court dismissed Discon's complaint for failure to state a claim. The Court of Appeals for the Second Circuit affirmed that dismissal with an exception, and that exception is before us for consideration.

The Second Circuit focused on one of Discon's specific claims, a claim that Materiel Enterprises had switched its purchases from Discon **[****8]** to Discon's competitor, AT&T Technologies, **[*132]** as part of an attempt to defraud local telephone service customers by hoodwinking regulators. According to Discon, Materiel Enterprises would pay AT&T Technologies more than Discon would have charged for similar removal services. It did so because it could pass the higher prices on to New York Telephone, which in turn could pass those prices on to telephone consumers in the form of higher regulatory-agency-approved telephone service charges. At the end of the year, Materiel Enterprises would receive a special rebate from AT&T Technologies, which Materiel Enterprises would share with its parent, NYNEX. Discon added that it refused to participate in this fraudulent scheme, with the result that Materiel Enterprises would not buy from Discon, and Discon went out of business.

These allegations, the Second Circuit said, state a cause of action under *§ 1* of the Sherman Act, though under a "different legal theory" from the one articulated by *Discon. 93 F.3d 1055, 1060 (1996)*. The Second Circuit conceded that ordinarily "the decision to discriminate in favor of one supplier over another will have a pro-competitive intent and effect." *Id. at* ***[****9]*** *1061*. But, it added, in this case, "no such pro-competitive **[***516]** rationale appears on the face of the complaint." *Ibid.* Rather, the complaint alleges Materiel Enterprises' decision to buy from AT&T Technologies, rather than from Discon, was intended to be, and was, "anti-competitive." *Ibid.* Hence, "Discon has alleged a cause of action under, at least, the rule of reason, and possibly under the *per se* rule applied to group boycotts in *Klor's*, if the restraint of trade '"has no purpose except stifling competition."' " *Ibid.* (quoting *Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131* (CA2) (en banc) (in turn quoting *White Motor Co. v. United States, 372 U.S. 253, 263, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963))*, cert. denied, *439 U.S. 946 (1978))*. For somewhat similar reasons the Second Circuit believed the complaint stated a valid claim of conspiracy to monopolize under *§ 2* of the Sherman Act. See *93 F.3d at 1061-1062*. **[*133]**

The Second Circuit noted that the Courts of Appeals are uncertain as to whether, or when, the *per se* group boycott rule applies to a decision by a purchaser to favor one supplier over another (which the Second Circuit called a "two-firm group boycott"). Compare *Com-Tel,* ***[****10]*** *Inc. v. DuKane Corp., 669 F.2d 404, 411-413*, and nn. 13, 16 (CA6 1982); *Cascade Cabinet Co. v. Western Cabinet* ***[**497]*** *& Millwork Inc., 710 F.2d 1366, 1370-1371 (CA9 1983)*, with *Construction Aggregate Transport, Inc. v. Florida Rock Industries, Inc., 710 F.2d 752, 776-778 (CA11 1983)*. We granted certiorari in order to consider the applicability of the *per se* group boycott rule where a single buyer favors one seller over another, albeit for an improper reason.

II

LEdHN[2][] [2]LEdHN[3][] [3]As this Court has made clear, HN1[] the Sherman Act's prohibition of "every" agreement in "restraint of trade," 26 Stat. 209, as amended, 15 U.S.C. § 1, prohibits only agreements that *unreasonably* restrain trade. See Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 99 L. Ed. 2d 808, 108 S. Ct. 1515 (1988) (citing National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 98, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)); Standard Oil Co. of N. J. v. United States, 221 U.S. 1, 59-62, 55 L. Ed. 619, 31 S. Ct. 502 (1911); 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P320b, p. 49 (1995). Yet certain kinds of agreements will so often prove so harmful to competition and so rarely prove justified that the antitrust laws do not require proof **[****11]** that an agreement of that kind is, in fact, anticompetitive in the particular circumstances. See State Oil Co. v. Khan, 522 U.S. 3, 10, 139 L. Ed. 2d 199, 118 S. Ct. 275 (1997); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289-290, 86 L. Ed. 2d 202, 105 S. Ct. 2613 (1985); supra, 2 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P320b, at 49-52. An agreement of such a kind is unlawful *per se*. See, *e.g.,* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 84 L. Ed. 1129, 60 S. Ct. 811 (1940) (finding horizontal price-fixing agreement *per se* illegal); Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408, 55 L. Ed. 502, 31 S. Ct. 376 (1911) (finding vertical price-fixing agreement *per se* illegal); **[*134]** Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 112 L. Ed. 2d 349, 111 S. Ct. 401 (1990) *(per curiam)* (finding horizontal market division *per se* illegal).

[*517]** The Court has found the *per se* rule applicable in certain group boycott cases. Thus, in Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941), this Court considered a group boycott created by an agreement among a group of clothing designers, manufacturers, suppliers, and retailers. The defendant designers, manufacturers, and suppliers had promised not to sell their clothes **[****12]** to retailers who bought clothes from competing manufacturers and suppliers. The defendants wanted to present evidence that would show their agreement was justified because the boycotted competitors used "pirated" fashion designs. Id. at 467. But the Court wrote that "it was not error to refuse to hear the evidence offered" -- evidence that the agreement was reasonable and necessary to "protect . . . against the devastating evils" of design pirating -- for that evidence "is no more material than would be the reasonableness of the prices fixed" by a price-fixing agreement. Id. at 467-468.

In *Klor's* the Court also applied the *per se* rule. The Court considered a boycott created when a retail store, Broadway-Hale, and 10 household appliance manufacturers and their distributors agreed that the distributors would not sell, or would sell only at discriminatory prices, household appliances to Broadway-Hale's small, nearby competitor, namely, Klor's. 359 U.S. at 208-209. The defendants had submitted undisputed evidence that their agreement hurt only one competitor (Klor's) and that so many other nearby appliance-selling competitors remained that competition in the marketplace **[****13]** continued to thrive. 359 U.S. at 209-210. The Court held that this evidence was beside the point. The conspiracy was "not to be tolerated merely because the victim is just one merchant." 359 U.S. at 213. The Court thereby inferred injury to the competitive process itself from the nature of the boycott agreement. And it forbade, as a matter **[*135]** of law, a defense based upon a claim that only one small firm, not competition itself, had suffered injury.

LEdHN[1B][] [1B]The case before us involves *Klor's*. The Second Circuit did not forbid the defendants to introduce evidence of "justification." **[**498]** To the contrary, it invited the defendants to do so, for it said that the "*per se* rule" would apply only if no "pro-competitive justification" were to be found. 93 F.3d at 1061; cf. 7 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P1510, p. 416 (1986) ("Boycotts are said to be unlawful per se but justifications are routinely considered in defining the forbidden category"). Thus, HN2[] the specific legal question before us is whether an antitrust court considering an agreement by a buyer to purchase goods or services from one supplier rather than another should (after examining the buyer's reasons or justifications) apply **[****14]** the *per se* rule if it finds no legitimate business reason for that purchasing decision. We conclude no boycott-related *per se* rule applies and that the plaintiff here must allege and prove harm, not just to a single competitor, but to the competitive process, *i.e.*, to competition itself.

Our conclusion rests in large part upon precedent, for precedent limits the *per se* rule in the boycott context **[***518]** to cases involving horizontal agreements among direct competitors. The agreement in *Fashion*

Originators' Guild involved what may be called a group boycott in the strongest sense: A group of competitors threatened to withhold business from third parties unless those third parties would help them injure their directly competing rivals. Although *Klor's* involved a threat made by a *single* powerful firm, it also involved a horizontal agreement among those threatened, namely, the appliance suppliers, to hurt a competitor of the retailer who made the threat. See *359 U.S. at 208-209*; see also P. Areeda & L. Kaplow, Antitrust Analysis: Problems, Text, and Cases 333 (5th ed. 1997) (defining paradigmatic boycott as "collective action among a group of competitors **[*136]** that may **[****15]** inhibit the competitive vitality of rivals"); 11 H. Hovenkamp, ***Antitrust Law*** P1901e, pp. 189-190 (1998). This Court emphasized in *Klor's* that the agreement at issue was

"not a case of a single trader refusing to deal with another, nor even of a manufacturer and a dealer agreeing to an exclusive distributorship. Alleged in this complaint is a wide combination consisting of manufacturers, distributors and a retailer." *359 U.S. at 212-213* (footnote omitted).

This Court subsequently pointed out specifically that *Klor's* was a case involving not simply a "vertical" agreement between supplier and customer, but a case that also involved a "horizontal" agreement among competitors. See *Business Electronics, 485 U.S. at 734*. And in doing so, the Court held that ***HN3***[] a "vertical restraint is not illegal *per se* unless it includes some agreement on price or price levels." *485 U.S. at 735-736*. This precedent makes the *per se* rule inapplicable, for the case before us concerns only a vertical agreement and a vertical restraint, a restraint that takes the form of depriving a supplier of a potential customer. See 11 Hovenkamp, ***Antitrust Law***, *supra, P1902*d, at 198.

We have not found any special **[****16]** feature of this case that could distinguish it from the precedent we have just discussed. We concede Discon's claim that the petitioners' behavior hurt consumers by raising telephone service rates. But that consumer injury naturally flowed not so much from a less competitive market for removal services, as from the exercise of market power that is *lawfully* in the hands of a monopolist, namely, New York Telephone, combined with a deception worked upon the regulatory agency that prevented the agency from controlling New York Telephone's exercise of its monopoly power.

To apply the *per se* rule here -- where the buyer's decision, though not made for competitive reasons, composes **[*137]** part of a regulatory fraud -- would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases. And that *per se* rule would discourage firms from changing suppliers -- even where the competitive process itself does not suffer harm. Cf. *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 484, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)* (Harlan, J., dissenting) (citing *Packard Motor Car Co. v. Webster Motor Car* ***[****17]*** *Co., 100 U.S. App. D.C. 161, 243 F.2d 418, 421 (CADC 1957))*.

[*519]** **[**499]** The freedom to switch suppliers lies close to the heart of the competitive process that the antitrust laws seek to encourage. Cf. *Standard Oil, 221 U.S. at 62* (noting "the freedom of the individual right to contract when not unduly or improperly exercised [is] the most efficient means for the prevention of monopoly"). At the same time, other laws, for example, "unfair competition" laws, business tort laws, or regulatory laws, provide remedies for various "competitive practices thought to be offensive to proper standards of business morality." 3 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P651d, p. 78 (1996). Thus, this Court has refused to apply *per se* reasoning in cases involving that kind of activity. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)* ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws"); 3 Areeda & Hovenkamp, ***Antitrust Law*** *supra,* P651d, at 80 ("In the presence of substantial market power, some kinds of tortious behavior could anticompetitively create or sustain a monopoly, [but] it is wrong categorically **[****18]** to condemn such practices . . . or categorically to excuse them").

Discon points to another special feature of its complaint, namely, its claim that Materiel Enterprises hoped to drive Discon from the market lest Discon reveal its behavior to New York Telephone or to the relevant regulatory agency. That hope, says Discon, amounts to a special anticompetitive motive.

[*138] We do not see how the presence of this special motive, however, could make a significant difference. That motive does not turn Materiel Enterprises' actions into a "boycott" within the meaning of this Court's precedents. See *supra, at 6-7*. Nor, for that matter, do we understand how Discon believes the motive affected Materiel Enterprises' behavior. Why would Discon's demise have made Discon's employees less likely, rather than more likely, to report the overcharge/rebate scheme to telephone regulators? Regardless, a *per se* rule that would turn upon a showing that a defendant not only knew about but also hoped for a firm's demise would create a legal distinction -- between corporate knowledge and corporate motive -- that does not necessarily correspond to behavioral differences and which would be difficult to prove, **[****19]** making the resolution of already complex antitrust cases yet more difficult. We cannot find a convincing reason why the presence of this special motive should lead to the application of the *per se* rule.

Finally, we shall consider an argument that is related tangentially to Discon's *per se* claims. The complaint alleges that New York Telephone (through Materiel Enterprises) was the largest buyer of removal services in New York State, see Amended Complaint PP2, 29, 99, App. 75, 83, 110, and that only AT&T Technologies competed for New York Telephone's business, see PP2, 26, 29, *id. at 75, 82-83*. One might ask whether these accompanying allegations are sufficient to warrant application of a *Klor's*-type presumption of consequent harm to the competitive process itself.

We believe that these allegations do not do so, for, as we have said, see *supra, at 6-7*, ***antitrust law*** does not **[***520]** permit the application of the *per se* rule in the boycott context in the absence of a horizontal agreement, though in other contexts, say, vertical price fixing, conduct may fall within the scope of a *per se* rule not at issue here, see, *e.g., Dr. Miles Medical Co., 220 U.S. at* ***[****20]*** *408*. The complaint **[*139]** itself explains why any such presumption would be particularly inappropriate here, for it suggests the presence of other potential or actual competitors, which fact, in the circumstances, could argue against the likelihood of anticompetitive harm. The complaint says, for example, that New York Telephone itself was a potential competitor in that New York Telephone considered removing its equipment by itself, and in fact did perform a few jobs itself. See P27, App. 83. The complaint also suggests that other nearby small local telephone companies needing removal services must have worked out some way to supply them. See P53, *id. at 91*. The complaint's description of the removal business suggests that entry was easy, perhaps to the point where other firms, employing workers who knew how to **[**500]** remove a switch and sell it for scrap, might have entered that business almost at will. Cf. P27, *id. at 83*. To that extent, the complaint suggests other actual or potential competitors might have provided roughly similar checks upon "equipment removal" prices and services with or without Discon. At the least, the complaint provides no sound basis for assuming the contrary. **[****21]** Its simple allegation of harm to Discon does not automatically show injury to competition.

III

LEdHN[4][] [4]The Court of Appeals also upheld the complaint's charge of a conspiracy to monopolize in violation of *§ 2* of the Sherman Act. It did so, however, on the understanding that the conspiracy in question consisted of the very same purchasing practices that we have previously discussed. ***HN4***[] Unless those agreements harmed the competitive process, they did not amount to a conspiracy to monopolize. We do not see, on the basis of the facts alleged, how Discon could succeed on this claim without prevailing on its *§ 1* claim. See 3 Areeda & Hovenkamp, *supra,* P651e, at 81-82. Given our conclusion that Discon has not alleged a *§ 1* *per se* violation, we think it prudent to vacate this portion of the Court **[*140]** of Appeals' decision and allow the court to reconsider its finding of a *§ 2* claim.

IV

Petitioners ask us to reach beyond the "*per se*" issues and to hold that Discon's complaint does not allege anywhere that their purchasing decisions harmed the competitive process itself and, for this reason, it should be dismissed. They note that Discon has not pointed to any paragraph of the complaint **[****22]** that alleges harm to the competitive process. This matter, however, lies outside the questions presented for certiorari. Those questions were limited to the application of the *per se* rule. For that reason, we believe petitioners cannot raise that argument in this Court.

V

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 118, *123*

15 USCS 1, *2*

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices 30.3, 44

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices; Sherman Act

Annotation References:

Vertical restraints on sales territory or location as violative of 1 of Sherman Act (*15 USCS 1*). 92 ALR Fed 436.

Refusals to deal as violation of the federal antitrust laws (*15 USCS 1*, *2*, *13*). 41 ALR Fed 175.

End of Document

AT&T Corp. v. Iowa Utils. Bd.

Supreme Court of the United States

October 13, 1998, Argued ; January 25, 1999, * Decided

Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141

Reporter

525 U.S. 366 *; 119 S. Ct. 721 **; 142 L. Ed. 2d 834 ***; 1999 U.S. LEXIS 903 ****; 67 U.S.L.W. 4104; 1991-1 Trade Cas. (CCH) P72,405; 99 Cal. Daily Op. Service 633; 99 Daily Journal DAR 773; 1999 Colo. J. C.A.R. 456; 14 Comm. Reg. (P & F) 1120; 12 Fla. L. Weekly Fed. S 85

AT&T CORPORATION, ET AL., PETITIONERS v. IOWA UTILITIES BOARD ET AL.; AT&T CORPORATION, ET AL., PETITIONERS v. CALIFORNIA ET AL. MCI TELECOMMUNICATIONS CORPORATION, PETITIONER v. IOWA UTILITIES BOARD ET AL.; MCI TELECOMMUNICATIONS CORPORATION, PETITIONER v. CALIFORNIA ET AL. ASSOCIATION FOR LOCAL TELECOMMUNICATIONS SERVICES, ET AL., PETITIONERS v. IOWA UTILITIES BOARD ET AL. FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS v. IOWA UTILITIES BOARD ET AL.; FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES, PETITIONERS v. CALIFORNIA ET AL. AMERITECH CORPORATION, ET AL., PETITIONERS v. FEDERAL COMMUNICATIONS COMMISSION ET AL. GTE MIDWEST, INCORPORATED, PETITIONER v. FEDERAL COMMUNICATIONS COMMISSION ET AL. U S WEST, INC., PETITIONER v. FEDERAL COMMUNICATIONS COMMISSION ET AL. SOUTHERN NEW ENGLAND TELEPHONE COMPANY, ET AL., PETITIONERS v. FEDERAL COMMUNICATIONS COMMISSION ET AL.

Subsequent History: [**1]** As Amended November 9, 1999.

Prior History: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Disposition: Nos. 97-826 (first judgment), 97-829 (first judgment), 97-830, 97-831 (first judgment), 97-1075, 97-1087, 97-1099, and *97-1141, 120 F.3d 753*, reversed in part, affirmed in part, and remanded; Nos. 97-826, 97-829, and 97-831 (second judgments), *124 F.3d 934*, reversed in part and remanded.

Core Terms

network, incumbent, regulations, carrier, unbundled, state commission, provisions, impair, Telecommunications, intrastate, pricing, entrants, rates, interconnection, competitors, costs, requesting, Communications, long-distance, facilities, interstate, arbitration, ratesetting, commission's jurisdiction, local service, telephone, depreciation, negotiation, purposes, terms

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* Together with *AT&T Corp. et al.* v. *California et al.* (see this Court's Rule 12.4), No. 97-829, *MCI Telecommunications Corp.* v. *Iowa Utilities Board et al., MCI Telecommunications Corp.* v. *California et al.* (see this Court's Rule 12.4), No. 97-830, *Association for Local Telecommunications Services et al.* v. *Iowa Utilities Board et al.,* No. 97-831, *Federal Communications Commission et al.* v. *Iowa Utilities Board et al., Federal Communications Commission et al.* v. *California et al.* (see this Court's Rule 12.4), No. 97-1075, *Ameritech Corp. et al.* v. *Federal Communications Commission et al.,* No. 97-1087, *GTE Midwest Inc.* v. *Federal Communications Commission et al.,* No. 97-1099, *U S West, Inc.* v. *Federal Communications Commission et al.,* and No. 97-1141, *Southern New England Telephone Co. et al.* v. *Federal Communications Commission et al.,* also on certiorari to the same court.

LexisNexis® Headnotes

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN1[] **Telephone Services, Local Exchange Carriers**

See *47 U.S.C.S. § 251(c)*.

Communications Law > ... > Regulated Practices > Introducing Competition > Resale of Services

HN2[] **Introducing Competition, Resale of Services**

See *47 U.S.C.S. § 251(b)*.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN3[] **Telephone Services, Local Exchange Carriers**

Rule 319, the primary unbundling rule, sets forth a minimum number of network elements that incumbents must make available to requesting carriers. *47 C.F.R. § 51.319 (1997)*.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN4[] **Telephone Services, Local Exchange Carriers**

Rule 315(b) forbids incumbents to separate network elements before leasing them to competitors. *47 C.F.R. § 51.315(b)*.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN5[] **Telephone Services, Local Exchange Carriers**

A carrier may demand that the local exchange carrier (LEC) make available to it any individual interconnection, service, or network element arrangement on the same terms and conditions the LEC has given anyone else in an agreement approved under *47 U.S.C.S. § 252*, without its having to accept the other provisions of the agreement. *47 CFR § 51.809*.

Communications Law > Regulators > US Federal Communications Commission > Authorities & Powers

Communications Law > Federal Acts > General Overview

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN6[] US Federal Communications Commission, Authorities & Powers

The Federal Communications Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Communications Act of 1934. *47 U.S.C.S. § 201(b)*.

Communications Law > Federal Acts > Federal Communications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN7[] Federal Acts, Federal Communications Act

The first sentence of *47 U.S.C.S. § 201(a)* makes it the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor.

Communications Law > Federal Acts > Federal Communications Act > General Overview

HN8[] Federal Acts, Federal Communications Act

See *47 U.S.C.S. § 152(B)*.

Business & Corporate Compliance > ... > Federal Versus State Law > Intrastate Communications > State Regulation of Intrastate Communications

Communications Law > ... > Regulated Entities > Broadcasting > Rate Regulation

Tax Law > ... > Amortization, Depletion & Depreciation > Amortization, Cost Recovery & Depreciation > General Overview

Antitrust & Trade Law > Regulated Industries > Communications > State Regulation

Communications Law > Federal Acts > Federal Communications Act > General Overview

Communications Law > Regulators > State Agencies Regulating Intrastate Communications > General Overview

Tax Law > Federal Income Tax Computation > Amortization, Depletion & Depreciation > General Overview

HN9[] Communications, Satellite Transmissions & Telecommunications, State Regulation of Intrastate Communications

Even though the Federal Communication Commission's (FCC) broad regulatory authority normally is enough to justify its regulation of intrastate depreciation methods that affect interstate commerce, *47 U.S.C.S. § 152(b)* prevents the FCC from taking intrastate action solely because it furthers an interstate goal.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Regulated Entities > Cable Systems > US Federal Communications Commission Jurisdiction

Communications Law > Federal Acts > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN10[] **Federal Acts, Telecommunications Act**

Within six months after the date of enactment of the Telecommunications Act of 1996, the Federal Communications Commission shall complete all actions necessary to establish regulations to implement the requirements of this section. *47 U.S.C.S. § 251(d)*.

Communications Law > Regulators > US Federal Communications Commission > Authorities & Powers

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN11[] **US Federal Communications Commission, Authorities & Powers**

47 U.S.C.S. § 251(e) provides that the Federal Communications Commission (FCC) shall create or designate one or more impartial entities to administer telecommunications numbering, requires the FCC to exercise its rulemaking authority, as opposed to *47 U.S.C.S. § 201(b)*, which merely authorizes the FCC to promulgate rules if it so chooses. *47 U.S.C.S. § 251(h)(2)* says that the FCC may, by rule, provide for the treatment of a local exchange carrier as an incumbent local exchange carrier for purposes of *§ 251* if the carrier satisfies certain requirements.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN12[] **Telephone Services, Local Exchange Carriers**

See *47 U.S.C.S. § 252(c)*.

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Regulated Practices > Introducing Competition > Interconnection Agreements

HN13[] **Federal Acts, Telecommunications Act**

The Telecommunications Act of 1996 entrusts state commissions with the job of approving interconnection agreements, *47 U.S.C.S. § 252(e)*, and granting exemptions to rural Local Exchange Carriers, *47 U.S.C.S. § 251(f)*.

Administrative Law > Judicial Review > Reviewability > Ripeness

HN14[] **Reviewability, Ripeness**

When there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN15[] Telephone Services, Local Exchange Carriers

See 47 U.S.C.S. § 153(29).

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN16[] Telephone Services, Local Exchange Carriers

Rule 319 requires an incumbent to provide requesting carriers with access to a minimum of seven network elements: the local loop, the network interface device, switching capability, interoffice transmission facilities, signaling networks and call-related databases, operations support systems functions, and operator services and directory assistance. 47 C.F.R. § 51.319. If a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis. 47 C.F.R. § 51.317.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN17[] Telephone Services, Local Exchange Carriers

See 47 U.S.C.S. § 251(d)(2).

Business & Corporate Compliance > ... > Transportation Law > Carrier Duties & Liabilities > Duty to Provide Service

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN18[] Common Carrier Duties & Liabilities, Duty to Provide Service

See 47 U.S.C.S. § 251(c)(3).

Communications Law > ... > Orders & Hearings > Complaints & Charges > Rates

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN19[] Complaints & Charges, Rates

An incumbent local exchange carrier shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to 47 U.S.C.S. § 252, upon the same rates, terms, and conditions as those provided in the agreement. 47 C.F.R. § 51.809.

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN20[] Telephone Services, Local Exchange Carriers

See 47 U.S.C.S. § 252(i).

Lawyers' Edition Display

Decision

Federal Communications Commission (FCC) held authorized to implement local-competition provisions of Telecommunications Act of 1996 (*47 USCS 251 et seq.*); FCC's implementing rules, with one exception, held consistent with 1996 Act.

Summary

Prior to Congress' enactment of the Telecommunications Act of 1996 (PL 104-104, 110 Stat 56), states typically granted an exclusive franchise in each local telephone market to a local exchange carrier (LEC), which owned the various forms of equipment that constituted a local exchange network. The 1996 Act ended such state-granted monopolies and subjected incumbent LECs to various duties--including the obligation under *47 USCS 251(c)* to share networks with competitors--that were intended to facilitate market entry. Under 251(c), a requesting carrier was permitted to obtain access to an incumbent's network by various means, such as (1) leasing elements of the incumbent's network "on an unbundled basis," or (2) interconnecting the requesting carrier's own facilities with the incumbent's network. After the Federal Communications Commission (FCC) issued rules implementing the 1996 Act's local-competition provisions, several incumbent LECs and state commissions challenged some of these rules by filing petitions for review which were consolidated in the United States Court of Appeals for the Eighth Circuit. The Court of Appeals concluded, among other matters, that (1) the FCC lacked jurisdiction to promulgate rules regarding (a) pricing (*47 CFR 51.503* and *51.505*), (b) state review of pre-existing interconnection agreements between incumbent LECs and other carriers (*47 CFR 51.303*), and (c) rural exemptions (*47 CFR 51.405*); (2) with respect to the FCC's primary "unbundling" rule (*47 CFR 51.319*), the FCC--in specifying the network elements available to requesting carriers--reasonably implemented the requirement of *47 USCS 251(d)(2)* that the FCC consider whether access to proprietary elements was "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service; (3) the FCC's rule forbidding incumbent LECs to separate already-combined network elements before leasing them to competitors (*47 CFR 51.315(b)*) had to be vacated as requiring access to those elements on a bundled rather than an unbundled--that is, physically separated--basis; and (4) the FCC's "pick and choose" rule (*47 CFR 51.809*)--enabling a competing LEC to demand access to any individual interconnection, service, or network element arrangement on the same terms and conditions that the incumbent LEC gave anyone else in an agreement approved pursuant to *47 USCS 252*, but not obligating the competing LEC to accept the agreement's other provisions--had to be vacated as deterring the "voluntarily negotiated agreements" that the 1996 Act favored (*120 F3d 753, 1997 US App LEXIS 18183*). In a separate opinion, the Court of Appeals concluded that the FCC lacked jurisdiction to promulgate rules regarding dialing parity, that is, an arrangement enabling a new entrant's customers to make calls without having to dial an access code (47 CFR 51.205-51.215) (*124 F3d 934, 1997 US App LEXIS 22343*).

On certiorari, the United States Supreme Court (1) reversed the Court of Appeals' first judgment in part and affirmed that judgment in part, (2) reversed the second judgment in part, and (3) remanded the cases for further proceedings. In an opinion by Scalia, J., joined by Stevens, Kennedy, and Ginsburg, JJ., joined in part (except for holding 5 below) by Souter, J., and joined in part (except for holdings 1 and 2 below) by Rehnquist, Ch. J., and Thomas and Breyer, JJ., it was held that (1) the FCC had rule-making authority under a provision of the Communications Act of 1934 (1934 Act) (*47 USCS 201(b)*) to carry out the 1996 Act's local-competition provisions (*47 USCS 251 et seq.*); (2) the FCC had jurisdiction to promulgate the rules regarding pricing, state review of pre-existing interconnection agreements, rural exemptions, and dialing parity; (3) the rule forbidding incumbents to separate already-combined network elements before leasing them to competitors was a reasonable interpretation of *47 USCS 251(c)(3)*; (4) the "pick and choose" rule was a reasonable interpretation of *47 USCS 252(i)*; and *(5)* the primary unbundling rule was invalid, since the FCC, in giving requesting LECs blanket access to network elements, had not adequately considered the "necessary" and "impair" standards set by 251(d)(2).

Souter, J., concurring in part and dissenting in part, (1) agreed that the FCC had authority to implement and interpret the disputed provisions of the 1996 Act, and (2) expressed the view that the primary unbundling rule was based on a reasonable interpretation of 251(d)(2).

Thomas, J., joined by Rehnquist, Ch. J., and Breyer, J., concurring in part and dissenting in part, (1) agreed with the Supreme Court's analysis of the unbundling and "pick and choose" rules, but (2) expressed the view that the FCC lacked jurisdiction to promulgate the regulations challenged on jurisdictional grounds, as such regulations contravened the division of authority set forth in the 1996 Act and disregarded a longstanding tradition of state authority over intrastate telecommunications.

Breyer, J., concurring in part and dissenting in part, expressed the view that the 1996 Act did not permit the FCC to promulgate the pricing and unbundling rules at issue.

O'Connor, J., did not participate.

Headnotes

COMMUNICATIONS §12 > -- administrative jurisdiction -- local telephone service > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]

With respect to local telephone service, the Federal Communications Commission (FCC) has rule-making authority under a provision of the Communications Act of 1934 (1934 Act) (*47 USCS 201(b)*) to carry out the local-competition provisions inserted into the 1934 Act by the Telecommunications Act of 1996 (1996 Act) (*47 USCS 251 et seq.*), notwithstanding that another provision of the 1934 Act (*47 USCS 152(b)*) states that except as otherwise provided, nothing in the 1934 Act is to be construed "to apply or to give the Commission jurisdiction" with respect to regulations in connection with intrastate communication service, for (1) 201(b) explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies; and (2) the term "apply" in 152(b) limits the substantive reach of the 1934 Act and the concomitant scope of primary FCC jurisdiction, while the phrase "or give the Commission jurisdiction" limits, in addition, the FCC's ancillary jurisdiction, which could exist even where the 1934 Act does not apply. (Thomas, J., Rehnquist, Ch. J., and Breyer, J., dissented from this holding.)

ADMINISTRATIVE LAW §58 > COMMERCE §140 > -- state and federal jurisdiction -- local telephone service > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

With respect to local telephone service, a provision of the Telecommunications Act of 1996 (*47 USCS 252(c)(2)*), which requires state commissions to assure compliance with the pricing standards in *47 USCS 252(d)*, does not negate the jurisdiction of the Federal Communications Commission (FCC) under a provision of the Communications Act of 1934 (1934 Act) (*47 USCS 201(b)*) to design a pricing methodology such as "Total Element Long Run Incremental Cost"--based upon the cost of operating a hypothetical telephone network built with the most efficient technology available--as set forth in *47 CFR 51.503* and *51.505*, for (1) the FCC's prescription, through rule making, of a requisite pricing methodology no more prevents the states from establishing rates than do the statutory pricing standards set forth in *47 USCS 252(d)*, as it is the states that apply such standards and implement such a methodology so as to determine the concrete result in particular circumstances; and (2) the fact that *47 USCS 252(c)(1)*, which requires state commissions to assure compliance with the provisions of *47 USCS 251*, adds "including the regulations prescribed by the Commission pursuant to *section 251*"--whereas 252(c)(2), which requires state commissions to assure compliance with the pricing standards in 252(d), says nothing about FCC regulations applicable to 252(d)--is not enough to displace the FCC's explicit rule-making authority under 201(b). (Thomas, J., Rehnquist, Ch. J., and Breyer, J., dissented from this holding.)

ADMINISTRATIVE LAW §58 > COMMERCE §140 > -- state and federal jurisdiction -- local telephone service > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

With respect to local telephone service, the Federal Communications Commission (FCC) has jurisdiction under a provision of the Communications Act of 1934 (1934 Act) (*47 USCS 201(b)*) to promulgate rules regarding state review of pre-existing interconnection agreements between incumbent local exchange carriers (LECs) and other carriers (*47 CFR 51.303*), rural exemptions (*47 CFR 51.405*), and dialing parity, that is, an arrangement enabling a new entrant's customers to make calls without having to dial an access code (47 CFR 51.205-51.215); none of the statutory provisions that such rules interpret displaces the FCC's general rule-making authority, for (1) while provisions of the Telecommunications Act of 1996 (1996 Act) (*47 USCS 251(f)* and *252(e)*) entrust state commissions with the job of granting exemptions to rural LECs and approving interconnection agreements, these assignments do not logically preclude the FCC's issuance of rules to guide the state commissions' judgments, and (2) the 1996 Act provision addressing dialing parity (*47 USCS 251(b)(3)*) does not even mention the states. (Thomas, J., Rehnquist, Ch. J., and Breyer, J., dissented from this holding.)

COMMUNICATIONS §12 > -- administrative regulation -- local telephone service > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]***LEdHN[4C]***[] [4C]

With respect to local telephone service regulations promulgated by the Federal Communications Commission (FCC) under the local-competition provisions of the Telecommunications Act of 1996 (1996 Act) (*47 USCS 251 et seq.*), an FCC "unbundling" rule setting forth a minimum number of network elements that incumbent local exchange carriers (LECs) must make available to requesting LECs (Rule 319, *47 CFR 51.319*) is invalid, because (1) *47 USCS 251(d)(2)* requires the FCC to consider whether access to proprietary elements is "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service; and (2) the FCC, in giving requesting LECs blanket access to network elements, does not adequately consider the "necessary" and "impair" standards, as (a) Rule 319 implicitly regards the "necessary" standard as having been met regardless of whether LECs can obtain requested proprietary elements from a source other than the incumbent, (b) Rule 319 regards the "impair" standard as having been met if an incumbent's failure to provide access to a network element would decrease the quality, or increase the cost, of the service that a requesting LEC seeks to offer, compared with providing that service over other unbundled elements in the incumbent LEC's network, and (c) the FCC's assumptions are not in accord with the ordinary and fair meaning of the terms "necessary" and "impair." (Souter, J., dissented from this holding.)

COMMUNICATIONS §12 > -- administrative regulation -- local telephone service > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

With respect to local telephone service regulations promulgated by the Federal Communications Commission (FCC) under the local-competition provisions of the Telecommunications Act of 1996 (1996 Act) (*47 USCS 251 et seq.*), the FCC's refusal to impose a requirement of facilities ownership on competing local exchange carriers (LECs)--where such competing LECs are permitted to provide service by accessing an incumbent LEC's network, whether in whole or in part--is reasonable and proper, as the 1996 Act (1) imposes no such limitation, and (2) suggests the opposite by requiring in 47 USCS 251(c)(3) that incumbents provide access to "any" requesting carrier.

COMMUNICATIONS §12 > -- administrative regulation -- local telephone service > Headnote:
LEdHN[6A][] [6A]**LEdHN[6B]**[] [6B]

With respect to local telephone service regulations promulgated by the Federal Communications Commission (FCC) under the local-competition provisions of the Telecommunications Act of 1996 (1996 Act) (47 USCS 251 et seq.), the FCC's Rule 315(b) (47 CFR 51.315(b)), forbidding incumbent local exchange carriers (LECs) to separate already-combined network elements before leasing such elements to competitors, reasonably interprets 47 USCS 251(c)(3)--which establishes the duty to provide access to network elements "on an unbundled basis" on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements--because (1) 251(c)(3) forbids incumbents to sabotage elements that are provided in discrete pieces, but does not say or imply that elements must be provided in that fashion; and (2) the phrase "on an unbundled basis" does not mean physically separated, but is properly interpreted by the FCC to mean giving separate prices for equipment and supporting services.

COMMUNICATIONS §12 > -- administrative regulation -- local telephone service > Headnote:
LEdHN[7A][] [7A]**LEdHN[7B]**[] [7B]

With respect to local telephone service regulations promulgated by the Federal Communications Commission (FCC) under the local-competition provisions of the Telecommunications Act of 1996 (1996 Act) (47 USCS 251 et seq.), the FCC's "pick and choose" rule (47 CFR 51.809)--enabling a competing local exchange carrier (LEC) to demand access to any individual interconnection, service, or network element arrangement on the same terms and conditions given by the incumbent LEC to anyone else in an approved agreement pursuant to 47 USCS 252 without having to accept the agreement's other provisions--is consistent with the 1996 Act, as (1) the rule's language tracks that of 47 USCS 252(i) almost exactly, and (2) the FCC's interpretation is the most readily apparent one.

COMMUNICATIONS §12 > -- administrative jurisdiction -- intrastate service > Headnote:
LEdHN[8A][] [8A]**LEdHN[8B]**[] [8B]

Under a provision of the Communications Act of 1934 (1934 Act) (47 USCS 152(b))--which states that except as otherwise provided, nothing in the 1934 Act is to be construed to apply or to give the Federal Communications Commission (FCC) jurisdiction with respect to regulations in connection with intrastate communication service--the FCC cannot regulate any aspect of intrastate communication that is not governed by provisions inserted into the 1934 Act by the Telecommunications Act of 1996 (PL 104-104, 110 Stat 56) on the theory that such an aspect of intrastate communication has an ancillary effect on matters within the FCC's primary jurisdiction.

COMMUNICATIONS §25 > -- judicial review -- ripeness > Headnote:
LEdHN[9][] [9]

On review to determine the validity of local telephone service regulations promulgated by the Federal Communications Commission (FCC), a Federal Court of Appeals errs in reaching a claim which challenges a statement by the FCC that a provision of the Communications Act of 1934 (1934 Act) (*47 USCS 208*) giving the FCC general authority to hear complaints arising under the 1934 Act also gives the FCC authority to review agreements approved by state commissions under the local-competition provisions of the Telecommunications Act of 1996 (*47 USCS 251 et seq.*), where the claim is not ripe, in that the FCC statement in question has no immediate effect on the challenger's primary conduct.

ADMINISTRATIVE LAW §216 > -- judicial review > Headnote:
LEdHN[10][] [10]

Federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements, where such a rule or statement has no immediate effect on the plaintiff's primary conduct.

COMMUNICATIONS §12 > -- administrative regulation -- local telephone service > Headnote:
LEdHN[11][] [11]

For purposes of a provision of the Telecommunications Act of 1996 (1996 Act) (*47 USCS 153(29)*)--which defines "network element" as (1) a facility or equipment used in the provision of a telecommunications service, or (2) any of various features, functions, and capabilities that are provided by means of such facility or equipment--a network element need not be part of the physical facilities and equipment used to provide local telephone service; thus, with respect to local telephone service regulations promulgated by the Federal Communications Commission (FCC) under the local-competition provisions of 1996 Act (*47 USCS 251 et seq.*), it is reasonable for the FCC to apply the definition of "network element" to include items such as (1) operator services and directory assistance, whether involving live operators or automation; (2) a local exchange carrier's background software system containing essential network information as well as programs to manage billing, repair ordering, and other functions; and (3) vertical switching features such as caller I.D., call forwarding, and call waiting.

COMMUNICATIONS §12 > -- administrative regulation -- local telephone service > Headnote:
LEdHN[12][] [12]

A provision of the Telecommunications Act of 1996 (1996 Act) (*47 USCS 251(c)(3)*)--which requires incumbent local exchange carriers (LECs) to provide competing LECs with access to network elements on an "unbundled" basis "at any technically feasible point"--indicates where unbundled access must occur, not which network elements must be unbundled; thus, the Federal Communications Commission, in promulgating regulations under the 1996 Act, misunderstands 251(c)(3) by interpreting that provision to impose on an incumbent LEC the duty to provide all network elements for which it is technically feasible to provide access.

ADMINISTRATIVE LAW §246 > -- extent of judicial review > Headnote:
LEdHN[13][] [13]

In determining the validity of administrative regulations promulgated under the Telecommunications Act of 1996 (1996 Act) (PL 104-104, 110 Stat 56), the United States Supreme Court can only enforce the clear limits that the 1996 Act contains.

Syllabus

The Telecommunications Act of 1996 (1996 Act) fundamentally restructures local telephone markets, ending the monopolies that States historically granted to local exchange carriers (LECs) and subjecting incumbent LECs to a host of duties intended to facilitate market entry, including the obligation under *47 U.S.C. § 251(c)* to share their networks with competitors. A requesting carrier can obtain such shared **[****2]** access by purchasing local telephone services at wholesale rates for resale to end-users, by leasing elements of the incumbent's network "on an unbundled basis," and by interconnecting its own facilities with the incumbent's network. After the Federal Communications Commission (FCC) issued regulations implementing the 1996 Act's local-competition provisions, incumbent LECs and state commissions filed numerous challenges, which were consolidated in the Eighth Circuit. Among other things, that court held that the FCC lacked jurisdiction to promulgate its rules regarding pricing, dialing parity, exemptions for rural LECs, the proper procedure for resolving local-competition disputes, and state review of pre-1996 interconnection agreements; that, in specifying the network elements available to requesting carriers under Rule 319, the FCC reasonably implemented the 1996 Act's requirement that it consider whether access to proprietary elements was "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service, see *§ 251(d)(2)*; that, in Rule 319, the FCC reasonably interpreted the statutory definition of "network element," see *§ 153(29)*; that the "all elements" rule, **[****3]** which effectively allows competitors to provide local phone service relying solely on the elements in an incumbent's network, is consistent with the 1996 Act; that Rule 315(b), which forbids incumbents to separate already-combined network elements before leasing them to competitors, must be vacated because it requires access to those elements on a bundled rather than an unbundled, *i.e.,* physically separated, basis; and that the FCC's "pick and choose" rule, which enables a carrier to demand access to any individual interconnection, service, or network element arrangement on the same terms and conditions the LEC has given anyone else in an approved *§ 252* agreement without having to accept the agreement's other provisions, must be vacated because it would deter the "voluntarily negotiated agreements" that the 1996 Act favors.

Held:

1. The FCC has general jurisdiction to implement the 1996 Act's local-competition provisions. Since Congress expressly directed that the 1996 Act be inserted into the Communications Act of 1934, and since the 1934 Act already provides that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out **[****4]** the provisions of this Act," *47 U.S.C. § 201(b)*, the FCC's rulemaking authority extends to implementation of *§§ 251* and *252*. *Section 152(b)* of the Communications Act, which provides that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communications service . . .," does not change this conclusion because the 1996 Act clearly applies to intrastate matters. The Eighth Circuit erred in reaching the challenge of the incumbent LECs and state commissions to the FCC's claim that *§ 208* gives it authority to review agreements approved by state commissions under the local-competition provisions, because that claim is not ripe. *See* *Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158*, Pp. 9-19, *18 L. Ed. 2d 697, 87 S. Ct. 1520*.

2. The FCC's rules governing unbundled access are, with the exception of Rule 319, consistent with the 1996 Act. Pp. 19-28.

(a) Given the breadth of *§ 153(29)*'s "network element" definition -- *i.e.,* "features, functions, and capabilities . . . provided by means of" a facility or equipment used in the provision of a telecommunications service -- it is impossible to credit the incumbents' argument that a "network element" must be part of the physical **[****5]** facilities and equipment used to provide local phone service. It was therefore proper for Rule 319 to include operator services and directory assistance, operational support systems, and vertical switching functions such as caller I.D., call forwarding, and call waiting within the features and services that must be provided to competitors. Pp. 19-20.

(b) However, since the FCC did not adequately consider the *§ 251(d)(2)* "necessary and impair" standards when it gave requesting carriers blanket access to network elements, Rule 319 is vacated. The Rule implicitly regards the "necessary" standard as having been met regardless of whether carriers can obtain requested proprietary elements from a source other than the incumbent, and regards the "impairment" standard as having been met if an incumbent's failure to provide access to a network element would decrease the quality, or increase the cost, of the service a requesting carrier seeks to offer, compared with providing that service *over other unbundled elements in the incumbent LEC's network*. The FCC cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. In addition, **[****6]** the FCC's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element "necessary," and causes the failure to provide that element to "impair" the entrant's ability to furnish its desired services, is simply not in accord with the ordinary and fair meaning of those terms. *Section 251(d)(2)* requires the FCC to determine on a rational basis *which* network elements must be made available, taking into account the 1996 Act's objectives and giving some substance to the "necessary" and "impair" requirements. Pp. 20-25.

(c) The FCC reasonably omitted a facilities-ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in *§ 251(c)(3)* that incumbents provide access to "any" requesting carrier. P. 25.

(d) Rule 315(b), which forbids incumbents to separate already-combined network elements before leasing them to competitors, reasonably interprets *§ 251(c)(3)*, which establishes the duty to provide access to network elements on nondiscriminatory rates, terms, and conditions and in a manner that allows requesting carriers to combine such elements. That **[****7]** section forbids incumbents to sabotage elements that *are* provided in discrete pieces, but it does not say, or even remotely imply, that elements *must* be provided in that fashion. Pp. 25-28.

3. Because the "pick and choose" rule tracks the pertinent language in *§ 252(i)* almost exactly, it is not only a reasonable interpretation of that section, it is the most readily apparent. Pp. 28-30.

Nos. 97-826 (first judgment), 97-829 (first judgment), 97-830, 97-831 (first judgment), 97-1075, 97-1087, 97-1099, and *97-1141, 120 F.3d 753*, reversed in part, affirmed in part, and remanded; Nos. 97-826, 97-829, and 97-831 (second judgments), *124 F.3d 934*, reversed in part and remanded.

Counsel: Seth P. Waxman argued the cause for federal petitioners and federal cross-respondents/petitioners.

Bruce J. Ennis, Jr., argued the cause for private petitioners.

Diane Munns for argued the cause for state commission respondents.

Laurence H. Tribe argued the cause for private respondents.

William P. Barr argued the cause for cross-petitioners/respondents.

David W. Carpenter for argued the cause for private cross-respondents/petitioners.

Judges: SCALIA, J., delivered the opinion of the Court, Parts I, III-A, III-C, III-D, and IV of which were joined by REHNQUIST, C. J., and STEVENS, KENNEDY, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., Part II of which was joined by STEVENS, KENNEDY, SOUTER, and GINSBURG, JJ., and Part III-B of which was joined by REHNQUIST, C. J., and STEVENS, KENNEDY, THOMAS, GINSBURG, and BREYER, JJ. SOUTER, J., filed an opinion concurring in part and dissenting in part, post, THOMAS, J., filed an opinion concurring in part **[****8]** and dissenting in part, in which REHNQUIST, C. J., and BREYER, J., joined, post, BREYER, J., filed an opinion concurring in part and dissenting in part, post. O'CONNOR, J., took no part in the consideration or decision of these cases.

Opinion by: SCALIA

Opinion

[*844] [*370] [**726]** JUSTICE SCALIA delivered the opinion of the Court.

LEdHN[1A][] [1A] *LEdHN[2A]*[] [2A] *LEdHN[3A]*[] [3A] *LEdHN[4A]*[] [4A] *LEdHN[5A]*[] [5A] *LEdHN[6A]*[] [6A] *LEdHN[7A]*[] [7A]In these cases we address whether the Federal Communications Commission has authority to implement certain pricing and nonpricing provisions of the Telecommunications Act of 1996, as well as whether the Commission's rules governing **[*371]** unbundled access and "pick and choose" negotiation are consistent with the statute.

I

Until the 1990s, local phone service was thought to be a natural monopoly. States typically granted an exclusive franchise in each local service area to a local exchange carrier (LEC), which owned, among other things, the local loops (wires connecting telephones to switches), the switches (equipment directing calls to their destinations), and the transport trunks (wires carrying calls between switches) that constitute a local exchange network. Technological advances, however, have made competition among multiple providers of local service seem possible, and Congress recently ended **[****9]** the longstanding regime of state-sanctioned monopolies.

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, (1996 Act or Act) fundamentally restructures local telephone markets. States may no longer enforce laws that impede competition, and incumbent LECs are subject to a host of duties intended to facilitate market entry. Foremost among these duties is the LEC's obligation under *47 U.S.C. § 251(c) (1994 ed., Supp. II)* to share its network with competitors. Under this provision, a requesting carrier can obtain access to an incumbent's network in three ways: It can purchase local telephone services at wholesale rates for resale to end users; it can lease elements of the incumbent's network "on an unbundled basis"; and it can interconnect **[***845]** its own facilities with the incumbent's network. [1] When **[**727]**

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[1] Title *47 U.S.C. § 251(c) (1994 ed., Supp. II)* provides as follows:

"*HN1*[] Additional Obligations of Incumbent Local Exchange Carriers

"In addition to the duties contained in subsection (b) of this section, each incumbent local exchange carrier has the following duties:

"(1) Duty to Negotiate

"The duty to negotiate in good faith in accordance with *section 252* of this title the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of this section and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

"(2) Interconnection

"The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network --

"(A) for the transmission and routing of telephone exchange service and exchange access;

"(B) at any technically feasible point within the carrier's network;

"(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

"(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and *section 252* of this title.

"(3) Unbundled Access

an entrant **[*372]** seeks access through any of these routes, the incumbent can negotiate an agreement without regard to the duties **[*373]** it would otherwise have under *§ 251(b)* [2] or *§ 251(c)*. See *§ 252(a)(1)*. But if private negotiation fails, either party **[***846]** can petition the state commission that regulates local phone service to arbitrate open issues, which arbitration is subject to *§ 251* and the **[****10]** FCC regulations promulgated thereunder. **[****11]**

"The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and *section 252* of this title. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

"(4) Resale

"The duty --

"(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

"(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

"(5) Notice of Changes

"The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

"(6) Collocation

"The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."

[2] *Section 251(b)* imposes the following duties on incumbents:

HN2[] "(1) Resale

"The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

"(2) Number Portability

"The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

"(3) Dialing Parity

"The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

"(4) Access to Rights-of-Way

"The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224 of this title.

"(5) Reciprocal Compensation

"The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications."

[**12]** Six months after the 1996 Act was passed, the FCC issued its First Report and Order implementing the local-competition **[*374]** provisions*. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, *11 FCC Rcd 15499 (1996)* (First Report & Order). The numerous challenges to this rulemaking, filed across the country by incumbent LECs and state utility commissions, were consolidated **[**728]** in the United States Court of Appeals for the Eighth Circuit.

The basic attack was jurisdictional. The LECs and state commissions insisted that primary authority to implement the local-competition provisions belonged to the States rather than to the FCC. They thus argued that many of the local-competition rules were invalid, most notably the one requiring that prices for interconnection and unbundled access be based on "Total Element Long Run Incremental Cost" (TELRIC) -- a forward-looking rather than historic measure. [3] See *47 CFR §§ 51.503*, *51.505 (1997)*. The Court of Appeals agreed, and vacated the pricing rules, and several other aspects of the order, as reaching beyond the Commission's jurisdiction. *Iowa Utilities Board v. FCC, 120 F.3d 753, 800, 804, 805-806* ***[****13]*** *(1997)*. It held that the general rulemaking authority conferred upon the Commission by the Communications Act of 1934 extended only to interstate matters, and that the Commission therefore needed specific congressional authorization before implementing provisions of the 1996 Act addressing intrastate telecommunications. *Id. at 795*. It found no such authorization for the Commission's rules regarding pricing, dialing parity, [4] exemptions **[*375]** for rural LECs, the proper procedure for resolving local-competition disputes, and state review of pre-1996 interconnection **[***847]** agreements. *Id. at 795-796, 802-806*. Indeed, with respect to some of these matters, the Eighth Circuit said that the 1996 Act had affirmatively given exclusive authority to the state commissions. *Id. at 795, 802, 805*. **[****14]**

The Court of Appeals found support for its holdings in *47 U.S.C. § 152(b)* (§ 2(b) of the Communications Act of 1934), which, it said, creates a presumption in favor of preserving state authority over intrastate communications. *120 F.3d at 796*. It found nothing in the 1996 Act clear enough to overcome this presumption, which it described as a fence that is "hog tight, horse high, and bull strong, preventing the FCC from intruding on the states' intrastate turf." *Id. at 800*.

Incumbent LECs also made several challenges, only some of which are relevant here, to **[****15]** the rules implementing the 1996 Act's requirement of unbundled access. See *47 U.S.C. § 251(c)(3) (1994 ed., Supp. II)*. ***HN3***[] Rule 319, the primary unbundling rule, sets forth a minimum number of network elements that incumbents must make available to requesting carriers. See *47 CFR § 51.319 (1997)*. The LECs complained that, in compiling this list, the FCC had virtually ignored the 1996 Act's requirement that it consider whether access to proprietary elements was "necessary" and whether lack of access to nonproprietary elements would "impair" an entrant's ability to provide local service. See *47 U.S.C. § 251(d)(2) (1994 ed., sup. II)*. In addition, the LECs thought that the list included items (like directory assistance and caller I.D.) that did not meet the statutory definition of "network element." See *§ 153(29)*. The Eighth Circuit rebuffed both arguments, holding that the Commission's interpretations **[*376]** of the "necessary and impair" standard and the definition of "network element" were reasonable and hence lawful under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.(NRDC)*, *467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. See *120 F.3d at 809-810*.

When it promulgated its unbundling rules, the Commission explicitly declined to **[****16]** impose a requirement of facility ownership on carriers who sought to lease network elements. First Report & Order PP 328-340. Because the

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[3] TELRIC pricing is based upon the cost of operating a hypothetical network built with the most efficient technology available. Incumbents argued below that this method was unreasonable because it stranded their historic costs and underestimated the actual costs of providing interconnection and unbundled access. The Eighth Circuit did not reach this issue, and the merits of TELRIC are not before us.

[4] Dialing parity, which seeks to ensure that a new entrant's customers can make calls without having to dial an access code, was addressed in the Commission's Second Report and Order. See *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, *11 FCC Rcd 19392 (1996)*. In a separate opinion that is also before us today, the Eighth Circuit vacated this rule insofar as it went beyond the FCC's jurisdiction over interstate calls. *People of California v. FCC, 124 F.3d 934, 943 (1997)*.

list of elements that Rule 319 made available **[**729]** was so extensive, the effect of this omission was to allow competitors to provide local phone service relying solely on the elements in an incumbent's network. The LECs argued that this "all elements" rule undermined the 1996 Act's goal of encouraging entrants to develop their own facilities. The Court of Appeals, however, deferred to the FCC's approach. Nothing in the 1996 Act itself imposed a requirement of facility ownership, and the court was of the view that the language of *§ 251(c)(3)* indicated that "a requesting carrier may achieve the capability to provide telecommunications services completely through access to the unbundled elements of an incumbent LECs' network." *120 F.3d at 814*.

Given the sweep of the "all elements" rule, however, the Eighth Circuit thought that the FCC went too far in its ***HN4***[] Rule 315(b), which forbids incumbents to separate network elements before leasing them to competitors. *47 CFR § 51.315(b) (1997)*. Taken together, the two rules allowed requesting carriers to lease the incumbent's **[****17]** entire, preassembled network. The Court of Appeals believed **[***848]** that this would render the resale provision of the statute a dead letter, because by leasing the entire network rather than purchasing and reselling service offerings, entrants could obtain the same product -- finished service -- at a cost-based, rather than wholesale, rate. *120 F.3d at 813*. Apparently reasoning that the word "unbundled" in *§ 251(c)(3)* meant "physically **[*377]** separated," the court vacated Rule 315(b) for requiring access to the incumbent LEC's network elements "on a bundled rather than an unbundled basis." *Ibid.*

Finally, incumbent LECs objected to the Commission's "pick and choose" rule, which governs the terms of agreements between LECs and competing carriers. Under this rule, ***HN5***[] a carrier may demand that the LEC make available to it "any individual interconnection, service, or network element arrangement" on the same terms and conditions the LEC has given anyone else in an agreement approved under *§ 252* -- without its having to accept the other provisions of the agreement. *47 CFR § 51.809 (1997)*; First Report & Order PP 1309-1310. The Court of Appeals vacated the rule, reasoning that it would deter the "voluntarily **[****18]** negotiated interconnection agreements" that the 1996 Act favored, by making incumbent LECs reluctant to grant quids for quos, so to speak, for fear that they would have to grant others the same quids without receiving quos. *120 F.3d at 801*.

The Commission, MCI, and AT&T petitioned for review of the Eighth Circuit's holdings regarding jurisdiction, Rule 315(b), and the "pick and choose" rule; the incumbent LECs cross-petitioned for review of the Eighth Circuit's treatment of the other unbundling issues. We granted all the petitions. *522 U.S. 1089 (1998)*.

II

LEdHN[1B][] [1B]*Section 201(b)*, a 1938 amendment to the Communications Act of 1934, provides that "***HN6***[] the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." 52 Stat. 588, *47 U.S.C. § 201(b)*. Since Congress expressly directed that the 1996 Act, along with its local-competition provisions, be inserted into the Communications Act of 1934, 1996 Act, § 1(b), 110 Stat. 56, the Commission's rulemaking authority **[*378]** would seem to extend to implementation of the local-competition provisions. [5]

[**19]** **[**730]** The incumbent LECs and State Commissions (hereinafter respondents) argue, however, that *§ 201(b)* rulemaking authority is limited to those provisions dealing with purely **[***849]** *interstate and foreign* matters, because ***HN7***[] the first sentence of *§ 201(a)* makes it "the duty of every common carrier engaged in

[5] JUSTICE BREYER says, *post*, at 10, that "Congress enacted [the] language [of *§ 201(b)*] in 1938," and that whether it confers "general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates." That is assuredly true. But we think that what the later statute contemplates is best determined, not by speculating about what the 1996 Act (and presumably every other amendment to the Communications Act since 1938) "foresees," *ibid*., but by the clear fact that the 1996 Act was adopted, not as a freestanding enactment, but as an amendment to, and hence *part of*, an Act which said that "the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act." JUSTICE BREYER cannot plausibly assert that the 1996 Congress was unaware of the general grant of rulemaking authority contained within the Communications Act, since *§ 251(i)* specifically provides that "nothing in this section shall be construed to limit or otherwise affect the Commission's authority under *section 201*."

interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ." It is impossible to understand how this use of the qualifier "interstate or foreign" in *§ 201(a)*, which limits the class of common carriers with the duty of providing communication service, reaches forward into the last sentence of *§ 201(b)* to limit the class of provisions that the Commission has authority to implement. We think that the grant in *§ 201(b)* means what it says: The FCC has rulemaking authority to carry out the "provisions of this Act," which include *§§ 251* and *252*, added by the Telecommunications Act of 1996. [6]

[**20]** **[*379]** Our view is [unaffected] by *47 U.S.C. § 152(b)* (§ 2(b) of the 1934 enactment), which reads:

"***HN8***[] Except as provided in sections 223 through 227 . . . , inclusive, and section 332 . . . , and subject to the provisions of section 301 of this title . . . , nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service . . . ."

The local-competition provisions are not identified in *§ 152(b)*'s "except" clause. Seizing on this omission, respondents argue that the 1996 Act does nothing to displace the presumption that the States retain their traditional authority over local phone service.

Respondents' argument on this point is (necessarily) an extremely subtle one. They do not contend that the "nothing **[*380]** . . . shall be construed" provision prevents all "application" of the Communications Act, as amended in 1996, to intrastate service, or even precludes all "Commission jurisdiction with respect to" such service. Such an interpretation would utterly nullify the 1996 amendments, which clearly "apply" to intrastate **[****21]** service, and clearly confer "Commission jurisdiction" over some matters. Respondents argue, therefore, that the effect of the "nothing . . . shall be construed" provision is to require **[***850]** an *explicit* "application" to intrastate service, *and in addition an explicit conferral of "Commission jurisdiction" over intrastate service*, before Commission jurisdiction can be found to exist. Such explicit "application," they acknowledge, was effected by the 1996 amendments, but "Commission jurisdiction" was explicitly conferred only as to a few matters.

The fallacy in this reasoning is that it ignores the fact that *§ 201(b)* *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies. Respondents argue that avoiding this *pari passu* expansion of Commission jurisdiction with expansion of the substantive scope of the Act **[**731]** was the reason the "nothing shall be construed" provision was framed in the alternative: "Nothing in this Act shall be construed to apply *or to give the Commission jurisdiction*" (emphasis added) with respect to the forbidden subjects. The italicized portion would have no operative effect, they assert, if every "application" **[****22]** of the Act automatically entailed Commission jurisdiction. The argument is an imaginative one, but ultimately fails. For even though "Commission jurisdiction" always follows where the Act "applies," Commission jurisdiction (so-called "ancillary" jurisdiction) *could* exist even where the Act does *not* "apply." The term "apply" limits the substantive reach of the statute (and the

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[6] JUSTICE BREYER appeals to our cases which say that there is a "'presumption against the pre-emption of state police power regulations,'" *post*, at 10, quoting from *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992)*, and that there must be "'clear and manifest' showing of congressional intent to supplant traditional state police powers," *post*, at 10, quoting from *Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)*. But the question in these cases is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has. The question is whether the state commissions' participation in the administration of the new *federal* regime is to be guided by federal-agency regulations. If there is any "presumption" applicable to this question, it should arise from the fact that a federal program administered by 50 independent state agencies is surpassing strange.

The appeals by both JUSTICE THOMAS and JUSTICE BREYER to what might loosely be called "States' rights" are most peculiar, since there is no doubt, even under their view, that if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel. This is, at bottom, a debate not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew. To be sure, the FCC's lines can be even more restrictive than those drawn by the courts -- but it is hard to spark a passionate "States' rights" debate over that detail.

concomitant scope of primary FCC jurisdiction), and the phrase "or to give the Commission jurisdiction" limits, in addition, the FCC's *ancillary* jurisdiction.

[*381] ***LEdHN[8A]***[] [8A]The need for both limitations is exemplified by *Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986)*, where the FCC claimed authority to issue rules governing depreciation methods applied by local telephone companies. [7] The Commission supported its claim with two arguments. First, that it could regulate intrastate because Congress had intended the depreciation provisions of the Communications Act to bind state commissions -- *i.e.*, that the depreciation provisions "applied" to intrastate ratemaking. *Id. at 376-377*. We observed that "while it is, no doubt, possible to find some support in the broad language of the section for **[****23]** respondents' position, we do not find the meaning of the section so unambiguous or straightforward as to override the command of *§ 152(b)* . . . ." *Id. at 377*. But the Commission also argued that, even if the statute's depreciation provisions did not apply intrastate, regulation of state depreciation methods would enable it to effectuate the federal policy of encouraging competition in interstate telecommunications. *Id. at 369*. We rejected that argument because, ***HN9***[] even though the FCC's broad regulatory authority normally would have been enough to justify its regulation of intrastate depreciation methods that affected interstate commerce, see *id., at 370*; cf. *Shreveport Rate Cases, 234 U.S. 342, 358, 34 S. Ct. 833, 58 L. Ed. 1341 (1914)*, *§ 152(b)* prevented the **[***851]** Commission from taking intrastate action solely because it furthered an interstate goal. *476 U.S. at 374*. [8] **[****24]**

[**25]** **[*382]** **[**732]** The parties have devoted some effort in these cases to debating whether *§ 251(d)* serves as a jurisdictional grant to the FCC. That section provides that "***HN10***[] within 6 months **[*383]** after [the date of

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[7] We discuss the *Louisiana* case because of the light it sheds upon the meaning of *§ 152(b)*. We of course do not agree with JUSTICE BREYER's contention, *post*, at 11, that the case "raised a question almost identical to the one before us." That case involved the Commission's attempt to regulate services over which it had not explicitly been given rulemaking authority; this one involves its attempt to regulate services over which it *has* explicitly been given rulemaking authority.

[8] ***LEdHN[8B]***[] [8B]

Because this reasoning clearly gives separate meanings to the provisions "apply" and "give the Commission jurisdiction," we do not understand why JUSTICE THOMAS asserts, *post,* at 9-10, that we have not given effect to every word that Congress used. Nor do we agree with JUSTICE THOMAS that our interpretation renders *§ 152(b)* a nullity. See *post*, at 9. After the 1996 Act, *§ 152(b)* may have less practical effect. But that is because Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control. Insofar as Congress has remained silent, however, *§ 152(b)* continues to function. The Commission could not, for example, regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.

JUSTICE THOMAS admits, as he must, that the Commission has authority to implement at least some portions of the 1996 Act. See *post*, at 7. But his interpretation of *§ 152(b)* confers such inflexibility upon that provision that he must strain to explain where the Commission gets this authority. A number of the provisions he relies on plainly read, not like conferrals of authority, but like references to the exercise of authority conferred elsewhere (we think, of course, in *§ 201(b)*). See, *e.g., § 251(b)(2)* (assigning state commissions "the duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission"); *§ 251(d)(2)* (setting forth factors for the Commission to consider "in determining what network elements should be made available for purposes of subsection (c)(3)"); *§ 251(g)* (requiring that any pre-existing "regulation, order, or policy of the Commission" governing exchange access and interconnection agreements remain in effect until it is "explicitly superseded by regulations prescribed by the Commission"). Moreover, his interpretation produces a most chopped-up statute, conferring Commission jurisdiction over such curious and isolated matters as "number portability, . . . those network elements that the carrier must make available on an unbundled basis for purposes of *§ 251(c)*, . . . numbering administration, . . . exchange access and interconnection requirements in effect prior to the Act's effective date, . . . and treatment of comparable carriers as incumbents . . . ," *post*, at 7, but denying Commission jurisdiction over much more significant matters. We think it most unlikely that Congress created such a strange hodgepodge. And, of course, JUSTICE THOMAS's recognition of *any* FCC jurisdiction over intrastate matters subjects his analysis to the same criticism he levels against us, *post*, at 10: Just as it is true that Congress did not explicitly amend *§ 152(b)* to exempt the entire 1996 Act, neither did it explicitly amend *§ 152(b)* to exempt the five provisions he relies upon.

enactment of the Telecommunications Act of 1996,] the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section." *47 U.S.C. § 251(d) (1994 ed., Supp. II)*. The FCC relies on this section as an alternative source of jurisdiction, arguing that if it was necessary for Congress to include an express jurisdictional grant in the 1996 Act, *§ 251(d)* does the job. Respondents counter that this provision functions only as a time constraint on the exercise of regulatory authority that the Commission has been given in the six subsections of *§ 251* that specifically mention the FCC. See *§§ 251(b)(2)*, *251(c)(4)(B)*, *251(d)(2)*, *251(e)*, *251(g)*, *251(h)(2)*. Our understanding of the Commission's general authority under *§ 201(b)* renders this debate academic. [9]

[**26]** ***LEdHN[2B]***[] [2B]The jurisdictional objections we have addressed thus far pertain **[***852]** to an asserted lack of what might be called underlying FCC jurisdiction. The remaining jurisdictional argument is that certain individual provisions in the 1996 Act negate particular aspects of the Commission's implementing authority. With regard to pricing, respondents point to *§ 252(c)*, which provides:

[*384] "***HN12***[] (c) Standards for Arbitration.

"In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall --

"(1) ensure that such resolution and conditions meet the requirements of *section 251*, including the regulations prescribed by the Commission pursuant to *section 251*;

"(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

"(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement."

Respondents contend that the Commission's TELRIC rule is invalid because *§ 252(c)(2)* entrusts the task of establishing rates to the state commissions. We think this attributes to that task a greater degree of autonomy than the **[****27]** phrase "establish any rates" necessarily implies. The FCC's prescription, through rulemaking, of a [requisite pricing methodology] [no more prevents the States from establishing rates than do the statutory "Pricing standards" set forth in *§ 252(d)*.] It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. That is enough to constitute the establishment of rates.

Respondents emphasize the fact that *§ 252(c)(1)*, which requires state commissions to assure compliance with the **[**733]** provisions of *§ 251*, adds "including the regulations prescribed by the Commission pursuant to *section 251*," whereas *§ 252(c)(2)*, which requires state commissions to assure compliance with the pricing standards in subsection (d), says nothing about Commission regulations applicable to subsection (d). There is undeniably a lack of parallelism here, but it seems to us adequately explained by the fact that *§ 251* specifically *requires* the Commission to promulgate regulations implementing that provision, whereas subsection (d) **[*385]** of *§ 252* does not. It seems to us not peculiar that the mandated regulations should be specifically referenced, **[****28]** whereas regulations permitted pursuant to the Commission's *§ 201(b)* authority are not. In any event, the mere lack of

[9] JUSTICE THOMAS says that the grants of authority to the Commission in *§ 251* would have been unnecessary "if Congress believed . . . that *§ 201(b)* provided the FCC with plenary authority to promulgate regulations." *Post*, at 9. We have already explained that three of the five provisions on which JUSTICE THOMAS relies are not grants of authority at all. See n. 8, *supra.* And the remaining two do not support his argument because they are not redundant of *§ 201(b)*. ***HN11***[] *Section 251(e)*, which provides that "the Commission shall create or designate one or more impartial entities to administer telecommunications numbering," *requires* the Commission to exercise its rulemaking authority, as opposed to *§ 201(b)*, which merely authorizes the Commission to promulgate rules if it so chooses. *Section 251(h)(2)* says that the FCC "may, by rule, provide for the treatment of a local exchange carrier . . . as an incumbent local exchange carrier for purposes of *[§ 251*]" if the carrier satisfies certain requirements. This provision gives the Commission authority beyond that conferred by *§ 201(b)*; without it, the FCC certainly could not have saddled a nonincumbent carrier with the burdens of incumbent status.

parallelism is surely not enough to displace that explicit authority. We hold, therefore, that the Commission has jurisdiction to design a pricing methodology.

[*853]** ***LEdHN[3B]***[] [3B]For similar reasons, we reverse the Court of Appeals' determinations that the Commission had no jurisdiction to promulgate rules regarding state review of pre-existing interconnection agreements between incumbent LECs and other carriers, regarding rural exemptions, and regarding dialing parity. See *47 CFR §§ 51.303*, *51.405*, and 51.205-51.215 (1997). None of the statutory provisions that these rules interpret displaces the Commission's general rulemaking authority. While it is true that ***HN13***[] the 1996 Act entrusts state commissions with the job of approving interconnection agreements, *47 U.S.C. § 252(e) (1994 ed., Supp. II)*, and granting exemptions to rural LECs, *§ 251(f)*, these assignments, like the rate-establishing assignment just discussed, do not logically preclude the Commission's issuance of rules to [guide the state-commission judgments.] And since the provision addressing dialing parity, *§ 251(b)(3)*, does **[****29]** not even mention the States, it is even clearer that the Commission's *§ 201(b)* authority is not superseded. [10]

[*386] **[****30]** ***LEdHN[9]***[] [9] ***LEdHN[10]***[] [10]Finally (as to jurisdiction), respondents challenge the claim in the Commission's First Report & Order that *§ 208*, a provision giving the Commission general authority to hear complaints arising under the Communications Act of 1934, also gives it authority to review agreements approved by state commissions under the local-competition provisions. First Report & Order PP 121-128. The Eighth Circuit held that the Commission's "perception of its authority . . . is untenable . . . in light of the language and structure of the Act and . . . operation of *[§152(b)]*." *120 F.3d at 803*. The Court of Appeals erred in reaching this claim because it is not ripe. ***HN14***[] When, as is the case with this Commission statement, there is no immediate effect on the plaintiff's primary conduct, federal courts normally do not entertain pre-enforcement challenges to agency rules and policy statements. *Toilet Goods Assn., Inc. v. Gardner, 387 U.S. 158, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967)*; see also *Lujan v. National Wildlife Federation, 497 U.S. 871, 891, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990)*.

III

A

LEdHN[11][] [11]We turn next to the unbundling rules, and come first to the incumbent LECs' complaint **[**734]** that the FCC included within the features and services that must **[****31]** be provided to competitors under Rule 319 items that do not (as they must) meet the **[***854]** statutory definition of "network element" -- namely, operator services and directory assistance, operational support systems (OSS), and vertical switching functions such as caller I. D., call forwarding, and call waiting. See *47 CFR §§ 51.319(f)-(g) [*387] (1997)*; First Report & Order P 413. The statute defines "network element" as

"***HN15***[] a facility or equipment used in the provision of a telecommunications service. Such term also includes features, functions, and capabilities that are provided by means of such facility or equipment, including subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." *47 U.S.C. § 153(29) (1994 ed., Supp. II)*.

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[10] JUSTICE THOMAS notes that it is well settled that state officers may interpret and apply federal law, see, *e.g.*, *United States v. Jones, 109 U.S. 513, 27 L. Ed. 1015, 3 S. Ct. 346 (1883)*, which leads him to conclude that there is no constitutional impediment to the interpretation that would give the States general authority, uncontrolled by the FCC's general rulemaking authority, over the matters specified in the particular sections we have just discussed. *Post*, at 12-13. But constitutional impediments aside, we are aware of no similar instances in which federal policymaking has been turned over to state administrative agencies. The arguments we have been addressing in the last three paragraphs of our text assume a scheme in which Congress has broadly extended its law into the field of intrastate telecommunications, but in a few specified areas (ratemaking, interconnection agreements, etc.) has left the policy implications of that extension to be determined by state commissions, which -- within the broad range of lawful policymaking left open to administrative agencies -- are beyond federal control. Such a scheme is decidedly novel, and the attendant legal questions, such as whether federal courts must defer to state agency interpretations of federal law, are novel as well.

Given the breadth of this definition, it is impossible to credit the incumbents' argument that a "network element" must be part of the physical facilities and equipment used to provide local phone service. Operator services and directory assistance, whether they involve live operators or automation, are "features, functions, and capabilities **[****32]** . . . provided by means of" the network equipment. OSS, the incumbent's background software system, contains essential network information as well as programs to manage billing, repair ordering, and other functions. *Section 153(29)*'s reference to "databases . . . and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service" provides ample basis for treating this system as a "network element." And vertical switching features, such as caller I. D., are "functions . . . provided by means of" the switch, and thus fall squarely within the statutory definition. We agree with the Eighth Circuit that the Commission's application of the "network element" definition is eminently reasonable. See *Chevron* v. *NRDC*, 467 U.S. at 866.

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LEdHN[4B][] [4B]We are of the view, however, that the FCC did not adequately consider the "necessary and impair" standards when it gave blanket access to these network elements, and others, in Rule 319. That ***HN16***[] Rule requires an incumbent to provide **[*388]** requesting carriers with access to a minimum of seven network elements: the local loop, the network interface device, switching capability, interoffice **[****33]** transmission facilities, signaling networks and call-related databases, operations support systems functions, and operator services and directory assistance. *47 CFR § 51.319 (1997)*. If a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis. *§ 51.317*.

Section 251(d)(2) of the Act provides:

"***HN17***[] In determining what network elements should be made available for purposes of subsection (c)(3) of this section, the Commission shall consider, at a minimum, whether --

"(A) access to such network elements as are proprietary in nature is necessary; and

"(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."

[*855]** The incumbents argue that *§ 251(d)(2)* codifies something akin to the "essential facilities" doctrine of antitrust theory, see generally 3A P. Areeda & H. Hovenkamp, ***Antitrust Law*** PP 771-773 (1996), opening up only those "bottleneck" elements unavailable elsewhere in the marketplace. We need not decide whether, as a matter of law, the 1996 Act requires the FCC **[****34]** to apply *that* standard; it may be that some other standard would provide an equivalent or better criterion for the limitation upon network-element availability that the statute has in mind. But we do agree with the incumbents that [the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, **[**735]** which it has simply failed to do.] In the general statement of its methodology set forth in the First Report and Order, the Commission announced that it would regard the "necessary" standard **[*389]** as having been met regardless of whether "requesting carriers can obtain the requested proprietary element from a source other than the incumbent," since "requiring new entrants to duplicate unnecessarily even a part of the incumbent's network could generate delay and higher costs for new entrants, and thereby impede entry by competing local providers and delay competition, contrary to the goals of the 1996 Act." First Report & Order P 283. And it announced that it would regard the "impairment" standard as having been met if "the failure of an incumbent to provide access to a network element would decrease the quality, or increase the financial or administrative **[****35]** cost of the service a requesting carrier seeks to offer, compared with providing that service *over other unbundled elements in the incumbent LEC's network*," *id., P 285* (emphasis added) -- which means that comparison with self-provision, or with purchasing from another provider, is excluded. Since any entrant will request the most efficient network element that the incumbent has to offer, it is hard to imagine when the incumbent's failure to give access to the element would not constitute an "impairment" under this standard. The Commission asserts that it deliberately limited its inquiry to the incumbent's own network because no rational entrant would seek access to network elements from an incumbent if it could get better service or prices elsewhere.

That may be. But that judgment [allows entrants, rather than the Commission, to determine] whether access to proprietary elements is necessary, and whether the failure to obtain access to nonproprietary elements would impair the ability to provide services. The Commission cannot, consistent with the statute, blind itself to the availability of elements outside the incumbent's network. That failing alone would require the Commission's **[****36]** rule to be set aside. In addition, however, the Commission's assumption that *any* increase in cost (or decrease in quality) imposed by denial of a network element renders access to that element ["necessary,"] and causes the failure to provide **[*390]** that element to ["impair"] the entrant's ability to furnish its desired services, is simply not in accord with [the ordinary and fair meaning of those terms.] An entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment has perhaps been "impaired" in its ability to amass earnings, but has not *ipso facto* been "impaired . . . in its ability to provide the services it seeks to offer"; **[***856]** and it cannot realistically be said that the network element enabling it to raise its profits to 100% is "necessary." [11] In a world of perfect competition, in which all carriers are providing their service at marginal cost, the Commission's total equating of increased cost (or decreased quality) with "necessity" and "impairment" might be reasonable; but it has not established the existence of such an ideal world. We cannot avoid the conclusion that, [if Congress had wanted to give blanket access to incumbents' **[****37]** networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included *§ 251(d)(2)* in the statute at all.] It would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided.

[**38]** **[**736]** ***LEdHN[12]***[] [12]When the full record of these proceedings is examined, it appears that that is precisely what the Commission *thought* **[*391]** Congress had said. The FCC was content with its expansive methodology because of its misunderstanding of *§ 251(c)(3)*, which directs an incumbent to allow a requesting carrier access to its network elements "at any technically feasible point." The Commission interpreted this to "impose on an incumbent LEC *the duty to provide all network elements for which it is technically feasible to provide access*," and went on to "conclude that we have authority to establish regulations that are coextensive" with this duty. First Report & Order P 278 (emphasis added). See also *id., P 286* ("We conclude that the statute does not require us to interpret the 'impairment' standard in a way that would significantly diminish the obligation imposed by *section 251(c)(3)*"). As the Eighth Circuit held, that was undoubtedly wrong: *Section 251(c)(3)* indicates "*where* unbundled access must occur, not *which* [network] elements must be unbundled." *120 F.3d at 810*. The Commission does not seek review of the Eighth Circuit's holding on this point, and we bring it into our discussion **[****39]** only because the Commission's application of *§ 251(d)(2)* was colored by this error. The Commission began with the premise that an incumbent was obliged to turn over as much of its network as was "technically feasible," and viewed (d)(2) as merely permitting it to soften that obligation by regulatory grace:

"To give effect to both *sections 251(c)(3)* and *251(d)(2)*, we conclude that the proprietary and impairment standards in *section 251(d)(2)* grant us the authority to refrain from requiring incumbent LECs to provide all network elements for which it is technically feasible to provide access on an unbundled basis." First Report & Order P 279.

The Commission's premise was wrong. *Section 251(d)(2)* does not authorize **[***857]** the Commission to create isolated exemptions from some underlying duty to make all network elements available. It requires the Commission to determine **[*392]** on a rational basis *which* network elements must be made available, taking into account the objectives of the Act and giving some substance to the "necessary" and "impair" requirements. The latter is not achieved by disregarding entirely the availability of elements outside the network, and by regarding *any*

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[11] JUSTICE SOUTER points out that one can say his ability to replace a light bulb is "impaired" by the absence of a ladder, and that a ladder is "necessary" to replace the bulb, even though one "could stand instead on a chair, a milk can, or eight volumes of Gibbon." True enough (and nicely put), but the proper analogy here, it seems to us, is not the absence of a ladder, but the presence of a ladder tall enough to enable one to do the job, but not without stretching one's arm to its full extension. A ladder one-half inch taller is not, "within an ordinary and fair meaning of the word," *post*, at 4, "necessary," nor does its absence "impair" one's ability to do the job. We similarly disagree with JUSTICE SOUTER that a business can be impaired in its *ability* to provide services -- even impaired in that ability "in an ordinary, weak sense of impairment," post, at 5 -- when the business receives a handsome profit but is denied an even handsomer one.

"increased **[****40]** cost or decreased service quality" as establishing a "necessity" and an "impairment" of the ability to "provide . . . services."

LEdHN[4C][] [4C]The Commission generally applied the above described methodology as it considered the various network elements *seriatim*. See *id., PP 388-393, 419-420, 447, 481-482, 490-491, 497-499, 521-522, 539-540*. Though some of these sections contain statements suggesting that the Commission's action might be supported by a higher standard, see, *e.g.,* PP 521-522, no other standard is consistently applied and we must assume that the Commission's expansive methodology governed throughout. Because the Commission has not interpreted the terms of the statute in a reasonable fashion, we must vacate *47 CFR § 51.319 (1997)*.

C

LEdHN[5B][] [5B]The incumbent LECs also renew their challenge to the "all elements" rule, which allows competitors to provide local phone service relying solely on the elements in an incumbent's network. See First Report & Order PP 328-340. This issue may be largely academic in light of our disposition of Rule 319. If the FCC on remand makes fewer network elements unconditionally available through the unbundling requirement, an entrant will no longer be able **[****41]** to lease every component of the network. But whether a requesting carrier can access the incumbent's network in whole or in part, we think that the Commission reasonably omitted a facilities-ownership requirement. The 1996 Act imposes no such limitation; if anything, it suggests the opposite, by requiring in *§ 251(c)(3)* that incumbents provide access to "any" requesting carrier. We agree with the Court of Appeals **[*393]** that the Commission's refusal to impose a facilities-ownership requirement was proper.

D

LEdHN[6B][] [6B]Rule 315(b) forbids an incumbent to separate already-combined network elements before **[**737]** leasing them to a competitor. As they did in the Court of Appeals, the incumbents object to the effect of this Rule when it is combined with others before us today. TELRIC allows an entrant to lease network elements based on forward-looking costs, Rule 319 subjects virtually all network elements to the unbundling requirement, and the all-elements rule allows requesting carriers to rely only on the incumbent's network in providing service. When Rule 315(b) is added to these, a competitor can lease a complete, preassembled network at (allegedly very low) cost-based rates.

The incumbents argue that this **[****42]** result is totally inconsistent with the 1996 Act. They say that it not only eviscerates the distinction between resale and unbundled access, but that it also amounts to Government-sanctioned regulatory arbitrage. Currently, state laws require local phone rates to include a "universal service" subsidy. Business customers, for **[***858]** whom the cost of service is relatively low, are charged significantly above cost to subsidize service to rural and residential customers, for whom the cost of service is relatively high. Because this universal-service subsidy is built into retail rates, it is passed on to carriers who enter the market through the resale provision. Carriers who purchase network elements at cost, however, avoid the subsidy altogether and can lure business customers away from incumbents by offering rates closer to cost. This, of course, would leave the incumbents holding the bag for universal service.

As was the case for the all-elements rule, our remand of Rule 319 may render the incumbents' concern on this score academic. Moreover, § 254 requires that universal-service **[*394]** subsidies be phased out, so whatever possibility of arbitrage remains will be only temporary. In any event, we **[****43]** cannot say that Rule 315(b) unreasonably interprets the statute.

Section 251(c)(3) establishes:

"***HN18***[] The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and *section 252* . .

. . An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service."

Because this provision requires elements to be provided in a manner that "allows requesting carriers to combine" them, incumbents say that it contemplates the leasing of network elements in discrete pieces. It was entirely reasonable for the Commission to find that the text does not command this conclusion. It forbids incumbents to sabotage network elements that *are* provided in discrete pieces, and thus assuredly contemplates that elements *may* be requested and provided **[****44]** in this form (which the Commission's rules do not prohibit). But it does not say, or even remotely imply, that elements *must* be provided only in this fashion and never in combined form. Nor are we persuaded by the incumbents' insistence that the phrase "on an unbundled basis" in *§ 251(c)(3)* means "physically separated." The dictionary definition of "unbundled" (and the only definition given, we might add) matches the FCC's interpretation of the word: "to give separate prices for equipment and supporting services." Webster's Ninth New Collegiate Dictionary 1283 (1988).

[*395] The reality is that *§ 251(c)(3)* is ambiguous on whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in *§ 251(c)(3)*'s nondiscrimination requirement. As the Commission explains, it is aimed at preventing incumbent LECs from "disconnecting previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." Reply Brief for Federal Petitioners and Brief for Federal Cross - Respondents 23. It is true that Rule 315(b) could allow entrants access to an entire preassembled **[****45]** network. In the absence of Rule 315(b), however, **[***859]** incumbents could **[**738]** impose wasteful costs on even those carriers who requested less than the whole network. It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice.

IV

LEdHN[7B][] [7B]The FCC's "pick and choose" rule provides, in relevant part:

"***HN19***[] An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, or network element arrangement contained in any agreement to which it is a party that is approved by a state commission pursuant to *section 252* of the Act, upon the same rates, terms, and conditions as those provided in the agreement." *47 CFR § 51.809 (1997)*.

Respondents argue that this rule threatens the give-and-take of negotiations, because every concession as to an "interconnection, service, or network element arrangement" made (in exchange for some other benefit) by an incumbent LEC will automatically become available to every potential entrant into the market. A carrier who wants one term **[*396]** from an existing agreement, they say, should be required to accept *all* the terms in the **[****46]** agreement.

Although the latter proposition seems eminently fair, it is hard to declare the FCC's rule unlawful when it tracks the pertinent statutory language almost exactly. United States Code *§ 252(i)* (1994 ed., Supp. II) provides:

"***HN20***[] A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

The FCC's interpretation is not only reasonable, it is the most readily apparent. Moreover, in some respects the rule is more generous to incumbent LECs than *§ 252(i)* itself. It exempts incumbents who can prove to the state commission that providing a particular interconnection service or network element to a requesting carrier is either (1) more costly than providing it to the original carrier, or (2) technically infeasible. *47 CFR § 51.809(b) (1997)*. And it limits the amount of time during which negotiated agreements are open to requests under this section. *§ 51.809(c)*. The Commission has said that an incumbent LEC can require a requesting carrier to accept all terms that it can prove **[****47]** are "legitimately related" to the desired term. First Report & Order P 1315. *Section 252(i)* certainly demands no more than that. And whether the Commission's approach will significantly impede negotiations (by making it impossible for favorable interconnection-service or network-element terms to be traded off against unrelated provisions) is a matter eminently within the expertise of the Commission and eminently beyond our ken. We reverse the Eighth Circuit and reinstate the rule.

[*397] * * *

LEdHN[13][] [13]It would be gross understatement to say that the 1996 Act is not a model of clarity. It is in many important respects a [model of ambiguity] or indeed even [self-contradiction]. That is most unfortunate for a piece of legislation **[***860]** that profoundly affects a crucial segment of the economy worth tens of billions of dollars. The 1996 Act can be read to grant (borrowing a phrase from incumbent GTE) "most promiscuous rights" to the FCC vis-a-vis the state commissions and to competing carriers vis-a-vis the incumbents -- and the Commission has chosen in some instances to read it that way. But Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved **[****48]** by the implementing agency, see *Chevron*, 467 U.S. at 842-843. We can only enforce the clear limits that the 1996 Act contains, which in the present cases invalidate only Rule 319.

For the reasons stated, the July 18, 1997, judgment of the Court of *Appeals, 120 F.3d 753*, is reversed in part and affirmed in part; the August 22, 1997, judgment of the Court of *Appeals, 124 F.3d 934*, is reversed in part; and the cases are remanded for proceedings consistent with this opinion. **[**739]**

It is so ordered.

JUSTICE O'CONNOR took no part in the consideration or decision of these cases.

Concur by: SOUTER (In Part); THOMAS (In Part); BREYER (In Part)

Dissent by: SOUTER (In Part); THOMAS (In Part); BREYER (In Part)

Dissent

JUSTICE SOUTER, concurring in part and dissenting in part.

I agree with the Court's holding that the Federal Communications Commission has authority to implement and interpret the disputed provisions of the Telecommunications Act of 1996, and that deference is due to the Commission's reasonable interpretation under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*. I disagree with the Court's holding that the Commission was **[*398]** unreasonable in **[****49]** its interpretation of *47 U.S.C. § 251(d)(2) (1994 ed., Supp. II)*, which requires it to consider whether competitors' access to network elements owned by local exchange Carriers (LECs) is "necessary" and whether failure to provide access to such elements would "impair" competitors' ability to provide services. *Ante*, at 17. Because I think that, under *Chevron*, the Commission reasonably interpreted its duty to consider necessity and impairment, I respectfully dissent from Part III-B of the Court's opinion.

The statutory provision in question specifies that in determining what network elements should be made available on an unbundled basis to potential competitors of the LECs, the Commission "shall consider" whether "access to such network elements as are proprietary in nature is necessary," *§ 251(d)(2)(A)*, and whether "the failure to provide access" to network elements "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer," *§ 251(d)(2)(B)*. The Commission interpreted "necessary" to mean "prerequisite for competition," in the sense that without access to certain proprietary network elements, competitors' "ability **[****50]** to compete would be significantly impaired or thwarted." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, P 282, *11 FCC Rcd 15499, 15641-15642 (1996)* (First Report & Order). On this basis, it decided to require access to such elements unless the **[***861]** incumbent LEC could prove both that the requested network element was proprietary and that the requesting competitor could offer the same service through the use of another, nonproprietary element offered by the incumbent LEC. *Id. P 283, at 15642*.

The Commission interpreted "impair" to mean "diminished in value," and explained that a potential competitor's ability to offer services would diminish in value when the quality of those services would decline or their price rise, absent the element in question. *Id. P 285, at 15643*. The Commission chose to apply this standard "by evaluating **[*399]** whether a carrier could offer a service using other unbundled elements within an incumbent LEC's network," *ibid*., and decided that whenever it would be more expensive for a competitor to offer a service using other available network elements, or whenever the service offered using those other elements **[****51]** would be of lower quality, the LEC must offer the desired element to the competitor, *ibid*.

In practice, as the Court observes, *ante*, at 18, the Commission's interpretation will probably allow a competitor to obtain access to any network element that it wants; a competitor is unlikely in fact to want an element that would be economically unjustifiable, and a weak economic justification will do. Under *Chevron*, the only question before us is whether the Commission's interpretation, obviously favorable to potential competitors, falls outside the bounds of reasonableness.

As a matter of textual justification, certainly, the Commission is not to be faulted. The words ["necessary"] and ["impair"] are ambiguous in being susceptible to a fairly wide range of meanings, and doubtless can carry the meanings the Commission identified. If I want to replace a light bulb, I would be [within an ordinary and fair meaning of the word] "necessary" to say that a stepladder is "necessary" to install the bulb, even though I [could stand instead on a chair, a milk can, or eight volumes of Gibbon.] I could just as easily say that the want of a ladder would "impair" my ability to install the bulb under **[****52]** the same circumstances. These examples **[**740]** use the concepts of necessity and impairment in what might be called their weak senses, but these are unquestionably still ordinary uses of the words.

Accordingly, the Court goes too far when it says that under "the ordinary and fair meaning" of "necessary" and "impair," *ante*, at 18, "an entrant whose anticipated annual profits from the proposed service are reduced from 100% of investment to 99% of investment . . . has not *ipso facto* been 'impaired . . . in its ability to provide the services **[*400]** it seeks to offer'; and it cannot realistically be said that the network element enabling it to raise profits to 100% is 'necessary,'" *ante*, at 18-19. A service is surely "necessary" to my business in an ordinary, weak sense of necessity when that service would allow me to realize more profits, and a business can be said to be "impaired" in delivery of services [in an ordinary, weak sense of impairment] when something stops the business from getting the profit it wants for those services.

Not every choice of meaning that falls within the bounds of textual ambiguity is necessarily reasonable, to be sure, but the Court's appeal to broader statutory **[****53]** policy comes up **[***862]** short in my judgment. The Court says, with some intuitive plausibility, that "the Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act, which it has simply failed to do." *Ante*, at 17. In the Court's eyes, the trouble with the Commission's interpretation is that it "allows entrants, rather than the Commission, to determine" necessity and impairment, *ante*, at 18, and so the Court concludes that "if Congress had wanted to give blanket access to incumbents' networks on a basis as unrestricted as the scheme the Commission has come up with, it would not have included *§ 251(d)(2)* in the statute at all;" *ante*, at 19.

The Court thus judges the reasonableness of the Commission's rule for implementing *§ 251(d)(2)* by asking how likely it is that Congress would have legislated at all if its point in adopting the criteria of necessity and impairment was to do no more than require economic rationality, and the Court answers that the Commission's notion of the congressional objective in using the ambiguous language is just too modest to be reasonable. The persuasiveness of the Court's answer to its question, however, rests **[****54]** on overlooking the very different question that the Commission was obviously answering when it adopted Rule 319. As the Court itself notes, *ante*, at 17-18, **[*401]** the Commission explicitly addressed the consequences that would follow from requiring an entrant to satisfy the necessity and impairment criteria by showing that alternative facilities were unavailable at reasonable cost from anyone except the incumbent LEC. First Report & Order P 283, 11 FCC Rcd at 15642. To require that kind of a showing, the Commission said, would encourage duplication of facilities and personnel, with obvious systemic costs. *Ibid*. The Commission, in other words, was approaching the task of giving reasonable interpretations to "necessary" and "impair" by asking whether Congress would have mandated economic inefficiency as a limit on the objective of encouraging competition through ease of market entry. The Commission concluded, without any apparent implausibility, that the answer was no, and proceeded to implement the necessity and impairment provisions in accordance with that answer.

Before we conclude that the Commission's reading of the statute was unreasonable, therefore, we have to do more than **[****55]** simply ask whether Congress would probably have legislated the necessity and impairment criteria in their weak senses. We have to ask whether the Commission's further question is an irrelevant one, and (if it is not), whether the Commission's answer is reasonably defensible. If the question is sensible and the answer fair, *Chevron* deference surely requires us to respect the Commission's conclusion. This is so regardless of whether the answer to the Commission's question points in a different direction from the answer to the Court's question; there is no apparent reason why deference to the agency should not extend to the agency's choice in responding to mutually ill-fitting clues to congressional meaning. This, indeed, is surely a classic case for such deference, the statute here being infected not only with "ambiguity" **[**741]** but even "self-contradiction." *Ante*, at 25. I would accordingly respect the Commission's choice to give primacy to the question it chose.

[*863]** **[*402]** JUSTICE THOMAS, with whom THE CHIEF JUSTICE and JUSTICE BREYER join, concurring in part and dissenting in part.

Since Alexander Graham Bell invented the telephone in 1876, the States have been, for all practical purposes, **[****56]** exclusively responsible for regulating intrastate telephone service. Although the Telecommunications Act of 1996 altered that more than century-old tradition, the majority takes the Act too far in transferring the States' regulatory authority wholesale to the Federal Communications Commission. In my view, the Act does not unambiguously indicate that Congress intended for such a transfer to occur. Indeed, it specifically reserves for the States the primary responsibility to conduct mediations and arbitrations and to approve agreements between carriers See 47 U.S.C. §§ 252(c), (e) (1994 ed., Supp. II). I therefore respectfully dissent from Part II of the majority's opinion. [1]

I

From the time that the commercial offering of telephone service began in 1877 until the expiration of key patents in 1893 and 1894, Alexander Graham Bell's telephone company -- which came to be known **[****57]** as the American Telephone and Telegraph Company -- enjoyed a monopoly. J. Brooks, Telephone: The First Hundred Years 59, 67, 71-72 (1976). In the decades that followed, thousands of independent phone companies emerged to fill in the gaps left by the telephone giant and, in most larger markets, to build rival networks in direct competition with it. Id. at 102-111. As competition developed, many municipalities began to adopt ordinances regulating telephone service. See, *e.g.*, K. Lipartito, The Bell System and Regional Business 177-186 (1989).

During the 1900's, state legislatures came under increasing pressure to centralize the regulation of telephone service. **[*403]** See, *e.g., id., at 185-207*. Although the quasi-competitive system had significant drawbacks from the consumers' standpoint -- principally the refusal of competing systems to interconnect -- perhaps the strongest advocate of state regulation was AT&T itself. *Ibid*. The company's arguments that telephone service was naturally monopolistic and that competition was resulting in wasteful duplication of facilities appealed to Progressive-era legislatures. Cohen, The Telephone Problem and the Road to Telephone Regulation **[****58]** in the United States, 3 J. Policy Hist. 42, 55-57 (1991); see generally, Lipartito, *supra,* at 185-207. By 1915, most States had established public utility commissions and charged them with regulating telephone service. Brooks, *supra,* at 144. Over time, the Bell Companies' policy of buying out independent providers coupled with the state commissions' practice of prohibiting competitive entry led back to the monopoly provision of local telephone service. See R. Garnet, The Telephone Enterprise: The Evolution of the Bell System's Horizontal Structure, 1876-1909, 146-153 (1985).

Early federal telecommunications regulation, which began with the Mann-Elkins Act of 1910, did not displace the States' fledgling efforts to regulate intrastate telephone service. **[***864]** To the contrary, the Mann-Elkins Act

[1] I agree with the majority's analysis of the unbundling and pick-and-choose rules, which were not challenged on jurisdictional grounds.

extended the jurisdiction of the Interstate Commerce Commission (ICC) to cover *only* interstate and international telecommunications services. [2] As a result, state and federal agencies were required to meticulously separate the intrastate and interstate aspects of telephone services. Accordingly, in *Smith v. Illinois Bell Telephone Co., 282 U.S. 133, 75 L. Ed. 255, 51 S. Ct. 65 (1930)*, this Court **[*404]** **[**742]** invalidated **[****59]** an Illinois Commerce Commission order establishing rates for the city of Chicago because it failed to distinguish between the intrastate and interstate property and business of the telephone company. In so doing, the Court emphasized that "the separation of the intrastate and interstate property, revenues and expenses of the Company is . . . essential to the appropriate recognition of the competent governmental authority in each field of regulation." *Id. at 148*.

In the Communications Act of 1934, 48 Stat. 1064, as amended, *47 **[****60]** U.S.C. § 151 et seq.*, Congress transferred authority over interstate communications from the ICC to the newly created Federal Communications Commission (FCC or Commission). As in the Mann-Elkins Act, Congress chose not to displace the States' authority over intrastate communications. Indeed, Congress took care to preserve it explicitly in § 2(b), which provides, in relevant part, that "nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service." *47 U.S.C. § 152(b)*. We have carefully guarded the historical jurisdictional division codified in § 2(b). See *Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986)*. In *Louisiana*, we held that § 2(b) precluded the FCC from pre-empting state depreciation regulations. In so doing, we rejected the FCC's argument that § 220 of the Communications Act of 1934 provided it with authority to displace state regulations that were inconsistent with federal depreciation standards. We instead concluded that § 2(b) "fences off from FCC reach or regulation **[****61]** intrastate matters -- indeed, including matters 'in connection with' intrastate service," *id., at 370*, and we further indicated that the FCC could breach § 2(b)'s jurisdictional "fence" only when Congress used "unambiguous or straightforward" language to give it jurisdiction over intrastate communications, *id. at 377*. **[*405]**

Congress enacted the Telecommunications Act of 1996 (1996 Act or Act), Pub. L. 104-104, 110 Stat. 56, against this backdrop. To be sure, the 1996 Act marked a significant change in federal telecommunications policy. Most important, Congress ended the States' longstanding practice of granting and maintaining local exchange monopolies. See *47 U.S.C. § 253(a) **[***865]** (1994 ed., Supp. II)*. It also required incumbent local exchange carriers to allow their competitors to access their facilities in three different ways. As the majority describes more completely, *ante,* at 3, n. 1, incumbents must: interconnect their networks with requesting carriers' facilities and equipment, *§ 251(c)(2)*; provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point, *§ 251(c)(3)*; and offer to resell at wholesale rates any telecommunications service **[****62]** that they provide to subscribers who are not telecommunications carriers, *§ 251(c)(4)*. The Act sets forth additional obligations applicable to all telecommunications carriers, *§ 251(a)*, and all local exchange carriers, *§ 251(b)*. To facilitate rapid transition from monopoly to competitive provision of local telephone service, Congress set forth a process to ensure that the incumbent and competing carriers fulfill these obligations in *§ 252*.

Section 252 sets up a preference for negotiated interconnection agreements. *§ 252(a)*. To the extent that the incumbent and competing carriers cannot agree, the Act gives the state commissions primary responsibility for mediating and arbitrating agreements. Specifically, Congress directed the state commissions to mediate disputes between carriers during the voluntary negotiation period, *§ 252(a)(2)*, and -- after the negotiations have run their course -- to arbitrate any "open issues," *§ 252(b)(1)*. In conducting these arbitrations, state commissions are directed to ensure that open issues are resolved in accordance with the requirements of *§ 251*, "establish . . . rates for interconnection, services, or network elements" according to the standards **[****63]** that Congress **[*406]** set forth in *§ 252(d)*, and provide a schedule for implementing the agreement reached during arbitration. *§ 252(c)*. The state commissions are also to approve or reject any interconnection agreement, whether adopted by negotiation **[**743]** or arbitration, *§ 252(e)(1)*, guided by the standards set forth in *§ 252(e)(2)*. The 1996 Act permits the FCC

[2] The Mann-Elkins Act provided, in relevant part, that "the provisions of this Act shall apply to . . . telegraph, telephone, and cable companies . . . engaged in sending messages from one State, Territory, or District of the United States, to any other State, Territory or District of the United States, or to any foreign country, who shall be considered and held to be common carriers within the meaning and purpose of this Act." Act of June 18, 1910, ch. 309, § 7, 36 Stat. 544-545.

to intervene in this process only as a last resort, when "a State commission fails to act to carry out its responsibilities." *§ 252(e)(5)*. In that event, "the Commission shall issue an order preempting the State commission's jurisdiction . . . and shall assume the responsibility of the State commission . . . and act for the State commission." *Ibid.*

To be sure, the Act directs the state commissions, in conducting arbitrations, to ensure that open issues are resolved in accordance with the "regulations prescribed by the [FCC] pursuant to *section 251*," *§ 252(c)(1)*, and provides that the state commissions may reject an arbitrated agreement if it does not meet the requirements of *§ 251*, "including the regulations prescribed by the Commission pursuant to *section 251*," *§ 252(e)(2)(B)*. But the scope of the FCC's rulemaking authority **[****64]** under the Act is quite limited. *Section 251(d)(1)* directs the Commission to "complete all actions necessary to establish regulations to implement the requirements of this section" within a certain time period. I believe that this subsection is a time limitation upon, and a mandate for, the exercise of rulemaking authority conferred elsewhere. The source of that authority, as I describe below, is not *§ 201(b)*, but, rather, *§ 251* itself. *Section 251* specifically identifies those subjects upon which the FCC may **[***866]** regulate. The FCC has authority to regulate on the subject of [number portability, *§ 251(b)(2)*; those network elements that the carrier must make available on an unbundled basis for purposes of *§ 251(c)*, *§ 251(d)(2)*; numbering administration, *§ 251(e)*; exchange access and interconnection requirements in effect prior to the Act's effective date, *§ 251(g)*; and treatment of comparable carriers as incumbents, *§ 251(h)(2)*.]

[*407] II

The regulations that are the subject of the jurisdictional challenge of the respondent LECs and state Commissions contravene the division of authority set forth in the 1996 Act and disregard the 100-year tradition of state authority over intrastate telecommunications. In the introduction **[****65]** to its First Report and Order, the FCC peremptorily declared that *§§ 251* and *252* "require [it] to establish implementing rules to govern interconnection, resale of services, access to unbundled network elements, and other matters, and direct the states to follow the Act and those rules in arbitrating and approving arbitrated agreements under *sections 251* and *252*." *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, *11 FCC Rcd 15499, 15544-15545 (1996)* (emphasis added). In fulfilling its perceived statutory mandate, the FCC promulgated painstakingly detailed regulations dictating to the state commissions how they must implement *§§ 251* and *252*. I agree with the Eighth Circuit that the FCC lacked jurisdiction to promulgate the regulations challenged on jurisdictional grounds. [3]

[**66]** A

In endorsing the FCC's claim that it has general rulemaking authority to implement the local competition provisions of the 1996 Act, the majority relies upon a general grant of authority that predates the Act, *47 U.S.C. § 201(b)*. The last sentence of that provision, upon which the majority so heavily relies, provides that "the Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter." **[*408]** This grant of authority, however, cannot be read in isolation. As the first Justice Harlan once observed: "It is a familiar rule in the interpretation of . . . statutes that 'a passage will be best interpreted by reference to that which precedes and follows it.'" *Neal v. Clark, 95 U.S. 704, 708, 24 L. Ed. 586 (1878)*. *Section 201(a)* refers exclusively to "interstate or foreign communication by wire or radio," and the first sentence of *§ 201(b)* refers to "charges, practices, classifications, **[**744]** and regulations for and in connection with such communication service." "Under the principle of *ejusdem generis*, when a general term follows a specific one, the general term should be understood as a reference to subjects akin to the **[****67]** one with specific enumeration." *Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129, 113 L. Ed. 2d 95, 111 S. Ct. 1156 (1991)*. Applying this principle here, it is clear that the last sentence of *§ 201(b)* only gives the FCC authority to promulgate regulations governing interstate and foreign communications. By failing to read *§ 201(b)*'s grant of rulemaking

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[3] I agree with the majority, *ante,* at 18, that respondents' challenge to the FCC's assertion that it has authority under *47 U.S.C. § 208* to consider complaints arising under the 1996 Act is not ripe for review. It appears to me, however, that the Court of Appeals conclusion that the FCC lacks such authority carries considerable force.

authority in **[***867]** light of the limitation that precedes it, the majority attributes to the provision "a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breath to the Acts of Congress.'" Gustafson v. Alloyd Co., 513 U.S. 561, 575, 131 L. Ed. 2d 1, 115 S. Ct. 1061 (1995) (quoting Jarecki v. G. D. Searle & Co., 367 U.S. 303, 307, 6 L. Ed. 2d 859, 81 S. Ct. 1579 (1961)).

That Congress apparently understood § 201(b) to be so limited is demonstrated by the fact that the FCC is specifically charged, under the 1996 Act, with issuing regulations that implement particular portions of § 251, as I have described, supra, at 7. If Congress believed, as does the majority, that § 201(b) provided the FCC with plenary authority to promulgate regulations implementing all of the 1996 Act's provisions, it presumably would not have needed to make clear that the FCC **[****68]** had regulatory authority with respect to particular matters.

[*409] B

Moreover, I cannot see how § 201(b) represents an "unambiguous" grant of authority that is sufficient to overcome § 2(b)'s jurisdictional fence. In my view, the majority's interpretation of § 201(b) necessarily implies that Congress *sub silentio* rendered § 2(b) a nullity by extending federal law to cover intrastate telecommunications. That conclusion is simply untenable in light of the fact that § 2(b) is written in the disjunctive. Section 2(b), 47 U.S.C. § 152(b), provides that "nothing in this chapter shall be construed to apply to *or to give the Commission jurisdiction with respect to*" intrastate telecommunications service. (Emphasis added.) Contrary to the majority's suggestion, *ante*, at 12, there is nothing "subtle" or "imaginative" about the principle that "in construing a statute we are obliged to give effect, if possible, to every word Congress used. Canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise . . . ." Reiter v. Sonotone Corp., 442 U.S. 330, 339, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979) (citation omitted). Nor is the majority **[****69]** correct that *Louisiana Pub. Serv. Comm'n v. FCC* supports its reading of § 2(b). Indeed, the disjunctive structure of the provision led us to conclude in *Louisiana* that § 2(b) contains both "a rule of statutory construction" and a "substantive jurisdictional limitation on the FCC's power." 476 U.S. at 372-373. It follows that we should give independent legal significance to each. Thus, it is not enough for the majority simply to demonstrate that the 1996 Act "applies to" intrastate services; it must also point to "unambiguous" and "straightforward" evidence that Congress intended to eliminate § 2(b)'s "substantive jurisdictional limitation."

This they cannot do. Nothing in the 1996 Act eliminates § 2(b)'s jurisdictional fence. Congress has elsewhere demonstrated that it knows how to exempt certain provisions from **[*410]** § 2(b)'s reach; indeed, it has done so quite recently. For example, in 1992, Congress enacted legislation providing that § 2(b) shall apply "except as provided in sections 223 through 227" of the Communications Act of 1934. Pub. L. 102-243. The following year, Congress also exempted § 301 from § 2(b)'s purview. Pub. L. 103-66. **[***868]** With **[****70]** the 1996 Act, Congress neither eliminated § 2(b) altogether nor added §§ 251 and 252 to the list of provisions exempted from its jurisdictional fence. I believe that we are obliged to honor that choice.

C

Even if the rulemaking authority granted by § 201(b) was not limited to interstate and international communications *and* the 1996 **[**745]** Act rendered § 2(b) a nullity, the FCC's argument would still fail with respect to its pricing rules and its rules governing the state commissions' approval of interconnection agreements. We have made it clear that "where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one." Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 445, 96 L. Ed. 2d 385, 107 S. Ct. 2494 (1987) (emphasis deleted; internal quotation marks omitted). Section 201(b) at best gives the FCC general rulemaking authority. But the 1996 Act gives the state commissions the primary responsibility for conducting mediations and arbitrations and approving **[*411]** interconnection agreements. Indeed, as I have described, Congress set forth specific standards that the state commissions are to adhere to in setting pricing, § 252(d), and in approving interconnection **[****71]** agreements, § 252(e). The majority appears to believe that Congress expected that the FCC would promulgate rules to "guide the state-commission judgments." *Ante*, at 18. I do not agree. It seems to me that Congress consciously designed a system that respected the States' historical role as the dominant authority with respect to intrastate communications. In giving the state commissions primary responsibility for conducting mediations and arbitrations and for approving interconnection agreements, I simply do not think that

Congress intended to limit States' authority to mechanically apply whatever methodologies, formulas, and rules that the FCC mandated. Because Congress set forth specific provisions giving primary responsibility in certain areas to the States, and because the subsections setting forth the standards that the state commissions are to apply make no mention of FCC regulation, I believe that we are obliged to presume that Congress intended the specific grant of primary authority to the States to control. [4]

[**72]** D

My interpretation, of course, would require the state commissions to interpret and implement the substantive provisions of the 1996 Act in those instances where the 1996 Act gave the state commissions primary authority. Several parties have suggested that it is inappropriate for the States to do so. One of the many petitioners in these cases goes so far as to suggest that under our decision in *Printz v. United States, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997)*, the "legitimacy of any such delegation of federal substantive authority [to the States] would be suspect." Brief for Petitioner in No. 97-829, p. 40. To be sure, we held in *Printz* that the Federal Government may not commandeer state executive agencies. But I do not know of a **[***869]** principle of federal law that prohibits the States from interpreting and applying federal law. Indeed, basic principles of federalism compel us to presume that States are competent to do so. As Justice Field observed over 100 years ago in a decision upholding a federal law delegating to the States the authority to determine compensation in takings cases:

[*412] "It was the purpose of the Constitution to establish a general government independent of, and in some respects **[****73]** superior to, that of the State governments -- one which could enforce its own laws through its own officers and tribunals . . . . Yet from the time of its establishment that government has been in the habit of using, with the consent of the States, their officers, tribunals, and institutions as its agents. Their use has not been deemed violative of any principle or as in any manner derogating from the sovereign authority of the federal government; but as a matter of convenience and as tending to a great saving of expense." *United States v. Jones, 109 U.S. 513, 519-520, 27 L. Ed. 1015, 3 S. Ct. 346 (1883)*.

When, in 1996, Congress decided to attempt to introduce competition into the market for local telephone service, it deemed it wise to take advantage of the policy expertise that the state commissions have developed in regulating **[**746]** such service. It is not for us -- or the FCC -- to second-guess its decision.

* * *

Contrary to longstanding historical practice, this Court's precedents respecting that practice, and the 1996 Act's adherence to it, the majority grants the FCC unbounded authority to regulate a matter of state concern. Because I do not believe that Congress intended such a result, I respectfully **[****74]** dissent from Part II of the majority's opinion.

JUSTICE BREYER, concurring in part and dissenting in part.

A statute's history and purpose can illuminate its language. When read in light of history, purpose, and precedent, the Telecommunications Act of 1996 (1996 Act or Act), Pub. L. 104-104, 110 Stat. 56, is not the "model of ambiguity" or "self-contradiction" of which the majority complains. *Ante,* at 29. Neither does it permit the Federal Communications **[*413]** Commission (FCC) to promulgate the pricing and unbundling rules before us.

I

The FCC's pricing rules fall outside its delegated authority because both (1) a century of regulatory history establishes state authority as the local telephone service ratemaking norm and (2) the 1996 Act nowhere changes, or creates an exception to, that norm. JUSTICE THOMAS' opinion describes the history that has created the norm.

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[4] My conclusion applies with equal force to other FCC regulations that trump the state commissions' responsibilities, including exemptions, suspensions, and modification, *§ 251(f)*; approval of agreements predating the Act, *§ 252(a)*; and pre-emption of state access regulations that are inconsistent with FCC dictates, *§ 251(d)(3)*.

Ante, at 2-5. In my view, the Act's purposes, its language, relevant precedent, and the nature of the FCC's rules provide added support for his conclusion.

A

The Act's purposes help explain why its language and structure foresee not national rate uniformity, but traditional local ratemaking -- FCC views to the contrary **[****75]** notwithstanding. See *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, P 113, *11 FCC Rcd 15499, 15558 (1996)* (First Report & Order). **[***870]** To understand those purposes, one must recall that AT&T once dominated the national telecommunications industry. It controlled virtually all long-distance telephone service, most local telephone service, and a substantial amount of all telephone equipment manufacturing. See generally *United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 165 (DC 1982)* (describing AT&T's "commanding position" in the Nation's telecommunications business), aff'd *sub nom.* *Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983)*. In 1982, however, AT&T entered into an antitrust consent decree, which ended its industry dominance. See *552 F. Supp. at 160-170*.

The decree split AT&T from its local telephone service subsidiaries. By doing so, the decree sought to encourage new competition in long-distance service by firms such as MCI and Sprint. And it also encouraged new competition in telephone equipment markets. But the decree did not **[*414]** introduce new competition into the local telephone service markets. Rather, it **[****76]** left each local market in the hands of a single state-regulated local service supplier, such as NYNEX in New York, or Bell Atlantic in Washington, D.C. That circumstance may have reflected the belief, current at the time, that local service competition could prove wasteful, leading to the unwarranted duplication of expensive physical facilities by requiring, say, the unnecessary digging up of city streets to install unneeded wires connecting each house with a series of new but redundant local switches. See, *e.g., United States v. Western Elec. Co., 673 F. Supp. 525, 537-538 (DC 1987)*; P. Huber, M. Kellogg, & J. Thorne, The Geodesic Network II: 1993 Report on Competition in the Telephone Industry, pp. 2.3-2.5 (1992).

At the same time, the decree forbade most such local service suppliers from entering long-distance markets. *United States v. American Tel. & Tel. Co., supra, 552 F. Supp. at 186-188*. That prohibition, by preventing entry by local firms willing and able to supply long-distance service, risked less long-distance competition. Cf. P. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services 179-183 (1996). But the decree **[****77]** reflected **[**747]** a countervailing concern. Local firms might enjoy special long-distance advantages not available to purely long-distance companies. See *United States v. American Tel. & Tel., supra, 552 F. Supp. at 186-188*. Perhaps a local service company would find it unusually easy to attract local customers to its long-distance service; perhaps it could use its control of local service to place its long-distance competitors at a disadvantage. See T. Krattenmaker, Telecommunications Law and Policy 411-412 (2d ed. 1998) (explaining rationale of the decree). And though some argued that any such special advantages were innocent, rather like those enjoyed by a transcontinental airline that dominates a local hub, others claimed they were unfair, like those that had once helped AT&T (through its control of local service) maintain long-distance **[*415]** dominance. See *United States v. American Tel. & Tel., supra, at 165*; see generally A. Kahn, Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness 37-38, and n. 53 (1998) (discussing the debate). Whether the decree's tradeoff made sense -- *i.e.,* whether the **[****78]** existence of some such **[***871]** local-firm/long-distance-service advantage warranted the decree's prohibition limiting the number of potential long-distance competitors -- became a fertile source for later argument. See, *e.g.*, MacAvoy, *supra*, at 171-177 (arguing that oligopolistic conditions in long-distance markets have produced supranormal profits that would not be sustainable with increased competition); Robinson, The Titanic Remembered: AT&T and the Changing World of Telecommunications, *5 Yale J. On Reg. 517, 537 (1988)* (arguing that the rationale for the decree's restrictions on local service companies was "just as persuasive" as that underlying the decree).

The Act before us responds to this argument by changing the postdecree status quo in two important ways. First, it creates a legal method through which local telephone service companies may enter long-distance markets, thereby providing additional long-distance competition. See *47 U.S.C. § 271(c)(2)(B) (1994 ed., Supp. II)* (listing 14 conditions that, if met, permit incumbent local firms to enter long-distance market). Second, it conditions that long-distance entry upon either (1) the introduction of competition into local markets, **[****79]** *or* (2) the failure of a competing carrier to request access to or interconnection with the local service supplier (or the competing carrier's failure to engage in "good faith" negotiations). *§§ 271(c)(1)(A)*, *(B)*. The existence of these two alternatives is important. In setting forth the first alternative, actual local competition, the statute recognizes that local service competition would diminish any special long-distance advantages that the local firm has, thereby lessening the need for the decree's long-distance-market **[*416]** entry prohibition. See *supra, at 4*; Krattenmaker, The Telecommunications Act of 1996, *49 Fed. Com. L. J. 1, 15-16 (1996)*. In setting forth the second alternative, the Act recognizes that actual local competition might not prove practical; in some places, to some extent, local markets may not support more than a single firm, at least not without wasteful duplication of resources. See Note, The FCC and the Telecom Act of 1996: Necessary Steps to Achieve Substantial Deregulation, *11 Harv. J. L. & Tech. 797, 810, n. 57 (1998)*.

These alternatives raise a difficult empirical question. To what extent is local competition possible without wasteful duplication of **[****80]** facilities? The Act does not purport to answer this question. Rather, it creates a set of legal rules which, through interaction with the marketplace, aims to produce sensible answers. In particular, the Act *permits* new local entry by dismantling existing legal barriers that would otherwise inhibit it. *47 U.S.C. § 253(a) (1994 ed., Supp. II)*. Equally important, the Act *promotes* new local entry by requiring incumbents (1) to "interconnect" with new entrants (thereby allowing even a partial new entrant's small set of subscribers to call others within an entire local area), *§ 251(c)(2)*; (2) to sell retail services to new entrants at wholesale rates (thereby allowing **[**748]** newly entering firms to become "resellers," competing in retailing), *§ 251(c)(4)*; and (3) to provide new entrants "access to network elements," say, house-to-street telephone lines, "on an unbundled basis" (thereby allowing new entry in respect to *some* aspects of the local service business without requiring wasteful duplication of the *entire* business), *§ 251(c)(3)*. The last mentioned "unbundling" requirement **[***872]** does not specifically state which elements must be unbundled, a difficult matter that I shall discuss **[****81]** below. See *infra*, at 18-21. But one can understand the basic logic of "unbundling" by imagining that Congress required a sole incumbent railroad providing service between City A and City B to share certain basic facilities, say, bridges, rights-of-way, or tracks, in order to avoid wasteful **[*417]** duplication of those hard-to-duplicate resources while facilitating competition in the *remaining* aspects of A-to-B railroad service. Indeed, one might characterize the Act's basic purpose as seeking to bring about, without inordinate waste, greater local service competition both as an end in local markets and as a means toward more competition, and fair competition, in long-distance markets.

For the present cases, the most important characteristic of the Act's purposes is what those purposes do *not* require. Those purposes neither require nor suggest reading the Act's language to change radically the scope of local regulators' traditional ratesetting powers. A utility's rate structure consists of complex sets of typically interdependent individual rates, the determination of which depends upon numerous considerations, many of which are local in nature and fall outside the Act's purview. **[****82]** The introduction of competition into a particular locality does not diminish the importance of place-specific factors, such as local history, geography, demands, and costs. And local regulators are likely more familiar than are national regulators, for example, with a particular utility's physical plant, its cost structure, the pattern of local demand, the history of local investment, and the need for recovery of undepreciated fixed costs.

Moreover, local regulators have experience setting rates that recover both the immediate, smaller, added costs that demand for additional service imposes upon a local system and also a proper share of the often huge fixed costs (of local loops, say, or switches) and overhead needed to provide the dial tone itself. Indeed, local regulators would seem as likely, if not more likely, than national regulators to know whether, when, or the extent to which particular local charges or systems of charges will lead new entrants to abandon efforts to use a local incumbent's elements, turning instead to alternative technologies. And local regulators would seem as likely as national regulators to know whether or when use of such alternative technologies in **[****83]** the local circumstances **[*418]** will prove more beneficial than wasteful. It is the local communities, and, hence, local regulators, that will directly confront the problems and enjoy the benefits associated with local efforts to integrate new and old communications resources and communications firms. These factors, along with the fact that the relevant technology changes rapidly, argue in favor of, not against, local ratesetting control, including local ratesetting differences, for those differences can amount to the kind of "experimentation" long thought a strength of our federal system.

At most, the Act's purposes argue for a grant to the FCC of authority to set federal limitations preventing States from adopting forms of ratemaking that would interfere with the Act's basic objectives. The Act explicitly grants the FCC a particular pre-emption tool, not here invoked, which is apparently suited to that job. *47 U.S.C. § 253(d) (1994 ed., Supp. II)* (permitting the FCC **[***873]** to pre-empt, after notice and comment, any state legal requirement that has the effect of prohibiting entry into local service). Such a grant could not help the FCC here, however, for, as I discuss below, *infra*, at 13-17, **[****84]** the FCC's rules do not just create an outer envelope or simply prevent the States from going too far. Rather, they effectively supplant much of a local regulator's local rate-setting work.

B

Read in light of its purposes, the Act's language more clearly foresees retention, not replacement, of the traditional allocation of state-federal ratesetting authority. *Ante*, at 6-7 (THOMAS, J., concurring in part and dissenting in part). *Sections 251* and **[**749]** *252*, which establish and provide for implementation of new local service obligations, contain the relevant language.

Section 251 lists basic obligations that the Act imposes upon local incumbents. These include obligations to interconnect, to unbundle, to sell at wholesale rates, to provide "number portability," to assure "dialing parity," to negotiate **[*419]** with potential entrants in good faith, and generally to encourage local competition. *Section 251* also refers to the FCC, but only in respect to *some* of these obligations. See, *e.g., § 251(d)(2)* ("The Commission shall consider" certain standards in determining which network elements must be unbundled); *§ 251(b)(2)* (local firms have duty to provide "number portability in accordance **[****85]** with requirements prescribed by the Commission"); see *ante*, at 7 (THOMAS, J., concurring in part and dissenting in part). It makes no mention of a regulator in respect to other matters, *which others include ratemaking*. Thus, *§ 251*'s language leaves open the relevant question -- which regulator has the authority to set rates.

Section 252, which specifically describes how *§ 251*'s obligations are to be implemented, is less ambivalent. Its implementation system consists of negotiation between incumbents and new entrants, followed by *state* regulatory commission arbitration if negotiations fail. *§§ 252(a)*, *(b)*. Certain of *§ 252*'s language, I concede, can be read to favor the majority -- in particular its statement that the results of state arbitration must be consistent with *§ 251* and with "regulations prescribed by the [FCC] pursuant to *section 251*." *§ 252(c)(1)*. But the word "regulations" here might or might not include rate regulations. *Ante*, at 13-14. And the immediately following language indicates that it does not.

That immediately following language, beginning with the immediately subsequent subsection and including nine paragraphs, speaks separately, and **[****86]** specifically, of rates. *§§ 252(c)(2)*, *(d)*. And that language expressly says that the "*State commissions*" are to "establish any rates." It adds that they are to do so "according to" a further subsection, "subsection (d)." And this further subsection (d), headed by the words "Pricing standards" and focusing upon "charges," sets forth the pricing standards for use by the *state commissions*. It speaks of "determinations by a state commission of the just and reasonable rate" (which, it adds, must be **[*420]** "nondiscriminatory" and "based on . . . cost"), but it says nothing about a role for the FCC. *Section 252*'s **[***874]** references to the state commissions, its rate-setting detail, and its silence about the FCC's role all favor a reading of the earlier word "regulations" that excludes, rather than includes, FCC rate regulations.

Thus, *§ 251* is silent about local ratesetting power. *Section 252* speaks of state, not federal, ratemaking. As most naturally read, the structure and language of those sections foresee the traditional allocation of ratemaking authority -- an allocation that within broad limits assumes local rates are local matters for local regulators.

I recognize that the majority finds the **[****87]** relevant rulemaking authority not in *§§ 251* and *252*, but in a different section containing a general grant of rulemaking authority. *Ante*, at 9-10 (citing *47 U.S.C. § 201(b)*). But [Congress enacted that language in 1938,] see 52 Stat. 588. The scope of the FCC's legal power to apply an explicit grant of [general authority to make rules implementing the more specific terms of a later enacted statute depends upon what that later enacted statute contemplates.] Cf. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 376-377, n. 5, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986). And here, as just explained, the 1996 Act [foresees] the reservation of most local ratesetting authority to local regulators.

C

The most the FCC can claim is linguistic ambiguity. But such a claim does not help the FCC, for relevant precedent makes clear that, when faced with ambiguity, we are to interpret statutes of this kind on the assumption that Congress intended to preserve local authority. See, *e.g.,* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 518, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992) (["presumption against the pre-emption of state police power regulations"]); Rice v. Santa Fe Elevator **[**750]** Corp., 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947) (requiring ["clear and manifest" showing **[****88]** of congressional intent to supplant traditional state police powers).] Moreover, **[*421]** the Communications Act itself, into which Congress inserted the provisions of the 1996 Act with which we are here concerned, comes equipped with a specific instruction that courts are *not* to "construe" the FCC's statutory grant of authority as

"giving the Commission jurisdiction with respect to . . . charges . . . for or in connection with intrastate communication." 47 U.S.C. § 152(b).

Thus, as JUSTICE THOMAS points out, *ante*, at 10, it is not surprising to find that this Court has interpreted the Communications Act as denying the FCC authority to determine local rate-related practices in the face of statutory language far more helpful to the FCC than anything present here. Louisiana Pub. Serv. Comm'n v. FCC, supra. That precedent requires a similar result here.

Louisiana [raised a question almost identical to the one before us:] Does a statute granting the FCC authority to set certain *general* rate-related rules (there, depreciation rules) also grant the FCC authority to set *primarily local* rate-related rules (*i.e.*, local depreciation rules)? Writing for the Court, Justice **[****89]** Brennan stated that the basic "rule of statutory construction" contained in § 152(b) and just quoted above requires interpretations that favor the reservation **[***875]** of ratemaking authority to the States. 476 U.S. at 373. Hence, the statute did not permit the FCC to write depreciation rules that would apply to equipment insofar as it was used for local service. *Ibid.*

Consider the similarities between *Louisiana* and the present cases. The relevant rules of statutory construction -- the general and explicit presumptions favoring retention of local authority -- are the same. See id., at 369 (asking whether "Congress intended that federal regulation supersede state law" and citing Rice v. Santa Fe Elevator Corp., supra); 476 U.S. at 371-373 (relying on § 152(b)). The subject matter is highly similar -- both cases involve the way in **[*422]** which local rates will be set for equipment used for both intrastate and interstate calls. Compare Opening Brief for Federal Petitioners in No. 97-831, P. 36-38, with Louisiana, supra, 476 U.S. at 374-376. And both cases involve intrastate charges that could affect interstate rates, here because of local competition's interstate impact, see First Report & Order **[****90]** P 84, 11 FCC Rcd at 15544, in *Louisiana* because more (or less) stringent local depreciation rules would affect the rate of replacement of equipment used for interstate calls, 476 U.S. at 362-363.

Consider, too, the differences. The language of the relevant statute here explicitly refers to "*State commissions*," which, it says, will "establish any rates." 47 U.S.C. § 252(c)(2) (1994 ed., Supp. II) (emphasis added). The language of the relevant statute in *Louisiana,* by contrast, was far more easily read as granting the FCC the authority it sought. That statute said that the FCC would "prescribe" depreciation practices for the relevant local telephone companies, and it prohibited "any depreciation charges . . . other than those prescribed by the [FCC]," § 220(b); it made it "unlawful . . . to keep any other [depreciation] accounts . . . than those so prescribed or . . . approved" by the FCC, § 220(g); it ordered the FCC to hear from state commissions before establishing its own rules, § 220(i); and it authorized the FCC to exempt state-regulated companies from its depreciation rules, § 220(h). See 476 U.S. at 366-367. These differences, of course, make **[****91]** the argument for local ratemaking in these cases stronger, not weaker, than in *Louisiana*.

The majority says its view is "unaffected" by § 152(b). *Ante*, at 11. But Congress' apparently was not, for when it enacted the 1996 Act, it initially considered amending § 152(b) to make it inapplicable to the provisions that we here consider, thereby facilitating an interpretation, like the majority's, that would give the FCC the local ratesetting power it now seeks to exercise. See S. 652, 104th Cong., 1st Sess., § 101(c)(2) (1995); H. R. 1555, 104th Cong., 1st Sess., **[*423]** § 101(e)(1) (1995). The final legislation, however, rejected **[**751]** that proposed language. See 47 U.S.C. § 152(b). It cannot be thought that Congress "intended *sub silentio* to enact statutory language that it had earlier discarded in favor of other language." *INS v. Cardoza-Fonseca, 480 U.S. 421, 442-443, 94 L. Ed. 2d 434, 107 S. Ct. 1207 (1987)* (internal quotation marks and citation omitted).

D

The FCC's strongest argument, in **[***876]** my view, is that its rate rules do not actually supplant local ratesetting authority; they simply set forth limits, creating a kind of envelope marking the outer bounds of what would constitute a reasonable local ratesetting **[****92]** system. The majority may accept a version of this argument, for it says the FCC has prescribed a "requisite pricing methodology" that "no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in § 252(d)." *Ante*, at 16. That, however, is not what the FCC has done.

The FCC's rate regulations are not at all like § 252(d)'s pricing standards. The statute sets forth those standards in general terms, using such words as "based on . . . cost," "nondiscriminatory," and "just and reasonable." Terms such as these give ratesetting commissions broad methodological leeway; they say little about the "method employed" to determine a particular rate. *FPC v. Hope Natural Gas Co., 320 U.S. 591, 602, 88 L. Ed. 333, 64 S. Ct. 281 (1944)*. The FCC's rules, on the other hand, are not general. The dozens of pages of text that set them forth are highly specific and highly detailed. See First Report & Order PP 672-715*, supra,* at 15844-15862. They deprive state commissions of methodological leeway. Their ratesetting instructions grant a state commission little or no freedom to choose among reasonable rate-determining methods according to the State's policy-related judgments, **[****93]** assessing local economic circumstance or community need. I grant the fact that the rules leave it to the state commissions to fix the actual rate, but that is rather like giving a restaurant **[*424]** chef the authority to choose a menu while restricting him to one dish, an omelette, and to one single favorite recipe.

Nor can the FCC successfully argue that the Act requires the particular ratesetting system that its regulations contain. The FCC's system, which the FCC calls "forward-looking," bases the charge for the use of an unbundled element (say, a set of local wires connecting a subscriber to a local switch) upon a hypothetical set of costs -- the costs of providing that service using the incumbent's actual wire center, but otherwise assuming use of the most efficient technology that the incumbent *could* use (not the equipment the incumbent actually *does* use). See First Report & Order PP 682, 685, *supra,* at 15847-15849. The FCC does not claim that the statute's language (though ruling out certain kinds of rate-of-return proceedings, *47 U.S.C. § 252(d)(1)(A)(i) (1994 ed., Supp. II)*) forces use of this forward-looking cost determination system. Moreover, I have explained above **[****94]** why I do not believe the Act's purposes demand what its language denies, namely, a single nationwide ratesetting system. *Supra, at 7-8*; First Report & Order P 114, 11 FCC Rcd at 15558-15559 (arguing that a single pricing methodology is needed to assure uniform administration of the Act).

The FCC does argue that the Act's purpose, competition, favors its system. For competition, according to the FCC, tends to produce prices that reflect forward-looking replacement costs, not actual historical costs. *E.g.*, *id., P 672*, 11 FCC Rcd at 15844. But this argument does not show that the Act compels the use of the FCC's system over any other. How could it? The competition that the Act seeks is a process, not an end result; and a regulatory system that imposes through administrative mandate a **[***877]** set of prices that tries to mimic those that competition would have set does not thereby become any the less a regulatory process, nor any the more a competitive one.

Most importantly, the FCC's rules embody not an effort to circumscribe the realm of the reasonable, but rather a **[*425]** policy-oriented effort to choose among several different systems, including systems based upon actual costs **[****95]** or price caps, which other systems the FCC's rules prohibit. A few examples, focusing **[**752]** upon some of the claimed weaknesses of the FCC's preferred system, will illustrate, however, how easily a regulator weighing certain policy considerations (for example, administrative considerations) differently might have chosen a different set of reasonable rules:

-- Consider the FCC's decision to deny state commissions the choice of establishing rates based on actual historic, rather than hypothetical forward-looking, costs. See First Report & Order P 705, 11 FCC Rcd at 15857-15858. Justice Brandeis, joined by Justice Holmes, pointed out the drawback of using a forward-looking, rather than an actual historic, cost system many years ago. He wrote that whatever the theoretical economic merits of a "reproduction cost" system (a system bearing an uncanny resemblance to the FCC's choice), the hypothetical nature of the regulatory judgments it required made such a system administratively unworkable. See *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Serv. Comm'n of Mo., 262 U.S. 276, 292-296, 67 L. Ed. 981, 43 S. Ct. 544 (1923)* (dissenting opinion).

The passage of time has not outdated the Brandeis and **[****96]** Holmes criticism. Modern critics question whether regulators can accurately determine the "efficient" cost of supplying telephone service, say, to a particular group of Manhattan office buildings, by means of hypothetically efficient up-to-date equipment connected to a hypothetically efficient New York City network built to connect with NYNEX's existing (nonhypothetical) wire center. See, *e.g.,* Kahn, Letting Go, at 93, and n. 135. The use of historic costs draws added support from one major statutory aim -- expeditious introduction of competition. That is because efforts to determine hypothetical (rather than actual) costs means argument, and argument means delay, with respect to entry into both local and long-distance markets. See *supra, at 4-5*. Though **[*426]** the FCC disfavors actual or historic costs, it does not satisfactorily explain why their use would be arbitrary or unreasonable.

-- Consider the FCC's decision to prohibit use of an "efficient component pricing rule." See First Report & Order P 708-711*, supra,* at 15859-15860. Where an incumbent supplies an element to New Entrant B that it otherwise would have provided Old Customer A, that rule, roughly speaking, permits **[****97]** the incumbent to charge a price measured by either (1) the element's market price, if it is sold in the marketplace, or (2), if it is not, the incumbent's actual costs (including the net revenue the incumbent loses from foregoing the sale to Old Customer A). See generally, *e.g.,* W. Baumol & J. Sidak, Toward Competition in Local Telephony 95-97 (1994). This pricing system seeks to assure the incumbent that it will obtain from B the contribution, say, to fixed costs or to overhead, that A **[***878]** had previously made. Many experts prefer such a system. See, *e.g.,* Sidak & Spulber, The Tragedy of the Telecommons: Government Pricing of Unbundled Network Elements Under the Telecommunications Act of 1996, *97 Colum. L. Rev. 1081, 1111-1113*, and nn. 75-85 (1997); Kahn & Taylor, The Pricing of Inputs Sold to Competitors: A Comment, *11 Yale J. On Reg. 225, 228-230 (1994)*. The FCC rejected that system, but in doing so it did not claim, nor did its reasoning support the claim, that the use of such a system would be arbitrary or unreasonable. See Sidak & Spulber*, supra,* at 1095-1098.

-- Consider the FCC's decision to forbid the use of what regulators call "Ramsey pricing," see First Report & Order **[****98]** P 696*, supra,* at 15852-15853. Ramsey pricing is a classical regulatory pricing system that assigns fixed costs in a way that helps maintain services for customers who cannot (or will not) pay higher prices. See generally, *e.g.*, 1 A. Kahn, The Economics of Regulation: Principles and Institutions 137-141 (reprint 1988). Many experts strongly prefer the use of such a system. See, *e.g.,* Sidak & Spulber*, supra,* at **[*427]** 1109 (arguing that the FCC's prohibition of Ramsey pricing will "minimize rather than maximize consumer welfare"). The FCC disfavors Ramsey pricing, but it does not explain why a contrary judgment would conflict with the statute or otherwise be arbitrary or unreasonable.

These examples do not show that the FCC's rules themselves are unreasonable. That question is not now before us, and I **[**753]** express no view on the matter. The examples simply help explain why the FCC's rules could not set forth the *only* ratesetting system consistent with the Act's objectives. The FCC's regulations do not set forth an outer envelope surrounding a set of reasonable choices; instead, they constitute the kind of detailed policy-related ratesetting that the statute in respect to local **[****99]** matters leaves to the States.

* * *

Two Terms ago the Court held that Congress could not constitutionally require a state sheriff to fill out a form providing background information about a buyer of a gun. *Printz v. United States, 521 U.S. 898, 935, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997)*. Dissenters in that case noted that the law deprived the States of a power that had little practical significance. See *id., at 961* (opinion of STEVENS, J.); *id., at 977* (opinion of BREYER, J.). Today's decision does deprive the States of practically significant power, a camel compared with *Printz*'s gnat. The language of the statute nowhere reveals any "clear and manifest purpose," *Rice, 331 U.S. at 230*, that such was Congress' intent. History, purpose, and precedent all argue to the contrary. I would hold that, in respect to local ratesetting, the FCC's reach has exceeded its legal grasp.

II

I agree with the Court's disposition of the FCC's "unbundling" rules. As earlier explained, the Act seeks to introduce competition into local markets by removing legal barriers to new entry, by requiring interconnection, by requiring **[*428]** incumbents to sell to potential retail competitors at wholesale rates, and by **[****100]** requiring the sharing, or "unbundling," of certain facilities. *Supra, at 6*; see *47 U.S.C. §§ 251(c)(2)- **[***879]** (4)*, *253(a) (1994 ed., Supp. II)*. The Act expresses this last-mentioned sharing requirement in general terms, reflecting congressional uncertainty about the extent to which compelled use of an incumbent's facilities will prove necessary to avoid waste. Will wireless technology or cable television lines, for example, permit the efficient provision of local telephone service without the use of existing telephone lines that now run house to house?

Despite the empirical uncertainties, the basic congressional objective is reasonably clear. The unbundling requirement seeks to facilitate the introduction of competition where practical, *i.e.*, without inordinate waste. *Supra, at 6-7*. And although the provision describing which elements must be unbundled does not explicitly refer to the analogous "essential facilities" doctrine (an antitrust doctrine that this Court has never adopted), the Act, in my view, does impose related limits upon the FCC's power to compel unbundling. In particular, I believe that, given the Act's basic purpose, it requires a convincing explanation of why **[****101]** facilities should be shared (or "unbundled") where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available. *§ 251(d)(2)*; see generally Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841, 852-853 (1989).

As the majority points out, the Act's language itself suggests some such limits. *Ante*, at 20-25. The fact that compulsory sharing can have significant administrative and social costs inconsistent with the Act's purposes suggests the same. Even the simplest kind of compelled sharing, say, requiring a railroad to share bridges, tunnels, or track, means that someone must oversee the terms and conditions of that sharing. Moreover, a sharing requirement may diminish the original owner's incentive to keep up or to improve the property **[*429]** by depriving the owner of the fruits of value-creating investment, research, or labor. And as one moves beyond the sharing of readily separable and administrable physical facilities, say, to the sharing of research facilities, firm management, or technical capacities, these problems can become more severe. One would not ordinarily believe it **[****102]** practical, for example, to require a railroad to share its locomotives, fuel, or work force. Nor can one guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement. **[**754]** The more complex the facilities, the more central their relation to the firm's managerial responsibilities, the more extensive the sharing demanded, the more likely these costs will become serious. See generally 1 H. Demsetz, Ownership, Control, and the Firm: The Organization of Economic Activity 207 (1988). And the more serious they become, the more likely they will offset any economic or competitive gain that a sharing requirement might otherwise provide. The greater the administrative burden, for example, the more the need for complex proceedings, the very existence of which means delay, which in turn can impede the entry into long-distance markets that the Act foresees. See *supra, at 5*.

[*880]** Nor are any added costs imposed by more extensive unbundling requirements necessarily offset by the added potential for competition. Increased sharing by itself does not **[****103]** automatically mean increased competition. It is in the *un*shared, not in the shared, portions of the enterprise that meaningful competition would likely emerge. Rules that force firms to share *every* resource or element of a business would create not competition, but pervasive regulation, for the regulators, not the marketplace, would set the relevant terms.

The upshot, in my view, is that the statute's unbundling requirements, read in light of the Act's basic purposes, require **[*430]** balance. Regulatory rules that go too far, expanding the definition of what must be shared beyond that which is essential to that which merely proves advantageous to a single competitor, risk costs that, in terms of the Act's objectives, may make the game not worth the candle.

I believe the FCC's present unbundling rules are unlawful because they do not sufficiently reflect or explore this other side of the unbundling coin. See *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43, 77 L. Ed. 2d 443, 103 S. Ct. 2856 (1983)*. They do not explain satisfactorily why, for example, an incumbent must share with new entrants "call waiting," or various operator services. Nor do they adequately **[****104]** explain why an incumbent should be forced to share virtually every aspect of its business. As the majority points out, *ante*, at 22-23, they seem to assume, without convincing explanation, that the more the incumbent unbundles, the better. Were that the Act's objective, however, would Congress have seen a need for a separate wholesale sales requirement (since the "unbundling" requirement would have led to a similar result)? Indeed, would Congress have so emphasized the importance of competition? A totally unbundled world -- a world in which competitors share every part of an incumbent's existing system, including, say, billing, advertising, sales staff, and work force (and in which regulators set all unbundling charges) -- is a world in which competitors would have little, if anything, to compete about.

I understand the difficulty of making the judgments that the statute entrusts to the FCC and the short time that it gave the FCC in which to make them. *47 U.S.C. § 251(d)(1) (1994 ed., Supp. II)*. I also understand that the law gives the FCC considerable leeway in the exercise of its judgment. *E.g.*, R. Pierce, S. Shapiro, & P. Verkuil, Administrative Law and Process § 7.4, **[****105]** p. 353 (2d ed. 1992). But, without added explanation, I must conclude that the unbundling rules before us go too far. They are inconsistent with Congress' approach. **[*431]** They have not been adequately justified in terms of the statute's mandate, read in light of its purposes. See *5 U.S.C. § 706(2)*. For this reason, as well as the reasons set forth in the majority's opinion, I agree with its conclusion that Rule 319 must be vacated.

References

74 Am Jur 2d, Telecommunications 21-24

47 USCS 251, *252*

L Ed Digest, Administrative Law 58; Commerce 140; Communications 12

L Ed Index, Federal Communications Act or Commission; Telecommunications Act of 1996; Telephones and Telegraphs

Annotation References:

Who **[****106]** is a "common carrier" or "carrier" within the meaning of 3(h) of the Communication Act of 1934 (*47 USCS 153(h)*). 46 ALR Fed 626.

End of Document

Cal. Dental Ass'n v. Ftc

Supreme Court of the United States

January 13, 1999, Argued ; May 24, 1999, Decided

No. 97-1625

Reporter

526 U.S. 756 *; 119 S. Ct. 1604 **; 143 L. Ed. 2d 935 ***; 1999 U.S. LEXIS 3606 ****; 67 U.S.L.W. 4365; 1999-1 Trade Cas. (CCH) P72,529; 99 Cal. Daily Op. Service 3835; 99 Daily Journal DAR 4896; 1999 Colo. J. C.A.R. 2910; 12 Fla. L. Weekly Fed. S 262

CALIFORNIA DENTAL ASSOCIATION, PETITIONER v. FEDERAL TRADE COMMISSION

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Disposition: *128 F.3d 720*, vacated and remanded.

Core Terms

advertising, restrictions, anticompetitive, court of appeals, dentists, discount, dental, misleading, effects, procompetitive, output, patients, customers, rule of reason, antitrust, prices, ban, across-the-board, disclosure, consumers, FTC Act, nonprofit, entity, price competition, market power, circumstances, abbreviated, dental services, anti trust law, rule-of-reason

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > Remedies > Injunctions

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > Professional Associations

HN1[] **Antitrust & Trade Law, Sherman Act**

The court holds that the Federal Trade Commission's jurisdiction under the Federal Trade Commission Act extends to an association that provides substantial economic benefit to its for-profit members, but that where any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a thorough enquiry into the consequences of those restraints.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN2[] **Public Enforcement, US Federal Trade Commission Actions**

See *15 U.S.C.S. § 45(a)(2)*.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Business & Corporate Law > Unincorporated Associations

HN3[] **Antitrust & Trade Law, Federal Trade Commission Act**

See *15 U.S.C.S. § 44*.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

HN4[] **Antitrust & Trade Law, Federal Trade Commission Act**

Federal Trade Commission Act (Act) includes not only an entity organized to carry on business for its own profit but also one that carries on business for the profit of its members. *15 U.S.C.S. § 44*. Just as the Act does not require that a supporting organization must devote itself entirely to its members' profits, neither does it say anything about how much of the entity's activities must go to raising the members' bottom lines. There is no apparent reason to let the Act's application turn on meeting some threshold percentage of activity for this purpose, or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. Proximate relation to lucre must appear; the Act does not cover all membership organizations of profit-making corporations without more, and an organization devoted solely to professional education may lie outside the Act jurisdictional reach, even though such ultimately affects the profits of those who deliver them.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

HN5[] **Antitrust & Trade Law, Federal Trade Commission Act**

See *15 U.S.C.S. § 45(a)(2)*.

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Business & Corporate Law > Nonprofit Corporations & Organizations > General Overview

HN6[] **Antitrust & Trade Law, Federal Trade Commission Act**

Nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts under the Federal Trade Commission Act. It may even be possible that a nonprofit entity up to no good would have certain advantages, not only over a for-profit member but over a for-profit membership organization as well; it would enjoy the screen of superficial disinterest while devoting itself to serving the interests of its members without concern for doing more than breaking even.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > Employer & Physician Covenants

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Healthcare Law > Business Administration & Organization > Covenants not to Compete > General Overview

HN7[] **Price Fixing & Restraints of Trade, Cartels & Horizontal Restraints**

A naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis. No elaborate industry analysis is required to demonstrate the anticompetitive character of horizontal agreements among competitors to refuse to discuss prices or to withhold a particular desired service. With an abbreviated or "quick-look" analysis under the rule of reason, 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. As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained.

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Sherman Act**

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A naked restraint on price and output need not be supported by a detailed market analysis in order to require some competitive justification. It does not follow however that every case attacking a less obviously anticompetitive restraint is a candidate for plenary market examination. The truth is that categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear. There is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick or at least quicker look, in place of a more sedulous one.

Lawyers' Edition Display

Decision

FTC jurisdiction held to extend to nonprofit dental association that provided substantial economic benefits to its for-profit members; FTC's "quick look" held to be insufficient to justify finding that association's advertising restrictions on members were anticompetitive.

Summary

A nonprofit dental association to which approximately three-quarters of the dentists practicing in California belonged (1) provided insurance and financing arrangements to members, and (2) engaged, on behalf of members, in lobbying, litigation, marketing, and public relations. Members were prohibited, under the association's code of ethics, from engaging in false or misleading advertising, and the association had issued advisory opinions and guidelines concerning advertising. The Federal Trade Commission (FTC) brought a complaint alleging that the association had applied its guidelines so as to unreasonably restrict two types of truthful and nondeceptive advertising--price advertising, particularly as to discounted fees, and advertising related to the quality of dental services--in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), which, in *15 USCS 45(a)(1)*, prohibits unfair competition and deceptive acts or practices. An administrative law judge (ALJ) (1) held the FTC to have jurisdiction under the Act (*15 USCS 41 et seq.*)--which in *15 USCS 45(a)(2)* gives the FTC authority over corporations and in *15 USCS 44* defines "corporation" to include any incorporated or unincorporated association that is organized to carry on business for its own profit or that of its members--over the association; and (2) found a violation of 5. The FTC, in affirming, under an abbreviated rule-of-reason analysis, the ALJ's judgment, held that the association's advertising restrictions violated provisions including 5. The United States Court of Appeals for the Ninth Circuit, in affirming the FTC's judgment, sustained the FTC's assertion of jurisdiction over the association and concluded that the FTC had properly applied an abbreviated or "quick look" rule-of-reason analysis in the instant case (*128 F3d 720*).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Souter, J, expressing the unanimous view of the court with respect to holding 1 below, and joined by Rehnquist, Ch. J., and O'Connor, Scalia, and Thomas, JJ., with respect to holdings 2 and 3 below, it was held that (1) FTC jurisdiction under the Act extended to the association, because (a) the economic benefits provided by the association fell within the object of enhancing the members' profits, (b) nonprofit entities organized on behalf of for-profit members had the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair competition, and (c) the legislative history, like the text of the Act, was devoid of any hint at an exemption for professional associations as such; (2) the Court of Appeals had erred in deciding that a "quick look" by the FTC was sufficient for finding that the restrictions were anticompetitive, as any anticompetitive effects of the restraints were far from intuitively obvious; and (3) thus, a fuller consideration of the issues was called for on remand.

Breyer, J., joined by Stevens, Kennedy, and Ginsburg, JJ., concurring in part and dissenting in part, (1) agreed that the FTC had jurisdiction over the association; but (2) expressed the view that a traditional application of the rule of reason to the facts as found by the FTC required affirming the FTC decision, where (a) to restrain truthful advertising about lower prices was likely to restrict competition in respect to price, and (b) the restrictions on the advertising of service quality also had serious anticompetitive tendencies.

Headnotes

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §103 > -- nonprofit dental association -- FTC jurisdiction > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

The jurisdiction of the Federal Trade Commission (FTC), under the Federal Trade Commission Act (*15 USCS 41 et seq.*)--which in *15 USCS 45(a)(2)* gives the FTC authority over corporations and in *15 USCS 44* defines "corporation" to include any incorporated or unincorporated association that is organized to carry on business for its own profit or that of its members--extends to a voluntary nonprofit dental association, to which approximately three-quarters of the dentists practicing in a state belong, because (1) the association provides to its for-profit members substantial economic benefits that include insurance and financing arrangements, lobbying, litigation, marketing, and public relations; (2) these economic benefits fall within the object of enhancing the members' profits, which the Act makes the jurisdictional touchstone; (3) the logic and purpose of the Act comport with this result, as nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts; and (4) the legislative history, like the text of the Act, is devoid of any hint at an exemption for professional associations as such.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §115 > -- dental association -- advertising restrictions -- judicial review of FTC findings > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]***LEdHN[2D]***[] [2D]***LEdHN[2E]***[] [2E]

A Federal Court of Appeals errs in deciding that a "quick look" by the Federal Trade Commission (FTC) at the restrictions by a voluntary nonprofit dental association, of which three-quarters of the dentists practicing in a state are members, on two types of advertising--price advertising, particularly as to discounted fees, and advertising related to the quality of dental services--by the members is sufficient for finding that the restrictions are anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), which, in *15 USCS 45(a)(1)*, prohibits unfair competition and deceptive acts or practices, because where, as in the instant case, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough inquiry into the consequences of those restraints than the Court of Appeals, which did not scrutinize the assumption of anticompetitive tendencies, performed, as the restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect on competition, for (1) the restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false advertising in a market characterized by striking disparities between the information available to the professional and the patient, where even if it is assumed that the record supports the conclusion that the restrictions essentially bar advertisement of across-the-board discounts, it does not obviously follow that such a ban would have a net anticompetitive effect, and (2) it is possible to understand the restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery. (Breyer, Stevens, Kennedy, and Ginsburg, JJ., dissented from this holding.)

INCOME TAXES §84 > -- exempt organizations -- dental association > Headnote:
LEdHN[3][] [3]

A voluntary nonprofit dental association to which approximately three-quarters of the dentists practicing in a state belong is exempt from federal income tax under *26 USCS 501(c)(6)*, covering business leagues, chambers of commerce, real-estate boards, and boards of trade, although the dental association has for-profit subsidiaries that give its members advantageous access to various sorts of insurance, including liability coverage, and to financing for their real estate, equipment, cars, and patients' bills.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §106 > -- unfair practices > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

The prohibition in part of 5 of the Federal Trade Commission Act (*15 USCS 45(a)(1)*) against unfair competition and deceptive acts or practices overlaps the scope of 1 of the Sherman Act (*15 USCS 1*), aimed at prohibiting restraint of trade.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §103 > -- FTC jurisdiction -- organization that supports members' profits > Headnote:
LEdHN[5][] [5]

With respect to the inclusion within Federal Trade Commission jurisdiction, under a Federal Trade Commission Act provision (*15 USCS 44*), of an entity that carries on business for the profit of its members, while such a supportive organization may be devoted to helping its members in ways beyond immediate enhancement of profit, it cannot be supposed that Congress intended such a restricted notion of covered supporting organizations under which such an entity must devote itself single-mindedly to the profit of others, with the opportunity this would bring for avoiding jurisdiction where the purposes of the Act (*15 USCS 41 et seq.*) would obviously call for asserting it; just as the Act does not require that a supporting organization must devote itself entirely to its members' profits, neither does the Act say anything about how much of the entity's activities must go to raising the members' bottom lines; there is accordingly no apparent reason to let the statute's application turn on (1) meeting some threshold percentage of activity for this purpose, or (2) even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit; however, proximate relation to lucre must appear; the Act does not cover all membership organizations of profit-making corporations without more; an organization devoted solely to professional education may lie outside the Act's jurisdictional reach, even though the quality of professional services ultimately affects the profits of those who deliver them.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §103 > -- FTC jurisdiction -- profits of organization members -- issue not decided > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

The Federal Trade Commission Act (*15 USCS 41 et seq.*) does not require for Federal Trade Commission (FTC) jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit; nonetheless, the United States Supreme Court, in determining whether FTC jurisdiction extends to a nonprofit association that provides substantial economic benefits to its for-profit members, will not--and on the facts in the instant case, cannot--decide whether the FTC has jurisdiction over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players; the court therefore does not (1) foreclose the possibility that various paradigms of profit might fall within the ambit of the Act, or (2) decide whether a purpose of contributing to profit only in a presumed sense, as by enhancing professional educational efforts, would implicate FTC jurisdiction.

APPEAL §1662 > -- issue not decided below -- remand -- additional findings > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]

On certiorari to determine the validity of a Federal Court of Appeals' decision that a "quick look" by the Federal Trade Commission (FTC) was sufficient to justify finding that a nonprofit dental association's advertising restrictions on association members are anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), where the Court of Appeals treated as distinct questions the sufficiency of the FTC's analysis of the restrictions' allegedly anticompetitive effects and the substantiality of the evidence supporting the FTC's conclusions, the United States Supreme Court, because it has decided that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate, will not reach the question of the substantiality of the evidence supporting the FTC's conclusion; the Supreme Court will leave to the Court of Appeals the question whether on remand the Court of Appeals (1) can effectively assess the FTC's decision for substantial evidence on the record, or (2) must remand to the FTC for a more extensive rule-of-reason analysis on the basis of an enhanced record.n (Breyer, Stevens, Kennedy, and Ginsburg, JJ., dissented from this holding.)

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §115 > -- FTC findings -- judicial review > Headnote:
LEdHN[8][] [8]

For purposes of making such determinations as whether a horizontal agreement among dentists to withhold from their customers a particular service that the customers desire is anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), quick-look analysis carries the day when the great likelihood of anticompetitive effect can easily be ascertained.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §111 > -- advertising -- sufficiency of evidence > Headnote:
LEdHN[9][] [9]

For purposes of determining whether a nonprofit dental association's restrictions on two types of advertising--price advertising and advertising related to the quality of dental services--by dentists who are members of the association are anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), even on the view that bars on truthful and verifiable price and quality advertising are prima facie anticompetitive and place the burden of procompetitive justification on those who agree to adopt them, the issue at the threshold of the instant case is whether professional price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §107 > -- false advertising > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

With respect to unfair methods of competition that violate 5 of the Federal Trade Commission Act (*15 USCS 45*), false or misleading advertising has an anticompetitive effect.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §32 > -- operation of restraint upon profession > Headnote:
LEdHN[11A][] [11A]***LEdHN[11B]***[] [11B]

The fact that a restraint of trade operates upon a profession as distinguished from a business is relevant in determining whether that particular restraint violates the Sherman Act (*15 USCS 1 et seq.*), as it would be unrealistic (1) to view the practice of professions as interchangeable with other business activities, and (2) automatically to apply to the professions antitrust concepts which originated in other areas; the public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.

EVIDENCE §343.5 > -- burden to show procompetitive effects > Headnote:
LEdHN[12A][] [12A]***LEdHN[12B]***[] [12B]

With respect to unfair methods of competition that are alleged to violate 5 of the Federal Trade Commission Act (*15 USCS 45*), before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects--as quick-look analysis in effect requires--there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive; where the circumstances of the restriction are somewhat complex, assumption alone will not do. (Breyer, Stevens, Kennedy, and Ginsburg, JJ., dissented from this holding.)

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §107 > -- dental association -- advertising restrictions > Headnote:
LEdHN[13][] [13]

For purposes of determining whether a nonprofit dental association's restrictions on advertising related to the quality of dental services by dentists who are members of the association are anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), the question is not whether the universe of possible advertisements has been limited, but whether the limitation on advertisements obviously tends to limit the total delivery of dental services.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §106 > -- output limitation -- anticompetitive effect > Headnote:
LEdHN[14][] [14]

For purposes of determining whether a producer-imposed output limitation on goods is anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), it is the producers' supply of goods in relation to demand that is normally relevant in determining whether the limitation has the anticompetitive effect of artificially raising prices.

RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §115 > -- FTC Act -- analysis of restraint -- extent of judicial review > Headnote:
LEdHN[15][] [15]

In determining that a Federal Court of Appeals erred by deciding that a "quick look" by the Federal Trade Commission was sufficient to justify finding that a nonprofit dental association's advertising restrictions on association members are anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), the United States Supreme Court, by saying that the Court of Appeals' conclusion at least requires a more extended examination of the possible factual underpinnings than it received, does not necessarily call for the fullest market analysis; although the Supreme Court has said in a prior case that a challenge to a naked restraint on price and output need not be supported by a detailed market analysis in order to require some competitive justification, it does not follow that every case attacking a less obviously anticompetitive restraint is a candidate for plenary market examination; the categories of analysis of anticompetitive effect are less fixed than terms like "per se," "quick look," and "rule of reason" tend to make them appear; whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same--whether the challenged restraint enhances competition--where there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment; what is required, rather, is an inquiry meet for the case, looking to the circumstances, details, and logic of a restraint; the object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick, or at least quicker, look, in place of a more sedulous one.

APPEAL §1692.2 > -- remand -- issue not scrutinized below > Headnote:
LEdHN[16][] [16]

On certiorari to determine whether a Federal Court of Appeals' "quick look" was sufficient to justify the Court of Appeals' affirmance of a Federal Trade Commission decision to the effect that a nonprofit dental association's advertising restrictions on association members are anticompetitive, in violation of 5 of the Federal Trade Commission Act (*15 USCS 45*), the United States Supreme Court, because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, will vacate the Court of Appeals' judgment and remand the case for a fuller consideration of the issues. (Breyer, Stevens, Kennedy, and Ginsburg, JJ., dissented from this holding.)

Syllabus

Petitioner California Dental Association (CDA), a nonprofit association of local dental societies to which about three-quarters of the State's dentists belong, provides desirable insurance and preferential financing arrangements for its members, and engages in lobbying, litigation, marketing, and public relations for members' benefit. Members agree to abide by the CDA's Code of Ethics, which, *inter alia,* prohibits false or misleading advertising. The CDA has issued interpretive advisory opinions and guidelines relating to advertising. Respondent Federal Trade Commission brought a complaint, alleging that the CDA violated § 5 of the Federal Trade Commission Act **[****2]** (Act), *15 U.S.C. § 45*, in applying its guidelines so as to restrict two types of truthful, nondeceptive advertising: price advertising, particularly discounted fees, and advertising relating to the quality of dental services. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA and found a § 5 violation. As relevant here, the Commission held that the advertising restrictions violated the Act under an abbreviated rule-of-reason analysis. In affirming, the Ninth Circuit sustained the Commission's jurisdiction and concluded that an abbreviated or "quick look" rule-of-reason analysis was proper in this case.

Held:

1. The Commission's jurisdiction extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members. The Act gives the Commission authority over a "corporation," *15 U.S.C. § 45(a)(2)*, "organized to carry on business for its own profit or that of its members," *§ 44*. The Commission's claim that the Act gives it jurisdiction over nonprofit associations whose activities provide substantial economic benefits to their for-profit members is clearly **[****3]** the better reading of the Act, which does not require that a supporting organization must devote itself entirely to its members' profits or say anything about how much of the entity's activities must go to raising the members' bottom lines. There is thus no apparent reason to let the Act's application turn on meeting some threshold percentage of activity for this purpose or even a softer formulation calling for a substantial part of the entity's total activities to be aimed at its members' pecuniary benefit. The Act does not cover all membership organizations of profit-making corporations without more. However, the economic benefits conferred upon CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit," which is the Act's jurisdictional touchstone. The Act's logic and purpose comport with this result, and its legislative history is not inconsistent with this interpretation. Pp. 7-11.

2. Where any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the consequences of those restraints than the abbreviated analysis the Ninth Circuit performed in this case. **[****4]** Pp. 11-24.

(a) An abbreviated or "quick-look" analysis is appropriate when an observer with even a rudimentary understanding of economics could conclude that the arrangements in question have an anticompetitive effect on customers and markets. *See, e.g., National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948*. This case fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious, for the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect or possibly no effect at all on competition. Pp. 11-14.

(b) The discount and nondiscount advertising restrictions are, on their face, designed to avoid false or deceptive advertising in a market characterized by striking disparities between the information available to the professional and the patient. The existence of significant challenges to informed decisionmaking by the customer for professional services suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment. In applying cursory **[****5]** review, the Ninth Circuit brushed over the professional context and described no anticompetitive effects from the discount advertising bar. The CDA's price advertising rule appears to reflect the prediction that any costs to competition associated with eliminating across-the-board advertising will be outweighed by gains to consumer information created by discount advertising that is exact, accurate, and more easily verifiable. This view may or may not be correct, but it is not implausible; and neither a court nor the Commission may initially dismiss it as presumptively wrong. The CDA's plausible explanation for its nonprice advertising restrictions, namely that restricting unverifiable quality claims would have a procompetitive effect by preventing misleading or false claims that distort the market, likewise rules out the Ninth Circuit's use of abbreviated rule-of-reason analysis for those restrictions. The obvious anticompetitive effect that triggers such analysis has not been shown. Pp. 14-21.

(c) Saying that the Ninth Circuit's conclusion required a more extended examination of the possible factual underpinnings than it received is not necessarily to call for the fullest market **[****6]** analysis. Not every case attacking a restraint not obviously anticompetitive is a candidate for plenary market examination. There is generally no categorical line between restraints giving rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required is an enquiry meet for the case, looking to a restraint's circumstances, details, and logic. Here, a less quick look was required for the initial assessment of the CDA's advertising restrictions. Pp. 21-24.

128 F.3d 720, vacated and remanded.

Counsel: Peter M. Sfikas argued the cause for petitioner.

Lawrence G. Wallace argued the cause for respondent.

Judges: [**7]** SOUTER, J., delivered the opinion for a unanimous Court with respect to Parts I and II, and the opinion of the Court with respect to Part III, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed an opinion concurring in part and dissenting in part, in which STEVENS, KENNEDY, and GINSBURG, JJ., joined.

Opinion by: SOUTER

Opinion

[*759] [*943] [**1607]** JUSTICE **SOUTER** delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A]There are two issues in this case: whether the jurisdiction of the **[***944]** Federal Trade Commission extends to the California Dental Association (CDA), a nonprofit professional association, and whether a "quick look" sufficed to justify finding that certain advertising restrictions adopted by the CDA violated the antitrust laws. ***HN1***[] We hold that the Commission's jurisdiction under the Federal Trade Commission Act (FTC Act) extends to an association that, like the CDA, provides substantial economic benefit to its for-profit members, but that where, as here, any anticompetitive effects of given restraints are far from intuitively obvious, the rule of reason demands a more thorough enquiry into the **[****8]** consequences of those restraints than the Court of Appeals performed.

I

LEdHN[3][] [3]The CDA is a voluntary nonprofit association of local dental societies to which some 19,000 dentists belong, including about three-quarters of those practicing in the State. *In re California Dental Assn., 121 F.T.C. 190, 196-197 (1996)*. The CDA is exempt from federal income tax under *26 U.S.C. **[**1608]** § 501(c)(6)*, covering "business leagues, chambers **[*760]** of commerce, real-estate boards, [and] boards of trade," although it has for-profit subsidiaries that give its members advantageous access to various sorts of insurance, including liability coverage, and to financing for their real estate, equipment, cars, and patients' bills. The CDA lobbies and litigates in its members' interests, and conducts marketing and public relations campaigns for their benefit. *128 F.3d 720, 723 (CA9 1997)*.

The dentists who belong to the CDA through these associations agree to abide by a Code of Ethics (Code) including the following § 10:

> "Although any dentist may advertise, no dentist shall advertise or solicit patients in any form of **[****9]** communication in a manner that is false or misleading in any material respect. In order to properly serve the public, dentists should represent themselves in a manner that contributes to the esteem of the public. Dentists should not misrepresent their training and competence in any way that would be false or misleading in any material respect." App. 33.

The CDA has issued a number of advisory opinions interpreting this section, [1] **[****10]** and through separate advertising **[*761]** guidelines intended to help members comply with the Code and **[***945]** with state law the CDA has advised its dentists of disclosures they must make under state law when engaging in discount advertising. [2]

Responsibility for enforcing the Code rests in the first instance with the local dental societies, to which applicants for CDA membership must submit copies of their own advertisements and those of their employers or referral services to assure compliance with the Code. The local societies also actively seek information about potential Code violations by applicants or CDA members. Applicants who refuse to withdraw or revise objectionable advertisements may be denied membership; and members who, after a hearing, remain **[*762]** similarly recalcitrant are subject to censure, suspension, or expulsion from the **[****11]** CDA. 128 F.3d at 724.

LEdHN[4A][] [4A]The Commission brought a complaint against the CDA, alleging that it applied its guidelines so as to restrict truthful, nondeceptive advertising, and so violated § 5 of the FTC Act, 38 Stat. 717, *15 U.S.C. § 45*. [3] The **[**1609]** complaint alleged that the CDA had unreasonably restricted two types of advertising: price

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[1] The advisory opinions, which substantially mirror parts of the California Business and Professions Code, see *Cal. Bus. & Prof. Code Ann. §§ 651*, *1680* (West 1999), include the following propositions:

"A statement or claim is false or misleading in any material respect when it:

"a. contains a misrepresentation of fact;

"b. is likely to mislead or deceive because in context it makes only a partial disclosure of relevant facts;

"c. is intended or is likely to create false or unjustified expectations of favorable results and/or costs;

"d. relates to fees for specific types of services without fully and specifically disclosing all variables and other relevant factors;

"e. contains other representations or implications that in reasonable probability will cause an ordinarily prudent person to misunderstand or be deceived.

"Any communication or advertisement which refers to the cost of dental services shall be exact, without omissions, and shall make each service clearly identifiable, without the use of such phrases as 'as low as,' 'and up,' 'lowest prices,' or words or phrases of similar import.

"Any advertisement which refers to the cost of dental services and uses words of comparison or relativity -- for example, 'low fees' -- must be based on verifiable data substantiating the comparison or statement of relativity. The burden shall be on the dentist who advertises in such terms to establish the accuracy of the comparison or statement of relativity."

"Advertising claims as to the quality of services are not susceptible to measurement or verification; accordingly, such claims are likely to be false or misleading in any material respect." *128 F.3d 720, 723-724 (CA9 1997)* (some internal quotation marks omitted).

[2] The disclosures include:

"1. The dollar amount of the nondiscounted fee for the service[.]

"2. Either the dollar amount of the discount fee or the percentage of the discount for the specific service[.]

"3. The length of time that the discount will be offered[.]

"4. Verifiable fees[.]

"5. [The identity of] specific groups who qualify for the discount or any other terms and conditions or restrictions for qualifying for the discount." *Id. at 724*.

[3] ***LEdHN[4B]***[] [4B]

The FTC Act's prohibition of unfair competition and deceptive acts or practices, *15 U.S.C. § 45(a)(1)*, overlaps the scope of *§ 1* of the Sherman Act, *15 U.S.C. § 1*, aimed at prohibiting restraint of trade, *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454-455, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*, and the Commission relied upon Sherman Act law in adjudicating this case, ***In re California Dental Assn., 121 F.T.C. 190, 292, n. 5 (1996)***.

advertising, particularly discounted fees, and advertising relating to the quality of dental services. Complaint P7. An Administrative Law Judge (ALJ) held the Commission to have jurisdiction over the CDA, which, the ALJ noted, had itself "stated that a selection of its programs and services has a potential value to members of between $ 22,739 and $ 65,127," *121 F.T.C. at 207*. He found that, although there had been no proof that the CDA exerted market power, no such proof was required to establish an antitrust violation under *In re Mass. Bd. of Registration in Optometry, 110 F.T.C. 549 (1988)*, since the CDA had unreasonably prevented members and potential members from using truthful, nondeceptive advertising, all to the detriment of both dentists and consumers **[****12]** of dental services. He accordingly found a violation of § 5 of the FTC Act. 121 F.T.C. at 272-273.

The Commission adopted the factual **[***946]** findings of the ALJ except for his conclusion that the CDA lacked market power, with which the Commission disagreed. The Commission treated the CDA's restrictions on discount advertising as illegal *per se*. **[****13]** *128 F.3d at 725*. In the alternative, the Commission held the price advertising (as well as the nonprice) restrictions to be violations of the Sherman and FTC Acts **[*763]** under an abbreviated rule-of-reason analysis. One Commissioner concurred separately, arguing that the Commission should have applied the *Mass Bd.* standard, not the *per se* analysis, to the limitations on price advertising. Another Commissioner dissented, finding the evidence insufficient to show either that the restrictions had an anticompetitive effect under the rule of reason, or that the CDA had market power. *128 F.3d at 725*.

The Court of Appeals for the Ninth Circuit affirmed, sustaining the Commission's assertion of jurisdiction over the CDA and its ultimate conclusion on the merits. *128 F.3d at 730*. The court thought it error for the Commission to have applied *per se* analysis to the price advertising restrictions, finding analysis under the rule of reason required for all the restrictions. But the Court of Appeals went on to explain that the Commission had properly

> "applied an abbreviated, or 'quick look,' rule of reason analysis designed for restraints **[****14]** that are not per se unlawful but are sufficiently anticompetitive on their face that they do not require a full-blown rule of reason inquiry. *See* [*National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 109-110, 82 L. Ed. 2d 70, 104 S. Ct. 2948, and n. 39 (1984)]* ('The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.' [*Ibid.* (citing P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981) (parenthetical omitted)).] It allows the condemnation of a 'naked restraint' on price or output without an 'elaborate industry analysis.' *468 U.S. at 109*." *128 F.3d at 727*.

The Court of Appeals thought truncated rule-of-reason analysis to be in order for several reasons. As for the restrictions on discount advertising, they "amounted in practice to a fairly 'naked' restraint on price competition itself," *ibid*. The CDA's procompetitive justification, that the restrictions **[*764]** encouraged disclosure and prevented false and misleading advertising, carried little weight because "it is simply infeasible **[****15]** to disclose all of the information that is required," *128 F.3d at 728*, and "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *ibid*. As to non-price advertising restrictions, the court said that

> "these restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services. *See* Areeda & Hovenkamp, ***Antitrust Law*** P1505 at 693-694 (Supp. 1997) . . . . The restrictions may also affect **[**1610]** output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so . . . . Under these circumstances, we think that the restriction is a sufficiently naked restraint **[***947]** on output to justify quick look analysis." *Ibid*.

The Court of Appeals went on to hold that the Commission's findings with respect to the CDA's agreement and intent to restrain trade, as well as on the effect of the restrictions and the existence of market power, were all supported by substantial evidence. **[****16]** *128 F.3d at 728-730*. In dissent, Judge Real took the position that the Commission's jurisdiction did not cover the CDA as a nonprofit professional association engaging in no commercial operations. *128 F.3d at 730*. But even assuming jurisdiction, he argued, full-bore rule-of-reason analysis was called for, since the disclosure requirements were not naked restraints and neither fixed prices nor banned nondeceptive advertising. *128 F.3d at 730-731*.

We granted certiorari to resolve conflicts among the Circuits on the Commission's jurisdiction over a nonprofit professional association [4] **[****17]** and the occasions for abbreviated **[*765]** rule-of-reason analysis. [5] 524 U.S. __ (1998). We now vacate the judgment of the Court of Appeals and remand.

II

HN2[] The FTC Act gives the Commission authority over "persons, partnerships, or corporations," *15 U.S.C. § 45(a)(2)*, ***HN3***[] and defines "corporation" to include "any company . . . or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members," *§ 44*. Although the Circuits have not agreed on the precise extent of this definition, see n. 4, *supra*, the Commission has long held that some circumstances give it jurisdiction over an entity **[****18]** that seeks no profit for itself. While the Commission has claimed to have jurisdiction over a nonprofit entity if a substantial part of its total activities provide pecuniary benefits to its members, see *In re American Medical Assn., 94 F.T.C. 701, 983-984 (1980)*, respondent now advances the slightly different formulation that the Commission has jurisdiction "over anticompetitive practices by nonprofit associations whose activities provide substantial economic benefits to their for-profit members' businesses." Brief for Respondent 20.

Respondent urges deference to this interpretation of the Commission's jurisdiction as reasonable. Brief for Respondent 25-26 (citing *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)*, *Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 380-382,* ***[*766]*** *101 L. Ed. 2d 322, 108 S. Ct. 2428 (1988)* (SCALIA, J. concurring) (*Chevron* deference applies to agency's interpretation of its own statutory jurisdiction)). But we have no **[***948]** occasion to review the call for deference here, the interpretation **[****19]** urged in respondent's brief being clearly the better reading of the statute under ordinary principles of construction.

LEdHN[5][] [5]***HN4***[] The FTC Act is at pains to include not only an entity "organized to carry on business for its own profit," *15 U.S.C. § 44*, but also one that carries on business for the profit "of its members," *ibid*. While such a supportive organization may be devoted to helping its members in ways beyond immediate enhancement of profit, no one here has claimed that such an entity must devote itself single-mindedly to the profit of others. It **[**1611]** could, indeed, hardly be supposed that Congress intended such a restricted notion of covered supporting organizations, with the opportunity this would bring with it for avoiding jurisdiction where the purposes of the FTC Act would obviously call for asserting it.

Just as the FTC Act does not require that a supporting organization must devote itself entirely to its members' profits, neither does the Act say anything about how much of the entity's activities must go to raising the members' bottom lines. There is accordingly no apparent reason to let the statute's application turn on meeting **[****20]** some threshold percentage of activity for this purpose, or even satisfying a softer formulation calling for a substantial part of the nonprofit entity's total activities to be aimed at its members' pecuniary benefit. To be sure, proximate relation to lucre must appear; the FTC Act does not cover all membership organizations of profit-making corporations without more, and an organization devoted solely to professional education may lie outside the FTC Act's jurisdictional reach, even though the quality of professional services ultimately affects the profits of those who deliver them.

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[4] Compare ***In re American Medical Assn., 94 F.T.C. 701, 983-984***, aff'd, *638 F.2d 443 (CA2 1980)*, aff'd by an equally divided *Court, 455 U.S. 676, 102 S. Ct. 1744, 71 L. Ed. 2d 546* *(per curiam)* (1982), *FTC v. National Comm'n on Egg Nutrition, 517 F.2d 485, 487-488 (CA7 1975)*, with *Community Blood Bank v. FTC, 405 F.2d 1011, 1017 (CA8 1969)*.

[5] Cf. *Bogan v. Hodgkins, 166 F.3d 509, 514 & n.6 (CA2 1999)*; *United States v. Brown University, 5 F.3d 658, 669 (CA3 1993)*; *Chicago Professional Sports Limited Partnership v. National Basketball Assn., 961 F.2d 667, 674-676 (CA7 1992)*; *Law v. National Collegiate Athletic Assn., 134 F.3d 1010, 1020 (CA10 1998)*; *U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 594-595 (CA1 1993)*.

LEdHN[1B][] [1B] ***LEdHN[6A]***[] [6A]There is no line drawing exercise in this case, however, where the CDA's contributions to the profits of its individual **[*767]** members are proximate and apparent. Through for-profit subsidiaries, the CDA provides advantageous insurance and preferential financing arrangements for its members, and it engages in lobbying, litigation, marketing, and public relations for the benefit of its members' interests. This congeries of activities confers far more than *de minimis* or merely presumed economic benefits on CDA members; the economic benefits conferred upon **[****21]** the CDA's profit-seeking professionals plainly fall within the object of enhancing its members' "profit," [6] which the FTC Act makes the jurisdictional touchstone. **[*768]** **[***949]** There is no difficulty in concluding that the Commission has jurisdiction over the CDA.

[**22]** ***LEdHN[1C]***[] [1C]The logic and purpose of the FTC Act comport with this result. ***HN5***[] The FTC Act directs the Commission to "prevent" the broad set of entities under its jurisdiction "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." *15 U.S.C. § 45(a)(2)*. ***HN6***[] Nonprofit entities organized on behalf of for-profit members have the same capacity and derivatively, at least, **[**1612]** the same incentives as for-profit organizations to engage in unfair methods of competition or unfair and deceptive acts. It may even be possible that a nonprofit entity up to no good would have certain advantages, not only over a for-profit member but over a for-profit membership organization as well; it would enjoy the screen of superficial disinterest while devoting itself to serving the interests of its members without concern for doing more than breaking even.

Nor, contrary to petitioner's argument, is the legislative history inconsistent with this interpretation of the Commission's jurisdiction. Although the versions of the FTC Act first passed by the House and the Senate defined "corporation" to **[****23]** refer only to incorporated, joint stock, and share-capital companies organized to carry on business for profit, see H. R. Conf. Rep. No. 1142, 63d Cong., 2d Sess., 11, 14 (1914), the Conference Committee subsequently revised the definition to its present form, an alteration that indicates an **[*769]** intention to include nonprofit entities. [7] And the legislative history, like the text of the FTC Act, is devoid of any hint at an exemption for professional associations as such.

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[6] ***LEdHN[6B]***[] [6B]

This conclusion is consistent with holdings by a number of Courts of Appeals. In *FTC v. National Comm'n on Egg Nutrition, supra*, the Court of Appeals held that a nonprofit association "organized for the profit of the egg industry," *517 F.2d at 488*, fell within the Commission's jurisdiction. In ***American Medical Assn. v. FTC, supra***, the Court of Appeals held that the "business aspects," 517 F.2d at 448, of the AMA's activities brought it within the Commission's reach. These cases are consistent with our conclusion that an entity organized to carry on activities that will confer greater than *de minimis* or presumed economic benefits on profit-seeking members certainly falls within the Commission's jurisdiction. In *Community Blood Bank v. FTC, supra,* the Court of Appeals addressed the question whether the Commission had jurisdiction over a blood bank and an association of hospitals. It held that "the question of the jurisdiction over the corporations or other associations involved should be determined on an ad hoc basis," *134 F.3d at 1018*, and that the Commission's jurisdiction extended to "any legal entity without shares of capital which engages in business for profit within the traditional meaning of that language," *ibid*. (emphasis deleted). The Court of Appeals also said that "according to a generally accepted definition 'profit' means gain from business or investment over and above expenditures, or gain made on business or investment where both receipts or payments are taken into account," *134 F.3d at 1017*, although in the same breath it noted that the term's "meaning must be derived from the context in which it is used," *134 F.3d at 1016*. Our decision here is fully consistent with *Community Blood Bank*, because the CDA contributes to the profits of at least some of its members, even on a restrictive definition of profit as gain above expenditures. (It should go without saying that the FTC Act does not require for Commission jurisdiction that members of an entity turn a profit on their membership, but only that the entity be organized to carry on business for members' profit.) Nonetheless, we do not, and indeed, on the facts here, could not, decide today whether the Commission has jurisdiction over nonprofit organizations that do not confer profit on for-profit members but do, for example, show annual income surpluses, engage in significant commerce, or compete in relevant markets with for-profit players. We therefore do not foreclose the possibility that various paradigms of profit might fall within the ambit of the FTC Act. Nor do we decide whether a purpose of contributing to profit only in a presumed sense, as by enhancing professional educational efforts, would implicate the Commission's jurisdiction.

[7] A letter from Bureau of Corporations Commissioner Joseph E. Davies to Senator Francis G. Newlands, the bill's sponsor and a member of the Conference Committee, written August 8, 1914, before the Conference Committee revisions, included a memorandum dated August 7, 1914, that expressed concern that the versions of the bill passed by the House and the Senate

[**24]** We therefore conclude that the Commission had jurisdiction to pursue **[***950]** the claim here, and turn to the question whether the Court of Appeals devoted sufficient analysis to sustain the claim that the advertising restrictions promulgated by the CDA violated the FTC Act.

III

LEdHN[7A][] [7A]The Court of Appeals treated as distinct questions the sufficiency of the analysis of anticompetitive effects and the substantiality of the evidence supporting the Commission's conclusions. Because we decide that the Court of Appeals erred when it held as a matter of law that quick-look analysis was appropriate (with the consequence that the Commission's abbreviated analysis and conclusion were sustainable), we do not reach the question of the substantiality of the evidence supporting the Commission's conclusion. [8]

[**25]** ***LEdHN[8]***[] [8]***HN7***[] In *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*, we held that a "naked restraint on price and output requires some competitive justification **[*770]** even in the absence of a detailed market analysis." *Id. at 110*. Elsewhere, we held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of " horizontal agreements among competitors to refuse to discuss prices, *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*, or to withhold a particular desired service, *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 459, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)* (quoting *National Soc. of Professional Engineers, supra, at 692*). In each of these cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have **[****26]** an anticompetitive effect on customers and markets. In *National Collegiate Athletic Assn.*, the league's television plan expressly limited output (the number of games that could be televised) and fixed a minimum price. *468 U.S. at 99-100*. In *National Soc. of Professional* **[**1613]** *Engineers*, the restraint was "an absolute ban on competitive bidding." *435 U.S. at 692*. In *Indiana Federation of Dentists*, the restraint was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire." *476 U.S. at 459*. As in such cases, quick-look analysis carries the day when the great likelihood of anticompetitive effects can easily be ascertained. See *Law v. National Collegiate Athletic Assn., 134 F.3d 1010, 1020 (CA10 1998)* (explaining that quick-look analysis applies "where a practice has obvious anticompetitive effects"); *Chicago Professional Sports Limited Partnership v. National Basketball Assn., 961 F.2d 667, 674-676 (CA7 1992)* (finding quick-look analysis adequate after assessing and rejecting logic of proffered procompetitive justifications); **[****27]** cf. *United* **[***951]** *States v. Brown University, 5 F.3d 658, 677-678 (CA3 1993)* (finding full rule-of-reason analysis required where universities sought to provide financial aid to needy students and noting by way of contrast that the agreements **[*771]** in *National Soc. of Professional Engineers* and *Indiana Federation of Dentists* "embodied a strong economic self-interest of the parties to them").

LEdHN[2B][] [2B] ***LEdHN[9]***[] [9] ***LEdHN[10A]***[] [10A] ***LEdHN[11A]***[] [11A]The case before us, however, fails to present a situation in which the likelihood of anticompetitive effects is comparably obvious. Even on JUSTICE BREYER's view that bars on truthful and verifiable price and quality advertising are *prima facie* anticompetitive, see *post*, at 4-5 (opinion concurring in part and dissenting in part), and place the burden of procompetitive justification on those who agree to adopt them, the very issue at the threshold of this case is whether professional price and quality advertising is sufficiently verifiable in theory and in fact to fall within such a general rule. Ultimately our disagreement with JUSTICE BREYER turns on our **[****28]** different responses to this

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would not extend jurisdiction to purportedly nonprofit organizations, which might "furnish convenient vehicles for common understandings looking to the limitation of output and the fixing of prices contrary to law." Trade Commission Bill: Letter from the Commissioner of Corporations to the Chairman of the Senate Comm. on Interstate Commerce, Transmitting Certain Suggestions Relative to the Bill (H. R. 15613) to Create a Federal Trade Commission, 63d Cong., 2d Sess., 3 (1914).

[8] ***LEdHN[7B]***[] [7B]

We leave to the Court of Appeals the question whether on remand it can effectively assess the Commission's decision for substantial evidence on the record, or whether it must remand to the Commission for a more extensive rule-of-reason analysis on the basis of an enhanced record.

issue. Whereas he accepts, as the Ninth Circuit seems to have done, that the restrictions here were like restrictions on advertisement of price and quality generally, see, *e.g., post*, at 5, 7, 10, it seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition. The restrictions on both discount and nondiscount advertising are, at least on their face, designed to avoid false or deceptive advertising [9] **[****31]** in a market characterized by striking disparities between the information available to the professional and the patient. [10] Cf. Carr & Mathewson, The Economics **[*772]** of Law Firms: A Study in the Legal Organization of the Firm, 33 J. Law & Econ. 307, 309 (1990) (explaining that in a market for complex professional services, "inherent asymmetry of knowledge about the product" arises because "professionals supplying the good are knowledgeable [whereas] consumers demanding the good are uninformed"); Akerlof, The Market for 'Lemons': Quality Uncertainty and the Market Mechanism, 84 Q. J. Econ. 488 (1970) (pointing out quality problems in market **[****29]** characterized by asymmetrical information). In a market for professional services, in which advertising is relatively rare and the comparability of service packages not easily established, the difficulty for customers or potential competitors to get and verify information about the price and availability of services magnifies the dangers to competition associated with misleading advertising. **[***952]** What is more, the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required **[**1614]** to evaluate the services, and partly because of the difficulty in determining whether, and the degree to which, an outcome is attributable to the quality of services (like a poor job of tooth-filling) or to something else (like a very tough walnut). See Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328, 1330 (1979); 1 B. Furrow, T. Greaney, S. Johnson, T. Jost, & R. Schwartz, Health Law § 3-1, p. 86 (1995) (describing the common view that "the lay public is incapable of adequately evaluating the quality of medical services"). Patients' **[****30]** attachments to particular professionals, the rationality of which is difficult to assess, complicate the picture even further. Cf. Evans, Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?, in Occupational Licensure and Regulation 235-236 (S. Rottenberg **[*773]** ed. 1980) (describing long-term relationship between professional and client not as "a series of spot contracts" but rather as "a long-term agreement, often implicit, to deal with each other in a set of future unspecified or incompletely specified circumstances according to certain rules," and adding that "it is not clear how or if these [implicit contracts] can be reconciled with the promotion of effective price competition in individual spot markets for particular services"). The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition.

The explanation proffered by the Court of Appeals for the likely anticompetitive effect of the CDA's restrictions on discount advertising began with the unexceptionable statements that "price advertising is fundamental to price competition," **[****32]** *128 F.3d at 727*, and that "restrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for dentists to compete on the basis of price," *ibid*. (citing *Bates v. State Bar of Ariz., 433 U.S. 350, 364, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)*; *Morales v. Trans World Airlines, Inc., 504 U.S. 374, 388, 119 L. Ed. 2d 157, 112 S. Ct. 2031 (1992))*. The court then acknowledged that,

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9 ***LEdHN[10B]***[] [10B]

That false or misleading advertising has an anticompetitive effect, as that term is customarily used, has been long established. Cf. *FTC v. Algoma Lumber Co., 291 U.S. 67, 79-80, 78 L. Ed. 655, 54 S. Ct. 315 (1934)* (finding a false advertisement to be unfair competition).

10 ***LEdHN[11B]***[] [11B]

HN8[] "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." *Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-789, n. 17, 44 L. Ed. 2d 572, 95 S. Ct. 2004 (1975)*.

according to the CDA, the restrictions nonetheless furthered the "legitimate, indeed procompetitive, goal of preventing false and misleading price advertising." *128 F.3d at 728*. The Court of Appeals might, at this juncture, have recognized that the restrictions at issue here are very far from a total ban on price or discount advertising, and might have considered the possibility that the particular restrictions on professional advertising could have different effects from those "normally" found in the commercial world, even to the point of promoting competition by reducing the occurrence of unverifiable and **[***953]** misleading across-the-board **[*774]** discount advertising. **[****33]** [11] Instead, the Court of Appeals confined itself to the brief assertion that the "CDA's disclosure requirements appear to prohibit across-the-board discounts because it is simply infeasible to disclose all of the information that is required," *ib*id. followed by the observation that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *ibid*.
[**34]**

LEdHN[2C][] [2C] ***LEdHN[12A]***[] [12A]But these observations brush over the professional context and describe no anticompetitive effects. Assuming that the record in fact supports the conclusion that the CDA disclosure rules essentially bar advertisement of across-the-board discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here. Whether advertisements that announced discounts for, say, first-time customers, would be less effective at conveying information relevant to competition if they listed the original **[**1615]** and discounted prices for checkups, X-rays, and fillings, than they would be if they simply specified a percentage discount across the board, seems to us a question susceptible to empirical but not *a priori* analysis. In a suspicious world, the discipline of specific example may well be a necessary condition of plausibility for professional claims that for all practical purposes defy comparison shopping. It is also possible in principle that, even if across-the-board discount advertisements were more effective in drawing customers in the short run, the recurrence of some measure of intentional or accidental misstatement due to the breadth **[****35]** of their claims might **[*775]** leak out over time to make potential patients skeptical of any such across-the-board advertising, so undercutting the method's effectiveness. Cf. Akerlof, 84 Q. J. Econ., at 495 (explaining that "dishonest dealings tend to drive honest dealings out of the market"). It might be, too, that across-the-board discount advertisements would continue to attract business indefinitely, but might work precisely because they were misleading customers, and thus just because their effect would be anticompetitive, not procompetitive. Put another way, the CDA's rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators). As a matter of economics this view may or may not be correct, but it is not implausible, and neither a court nor the Commission may initially dismiss it as presumptively wrong. [12]

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[11] JUSTICE BREYER claims that "the Court of Appeals did consider the relevant differences." *Post*, at 10. But the language he cites says nothing more than that *per se* analysis is inappropriate here and that "some caution" was appropriate where restrictions purported to restrict false advertising, see *128 F.3d at 726-727*. Caution was of course appropriate, but this statement by the Court of Appeals does not constitute a consideration of the possible differences between these and other advertising restrictions.

[12] ***LEdHN[12B]***[] [12B]

JUSTICE BREYER suggests that our analysis is "of limited relevance," *post*, at 12, because "the basic question is whether this . . . theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case," *ibid*. He thinks that the Commission and the Court of Appeals "adequately answered that question," *ib*id. but the absence of any empirical evidence on this point indicates that the question was not answered, merely avoided by implicit burden-shifting of the kind accepted by JUSTICE BREYER. The point is that before a theoretical claim of anticompetitive effects can justify shifting to a defendant the burden to show empirical evidence of procompetitive effects, as quick-look analysis in effect requires, there must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where, as here, the circumstances of the restriction are somewhat complex, assumption alone will not do.

[**36]** In theory, it is true, the Court of Appeals neither ruled out the plausibility **[***954]** of some procompetitive support for the CDA's requirements nor foreclosed the utility of an evidentiary discussion on the point. The court indirectly acknowledged the plausibility of procompetitive justifications for the **[*776]** CDA's position when it stated that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing," *128 F.3d at 728*. But because petitioner alone would have had the incentive to introduce such evidence, the statement sounds as though the Court of Appeals may have thought it was justified without further analysis to shift a burden to the CDA to adduce hard evidence of the procompetitive nature of its policy; the court's adversion to empirical evidence at the moment of this implicit burden-shifting underscores the leniency of its enquiry into evidence of the restrictions' anticompetitive effects.

LEdHN[13][] [13] ***LEdHN[14]***[] [14]The Court of Appeals was comparably tolerant in accepting the sufficiency of abbreviated rule-of-reason analysis as to the nonprice advertising restrictions. **[****37]** The court began with the argument that "these restrictions are in effect a form of output limitation, as they restrict the supply of information about individual dentists' services." *Ibid*. (citing P. Areeda & H. Hovenkamp, ***Antitrust Law*** P1505, pp. 693-694 (1997 Supp.)). Although this sentence does indeed appear as cited, it is puzzling, given that the relevant output for antitrust purposes here is presumably not information or advertising, but dental services themselves. The question is not whether the universe of possible advertisements has been limited (as assuredly it has), but whether the limitation on advertisements obviously tends to limit the total delivery of dental services. The court came closest to addressing this latter question **[**1616]** when it went on to assert that limiting advertisements regarding quality and safety "prevents dentists from fully describing the package of services they offer," *128 F.3d at 728*, adding that "the restrictions may also affect output more directly, as quality and comfort advertising may induce some customers to obtain nonemergency care when they might not otherwise do so," *ibid.* This suggestion about output is also **[****38]** puzzling. If quality advertising actually induces some patients to obtain more care **[*777]** than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and it is of course the producers' supply of a good in relation to demand that is normally relevant in determining whether a producer-imposed output limitation has the anticompetitive effect of artificially raising prices, [13] see *General Leaseways, Inc. v. National **[***955]** Truck Leasing Assn., 744 F.2d 588, 594-595 (CA7 1984)* ("An agreement on output also equates to a price-fixing agreement. If firms raise price, the market's demand for their product will fall, so the amount supplied will fall too -- in other words, output will be restricted. If instead the firms restrict output directly, price will as mentioned rise in order to limit demand to the reduced supply. Thus, with exceptions not relevant here, raising price, reducing output, and dividing markets have the same anticompetitive effects").

[**39]** ***LEdHN[2D]***[] [2D]Although the Court of Appeals acknowledged the CDA's view that "claims about quality are inherently unverifiable and therefore misleading," *128 F.3d at 728*, it responded that this concern "does not justify banning all quality claims without regard to whether they are, in fact, false or misleading," *ibid*. As a result, the court said, "the restriction is a sufficiently naked restraint on output to justify quick look analysis." *Ibid*. The court assumed, in these words, that some dental quality claims may escape justifiable censure, because they are both verifiable and true. But its implicit **[*778]** assumption fails to explain why it gave no weight to the countervailing, and at least equally plausible, suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market. It is, indeed, entirely possible to understand the CDA's restrictions on unverifiable quality and comfort advertising as nothing more than a procompetitive ban on puffery, cf. **[****40]** *Bates, 433 U.S. at 366* (claims relating to the quality of legal services "probably are not susceptible of precise measurement or verification and, under some

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[13] JUSTICE BREYER wonders if we "mean this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality." *Post*, at 11. But as the preceding sentence shows, we intend simply to question the logic of the Court of Appeals's suggestion that the restrictions are anticompetitive because they somehow "affect output," *128 F.3d at 728*, presumably with the intent to raise prices by limiting supply while demand remains constant. We do not mean to deny that an agreement not to advertise service quality might have anticompetitive effects. We merely mean that, absent further analysis of the kind JUSTICE BREYER undertakes, it is not possible to conclude that the net effect of this particular restriction is anticompetitive.

circumstances, might well be deceptive or misleading to the public, or even false"); *433 U.S. at 383-384* ("Advertising claims as to the quality of services . . . are not susceptible of measurement or verification; accordingly, such claims may be so likely to be misleading as to warrant restriction"), notwithstanding JUSTICE BREYER's citation (to a Commission discussion that never faces the issue of the unverifiability of professional quality claims, raised in *Bates*), *post*, at 5. [14]

The point is not that the CDA's restrictions necessarily **[****41]** have the procompetitive effect claimed by the CDA; it is possible that banning quality claims might have no effect at all on competitiveness if, for example, many dentists made very much the same sort of claims. And it is also of course possible that the restrictions might in the final analysis be anticompetitive. The point, rather, is that the plausibility of competing claims **[**1617]** about the effects of the professional advertising restrictions **[***956]** rules out the indulgently abbreviated review to which the Commission's order was treated. The obvious anticompetitive effect that triggers abbreviated analysis has not been shown.

[*779] In light of our focus on the adequacy of the Court of Appeals's analysis, JUSTICE BREYER's thorough-going, *de novo* antitrust analysis contains much to impress on its own merits but little to demonstrate the sufficiency of the Court of Appeals's review. The obligation to give a more deliberate look than a quick one does not arise at the door of this Court and should not be satisfied here in the first instance. Had the Court of Appeals engaged in a painstaking discussion in a league with JUSTICE BREYER's (compare his 14 pages with **[****42]** the Ninth Circuit's 8), and had it confronted the comparability of these restrictions to bars on clearly verifiable advertising, its reasoning might have sufficed to justify its conclusion. Certainly JUSTICE BREYER's treatment of the antitrust issues here is no "quick look." Lingering is more like it, and indeed JUSTICE BREYER, not surprisingly, stops short of endorsing the Court of Appeals's discussion as adequate to the task at hand.

LEdHN[2E][↑] [2E] ***LEdHN[15]***[↑] [15] ***LEdHN[16]***[↑] [16]Saying here that the Court of Appeals's conclusion at least required a more extended examination of the possible factual underpinnings than it received is not, of course, necessarily to call for the fullest market analysis. ***HN9***[↑] Although we have said that a challenge to a "naked restraint on price and output" need not be supported by "a detailed market analysis" in order to "require some competitive justification," *National Collegiate Athletic Assn., 468 U.S. at 110*, it does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination. **[****43]** The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating *per se* from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "*per se*" condemnation is justified. *468 U.S. at 104, n. 26*. "Whether the ultimate finding is the product of a presumption or actual **[*780]** market analysis, the essential inquiry remains the same -- whether or not the challenged restraint enhances competition." *468 U.S. at 104*. Indeed, the scholar who enriched ***antitrust law*** with the metaphor of "the twinkling of an eye" for the most condensed rule-of-reason analysis himself cautioned against the risk of misleading even in speaking of a 'spectrum' of adequate reasonableness analysis for passing upon antitrust claims: "There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for . . . . **[****44]** Nevertheless, the quality of proof required should vary with the circumstances." P. Areeda, ***Antitrust Law*** P1507, p. 402 (1986). [15] **[***957]** At the same time, Professor Areeda also emphasized the

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[14] The Commission said only that "'mere puffing' deceives no one and has never been subject to regulation.'" 121 F.T.C. at 318. The question here, of course, is not whether puffery may be subject to governmental regulation, but whether a professional organization may ban it.

[15] Other commentators have expressed similar views. See, *e.g.,* Kolasky, Counterpoint: The Department of Justice's "Stepwise" Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements, Antitrust 41, 43 (Spring 1998) ("In applying the rule of reason, the courts, as with any balancing test, use a sliding scale to determine how much proof to require"); Piraino, Making Sense of the Rule of Reason: A New Standard for *Section 1* of the Sherman Act, *47 Vand. L. Rev. 1753, 1771 (1994)* ("Courts will have to undertake varying degrees of inquiry depending upon the type of restraint at issue. The legality of certain restraints will be easy to determine because their competitive effects are obvious. Other restrictions will require a more detailed

necessity, particularly great in the quasi-common law realm of antitrust, that courts explain the logic of their conclusions. "By exposing their reasoning, judges . . . are subjected to others' critical analyses, which in turn can lead to better understanding for the future." *433 U.S. at 364*. As **[**1618]** the circumstances here demonstrate, there is generally no categorical line to be drawn between **[*781]** restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. And of course what we see may vary over time, if rule-of-reason **[****45]** analyses in case after case reach identical conclusions. For now, at least, a less quick look was required for the initial assessment of the tendency of these professional advertising restrictions. Because the Court of Appeals did not scrutinize the assumption of relative anticompetitive tendencies, we vacate the judgment and remand the case for a fuller consideration of the issue.

[**46]** It is so ordered.

Concur by: BREYER (In Part)

Dissent by: BREYER (In Part)

Dissent

JUSTICE BREYER, with whom JUSTICE **STEVENS**, JUSTICE **KENNEDY**, and JUSTICE **GINSBURG** join, concurring in part and dissenting in part.

I agree with the Court that the Federal Trade Commission has jurisdiction over petitioner, and I join Parts I and II of its opinion. I also agree that in a "rule of reason" antitrust case "the quality of proof required should vary with the circumstances," that "what is required . . . is an enquiry meet for the case," and that the object is a "confident conclusion about the principal tendency of a restriction." *Ante*, at 23-24 (internal quotation marks omitted). But I do not agree that the Court has properly applied those unobjectionable principles here. In my view, a traditional application of the rule of reason to the facts as found by the Commission requires affirming the Commission -- just as the Court of Appeals did below.

[*782] I

The Commission's conclusion is lawful if its "factual findings," insofar as they are supported by "substantial **[***958]** evidence," "make out a violation of Sherman Act *§ 1*." *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454-455, 90 L. Ed. 2d 445, 106 S. Ct. 2009 (1986)*. **[****47]** To determine whether that is so, I would not simply ask whether the restraints at issue are anticompetitive overall. Rather, like the Court of Appeals (and the Commission), I would break that question down into four classical, subsidiary antitrust questions: (1) What is the specific restraint at issue? (2) What are its likely anticompetitive effects? (3) Are there offsetting procompetitive justifications? (4) Do the parties have sufficient market power to make a difference?

A

The most important question is the first: What are the specific restraints at issue? See, *e.g., National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U.S. 85, 98-100, 82 L. Ed. 2d 70, 104 S. Ct. 2948 (1984)*

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analysis because their competitive impact is more ambiguous"). But see Klein, A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review, Antitrust 41, 42 (Spring 1990) (examination of procompetitive justifications "is by no means a full scrutiny of the proffered efficiency justification. It is, rather, a hard look at the justification to determine if it meets the defendant's burden of coming forward with -- but not establishing -- a valid efficiency justification").

(NCAA); *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 21-23, 60 L. Ed. 2d 1, 99 S. Ct. 1551 (1979)*. Those restraints do *not* include merely the agreement to which the California Dental Association's (Dental Association or Association) ethical rule literally refers, namely, a promise to refrain from advertising that is "'false or misleading in any material respect.'" *Ante*, at 2 (quoting California Dental **[****48]** Code of Ethics § 10 (1993), App. 33). Instead, the Commission found a set of restraints arising out of the way the Dental Association implemented this innocent-sounding ethical rule in practice, through advisory opinions, guidelines, enforcement policies, and review of membership applications. *In re California Dental Assn., 121 F.T.C. 190 (1996)*. As implemented, the ethical rule reached beyond its nominal target, to prevent truthful and nondeceptive advertising. In particular, the Commission determined that the rule, in practice: **[*783]**

(1) "precluded advertising that characterized a dentist's fees as being low, reasonable, or affordable," Id. at 301.

(2) "precluded advertising . . . of across the board discounts," *ibid.*; and

[1619]**
(3) "prohibited all quality claims," id. at 308.

Whether the Dental Association's basic rule *as implemented* actually restrained the truthful and nondeceptive advertising of low prices, across-the-board discounts, and quality service are questions of fact. The Administrative Law Judge (ALJ) and the Commission may have found those questions difficult ones. But both the ALJ and the Commission ultimately **[****49]** found against the Dental Association in respect to these facts. And the question for us -- whether those agency findings are supported by substantial evidence, see *Indiana Federation, supra, at 454-455* -- is not difficult.

The Court of Appeals referred explicitly to some of the evidence that it found adequate to support the Commission's conclusions. It pointed out, for example, that the Dental Association's "advisory opinions and guidelines indicate that . . . descriptions of prices as 'reasonable' or 'low' do not comply" with the Association's rule; that in "numerous cases" the Association "advised members of objections to special offers, senior citizen discounts, and new patient discounts, apparently without regard **[***959]** to their truth"; and that one advisory opinion "expressly states that claims as to the quality of services are inherently likely to be false or misleading," all "without any particular consideration of whether" such statements were "true or false." *128 F.3d 720, 729 (CA9 1997)*.

The Commission itself had before it far more evidence. It referred to instances in which the Association, without regard for the truthfulness of the **[****50]** statements at issue, recommended denial of membership to dentists wishing to advertise, for example, "reasonable fees quoted in advance," "major savings," or "making teeth cleaning . . . inexpensive." **[*784]** 121 F.T.C. at 301. It referred to testimony that "across-the-board discount advertising in literal compliance with the requirements 'would probably take two pages in the telephone book' and 'nobody is going to really advertise in that fashion.'" 121 F.T.C. at 302. And it pointed to many instances in which the Dental Association suppressed such advertising claims as "we guarantee all dental work for 1 year," "latest in cosmetic dentistry," and "gentle dentistry in a caring environment." 121 F.T.C. at 308-310.

I need not review the evidence further, for this Court has said that "substantial evidence" is a matter for the courts of appeals, and that it "will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." **[****51]** *Universal Camera Corp. v. NLRB, 340 U.S. 474, 490-491, 95 L. Ed. 456, 71 S. Ct. 456 (1951)*. I have said enough to make clear that this is not a case warranting our intervention. Consequently, we must decide only the basic legal question whether the three restraints described above unreasonably restrict competition.

B

Do each of the three restrictions mentioned have "the potential for genuine adverse effects on competition"? *Indiana Federation, 476 U.S. at 460*; 7 P. Areeda, ***Antitrust Law*** P1503a, pp. 372-377 (1986) (hereinafter Areeda). I should have thought that the anticompetitive tendencies of the three restrictions were obvious. An agreement not to advertise that a fee is reasonable, that service is inexpensive, or that a customer will receive a discount makes it more difficult for a dentist to inform customers that he charges a lower price. If the customer does not know about a lower price, he will find it more difficult to buy lower price service. That fact, in turn, makes it less likely that a dentist will obtain more customers by offering lower prices. And that likelihood means that dentists will prove less likely to offer lower prices. **[****52]** But why should I have to spell out the obvious? To **[*785]** restrain truthful advertising about lower prices is likely to restrict competition in respect to price -- "the central nervous system of the economy." *United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n. 59, 84 L. Ed. 1129, 60 S. Ct. 811 (1940)*; cf., *e.g., Bates v. State Bar of Ariz., 433 U.S. 350, 364, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977)* (price advertising plays an "indispensable role in the allocation of resources in a free enterprise system"); *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* ***[**1620]*** *425 U.S. 748, 765, 48 L. Ed. 2d 346, 96 S. Ct. 1817 (1976)*. The Commission thought this fact sufficient to hold (in the alternative) that the price advertising restrictions **[***960]** were unlawful *per se*. See 121 F.T.C. at 307; cf. *Socony-Vacuum, 310 U.S. at 222-228* (finding agreement among competitors to buy "spot-market oil" unlawful *per se* because of its tendency to restrict price competition). For present purposes, I need not decide whether the Commission was right in applying **[****53]** a *per se* rule. I need only assume a rule of reason applies, and note the serious anticompetitive tendencies of the price advertising restraints.

The restrictions on the advertising of service quality also have serious anticompetitive tendencies. This is not a case of "mere puffing," as the FTC recognized. See 121 F.T.C. at 317-318; cf. *ante*, at 21. The days of my youth, when the billboards near Emeryville, California, home of AAA baseball's Oakland Oaks, displayed the name of "Painless" Parker, Dentist, are long gone -- along with the Oakland Oaks. But some parents may still want to know that a particular dentist makes a point of "gentle care." Others may want to know about 1-year dental work guarantees. To restrict that kind of service quality advertisement is to restrict competition over the quality of service itself, for, unless consumers know, they may not purchase, and dentists may not compete to supply that which will make little difference to the demand for their services. That, at any rate, is the theory of the Sherman Act. And it is rather late in the day for anyone to deny the significant anticompetitive tendencies of an agreement that restricts competition **[****54]** in any legitimate respect, see, *e.g.,* **[*786]** *Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43, 75 L. Ed. 145, 51 S. Ct. 42 (1930)*; *United States v. First Nat. Pictures, Inc., 282 U.S. 44, 54-55, 75 L. Ed. 151, 51 S. Ct. 45 (1930)*, let alone one that inhibits customers from learning about the quality of a dentist's service.

Nor did the Commission rely solely on the unobjectionable proposition that a restriction on the ability of dentists to advertise on quality is likely to limit their incentive to compete on quality. Rather, the Commission pointed to record evidence affirmatively establishing that quality-based competition is important to dental consumers in California. 121 F.T.C. at 309-311. Unsurprisingly, these consumers choose dental services based at least in part on "information about the type and quality of service." *Id. at 249*. Similarly, as the Commission noted, the ALJ credited testimony to the effect that "advertising the comfort of services will 'absolutely' bring in more patients," and, conversely, that restraining the ability to advertise based on quality would decrease the number of patients **[****55]** that a dentist could attract. 121 F.T.C. at 310. Finally, the Commission looked to the testimony of dentists who themselves had suffered adverse effects on their business when forced by petitioner to discontinue advertising quality of care. See 121 F.T.C. at 310-311.

The FTC found that the price advertising restrictions amounted to a "naked attempt to eliminate price competition." 121 F. T. C. at 300. It found that the service quality advertising restrictions "deprive consumers of information they value and of healthy competition for their patronage." 121 F.T.C. at 311. It added that the "anticompetitive nature of these restrictions" was "plain." *Ibid.* The Court of Appeals agreed. I do not believe it possible to **[***961]** deny the anticompetitive tendencies I have mentioned.

C

We must also ask whether, despite their anticompetitive tendencies, these restrictions might be justified by other procompetitive tendencies or redeeming virtues. See 7 Areeda, **[*787]** P1504, at 377-383. This is a closer question -- at least in theory. The Dental Association argues that the three relevant restrictions are inextricably tied to **[****56]** a legitimate Association effort to restrict false or misleading advertising. The Association, the argument goes, had to prevent dentists from engaging in the kind of truthful, nondeceptive advertising that it banned in order effectively to stop dentists from making unverifiable claims about price or service quality, which claims would mislead the consumer.

The problem with this or any similar argument is an empirical one. Notwithstanding **[**1621]** its theoretical plausibility, the record does not bear out such a claim. The Commission, which is expert in the area of false and misleading advertising, was uncertain whether petitioner had even *made* the claim. It characterized petitioner's efficiencies argument as rooted in the (unproved) factual assertion that its ethical rule "challenges *only* advertising that is false or misleading." 121 F.T.C. at 316 (emphasis added). Regardless, the Court of Appeals wrote, in respect to the price restrictions, that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing." **[****57]** *128 F.3d at 728*. With respect to quality advertising, the Commission stressed that the Association "offered no convincing argument, let alone evidence, that consumers of dental services have been, or are likely to be, harmed by the broad categories of advertising it restricts." 121 F.T.C. at 319. Nor did the Court of Appeals think that the Association's unsubstantiated contention that "claims about quality are inherently unverifiable and therefore misleading" could "justify banning all quality claims without regard to whether they are, in fact, false or misleading." *128 F.3d at 728*.

With one exception, my own review of the record reveals no significant evidentiary support for the proposition that the Association's members must agree to ban truthful price and quality advertising in order to stop untruthful **[*788]** claims. The one exception is the obvious fact that one can stop untruthful advertising if one prohibits all advertising. But since the Association made virtually no effort to sift the false from the true, see **[****58]** 121 F.T.C. at 316-317, that fact does not make out a valid antitrust defense. See *NCAA*, 468 U.S. at 119; 7 Areeda, P1505, at 383-384.

In the usual Sherman Act *§ 1* case, the defendant bears the burden of establishing a procompetitive justification. See *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 695, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978)*; 7 Areeda, P1507b, at 397; 11 H. Hovenkamp, ***Antitrust Law*** P1914c, pp. 313-315 (1998); see also *Law v. National Collegiate Athletic Assn., 134 F.3d 1010, 1019* (CA10), cert. denied, 525 U.S. __ (1998); *United States v. Brown Univ., 5 F.3d 658, 669 (CA3 1993)*; *Capital Imaging Associates v. Mohawk Valley Medical Associates, Inc., 996 F.2d 537, 543* (CA2), cert. denied, *510 U.S. 947,* ***[***962]*** *126 L. Ed. 2d 337, 114 S. Ct. 388 (1993)*; *Kreuzer v. American Academy of Periodontology, 237 U.S. App. D.C. 43, 735 F.2d 1479, 1492-1495 (CADC 1984)*. And the Court of Appeals was correct when it concluded that no such justification had been established here.

[**59]** D

I shall assume that the Commission must prove one additional circumstance, namely, that the Association's restraints would likely have made a real difference in the marketplace. See 7 Areeda, P1503, at 376-377. The Commission, disagreeing with the ALJ on this single point, found that the Association did possess enough market power to make a difference. In at least one region of California, the mid-Peninsula, its members accounted for more than 90% of the marketplace; on average they accounted for 75%. See 121 F.T.C. at 314. In addition, entry by new dentists into the market place is fairly difficult. Dental education is expensive (leaving graduates of dental school with $ 50,000-$ 100,000 of debt), as is opening a new dentistry office (which costs $ 75,000-$ 100,000). *Id. at 315-316*. And Dental Association members believe membership in the Association is **[*789]** important, valuable, and recognized as such by the public. Id. at 312-313, 315-316.

These facts, in the Court of Appeals' view, were sufficient to show "enough market power to harm competition through [the Association's] standard setting in the area of advertising." **[****60]** *128 F.3d at 730*. And that conclusion is correct. Restrictions on advertising price discounts in Palo Alto may make a difference because potential patients may not respond readily to discount advertising by the handful (10%) of dentists who are not members of the Association. And that fact, in turn, means that the remaining 90% will prove less likely to engage in price competition. Facts such as these have previously led this Court to find market power -- unless the defendant has overcome the showing **[**1622]** with strong contrary evidence. See, *e.g.,* *Indiana Federation, 476 U.S. at 456-457*; cf. *United States v. Loew's Inc., 371 U.S. 38, 45, 9 L. Ed. 2d 11, 83 S. Ct. 97 (1962)*; *Brown Shoe Co. v. United States, 370 U.S. 294, 341-344, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962)*; accord, *United States v. Aluminum Co. of America, 148 F.2d 416, 424 (CA2 1945)*. I can find no reason for departing from that precedent here.

II

In the Court's view, the legal analysis conducted by the Court of Appeals was insufficient, and the Court remands the case for a more thorough application of the rule of reason. **[****61]** But in what way did the Court of Appeals fail? I find the Court's answers to this question unsatisfactory -- when one divides the overall Sherman Act question into its traditional component parts and adheres to traditional judicial practice for allocating the burdens of persuasion in an antitrust case.

Did the Court of Appeals misconceive the anticompetitive tendencies of the restrictions? After all, the object of the rule of reason is to separate those restraints that "may suppress or even destroy competition" from those that "merely regulate and perhaps thereby promote competition." *Board of Trade of Chicago v. United States, 246 U.S. 231, 238,* ***[*790]*** *62 L. Ed. 683, 38 S. Ct. 242 (1918)*. **[***963]** The majority says that the Association's "advertising restrictions might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Ante*, at 14. It adds that

> "advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment as obviously comparable to classic horizontal agreements to limit output or price competition." *Ante*, at 15.

[**62]** And it criticizes the Court of Appeals for failing to recognize that "the restrictions at issue here are very far from a total ban on price or discount advertising" and that "the particular restrictions on professional advertising could have different effects from those 'normally' found in the commercial world, even to the point of promoting competition . . . ." *Ante*, at 16.

The problem with these statements is that the Court of Appeals did consider the relevant differences. It *rejected* the legal "treatment" customarily applied "to classic horizontal agreements to limit output or price competition" -- *i.e.,* the FTC's (alternative) *per se* approach. See *128 F.3d at 726-727*. It did so because the Association's "policies do not, on their face, ban truthful nondeceptive ads"; instead, they "have been enforced in a way that restricts truthful advertising." *128 F.3d at 727*. It added that "the value of restricting false advertising . . . counsels some caution in attacking rules that purport to do so but merely sweep too broadly." *Ibid.*

Did the Court of Appeals misunderstand the nature of an anticompetitive effect? The Court says:

> "If **[****63]** quality advertising actually induces some patients to obtain more care than they would in its absence, then restricting such advertising would reduce the demand for dental services, not the supply; and . . . the producers' supply . . . is normally relevant in determining **[*791]** whether a . . . limitation has the anticompetitive effect of artificially raising prices." *Ante*, at 19.

But if the Court means this statement as an argument against the anticompetitive tendencies that flow from an agreement not to advertise service quality, I believe it is the majority, and not the Court of Appeals, that is mistaken. An agreement not to advertise, say, "gentle care" is anticompetitive because it imposes an artificial barrier against each dentist's independent decision to advertise gentle care. That barrier, in turn, tends to inhibit those dentists who want to supply gentle care from getting together with those customers who want to buy gentle care. See P. Areeda & H. Hovenkamp, ***Antitrust Law*** P1505', p. 404 (Supp. 1998). There is adequate reason to believe that tendency present in this case. See *supra, at 5-6*.

Did the Court of Appeals inadequately consider possible procompetitive **[****64]** justifications? The Court seems to think so, for it says:

> **[**1623]** "The [Association's] rule appears to reflect the prediction that any costs to competition associated with the elimination of across-the-board advertising will be outweighed by gains to consumer information **[***964]** (and hence competition) created by discount advertising that is exact, accurate, and more easily verifiable (at least by regulators)." *Ante*, at 17-18.

That may or may not be an accurate assessment of the Association's motives in adopting its rule, but it is of limited relevance. Cf. *Chicago Board of Trade, supra, at 238*. The basic question is whether this, or some other, theoretically redeeming virtue in fact offsets the restrictions' anticompetitive effects in this case. Both court and Commission adequately answered that question.

The Commission found that the defendant did not make the necessary showing that a redeeming virtue existed in practice. See 121 F.T.C. at 319-320. The Court of Appeals, **[*792]** asking whether the rules, as enforced, "augmented competition and increased market efficiency," found the Commission's conclusion supported **[****65]** by substantial evidence. *128 F.3d at 728*. That is why the court said that "the record provides no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing" -- which is to say that the record provides no evidence that the effects, though anticompetitive, are nonetheless redeemed or justified. *Ibid.*

The majority correctly points out that "petitioner alone would have had the incentive to introduce such evidence" of procompetitive justification. *Ante*, at 18. (Indeed, that is one of the reasons defendants normally bear the burden of persuasion about redeeming virtues. See *supra, at 8*.) But despite this incentive, petitioner's brief in this Court offers nothing concrete to counter the Commission's conclusion that the record does not support the claim of justification. Petitioner's failure to produce such evidence itself "explains why [the lower court] gave no weight to the . . . suggestion that restricting difficult-to-verify claims about quality or patient comfort would have a procompetitive effect by preventing misleading or false claims that distort the market." *Ante*, at 20-21.

With respect to the restraint on **[****66]** advertising across-the-board discounts, the majority summarizes its concerns as follows: "Assuming that the record in fact supports the conclusion that the [Association's] disclosure rules essentially bar advertisement of [such] discounts, it does not obviously follow that such a ban would have a net anticompetitive effect here." *Ante*, at 17. I accept, rather than assume, the premise: The FTC found that the disclosure rules did bar advertisement of across-the-board discounts, and that finding is supported by substantial evidence. See *supra, at 3-4*. And I accept as *literally* true the conclusion that the Court says follows from that premise, namely, that "net anticompetitive effects" do not "*obviously*" follow from that **[*793]** premise. But obviousness is not the point. With respect to any of the three restraints found by the Commission, whether "net anticompetitive effects" follow is a matter of how the Commission, and, here, the Court of Appeals, have answered the questions I laid out at the beginning. See *supra, at 2*. Has the Commission shown that the **[***965]** restriction has anticompetitive tendencies? It has. Has the Association nonetheless shown offsetting **[****67]** virtues? It has not. Has the Commission shown market power sufficient for it to believe that the restrictions will likely make a real world difference? It has.

The upshot, in my view, is that the Court of Appeals, applying ordinary antitrust principles, reached an unexceptional conclusion. It is the same legal conclusion that this Court itself reached in *Indiana Federation* -- a much closer case than this one. There the Court found that an agreement by dentists not to submit dental X rays to insurers violated the rule of reason. The anticompetitive tendency of that agreement was to reduce competition among dentists in respect to their willingness to submit X rays to insurers, see *476 U.S. at 456* -- a matter in respect to which consumers are relatively indifferent, as compared to advertising of price discounts and service quality, the matters at issue here. The redeeming virtue in *Indiana Federation* was the alleged **[**1624]** undesirability of having insurers consider a range of matters when deciding whether treatment was justified -- a virtue no less plausible, and no less proved, than the virtue offered here. See **[****68]** *476 U.S. at 462-464*. The "power" of the dentists to enforce their agreement was no greater than that at issue here (control of 75% to 90% of the relevant markets). See *476 U.S. at 460*. It is difficult to see how the two cases can be reconciled.

* * *

I would note that the form of analysis I have followed is not rigid; it admits of some variation according to the circumstances. The important point, however, is that its allocation **[*794]** of the burdens of persuasion reflects a gradual evolution within the courts over a period of many years. That evolution represents an effort carefully to blend the procompetitive objectives of the law of antitrust with administrative necessity. It represents a considerable advance, both from the days when the Commission had to present and/or refute every possible fact and theory, and from antitrust theories so abbreviated as to prevent proper analysis. The former prevented cases from ever reaching a conclusion, cf. Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 266 (1960), and the latter called forth the criticism that the "Government always wins," **[****69]** *United States v. Von's Grocery Co., 384 U.S. 270, 301, 16 L. Ed. 2d 555, 86 S. Ct. 1478 (1966)* (Stewart, J., dissenting). I hope that this case does not represent an abandonment of that basic, and important, form of analysis.

For these reasons, I respectfully dissent from Part III of the Court's opinion.

References

54A Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices 1160, *1162*, 1233

15 USCS 45

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Competition 103, 115

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices

Annotation References:

Advertising free gifts and representations as to price of goods as unfair method of competition or practice within 5(a) of the Federal Trade Commission Act (*15 USC 45(a)*). *15 L Ed 2d 865*.

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BE&K Constr. Co. v. NLRB

Supreme Court of the United States

April 16, 2002, Argued ; June 24, 2002, Decided

No. 01-518

Reporter

536 U.S. 516 *; 122 S. Ct. 2390 **; 153 L. Ed. 2d 499 ***; 2002 U.S. LEXIS 4653 ****; 70 U.S.L.W. 4647; 146 Lab. Cas. (CCH) P10,037; 170 L.R.R.M. 2225; 2002 Daily Journal DAR 7059; 15 Fla. L. Weekly Fed. S 457

BE & K CONSTRUCTION COMPANY, PETITIONER v. NATIONAL LABOR RELATIONS BOARD ET AL.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BE&K Constr. Co. v. NLRB, 246 F.3d 619, 2001 U.S. App. LEXIS 6013 (6th Cir. 2001)

Disposition: Reversed and remanded.

Core Terms

lawsuit, suits, retaliatory, unsuccessful, motive, baseless, petitioning, antitrust, courts, genuine, retaliation, anti trust law, enjoin, declare, Relations, sham, labor law, state court, Sherman Act, anticompetitive, employees, rights, antitrust immunity, right of petition, attorney's fees, false statement, unmeritorious, join, unfair labor practice, protected activity

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN1[] **Employer Violations, Interference With Protected Activities**

Section 8(a)(1) of the National Labor Relations Act, codified at *29 U.S.C.S. § 158(a)(1)*, prohibits employers from restraining, coercing, or interfering with employees' exercise of rights related to self-organization, collective bargaining, and other concerted activities. *29 U.S.C.S. §§ 157*, *158(a)(1)*.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN2[] **Fundamental Freedoms, Freedom to Petition**

See U.S. Const. amend. I.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > Bill of Rights > General Overview

HN3[] **Fundamental Freedoms, Freedom to Petition**

The United States Supreme Court recognizes the right to petition as one of the most precious of the liberties safeguarded by the Bill of Rights, and the right is implied by the very idea of a government, republican in form.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Constitutional Law > Bill of Rights > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Labor > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN4[] **Scope, Exemptions**

In the antitrust context, the Sherman Act does not prohibit persons from associating in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. The United States Supreme Court would not lightly impute to Congress an intent to invade freedoms protected by the Bill of Rights, such as the right to petition. This antitrust immunity shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose.These antitrust immunity principles extend to situations where groups use courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors. The right to petition extends to all departments of the government, and the right of access to the courts is but one aspect of the right of petition.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Torts > Public Entity Liability > Immunities > Judicial Immunity

HN5[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Antitrust immunity does not extend to illegal and reprehensible practices which may corrupt the judicial process. Antitrust immunity does not extend to lobbying ostensibly directed toward influencing governmental action that is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. Thus, while genuine petitioning is immune from antitrust liability, sham petitioning is not. There is a two-part definition of sham antitrust litigation: first, it must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits; second, the litigant's subjective motivation must conceal an attempt to interfere directly with the business relationships of a competitor through the use of the governmental process -- as opposed to the outcome of that process -- as an anticompetitive weapon. For a suit to violate the antitrust laws, then, it must be a sham both objectively and subjectively.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN6[] **Employer Violations, Interference With Protected Activities**

First Amendment and federalism concerns prevent the filing and prosecution of a well-founded lawsuit from being enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the National Labor Relations Act (NLRA). The National Labor Relations Board may not decide that a suit is baseless by making credibility determinations when genuine issues of material fact or state law exist. In recognition of the sham exception to antitrust immunity, however, a similar course should be followed under the NLRA, and the board can enjoin baseless suits brought with a retaliatory motive.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Torts > ... > Standards of Care > Appropriate Standard > Objectivity

HN7[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

Because of its objective component, the sham litigation standard protects reasonably based petitioning from antitrust liability. Because of its subjective component, it also protects petitioning that is unmotivated by anticompetitive intent, whether it is reasonably based or not.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Scope

HN8[] **Pleadings, Amendment of Pleadings**

The National Labor Relations Board can enjoin baseless retaliatory suits because they fall outside of the *First Amendment* and thus are analogous to "false statements." Just as false statements are not immunized by the *First Amendment* right to freedom of speech, baseless litigation is not immunized by the *First Amendment* right to petition.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN9[] **Employer Violations, Interference With Protected Activities**

In the context of employer-filed lawsuits, retaliatory suits are those filed in retaliation for the exercise of the employees' National Labor Relations Act § 7, codified at *29 U.S.C.S. § 157*, rights.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN10[] **Employer Violations, Interference With Protected Activities**

An employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the National Labor Relations Act.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

HN11[] **Fundamental Freedoms, Freedom to Petition**

As long as a plaintiff's purpose is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > General Overview

HN12[] **Employer Violations, Interference With Protected Activities**

Section 8(a)(1) of the National Labor Relations Act, codified at *29 U.S.C.S. § 158(a)(1)*, prohibits employers from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in *29 U.S.C.S. § 157*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Right to Organize

HN13[] **Collective Bargaining & Labor Relations, Protected Activities**

See *29 U.S.C.S. § 157*.

Labor & Employment Law > Collective Bargaining & Labor Relations > Labor Arbitration > Discipline, Layoffs & Terminations

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN14[] **Labor Arbitration, Discipline, Layoffs & Terminations**

29 U.S.C.S. § 158(a)(2)-(5) generally prohibits employers from interfering with the formation and administration of a union, from discriminating in employment practices based on union membership, from discharging employees who provide testimony or file charges under the National Labor Relations Act, and from refusing to bargain collectively with employee representatives.

Business & Corporate Compliance > ... > Unfair Labor Practices > Employer Violations > Interference With Protected Activities

Labor & Employment Law > Collective Bargaining & Labor Relations > Protected Activities

HN15[] **Employer Violations, Interference With Protected Activities**

29 U.S.C.S. § 158(a)(1) does not reach all reasonably based but unsuccessful suits filed with a retaliatory purpose. Because the National Labor Relations Board's standard for imposing liability under the National Labor Relations Act allows it to penalize such suits, its standard is thus invalid.

Lawyers' Edition Display

Decision

National Labor Relations Board held not permitted to impose liability on employer for filing losing retaliatory lawsuit if employer could show that suit was not objectively baseless.

Summary

Plaintiffs including an employer (1) sued several unions in the United States District Court for the Northern District of California; and (2) initially claimed that the unions' lobbying, litigation, and other concerted activities violated 303 of the Labor-Management Relations Act (*29 USCS 187*), which provided a cause of action for injuries caused by some secondary boycotts. After the District Court granted the unions' motion for summary judgment, the complaint was amended to include a claim alleging an antitrust violation of 1 and 2 of the Sherman Act, as amended (*15 USCS 1* and *2*). The District Court dismissed the amended complaint as re-alleging claims that had already been decided. The plaintiffs filed a second amended complaint, which included the remaining claims, but again re-alleged claims that had already been decided. Eventually, (1) the District Court (a) dismissed the decided claims, and (b) granted summary judgment to the unions on the antitrust claim; (2) the employer dismissed its remaining claims with prejudice; and (3) the United States Court of Appeals for the Ninth Circuit upheld the District Court with respect to the antitrust claim.

Meanwhile, two unions had (1) filed complaints against the employer with the National Labor Relations Board (NLRB); and (2) alleged a violation of 8(a)(1) of the National Labor Relations Act (NLRA) (*29 USCS 158(a)(1)*), which prohibited employers from restraining, coercing, or interfering with employees' exercise of rights guaranteed under 7 of the NLRA (*29 USCS 157*), in relation to organizing, collective bargaining, and other concerted activities.

After the court proceedings ended, the NLRB determined that the employer's federal lawsuit had been unmeritorious because all of the employer's claims had been dismissed or voluntarily withdrawn with prejudice. In addition, the NLRB found that the employer's lawsuit was retaliatory due, for example, to some claims' "utter" lack of merit. The NLRB ordered the employer (1) to cease and desist from prosecuting such lawsuits, (2) to post notices to its employees which would admit that the employer had been found to have violated the NLRA, and (3) to pay the unions' legal fees and expenses incurred in defending the federal suit.

When the employer sought review of the NLRB's decision and the NLRB cross-petitioned for enforcement, the Court of Appeals for the Sixth Circuit upheld the NLRB's decision (*246 F3d 619*).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by O'Connor, J., joined by Rehnquist, Ch. J., and Scalia, Kennedy, and Thomas, JJ., it was held that as a matter of interpreting 8(a)(1) to avoid concerns under the *Federal Constitution's First Amendment* right to petition the government for a redress of grievances, the NLRB was not permitted to impose liability on an employer for filing a losing retaliatory lawsuit if the employer could show that the suit was not objectively baseless, in the sense that the suit was reasonably based but unsuccessful.

Scalia, J., joined by Thomas, J., concurring, (1) expressed the view that in a future case, the Supreme Court would construe the NLRA in the same way as the court had construed the Sherman Act, so as to prohibit only lawsuits that were both objectively baseless and subjectively intended to abuse process; and (2) emphasized that the Supreme Court's opinion in the case at hand did not curtail the validity of common litigation sanctions imposed by the courts themselves.

Breyer, J., joined by Stevens, Souter, and Ginsburg, JJ., concurring in part and concurring in the judgment, expressed the view that (1) the Supreme Court left open other circumstances where a retaliatory motive might be stronger or different than in the case at hand, in which the NLRB seemingly rested its finding on the facts that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the unions; and (2) while the NLRB could not halt the prosecution of an employer's lawsuit unless that suit lacked an objectively reasonable basis, the NLRB could properly adjudicate unfair-labor-practice complaints where an employer brought an unmeritorious retaliation suit and lost.

Headnotes

LABOR §95 > -- losing retaliatory suit by employer -- authority of NLRB > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]***LEdHN[1G]***[] [1G]

As a matter of interpreting 8(a)(1) of the National Labor Relations Act (NLRA) (*29 USCS 158(a)(1)*)--which prohibited employers from restraining, coercing, or interfering with employees' exercise of rights guaranteed under 7 of the NLRA (*29 USCS 157*), in relation to organizing, collective bargaining, and other concerted activities--in order to avoid concerns under the *Federal Constitution's First Amendment* right to petition the government for a redress of grievances, the National Labor Relations Board (NLRB) was not permitted to impose liability on an employer for filing a losing retaliatory lawsuit if the employer could show that the suit was not objectively baseless, in the sense that the suit was reasonably based but unsuccessful. Because there was nothing in the statutory text which indicated that 8(a)(1) had to be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, the United States Supreme Court declined to do so. Moreover, because the NLRB's standard for imposing liability under the NLRA allowed the NLRB to penalize such suits, the NLRB's standard was thus invalid. (Breyer, Stevens, Souter, and Ginsburg, JJ., dissented in part from this holding.)

LABOR §97 > RESTRAINTS OF TRADE MONOPOLIES UNFAIR TRADE PRACTICES §9.5 > -- liability for sham litigation > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

While genuine petitioning before the courts is immune from antitrust liability--in order to avoid concerns under the *Federal Constitution's First Amendment* right to petition the government for a redress of grievances--sham petitioning is not so immune. For a suit to violate the antitrust laws, the suit must be a sham both objectively and subjectively. The sham-litigation standard developed by the courts under the Sherman Act (*15 USCS 1 et seq.*) protects (1) reasonably based petitioning from antitrust liability, because of the standard's objective component; and (2) petitioning that is unmotivated by anticompetitive intent, because of the standard's subjective component. An employer's retaliatory suit in a labor context raises the same underlying issue of when litigation may be found to violate federal law, but with respect to the National Labor Relations Act (NLRA) (*29 USCS 151 et seq.*) rather than the Sherman Act. While the threat of an antitrust suit may pose a greater burden on petitioning than the threat of an NLRA adjudication, this does not mean the burdens posed by the NLRA raise no *First Amendment* concerns.

CONSTITUTIONAL LAW §974 > STATUTES §107.5 > -- right to petition -- unsuccessful retaliatory lawsuit -- difficult question > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]***LEdHN[3D]***[] [3D]***LEdHN[3E]***[] [3E]***LEdHN[3F]***[] [3F]***LEdHN[3G]***[] [3G]***LEdHN[3H]***[] [3H]***LEdHN[3I]***[] [3I]

For purposes of determining whether the National Labor Relations Board (NLRB) could properly declare that an employer's unsuccessful retaliatory lawsuit violated the National Labor Relations Act (NLRA) (*29 USCS 151 et seq.*) even if the suit was reasonably based, the question whether this class of suits fell outside the scope of the *Federal Constitution's First Amendment* right to petition the government for a redress of grievances, at the least, presented a difficult constitutional question, as:

(1) A suggested analogy to other areas of *First Amendment* law--on the theory that (a) the *First Amendment* historically provided greater protection from prior restraints than after-the-fact penalties, and (b) enjoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning--at most suggested that injunctions might raise greater *First Amendment* concerns, not that after-the-fact penalties raised no concerns.

(2) The fact that certain baseless suits could be enjoined told little about the propriety of imposing penalties on various classes of nonbaseless suits.

(3) Another suggested analogy--on the theory that false statements were not immunized by the *First Amendment* right to free speech--was helpful, but did not (a) suggest that the class of baseless litigation was completely unprotected, or (b) directly extend to suits that were unsuccessful but reasonably based.

(4) The *First Amendment's* text did not speak in terms of successful petitioning.

(5) Even unsuccessful but reasonably based suits advanced some *First Amendment* interests, for (a) such suits, like successful suits, allowed the public airing of disputed facts and raised matters of public concern; (b) such suits also promoted the evolution of the law, by supporting the development of legal theories that might not gain

acceptance the first time around; and (c) the ability to prosecute lawfully even unsuccessful suits added legitimacy to the court system as a designated alternative to force.

(6) The *First Amendment* question was not made significantly easier by the NLRB's retaliatory-motive limitation, since that limitation failed to exclude a substantial amount of petitioning that was objectively and subjectively genuine, for (a) the NLRB's view was that a retaliatory suit was one brought with a motive to interfere with the exercise of protected rights established by 7 of the NLRA (*29 USCS 157*); and (b) while disputes between adverse parties might generate such ill will that recourse to the courts became the only legal and practical means to resolve the situation, petitioning was genuine both objectively and subjectively, as long as a plaintiff's purpose was to stop conduct which the plaintiff reasonably believed was illegal.

LABOR §95 > -- losing retaliatory suit by employer -- authority of NLRB > Headnote:
LEdHN[4][] [4]

In a case where a National Labor Relations Board (NLRB) determination that an employer's lawsuit against some unions violated the National Labor Relations Act (NLRA) (*29 USCS 151 et seq.*) resulted in an order requiring the employer to post certain notices, to refrain from filing similar suits, and to pay the unions' attorneys' fees, the threshold question was whether the NLRB could properly declare that an employer's unsuccessful retaliatory lawsuit violated the NLRA even if the suit was reasonably based, for:

(1) If the NLRB was permitted to do so, then the resulting finding of illegality would be a burden by itself.

(2) A finding that the NLRB had the authority to impose any liability under such circumstances posed a threat of reputational harm that was different and additional to any burden posed by other penalties, such as a fee award.

APPEAL §1750.6 > -- what questions decided -- civil case > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]***LEdHN[5C]***[] [5C]

On certiorari in a case where a National Labor Relations Board (NLRB) determination that an employer's lawsuit against some unions violated the National Labor Relations Act (NLRA) (*29 USCS 151 et seq.*) resulted in an order requiring the employer to post certain notices, to refrain from filing similar suits, and to pay the unions' attorneys' fees, the United States Supreme Court--in holding that the NLRB was not permitted to impose liability on an employer for filing a losing retaliatory lawsuit if the employer could show that the suit was not objectively baseless, in the sense that the suit was reasonably based but unsuccessful--did not need to decide whether the NLRB would otherwise have authority to award attorneys' fees, because the Supreme Court could resolve the case by looking only at the finding of illegality. Moreover, the Supreme Court did not decide:

(1) Whether objectively baseless litigation required any "breathing room" protection under the *Federal Constitution's First Amendment* right to petition the government for a redress of grievances, where the Supreme Court was dealing with a class of reasonably based but unsuccessful lawsuits.

(2) Whether the NLRB was permitted to declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA-protected activity, since the NLRB's standard did not confine itself to such suits.

(3) What the Supreme Court, in a prior case, might have meant by "retaliation."

(Breyer, Stevens, Souter, and Ginsburg, JJ., dissented in part from this holding.)

CONSTITUTIONAL LAW §927 > -- false speech > Headnote:
LEdHN[6][] [6]

While false statements may be unprotected, under the *Federal Constitution's First Amendment*, for the statements' own sake, the *First Amendment* requires that the United States Supreme Court protect some falsehood in order to protect speech that matters.

CONSTITUTIONAL LAW §948 > -- defamation -- public official > Headnote:
LEdHN[7A][] [7A]**LEdHN[7B]**[] [7B]

Under the *Federal Constitution's First Amendment* freedoms of speech and press, an example of "breathing space" protection is the requirement that a public official seeking compensatory damages for defamation must prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity. Also, this requirement is imposed even though it may indirectly shield much speech concealing ill motives.

APPEAL §1750.6 > -- what was concluded -- civil case > Headnote:
LEdHN[8][] [8]

Nothing in a holding of the United States Supreme Court on certiorari--that the National Labor Relations Board lacked the authority to impose liability on employers for filing reasonably based, but unsuccessful, retaliatory lawsuits--ought to be read to question the validity of common litigation sanctions imposed by courts themselves, such as those authorized under *Rule 11 of the Federal Rules of Civil Procedure*, or the validity of statutory provisions that merely authorized the imposition of attorneys' fees on a losing plaintiff.

Syllabus

Petitioner, who had a contract to modernize a steel mill, and the mill owner filed a federal lawsuit against respondent unions, claiming that the unions had engaged in lobbying, litigation, and other concerted activities in order to delay the project because petitioner had nonunion employees. Ultimately, petitioner lost on or withdrew each of its claims. In the meantime, two unions lodged complaints against petitioner with respondent National Labor Relations Board (Board). After the federal court proceedings ended, the Board's general counsel issued an administrative complaint, alleging that petitioner, by filing and maintaining **[****2]** its lawsuit, had violated § 8(a)(1) of the National Labor Relations Act (NLRA), which prohibits employers from restraining, coercing, or interfering with employees' exercise of rights related to self-organization, collective bargaining, and other concerted activities. *29 U.S.C. §§ 157*, *158(a)(1)*. The Board ruled in the general counsel's favor, finding that the lawsuit was unmeritorious because its claims were dismissed or voluntarily withdrawn with prejudice, and that it was filed to retaliate against the unions, whose conduct was protected under the NLRA. It ordered petitioner to cease and desist from prosecuting such suits, to post notice to its employees acknowledging the Board's finding and promising not to pursue such litigation in the future, and to pay the unions' legal fees and expenses incurred in the lawsuit. The Sixth Circuit granted the Board's enforcement petition. Relying on *Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S.*

731, 747, 76 L. Ed. 2d 277, 103 S. Ct. 2161, it held that because the Judiciary had already found petitioner's claims against the unions unmeritorious or dismissed, evidence of a simple retaliatory motive sufficed to adjudge petitioner of **[****3]** committing an unfair labor practice. It also rejected petitioner's argument that under Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920, only baseless or sham suits can restrict the otherwise unfettered right to seek court resolution of differences, finding that case inapplicable because its immunity standard was established in the antitrust context.

Held: The Board's standard for imposing liability is invalid. Pp. 6-19.

(a) The right to petition is one of the most precious liberties safeguarded by the Bill of Rights. This Court has considered that right when interpreting federal law, recognizing in the antitrust context, for example, that genuine petitioning is immune from liability, but sham petitioning is not. The two-part definition adopted in *Professional Real Estate Investors* requires that sham antitrust litigation must be objectively baseless such that no reasonable litigant could realistically expect success on the merits, and that the litigant's subjective motivation must conceal an attempt to interfere directly with a competitor's business relationship through the use of the governmental process **[****4]** as an anticompetitive weapon. 508 U.S., at 60-61. This suit raises the same underlying issue of when litigation may be found to violate federal law, but with respect to the NLRA. Recognizing the connection, the Court has previously decided that the Board can enjoin lawsuits by analogizing to the antitrust context, holding that the Board could enjoin ongoing baseless suits brought with a retaliatory motive. Here, however, the issue is the standard for declaring completed suits unlawful. In *Bill Johnson's,* the Court addressed that issue in dicta, noting a standard which would allow the Board to declare that a lost or withdrawn suit violated the NLRA if it was retaliatory. However, at issue in *Bill Johnson's* were ongoing suits, and the Court did not consider the precise scope of the term "retaliation." Although its statements regarding completed litigation were intended to guide further proceedings, the Court did not expressly order the Board to adhere to its prior unlawfulness finding under the stated standard. Exercising its customary refusal to be bound by dicta, the Court turns to the question presented. Pp. 6-10.

(b) Because of its objective component, **[****5]** *Professional Real Estate Investors'* sham litigation standard protects reasonably based petitioning from antitrust liability; because of its subjective component, it also protects petitioning that is unmotivated by anticompetitive intent, whether it is reasonably based or not. The Board argues that the broad immunity necessary in the antitrust context, with, *e.g.,* its treble damages remedy and privately initiated lawsuits, is unnecessary in the labor law context where, *e.g.,* most adjudication cannot be launched solely by private action and the Board cannot issue punitive remedies. At most, those arguments show that the NLRA poses less of a burden on petitioning, not that its burdens raise no First Amendment concerns. If the Board may declare that a reasonably based, but unsuccessful, retaliatory lawsuit violates the NLRA, the resulting illegality finding is a burden by itself. The finding also poses a threat of reputational harm that is different and additional to any burden imposed by other penalties. Having identified this burden, the Court must examine the petitioning activity it affects. The *Bill Johnson's* Court said that the Board could enjoin baseless retaliatory **[****6]** suits because they fell outside the First Amendment and thus were analogous to "false statements." 461 U.S., at 743. At issue here, however, is a class of reasonably based but unsuccessful lawsuits. Whether this class falls outside the Petition Clause at least presents a difficult constitutional question, given the following considerations. First, even though all lawsuits in this class are unsuccessful, the class includes suits involving genuine grievances because genuineness does not turn on whether the grievance succeeds. Second, even unsuccessful but reasonably based suits advance some First Amendment interests. Finally, the analogy of baseless suits to false statements does not directly extend to suits that are unsuccessful but reasonably based. Because the Board confines its penalties to unsuccessful suits brought with a retaliatory motive, this Court must also consider the significance of that particular limitation, which is fairly included within the question presented. Pp. 10-15.

(c) The Board's definition of a retaliatory suit as one brought with a motive to interfere with the exercise of protected NLRA § 7 rights covers a substantial amount of genuine petitioning. **[****7]** For example, an employer's suit to stop what the employer reasonably believes is illegal union conduct may interfere with or deter some employees' exercise of NLRA rights. But if the employer's motive still reflects a subjectively genuine desire to test the conduct's legality, then declaring the suit illegal affects genuine petitioning. The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. Yet ill will is not uncommon in litigation, and this Court, in other First

Amendment contexts, has found it problematic to regulate some demonstrably false expression based on the presence of ill will. Thus, the difficult constitutional question is not made significantly easier by the Board's retaliatory motive limitation. The final question is whether in light of the NLRA's important goals, the Board may nevertheless burden an unsuccessful but reasonably based suit that was brought with a retaliatory purpose. While the speech burdens are different here than in the antitrust context, the Court is still faced with the difficult constitutional question whether a class of petitioning may be declared unlawful when a substantial portion is subjectively and objectively **[****8]** genuine. This Court avoided a similarly difficult First Amendment issue in Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392, by adopting a limiting construction of the relevant NLRA provision. Section 158(a)(1)'s prohibition on interfering, restraining, or coercing is facially as broad as the prohibition in *DeBartolo,* and it need not be read so broadly as to reach the entire class of cases the Board has deemed retaliatory. Because nothing in § 158(a)(1)'s text indicates that it must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, the Court declines to do so. And because the Board's standard for imposing NLRA liability allows it to penalize such suits, its standard is invalid. Pp. 15-19.

246 F.3d 619, reversed and remanded.

Counsel: Maurice Baskin argued the cause for petitioner.

Lawrence G. Wallace argued the cause for respondents.

Judges: O'CONNOR, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and SCALIA, KENNEDY, and THOMAS, JJ., joined. SCALIA, J., filed a concurring opinion, in which THOMAS, J., joined. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which STEVENS, SOUTER, and GINSBURG, JJ., joined. **[****9]**

Opinion by: O'CONNOR

Opinion

[2393]** **[***507]** **[*519]** *JUSTICE O'CONNOR* delivered the opinion of the Court.

LEdHN[1A][] [1A]Petitioner sued respondent unions, claiming that their lobbying, litigation, and other concerted activities violated federal labor law and ***antitrust law***. After petitioner lost on or withdrew each of its claims, the National Labor Relations Board decided petitioner had violated federal labor law by prosecuting an unsuccessful suit with a retaliatory motive. The Court of Appeals affirmed. Because we find the Board **[*520]** lacked authority to assess liability using this standard, we reverse and remand.

I

Petitioner, an industrial general contractor, received a contract to modernize a California steel mill near the beginning of 1987. 246 F.3d 619, 621 (CA6 2001). According to petitioner, various unions attempted to delay the project because petitioner's employees were nonunion. *Ibid*. That September, petitioner and the mill operator filed suit against those unions in the District Court for the Northern District of California. App. to Pet. for Cert. 33a. The suit was based on the following basic allegations: First, the unions had lobbied for adoption and enforcement of an emissions standard, despite having **[****10]** no real concern the project would harm the environment. 246 F.3d at 621. Second, the unions had handbilled and picketed at petitioner's site -- and also encouraged strikes among the employees of petitioner's subcontractors -- without revealing reasons for their disagreement. *Ibid.* **[***508]** Third, to delay the construction project and raise costs, the unions had filed an action in state court alleging violations of California's Health and Safety Code. Id., at 621-622. Finally, the unions had launched grievance proceedings against petitioner's joint venture partner based on inapplicable collective bargaining agreements. Id., at 622.

Initially, petitioner and the mill operator sought damages under § 303 of the Labor-Management Relations Act, 1947 (LMRA), 61 Stat. 158, as amended, *29 U.S.C. § 187*, which provides a cause of action against labor organizations for injuries caused by secondary boycotts prohibited under *§ 158(b)(4)*. *246 F.3d at 622*. But after the District Court granted the unions' motion for summary judgment on the plaintiffs' lobbying- and grievance-related claims, the plaintiffs amended their **[****11]** complaint to allege that the unions' activities violated *§§ 1* and *2* of the Sherman Act, 26 Stat. 209, as amended, *15 U.S.C. §§ 1-2*, **[**2394]** which prohibit certain agreements **[*521]** in restraint of trade, monopolization, and attempts to monopolize. *246 F.3d at 622*. The District Court dismissed the amended complaint, however, because it realleged claims that had already been decided. *Id., at 622-623*. The District Court also dismissed the plaintiffs' claim regarding the unions' state court lawsuit since the plaintiffs had no evidence that the suit was not reasonably based and because two unions that the plaintiffs sued were never parties to that state court action. *Id., at 623*.

The plaintiffs filed a second amended complaint. It included their remaining claims but again realleged claims that had already been decided. *Ibid.*; App. 32-33. The District Court dismissed the decided claims and imposed sanctions on the plaintiffs under *Federal Rule of Civil Procedure 11*. *246 F.3d at 623*. At that point, the mill operator dismissed its remaining claims with prejudice. *Ibid.* The District Court then granted summary judgment **[****12]** to the unions on petitioner's antitrust claim once petitioner was unable to show the unions had formed a combination with nonlabor entities for an illegitimate purpose. *Ibid*. Petitioner dismissed its remaining claims and appealed. *Id., at 623-624*.

The United States Court of Appeals for the Ninth Circuit affirmed the dismissal of petitioner's antitrust claim. It held that the District Court erred in requiring petitioner to prove that the unions combined with nonlabor entities for an illegitimate purpose, but found the error harmless since the unions had antitrust immunity when lobbying officials or petitioning courts and agencies, unless the activity was a sham. *USS-POSCO Indus. v. Contra Costa County Bldg. & Const. Trades Council, 31 F.3d 800, 810 (CA9 1994)*. Petitioner did not argue that the unions' litigation activity had been objectively baseless, but maintained that "the unions had engaged in a pattern of *automatic* petitioning of governmental bodies . . . *without regard* to . . . the merits of said petitions." *Ibid.* (internal quotation marks omitted; emphasis added). The Ninth Circuit allowed that **[*522]** petitioner's **[****13]** claim, if proved, could overcome the unions' antitrust immunity, but rejected it nonetheless because "fifteen of the twenty-nine [actions filed by the unions] . . . have proven successful. The fact that more than half of all the actions . . . turn out **[***509]** to have merit cannot be reconciled with the charge that the unions were filing [them] willy-nilly without regard to success." *Id., at 811* (footnote omitted).

The Ninth Circuit reversed the District Court's award of *Rule 11* sanctions, however, after petitioner explained that it had realleged decided claims based on Circuit precedent suggesting that doing so was necessary to preserve them on appeal. *Ibid.* Although the Ninth Circuit decided that rule did not apply to amended complaints following summary judgment, it held that petitioner's view was not frivolous and that its counsel could not be blamed for "erring on the side of caution." *Id., at 812*.

In the meantime, two unions had lodged complaints against petitioner with theNational Labor Relations Board (Board), 246 F.3d at 624, and after the federal proceedings ended, the Board's general counsel issued an administrative complaint **[****14]** against petitioner, alleging that it had violated § 8(a)(1) of the National Labor Relations Act (NLRA), 49 Stat. 452, as amended, *29 U.S.C. § 158(a)(1)*, by filing and maintaining the federal lawsuit. App. to Pet. for Cert. 29a. ***HN1***[] Section 8(a)(1) prohibits employers from restraining, coercing, or interfering with employees' exercise of rights related to self-organization, collective bargaining, and other concerted activities. *29 U.S.C. §§ 157*, *158(a)(1)*.

A three-member panel of the Board addressed cross-motions for summary judgment and ruled in favor of the general counsel. The panel determined that petitioner's federal lawsuit had been unmeritorious because all of petitioner's claims were dismissed or voluntarily withdrawn **[**2395]** with prejudice. App. to Pet. for Cert. 30a, 47a, 49a. The panel then examined whether petitioner's suit had been filed to retaliate against the unions for engaging in activities protected under **[*523]** the NLRA. The panel first concluded that the unions' conduct was protected activity, *id., at 50*a-59a, and then decided that petitioner's lawsuit had been unlawfully motivated because it was "directed at protected conduct" and **[****15]** "necessarily tended to discourage similar protected activity," and because petitioner admitted it had filed suit "'to stop certain union conduct which it believed to be unprotected.'" *Id., at 59*a-60a. The panel found additional evidence of retaliatory motive because petitioner had sued some unions that were not parties to the state court lawsuit. *Id., at 60*a. The panel also found evidence of retaliatory motive because petitioner's LMRA claims had an "utter absence of merit" and had been dismissed on summary judgment. *Id., at 61*a. After determining that petitioner's suit had violated the NLRA because it was unsuccessful and retaliatory, the panel ordered petitioner to cease and desist from prosecuting such suits and to post notice to its employees admitting it had been found to have violated the NLRA and promising not to pursue such litigation in the future. *Id., at 65*a-67a. The panel also ordered petitioner to pay the unions' legal fees and expenses incurred in defense of the federal suit. *Id., at 65*a.

Petitioner sought review of the Board's decision in the United States Court of Appeals for the Sixth Circuit, and the Board cross-petitioned for enforcement of its **[****16]** order. The **[***510]** Sixth Circuit granted the Board's petition. Relying on *Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 747, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983)*, the Sixth Circuit held that "because the judicial branch of government had already determined that [petitioner's] claims against the unions were unmeritorious or dismissed, evidence of a simple retaliatory motive . . . sufficed to adjudge [petitioner] of committing an unfair labor practice." *246 F.3d at 628*. The court rejected petitioner's argument that under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*, "only baseless or 'sham' suits serve to restrict the otherwise unfettered right to seek court resolution of differences." **[*524]** *246 F.3d at 629*. Instead, the court decided *Professional Real Estate Investors* was inapplicable because its immunity standard had been established in the antitrust context without reference to any standard for determining if completed litigation violates the *NLRA. 246 F.3d at 629*. The Sixth Circuit found that substantial evidence supported the Board's inference of retaliatory motive because **[****17]** petitioner had filed an unmeritorious suit, realleged previously decided claims, sought treble damages on its antitrust claim, and sought damages from unions not parties to the state court suit. *Id., at 629-631*. The court also upheld the Board's award of attorney's fees. *Id., at 632*.

LEdHN[1B][] [1B]Petitioner sought review of the Sixth Circuit's judgment by a petition for certiorari that raised four separate questions. We granted certiorari on the following rephrased question:

"Did the Court of Appeals err in holding that under *Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983)*, the NLRB may impose liability on an employer for filing a losing retaliatory lawsuit, even if the employer could show the suit was not objectively baseless under *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*?" *534 U.S. 1074, 151 L. Ed. 2d 689, 122 S. Ct. 803 (2002)*.

We now reverse the judgment of the Sixth Circuit and remand.

II

LEdHN[2A][] [2A]The *First Amendment* provides, in relevant part, that ***HN2***[] "Congress shall make no law . . . abridging . . . the right of the **[**2396]** people . . . to petition the Government for a redress of **[****18]** grievances." ***HN3***[] We have recognized this right to petition as one of "the most precious of the liberties safeguarded by the *Bill of Rights*," *United Mine Workers v. Illinois Bar Ass'n, 389 U.S. 217, 222 (1967)*, and have explained that the right is implied **[*525]** by "the very idea of a government, republican in form," *United States v. Cruikshank, 92 U.S. 542, 552, 23 L. Ed. 588 (1876)*.

We have also considered the right to petition when interpreting federal law. ***HN4***[] In the antitrust context, for example, we held that "the Sherman Act does not prohibit . . . persons from associating . . . in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 136,* [***511] 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961). We based our interpretation in part on the principle that we would not "lightly impute to Congress an intent to invade . . . freedoms" protected by the Bill of Rights, such as the right to petition. Id., at 138. We later made clear that this antitrust immunity "shields from the Sherman Act a concerted effort to influence **[****19]** public officials regardless of intent or purpose." Mine Workers v. Pennington, 381 U.S. 657, 670, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965).

These antitrust immunity principles were then extended to situations where groups "use . . . *courts* to advocate their causes and points of view respecting resolution of their business and economic interests *vis-a-vis* their competitors." California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 511, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972) (emphasis added). We thus made explicit that "the right to petition extends to all departments of the Government," and that "the right of access to the courts is . . . but one aspect of the right of petition." Id., at 510.

Even then, however, we emphasized that **HN5**[] such immunity did not extend to "illegal and reprehensible practices which may corrupt the . . . judicial process," id., at 513, hearkening back to an earlier statement that antitrust immunity would not extend to lobbying "ostensibly directed toward influencing governmental action [that] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." **[****20]** Noerr, supra, 365 U.S.at 144. This line of cases thus establishes that while **[*526]** genuine petitioning is immune from antitrust liability, sham petitioning is not.

In *Professional Real Estate Investors,* we adopted a two-part definition of sham antitrust litigation: first, it "must be objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; second, the litigant's subjective motivation must "conceal an attempt to interfere *directly with the business relationships of a competitor . . . through the use [of] the governmental process* -- as opposed to the *outcome* of that process -- as an anticompetitive weapon." 508 U.S., at 60-61 (internal quotation marks omitted; emphasis in original). For a suit to violate the antitrust laws, then, it must be a sham *both* objectively and subjectively.

This case raises the same underlying issue of when litigation may be found to violate federal law, but this time with respect to the NLRA rather than the Sherman Act. Recognizing this underlying connection, we previously decided whether the Board could enjoin state court lawsuits by analogizing to the antitrust context. **[****21]** In *Bill Johnson's,* a restaurant owner had filed a state court lawsuit against individuals who picketed its restaurant after a waitress was fired. 461 U.S., at 733-734. The owner alleged that the picketing was harassing and dangerous and that a leaflet distributed by the picketers was libelous. Id., at 734. **[**2397]** The waitress filed a charge with the Board claiming the suit had been filed in retaliation for participation in protected activities. Id., at 735. **[***512]** The Administrative Law Judge (ALJ) decided that the owner's suit lacked a reasonable basis and was intended to penalize protected activity based on his assessment of the evidence and its credibility. Id., at 736, 744. The Board upheld this determination and ordered the owner to withdraw its suit and pay the defendants' legal expenses. Id., at 737. The Court of Appeals enforced the order. *Ibid*.

We vacated the judgment, however, holding that **HN6**[] First Amendment and federalism concerns prevented "the filing **[*527]** and prosecution of a well-founded lawsuit" from being "enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's **[****22]** desire to retaliate against the defendant for exercising rights protected by the [NLRA]." Id., at 737, 743. We also held that the Board may not decide that a suit is baseless by making credibility determinations, as the ALJ had done, when genuine issues of material fact or state law exist. Id., at 745, 746-747. In recognition of our sham exception to antitrust immunity, however, we reasoned that "we should follow a similar course under the NLRA" and held that the Board could enjoin baseless suits brought with a retaliatory motive, id., at 744 (citing California Motor Transport, supra), and then remanded for further proceedings, 461 U.S., at 749.

LEdHN[3A][] [3A]At issue today is not the standard for enjoining ongoing suits but the standard for declaring completed suits unlawful. In *Bill Johnson's,* we remarked in dicta about that situation:

"If judgment goes against the employer in the state court, . . . or if his suit is withdrawn or is otherwise shown to be without merit, the employer has had its day in court, the interest of the State in providing a forum for its citizens has been vindicated, and the Board may **[****23]** then proceed to adjudicate the . . . unfair labor practice case. The employer's suit having proved unmeritorious, the Board would be warranted in taking that fact into account in determining whether the suit had been filed in retaliation for the exercise of the employees' [NLRA] § 7 rights. If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses. It may also order any other proper relief that would effectuate the policies of the [NLRA]." *Id., at 747*.

Under this standard, the Board could declare that a lost or withdrawn suit violated the NLRA if it was retaliatory. In **[*528]** *Bill Johnson's*, however, the issue before the Court was whether the Board could enjoin an ongoing state lawsuit without finding that the suit lacked a reasonable basis in law or fact. *Id., at 733*. To resolve that issue, we had no actual need to decide whether the Board could declare unlawful reasonably based suits that were ultimately unsuccessful. Indeed, the Board had yet to declare such a suit unlawful: It had attempted to enjoin an *un*completed suit that it had declared **[****24]** *baseless*. *Id., at 736-737*. Nor did we have occasion to **[***513]** consider the precise scope of the term "retaliation." See *infra*, at 15, 19.

Moreover, although our statements regarding completed litigation were intended to guide further proceedings, we did not expressly order the Board to adhere to its prior finding of unlawfulness under the standard we stated. See *461 U.S., at 749-750, n. 15* ("On remand the Board *may* reinstate its finding that petitioner acted unlawfully . . . *if* the Board adheres to its previous finding that the suit was filed for a retaliatory purpose" (emphasis added)). Thus, exercising our "customary refusal to be bound by dicta," **[**2398]** *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 24, 130 L. Ed. 2d 233, 115 S. Ct. 386 (1994)*, we turn to the question presented.

III

LEdHN[2B][] [2B]***HN7***[] Because of its objective component, the sham litigation standard in *Professional Real Estate Investors* protects reasonably based petitioning from antitrust liability. Because of its subjective component, it also protects petitioning that is unmotivated by anticompetitive intent, whether it is reasonably based or not. The Board admits such broad immunity is **[****25]** justified in the antitrust context because it properly "balances the risk of anticompetitive lawsuits against the chilling effect" on *First Amendment* petitioning that might be caused by "the treble-damages remedy and other distinct features of antitrust litigation," such as the fact that antitrust claims may be privately initiated and may impose high **[*529]** discovery costs. Brief for Respondent NLRB 40-41. According to the Board, however, such broad protection is unnecessary in the labor law context because, outside of the LMRA, enforcement of the NLRA requires the Board's general counsel to first authorize the issuance of an administrative complaint; thus, an adjudication cannot be launched solely by private action. See *29 U.S.C. § 153(d)*; *NLRB v. Food & Commercial Workers, 484 U.S. 112, 118, 98 L. Ed. 2d 429, 108 S. Ct. 413 (1987)*. Nor can the Board issue punitive remedies, see *Republic Steel Corp. v. NLRB, 311 U.S. 7, 10, 85 L. Ed. 6, 61 S. Ct. 77 (1940)*, and instead is limited to restoring the previolation status quo, see *id., at 12-13*; *NLRB v. J. H. Rutter-Rex Mfg. Co., 396 U.S. 258, 265, 24 L. Ed. 2d 405, 90 S. Ct. 417 (1969)*. The Board also allows "little prehearing **[****26]** discovery." *NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 236, 57 L. Ed. 2d 159, 98 S. Ct. 2311 (1978)*.

At most, however, these arguments demonstrate that the threat of an antitrust suit may pose a *greater* burden on petitioning than the threat of an NLRA adjudication. This does not mean the burdens posed by the NLRA raise no *First Amendment* concerns. To determine if they do, we must first isolate those burdens.

LEdHN[1C][] [1C]***LEdHN[3B]***[] [3B]***LEdHN[4]***[] [4]***LEdHN[5A]***[] [5A]Here, the Board's determination that petitioner's lawsuit violated the NLRA resulted in an order requiring petitioner to post certain notices, refrain from filing similar suits, and pay the unions' attorney's fees. Petitioner did not challenge below the Board's authority to impose the notice and injunction penalties upon a finding of illegality, but did challenge the Board's authority to award attorney's fees, albeit unsuccessfully. *246 F.3d at 631-632*.Although petitioner **[***514]** sought review of the fee issue, Pet. for Cert. i, we did not grant certiorari on that specific question, instead asking the parties to address whether the Board may impose liability for a retaliatory lawsuit that was unsuccessful even if it was not objectively baseless. *534 U.S. 1074 (2002)*. **[****27]**

As we see it, a threshold question here is whether the Board may declare that an unsuccessful retaliatory lawsuit **[*530]** violates the NLRA even if reasonably based. If it may, the resulting finding of illegality is a burden by itself. In addition to a declaration of illegality and whatever legal consequences flow from that, the finding also poses the threat of reputational harm that is different and additional to any burden posed by other penalties, such as a fee award. Because we can resolve this case by looking only at the finding of illegality, we need not decide whether the Board otherwise has authority to award attorney's fees when a suit is found to violate the NLRA.

LEdHN[3C][] [3C]Having identified this burden, we must examine the petitioning activity it affects. In *Bill Johnson's*, we held that the Board may not enjoin reasonably based state court lawsuits in part because of *First Amendment* concerns. *461 U.S., at 742-743*.We implied those **[**2399]** concerns are no longer present when a suit ends because "the employer has had its day in court." *Id., at 747*. By analogy to other areas of *First Amendment* law, one might assume that any concerns related to the right to petition **[****28]** must be greater when enjoining ongoing litigation than when penalizing completed litigation. After all, the *First Amendment* historically provides greater protection from prior restraints than after-the-fact penalties, see *Alexander v. United States, 509 U.S. 544, 553-554, 125 L. Ed. 2d 441, 113 S. Ct. 2766 (1993)*, and enjoining a lawsuit could be characterized as a prior restraint, whereas declaring a completed lawsuit unlawful could be characterized as an after-the-fact penalty on petitioning. But this analogy at most suggests that injunctions may raise greater *First Amendment* concerns, not that after-the-fact penalties raise no concerns. Likewise, the fact that *Bill Johnson's* allowed certain *baseless* suits to be enjoined tells little about the propriety of imposing penalties on various classes of *nonbaseless* suits.

LEdHN[3D][] [3D]***LEdHN[6]***[] [6]***LEdHN[7A]***[] [7A]We said in *Bill Johnson's* that ***HN8***[] the Board could enjoin baseless retaliatory suits because they fell outside of the *First Amendment* and thus were analogous to "false statements." *461 U.S., at 743*.We concluded that "just as false statements **[*531]** are not immunized by the *First Amendment* right to freedom of speech, baseless litigation is not immunized by the *First **[****29]** Amendment* right to petition." *Ibid.* (citations omitted). While this analogy is helpful, it does not suggest that the class of baseless litigation is c*ompletely* unprotected: at most, it indicates such litigation should be unprotected "just as" false statements are. And while false statements may be unprotected for their own sake, "the *First Amendment* requires that we protect some falsehood in order to protect *speech that matters*." *Gertz v. Robert Welch, Inc., 418 U.S. 323, 341, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974)* (emphasis added); *id., at 342* **[***515]** (noting the need to protect some falsehoods to ensure that "the freedoms of speech and press [receive] that 'breathing space' essential to their fruitful exercise" (quoting *NAACP v. Button, 371 U.S. 415, 433, 9 L. Ed. 2d 405, 83 S. Ct. 328 (1963))*). An example of such "breathing space" protection is the requirement that a public official seeking compensatory damages for defamation prove by clear and convincing evidence that false statements were made with knowledge or reckless disregard of their falsity. See *New York Times Co. v. Sullivan, 376 U.S. 254, 279, 11 L. Ed. 2d 686, 84 S. Ct. 710 (1964)*.

LEdHN[1D][] [1D]***LEdHN[3E]***[] [3E]***LEdHN[5B]***[] [5B]It is at least consistent with these "breathing **[****30]** space" principles that we have never held that the entire class of objectively baseless litigation may be enjoined or declared unlawful even though such suits may advance no *First Amendment* interests of their own. Instead, in cases like *Bill Johnson's* and *Professional Real Estate Investors*, our holdings limited regulation to suits that were both objectively baseless *and* subjectively motivated by an unlawful purpose. But we need not resolve whether objectively baseless litigation requires any "breathing room" protection, for what is at issue here are suits that are not baseless in the first place. Instead, as an initial matter, we are dealing with the class of reasonably based but unsuccessful lawsuits. But whether this class of suits falls outside the scope of the *First Amendment's* **[*532]** Petition Clause at the least presents a difficult constitutional question, given the following considerations.

LEdHN[3F][] [3F]First, even though all the lawsuits in this class are unsuccessful, the class nevertheless includes a substantial proportion of all suits involving genuine grievances because the genuineness of a grievance does not turn on whether it succeeds. Indeed, this is reflected by our prior **[****31]** cases which have protected petitioning whenever it is genuine, not simply when it triumphs. See, *e.g.*, *Professional Real Estate Investors, 508 U.S., at 58-61* (protecting suits from antitrust liability **[**2400]** whenever they are objectively or subjectively genuine); *Pennington, 381 U.S., at 670* (shielding from antitrust immunity any "concerted effort to influence public officials"). Nor does the text of the *First Amendment* speak in terms of successful petitioning -- it speaks simply of "the right of the people . . . to petition the Government for a redress of grievances."

Second, even unsuccessful but reasonably based suits advance some *First Amendment* interests. Like successful suits, unsuccessful suits allow the "'public airing of disputed facts,'" *Bill Johnson's, supra, 461 U.S. at 743* (quoting Balmer, Sham Litigation and the ***Antitrust Law***, 29 Buffalo L. Rev. 39, 60 (1980)), and raise matters of public concern. They also promote the evolution of the law by supporting the development of legal theories that may not gain acceptance the first time around. Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the **[****32]** court system as a designated alternative to force. See Andrews, A Right of Access to Court Under the Petition Clause of the *First Amendment*: Defining the Right, *60 Ohio St. L. J. 557, 656 (1999)* (noting the potential for avoiding violence by the filing of unsuccessful claims).

[*516]** Finally, while baseless suits can be seen as analogous to false statements, that analogy does not directly extend to suits that are unsuccessful but reasonably based. For even if a suit could be seen as a kind of provable statement, the **[*533]** fact that it loses does not mean it is false. At most it means the plaintiff did not meet its burden of proving its truth. That does not mean the defendant has proved -- or could prove -- the contrary.

Because the Board confines its penalties to unsuccessful suits brought with a retaliatory motive, however, we must also consider the significance of that particular limitation, which is fairly included within the question presented. See *534 U.S. 1074 (2002)* (granting certiorari on whether the Board "may impose liability on an employer for filing a losing *retaliatory* lawsuit, even if the employer could show the suit was not objectively baseless" (emphasis **[****33]** added)).

IV

LEdHN[3G][] [3G]***HN9***[] In the context of employer-filed lawsuits, we previously indicated that retaliatory suits are those "filed in retaliation for the exercise of the employees' [NLRA] § 7 rights." *Bill Johnson's, supra, 461 U.S. at 747*. Because we did not specifically address what constitutes "retaliation," however, the precise scope of that term was not defined. The Board's view is that a retaliatory suit is one "brought with a motive to *interfere* with the exercise of protected [NLRA] § 7 rights." Brief for Respondent NLRB 46 (emphasis added). As we read it, however, the Board's definition broadly covers a substantial amount of genuine petitioning.

For example, ***HN10***[] an employer may file suit to stop conduct by a union that he reasonably believes is illegal under federal law, even though the conduct would otherwise be protected under the NLRA. As a practical matter, the filing of the suit may interfere with or deter some employees' exercise of NLRA rights. Yet the employer's motive may still reflect only a subjectively genuine desire to test the legality of the conduct. Indeed, in this very case, the Board's first basis for finding retaliatory motive was the fact that petitioner's **[****34]** suit related to protected conduct that petitioner believed was unprotected. App. to Pet. for Cert. 59a-60a. If such **[*534]** a belief is both subjectively genuine and objectively reasonable, then declaring the resulting suit illegal affects genuine petitioning.

The Board also claims to rely on evidence of antiunion animus to infer retaliatory motive. Brief for Respondent NLRB 47. Yet ill will is not uncommon in litigation. Cf. *Professional Real Estate Investors, 508 U.S., at 69* (STEVENS, J., concurring in judgment) ("We may presume that every litigant intends **[**2401]** harm to his adversary"). Disputes between adverse parties may generate such ill will that recourse to the courts becomes the only legal and practical means to resolve the situation. But that does not mean such disputes are not genuine. ***HN11***[] As long as a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal, petitioning is genuine both objectively and subjectively. See *id., at 60-61*.

LEdHN[3H][] [3H]***LEdHN[7B]***[] [7B]Even in other *First Amendment* **[***517]** contexts, we have found it problematic to regulate some *demonstrably false* expression based on the presence of ill will. For example, we invalidated a criminal statute **[****35]** prohibiting false statements about public officials made with ill will. See *Garrison v. Louisiana, 379 U.S. 64, 73, 13 L. Ed. 2d 125, 85 S. Ct. 209 (1964)* ("Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred"). Indeed, the requirement that private defamation plaintiffs prove the falsity of speech on matters of public concern may indirectly shield much speech concealing ill motives. See Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776, 89 L. Ed. 2d 783, 106 S. Ct. 1558 (1986); see also Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 53, 99 L. Ed. 2d 41, 108 S. Ct. 876 (1988) (prohibiting use of ill motive to create liability for speech in the realm of public debate about public figures).

LEdHN[1E][] [1E]LEdHN[3I][] [3I]For these reasons, the difficult constitutional question we noted earlier, supra, at 14-15, is not made significantly easier by the Board's retaliatory motive limitation since that **[*535]** limitation fails to exclude a substantial amount of petitioning that is objectively and subjectively genuine.

The final question is whether, in light of the important goals of the NLRA, the Board may nevertheless burden an unsuccessful but reasonably **[****36]** based suit when it concludes the suit was brought with a retaliatory purpose. As explained above, supra, at 7-8, we answered a similar question in the negative in the antitrust context. And while the burdens on speech at issue in this case are different from those at issue in *Professional Real Estate Investors*, we are still faced with a difficult constitutional question: namely, whether a class of petitioning may be declared *unlawful* when a substantial portion of it is subjectively *and* objectively genuine.

LEdHN[1F][] [1F]In a prior labor law case, we avoided a similarly difficult First Amendment issue by adopting a limiting construction of the relevant NLRA provision. See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568, 575, 99 L. Ed. 2d 645, 108 S. Ct. 1392 (1988). At issue there was the scope of § 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4), which limits unions from "threatening, coercing, or restraining any person engaged in commerce or in an industry affecting commerce" with respect to certain prohibited purposes. § 158(b)(4)(ii). The Board read this provision to cover handbilling that urged customers not to shop at a **[****37]** mall where the purpose of the handbilling was to convince the mall's proprietor to influence a tenant to quit dealing with a nonunion contractor. 485 U.S., at 574. A prior case had held that the same statutory prohibition on threats, coercion, and restraints was "'nonspecific, indeed vague,' and [thus] should be interpreted with 'caution' and not given a 'broad sweep.'" Id., at 578 (quoting NLRB v. Drivers, 362 U.S. 274, 290, 4 L. Ed. 2d 710, 80 S. Ct. 706 (1960)). Likewise, in *DeBartolo*, we found that the statutory provisions and their legislative history indicated no clear intent to reach the handbilling in question, **[***518]** 485 U.S., at 578-588, and so we simply read the statute not to cover it, **[*536]** thereby avoiding the First Amendment question altogether, id., at 588.

Here, the relevant HN12[] NLRA provision is § 8(a)(1), 29 U.S.C. § 158(a)(1), which prohibits **[**2402]** employers from "interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in [29 U.S.C. §]157." Section 157 provides, in relevant part:

HN13[] "Employees shall have the right to self-organization, to form, join, or assist labor **[****38]** organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."

Section 158(a)(1)'s prohibition on interfering, restraining, or coercing in connection with the above rights is facially as broad as the prohibition at issue in *DeBartolo*. And while it might be read to reach the entire class of suits the Board has deemed retaliatory, it need not be read so broadly. Indeed, even considered in context, there is no suggestion that these provisions were part of any effort to cover that class of suits. See §§ 158(a)(2)-(5) (HN14[] generally prohibiting employers from interfering with the formation and administration of a union, from discriminating in employment practices based on union membership, from discharging employees who provide testimony or file charges under the NLRA, and from refusing to bargain collectively with employee representatives).

LEdHN[1G][] [1G]LEdHN[5C][] [5C]LEdHN[8][] [8]HN15[] Because there is nothing in the statutory text indicating that § 158(a)(1) must be read to reach all reasonably based but unsuccessful suits filed with a retaliatory purpose, we decline to do so. Because **[****39]** the Board's standard for imposing liability under the NLRA allows it to penalize such suits, its standard is thus invalid. We do not decide whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the **[*537]** outcome, in retaliation for NLRA protected activity, since the Board's standard does not confine itself to such suits. Likewise, we need not decide what our dicta in *Bill Johnson's* may have meant by "retaliation." *461 U.S., at 747*; see *supra, at 15*. Finally, nothing in our holding today should be read to question the validity of common litigation sanctions imposed by courts themselves -- such as those authorized under *Rule 11 of the Federal Rules of Civil Procedure* -- or the validity of statutory provisions that merely authorize the imposition of attorney's fees on a losing plaintiff.

The judgment of the Court of Appeals for the Sixth Circuit is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: SCALIA; BREYER

Concur

JUSTICE SCALIA, with whom JUSTICE **[****40]** THOMAS joins, concurring.

Although the Court scrupulously avoids deciding the question (which is not presented in this case), I agree with JUSTICE BREYER that the implication **[***519]** of our decision today is that, in a future appropriate case, we will construe the National Labor Relations Act (NLRA) in the same way we have already construed the Sherman Act: to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process. See *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)*.

Choosing to make explicit what is implied, and then disagreeing with that result, JUSTICE BREYER describes a number of differences between the NLRA and the Sherman Act, all of which suggest to him that a complainant enjoys greater *First Amendment* rights to file a lawsuit in the face of the latter than the former. *Post*, at 4-6 (opinion concurring in part and concurring in judgment). Missing from his list, however, is the most important difference of all, which suggests -- indeed, demands -- precisely the opposite **[*538]** conclusion. Under the Sherman Act, the entity making the factual determination **[****41]** whether the objectively reasonable suit was brought with an unlawful motive would **[**2403]** have been an Article III court; even with that protection, we thought the right of access to Article III courts too much imperiled. Under the NLRA, however, the entity making the factual finding that determines whether a litigant will be punished for filing an objectively reasonable lawsuit will be an executive agency, the National Labor Relations Board. That this difference undermines JUSTICE BREYER's analysis, there can be no doubt. At the very least, it poses a difficult question under the *First Amendment*: whether an *executive agency* can be given the power to punish a reasonably based suit filed in an Article III court whenever *it* concludes -- insulated from *de novo* judicial review by the substantial-evidence standard of *29 U.S.C. §§ 160(e)*, *(f)* -- that the complainant had one motive rather than another. This makes resort to the courts a risky venture, dependent upon the findings of a body that does not have the independence prescribed for Article III courts. It would be extraordinary to interpret a statute which is silent on this subject to intrude upon the courts' **[****42]** ability to decide *for themselves* which postulants for their assistance should be punished.

For this reason, I am able, unlike JUSTICE BREYER, to join the Court's opinion in full -- including its carefully circumscribed statement that "nothing in our holding today should be read to question the validity of common litigation sanctions *imposed by courts themselves*," *ante*, at 19 (emphasis added).

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE SOUTER, and JUSTICE GINSBURG join, concurring in part and concurring in the judgment.

As I understand the Court's opinion, it focuses on employer lawsuits that are (1) reasonably based, (2) unsuccessful, and (3) filed with a "retaliatory motive," *i.e.*, a motive to **[*539]** interfere with protected union conduct. See *ante*, at 15. The Court holds that the National Labor Relations National Labor Relations Act (NLRA or Act) does not permit the National Labor Relations Board to declare unlawful under § 8(a) of the Act, *29 U.S.C. § 158(a)*, **[***520]** an employer's filing suit *in the circumstances present here*, which is to say, in the kind of case in which the Board rests its finding of "retaliatory motive" almost exclusively **[****43]** upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union. *Ante*, at 4-6. The Court expressly leaves open *other circumstances* in which the evidence of "retaliation" or antiunion motive might be stronger or different, showing, for example, an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union. *Ante*, at 19; see also *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 73-76, 123 L. Ed. 2d 611, 113 S. Ct. 1920 (1993)* (STEVENS, J., joined by O'CONNOR, J., concurring in judgment) (discussing colorable suits that would not be filed but for an illegal purpose). And it does not address at all lawsuits the employer brings as part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under § 7(a) of the NLRA, *29 U.S.C. § 157*.

I concur in the Court's opinion insofar as it holds no more than I have just set forth. While I recognize the broad leeway the Act gives the Board to make findings and to determine appropriate **[****44]** relief, § 10(c), *29 U.S.C. § 160*; see *NLRB v. Gissel Packing Co., 395 U.S. 575, 612, 23 L. Ed. 2d 547, 89 S. Ct. 1918, n. 32 (1969)*; *Shepard v. NLRB, 459 U.S. 344, 349, 74 L. Ed. 2d 523, 103 S. Ct. 665 (1983)*, I concur because the descriptions given by the Board and the Court of Appeals of the Board's reasons for finding unlawful employer activity here, insofar as they are probative, seem to me to rest on little more than the fact that the employer filed a reasonably based but ultimately unsuccessful lawsuit. See *329 N.L.R.B. 717, 329 N. L. R. B. No. 68 (1999)*, App. to Pet. **[**2404]** for Cert. 59a-61a **[*540]** (finding retaliatory motive because the suit was "directed at protected conduct," "necessarily tended to discourage similar protected activity," was admittedly brought to stop conduct BE&K Construction Company thought was unprotected, involved unions other than those parties to certain suits against the company, and was unmeritorious); *246 F.3d 619, 629-630 (CA6 2001)*. *Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 747, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983)*, suggested that "the Board would be warranted in taking . . . into account" for unfair labor practice purposes the fact that an employer **[****45]** had lost its suit, but it did not suggest, as it seems the Board thought here, that losing a lawsuit against a union, in and of itself, virtually alone, shows retaliation. See *id., at 743* (suggesting that retaliatory suits might be those that "would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act").

Insofar as language in the Court's opinion might suggest a more far-reaching rule, see *ante*, at 6-15, I do not agree. For one thing, I believe that *Bill Johnson's* decided many of the questions the Court declares unanswered. See *ante*, at 10, 19. **[***521]** It held that while the Board may not *halt* the prosecution of a lawsuit unless the suit lacks an objectively reasonable basis, it nonetheless "may . . . proceed to adjudicate the § 8(a)(1) and § 8(a)(4) unfair labor practice case" when an employer brings a merely "unmeritorious" retaliatory suit and loses. *461 U.S., at 747*. It added that the "employer's suit having proved unmeritorious, the Board *would be warranted in taking that fact into account* in determining whether the suit had been filed in retaliation for **[****46]** the exercise of the employees' § 7 rights." *Ibid*. (emphasis added). The courts, the Board, the bar, employers, and unions alike have treated the Court's discussion of completed lawsuits in *Bill Johnson's* as a holding and have followed it for 20 years. See, *e.g.*, *Petrochem Insulation, Inc. v. NLRB, 345 U.S. App. D.C. 102, 240 F.3d 26, 32* (CADC), cert. denied, *534 U.S. 992, 151 L. Ed. 2d 376, 122 S. Ct. 458* **[*541]** *(2001)*; *Diamond Walnut Growers, Inc. v. NLRB, 53 F.3d 1085, 1088 (CA9 1995)*; *NLRB v. International Union of Operating Engineers, Local 520,AFL-CIO, 15 F.3d 677, 679 (CA7 1994)*; *Braun Elec. Co., 324 N. L. R. B. 1, 2 (1997)*; *Summitville Tiles, 300 N. L. R. B. 64, 65, and n. 6 (1990)*; *Machinists Lodge 91 (United Technologies), 298 N. L. R. B. 325, 326 (1990)*, enf'd, *934 F.2d 1288 (CA2 1991)*. I can find no good reason to characterize the statements in *Bill Johnson's* as dicta -- though I recognize that the Court's language so characterizing *Bill Johnson's* is itself dicta.

For another thing, I do not believe that this Court's antitrust precedent determines the outcome here. **[****47]** See *Professional Real Estate, supra*; *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 5 L. Ed. 2d 464, 81 S. Ct. 523 (1961)*. That precedent finds all but sham lawsuits exempt from the reach of the antitrust laws. Professional Real Estate, supra, 508 U.S. at 60-61; Noerr, supra, 365 U.S. at 144. It does not hold employers enjoy a similar exemption from the reach of the *labor laws*. And it should not do so, for ***antitrust law*** and labor law differ significantly in respect to their consequences, administration, scope, history, and purposes.

Certain differences, while minor, are worth noting given the Court's concern to avoid discouraging legitimate lawsuits. To apply ***antitrust law*** to a defendant's reasonably based but unsuccessful anticompetitive lawsuit, for example, threatens the defendant with treble damages -- a considerable deterrent. See *ante*, at 10. To apply labor law to an employer's reasonably based but unsuccessful retaliatory lawsuit threatens the employer only with a shift in liability for attorney's fees. See *ante,* at 11. Similarly, to apply ***antitrust law*** to a defendant's reasonably based but unsuccessful **[**2405]** anticompetitive lawsuit **[****48]** threatens the defendant with high court-defense costs against any and all who initiate suit. To apply labor law to an employer's reasonably based but unsuccessful retaliatory lawsuit threatens the employer only with the typically far lower costs of defending the charge **[*542]** before a congressionally authorized and politically accountable administrative agency that acts as a screen for meritless complaints. See *ibid.;* see also 64 N.L.R.B. Ann. Rep. 5 (1999) (showing that of 27,450 **[***522]** unfair labor practice cases closed in 1999, only 1.4% were resolved by an order of the Board in a contested case).

Other differences, those related to scope, purpose, and history, are major and determinative. ***Antitrust law*** focuses generally upon anticompetitive conduct that can arise in myriad circumstances. Anticompetitively motivated lawsuits occupy but one tiny corner of the anticompetitive-activity universe. To circumscribe the boundaries of that corner does not significantly limit the scope of ***antitrust law*** or undermine any basic related purpose.

By way of contrast, the NLRA finds in the need to regulate an employer's antiunion lawsuits much of its historical reason for being. Throughout **[****49]** the 19th century, courts had upheld prosecutions of unions as criminal conspiracies. C. Tomlins, The State and the Unions 36-45 (1985). They had struck down protective labor legislation -- for, say, shorter working hours or better working conditions. W. Forbath, Law and the Shaping of the American Labor Movement 38, and n. 7 (1991) (by 1900, courts had struck down roughly 60 labor laws, and by 1920, roughly 300). They had granted injunctions against employees and labor unions that weakened the unions' ability to organize. Id., at 61-62 (conservatively estimating at least 4,300 injunctions issued in labor conflicts between 1880 and 1930). And in the process they had reinterpreted federal statutes that Congress had not intended for use against the organizing activities of labor unions. See, *e.g.*, In re Debs, 158 U.S. 564, 39 L. Ed. 1092, 15 S. Ct. 900 (1895) (applying Interstate Commerce Act of 1887 to union activities); Loewe v. Lawlor, 208 U.S. 274, 52 L. Ed. 488, 28 S. Ct. 301, 5 Ohio L. Rep. 617 (1908) (applying Sherman Act); see generally F. Frankfurter & N. Greene, The Labor Injunction (1930).

[*543] Congress initially passed the Clayton Act, 15 U.S.C. §§ 12-27, 44 to prevent employers **[****50]** from using the law, particularly ***antitrust law***, in this way. In doing so, Congress hoped to "substitute the opinion of Congress as to the propriety of the purpose [of union activities] for that of differing judges" who were "prejudicial to a position of equality between workingman and employer." Duplex Printing Press Co. v. Deering, 254 U.S. 443, 485, 65 L. Ed. 349, 41 S. Ct. 172, 18 Ohio L. Rep. 366 (1921) (Brandeis, J., joined by Holmes and Clarke, JJ., dissenting). When the Clayton Act proved insufficient, Congress passed the Norris-LaGuardia Act, 29 U.S.C. § 101, which made the labor injunction unlawful. See United States v. Hutcheson, 312 U.S. 219, 235, 85 L. Ed. 788, 61 S. Ct. 463 (1941) ("The underlying aim of the Norris-LaGuardia Act was to restore the broad purpose which Congress thought it had formulated in the Clayton Act but which was frustrated, so Congress believed, by unduly restrictive judicial construction"); see also Marine Cooks v. Panama S. S. Co., 362 U.S. 365, 369, 4 L. Ed. 2d 797, 80 S. Ct. 779 n. 7 (1960) (enactment of Norris-LaGuardia "was prompted by a desire . . . to withdraw federal courts from a type of controversy for which many believed they were ill-suited"). Similar **[****51]** objectives informed Congress' later enactment of the NLRA, which took from the courts much of the power to regulate "the relations between employers of labor and **[***523]** workingmen" by granting authority to an administrative agency. Duplex Printing, supra, at 486 (Brandeis, J., dissenting); see Mine Workers v. Pennington, 381 U.S. 657, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965) (Goldberg, J., dissenting) **[**2406]** (describing how Justice Brandeis' dissent in *Duplex Printing* "carried the day in the courts of history" when Congress passed Norris-LaGuardia and the NLRA).

The upshot is that an employer's antiunion lawsuit occupies a position far closer to the heart of the labor law than does a defendant's anticompetitive lawsuit in respect to ***antitrust law***. And that fact makes all the difference. Indeed, **[*544]** given these differences of history and purpose, I do not see how the Court could treat labor law, which sought to give the Board power to regulate an employer's antiunion conduct, including retaliatory lawsuits, as if it were ***antitrust law***, where no comparable purpose is evident. Perhaps that is why this Court previously made clear that these two areas of law significantly differ. Compare *Professional Real Estate, 508 U.S., at 55-60*, **[****52]** with *Bill Johnson's, 461 U.S., at 747*.

I do not know why the Court reopens these matters in its opinion today. See *ante*, at 10, 19. But I note that it has done so only to leave them open. It does not, in the end, decide them. On that understanding, but only to the extent that I describe at the outset, see *supra*, at 1-2, I join the Court's opinion.

References

16A Am Jur 2d, Constitutional Law 533; *48 Am Jur 2d, Labor and Labor Relations 1908-1910*

USCS, *Constitution, Amendment 1*; *29 USCS 157*, *158(a)(1)*

L Ed Digest, Labor 95, 97

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Annotation References:

Noerr-Pennington doctrine, exempting from federal antitrust laws joint efforts to influence government action--Supreme Court cases. *123 L Ed 2d 707*.

Right of petition and assembly under *Federal Constitution's First Amendment*--Supreme Court cases. *86 L Ed 2d 758*.

Supreme Court's views as to requisites for award of attorneys' fees. *77 L Ed 2d 1540*.

Supreme Court's views as to proper remedies for unfair labor **[****53]** practices under National Labor Relations Act (*29 USCS 151 et seq*). *74 L Ed 2d 1112*.

Progeny of New York Times v Sullivan in the Supreme Court. *61 L Ed 2d 975*.

Supreme Court's view as to weight and effect to be given, on subsequent judicial construction, to prior administrative construction of statute. *39 L Ed 2d 942*.

The Supreme Court and the right of free speech and press. *93 L Ed 1151, 2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976*.

"Sham" exception to application of Noerr-Pennington doctrine, exempting from federal antitrust laws joint efforts to influence governmental action. 71 ALR Fed 723.

Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP

Supreme Court of the United States

October 14, 2003, Argued ; January 13, 2004, Decided

No. 02-682

Reporter

540 U.S. 398 *; 124 S. Ct. 872 **; 157 L. Ed. 2d 823 ***; 2004 U.S. LEXIS 657 ****; 72 U.S.L.W. 4114; 2004-1 Trade Cas. (CCH) P74,241; 17 Fla. L. Weekly Fed. S 91; 31 Comm. Reg. (P & F) 542

VERIZON COMMUNICATIONS INC., Petitioner v. LAW OFFICES OF CURTIS V. TRINKO, LLP

Subsequent History: Complaint dismissed at *Law Offices of Curtis V. Trinko, LLP v. Verizon Communs. Inc., 2006 U.S. Dist. LEXIS 71101 (S.D.N.Y., Sept. 27, 2006)*

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Law Offices of Curtis V. Trinko, L.L.P. v. Bell Atl. Corp., 305 F.3d 89, 2002 U.S. App. LEXIS 12233 (2d Cir. N.Y., 2002)

Disposition: Reversed and remanded.

Core Terms

antitrust, FCC, incumbent, customers, orders, rivals, anti trust law, monopoly, sharing, anticompetitive, interconnection, long-distance, competitors, network, consent decree, allegations, regulation, facilities, Skiing, ticket, terms, fill, antitrust claim, authorization, damages, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Industries > Communications > Telecommunications Act

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN1[] **Communications, Telecommunications Act**

Central to the scheme of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, is the incumbent local exchange carrier's obligation under 47 U.S.C.S. § 251(c) to share its network with competitors, including provision of access to individual elements of the network on an "unbundled" basis. 47 U.S.C.S. § 251(c)(3).

Communications Law > ... > Regulated Practices > Introducing Competition > Duties of Incumbent Carriers & Resellers

Communications Law > Federal Acts > Telecommunications Act > General Overview

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

HN2[] Introducing Competition, Duties of Incumbent Carriers & Resellers

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, imposes a large number of duties upon incumbent local exchange carriers (LECs) -- above and beyond those basic responsibilities it imposes upon all carriers, such as assuring number portability and providing access to rights-of-way, 47 U.S.C.S. § 251(b)(2), (4). Under the sharing duties of 47 U.S.C.S. § 251(c), incumbent LECs are required to offer three kinds of access. Perhaps most intrusive, is the duty to offer access to unbundled network elements (UNEs) on "just, reasonable, and nondiscriminatory" terms, § 251(c)(3), a phrase that the Federal Communications Commission has interpreted to mean a price reflecting long-run incremental cost. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers. 47 U.S.C.S. § 251(c)(2), (4). The Act also imposes upon incumbents the duty to allow physical "collocation" -- that is, to permit a competitor to locate and install its equipment on the incumbent's premises -- which makes feasible interconnection and access to UNEs. 47 U.S.C.S. § 251(c)(6).

Antitrust & Trade Law > Regulated Industries > Communications > General Overview

Communications Law > Federal Acts > Federal Communications Act > Federal Preemption

Communications Law > Federal Acts > Telecommunications Act > General Overview

HN3[] Regulated Industries, Communications

Section 601(b)(1) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, is an antitrust-specific saving clause providing that nothing in the Act or the amendments made by the Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws. 110 Stat. 143, 47 U.S.C.S. § 152, note. This bars a finding of implied immunity. The saving clause preserves those claims that satisfy established antitrust standards. But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act modify, impair, or supersede the applicability of the antitrust laws.

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > Monopoly Power

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > Sherman Act

HN4[] Scope, Monopolization Offenses

Section 2 (15 U.S.C.S. § 2) of the Sherman Act declares that a firm shall not "monopolize" or "attempt to monopolize." 15 U.S.C.S. § 2. It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, 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. The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices -- at least for a short period -- is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Actual Monopolization > General Overview

HN5[] Monopolies & Monopolization, Actual Monopolization

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers.

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] Antitrust & Trade Law, Sherman Act

As a general matter, the Sherman Act does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.

Antitrust & Trade Law > Sherman Act > General Overview

HN7[] Antitrust & Trade Law, Sherman Act

The high value that is placed on the right to refuse to deal with other firms does not mean that the right is unqualified. Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 (15 U.S.C.S. § 2) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > New York Stock Exchange

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN8[] Antitrust & Trade Law, Sherman Act

Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. Careful account must be taken of the pervasive federal and state regulation characteristic of the industry. Antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which it applies. One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, it may also be a consideration in deciding whether to recognize an expansion of the contours of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act.

Antitrust & Trade Law > Sherman Act > General Overview

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

HN9[] **Antitrust & Trade Law, Sherman Act**

In certain circumstances, regulation significantly diminishes the likelihood of major antitrust harm.

Communications Law > ... > Telephone Services > Long Distance Telephone Services > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

Communications Law > Federal Acts > Federal Communications Act > Penalties

Communications Law > ... > Telephone Services > Local Exchange Carriers > General Overview

Communications Law > Regulators > US Federal Communications Commission > General Overview

Communications Law > Public Enforcement > Orders & Hearings > Judicial Review

HN10[] **Telephone Services, Long Distance Telephone Services**

Commitments to provide access to unbundled network elements are enforceable by the Federal Communications Commission through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. *47 U.S.C.S. § 271(d)(6)(A)*.

Antitrust & Trade Law > Sherman Act > General Overview

HN11[] **Antitrust & Trade Law, Sherman Act**

Under the best of circumstances, applying the requirements of *§ 2* (*15 U.S.C.S. § 2*) of the Sherman Act can be difficult because the means of illicit exclusion, like the means of legitimate competition, are myriad. Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect. The cost of false positives counsels against an undue expansion of *§ 2* liability.

Antitrust & Trade Law > Sherman Act > General Overview

HN12[] **Antitrust & Trade Law, Sherman Act**

No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremediable by ***antitrust law*** when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.

Antitrust & Trade Law > ... > Monopolies & Monopolization > Attempts to Monopolize > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN13[] **Monopolies & Monopolization, Attempts to Monopolize**

The Sherman Act is indeed the Magna Carta of free enterprise, but it does not give judges carte blanche to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition.

Lawyers' Edition Display

Decision

[*823]** Complaint--alleging, as to local telephone service, that incumbent local exchange carrier had breached its duty, under Telecommunications Act of 1996, to share incumbent's network with competitors--held not to state valid antitrust claim under 15 USCS § 2.

Summary

With respect to local telephone service, the Telecommunications Act of 1996, in *47 USCS § 251(c)*, required each incumbent local exchange carrier to share its network with competitors, including, under *47 USCS § 251(c)(3)*, the provision of access to individual "unbundled" network elements (UNEs). These *§ 251(c)* requirements were beyond the basic responsibilities which the 1996 Act, in provisions such as *47 USCS § 251(b)*, imposed upon all carriers. Also, the 1996 Act, in *47 USCS § 252*, required such incumbents to sign interconnection agreements with rivals, with compulsory arbitration if the terms could not be completely agreed upon. Moreover, in order for an incumbent to enter the potentially lucrative market for long-distance service, the 1996 Act, under *47 USCS § 271*, required satisfaction of a competitive checklist, which included such an incumbent's nondiscriminatory provision of access to the UNEs offered pursuant to *§ 251(c)*. In addition, the 1996 Act contained an antitrust-specific saving clause (*47 USCS § 152* note), which provided that "nothing in this Act or the amendments made by this Act [would] be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

The incumbent local exchange carrier for New York state had, as one of the incumbent's *§ 251(c)(3)* obligations, the provision of access to operations support systems (OSS), used to provide services to customers and to insure quality. Also, after this incumbent applied to provide long-distance service in the state, an eventual *§ 271* authorization by the Federal Communications Commission (FCC) discussed the incumbent's commitments to provide access to UNEs, including the provision of OSS. Moreover, the incumbent **[***824]** subjected itself to oversight by the state's public service commission (PSC). When several competitors complained about alleged deficiencies in the incumbent's OSS-related servicing of local-telephone orders, the FCC and PSC responded by

(1) imposing substantial financial penalties, and (2) establishing measurements and reporting requirements to gauge the incumbent's remediation.

The day after the incumbent had entered into a consent decree with the FCC on this subject, a New York City law firm, which was assertedly a local-telephone-service customer of another company, filed a complaint in the United States District Court for the Southern District of New York, on the purported behalf of the law firm and a class of similarly situated customers. As later amended, the complaint (1) asserted claims under various state and federal laws, including an antitrust claim under § 2 of the Sherman Act (*15 USCS § 2*), which prohibited monopolizing or attempting to monopolize; (2) sought damages and injunctive relief; (3) alleged that the incumbent had breached its 1996 Act duty to share the incumbent's network with competitors; and (4) set forth, as the complaint's single example of the incumbent's alleged failure to provide adequate access, the OSS failure that had resulted in the FCC consent decree and some PSC orders.

However, the District Court (1) dismissed the complaint in its entirety; and (2) as to the antitrust portion, concluded that the law firm's allegations of the incumbent's deficient assistance to rivals failed to satisfy the requirements of *§ 2* (*123 F. Supp. 2d 738*).

On appeal, the United States Court of Appeals for the Second Circuit--in vacating in part and in ordering a remand--(1) effectively reinstated the law firm's complaint in part, including the antitrust claim; and (2) expressed the view that the complaint's allegations described conduct that might support a *§ 2* antitrust claim "under a number of theories" (*305 F.3d 89*).

The United States Supreme Court granted certiorari limited to the antitrust issue (*538 U.S. 905, 155 L. Ed. 2d 224, 123 S. Ct. 1480*).

Then, on certiorari, the Supreme Court reversed and remanded. In an opinion by Scalia, J., joined by Rehnquist, Ch. J., and O'Connor, Kennedy, Ginsburg, and Breyer, JJ., it was held that the law firm, in alleging that the incumbent had breached its 1996 Act duty to share the incumbent's network with competitors, failed to state a valid antitrust claim under § 2 of the Sherman Act, for among other factors:

(1) Just as the 1996 Act, through its antitrust-specific saving clause, preserved claims that satisfied existing antitrust standards, the 1996 Act did not create new claims that went beyond existing antitrust standards.

(2) The allegations in the law firm's complaint did not fit within the existing refusal-to-deal exceptions already recognized by the Supreme Court, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating *§ 2*.

(3) Moreover, the allegations in the law firm's complaint did not provide a basis, under traditional antitrust principles, for the Supreme Court to recognize a new refusal-to-deal exception, whereby the incumbent's alleged refusal **[***825]** to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating *§ 2*.

Stevens, J., joined by Souter and Thomas, JJ., concurring in the judgment, expressed the view that (1) even if the allegations in the law firm's complaint were assumed to be true, the law firm was not a covered "person," under the Supreme Court's precedents, within the meaning of § 4 of the Clayton Act (*15 USCS § 15*), which provided for the treble-damages remedy which the law firm sought; and (2) the Supreme Court ought not to go beyond this threshold question in the case at hand.

Headnotes

COMMUNICATIONS §22 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- local telephone service -- claim that incumbent failed to share network > Headnote:

LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]***LEdHN[1G]***[] [1G]***LEdHN[1H]***[] [1H]***LEdHN[1I]***[] [1I]

With respect to local telephone service, a Federal District Court complaint by a law firm against an incumbent local exchange carrier failed to state a valid antitrust claim under § 2 of the Sherman Act (*15 USCS § 2*), which prohibited monopolizing or attempting to monopolize, for:

(1) In the complaint, the law firm, which was assertedly a local-telephone-service customer of another company, alleged that the incumbent had breached its duty, under some Telecommunications Act of 1996 provisions (codified at *47 USCS §§ 251*, *252*, and *271*), to share the incumbent's network with competitors.

(2) Just as the 1996 Act, through an antitrust-specific saving clause (*47 USCS § 152* note), preserved claims that satisfied existing antitrust standards, the 1996 Act did not create new claims that went beyond existing antitrust standards.

(3) The allegations in the law firm's complaint did not fit within the existing refusal-to-deal exceptions already recognized by the United States Supreme Court, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating *§ 2*.

(4) Moreover, the allegations in the law firm's complaint did not provide a basis, under traditional antitrust principles, for the Supreme Court to recognize a new refusal-to-deal exception, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating *§ 2*.

(5) Even if the law firm's complaint otherwise might have been thought to state a valid *§ 2* claim under a "monopoly leveraging" theory, such leveraging presupposed anticompetitive conduct, which, in the case at hand, could only be the refusal-to-deal claim that was being rejected.

(6) It would be a serious mistake to conflate the goals of the 1996 Act and the Sherman Act, as (a) the 1996 Act--which was in some respects more ambitious than the antitrust laws--attempted to eliminate the monopolies enjoyed by the inheritors of a particular company's local-telephone-service franchise; but (b) § 2 of the Sherman Act sought **[***826]** merely to prevent unlawful monopolization.

(Stevens, Souter, and Thomas, JJ., dissented in part from this holding.)

COMMUNICATIONS §22 > -- Telecommunications Act of 1996 -- enforcement -- antitrust > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]

Even though the Telecommunications Act of 1996, in *47 USCS § 251(c)*, imposed a large number of local-telephone-service duties upon incumbent local exchange carriers--beyond those basic responsibilities which the 1996 Act (in provisions such as *47 USCS § 251(b)*) imposed upon all carriers--the circumstance that Congress created these duties did not automatically lead to the conclusion that these duties could be validly enforced by means of an antitrust claim (under provisions such as § 2 of the Sherman Act, *15 USCS § 2*). In this regard, the 1996 Act, through an antitrust-specific saving clause (*47 USCS § 152* note)--which provided that "nothing in this Act or the amendments made by this Act [would] be construed to modify, impair, or supersede the applicability of any of the antitrust laws"--(1) barred a finding of implied antitrust immunity, and (2) preserved those claims that satisfied established antitrust standards, but (3) did not create new claims that went beyond existing antitrust standards.

COMMUNICATIONS §22 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- local telephone service -- claim that incumbent failed to share network > Headnote:
LEdHN[3A][] [3A]LEdHN[3B][] [3B]LEdHN[3C][] [3C]LEdHN[3D][] [3D]LEdHN[3E][] [3E]

With respect to local telephone service, the allegations in a law firm's Federal District Court complaint against an incumbent local exchange carrier did not fit within the existing refusal-to-deal exceptions, already recognized by the United States Supreme Court, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating § 2 of the Sherman Act (15 USCS § 2)--which prohibited monopolizing or attempting to monopolize--for:

(1) In the complaint, the law firm, which was assertedly a local-telephone-service customer of another company, alleged that the incumbent had breached its duty, under some Telecommunications Act of 1996 provisions (codified at 47 USCS §§ 251, 252, and 271), to share the incumbent's network with competitors.

(2) Because the complaint did not allege that the incumbent had voluntarily engaged in a course of dealing with the incumbent's rivals--or that the incumbent ever would have done so absent statutory compulsion--the incumbent's prior conduct shed no light upon the motivation of the incumbent's alleged refusal to deal, as to whether the incumbent's alleged regulatory lapses were prompted by (a) competitive zeal, or (b) anticompetitive malice.

(3) With respect to pricing behavior, the incumbent's alleged reluctance to interconnect at the cost-based rate of compensation available under 47 USCS § 251(c)(3) told the Supreme Court nothing about dreams of monopoly.

(4) The sharing obligation imposed by the 1996 Act created something brand new--a wholesale market for leasing network elements--where (a) such "unbundled" elements, offered pursuant to § 251(c)(3), had existed only deep within the incumbent; (b) these elements were brought out on **[***827]** compulsion of the 1996 Act; and (c) these elements were offered not to consumers, but to rivals, and at considerable expense and effort.

(5) Even if the Supreme Court considered to be established law the "essential facilities" doctrine crafted by some lower courts--which doctrine the Supreme Court had never recognized and found no need to recognize, or to repudiate, in the case at hand--the 1996 Act's extensive provision for network access made it unnecessary to impose such a judicial doctrine of forced access.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > -- factors > Headnote:
LEdHN[4][] [4]

An antitrust violation of § 2 of the Sherman Act (15 USCS § 2), which declares that a firm shall not "monopolize" or "attempt to monopolize," requires, in addition to the possession of monopoly power in the relevant market, 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. For such purposes, the mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only lawful, but also an important element of the free-market system. Thus, in order to safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful, under § 2, unless such possession is accompanied by an element of anticompetitive conduct.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- refusal to deal > Headnote:
LEdHN[5][] [5]

For antitrust purposes, § 2 of the Sherman Act (*15 USCS § 2*)--which declares that a firm shall not "monopolize" or "attempt to monopolize"--does not, as a general matter, restrict the long-recognized right of a trader or manufacturer, engaged in an entirely private business, freely to exercise independent discretion as to parties with whom the trader or manufacturer will deal.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- refusal to deal > Headnote:
LEdHN[6][] [6]

The high value that the United States Supreme Court has placed on a firm's right to refuse to deal with other firms does not mean that the right is unqualified for antitrust purposes. Thus, under certain circumstances, a firm's refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2 of the Sherman Act (*15 USCS § 2*), which prohibits monopolizing or attempting to monopolize.

COMMUNICATIONS §14 COMMUNICATIONS §22 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > -- local telephone service -- claim that incumbent failed to share network > Headnote:
LEdHN[7A][] [7A]***LEdHN[7B]***[] [7B]***LEdHN[7C]***[] [7C]***LEdHN[7D]***[] [7D]

With respect to local telephone service, the allegations in a law firm's Federal District Court complaint against an incumbent local exchange carrier did not provide a basis, under traditional antitrust principles, for the United States Supreme Court to recognize a new refusal-to-deal exception, whereby the incumbent's alleged refusal to cooperate with the incumbent's rivals could properly constitute anticompetitive conduct violating § 2 of the Sherman Act (*15 USCS § 2*)--which prohibited monopolizing or attempting to monopolize--for:

(1) In the complaint, the law firm, which was assertedly a local-telephone-service customer of another **[***828]** company, alleged that the incumbent had breached its duty, under some Telecommunications Act of 1996 provisions (codified at *47 USCS §§ 251*, *252*, and *271*), to share the incumbent's network with competitors.

(2) The regulatory regime that already existed in this industry was an effective steward of the antitrust function, where (a) in order for an incumbent to enter the potentially lucrative market for long-distance service, authorization by the Federal Communications Commission (FCC) required state-by-state satisfaction of *§ 271*'s competitive checklist, which included such an incumbent's nondiscriminatory provision of access to the "unbundled" network elements (UNEs) offered pursuant to *47 USCS § 251(c)*; (b) the FCC's eventual *§ 271* authorization for the incumbent in question to provide long-distance service in the state in question had discussed at great length the incumbent's commitments to provide access to UNEs, including the provision of operations support systems (OSS), used to provide services to customers and to insure quality; (c) the incumbent had also subjected itself to oversight by the state's public service commission (PSC); and (d) when several competitors had complained about alleged deficiencies in the incumbent's OSS-related servicing of local-telephone orders, the FCC and PSC had responded by (i) imposing substantial financial penalties, and (ii) establishing measurements and reporting requirements to gauge the incumbent's remediation.

(3) Under a realistic assessment, the cost of "false positives"--mistaken inferences and the resulting false condemnations--in such situations counseled against an undue expansion of *§ 2* liability, where (a) one false-positive risk was that an incumbent's failure to provide a service with sufficient alacrity might have nothing to do with the exclusion of competitors; (b) allegations of violations of *§ 251(c)(3)* duties would be difficult for antitrust courts to evaluate; and (c) judicial oversight under the Sherman Act would seem destined to distort investment and to lead to a new layer of litigation, atop the variety of litigation routes already available to, and actively pursued by, competitors.

(4) Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of *§ 251* might be beyond the practical ability of a judicial tribunal to control, where (a) the effective remediation of such violations ordinarily would require continuing supervision of a highly detailed decree, such as the equitable decree sought by the law firm in the case at hand; and (b) an antitrust court was unlikely to be an effective day-to-day enforcer of such detailed sharing obligations.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §75 > -- concerted action -- remedy > Headnote:
LEdHN[8A][] [8A]***LEdHN[8B]***[] [8B]

For purposes of antitrust analysis under § 2 of the Sherman Act (*15 USCS § 2*)--which declares that a firm shall not "monopolize" or "attempt to monopolize"--concerted action (1) presents greater anticompetitive concerns; and (2) is amenable to a remedy that does not require judicial estimation of free-market forces, by a court's simply requiring that the outsider be granted nondiscriminatory admission to the "club." **[***829]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > -- factors -- industry -- regulation > Headnote:
LEdHN[9A][] [9A]***LEdHN[9B]***[] [9B]

Antitrust analysis under § 2 of the Sherman Act (*15 USCS § 2*), which prohibits monopolizing or attempting to monopolize, must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. Thus, careful account must be taken of the pervasive federal and state regulation characteristic of an industry. In addition, antitrust analysis must sensitively recognize and reflect the distinctive economic and legal setting of the regulated industry to which the analysis applies. One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm, for (1) where such a structure exists, (a) the additional benefit to competition provided by antitrust enforcement will tend to be small, and (b) it will be less plausible that the antitrust laws contemplate such additional scrutiny; but (2) where, by contrast, there is nothing built into the regulatory scheme which performs the antitrust function, the benefits of antitrust are worth its sometimes considerable disadvantages. Moreover, just as regulatory context may serve as a basis for implied immunity, regulatory context may also be a consideration in deciding whether to recognize an expansion of the contours of *§ 2*.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §19 > -- success > Headnote:
LEdHN[10A][] [10A]***LEdHN[10B]***[] [10B]

In order for a "monopoly leveraging" antitrust claim to be valid under § 2 of the Sherman Act (*15 USCS § 2*), there must be a dangerous probability of success in monopolizing a second market.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > -- factors > Headnote:
LEdHN[11][] [11]

While the Sherman Act (15 USCS §§ 1 et seq.) is the "Magna Carta of free enterprise," the Sherman Act does not give judges the freedom to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. **[***830]**

Syllabus

The Telecommunications Act of 1996

imposes upon an incumbent local exchange carrier (LEC) the obligation to share its telephone network with competitors, 47 U.S.C. § 251(c) [47 USCS § 251(c)], including the duty to provide access to individual network elements on an "unbundled" basis, see § 251(c)(3). New entrants, so-called competitive LECs, combine and resell these unbundled network elements (UNEs). Petitioner Verizon Communications Inc., the incumbent LEC in New York State, has signed interconnection agreements with rivals such as AT&T, as § 252 obliges it to do, detailing the terms on which it will make its network **[****2]** elements available. Part of Verizon's § 251(c)(3) UNE obligation is the provision of access to operations support systems (OSS), without which a rival cannot fill its customers' orders. Verizon's interconnection agreement, approved by the New York Public Service Commission (PSC), and its authorization to provide long-distance service, approved by the Federal Communications Commission (FCC), each specified the mechanics **[***831]** by which its OSS obligation would be met. When competitive LECs complained that Verizon was violating that obligation, the PSC and FCC opened parallel investigations, which led to the imposition of financial penalties, remediation measures, and additional reporting requirements on Verizon. Respondent, a local telephone service customer of AT&T, then filed this class action alleging, *inter alia*, that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or remaining customers of competitive LECs in violation of § 2 of the Sherman Act, 15 USC § 2 [15 USCS § 2]. The District Court dismissed the complaint, concluding that respondent's allegations of deficient assistance to rivals **[****3]** failed to satisfy § 2's requirements. The Second Circuit reinstated the antitrust claim.

Held:

Respondent's complaint alleging breach of an incumbent LEC's 1996 Act duty to share its network with competitors does not state a claim under § 2 of the Sherman Act.

(a) The 1996 Act has no effect upon the application of traditional antitrust principles. Its saving clause--which provides that "nothing in this Act . . . shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws," 47 U.S.C. § 152, note [47 USCS § 152 note]--preserves claims that satisfy established antitrust standards, but does not create new claims that go beyond those standards.

(b) The activity of which respondent complains does not violate pre-existing antitrust standards. The leading case imposing § 2 liability for refusal to deal with competitors is *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 86 L. Ed. 2d 467, 105 S. Ct. 2847*, in which the Court concluded that the defendant's termination of a voluntary agreement with the plaintiff suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Aspen* **[****4]** is at or near the outer boundary of § 2 liability, and the present case does not fit within the limited exception it recognized. Because the complaint does not allege that Verizon ever engaged in a voluntary course of dealing with its rivals, its prior conduct sheds no light upon whether its lapses from the legally compelled dealing were anticompetitive. Moreover, the *Aspen* defendant turned down its competitor's proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher, whereas Verizon's reluctance to interconnect at the cost-based rate of compensation available under § 251(c)(3) is uninformative. More fundamentally, the *Aspen* defendant refused to provide its competitor with a product it already sold at retail, whereas here the unbundled elements offered pursuant to § 251(c)(3) are not available to the public, but are provided to rivals under compulsion and at considerable expense. The Court's conclusion would not change even if it considered to be established law the "essential facilities" doctrine crafted by some lower courts. The indispensable requirement for invoking that doctrine is the unavailability of **[****5]** access to the "essential facilities"; where access exists, as it does here by virtue of the 1996 Act, the doctrine serves no purpose.

(c) Traditional antitrust principles do not justify adding the present case to the few existing exceptions **[***832]** from the proposition that there is no duty to aid competitors. Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. When there exists a regulatory structure designed to deter and remedy anticompetitive harm, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Here Verizon was subject to oversight by the FCC and the PSC, both of which agencies responded to the OSS failure raised in respondent's complaint by imposing fines and other burdens on Verizon. Against the slight benefits of antitrust intervention here must be weighed a realistic assessment of its costs. Allegations of violations of *§ 251(c)(3)* duties are both technical and extremely numerous, and hence difficult for antitrust courts to evaluate. Applying *§ 2*'s requirements to this **[****6]** regime can readily result in "false positive" mistaken inferences that chill the very conduct the antitrust laws are designed to protect. *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348*.

305 F.3d 89, reversed and remanded.

Counsel: Richard G. Taranto argued the cause for petitioner.

Theodore B. Olson argued the cause for the United States, as amicus curiae, by special leave of court.

Donald B. Verrilli, Jr. argued the cause for respondent.

Judges: Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Kennedy, Ginsburg, and Breyer, JJ., joined. Stevens, J., filed an opinion concurring in the judgment, in which Souter and Thomas, JJ., joined.

Opinion by: SCALIA

Opinion

[*401] **[**875]** Justice **Scalia** delivered the opinion of the Court.

LEdHN[1A][] [1A] The *Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56*, imposes certain duties upon incumbent local telephone companies in order to facilitate market entry by competitors, and establishes a complex regime for monitoring and enforcement. In this case we consider whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under *§ 2 of the Sherman Act*, 26 Stat 209.

I

[*402] Petitioner Verizon Communications Inc. is the incumbent local exchange carrier (LEC) serving New York State. Before the 1996 Act, Verizon, [1] like **[****7]** other incumbent LECs, enjoyed an exclusive franchise within its local service area. The 1996 Act sought to "uproo[t]" the incumbent LECs' monopoly and to introduce competition in its place. *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 488, 152 L. Ed. 2d 701, 122 S. Ct. 1646 (2002)*. ***HN1***[] Central to the scheme of the Act is the incumbent LEC's **[**876]** obligation under *47 U.S.C. § 251(c)* [*47 USCS § 251(c)*] to share its network with competitors, see *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*, including provision of access to individual elements of the network on an

[1] In 1996, NYNEX was the incumbent LEC for New York State. NYNEX subsequently merged with Bell Atlantic Corporation, and the merged entity retained the Bell Atlantic name; a further merger produced Verizon. We use "Verizon" to refer to NYNEX and Bell Atlantic as well.

"unbundled" basis. *§ 251(c)(3)*. New entrants, so-called competitive **[***833]** LECs, resell these unbundled network elements (UNEs), recombined with each other or with elements belonging to the LECs.

[**8]** Verizon, like other incumbent LECs, has taken two significant steps within the Act's framework in the direction of increased competition. First, Verizon has signed interconnection agreements with rivals such as AT&T, as it is obliged to do under *§ 252*, detailing the terms on which it will make its network elements available. (Because Verizon and AT&T could not agree upon terms, the open issues were subjected to compulsory arbitration under *§§ 252(b) and (c)*.) In 1997, the state regulator, New York's Public Service Commission (PSC), approved Verizon's interconnection agreement with AT&T.

Second, Verizon has taken advantage of the opportunity provided by the 1996 Act for incumbent LECs to enter the long-distance market (from which they had long been excluded). That required Verizon to satisfy, among other things, a 14-item checklist of statutory requirements, which **[*403]** includes compliance with the Act's network-sharing duties. *§§ 271(d)(3)(A) and (c)(2)(B)*. Checklist item two, for example, includes "nondiscriminatory access to network elements in accordance with the requirements" of *§ 251(c)(3)*. *§ 271(c)(2)(B)(ii)*. Whereas the state regulator approves an interconnection agreement, **[****9]** for long-distance approval the incumbent LEC applies to the Federal Communications Commission (FCC). In December 1999, the FCC approved Verizon's *§ 271* application for New York.

Part of Verizon's UNE obligation under *§ 251(c)(3)* is the provision of access to operations support systems (OSS), a set of systems used by incumbent LECs to provide services to customers and ensure quality. Verizon's interconnection agreement and long-distance authorization each specified the mechanics by which its OSS obligation would be met. As relevant here, a competitive LEC sends orders for service through an electronic interface with Verizon's ordering system, and as Verizon completes certain steps in filling the order, it sends confirmation back through the same interface. Without OSS access a rival cannot fill its customers' orders.

In late 1999, competitive LECs complained to regulators that many orders were going unfilled, in violation of Verizon's obligation to provide access to OSS functions. The PSC and FCC opened parallel investigations, which led to a series of orders by the PSC and a consent decree with the FCC. [2] Under the FCC consent decree, Verizon undertook **[*404]** to make a "voluntary contribution" **[****10]** to the U. S. Treasury in the amount of $3 million, **[**877]** *15 FCC Rcd. 5415, 5421, P16 (2000)*; under the PSC orders, Verizon incurred liability to the competitive LECs in the amount of $10 **[***834]** million. Under the consent decree and orders, Verizon was subjected to new performance measurements and new reporting requirements to the FCC and PSC, with additional penalties for continued noncompliance. In June 2000, the FCC terminated the consent decree. Enforcement Bureau Announces that Bell Atlantic Has Satisfied Consent Decree Regarding Electronic Ordering Systems in New York (June 20, 2000), *http://www.fcc.gov/eb/News_Releases/bellatlet.html* (all Internet materials as visited Dec. 12, 2003, and available in Clerk of Court's case file). The next month the PSC relieved Verizon of the heightened reporting requirement. Order Addressing OSS Issues, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 1531916 (N. Y. PSC, July 27, 2000).

[**11]** Respondent Law Offices of Curtis V. Trinko, LLP, a New York City law firm, was a local telephone service customer of AT&T. The day after Verizon entered its consent decree with the FCC, respondent filed a complaint in the District Court for the Southern District of New York, on behalf of itself and a class of similarly situated customers. See App. 12-33. The complaint, as later amended, *id.*, at 34-50, alleged that Verizon had filled rivals' orders on a discriminatory basis as part of an anticompetitive scheme to discourage customers from becoming or

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[2] Order Directing Improvements To Wholesale Service Performance, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 2000 WL 363378 (N. Y. PSC, Feb. 11, 2000); Order Directing Market Adjustments and Amending Performance Assurance Plan, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 517633 (N. Y. PSC, Mar. 23, 2000); Order Addressing OSS Issues, *MCI Worldcom, Inc.* v *Bell Atlantic-New York*, Nos. 00-C-0008, 00-C-0009, 99-C-0949, 2000 WL 1531916 (N. Y. PSC, July 27, 2000); *In re Bell Atlantic-New York Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service In the State of New York, 15 FCC Rcd. 5413 (2000)* (Order); *id.*, at 5415 (Consent Decree).

remaining customers of competitive LECs, thus impeding the competitive LECs' ability to enter and compete in the market for local telephone service. See, *e.g., id.*, at 34-35, 46-47, PP 1, 2, 52, 54. According to the complaint, Verizon "has filled orders of [competitive LEC] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LEC] customers . . ., and has systematically failed to inform [competitive **[*405]** LECs] of the status of their customers' orders." *Id.*, at 39, P 21. The complaint set forth a single example of the **[****12]** alleged "failure to provide adequate access to [competitive LECs]," namely the OSS failure that resulted in the FCC consent decree and PSC orders. *Id.*, at 40, P 22. It asserted that the result of Verizon's improper "behavior with respect to providing access to its local loop" was to "deter potential customers [of rivals] from switching." *Id.*, 35, 47, PP2, 57. The complaint sought damages and injunctive relief for violation of § 2 of the Sherman Act, *15 USC § 2* [*15 USCS § 2*], pursuant to the remedy provisions of §§ 4 and 16 of the Clayton Act, 38 Stat 731, as amended, *15 USC §§ 15*, *26* [*15 USCS §§ 15, 26*. The complaint also alleged violations of the 1996 Act, § 202(a) of the Communications Act of 1934, 48 Stat 1064, as amended, *47 U.S.C. § 151 et seq.* [*47 USCS §§ 151 et seq.*], and state law.

The District Court dismissed the complaint in its entirety. As to the antitrust portion, it concluded that respondent's allegations of deficient assistance to rivals failed to satisfy the requirements of *§ 2*. The Court of Appeals for the Second Circuit reinstated the complaint in part, including the antitrust claim. *305 F.3d 89, 113 (2002)*. We granted **[****13]** certiorari, limited to the question whether the Court of Appeals erred in reversing the District Court's dismissal of respondent's antitrust claims.*538 U.S. 905, 538 U.S. 905, 155 L. Ed. 2d 224, 123 S. Ct. 1480 (2003)*.

[*835]** II

LEdHN[1B][] [1B] ***LEdHN[2A]***[] [2A] To decide this case, we must first determine what effect (if any) the 1996 Act has upon the application of traditional antitrust principles. ***HN2***[] The Act imposes a large number of duties upon incumbent LECs--above and beyond those basic responsibilities **[**878]** it imposes upon all carriers, such as assuring number portability and providing access to rights-of-way, see *47 U.S.C. §§ 251(b)(2), (4)* [*47 USCS §§ 251(b)(2)*, *(4)*]. Under the sharing duties of *§ 251(c)*, incumbent LECs are required to offer three kinds of access. Already noted, and perhaps most intrusive, is the duty to offer access to UNEs on "just, reasonable, and nondiscriminatory" **[*406]** terms, *§ 251(c)(3)*, a phrase that the FCC has interpreted to mean a price reflecting long-run incremental cost. See *Verizon Communs., Inc. v. FCC, 535 U.S. 467, at 495-496, 152 L. Ed. 2d 701, 122 S. Ct. 1646*. A rival can interconnect its own facilities with those of the incumbent LEC, or it can simply purchase services at wholesale from the incumbent and resell them to consumers. See *§§ 251(c)(2)*, **[****14]** (4). The Act also imposes upon incumbents the duty to allow physical "collocation"--that is, to permit a competitor to locate and install its equipment on the incumbent's premises--which makes feasible interconnection and access to UNEs. See *§ 251(c)(6)*.

LEdHN[2B][] [2B] That Congress created these duties, however, does not automatically lead to the conclusion that they can be enforced by means of an antitrust claim. Indeed, a detailed regulatory scheme such as that created by the 1996 Act ordinarily raises the question whether the regulated entities are not shielded from antitrust scrutiny altogether by the doctrine of implied immunity. See, *e.g.*, *United States v. National Ass'n. of Sec. Dealers, Inc., 422 U.S. 694, 45 L. Ed. 2d 486, 95 S. Ct. 2427 (1975)*; *Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 45 L. Ed. 2d 463, 95 S. Ct. 2598 (1975)*. In some respects the enforcement scheme set up by the 1996 Act is a good candidate for implication of antitrust immunity, to avoid the real possibility of judgments conflicting with the agency's regulatory scheme "that might be voiced by courts exercising jurisdiction under the antitrust laws." *United States v. National Ass'n. of Sec. Dealers, Inc., supra, 422 U.S. 694 at 734, 45 L. Ed. 2d 486, 95 S. Ct. 2427.* **[****15]**

Congress, however, precluded that interpretation. Section 601(b)(1) of the 1996 Act ***HN3***[] is an antitrust-specific saving clause providing that "nothing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws." 110 Stat 143, *47 U.S.C. § 152*, note [*47 USCS § 152* note]. This bars a finding of implied immunity. As the FCC has put the point, the saving clause preserves those "claims that satisfy established antitrust standards." Brief for United States and the Federal **[*407]** Communications Commission as *Amici Curiae* Supporting Neither Party in No. 02-7057, *Covad Communications Co.* v *Bell Atlantic Corp.* (CADC), p 8.

LEdHN[1C][] [1C] ***LEdHN[2C]***[] [2C] But just as the 1996 Act preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards; that would be equally inconsistent with the saving clause's mandate that nothing in the Act "modify, impair, or supersede the applicability" of the antitrust **[***836]** laws. We turn, then, to whether the activity of which respondent complains violates pre-existing antitrust standards.

III

LEdHN[1D][] [1D] ***LEdHN[3A]***[] [3A] ***LEdHN[4]***[] [4] The complaint alleges that Verizon denied interconnection **[****16]** services to rivals in order to limit entry. If that allegation states an antitrust claim at all, it does so ***HN4***[] under § 2 of the Sherman Act, *15 USC § 2* [*15 USCS § 2*], which declares that a firm shall not "monopolize" or "attempt to monopolize." *Ibid.* It is settled law that this offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior **[**879]** product, business acumen, or historic accident." *United States v. Grinnell Corp., 384 U.S. 563, 570-571, 16 L. Ed. 2d 778, 86 S. Ct. 1698 (1966)*. The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct.*

LEdHN[5][] [5] Firms ***HN5***[] may acquire **[****17]** monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose **[*408]** of ***antitrust law***, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing--a role for which they are illsuited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, ***HN6***[] as a general matter, the *Sherman Act* "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465, 1919 Dec. Comm'r Pat. 460 (1919)*.

LEdHN[3B][] [3B] ***LEdHN[6]***[] [6] ***LEdHN[7A]***[] [7A] However, ***HN7***[] "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 601, 86 L. Ed. 2d 467, 105 S. Ct. 2847 (1985).* **[****18]** Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate *§ 2*. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

LEdHN[3C][] [3C] The leading case for *§ 2* liability based on refusal to cooperate with a rival, and the case upon which **[***837]** respondent understandably places greatest reliance, is *Aspen Skiing, supra.* The Aspen ski area consisted of four mountain areas. The defendant, who owned three of those areas, and the plaintiff, who owned the fourth, had cooperated for years in the issuance of a joint, multiple-day, all-area ski ticket. After repeatedly demanding an increased share of the proceeds, the defendant canceled the joint ticket. The plaintiff, concerned that skiers would bypass its mountain without some joint **[*409]** offering, tried a variety of increasingly desperate measures to re-create **[****19]** the joint ticket, even to the point of in effect offering to buy the defendant's tickets at retail price. *Id., 472 U.S. 585 at 593-594, 86 L. Ed. 2d 467, 105 S.Ct. 2847*. The defendant refused even that. We upheld a jury verdict for the plaintiff, reasoning that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor." *Id., 472 U.S. 585 at 608, 86 L. Ed. 2d 467, 105 S. Ct. 2847*.

Aspen Skiing is at or near the outer boundary of *§ 2* liability. The Court there found significance in the defendant's decision **[**880]** to cease participation in a cooperative venture. See *id., 472 U.S. 585 at 608, 610-611, 86 L. Ed. 2d 467, 105 S. Ct. 2847*. The unilateral termination of a voluntary (*and thus presumably profitable*) course of dealing suggested a willingness to forsake short-term profits to achieve an anticompetitive end. *Ibid.* Similarly, the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent.

The refusal to deal alleged in the present case does not fit within the limited exception recognized in *Aspen Skiing.* The complaint does not allege that **[****20]** Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion. Here, therefore, the defendant's prior conduct sheds no light upon the motivation of its refusal to deal--upon whether its regulatory lapses were prompted not by competitive zeal but by anticompetitive malice. The contrast between the cases is heightened by the difference in pricing behavior. In *Aspen Skiing*, the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher. Verizon's reluctance to interconnect at the cost-based rate of compensation available under *§ 251(c)(3)* tells us nothing about dreams of monopoly.

LEdHN[3D][] [3D] ***LEdHN[8A]***[] [8A] The specific nature of what the 1996 Act compels makes this case different from *Aspen Skiing* in a more fundamental **[*410]** way. In *Aspen Skiing*, what the defendant refused to provide to its competitor was a product that it already sold at retail--to oversimplify slightly, lift tickets representing a bundle of services to skiers. Similarly, in *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)*, another case relied upon by respondent, **[****21]** the defendant was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers. *Id., 410 U.S. 366 at 370-371, 377-378, 35 L. Ed. 2d 359, 93 S. Ct. 1022*. In the present case, by contrast, the services allegedly withheld are not otherwise marketed or available to the public. The sharing obligation imposed by the 1996 Act **[***838]** created "something brand new"--"the wholesale market for leasing network elements." *Verizon Communs., Inc. v. FCC, 535 U.S. 467, at 528, 152 L. Ed. 2d 701, 122 S. Ct. 1646*. The unbundled elements offered pursuant to *§ 251(c)(3)* exist only deep within the bowels of Verizon; they are brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort. New systems must be designed and implemented simply to make that access possible--indeed, it is the failure of one of those systems that prompted the present complaint. [3]

[**22]** ***LEdHN[1E]***[] [1E] ***LEdHN[3E]***[] [3E] We conclude that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim under this Court's existing refusal-to-deal precedents. This conclusion would be unchanged even if we considered to be established law the "essential facilities" doctrine crafted by some lower courts, under which the Court of Appeals concluded respondent's allegations might state a claim. See generally Areeda, Essential Facilities: An Epithet **[*411]** in Need of **[**881]** Limiting Principles, 58 Antitrust L. J. 841 (1989). We have never recognized such a doctrine, see *Aspen Skiing Co., 472 U.S. 585 at 611, n. 44, 86 L. Ed. 2d 467, 105 S. Ct. 2847*; *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366 at 428, 142 L. Ed. 2d 834, 119 S. Ct. 721* (opinion of Breyer, J.), and we find no need either to recognize it or to repudiate it here. It suffices for present purposes to note that the indispensable requirement for invoking the doctrine is the unavailability of access to the "essential facilities"; where access exists, the doctrine serves no purpose. Thus, it is said that "essential facility claims should . . . be denied where a state or federal agency has effective power to compel sharing and to regulate **[****23]** its scope and terms." P. Areeda & H. Hovenkamp, ***Antitrust Law***, p 150, P 773e (2003 Supp.). Respondent believes that the existence of sharing duties under the 1996 Act supports its case. We think the opposite: The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's "essential facilities" argument is distinct from its general *§ 2* argument, we reject it.

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[3] ***LEdHN[8B]***[] [8B] Respondent also relies upon *United States v. Terminal R. Ass'n, 224 U.S. 383, 56 L. Ed. 810, 32 S. Ct. 507 (1912)*, and *Associated Press v. United States, 326 U.S. 1, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945)*. These cases involved *concerted* action, which presents greater anticompetitive concerns and is amenable to a remedy that does not require judicial estimation of free-market forces: simply requiring that the outsider be granted nondiscriminatory admission to the club.

IV

LEdHN[1F][] [1F] ***LEdHN[7B]***[] [7B] ***LEdHN[9A]***[] [9A] Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors. ***HN8***[] Antitrust analysis must always be attuned to the particular structure and circumstances of the industry at issue. Part of that attention to economic context is an awareness of the significance of regulation. As we have noted, "careful account must be taken of the pervasive federal and state regulation characteristic of the industry." *United States v. Citizens & Southern Nat. Bank, 422 U.S. 86, 91, 45 L. Ed. 2d 41, 95 S. Ct. 2099 (1975)*; see also IA P. Areeda & H. Hovenkamp, ***Antitrust Law***, p 12, P 240c3 (2d ed. **[***839]** 2000). "[A]ntitrust analysis must sensitively recognize and reflect **[****24]** the distinctive economic and legal setting of the regulated industry to which it applies." *Concord v. Boston Edison Co., 915 F.2d 17, 22* ***[*412]*** *(CA1 1990)* (Breyer, C. J.) (internal quotation marks omitted).

LEdHN[9B][] [9B] One factor of particular importance is the existence of a regulatory structure designed to deter and remedy anticompetitive harm. Where such a structure exists, the additional benefit to competition provided by antitrust enforcement will tend to be small, and it will be less plausible that the antitrust laws contemplate such additional scrutiny. Where, by contrast, "[t]here is nothing built into the regulatory scheme which performs the antitrust function," *Silver v. New York Stock Exchange, 373 U.S. 341, 358, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*, the benefits of antitrust are worth its sometimes considerable disadvantages. Just as regulatory context may in other cases serve as a basis for implied immunity, see, *e.g.*, *United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694 at 730-735, 45 L. Ed. 2d 486, 95 S. Ct. 2427*, it may also be a consideration in deciding whether to recognize an expansion of the contours of *§ 2*.

LEdHN[7C][] [7C] The regulatory framework that exists in this case demonstrates **[****25]** how, ***HN9***[] in certain circumstances, "regulation significantly diminishes the likelihood of major antitrust harm." *Concord v. Boston Edison Co., supra, at 25*. Consider, for example, the statutory restrictions upon Verizon's entry into the potentially lucrative market for long-distance service. To be allowed to enter the long-distance market in the first place, an incumbent LEC must be on good behavior in its local market. Authorization by the FCC requires state-by-state satisfaction of *§ 271*'s competitive checklist, which as we have noted includes the nondiscriminatory provision of access to **[**882]** UNEs. *Section 271* applications to provide long-distance service have now been approved for incumbent LECs in 47 States and the District of Columbia. See FCC Authorizes SBC to Provide Long Distance Service in Illinois, Indiana, Ohio and Wisconsin (Oct. 15, 2003), *http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-239978A1.pdf*.

The FCC's *§ 271* authorization order for Verizon to provide long-distance service in New York discussed at great length Verizon's commitments to provide access to UNEs, including **[*413]** the provision of OSS. **[****26]** *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, 15 FCC Rcd. 3953, 3989-4077, PP82-228 (1999)* (Memorandum Opinion and Order) (hereinafter *In re Application*). ***HN10***[] Those commitments are enforceable by the FCC through continuing oversight; a failure to meet an authorization condition can result in an order that the deficiency be corrected, in the imposition of penalties, or in the suspension or revocation of long-distance approval. See *47 U.S.C. § 271(d)(6)(A)* [*47 USCS § 271(d)(6)(A)*]. Verizon also subjected itself to oversight by the PSC under a so-called "Performance Assurance Plan" (PAP). See *In re New York Telephone Co., 197 P. U. R. 4th 266, 280-281 (N. Y. PSC, 1999)* (Order Adopting the Amended PAP). The PAP, which by its terms became binding upon FCC approval, provides specific financial penalties in the event of **[***840]** Verizon's failure to achieve detailed performance requirements. The FCC described Verizon's having entered into a PAP as a significant factor in its *§ 271* authorization, because that provided "a strong financial incentive for post-entry compliance **[****27]** with the *section 271* checklist," and prevented "'backsliding.'" *In re Application 3958-3959, PP8, 12.*

The regulatory response to the OSS failure complained of in respondent's suit provides a vivid example of how the regulatory regime operates. When several competitive LECs complained about deficiencies in Verizon's servicing of orders, the FCC and PSC responded. The FCC soon concluded that Verizon was in breach of its sharing duties under *§ 251(c)*, imposed a substantial fine, and set up sophisticated measurements to gauge remediation, with weekly reporting requirements and specific penalties for failure. The PSC found Verizon in violation of the PAP even earlier, and imposed additional financial penalties and measurements with *daily* reporting requirements. In short, the regime was an effective steward of the antitrust function.

[*414] Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. ***HN11***[] Under the best of circumstances, applying the requirements of *§ 2* "can be difficult" because "the means of illicit exclusion, like the means of legitimate competition, are myriad." *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (CADC 2001)* **[****28]** (en banc) *(per curiam).* Mistaken inferences and the resulting false condemnations "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986)*. The cost of false positives counsels against an undue expansion of *§ 2* liability. One false-positive risk is that an incumbent LEC's failure to provide a service with sufficient alacrity might have nothing to do with exclusion. Allegations of violations of *§ 251(c)(3)* duties are difficult for antitrust courts to evaluate, not only because they are highly technical, but also because they are likely to be extremely numerous, given the incessant, complex, and constantly **[**883]** changing interaction of competitive and incumbent LECs implementing the sharing and interconnection obligations. *Amici* States have filed a brief asserting that competitive LECs are threatened with "death by a thousand cuts," Brief for New York et al. as *Amici Curiae* 10 (internal quotation marks omitted)--the identification of which would surely be a daunting task for a generalist antitrust court. Judicial oversight under the **[****29]** *Sherman Act* would seem destined to distort investment and lead to a new layer of interminable litigation, atop the variety of litigation routes already available to and actively pursued by competitive LECs.

LEdHN[1G][] [1G] ***LEdHN[7D]***[] [7D] ***LEdHN[10A]***[] [10A] Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of *§ 251* may be, as we have concluded with respect to above-cost predatory pricing schemes, "beyond the practical ability of a judicial tribunal to control." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (1993)*. Effective **[*415]** remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think **[***841]** that Professor Areeda got it exactly right: ***HN12***[] "No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by ***antitrust law*** when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency." Areeda, 58 Antitrust L. J., at 853. In this case, respondent has requested an equitable decree to "[p]reliminarily and permanently enjoi[n] [Verizon] **[****30]** from providing access to the local loop market . . . to [rivals] on terms and conditions that are not as favorable" as those that Verizon enjoys. App. 49-50. An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations. [4]

* * *

LEdHN[1I][] [1I] ***LEdHN[11]***[] [11] The 1996 Act is in an important respect much more ambitious than the antitrust laws. It attempts "*to eliminate the monopolies* enjoyed by the inheritors **[****31]** of AT&T's local franchises." *Verizon Communs., Inc. v. FCC, 535 U.S. 467, at 476, 152 L. Ed. 2d 701, 122 S. Ct. 1646* (emphasis added). *Section 2 of the Sherman Act*, by contrast, seeks merely to prevent *unlawful monopolization.* It would be a serious mistake to conflate the two goals. *The Sherman Act* ***HN13***[] is indeed the "Magna Carta of free enterprise," *United States v. Topco Associates, Inc., 405 U.S. 596, 610, 31 L. Ed. 2d 515, 92 S. Ct. 1126 (1972)*, but it does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some

[4] ***LEdHN[1H]***[] [1H] ***LEdHN[10B]***[] [10B] The Court of Appeals also thought that respondent's complaint might state a claim under a "monopoly leveraging" theory (a theory barely discussed by respondent, see Brief for Respondent 24, n 10). We disagree. To the extent the Court of Appeals dispensed with a requirement that there be a "dangerous probability of success" in monopolizing a second market, it erred, *Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993)*. In any event, leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.

[*416] other approach might yield greater competition. We conclude that respondent's complaint fails to state a claim under the *Sherman Act*. [5]

[**32]** **[**884]** Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: STEVENS

Concur

Justice **Stevens,** with whom Justice **Souter** and Justice **Thomas** join, concurring in the judgment.

In complex cases it is usually wise to begin by deciding whether the plaintiff has standing to maintain the action. Respondent, the plaintiff in this case, is a local telephone service customer of AT&T. Its complaint alleges that it has received unsatisfactory service because Verizon has engaged in conduct that adversely affects AT&T's ability to serve its customers, in violation of § 2 of the Sherman Act. *15 USC § 2* [*15 USCS § 2*]. Respondent seeks from Verizon treble damages, a remedy that § 4 of **[***842]** the Clayton Act makes available to "any person who has been injured in his business or property." *15 USC § 15* [*15 USCS § 15*]. The threshold question presented by the complaint is whether, assuming the truth of its allegations, respondent is a "person" within the meaning of *§ 4*.

Respondent would unquestionably be such a "person" if we interpreted the text of the statute literally. But we have eschewed **[****33]** a literal reading of *§ 4*, particularly in cases in which there is only an indirect relationship between the defendant's alleged misconduct and the plaintiff's asserted injury. *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 529-535, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983)*. In such cases, "the importance of avoiding either the risk of duplicate recoveries **[*417]** on the one hand, or the danger of complex apportionment of damages on the other," weighs heavily against a literal reading of *§ 4*. *Id., 459 U.S. 519 at 543-544, 74 L. Ed. 2d 723, 103 S. Ct. 897*. Our interpretation of *§ 4* has thus adhered to Justice Holmes' observation that the "general tendency of the law, in regard to damages at least, is not to go beyond the first step." *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533, 62 L. Ed. 451, 38 S. Ct. 186 (1918)*.

I would not go beyond the first step in this case. Although respondent contends that its injuries were, like the plaintiff's injuries in *Blue Shield of Va. v. McCready, 457 U.S. 465, 479, 73 L. Ed. 2d 149, 102 S. Ct. 2540 (1982)*, "the very means by which . . . [Verizon] sought to achieve its illegal ends," it remains the case that whatever antitrust injury respondent suffered because of Verizon's **[****34]** conduct was purely derivative of the injury that AT&T suffered. And for that reason, respondent's suit, unlike *McCready*, runs both the risk of duplicative recoveries and the danger of complex apportionment of damages. The task of determining the monetary value of the harm caused to respondent by AT&T's inferior service, the portion of that harm attributable to Verizon's misconduct, whether all or just some of such possible misconduct was prohibited by the *Sherman Act*, and what offset, if any, should be allowed to make room for a recovery that would make AT&T whole, is certain to be daunting. AT&T, as the direct victim of Verizon's alleged misconduct, is in a far better position than respondent to vindicate the public interest in enforcement of the antitrust laws. Denying a remedy to AT&T's customer is not likely to leave a significant antitrust violation undetected or unremedied, and will serve the strong interest "in keeping the scope of complex antitrust trials within judicially manageable limits." *Associated Gen. Contractors, 459 U.S. 519 at 543, 74 L. Ed. 2d 723, 103 S. Ct. 897*.

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[5] Our disposition makes it unnecessary to consider petitioner's alternative contention that respondent lacks antitrust standing. See *Steel Co. v. Citizens for Better Environment, 523 U.S. 83, 97, and n 2, 140 L. Ed. 2d 210, 118 S. Ct. 1003* (1998); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 456, 38 L. Ed. 2d 646, 94 S. Ct. 690 (1974)*.

In my judgment, our reasoning in *Associated General Contractors* requires us to reverse the judgment of the Court **[****35]** of Appeals. **[**885]** I would not decide the merits of the *§ 2* **[*418]** claim unless and until such a claim is advanced by either AT&T or a similarly situated competitive local exchange carrier.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 113-*115*, 260; *74 Am Jur 2d, Telecommunications §§ 25*, 26, 45, 48, 53

15 USCS § 2; *47 USCS §§ 152* note, 251, 252, 271

L Ed Digest, Communications § 22; Restraints of Trade, Monopolies, and Unfair Trade Practices § 30.3

L Ed Index, Refusal or Denial; Telecommunications Act of 1996; Telephones and Telegraphs

Annotation References

Standing to sue, under § 4 of the Clayton Act (*15 USCS § 15* **[****36]**) and predecessor statute, to recover treble damages for antitrust violation--Supreme Court cases. *73 L Ed 2d 1427*.

Propriety and scope of injunctive relief in federal antitrust case--Supreme Court cases. *55 L Ed 2d 892*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L Ed 2d 841*.

Antitrust immunity under Federal Communications Act of 1934 (*47 USCS §§ 151 et seq.*) of communications carrier for acts involving interconnections with other communications carriers and equipment. 59 ALR Fed 239.

Refusals to deal as violations of the federal antitrust laws (*15 USCS §§ 1*, *2*, *13*). 41 ALR Fed 175.

Comment Note.--What constitutes "attempt to monopolize," within meaning of § 2 of Sherman Act (*15 USCS § 2*). 27 ALR Fed 762.

End of Document

United States Postal Serv. v. Flamingo Indus. (USA) Ltd.

Supreme Court of the United States

December 1, 2003, Argued ; February 25, 2004, Decided

No. 02-1290

Reporter

540 U.S. 736 *; 124 S. Ct. 1321 **; 158 L. Ed. 2d 19 ***; 2004 U.S. LEXIS 1625 ****; 72 U.S.L.W. 4212; 2004-1 Trade Cas. (CCH) P74,298; 17 Fla. L. Weekly Fed. S 168

UNITED STATES POSTAL SERVICE, Petitioner v. FLAMINGO INDUSTRIES (USA) LTD. et al.

Subsequent History: On remand at, Remanded by *Flamingo Indus. (USA) Ltd. v. United States Postal Serv., 366 F.3d 789, 2004 U.S. App. LEXIS 8534 (9th Cir. Cal., Apr. 30, 2004)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Flamingo Indus. v. United States Postal Serv., 302 F.3d 985, 2002 U.S. App. LEXIS 17524 (9th Cir. Cal., 2002)

Disposition: Reversed.

Core Terms

postal service, postal, antitrust, anti trust law, immunity, establishment, mail, Sherman Act, antitrust liability, executive branch, sue-and-be-sued, entity, appointed, delivery, monopoly, waived

LexisNexis® Headnotes

Governments > Federal Government > US Postal Service

HN1[] **Federal Government, US Postal Service**

The Articles of Confederation and the Constitution explicitly empowered the National Government to provide and regulate postal services. Article of Confederation IX; *U.S. Const. art. I, § 8*.

Governments > Federal Government > US Postal Service

HN2[] **Federal Government, US Postal Service**

The Postal Reorganization Act of 1971, *39 U.S.C.S. § 101 et seq.*, renames the Post Office Department the United States Postal Service and removes it from the Cabinet to make it an independent establishment of the executive branch of the Government of the United States. *39 U.S.C.S. § 201*.

Governments > Federal Government > US Postal Service

***HN3*[]** **Federal Government, US Postal Service**

The Postal Reorganization Act of 1971, *39 U.S.C.S. § 101 et seq.*, creates a second independent establishment, the Postal Rate Commission, to make recommendations on postal rate changes. *39 U.S.C.S. § 3601*. The Commission advises the Board of Governors on rates for all postal services, including both letter carriage and parcel delivery. *39 U.S.C.S. § 3621*. Rates are set by the Board of Governors based on the recommendations of the Commission, and those decisions are in certain circumstances subject to judicial review. *39 U.S.C.S. §§ 3625*, *3628*. In making rate recommendations the Commission must consider factors including making each class of mail bear the costs attributable to it, and the effect of rate increases on the mail-using public and on competitors in the parcel delivery business. *39 U.S.C.S. § 3622(b)*.

Governments > Federal Government > US Postal Service

***HN4*[]** **Federal Government, US Postal Service**

Under the Postal Reorganization Act of 1971, *39 U.S.C.S. § 101 et seq.*, the United States Postal Service retains its monopoly over the carriage of letters, and the power to authorize postal inspectors to search for, seize, and forfeit mail matter transported in violation of the monopoly. *39 U.S.C.S. §§ 601-606*.

Governments > Federal Government > US Postal Service

***HN5*[]** **Federal Government, US Postal Service**

The United States Postal Service retains the obligation to provide universal service to all parts of the country. *39 U.S.C.S. §§ 101*, *403*.

Governments > Federal Government > US Postal Service

International Trade Law > Dispute Resolution > General Overview

Governments > Federal Government > General Overview

***HN6*[]** **Federal Government, US Postal Service**

The United States Postal Service has the power of eminent domain, the power to make postal regulations, and the power to enter international postal agreements subject to the supervision of the Secretary of State. *39 U.S.C.S. §§ 401*, *407*. It has, in addition, powers to contract, to acquire property, and to settle claims. *39 U.S.C.S. § 401*.

Governments > Federal Government > Claims By & Against

Governments > Federal Government > US Postal Service

HN7[] **Federal Government, Claims By & Against**

The United States Postal Service has significant governmental powers, consistent with its status as an independent establishment of the Executive Branch.

Governments > Federal Government > US Postal Service

HN8[] **Federal Government, US Postal Service**

The Postal Reorganization Act of 1971, *39 U.S.C.S. § 101 et seq.*, waives the immunity of the United States Postal Service from suit by giving it the power to sue and be sued in its official name. *39 U.S.C.S. § 401*.

Administrative Law > Separation of Powers > Legislative Controls > General Overview

Governments > Federal Government > Claims By & Against

HN9[] **Separation of Powers, Legislative Controls**

When Congress passes enabling legislation allowing an agency or other entity of the Federal Government to be sued the waiver should be given a liberal -- that is to say, expansive -- construction.

Governments > Federal Government > Claims By & Against

HN10[] **Federal Government, Claims By & Against**

It must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under the circumstances would be.

Governments > Federal Government > US Postal Service

HN11[] **Federal Government, US Postal Service**

The sue-and-be-sued clause of the Postal Reorganization Act of 1971, *39 U.S.C.S. § 101 et seq.*, must be given broad effect.

Civil Procedure > Remedies > Judgment Interest > General Overview

Governments > Federal Government > Employees & Officials

Civil Rights Law > Protection of Rights > Immunity From Liability > State Consent & Waiver of Immunity

Governments > Federal Government > Claims By & Against

Governments > Federal Government > US Postal Service

Labor & Employment Law > ... > Title VII Discrimination > Scope & Definitions > General Overview

HN12[] **Remedies, Judgment Interest**

The sue-and-be-sued clause of the Postal Reorganization Act of 1971, *39 U.S.C.S. § 101 et seq.*, effects a broad waiver of immunity.

Governments > Federal Government > US Postal Service

HN13[] **Federal Government, US Postal Service**

As an independent establishment of the executive branch of the Government of the United States, *39 U.S.C.S. § 201*, the United States Postal Service is part of the Government and that status indicates immunity unless there is a waiver. The sue-and-be-sued clause waives immunity, and makes the Postal Service amenable to suit, as well as to the incidents of judicial process. *29 U.S.C.S. § 401*. While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status. The distinction is important. An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > US Postal Service

HN14[] **Antitrust & Trade Law, Sherman Act**

The United States Postal Service is not subject to antitrust liability.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > State & Territorial Governments > General Overview

HN15[] **Antitrust & Trade Law, Sherman Act**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, imposes liability on any "person." It defines the word. It provides that "person" shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States or of States or foreign governments. *15 U.S.C.S. § 7*. It follows then, that corporate or governmental status in most instances is not a bar to the imposition of liability on an entity as a "person" under the Act. The federal prohibition, for instance, binds state governmental bodies. It is otherwise, however, when liability is pursued against the Federal Government.

Antitrust & Trade Law > Sherman Act > Remedies > Damages

Governments > Federal Government > Claims By & Against

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN16[] **Remedies, Damages**

In the context of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the United States is not a person under the antitrust statute. If the definition of "person" included the United States, then the Government would be exposed to liability as an antitrust defendant, a result Congress could not have intended.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > Claims By & Against

HN17[] **Antitrust & Trade Law, Sherman Act**

In the context of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the United States is not an antitrust "person," in particular not a person who can be an antitrust defendant; the United States is not a proper antitrust defendant.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > US Postal Service

HN18[] **Antitrust & Trade Law, Sherman Act**

For purposes of the antitrust laws, the United States Postal Service is not a person separate from the United States itself. The statutory designation of the Postal Service as an independent establishment of the executive branch of the Government of the United States is not consistent with the idea that it is an entity existing outside the Government.

Antitrust & Trade Law > Sherman Act > Claims

Governments > Federal Government > US Postal Service

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN19[] **Sherman Act, Claims**

The Postal Reorganization Act of 1971 (PRA), *39 U.S.C.S. § 101 et seq.*, refers in explicit terms to various federal statutes and specifies that the United States Postal Service is exempt from some and subject to others. *39 U.S.C.S. §§ 409-410*. It makes no mention of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, or the antitrust laws, however. Absent an express statement from Congress that the Postal Service can be sued for antitrust violations despite its status as an independent establishment of the Government of the United States, the PRA does not subject the Postal Service to antitrust liability.

Governments > Federal Government > Domestic Security

Governments > Federal Government > General Overview

Governments > Federal Government > US Postal Service

HN20[] **Federal Government, Domestic Security**

The United States Postal Service has different goals, obligations, and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even, *39 U.S.C.S. § 3621*, which is consistent with its public character. It also has broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to the certain classes of persons, *39 U.S.C.S. §§ 3201-3405*, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

Governments > Federal Government > US Postal Service

HN21[] **Abuse of Discretion, Evidence**

The United States Postal Service's powers are more limited than those of private businesses. It lacks the prototypical means of engaging in anti-competitive behavior: the power to set prices. This is true both as a matter of mechanics, because pricing decisions are made with the participation of the separate Postal Rate Commission, and as a matter of substance, because price decisions are governed by principles other than profitability. Similarly, before it can close a post office, it must provide written reasons, and its decision is subject to reversal by the Commission for arbitrariness, abuse of discretion, failure to follow procedures, or lack of evidence. *39 U.S.C.S. § 404*. The Postal Service's public characteristics and responsibilities indicate it should be treated under the antitrust laws as part of the Government of the United States, not a market participant separate from it.

Governments > Courts > Clerks of Court

Governments > Federal Government > US Postal Service

HN22[] **Courts, Clerks of Court**

The United States Postal Service does operate nonpostal lines of business, for which it is free to set prices independent of the Postal Rate Commission, and in which it may seek profits to offset losses in the postal business. *39 U.S.C.S. § 403(a)*.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Federal Government > US Postal Service

HN23[] **Antitrust & Trade Law, Sherman Act**

The United States Postal Service, in both form and function, is not a separate antitrust person from the United States. It is part of the Government of the United States and so is not controlled by the antitrust laws.

Lawyers' Edition Display

Decision

[*19]** United States Postal Service held not to be "person" subject to antitrust liability under Sherman Act (15 USCS §§ 1 et seq.).

Summary

After a private corporation's contract to make mail sacks for the United States Postal Service was terminated, the corporation brought a suit alleging, among other matters, that the Postal Service had sought to suppress competition and create a monopoly in mail-sack production. The United States District Court for the Northern District of California, in dismissing the antitrust claims, concluded that the Postal Service was not subject to liability under federal ***antitrust law***.

The United States Court of Appeals for the Ninth Circuit, in reversing, concluded that the Postal Service could be liable, but had a limited immunity from antitrust liability for conduct undertaken at Congress' command (*302 F.3d 985*).

On certiorari, the United States Supreme Court reversed. In an opinion by Kennedy, J., expressing the unanimous view of the court, it was held that the Postal Service was not a "person" subject to antitrust liability under the Sherman Act (*15 USCS §§ 1 et seq.*), as:

(1) While, in the Postal Reorganization Act (*39 USCS §§ 101 et seq.*), Congress had generally waived the Postal Service's sovereign immunity from suit, Congress had not stripped the Postal Service of its governmental status.

(2) A federal entity's absence of immunity did not result in liability if the substantive law in question was not intended to reach the entity.

(3) The Sherman Act, the Supreme Court's decisions interpreting it, and the statutes that had created and organized the Postal Service led to the conclusion that the Postal Service was not subject to antitrust liability.

Headnotes

POSTAL SERVICE §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > -- Sherman Act -- liability > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

The United States Postal Service was not a "person" subject to antitrust liability under the Sherman Act (*15 USCS §§ 1 et seq.*)--and thus, a private corporation whose contract to make mail sacks for the Postal Service had been terminated could not sustain, against the Postal Service, an antitrust action alleging that the Postal Service had sought to suppress competition and monopolize mail-sack production--as the United States Supreme Court determined that:

(1) While, in the Postal Reorganization Act (*39 USCS §§ 101 et seq.*), Congress had generally waived the Postal Service's sovereign immunity from suit, Congress had not stripped the Postal Service of its governmental status.

(2) A federal entity's absence of immunity did not result in liability if the substantive law in question was not intended to reach the entity.

(3) The Sherman Act, the Supreme Court's decisions interpreting it, and the statutes that had created and organized the Postal Service led to the conclusion that the Postal Service was not subject to antitrust liability.

POSTAL SERVICE §1 > -- Postal Reorganization Act > Headnote:
LEdHN[2][] [2]

The Postal Reorganization Act (*39 USCS §§ 101 et seq.*) was adopted to increase the efficiency of the United States Postal Service and reduce political influences on its operations.

POSTAL SERVICE §6 > -- waiver of immunity -- Sherman Act > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

Under the Postal Reorganization Act (*39 USCS §§ 101 et seq.*)--which (1) in *39 USCS § 401*, generally waives the immunity of the United States Postal Service from suit by giving the Postal Service the power to sue and be sued in its official name, but (2) is silent as to whether the Postal Service is subject to antitrust liability--the waiver does not suffice by its own terms to subject the Postal Service to antitrust liability under the Sherman Act (*15 USCS §§ 1 et seq.*), as (1) Congress, although waiving Postal Service immunity, did not strip the Postal Service of its governmental status; and (2) an absence of immunity for a federal entity does not result in liability if the substantive law in question is not intended to reach the entity.

[*21]**

POSTAL SERVICE §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > -- liability -- factors > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

For purposes of determining whether the United States Postal Service was a "person" subject to antitrust liability under the Sherman Act (*15 USCS §§ 1 et seq.*), the United States Supreme Court applied a two-step analysis under which the court asked (1) whether, under the Postal Reorganization Act (*39 USCS §§ 101 et seq.*), there was a waiver of sovereign immunity for actions against the Postal Service; and (2) if so, whether the substantive prohibitions of the Sherman Act applied to an independent establishment of the Federal Government's executive branch. As to the first step, (1) as an "independent establishment of the executive branch of the Government of the United States," under *39 USCS § 201*, the Postal Service was part of the government, and that status indicated immunity unless there was a waiver; and (2) the clause in *39 USCS § 401* that gave the Postal Service the power to sue and be sued in its official name (a) waived immunity, and (b) made the Postal Service amenable to suit as well as to the incidents of judicial process.

[*22]**

POSTAL SERVICE §6 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > -- Sherman Act -- governmental immunity > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

Upon examining the Sherman Act (*15 USCS §§ 1 et seq.*), the United States Supreme Court decisions interpreting the Sherman Act, and the statutes--particularly the Postal Reorganization Act (PRA) (*39 USCS §§ 101 et seq.*)--that created and organized the United States Postal Service, the Supreme Court concluded that the Postal Service was not subject to antitrust liability, because:

(1) After an earlier Supreme Court decision holding that the United States could not sue for antitrust damages because it was not a person under the Sherman Act, Congress implicitly ratified this decision to the extent that the United States could not be an antitrust defendant, when Congress, in amending the antitrust statutes, did not

change the statutory definition of "person," but added a new Sherman Act section (*15 USCS § 15a*) allowing the United States to sue.

(2) The Postal Service's public characteristics and responsibilities indicated that it ought to be treated under the antitrust laws as part of the Federal Government, not a market participant separate from the government, for:

(a) The PRA's designation, in *39 USCS § 201*, of the Postal Service as an "independent establishment of the executive branch of the Government of the United States" was not consistent with the idea that it was an entity existing outside the government.

(b) Although the PRA gave the Postal Service a high degree of independence from other offices of the government, the Postal Service remained part of the government.

(c) Absent an express statement from Congress that the Postal Service could be sued for antitrust violations despite its status as an independent establishment of the government, the PRA did not subject the Postal Service to antitrust liability.

(d) The court's conclusion was consistent with the nationwide, public responsibilities of the Postal Service, which had different goals, obligations, and powers from those of private corporations, as (i) the most important difference was that the Postal Service did not seek profits, but--as illustrated in *39 USCS § 3621*--only to break even, which was consistent with its public character; (ii) the Postal Service also had broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to the certain classes of persons, and, most recently, increased public responsibilities related to national security; and (iii) the Postal Service had many powers more characteristic of government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.

(e) The Postal Service's powers were more limited than those of private businesses, for (i) the Postal Service lacked the prototypical means of engaging in anticompetitive behavior--the power to set prices; and (ii) before the Postal Service could close a post office, it was required to provide written reasons, and its decision was subject, under *39 USCS § 404*, to reversal by the Postal Rate Commission for arbitrariness, abuse of discretion, failure to follow procedures, or lack of evidence.

(f) Although the Postal Service operated nonpostal lines of business, for which it was free to set prices independent of the Commission, and in which the Postal Service could seek profits to offset losses in the postal business, the Postal Service's lines of business beyond the scope of its mail monopoly and universal service obligation did not show that it was separate from the government under the antitrust laws, as (i) the great majority of the Postal Service's business consisted of postal services; and (ii) the Postal Service's predecessor, the Post Office Department, had had nonpostal lines of business and, as a federal cabinet agency, had not been subject to the antitrust laws.

[*23]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §11 > STATES, TERRITORIES, AND POSSESSIONS §87 > -- liability > Headnote:
LEdHN[6][] [6]

As the Sherman Act (*15 USCS §§ 1 et seq.*), which imposes antitrust liability on any "person," provides, in *15 USCS § 7*, that "'person' shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States [or of States or foreign governments]," it follows that corporate or governmental status in most instances is not a bar to the imposition of liability on an entity as a "person" under the Act. The federal prohibition, for instance, binds state governmental bodies.

Syllabus

After their contract to make mail sacks for the United States Postal Service was terminated, respondents brought this suit alleging, *inter alia*, that the Postal Service had sought to suppress competition and create a monopoly in mail sack production. The District Court dismissed the antitrust claims, concluding that the Postal Service is not subject to liability under federal ***antitrust law***. The Ninth Circuit reversed, holding that the Postal Service can be liable but that it has a limited immunity from antitrust liability for conduct undertaken at Congress' command.

Held:

The Postal Service is not subject to antitrust liability. **[****2]** In both form and function, it is not a separate antitrust person from the United States but is part of the Government, and so is not controlled by the antitrust laws.

(a) The waiver of immunity from suit provided by the Postal Reorganization Act (PRA)--which gives the Postal Service the power "to sue and be sued in its official name," *39 USC § 401* [*39 USCS § 401*]--does not suffice by its own terms to subject the Postal Service to liability under the Sherman Act. The two-step analysis of *FDIC v. Meyer, 510 U.S. 471, 484, 127 L. Ed. 2d 308, 114 S. Ct. 996*, applies here. *Meyer*'s first step is met because the PRA's sue-and-be-sued clause effects a waiver of sovereign immunity for actions against the Postal Service. However, *Meyer*'s second step for finding liability--whether the Sherman Act's substantive prohibitions apply to the Postal Service--is not satisfied. The Sherman Act imposes liability on any "person," defined "to include corporations and associations existing under or authorized by the laws of . . . the United States." *15 USC § 7* [*15 USCS § 7*]. In holding that the United States is not a person authorized to bring a treble-damages claim for **[****3]** its own alleged antitrust injury under the Sherman Act, *United States v. Cooper Corp., 312 U.S. 600, 606-607, 85 L. Ed. 1071, 61 S. Ct. 742*, this Court observed that, if the definition of "person" included the United States, the Government would be exposed **[***24]** to liability as an antitrust defendant, a result Congress could not have intended, *id., at 607, 609, 85 L. Ed. 1071, 61 S. Ct. 742*. Although the antitrust statutes were later amended to allow the United States to bring antitrust suits, see *15 USC § 15a* [*15 USCS § 15a*], Congress did not thereby change the statutory definition of "person." So, *Cooper*'s conclusion that the United States is not an antitrust "person," in particular not a person who can be an antitrust defendant, was unaltered by Congress' action; indeed, the means Congress used to amend the ***antitrust law*** implicitly ratified *Cooper*'s conclusion that the United States is not a proper antitrust defendant.

(b) For purposes of the antitrust laws, the Postal Service is not a separate person from the United States. The PRA's designation of the Postal Service as an "independent establishment of the executive branch of the Government of the United States," *39 USC § 201* [*39 USCS § 201*], **[****4]** is not consistent with the idea that the Postal Service is an entity existing outside the Government. Indeed, the designation indicates just the contrary. The PRA gives the Postal Service a high degree of independence from other Government offices, but it remains part of the Government. The Sherman Act defines "person" to include corporations, *15 USC § 7* [*15 USCS § 7*], and had Congress chosen to create the Postal Service as a federal corporation, the Court would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text. Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment. The choice of words likely was more informed than unconsidered, because Congress debated proposals to make the Postal Service a Government corporation before it enacted the PRA. Although the PRA refers explicitly to various federal statutes and specifies that the Postal Service is exempt from some and subject to others, *39 U.S.C. § 409-410 [39 USCS §§ 409-410]*, it makes no mention of the Sherman Act or the antitrust laws. This silence leads to no helpful inference **[****5]** one way or the other on the question at issue. However, the other considerations the Court has discussed lead to the conclusion that, absent an express congressional statement that the Postal Service can be sued for antitrust violations despite its status as an independent establishment of the Government, the PRA does not subject the Postal Service to antitrust liability. This conclusion is consistent with the nationwide, public responsibilities of the Postal Service, which has different goals from private corporations, the most important being that it does not seek profits, *§ 3621*. It also has broader obligations, including the provision of universal mail delivery and free mail delivery to certain classes of persons, *§§ 3201-3405*, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, *§ 601 et seq.*, and the powers of eminent domain and to conclude international postal agreements, *§§ 401, 407*. On the other hand, but in ways still relevant to the antitrust laws' nonapplicability, the Postal **[****6]** Service's powers are more limited than those of **[***25]** private businesses, since it lacks the power unilaterally to set prices or to close a post office, *§ 404*. Its public characteristics and responsibilities indicate it should be treated under the antitrust laws as part of the Government, not a market participant separate from it. The fact that the Postal Service operates some nonpostal lines of business beyond the scope of its mail monopoly and universal service obligation does not alter this conclusion.

302 F.3d 985, reversed.

Counsel: Edwin S. Kneedler argued the cause for petitioner.

Harold J. Krent argued the cause for respondents.

Judges: Kennedy, J., delivered the opinion for a unanimous Court.

Opinion by: Kennedy

Opinion

[1324]** **[*738]** Justice **Kennedy** delivered the opinion of the Court.

LEdHN[1A][] [1A] This case requires us to consider whether the United States Postal Service is subject to liability under the federal antitrust laws.

Flamingo Industries (USA) Ltd., a private corporation, and its owner and principal officer are the respondents here. Flamingo had been making mail sacks for the Postal Service, but then its contract was terminated. The respondents sued in United States District Court alleging that the Postal Service had sought to suppress competition and create a monopoly in mail sack production. **[****7]** (They also brought claims against the Postal Service under federal procurement law and state law, but those claims are not before us.) The District **[*739]** Court dismissed the antitrust claims, concluding that the Postal Service is not subject to liability under federal ***antitrust law***. The Court of Appeals reversed. It held that the Postal Service can be liable but that it has a limited immunity from antitrust liability for conduct undertaken at the command of Congress. *302 F.3d 985, 993 (CA9 2002)*. We granted certiorari to consider the question whether the United States Postal Service is a "person" amenable to suit under the controlling antitrust statute. *538 U.S. 1056, 155 L. Ed. 2d 1104, 123 S. Ct. 2215 (2003)*. We hold it is not subject to antitrust liability, and we reverse.

After the Revolution, both ***HN1***[] the Articles of Confederation and the Constitution explicitly empowered the National Government to provide and regulate postal services. Article of Confederation IX; *U.S. Const., Art. I § 8*. The importance of the enterprise was prefigured by the Continental Congress' appointment of Benjamin Franklin to be the first Postmaster General, on July 26, 1775. G. Cullinan, The United States Postal Service **[****8]** 26 (1973) (hereinafter Cullinan). From those beginnings, the Postal Service has become "the nation's oldest and largest public business." J. Tierney, Postal Reorganization: Managing the Public's Business vii (1981) (hereinafter Tierney).

During its history since Postmaster Franklin, the postal organization has been **[**1325]** reorganized or restructured at various times. In the immediate period after ratification of the Constitution, it was called the General Post Office and was subordinate to the Treasury Department. Cullinan 35-36. In 1825, its name changed from the General Post Office to the Post Office Department, an alteration accomplished by somewhat informal means when Postmaster Joseph McLean simply changed the title on official letterhead. McLean also began the practice of reporting directly to the President rather than **[***26]** to the Secretary of the Treasury. *Id.*, at 50-51. (McLean was a popular Postmaster who served from 1823 until 1829, when the incoming President Andrew Jackson **[*740]** solved his worries about McLean's independence in matters of postal governance, especially patronage, by appointing him to this Court. *Id.,* at 52.) In 1829, President Jackson acknowledged the enhanced status **[****9]** of the Postmaster General by making him a member of the Cabinet, though it was not until 1872 that Congress formally recognized the Post Office Department as an executive department of the Federal Government. *Id.*, at 36. A more complete account of the origins and mission of the postal system is set forth in *Postal Service v. Council of Greenburgh Civic Assns., 453 U.S. 114, 120-126, 69 L. Ed. 2d 517, 101 S. Ct. 2676 (1981)*.

LEdHN[2][] [2] Major change came with the Postal Reorganization Act of 1971 (PRA), *39 U.S.C. § 101 et seq.* [*39 USCS §§ 101 et seq*.]. It was adopted to increase the efficiency of the Postal Service and reduce political influences on its operations. Tierney 1-26; Cullinan 5-10. ***HN2***[] The PRA renames the Post Office Department the United States Postal Service and removes it from the Cabinet to make it "an independent establishment of the executive branch of the Government of the United States." *39 USC § 201* [*39 USCS § 201*]. Superintendence over the new Postal Service is the responsibility of a Board of Governors, consisting of 11 members. *§ 202*. Nine governors are appointed by the President with the advice and consent of the Senate and are removable only for cause. *Ibid.* The other **[****10]** two governors are the Postmaster General, who also serves as the chief executive officer of the Postal Service, and who is appointed by the other nine, and the Deputy Postmaster General, who is appointed by the other nine together with the Postmaster General. *Ibid.*

HN3[] The PRA creates a second independent establishment, the Postal Rate Commission, to make recommendations on postal rate changes. *§ 3601*. The Commission advises the Board of Governors on rates for all postal services, including both letter carriage and parcel delivery. *§ 3621*. Rates are set by the Board of Governors based on the recommendations of the Commission, and those decisions are in certain **[*741]** circumstances subject to judicial review. *§§ 3625, 3628*. In making rate recommendations the Commission must consider factors including making each class of mail bear the costs attributable to it, and the effect of rate increases on the mail-using public and on competitors in the parcel delivery business. *§ 3622(b)*.

LEdHN[3A][] [3A] ***HN4***[] Under the PRA, the Postal Service retains its monopoly over the carriage of letters, and the power to authorize postal inspectors to search for, seize, and forfeit mail matter transported in violation of **[****11]** the monopoly. See *§§ 601-606*. ***HN5***[] It also retains the obligation to provide universal service to all parts of the country. *§§ 101, 403*. ***HN6***[] The Postal Service has the power of eminent domain, the power to make postal regulations, and the power to enter international postal agreements subject to the supervision of the Secretary of State. *§§ 401, 407*. It has, in addition, powers to contract, to acquire property, and to settle claims. *§ 401*. As this brief summary indicates, ***HN7***[] the Postal Service has significant **[**1326]** governmental powers, consistent with its status as an **[***27]** independent establishment of the Executive Branch. It was exempted from many, though not all, statutes governing federal agencies, and specifically subjected to some others. *§§ 409-410*. With respect to antitrust liability, however, the PRA neither exempts the Postal Service nor subjects it to liability by express mention. It is silent on the point.

HN8[] The PRA waives the immunity of the Postal Service from suit by giving it the power "to sue and be sued in its official name." *§ 401*. The first question we address is whether that waiver suffices by its own terms to subject the Postal Service to liability under the Sherman Act, 26 Stat 209, as **[****12]** amended, *15 U.S.C. § 1 et seq.* [*15 USCS §§ 1 et seq.*]. We begin with a discussion of our precedents bearing on the inquiry.

This Court has held that ***HN9***[] when Congress passes enabling legislation allowing an agency or other entity of the Federal Government to be sued the waiver should be given a liberal--that is to say, expansive--construction. *Federal* ***[*742]*** *Housing Administration v. Burr, 309 U.S. 242, 84 L. Ed. 724, 60 S. Ct. 488 (1940)*. In support of its holding in *Burr* the Court, in a passage often cited in later cases involving the waiver of sovereign immunity, wrote as follows:

> ***HN10***[] "[I]t must be presumed that when Congress launched a governmental agency into the commercial world and endowed it with authority to 'sue or be sued', that agency is not less amenable to judicial process than a private enterprise under the circumstances would be." *Id., at 245, 84 L. Ed. 724, 60 S. Ct. 488*.

This general proposition was cited in the first two cases in which the Court considered the extent of the waiver effected by the sue-and-be-sued clause of the PRA. In *Franchise Tax Bd. of Cal. v. Postal Service, 467 U.S. 512, 81 L. Ed. 2d 446, 104 S. Ct. 2549 (1984)*, the underlying dispute concerned the obligation of the Postal Service to **[****13]** withhold unpaid state taxes from the wages of its employees. A unanimous Court held that the Postal Service was required to respond to an order to withhold the amounts, even though the process was a state administrative tax levy, not an order issued by a state court. *Id., at 525, 81 L. Ed. 2d 446, 104 S. Ct. 2549*. ***HN11***[] The sue-and-be-sued clause, the Court held, must be given broad effect, and the Postal Service was required to respond to the administrative order even though it had not been issued by a judicial body. *Id., at 519-521, 81 L. Ed. 2d 446, 104 S. Ct. 2549*.

The second case in which the Court considered the scope of the waiver effected by the PRA's sue-and-be-sued clause was *Loeffler v. Frank, 486 U.S. 549, 100 L. Ed. 2d 549, 108 S. Ct. 1965 (1988)*. After the Postal Service had been found liable for damages from employment discrimination in an action brought under *Title VII of the Civil Rights Act of 1964*, the question arose whether it was subject as well to prejudgment interest. *Id., at 551, 100 L. Ed. 2d 549, 108 S. Ct. 1965*. The Court allowed the interest, and in the course of its decision asserted, or repeated, formulations which indicate that ***HN12***[] the sue-and-be-sued clause effects a broad waiver of immunity. ***[*743]*** *Id., at 554-555, 100 L. Ed. 2d 549, 108 S. Ct. 1965*. The **[****14]** Court also relied, however, upon the provisions of Title VII itself which, by specific amendment, extended the coverage under the Civil Rights Act to federal employees. ***[***28]*** *Id., at 558-561, 100 L. Ed. 2d 549, 108 S. Ct. 1965*.

After *Loeffler*, this Court decided *FDIC v. Meyer, 510 U.S. 471, 484, 127 L. Ed. 2d 308, 114 S. Ct. 996 (1994)*. In *Meyer*, the question was whether the Federal Savings and Loan Insurance Corp. (FSLIC), an agency of the United States, could be held liable in a so-called "*Bivens* action." See **[**1327]** *Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971)*. A federal statute provided for a waiver of sovereign immunity in suits against the FSLIC, but the Court explained that the interpretation of the waiver statute was just the initial part of a two-part inquiry. Even though sovereign immunity had been waived, there was the further, separate question whether the agency was subject to the substantive liability recognized in *Bivens. Meyer, supra, at 483, 127 L. Ed. 2d 308, 114 S. Ct. 996*. The *Loeffler* Court had not set forth the two-step analysis in the explicit terms *Meyer* used, but it did, as we have said, consult the statute as the source of the liability upon which the obligation **[****15]** to pay prejudgment interest depended.

LEdHN[4A][] [4A] The two-step analysis in *Meyer* applies here. We ask first whether there is a waiver of sovereign immunity for actions against the Postal Service. If there is, we ask the second question, which is whether the substantive prohibitions of the Sherman Act apply to an independent establishment of the Executive Branch of the United States.

When the Court of Appeals considered the instant case, it cited *Meyer* and seemed at the outset to follow *Meyer*'s two-step analysis. In our view, however, the ensuing discussion in the Court of Appeals' opinion was not consistent with the *Meyer* framework; for, having found that the Postal Service's immunity from suit is waived to the extent provided by the statutory sue-and-be-sued clause, the Court of Appeals relied on the same waiver to conclude that the Sherman **[*744]** Act applies to the Postal Service. This conflated the two steps and resulted in an erroneous conclusion. See *Meyer, supra, at 484, 127 L. Ed. 2d 308, 114 S. Ct. 996*.

LEdHN[1B][] [1B] ***LEdHN[3B]***[] [3B] ***LEdHN[4B]***[] [4B] As to the first step, ***HN13***[] as an "independent establishment of the executive branch of the Government of the United States," *39 USC § 201* [*39 USCS § 201*], the Postal Service is part **[****16]** of the Government and that status indicates immunity unless there is a waiver. The sue-and-be-sued clause waives immunity, and makes the Postal Service amenable to suit, as well as to the incidents of judicial process. *§ 401*. See *Meyer, supra, at 482, 127 L. Ed. 2d 308, 114 S. Ct. 996*; *Loeffler, supra, at 565, 100 L. Ed. 2d 549, 108 S. Ct. 1965*; *Franchise Tax Bd., supra, at 525, 81 L. Ed. 2d 446, 104 S. Ct. 2549*. While Congress waived the immunity of the Postal Service, Congress did not strip it of its governmental status. The distinction is important. An absence of immunity does not result in liability if the substantive law in question is not intended to reach the federal entity. So we proceed to *Meyer*'s second step to determine if the substantive antitrust liability defined by the statute extends to the Postal Service. Under *Meyer*'s second step, we must look to the statute.

LEdHN[1C][] [1C] ***LEdHN[5A]***[] [5A] Some years before *Meyer* was decided, the Court of Appeals for the District of Columbia Circuit recognized the two distinct inquiries required when the question is **[***29]** whether the Government, or an entity it owns, is named as a defendant in a suit under the antitrust laws. *Sea-Land Serv., Inc. v. Alaska R. Co., 212 U.S. App. D.C. 197, 659 F.2d 243, 245 (1981)* (R. Ginsburg, **[****17]** J.). That is the correct approach. Upon examining the Sherman Act, our decisions interpreting it, and the statutes that create and organize the Postal Service, we conclude that ***HN14***[] the Postal Service is not subject to antitrust liability.

LEdHN[6][] [6] ***HN15***[] The Sherman Act imposes liability on any "person." It defines the word. It provides that "'person' shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States [or of States or foreign governments.]" *15 USC § 7* [*15 USCS § 7*]. It follows then, that corporate or governmental status in most instances is not a bar to the imposition of liability on **[**1328]** an entity **[*745]** as a "person" under the Act. The federal prohibition, for instance, binds state governmental bodies. See *Georgia v. Evans, 316 U.S. 159, 86 L. Ed. 1346, 62 S. Ct. 972 (1942)*; see also *Pfizer Inc. v. Government of India, 434 U.S. 308, 54 L. Ed. 2d 563, 98 S. Ct. 584 (1978)*.

LEdHN[5B][] [5B] It is otherwise, however, when liability is pursued against the Federal Government. The Court made this proposition clear in *United States v. Cooper Corp., 312 U.S. 600, 614, 85 L. Ed. 1071, 61 S. Ct. 742 (1941)*. The question in *Cooper* was whether, under the Sherman Act, the United States **[****18]** was a person who could bring a treble-damages claim for its own alleged antitrust injury. The Court held ***HN16***[] the United States could not sue for antitrust damages because it is not a person under the antitrust statute. *Id., at 606-607, 614, 85 L. Ed. 1071, 61 S. Ct. 742*. Important to the present case is an explicit reason given by the *Cooper* Court for reaching its decision. The Court observed that if the definition of "person" included the United States, then the Government would be exposed to liability as an antitrust defendant, a result Congress could not have intended. *Id., at 607, 609, 614, 85 L. Ed. 1071, 61 S. Ct. 742*.

After *Cooper*, Congress amended the antitrust statutes to allow the United States to bring antitrust suits. For our purposes, the means by which it did so is instructive. Congress did not change the definition of "person" in the statute, but added a new section allowing the United States to sue. See *15 USC § 15a* [*15 USCS § 15a*]. So, *Cooper*'s conclusion that ***HN17***[] the United States is not an antitrust "person," in particular not a person who can be an antitrust defendant, was unaltered by Congress' action; indeed, the means Congress used to amend the ***antitrust law*** implicitly ratified **[****19]** *Cooper*'s conclusion that the United States is not a proper antitrust defendant. See *312 U.S., at 609, 614, 85 L. Ed. 1071, 61 S. Ct. 742*; *Sea-Land, 659 F.2d at 245* ("Although Congress was well aware of the view the Court indicated in *Cooper Corp.*, that Congress had not described the United States as a 'person' for Sherman Act purposes, Congress addressed only the direct holding in that case--the ruling that the United States was not authorized to proceed **[*746]** as a Sherman Act treble damage action plaintiff." (footnote omitted)).

The remaining question, then, is whether ***HN18***[] for purposes of the antitrust laws the Postal Service is a person separate from the United States itself. It is not. The statutory designation of the Postal Service as an "independent establishment of the **[***30]** executive branch of the Government of the United States" is not consistent with the idea that it is an entity existing outside the Government. The statutory instruction that the Postal Service is an establishment "of the executive branch of the Government of the United States" indicates just the contrary. The PRA gives the Postal Service a high degree of independence from other offices of the Government, but it remains **[****20]** part of the Government. The Sherman Act defines "person" to include corporations, and had the Congress chosen to create the Postal Service as a federal corporation, we would have to ask whether the Sherman Act's definition extends to the federal entity under this part of the definitional text. Congress, however, declined to create the Postal Service as a Government corporation, opting instead for an independent establishment. The choice of words likely was more informed than unconsidered, because Congress debated proposals to make the Postal Service a Government corporation before it enacted the PRA. See H. R. Rep. No. 91-1104, p 6 (1970).

[1329]** As we have noted, ***HN19***[] the PRA refers in explicit terms to various federal statutes and specifies that the Postal Service is exempt from some and subject to others. *39 U.S.C. §§ 409-410*[*39 USCS §§ 409-410*]. It makes no mention of the Sherman Act or the antitrust laws, however. The silence leads to no helpful inference one way or the other on the issue before us; but the other considerations we have discussed lead us to say that absent an express statement from Congress that the Postal Service can be sued for antitrust violations despite its status **[****21]** as an independent establishment of the Government of the **[*747]** United States, the PRA does not subject the Postal Service to antitrust liability.

Our conclusion is consistent with the nationwide, public responsibilities of the Postal Service. ***HN20***[] The Postal Service has different goals, obligations, and powers from private corporations. Its goals are not those of private enterprise. The most important difference is that it does not seek profits, but only to break even, *39 USC § 3621* [*39 USCS § 3621*], which is consistent with its public character. It also has broader obligations, including the provision of universal mail delivery, the provision of free mail delivery to the certain classes of persons, *§§ 3201-3405*, and, most recently, increased public responsibilities related to national security. Finally, the Postal Service has many powers more characteristic of Government than of private enterprise, including its state-conferred monopoly on mail delivery, the power of eminent domain, and the power to conclude international postal agreements.

On the other hand, but in ways still relevant to the nonapplicability of the antitrust laws to the Postal Service, ***HN21***[] its powers are more limited **[****22]** than those of private businesses. It lacks the prototypical means of engaging in anti-competitive behavior: the power to set prices. This is true both as a matter of mechanics, because pricing decisions are made with the participation of the separate Postal Rate Commission, and as a matter of substance, because price decisions are governed by principles other than profitability. See *supra, at ____ - ____, 158 L. Ed. 2d, at 26*. Similarly, before it can close a post office, it must provide written reasons, and its decision is **[***31]** subject to reversal by the Commission for arbitrariness, abuse of discretion, failure to follow procedures, or lack of evidence. *§ 404*. The Postal Service's public characteristics and responsibilities indicate it should be treated under the antitrust laws as part of the Government of the United States, not a market participant separate from it.

HN22[] The Postal Service does operate nonpostal lines of business, for which it is free to set prices independent of the **[*748]** Commission, and in which it may seek profits to offset losses in the postal business. *§ 403(a)*. The great majority of the organization's business, however, consists of postal services. See Revenue, Pieces and Weight by Classes of Mail **[****23]** and Special Services for Government Fiscal Year 2003, available at *http://www.usps.com/financials/_pdf/GFY03.pdf* (as visited Jan. 23, 2004) (available in Clerk of Court's case file). Further, the Postal Service's predecessor, the Post Office Department, had nonpostal lines of business, such as money orders and postal savings accounts. Cullinan 84-85, 107. As a Cabinet agency, the old Post Office Department was not subject to the antitrust laws. The new Postal Service's lines of business beyond the scope of its mail monopoly and universal service obligation do not show it is separate from the Government under the antitrust laws.

* * *

HN23[] The Postal Service, in both form and function, is not a separate antitrust person **[**1330]** from the United States. It is part of the Government of the United States and so is not controlled by the antitrust laws. The judgment of the Court of Appeals is reversed.

It is so ordered.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 21 **[****24]** , 25; 62 Am Jur 2d, Post Office § 105

15 USCS §§ 1 et seq.; *39 USCS §§ 101 et seq.*

L Ed Digest, Postal Service § 6; Restraints of Trade, Monopolies, and Unfair Trade Practices § 9.5

L Ed Index, Postal Service; Sherman Act

Annotation References

Congressional abrogation of states' immunity, under or as reflected in *Federal Constitution's Eleventh Amendment*, from suits in federal court--Supreme Court cases. *144 L Ed 2d 869*.

Applicability of "state action" doctrine granting immunity from federal antitrust laws for activities of, or directed by, state governments--Supreme Court cases. *119 L Ed 2d 641*.

Supreme Court's views as to meaning of term "person," as used in statutory or constitutional provision. *56 L Ed 2d 895*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L Ed 2d 841*.

Valid governmental action as conferring immunity or exemption from private liability under the federal antitrust laws. 12 ALR Fed 329. **[****25]**

[F. Hoffmann-La Roche Ltd v. Empagran S.A.]

Supreme Court of the United States

April 26, 2004, Argued ; June 14, 2004, Decided

No. 03-724

Reporter
542 U.S. 155 *; 124 S. Ct. 2359 **; 159 L. Ed. 2d 226 ***; 2004 U.S. LEXIS 4174 ****; 72 U.S.L.W. 4501; 2004-1 Trade Cas. (CCH) P74,448; 17 Fla. L. Weekly Fed. S 374

F. HOFFMANN-La ROCHE LTD, et al., Petitioners v. EMPAGRAN S.A. et al.

Subsequent History: Appeal after remand at *Empagran S.A. v. F. Hoffman-Laroche, Ltd., 2004 U.S. App. LEXIS 13431 (D.C. Cir., June 21, 2004)*

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

Empagran S.A. v. F. Hoffman-Laroche, LTD., 354 U.S. App. D.C. 257, 315 F.3d 338, 2003 U.S. App. LEXIS 647 (2003)

Disposition: Vacated and remanded.

Core Terms

domestic, commerce, Sherman Act, export, import, anti trust law, anticompetitive conduct, price-fixing, transactions, antitrust, vitamin, foreign nation, causes, comity, give rise, anticompetitive, cases, circumstances, prices, customers, Appeals, effects, courts, plaintiff's claim, private plaintiff, general rule, reasonably foreseeable, statutory language, district court, respondents'

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN1[] Regulated Practices, Price Fixing & Restraints of Trade

The Foreign Trade Antitrust Improvements Act of 1982 excludes from the Sherman Act's reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act shall not apply to conduct involving trade or commerce with foreign nations. *15 U.S.C.S. § 6a*. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] International Aspects, Foreign Trade Antitrust Improvements Act

When the case before the court concerns significant foreign anticompetitive conduct with an adverse domestic effect and an independent foreign effect, a purchaser in the United States can bring a Sherman Act claim under the Foreign Trade Antitrust Improvements Act based on domestic injury, but a purchaser in a foreign country can not bring a Sherman Act claim based on foreign harm.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > International Commerce & Trade > Exports & Imports > General Overview

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

International Trade Law > General Overview

HN3[] International Aspects, Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act (FTAIA) seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial activities taking place abroad, unless those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Antitrust & Trade Law, Exemptions & Immunities**

See 15 U.S.C.S. § 6a.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

International Law > Authority to Regulate > Anticompetitive Activities

International Trade Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] **Antitrust & Trade Law, Exemptions & Immunities**

The Foreign Trade Antitrust Improvements Act's general rule applies where the anticompetitive conduct at issue is foreign.

Antitrust & Trade Law > International Aspects > Foreign Trade Antitrust Improvements Act

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Antitrust & Trade Law > International Aspects > International Application of US Law > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN6[] **International Aspects, Foreign Trade Antitrust Improvements Act**

When price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect, the domestic-injury exception, 15 U.S.C.S. § 6a, of the Foreign Trade Antitrust Improvements Act does not apply (and thus, the Sherman Act does not apply).

Governments > Legislation > Interpretation

International Law > Dispute Resolution > General Overview

International Law > Sources of International Law

HN7[] **Legislation, Interpretation**

The court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of construction reflects principles of customary international law; law that (the court must assume) Congress ordinarily seeks to follow.

Antitrust & Trade Law > Exemptions & Immunities > General Overview

Governments > Courts > Judicial Comity

International Law > Authority to Regulate > Anticompetitive Activities

Antitrust & Trade Law > Sherman Act > General Overview

HN8[] **Antitrust & Trade Law, Exemptions & Immunities**

Courts hold that application of federal antitrust laws to foreign anticompetitive conduct is reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.

Antitrust & Trade Law > ... > Private Actions > Standing > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Remedies > General Overview

HN9[] **Private Actions, Standing**

A government plaintiff bringing a Sherman Act claim, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a government plaintiff has legal authority broad enough to allow it to carry out this mission. *15 U.S.C.S. § 25*. Private plaintiffs, by way of contrast, are far less likely to be able to secure broad relief.

Lawyers' Edition Display

Decision

[*226]** Alleged price-fixing activity held excluded from reach of Sherman Act (15 USCS §§ 1 et seq.) by Foreign Trade Antitrust Improvements Act of 1982 (15 USCS § 6a) where plaintiff's claim rested solely on independent foreign harm.

Summary

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*) excludes from the reach of the Sherman Act (*15 USCS §§ 1 et seq.*) much anticompetitive conduct that causes only foreign injury, by (1) setting forth a general exclusionary rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations"; and (2) creating a domestic-injury exception bringing such conduct back within the Sherman Act's reach, provided that the conduct (a) has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (b) such effect gives rise to a Sherman Act claim.

In the United States District Court for the District of Columbia, a purported class action was filed on behalf of foreign and domestic purchasers of vitamins under provisions including § 1 of the Sherman Act (*15 USCS § 1*). The complaint alleged that the defendants, foreign and domestic vitamin manufacturers and distributors, had engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries. The manufacturers and distributors moved to dismiss the suit as to some foreign-purchaser plaintiffs--vitamin distributors located in Ukraine, Australia, Ecuador, and Panama--each of which allegedly bought vitamins for delivery outside the United States. The District Court applied the FTAIA and dismissed the foreign purchasers' claims.

[*227]** On appeal, the United States Court of Appeals for the District of Columbia Circuit--in reversing, vacating the judgment against the foreign purchasers, and ordering a remand--expressed the view that (1) the FTAIA's general exclusionary rule applied to the case at hand, but (2) the FTAIA's domestic-injury exception also applied (*354 U.S. App. D.C. 257, 315 F.3d 338*).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by Breyer, J., joined by Rehnquist, Ch. J., and Stevens, Kennedy, Souter, and Ginsburg, JJ., it was held that:

(1) On the assumption, for the purposes of decision, that the alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, this alleged price-fixing activity fell within the FTAIA's general exclusionary rule.

(2) Moreover, on this assumption--and on consideration of the FTAIA's basic purposes, international comity, and Sherman Act history--such alleged price-fixing activity did not fall within the FTAIA's domestic-injury exception where a plaintiff's Sherman Act claim rested solely on the independent foreign harm.

(3) The foreign-purchaser plaintiffs in the case at hand remained free to ask the Court of Appeals, on remand, to consider the plaintiffs' argument that the foreign injury alleged in the case at hand was not independent.

Scalia, J., joined by Thomas, J., concurring in the judgment, expressed the view that (1) the FTAIA's language was readily susceptible of the interpretation which the Supreme Court provided; and (2) only this interpretation was consistent with the principle that federal statutes ought to be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

O'Connor, J., did not participate.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > -- price fixing -- exclusion -- foreign trade > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]

On the assumption, for the purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), that alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, this alleged price-fixing activity fell within the FTAIA's general exclusionary rule that the Sherman Act (*15 USCS §§ 1 et seq.*) did "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations." Moreover, on this assumption, such alleged price-fixing activity did not fall within the FTAIA's domestic-injury exception--which made the Sherman Act nonetheless applicable when conduct within the general rule (1) had a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (2) such **[***228]** effect gave rise to a Sherman Act claim--where a plaintiff's Sherman Act claim rested solely on the independent foreign harm. Thus, in a scenario in which it was assumed, for the purposes of decision, that vitamin sellers around the world had agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador, (1) a purchaser in the United States could properly bring a Sherman Act claim under the FTAIA on the basis of the asserted domestic injury; but

(2) a purchaser in Ecuador could not properly bring a Sherman Act claim under the FTAIA on the basis of the asserted foreign harm.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > -- price fixing -- exclusion -- foreign trade > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]***LEdHN[2C]***[] [2C]

On the assumption, for purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), that alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, this alleged price-fixing activity fell within the FTAIA's general exclusionary rule that (subject to a domestic-injury exception) the Sherman Act (*15 USCS §§ 1 et seq.*) did "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," for the general rule (1) placed all (non-import) activity involving foreign commerce outside the Sherman Act's reach; (2) did not apply to only conduct involving exports; and (3) applied where the anticompetitive conduct at issue was foreign.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > -- price fixing -- exclusion -- independent foreign harm > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]***LEdHN[3C]***[] [3C]***LEdHN[3D]***[] [3D]***LEdHN[3E]***[] [3E]***LEdHN[3F]***[] [3F]***LEdHN[3G]***[] [3G]***LEdHN[3H]***[] [3H]***LEdHN[3I]***[] [3I]

On the assumption, for purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), that alleged anticompetitive price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, the alleged activity did not fall within the FTAIA's domestic-injury exception--to the FTAIA's general exclusionary rule that the Sherman Act (*15 USCS §§ 1 et seq.*) did "not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations"--where a plaintiff's Sherman Act claim rested solely on the independent foreign harm. The United States Supreme Court's reading of the domestic-injury exception in this manner furthered the FTAIA's basic purposes, properly reflected considerations of international comity, and was consistent with Sherman Act history, for:

(1) The domestic-injury exception made the Sherman Act nonetheless applicable when conduct within the general exclusionary rule (a) had a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (b) such effect gave rise to a Sherman Act claim.

(2) No one denied that America's antitrust laws, when applied to foreign conduct, could interfere with a foreign nation's ability independently to regulate its own commercial affairs.

[*229]** (3) While federal courts had long held that application of America's antitrust laws to foreign anticompetitive conduct was nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as America's antitrust laws reflected a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct caused, it was not reasonable to apply those antitrust laws to foreign conduct insofar as (a) that conduct caused independent foreign harm, and (b) that foreign harm alone gave rise to a plaintiff's claim.

(4) A proposed alternative approach, under which courts would take account of comity considerations case by case, was too complex to prove workable in this antitrust situation.

(5) The FTAIA's language and history suggested that Congress had designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.

(6) The Supreme Court had found no significant indication that at the time Congress had written the FTAIA, American courts would have thought the Sherman Act applicable in this antitrust situation.

(7) While some linguistic arguments might show, at most, that a contrary reading of the FTAIA's language was the more natural one, those arguments did not show that the Supreme Court had to accept the contrary reading.

(8) The answer to some conflicting policy arguments was neither clear enough, nor of such likely empirical significance, as to change the Supreme Court's conclusion.

(Scalia and Thomas, JJ., dissented in part from this holding.)

APPEAL §1750.6 > -- civil antitrust case -- issues left open > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]***LEdHN[4C]***[] [4C]***LEdHN[4D]***[] [4D]

Given that, for the purposes of decision under the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*), the United States Supreme Court had assumed that alleged price-fixing activity was in significant part foreign, caused some domestic antitrust injury, and independently caused separate foreign injury, the Supreme Court, in holding that the FTAIA excluded such conduct from the reach of the Sherman Act (*15 USCS §§ 1 et seq.*) where a plaintiff's claim rested solely on the independent foreign harm--and in reversing a Federal Court of Appeals' judgment in favor of the foreign-purchaser plaintiffs in the case at hand--left those plaintiffs free to ask the Court of Appeals, on remand, to consider the plaintiffs' argument that the foreign injury alleged in the case at hand was not independent. In such circumstances, the Court of Appeals might properly determine whether the plaintiffs properly preserved the argument, and, if so, the Court of Appeals might properly consider the argument and decide the issue.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > -- foreign trade > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]***LEdHN[5C]***[] [5C]

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) (*15 USCS § 6a*) seeks to make clear to American exporters--and to firms doing business abroad--that the Sherman Act (*15 USCS §§ 1 et seq.*) does not prevent them from entering into business arrangements (such as joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. For this purpose, the FTAIA excludes from the Sherman **[***230]** Act's reach much anticompetitive conduct that causes only foreign injury, by (1) setting forth a general exclusionary rule that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations"; and (2) creating a domestic-injury exception which brings such conduct back within the Sherman Act's reach, provided that the conduct both (a) sufficiently affects American commerce, by having a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (b) has an effect of a kind that ***antitrust law*** considers harmful, by giving rise to a Sherman Act claim. Thus, the FTAIA seeks to release domestic and foreign anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm, while making an exception when that conduct also causes domestic harm.

STATUTES §82 > -- noninterference with foreign sovereign authority > Headnote:
LEdHN[6][] [6]

The United States Supreme Court ordinarily construes ambiguous federal statutes to avoid unreasonable interference with the sovereign authority of other nations. This rule of statutory construction (1) reflects principles of customary international law that the Supreme Court assumes Congress ordinarily seeks to follow; (2) cautions federal courts to assume that legislators take account of the legitimate sovereign interests of other nations when legislators write American laws; and (3) thereby helps the potentially conflicting laws of different nations to work together in harmony.

CONFLICT OF LAWS §3 > -- comity > Headnote:
LEdHN[7][] [7]

With respect to regulation of the commercial affairs of the United States and foreign nations, principles of comity provide Congress greater leeway when Congress seeks to control through legislation the actions of United States companies.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > -- relief -- factors > Headnote:
LEdHN[8][] [8]

In antitrust cases under the Sherman Act (*15 USCS §§ 1 et seq.*), a Federal Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. Moreover, under *15 USCS § 25*, a Federal Government plaintiff has legal authority broad enough to allow the plaintiff to carry out this mission, while private plaintiffs are far less likely to be able to secure broad relief.

Syllabus

[*231]** *The Foreign Trade Antitrust Improvements Act of 1982*

(FTAIA or Act) provides that the *Sherman Act* "shall not apply to conduct involving trade or commerce . . . with foreign nations," *15 USC § 6a* [*15 USCS § 6a*], but creates exceptions for conduct that significantly harms imports, domestic commerce, or American exporters. In this case, vitamin purchasers filed a class action alleging that vitamin manufacturers and distributors had engaged in a price-fixing conspiracy, raising vitamin prices in the United States and foreign countries, in violation of the *Sherman* and Clayton Acts. As relevant here, defendants **[****2]** (petitioners) moved to dismiss the suit as to the *foreign* purchasers (respondents), foreign companies located abroad, who had purchased vitamins only outside United States commerce. In dismissing respondents' claims, the District Court applied the FTAIA and found none of its exceptions applicable. The Court of Appeals reversed, concluding that the FTAIA's exclusionary rule applied, but so did its exception for conduct that has a "direct, substantial and reasonably foreseeable effect" on domestic commerce that "gives rise to a [*Sherman Act*] claim," *§§ 6a(1)(A), (2)*. Assuming that the foreign effect, *i.e.,* higher foreign prices, was independent of the domestic effect, *i.e.,* higher domestic prices, the court nonetheless concluded that the Act's text, legislative history, and policy goal of deterring harmful price-fixing activity made the lack of connection between the two effects inconsequential.

Held:

Where the price-fixing conduct significantly and adversely affects both customers outside and within the United States, but the adverse foreign effect is independent of any adverse domestic effect, the FTAIA exception does not apply, and thus, neither does the **[****3]** *Sherman Act,* to a claim based solely on the foreign effect. Pp. 161-175

(a) Respondents' threshold argument that the transactions fall outside the FTAIA because its general **[***232]** exclusionary rule applies only to conduct involving exports is rejected. The House Judiciary Committee changed the bill's original language from "export trade or export commerce," H. R. 5235, to "trade or commerce (other than import trade or import commerce)" deliberately to include commerce that did not involve American exports but was wholly foreign. Pp. 162-163

(b) The FTAIA exception does not apply here for two reasons. *First*, this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with other nations' sovereign authority. This rule of construction reflects customary international law principles and cautions courts to assume that legislators take account of other nations' legitimate sovereign interests when writing American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony. While applying America's antitrust laws to foreign conduct can interfere with a foreign nation's ability to regulate its own commercial affairs, courts have **[****4]** long held such application nonetheless reasonable, and hence consistent with prescriptive comity principles, insofar as the laws reflect a legislative effort to redress domestic antitrust injury caused by foreign anticompetitive conduct. However, it is not reasonable to apply American laws to foreign conduct insofar as that conduct causes independent foreign harm that alone gives rise to a plaintiff's claim. The risk of interference is the same, but the justification for the interference seems insubstantial. While some of the anticompetitive conduct alleged here took place in America, the higher foreign prices are not the consequence of any domestic anticompetitive conduct sought to be forbidden by Congress, which rather wanted to release domestic (and foreign) anticompetitive conduct from *Sherman Act* constraint when that conduct causes foreign harm. Contrary to respondents' claim, the comity concerns remain real as other nations have not in all areas adopted antitrust laws similar to this country's and, in any event, disagree dramatically about appropriate remedies. Respondents' alternative argument that case-by-case comity analysis is preferable to an across the board exclusion of **[****5]** foreign injury cases is too complex to prove workable. *Second*, the FTAIA's language and history suggest that Congress designed the Act to clarify, perhaps to limit, but not to expand, the *Sherman Act*'s scope as applied to foreign commerce. There is no significant indication that at the time Congress wrote the FTAIA courts would have thought the *Sherman Act* applicable in these circumstances, nor do the six cases on which respondents rely warrant a different conclusion. Pp. 163-173

(c) Respondents' additional linguistic arguments might show a natural reading of the statute, but the comity and history considerations previously discussed make clear that respondents' reading is not consistent with the FTAIA's basic intent. Their deterrence-based policy argument is also unavailing in light of the contrary arguments by the antitrust enforcement agencies. Pp. 173-175

(d) On remand, the Court of Appeals may consider whether respondents properly preserved their alternative argument that the foreign injury here was not in fact independent of the domestic effects; and, if so, it may consider and decide the related claim. P. 175

[*233]** *354 U.S. App. D.C. 257, 315 F.3d 338*, vacated and remanded. **[****6]**

Counsel: Stephen M. Shapiro argued the cause for petitioners.

R. Hewitt Pate argued the cause for the United States, as amicus curiae, by special leave of court.

Thomas C. Goldstein argued the cause for respondents.

Judges: Breyer, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Stevens, Kennedy, Souter, and Ginsburg, JJ., joined. Scalia, J., filed an opinion concurring in the judgment, in which Thomas, J., joined. O'Connor, J., took no part in the consideration or decision of the case.

Opinion by: BREYER

Opinion

[*158] **[**2363]** Justice **Breyer** delivered the opinion of the Court.

LEdHN[1A][] [1A]***LEdHN[2A]***[] [2A]***LEdHN[3A]***[] [3A]***LEdHN[4A]***[] [4A]***LEdHN[5A]***[] [5A]*The Foreign Trade Antitrust Improvements Act of 1982* (FTAIA) ***HN1***[] excludes from the *Sherman Act*'s reach much anticompetitive conduct that causes only foreign injury. It does so by setting forth a general rule stating that the Sherman Act "shall not apply to conduct involving trade or commerce . . . with foreign nations." 96 Stat 1246, *15 USC § 6a* [*15 USCS § 6a*]. It then creates exceptions to the general rule, applicable where (roughly speaking) that conduct significantly harms imports, domestic commerce, or American exporters.

We here focus upon anticompetitive price-fixing activity that is in significant part foreign, that causes some domestic antitrust injury, and that independently causes separate foreign injury. We ask two questions about the price-fixing conduct and the foreign injury that it causes. First, does **[****7]** that conduct fall within the FTAIA's general rule excluding the Sherman Act's application? That is to say, does the price-fixing activity constitute "conduct involving trade or commerce . . . with foreign nations"? We conclude that it does.

[*159] Second, we ask whether the conduct nonetheless falls within a domestic-injury exception to the general rule, an exception that applies (and makes the Sherman Act nonetheless applicable) where the conduct (1) has a "direct, substantial, and reasonably foreseeable effect" on domestic commerce, and (2) "such effect gives rise to a [Sherman Act] claim." *§§ 6a(1)(A), (2)*. We conclude that the exception does not apply where the plaintiff's claim rests solely on the independent foreign harm.

To clarify: The issue before us concerns (1) significant foreign anticompetitive conduct with (2) an adverse domestic effect and (3) an independent foreign effect giving rise to the claim. In more concrete terms, this case involves vitamin sellers around the world that agreed to fix prices, leading to higher vitamin prices in the United States and independently leading to higher vitamin prices in other countries such as Ecuador. ***HN2***[] We conclude that, in this scenario, **[****8]** a purchaser in the United States could bring a Sherman Act claim under the FTAIA based on domestic injury, but a purchaser in Ecuador could not bring a Sherman Act claim based on foreign harm.

I

The plaintiffs in this case originally filed a class-action suit on behalf of foreign and domestic purchasers of vitamins under, *inter alia*, § 1 of the Sherman Act, 26 Stat 209, as amended, *15 U.S.C. § 1* [*15 USCS § 1*], and §§ 4 and 16 of the Clayton Act, 38 Stat 731, 737, as amended, *15 U.S.C. §§ 15*, *26* [*15 USCS §§ 15*, *26*]. Their complaint alleged that petitioners, foreign and domestic vitamin manufacturers and distributors, had **[***234]** engaged in a price-fixing conspiracy, raising the price of vitamin products to customers in the United States and to customers in foreign countries.

As relevant here, petitioners moved to dismiss the suit as to the *foreign* purchasers **[**2364]** (the respondents here), five foreign vitamin distributors located in Ukraine, Australia, Ecuador, and Panama, each of which bought vitamins from petitioners **[*160]** for delivery outside the United States. *No. Civ. 001686TFH, 2001 U.S. Dist. LEXIS 20910, 2001 WL 761360, *4 (D. D. C., June 7, 2001)* (describing the relevant transactions as "wholly foreign"). Respondents **[****9]** have never asserted that they purchased any vitamins in the United States or in transactions in United States commerce, and the question presented assumes that the relevant "transactions occurr[ed] entirely outside U. S. commerce", Pet. for Cert. (i). The District Court dismissed their claims. *2001 U.S. Dist. LEXIS 20910, 2001 WL 761360, at *4*. It applied the FTAIA and found none of the exceptions applicable. *Id., 2001 U.S. Dist. LEXIS 20910 at *3-*4*. Thereafter, the *domestic* purchasers transferred their claims to another pending suit and did not take part in the subsequent appeal. *354 U.S. App. D.C. 257, 315 F.3d 338, 343 (CADC 2003)*.

A divided panel of the Court of Appeals reversed. *354 U.S. App. D.C. 257, 315 F.3d 338*. The panel concluded that the FTAIA's general exclusionary rule applied to the case, but that its domestic-injury exception also applied. It basically read the plaintiffs' complaint to allege that the vitamin manufacturers' price-fixing conspiracy (1) had "a direct, substantial, and reasonably foreseeable effect" on ordinary domestic trade or commerce, *i.e.*, the conspiracy brought about higher domestic vitamin prices, and (2) "such effect" gave "rise to a [Sherman Act] claim," *i.e.*, an injured *domestic* customer could have brought a Sherman Act suit, *15 USC §§ 6a(1)*, *(2)* [*15 USCS §§ 6a* **[****10]** *(1)*, *(2)*]. Those allegations, the court held, are sufficient to meet the exception's requirements. *315 F.3d at 341*.

The court assumed that the foreign effect, *i.e.*, higher prices in Ukraine, Panama, Australia, and Ecuador, was independent of the domestic effect, *i.e.*, higher domestic prices. *Ibid.* But it concluded that, in light of the FTAIA's text, legislative history, and the policy goal of deterring harmful price-fixing activity, this lack of connection does not matter. *Ibid.* The District of Columbia Circuit denied rehearing *en banc* by a 4-to-3 vote. App. to Pet. for Cert. 44a.

We granted certiorari to resolve a split among the Courts of Appeals about the exception's application. Compare *Den **[*161]** Norske Stats Oljeselskap As v. HeereMac Vof, 241 F.3d 420, 427 (CA5 2001)* (exception does not apply where foreign injury independent of domestic harm), with *Kruman v. Christie's Int'l PLC, 284 F.3d 384, 400 (CA2 2002)* (exception does apply even where foreign injury independent); *315 F.3d at 341* (similar).

II

LEdHN[1B][] [1B] ***LEdHN[2B]***[] [2B] ***LEdHN[3B]***[] [3B] ***LEdHN[4B]***[] [4B] ***LEdHN[5B]***[] [5B] ***HN3***[] The FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the **[****11]** Sherman Act does not prevent them from entering into business arrangements (say, joint-selling arrangements), however anticompetitive, as long as those arrangements adversely affect only foreign markets. See H. R. Rep. No. 97-686, pp 1-3, 9-10 (1982) (hereinafter House Report). It does so by removing from the Sherman Act's reach, (1) export activities and (2) other commercial **[***235]** activities taking place abroad, *unless* those activities adversely affect domestic commerce, imports to the United States, or exporting activities of one engaged in such activities within the United States.

The FTAIA says:

> ***HN4***[] "*Sections 1 to 7* of this title [the Sherman Act] shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless--
>
> **[**2365]** "(1) such conduct has a direct, substantial, and reasonably foreseeable effect--
>
> "(A) on trade or commerce which is not trade or commerce with foreign nations [*i.e.*, domestic trade or commerce], or on import trade or import commerce with foreign nations; or
>
> "(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States [*i.e.* **[****12]** , on an American export competitor]; and
>
> **[*162]** (2) such effect gives rise to a claim under the provisions of *sections 1 to 7* of this title, other than this section.
>
> "If *sections 1 to 7* of this title apply to such conduct only because of the operation of paragraph (1)(B), then *sections 1 to 7* of this title shall apply to such conduct only for injury to export business in the United States." *15 U.S.C. § 6a* [*15 USCS § 6a*].

This technical language initially lays down a general rule placing *all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach *provided that* the conduct *both* (1) sufficiently affects American commerce, *i.e.*, it has a "direct, substantial, and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, *and* (2) has an effect of a kind that ***antitrust law*** considers harmful, *i.e.*, the "effect" must "giv[e] rise to a [Sherman Act] claim." *§§ 6a(1), (2)*.

We ask here how this language applies to price-fixing activity that is in significant part foreign, that has the requisite domestic effect, and that also has independent foreign **[****13]** effects giving rise to the plaintiff's claim.

III

LEdHN[2C][] [2C] Respondents make a threshold argument. They say that the transactions here at issue fall outside the FTAIA because the FTAIA's general exclusionary rule applies only to conduct involving exports. The rule says that the Sherman Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) *with* foreign nations." *§ 6a* (emphasis added). The word "with" means *between* the United States and foreign nations. And, they contend, commerce between the United States and foreign nations that is not import commerce must consist of export commerce--a kind of commerce irrelevant to the case at hand.

[*163] The difficulty with respondents' argument is that the FTAIA originated in a bill that initially referred only to "export trade or export commerce." H. R. 5235, 97th Cong., 1st Sess., *§ 1* (1981). But the House Judiciary Committee subsequently changed that language to "trade or commerce (other than import trade **[***236]** or import commerce)." *15 U.S.C. § 6a* [*15 USCS § 6a*]. And it did so deliberately to include commerce that did not involve American exports but which was wholly foreign.

The House Report **[****14]** says in relevant part:

> "The Subcommittee's 'export' commerce limitation appeared to make the amendments inapplicable to transactions that were neither import nor export, *i.e.*, transactions within, between, or among other nations. . . . *Such foreign transactions should, for the purposes of this legislation, be treated in the same manner as export transactions*--that is, there should be no American antitrust jurisdiction absent a direct, substantial and reasonably foreseeable effect on domestic commerce or a domestic competitor. The Committee amendment therefore deletes references to 'export' trade, **[**2366]** and substitutes phrases such as 'other than import' trade. *It is thus clear that wholly foreign transactions as well as export transactions are covered by the amendment,* but that import transactions are not." House Report, at 9-10 (emphases added).

For those who find legislative history useful, the House Report's account should end the matter. Others, by considering carefully the amendment itself and the lack of any other plausible purpose, may reach the same conclusion, namely, that ***HN5***[] the FTAIA's general rule applies where the anticompetitive conduct at issue is foreign.

IV

LEdHN[3C][] [3C] ***LEdHN[4C]***[] [4C] We **[****15]** turn now to the basic question presented, that of the exception's application. Because the underlying antitrust **[*164]** action is complex, potentially raising questions not directly at issue here, we reemphasize that we base our decision upon the following: ***HN6***[] The price-fixing conduct significantly and adversely affects both customers outside the United States and customers within the United States, but the adverse foreign effect is independent of any adverse domestic effect. In these circumstances, we find that the FTAIA exception does not apply (and thus the *Sherman Act* does not apply) for two main reasons.

LEdHN[6][] [6] *First*, ***HN7***[] this Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations. See, *e.g., McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 20-22, 9 L. Ed. 2d 547, 83 S. Ct. 671 (1963)* (application of *National Labor Relations Act* to foreign-flag vessels); *Romero v. International Terminal Operating Co., 358 U.S. 354, 382-383, 3 L. Ed. 2d 368, 79 S. Ct. 468 (1959)* (application of Jones Act in maritime case); *Lauritzen v. Larsen, 345 U.S. 571, 578, 97 L. Ed. 1254, 73 S. Ct. 921 (1953)* (same). This rule of construction reflects principles **[****16]** of customary international law--law that (we must assume) Congress ordinarily seeks to follow. See *Restatement (Third) of Foreign Relations Law of the United States §§ 403(1), 403(2)* (1986) (hereinafter Restatement) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State); *Murray v. Schooner Charming Betsy, 6 U.S. 64, 2 Cranch 64, 2 L. Ed. 208 (1804)* ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible **[***237]** construction remains"); *Hartford Fire Insurance Co. v. California, 509 U.S. 764, 817, 125 L. Ed. 2d 612, 113 S. Ct. 2891 (1993)* (Scalia, J., dissenting) (identifying rule of construction as derived from the principle of "prescriptive comity").

This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony--a harmony particularly **[*165]** needed in today's highly interdependent commercial world.

LEdHN[3D][] [3D] No one denies that America's antitrust laws, when applied to foreign conduct, **[****17]** can interfere with a foreign nation's ability independently to regulate its own commercial affairs. But our ***HN8***[] courts have long held that application of our antitrust laws to foreign anticompetitive conduct is nonetheless reasonable, and hence consistent with principles of prescriptive comity, insofar as they reflect a legislative effort to redress *domestic* antitrust injury that foreign anticompetitive conduct has caused. See *United States v. Aluminum Co. of* ***[**2367]*** *America, 148 F.2d 416, 443-444 (CA2 1945)* (L. Hand, J.); 1 P. Areeda & D. Turner, ***Antitrust Law*** P 236 (1978).

But why is it reasonable to apply those laws to foreign conduct *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* Like the former case, application of those laws creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs. But, unlike the former case, the justification for that interference seems insubstantial. See *Restatement § 403(2)* (determining reasonableness on basis of such factors as connections with regulating nation, harm to that nation's interests, extent **[****18]** to which other nations regulate, and the potential for conflict). Why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?

LEdHN[3E][] [3E] ***LEdHN[5C]***[] [5C] ***LEdHN[7]***[] [7] We recognize that principles of comity provide Congress greater leeway when it seeks to control through legislation the actions of *American* companies, see *Restatement § 402*; and some of the anticompetitive price-fixing conduct alleged here took place in *America.* But the higher foreign prices of which the foreign plaintiffs here complain are not the consequence **[*166]** of any domestic anticompetitive conduct *that Congress sought to forbid*, for Congress did not seek to forbid any such conduct insofar as it is here relevant, *i.e.*, insofar as it is intertwined with foreign conduct that causes independent foreign harm. Rather Congress sought to *release* domestic (and foreign) anticompetitive conduct from Sherman Act constraints when that conduct causes foreign harm. Congress, of course, did make an exception where that conduct **[****19]** also causes domestic harm. See House Report 13 (concerns about American firms' participation in international cartels addressed through "domestic injury" exception). But any independent domestic harm the foreign conduct **[***238]** causes here has, by definition, little or nothing to do with the matter.

LEdHN[3F][] [3F] We thus repeat the basic question: Why is it reasonable to apply this law to conduct that is significantly foreign *insofar as that conduct causes independent foreign harm and that foreign harm alone gives rise to the plaintiff's claim?* We can find no good answer to the question.

The Areeda and Hovenkamp treatise notes that under the Court of Appeals' interpretation of the statute

> "a Malaysian customer could . . . maintain an action under United States law in a United States court against its own Malaysian supplier, another cartel member, simply by noting that unnamed third parties injured [in the United States] by the American [cartel member's] conduct would also have a cause of action. Effectively, the United States courts would provide worldwide subject matter jurisdiction to any foreign suitor wishing to sue its own local supplier, but unhappy with its own sovereign's provisions for **[****20]** private antitrust enforcement, provided that a different plaintiff had a cause of action against a different firm for injuries that were within U. S. [other-than-import] commerce. It does not seem excessively rigid to infer that Congress would not have **[*167]** intended that result." P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 273, pp 51-52 (Supp 2003).

We agree with the comment. We can find no convincing justification for the extension **[**2368]** of the Sherman Act's scope that it describes.

Respondents reply that many nations have adopted antitrust laws similar to our own, to the point where the practical likelihood of interference with the relevant interests of other nations is minimal. Leaving price fixing to the side, however, this Court has found to the contrary. See, *e.g., Hartford Fire, 509 U.S., at 797-799, 125 L. Ed. 2d 612, 113 S. Ct. 2891* (noting that the alleged conduct in the London reinsurance market, while illegal under United States antitrust laws, was assumed to be perfectly consistent with British law and policy); see also, *e.g.*, 2 W. Fugate, Foreign Commerce and the Antitrust Laws § 16.6 (5th ed. 1996) (noting differences between European Union and United States law on vertical restraints).

[**21]** Regardless, even where nations agree about primary conduct, say, price fixing, they disagree dramatically about appropriate remedies. The application, for example, of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy. See, *e.g.*, 2 ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 1208-1209 (5th ed. 2002). And several foreign nations have filed briefs here arguing that to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody. *E.g.*, Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 2 (setting forth German interest "in seeing that German companies are not subject to the extraterritorial reach of the United States' antitrust laws by private foreign plaintiffs--whose injuries were sustained in transactions entirely outside United States commerce--seeking treble damages in private **[***239]** lawsuits against German companies"); Brief for Government **[*168]** of Canada as *Amicus Curiae* 14 ("treble damages remedy would supersede" Canada's **[****22]** "national policy decision"); Brief for Government of Japan as *Amicus Curiae* 10 (finding "particularly troublesome" the potential "interfere[nce] with Japanese governmental regulation of the Japanese market").

These briefs add that a decision permitting independently injured foreign plaintiffs to pursue private treble-damages remedies would undermine foreign nations' own antitrust enforcement policies by diminishing foreign firms' incentive to cooperate with antitrust authorities in return for prosecutorial amnesty. Brief for Government of Federal Republic of Germany et al. as *Amici Curiae* 28-30; Brief for Government of Canada as *Amicus Curiae* 11-14. See also Brief for United States as *Amicus Curiae* 19-21 (arguing the same in respect to American antitrust enforcement).

Respondents alternatively argue that comity does not demand an interpretation of the FTAIA that would exclude independent foreign injury cases *across the board.* Rather, courts can take (and sometimes have taken) account of comity considerations case by case, abstaining where comity considerations so dictate. Cf., *e.g.*, *Hartford Fire, supra, at 797, n. 24, 125 L. Ed. 2d 612, 113 S. Ct. 2891*; *United States v. Nippon Paper Industries Co., 109 F.3d 1, 8 (CA1 1997)*; **[****23]** *Mannington Mills, Inc. v. Congoleum Corp., 595 F.2d 1287, 1294-1295 (CA3 1979)*.

In our view, however, this approach is too complex to prove workable. The Sherman Act covers many different kinds of anticompetitive agreements. Courts would have to examine how foreign law, compared with American law, treats not only price fixing but also, say, information-sharing agreements, patent-licensing price conditions, territorial product resale limitations, **[**2369]** and various forms of joint venture, in respect to both primary conduct and remedy. The legally and economically technical nature of that enterprise means lengthier proceedings, appeals, and more proceedings--to the point where procedural costs and delays could **[*169]** themselves threaten interference with a foreign nation's ability to maintain the integrity of its own antitrust enforcement system. Even in this relatively simple price-fixing case, for example, competing briefs tell us (1) that potential treble-damages liability would help enforce widespread anti-price-fixing norms (through added deterrence) and (2) the opposite, namely that such liability would hinder antitrust enforcement (by reducing incentives to enter amnesty **[****24]** programs). Compare, *e.g.*, Brief for Certain Professors of Economics as *Amici Curiae* 2-4 with Brief for United States as *Amicus Curiae* 19-21. How could a court seriously interested in resolving so empirical a matter--a matter potentially related to impact on foreign interests--do so simply and expeditiously?

We conclude that principles of prescriptive comity counsel against the Court of Appeals' interpretation of the FTAIA. Where foreign anticompetitive conduct plays a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to **[***240]** other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat.

Second, the FTAIA's language and history suggest that Congress designed the FTAIA to clarify, perhaps to limit, but not *to expand* in any significant way, the Sherman Act's scope as applied to foreign commerce. See House Report, at **[****25]** 2-3. And we have found no significant indication that at the time Congress wrote this statute courts would have thought the Sherman Act applicable in these circumstances.

The Solicitor General and petitioners tell us that they have found no case in which any court applied the *Sherman Act* to redress foreign injury in such circumstances. Tr. of Oral Arg. 21; Brief for United States as *Amicus Curiae* 13; Brief **[*170]** for Petitioners 13; see also *Den Norske, 241 F.3d at 429* ("[W]e have found no case in which jurisdiction was found in a case like this--where a foreign plaintiff is injured in a foreign market with no injuries arising from the anticompetitive effect on a United States market"). And respondents themselves apparently conceded as much at a May 23, 2001, hearing before the District Court below. *2001 U.S. Dist. 20910, 2001 WL 761360, at *4*.

Nevertheless, respondents now have called to our attention six cases, three decided by this Court and three decided by lower courts. In the first three cases the defendants included both American companies and foreign companies jointly engaged in anticompetitive behavior having both foreign and domestic effects. See **[****26]** *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 595, 95 L. Ed. 1199, 71 S. Ct. 971 (1951)* (agreements among American, British, and French corporations to eliminate competition in the manufacture and sale of antifriction bearings in world, including United States, markets); *United States v. National Lead Co., 332 U.S. 319, 325-328, 91 L. Ed. 2077, 67 S. Ct. 1634 (1947)* (international cartels with American and foreign members, restraining international commerce, including United States commerce, in titanium pigments); *United States v. American Tobacco Co., 221 U.S. 106, 171-172,* ***[**2370]*** *55 L. Ed. 663, 31 S. Ct. 632 (1911)* (American tobacco corporations agreed in England with British company to divide world markets). In all three cases the plaintiff sought relief, including relief that might have helped to protect those injured abroad.

LEdHN[3G][] [3G] ***LEdHN[8]***[] [8] In all three cases, however, the plaintiff was the Government of the United States. ***HN9***[] A Government plaintiff, unlike a private plaintiff, must seek to obtain the relief necessary to protect the public from further anticompetitive conduct and to redress anticompetitive harm. And a Government plaintiff has legal authority broad enough to allow it to carry out this mission. *15 U.S.C. § 25* [*15 USCS § 25*]; **[****27]** see also, *e.g.*, *United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316, 334, 6 L. Ed. 2d 318, 81 S. Ct. 1243 (1961)* ("[I]t is well settled that once the Government has **[*171]** successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor"). Private plaintiffs, by way of contrast, are far less likely to be able to secure **[***241]** broad relief. See *California v. American Stores Co., 495 U.S. 271, 295, 109 L. Ed. 2d 240, 110 S. Ct. 1853 (1990)* ("Our conclusion that a district court has the power to order divestiture in appropriate cases brought [by private plaintiffs] does not, of course, mean that such power should be exercised in every situation in which the Government would be entitled to such relief"); 2 P. Areeda, H. Hovenkamp, & R. Blair, ***Antitrust Law*** PP 303d-303e, pp 40-45 (2d ed. 2000) (distinguishing between private and government suits in terms of availability, public interest motives, and remedial scope); Griffin, Extraterritoriality in U. S. and EU Antitrust Enforcement, 67 Antitrust L. J. 159, 194 (1999) ("[P]rivate plaintiffs often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental **[****28]** sensibilities generally exercised by the U. S. Government"). This difference means that the Government's ability, in these three cases, to obtain relief helpful to those injured abroad tells us little or nothing about whether this Court would have awarded similar relief at the request of private plaintiffs.

Neither did the Court focus explicitly in its opinions on a claim that the remedies sought to cure only independently caused foreign harm. Thus the three cases tell us even less about whether this Court then thought that foreign private plaintiffs could have obtained foreign relief based solely upon such independently caused foreign injury.

LEdHN[3H][] [3H] Respondents also refer to three lower court cases brought by private plaintiffs. In the first, *Industria Siciliana Asfalit, Biutmi, S.p.A. v. Exxon Research & Engineering Co., No. 75 Civ. 5828-CSH, 1977 U.S. Dist. LEXIS 17851, 1977 WL 1353 (SDNY, Jan. 18, 1977)*, a District Court permitted an Italian firm to proceed against an American firm with a *Sherman Act* claim based upon a purely foreign injury, *i.e.*, an injury suffered in Italy. The court made clear, however, that the foreign injury was "*inextricably* ***[*172]*** *bound up with . . . domestic restraints of trade*," and **[****29]** that the plaintiff *"was injured . . . by reason of an alleged restraint of our domestic trade,*" *id., 1977 U.S. Dist. LEXIS 17851 at *11, *12* (emphasis added), *i.e.*, the foreign injury was dependent upon, *not independent of*, domestic harm. See Part VI, *infra.*

In the second case, *Dominicus Americana Bohio v. Gulf & Western Industries, Inc., 473 F. Supp. 680 (SDNY 1979)*, a District Court permitted Dominican and American firms to proceed against a competing American firm and the Dominican Tourist Information Center with a Sherman Act claim based upon injury apparently suffered in the Dominican Republic. The court, in finding the Sherman Act **[**2371]** applicable, weighed several different factors, including the participation of American firms in the unlawful conduct, the partly domestic nature of both conduct and harm (to American tourists, a kind of "export"), and the fact that the domestic harm depended in part upon the foreign injury. *Id., at 688*. The court did not separately analyze the legal problem before it in terms of independently caused foreign injury. Its opinion simply does not discuss the matter. It consequently cannot be taken as significant support for **[****30]** application of the Sherman Act here.

The third case, *Hunt v. Mobil Oil Corp., 550 F.2d 68, 72 (CA2 1977)*, involved a claim by Hunt, an independent oil producer with reserves in Libya, that other major oil producers in Libya and the Persian Gulf **[***242]** (the "seven majors") had conspired in New York and elsewhere to make it more difficult for Hunt to reach agreement with the Libyan Government on production terms and thereby eliminate him as a competitor. The case can be seen as involving a primarily foreign conspiracy designed to bring about foreign injury in Libya. But, as in *Dominicus,* the court nowhere considered the problem of independently caused foreign harm. Rather, the case was about the "act of state" doctrine, and the sole discussion of Sherman Act applicability--one brief paragraph--refers to other matters. *550 F.2d at 72*, and n 2. **[*173]** We do not see how Congress could have taken this case as significant support for the proposition that the Sherman Act applies in present circumstances.

The upshot is that no pre-1982 case provides significant authority for application of the Sherman Act in the circumstances we here assume. Indeed, a leading **[****31]** contemporaneous lower court case contains language suggesting the contrary. See *Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 613 (CA9 1976)* (insisting that the foreign conduct's domestic effect be "sufficiently large to present a cognizable injury *to the plaintiffs*" (emphasis added)).

Taken together, these two sets of considerations, the one derived from comity and the other reflecting history, convince us that Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the Sherman Act's reach.

V

LEdHN[3I][] [3I] Respondents point to several considerations that point the other way. For one thing, the FTAIA's language speaks in terms of the Sherman Act's *applicability* to certain kinds of *conduct.* The FTAIA says that the Sherman Act applies to foreign "conduct" with a certain kind of harmful domestic effect. Why isn't that the end of the matter? How can the Sherman Act both *apply to the conduct* when one person sues but *not apply to the same conduct* when another person sues? The question of who can or cannot sue is a matter for other statutes (namely, the *Clayton Act*) to determine.

Moreover, the exception **[****32]** says that it applies if the conduct's domestic effect gives rise to "*a* claim," not to "*the plaintiff's* claim" or "*the* claim *at issue.*" *15 U.S.C. § 6a(2)* [*15 USCS § 6a(2)*] (emphases added). The alleged conduct here did have domestic effects, and those effects were harmful enough to give rise to "a" claim. Respondents concede that this claim is not their own claim; it is someone else's claim. But, linguistically **[*174]** speaking, they say, that is beside the point. Nor did Congress place the relevant words "gives rise to a claim" in the FTAIA to suggest any geographical limitation; rather it did so for a here neutral reason, namely, in order to make clear that the domestic effect must be an *adverse* (as opposed to a beneficial) effect. **[**2372]** See House Report 11 (citing *National Bank of Canada v. Interbank Card Asso., 666 F.2d 6, 8 (CA2 1981))*.

Despite their linguistic logic, these arguments are not convincing. Linguistically speaking, a statute can apply and not apply to the same conduct, depending upon other circumstances; and those other circumstances may include the nature of the lawsuit (or of the related underlying harm). It also makes linguistic **[***243]** sense **[****33]** to read the words "a claim" as if they refer to the "plaintiff's claim" or "the claim at issue."

At most, respondents' linguistic arguments might show that respondents' reading is the more natural reading of the statutory language. But those arguments do not show that we *must* accept that reading. And that is the critical point. The considerations previously mentioned--those of comity and history--make clear that the respondents' reading is not consistent with the FTAIA's basic intent. If the statute's language reasonably permits an interpretation consistent with that intent, we should adopt it. And, for the reasons stated, we believe that the statute's language permits the reading that we give it.

Finally, respondents point to policy considerations, namely, that application of the Sherman Act in present circumstances will (through increased deterrence) help protect Americans against foreign-caused anticompetitive injury. Petitioners and supporting enforcement-agency *amici,* however, have made important experience-backed arguments (based upon amnesty-seeking incentives) to the contrary. We cannot **[****34]** say whether, on balance, respondents' side of this empirically based argument or the enforcement agencies' side is correct. But we can say that the answer to the dispute is neither **[*175]** clear enough, nor of such likely empirical significance, that it could overcome the considerations we have previously discussed and change our conclusion.

For these reasons, we conclude that petitioners' reading of the statute's language is correct. That reading furthers the statute's basic purposes, it properly reflects considerations of comity, and it is consistent with Sherman Act history.

VI

LEdHN[4D][] [4D] We have assumed that the anticompetitive conduct here independently caused foreign injury; that is, the conduct's domestic effects did not help to bring about that foreign injury. Respondents argue, in the alternative, that the foreign injury was not independent. Rather, they say, the anticompetitive conduct's domestic effects were linked to that foreign harm. Respondents contend that, because vitamins are fungible and readily transportable, without an adverse domestic effect (*i.e.*, higher prices in the United States), the sellers could not have maintained their international price-fixing arrangement and respondents **[****35]** would not have suffered their foreign injury. They add that this "but for" condition is sufficient to bring the price-fixing conduct within the scope of the FTAIA's exception.

The Court of Appeals, however, did not address this argument, *315 F.3d at 341*, and, for that reason, neither shall we. Respondents remain free to ask the Court of Appeals to consider the claim. The Court of Appeals may determine whether respondents properly preserved the argument, and, if so, it may consider it and decide the related claim.

For these reasons, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

[2373]** It is so ordered.

Justice **O'Connor** took no part in **[***244]** the consideration or decision of this case.

Concur by: SCALIA,

Concur

[*176] Justice **Scalia,** with whom Justice **Thomas** joins, concurring in the judgment.

I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own **[****36]** territories.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 17-*20*

15 USCS § 6a

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 36.7

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices

Annotation References

Propriety and scope of injunctive relief in federal antitrust case--Supreme Court cases. *55 L Ed 2d 892*.

Extraterritorial application of federal antitrust laws to acts occurring in foreign commerce. 40 ALR Fed 343.

[Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.]

Supreme Court of the United States

October 31, 2005, Argued ; January 10, 2006, Decided

No. 04-905

Reporter

546 U.S. 164 *; 126 S. Ct. 860 **; 163 L. Ed. 2d 663 ***; 2006 U.S. LEXIS 758 ****; 74 U.S.L.W. 4045; 2006-1 Trade Cas. (CCH) P75,077; 19 Fla. L. Weekly Fed. S 27

VOLVO TRUCKS NORTH AMERICA, INC., Petitioner v. REEDER-SIMCO GMC, INC.

Subsequent History: On remand at, Judgment entered by, Motion granted by, in part *Reeder-Simco GMC v. Volvo GM Heavy Truck Corp., 2006 U.S. Dist. LEXIS 33435 (W.D. Ark., May 22, 2006)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 374 F.3d 701, 2004 U.S. App. LEXIS 14231 (8th Cir. Ark., 2004)

Disposition: Reversed and remanded.

Core Terms

dealers, bid, trucks, purchasers, customer, favored, sales, prices, price discrimination, competitive injury, Robinson-Patman Act, comparisons, competed, discount, instances, retail customer, manufacturer, competitors, cases, court of appeals, franchised, geographic, non-Volvo, profits, discriminated, disfavored, negotiate, occasions, injure, bidding process

LexisNexis® Headnotes

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN1[ ] **Robinson-Patman Act, Claims**

A manufacturer cannot be held liable for secondary-line price discrimination under the Robinson-Patman Price Discrimination Act, 49 Stat. 1526, in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.

Antitrust & Trade Law > Regulated Practices > Price Discrimination

Antitrust & Trade Law > Robinson-Patman Act

HN2[] Regulated Practices, Price Discrimination

See *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

Antitrust & Trade Law > Clayton Act > Remedies > Damages

HN3[] Remedies, Damages

Pursuant to § 4 of the Clayton Act, 38 Stat. 730, a private plaintiff may recover threefold for actual injury sustained as a result of a violation of the Robinson-Patman Price Discrimination Act, 49 Stat. 1526. *15 U.S.C.S. § 15(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Coverage > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Primary Line Injuries

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN4[] Robinson-Patman Act, Coverage

The Robinson-Patman Price Discrimination Act (Act), 49 Stat. 1526, does not ban all price differences charged to different purchasers of commodities of like grade and quality; rather, the Act proscribes price discrimination only to the extent that it threatens to injure competition. The U.S. Supreme Court describes three categories of competitive injury that may give rise to a claim under the Act: primary-line, secondary-line, and tertiary-line. Primary-line cases entail conduct--most conspicuously, predatory pricing--that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases involve price discrimination that injures competition among the discriminating seller's customers; cases in this category typically refer to favored and disfavored purchasers. Tertiary-line cases involve injury to competition at the level of the purchaser's customers.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > Secondary & Tertiary Line Injuries

HN5[] Robinson-Patman Act, Claims

To establish a secondary-line injury, a purchasing plaintiff must show that: (1) the relevant sales were made in interstate commerce; (2) the products were of like grade and quality; (3) the seller discriminated in price between the plaintiff and another purchaser of the products; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of the favored purchaser, i.e., the purchaser who received the benefit of such discrimination. *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Competitive Injuries

HN6[] **Robinson-Patman Act, Claims**

A hallmark of the requisite competitive injury is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. A permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. Absent actual competition with a favored purchaser, however, a disfavored purchaser cannot establish the competitive injury required under the Robinson-Patman Price Discrimination Act, 49 Stat. 1526.

Antitrust & Trade Law > General Overview

HN7[] **Antitrust & Trade Law**

Interbrand competition is the primary concern of ***antitrust law***.

Lawyers' Edition Display

Decision

[*663]** Manufacturer held not subject to liability for secondary-line price discrimination under Robinson-Patman Act (15 U.S.C.S. § 13) absent showing of discrimination between dealers competing to resell to same retail customers.

Summary

The Robinson-Patman Act (*15 U.S.C.S. § 13*), in *15 U.S.C.S. § 13(a)*, prohibited anyone engaged in commerce from discriminating in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination might substantially lessen competition or tend to create a monopoly, or injure, destroy, or prevent competition with (1) anyone who granted or knowingly received the benefit of such discrimination, or (2) customers of either of them.

A franchised regional dealer of a particular manufacturer's heavy-duty trucks sold those trucks to retail customers by bidding against (1) sellers of other brands of trucks, and (2) sometimes, against the manufacturer's franchised dealers from other regions. The manufacturer decided on a case-by-case basis whether to offer dealers a discount--and, if so, the amount of the discount--off the wholesale price, and the dealers then used the price offered by the manufacturer in preparing their bids to potential customers. The dealers purchased from the manufacturer--whose stated policy, in the atypical case in which a retail customer solicited a bid from more than one of the manufacturer's dealers, was to provide the same discount to each dealer--only those trucks for which the dealers' bids were successful.

The dealer in question filed, under state law and the Robinson-Patman Act, a suit alleging that the dealer's sales and profits had declined because the manufacturer offered other dealers more favorable price concessions. On the Robinson-Patman Act claim, the United States District Court for the Western District of Arkansas entered a judgment for the dealer.

[*664]** On appeal, the United States Court of Appeals for the Eighth Circuit (1) determined that a jury properly could have decided that the dealer had (a) been competing with favored dealers when price differentials were imposed, and (b) proved competitive injury; and (2) affirmed the District Court's judgment (*374 F. 3d 701*).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Ginsburg, J., joined by Roberts, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ., it was held that manufacturers were not subject to liability for secondary-line price discrimination under the Robinson-Patman Act absent a showing of discrimination between dealers contemporaneously competing to resell to the same retail customers--and thus, the dealer in question had failed to establish the competitive injury required to sustain the dealer's claim under *§ 13(a)*--as:

(1) The purchase-to-purchase and offer-to-purchase comparisons presented by the dealer failed to show that the manufacturer sold at a lower price to the dealer's "competitors."

(2) Even if it were assumed that the Act applied to the head-to-head transactions, the dealer did not establish that it was disfavored relative to other franchisees in the rare instances in which they competed for the same sale, let alone that the alleged discrimination was substantial.

(3) By declining to extend the Act's governance to protection of existing competitors, rather than to stimulation of completion, the court continued to construe the Act consistently with broader policies of the antitrust laws.

Stevens, J., joined by Thomas, J., dissenting, expressed the view that (1) until the court's decision in the instant case, the Robinson-Patman Act's prohibition of price discrimination would have protected the dealer's ability to negotiate in all situations described in *§ 13(a)*; but (2) by adopting a novel, transaction-specific concept of competition, the court eliminated that statutory protection in all but those rare situations in which a prospective purchaser was negotiating with two of the manufacturer's dealers at the same time.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > -- price discrimination -- manufacturer's discounts to dealers > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

Manufacturers are not subject to liability for secondary-line price discrimination under the Robinson-Patman Act (*15 U.S.C.S. § 13*)--which, in *15 U.S.C.S. § 13(a)*, prohibits price discrimination between commodities purchasers, where the effect of such discrimination may substantially lessen competition or tend to create a monopoly, or injure, destroy, or prevent competition with (1) anyone who grants or knowingly receives the benefit of such discrimination, or (2) customers of either of them--absent a showing of discrimination between dealers contemporaneously competing to resell to the same retail customers. Thus, a heavy-duty truck manufacturer's franchised regional dealer, who sold those trucks to retail customers **[***665]** by bidding against sellers of other brands of trucks and, rarely, against the manufacturer's franchisees from other regions, failed to establish the competitive injury required to sustain the dealer's claim that the manufacturer had violated the Act by offering greater discounts on truck prices to other franchisees than to the dealer, as:

(1) The purchase-to-purchase and offer-to-purchase comparisons presented by the dealer failed to show that the manufacturer sold at a lower price to the dealer's "competitors," for (a) in none of the discrete instances on which the dealer relied did the dealer compete with beneficiaries of the alleged discrimination for the same customer; (b) the dealer did not attempt to show that the compared franchisees were consistently favored relative to the dealer; and (c) the circumstance that franchisees were allowed to bid for sales in the same geographic area did not import that they competed for the same customer-tailored sales.

(2) Even if it were assumed that the Act applied to the head-to-head transactions, the dealer did not establish that it was disfavored relative to other franchisees in the rare instances in which they competed for the same sale, let alone that the alleged discrimination was substantial. If price discrimination between two purchasers existed at all,

then it was not of such magnitude as to affect substantially competition between the dealer and a "favored" franchisee.

(3) By declining to extend the Robinson-Patman Act's governance to protection of existing competitors, rather than to stimulation of completion, the United States Supreme Court continued to construe the Act consistently with broader policies of the antitrust laws.

(Ginsburg, J., joined by Roberts, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > -- price discrimination -- competitive injury > Headnote:
LEdHN[2][] [2]

Under the Robinson-Patman Act (*15 U.S.C.S. § 13*)--which, in *15 U.S.C.S. § 13(a)*, prohibits price discrimination between commodities purchasers, where the effect of such discrimination may substantially lessen competition or tend to create a monopoly, or injure, destroy, or prevent competition with (1) anyone who grants or knowingly receives the benefit of such discrimination, or (2) customers of either of them--three categories of competitive injury may give rise to a claim:

(1) Primary-line cases, which entail conduct--most conspicuously, predatory pricing--that injures competition at the level of the discriminating seller and its direct competitors.

(2) Secondary-line cases, which involve price discrimination that injures competition among the discriminating seller's customers.

(3) Tertiary-line cases, which involve injury to competition at the level of the purchaser's customers.

(Ginsburg, J., joined by Roberts, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

EVIDENCE §343.5 > RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §37 > -- price discrimination -- competitive injury -- inference > Headnote:
LEdHN[3][] [3]

A hallmark of the requisite competitive injury for a successful claim under the Robinson-Patman Act (*15 U.S.C.S. § 13*)--which, in *15 U.S.C.S. **[***666]** § 13(a)*, prohibit price discrimination between commodities purchasers, where the effect of such discrimination may substantially lessen competition or tend to create a monopoly, or injure, destroy, or prevent competition with (1) anyone who grants or knowingly receives the benefit of such discrimination, or (2) customers of either of them--is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. The United States Supreme Court has also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. (Ginsburg, J., joined by Roberts, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.3 > -- ***antitrust law*** > Headnote:
LEdHN[4][] [4]

Interbrand competition is the primary concern of ***antitrust law***. (Ginsburg, J., joined by Roberts, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > -- price fixing -- reduction in number of dealers > Headnote:
LEdHN[5A][] [5A]***LEdHN[5B]***[] [5B]

The Robinson-Patman Act--which, in *15 U.S.C.S. § 13(a)*, prohibit price discrimination between commodities purchasers, where the effect of such discrimination may substantially lessen competition or tend to create a monopoly, or injure, destroy, or prevent competition with (1) anyone who grants or knowingly receives the benefit of such discrimination, or (2) customers of either of them--does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations. Thus, if a truck manufacturer did not honor its obligations to one of its dealers as its franchisee, then any remedy lay in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act, where the manufacturer had announced its determination that it had too many dealers. (Ginsburg, J., joined by Roberts, Ch. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ.) **[***667]**

Syllabus

Reeder-Simco GMC, Inc. (Reeder), an authorized dealer of heavy-duty trucks manufactured by Volvo Trucks North America, Inc. (Volvo), generally sold those trucks through an industry-wide competitive bidding process, whereby the retail customer describes its specific product requirements and invites bids from dealers it selects based on such factors as an existing relationship, geography, and reputation. Once a Volvo dealer receives the customer's specifications, it requests from Volvo a discount or "concession" off the wholesale price. Volvo decides on a case-by-case basis whether to offer a concession. The dealer then uses **[****2]** its Volvo discount in preparing its bid; it purchases trucks from Volvo only if and when the retail customer accepts its bid. Reeder was one of many regional Volvo dealers. Although nothing prohibits a Volvo dealer from bidding outside its territory, Reeder rarely bid against another Volvo dealer. In the atypical case in which a retail customer solicited a bid from more than one Volvo dealer, Volvo's stated policy was to provide the same price concession to each dealer. In 1997, after Volvo announced plans to enlarge the size of its dealers' markets and to reduce by almost half the number of its dealers, Reeder learned that Volvo had given another dealer a price concession greater than the discounts Reeder typically received.

Reeder, suspecting it was one of the dealers Volvo sought to eliminate, filed this suit under, *inter alia*, § 2 of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13*, alleging that its sales and profits declined because Volvo offered other dealers more favorable price concessions. At trial, Reeder presented evidence of two instances when it bid against another Volvo dealer for a particular sale. In the first, **[****3]** although Volvo initially offered Reeder a lower concession, Volvo ultimately matched the concession offered to the competing dealer. Neither **[***668]** dealer won the bid. In the second, Volvo initially offered the two dealers the same concession, but increased the other dealer's discount after it, rather than Reeder, was selected. Reeder dominantly relied on comparisons between concessions it received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks), with more favorable concessions other successful Volvo dealers received in bidding processes in which Reeder did not participate. Reeder also compared concessions Volvo offered it on several occasions when it bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks), with more favorable concessions accorded other Volvo dealers who gained contracts on which Reeder did not bid. Reeder did not look for instances in which it received a larger concession than another Volvo dealer, but acknowledged it was "quite possible" that such instances occurred. Nor did Reeder offer any statistical analysis revealing whether it was disfavored on average as compared to other dealers. **[****4]** The jury found a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo dealers, that Volvo's discriminatory pricing injured Reeder, and that Reeder's damages from Volvo's Robinson-Patman violation exceeded $1.3 million. The District Court awarded treble damages on the Robinson-Patman Act claim, and entered judgment.

Affirming, the Eighth Circuit, among other things, noted the threshold requirement that Reeder show it was a "purchaser" within the Act's meaning; rejected Volvo's contention that competitive bidding situations do not give rise to Robinson-Patman claims; held that the four instances in which Reeder purchased trucks following successful bids rendered it a purchaser under the Act; determined that a jury could reasonably decide Reeder was in actual competition with favored dealers at the time price differentials were imposed; and held that the jury could properly find Reeder had proved competitive injury based on evidence that (1) Volvo intended to reduce the number of its dealers, (2) Reeder lost one contract for which it competed with another Volvo dealer, (3) Reeder would have earned more profits, had it received **[****5]** the concessions given other dealers, and (4) Reeder's sales declined over time.

Held:

A manufacturer may not be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer. The Act does not reach the case Reeder presents. It centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process. Pp. 177-182.

1. *Section 2* was enacted to curb financially powerful corporations' use of localized price-cutting tactics that gravely impaired other sellers' competitive position. *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543, 80 S. Ct. 1267, 4 L. Ed. 2d 1385*. Augmenting *§ 2*, the Robinson-Patman Act targeted the perceived harm to competition occasioned by the advent of large chainstores able **[***669]** to obtain lower prices for goods than smaller buyers could demand. Robinson-Patman does not ban all price differences **[****6]** charged to different purchasers of similar commodities, but proscribes only "price discrimination [that] threatens to injure competition," *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. Of the three categories of competitive injury that may give rise to a Robinson-Patman claim, secondary-line cases, like this one, involve price discrimination that injures competition among the discriminating seller's customers (here, Volvo's dealerships). Reeder has satisfied the Act's first two requirements for establishing secondary-line injury: (1) The relevant Volvo truck sales were made in interstate commerce, and (2) the trucks were of "like grade and quality," *15 U.S.C. § 13(a)*. Because Reeder has not identified any differentially priced transaction in which it was both a "purchaser" under the Act and "in actual competition" with a favored purchaser for the same customer, see *e.g.*, *FTC v. Sun Oil Co., 371 U.S. 505, 518-519, 83 S. Ct. 358, 9 L. Ed. 2d 466*, Volvo and *amicus* United States maintain that Reeder cannot satisfy the Act's third and fourth requirements--that (3) Volvo "discriminate[d] in price between" Reeder and another **[****7]** purchaser of Volvo trucks, and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored purchaser, *i.e.*, one who "receive[d] the benefit of such discrimination," *ibid.* Absent actual competition with a favored Volvo dealer, Reeder cannot establish the competitive injury the Act requires. Pp. 175-177.

2. The injury to competition targeted by the Robinson-Patman Act is not established by the selective comparisons Reeder presented at trial: (1) comparisons of concessions Reeder received for four successful bids against *non-Volvo* dealers, with larger concessions other successful Volvo dealers received for *different sales* on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to Reeder in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for *different sales* on which Reeder did not bid (offer-to-purchase comparisons); and (3) comparisons of two occasions on which Reeder bid against another Volvo dealer (head-to-head comparisons). Pp. 177-180.

(a) Because **[****8]** the purchase-to-purchase and offer-to-purchase comparisons fail to show that Volvo sold at a lower price to Reeder's "competitors," those comparisons do not support an inference of competitive injury. See *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174*. Both types of comparisons fall short because in none of the discrete instances on which Reeder relied did it compete with beneficiaries of the alleged discrimination *for the same customer.* Nor did Reeder even attempt to show that the compared dealers were consistently favored over it. Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and **[***670]** were separated in time by as many as seven months. This Court declines to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. No similar risk of manipulation occurs in cases kin to the chainstore paradigm. Here, there is no discrete "favored" dealer comparable to a chainstore or a large independent **[****9]** department store--at least, Reeder's evidence is insufficient to support an inference that such a dealer exists. For all that appears, Reeder, on occasion, might have gotten a better deal vis-à-vis one or more of the dealers in its comparisons. While Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic area, competition at that initial stage is based on a variety of factors, including the existence *vel non* of a relationship between the potential bidder and the customer, geography, and reputation. Once the customer has chosen the particular dealers from which it will solicit bids, the relevant market becomes limited to the needs and demands of the particular end user, with only a handful of dealers competing for the sale. Volvo dealers' bidding for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales. Pp. 178-179.

(b) Nor is a Robinson-Patman violation established by Reeder's evidence of two instances in which it competed head to head with another Volvo dealer. When multiple dealers bid for the business of the *same* customer, only one dealer will **[****10]** win the business and thereafter purchase the supplier's product to fulfill its contractual commitment. Even assuming the Act applies to head-to-head transactions, Reeder did not establish that it was *disfavored* vis-a-vis other Volvo dealers in the rare instances in which they competed for the same sale--let alone that the alleged discrimination was substantial. Reeder's evidence showed loss of only one sale to another Volvo dealer, a sale of 12 trucks that would have generated $30,000 in gross profits for Reeder. Per its policy, Volvo initially offered Reeder and the other dealer the same concession, but ultimately granted a larger concession to the other dealer after it had won the bid. In the only other instance of head-to-head competition, Volvo increased Reeder's initial discount to match the discount offered the other competing Volvo dealer, but neither dealer won the bid. If price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the "favored" Volvo dealer. Pp. 179-180.

3. The Robinson-Patman Act signals no large departure from ***antitrust law***'s primary concern, interbrand competition. **[****11]** Even if the Act's text could be construed as Reeder urges and the Eighth Circuit held, this Court would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition.* There is no evidence here that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson-Patman's governance to such cases, the Court continues to construe the Act consistently **[***671]** with ***antitrust law***'s broader policies. Pp. 180-181.

374 F.3d 701, reversed and remanded.

Counsel: Roy T. Englert, Jr. argued the cause for petitioner.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

Carter G. Phillips argued the cause for respondent.

Judges: Ginsburg, J., delivered the opinion of the Court, in which Roberts, C. J., and O'Connor, Scalia, Kennedy, Souter, and Breyer, JJ., joined. Stevens, J., filed a dissenting opinion, in which Thomas, J., joined, *post*, p. 182.

Opinion by: GINSBURG

Opinion

[*169] **[**866]** Justice **Ginsburg** delivered the opinion of the Court.

LEdHN[1A][] [1A] This case concerns specially ordered products--heavy-duty trucks supplied by Volvo Trucks North America, Inc. (Volvo), and sold by franchised dealers **[****12]** through a competitive bidding process. In this process, the retail customer states its specifications and invites bids, generally from dealers franchised by different manufacturers. Only when a Volvo dealer's bid proves successful does the dealer arrange to purchase the trucks, which Volvo then builds to meet the customer's specifications.

Reeder-Simco GMC, Inc. (Reeder), a Volvo dealer located in Fort Smith, Arkansas, commenced suit against Volvo alleging that Reeder's sales and profits declined because Volvo offered other dealers more favorable price concessions than those offered to Reeder. Reeder sought redress for its alleged losses under § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Price Discrimination Act, 49 Stat. 1526, *15 U.S.C. § 13* (Robinson-Patman Act or Act), and the Arkansas Franchise Practices Act, *Ark. Code Ann. § 4-72-201 et seq* (2001). Reeder prevailed at trial and on appeal on both claims.

We granted review on the federal claim to resolve the question whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing **[****13]** that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer. While state law designed to protect franchisees may provide, and in this case has provided, a remedy for the dealer exposed to conduct of the kind Reeder alleged, the Robinson-Patman Act, we hold, does not reach the case Reeder presents. The Act centrally addresses price discrimination in cases involving competition between different purchasers for **[*170]** resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process.

I

Volvo manufactures heavy-duty trucks. Reeder sells new and used trucks, including heavy-duty trucks. *374 F.3d 701, 704 (CA8 2004)*. Reeder became an authorized dealer of Volvo trucks in 1995, pursuant to a five-year franchise agreement that provided for automatic one-year extensions if Reeder met sales objectives set by Volvo. *Ibid.* Reeder generally sold Volvo's trucks through a competitive bidding process. *Ibid.* In this process, the retail customer describes its specific product requirements and invites bids **[****14]** from several dealers it selects. The customer's "decision to request a bid from a **[***672]** particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Id., at 719* (Hansen, J., concurring in part and dissenting in part).

Once a Volvo dealer receives the customer's specifications, it turns to Volvo and requests a discount or "concession" off the wholesale price (set at 80% of the published retail price). *Id., at 704*. It is common practice in the industry for manufacturers to offer customer-specific discounts to their dealers. *Ibid.;* App. 334, 337. Volvo decides on a case-by-case basis whether to offer a discount and, if so, what the discount rate will be, taking account of such factors as industry-wide demand and **[**867]** whether the retail customer has, historically, purchased a different brand of trucks. App. 348-349, 333-334. [1] The dealer then uses the discount offered by Volvo in preparing **[*171]** its bid; it purchases trucks from Volvo only if and when the retail customer accepts its bid. *Ibid.*

[**15]** Reeder was one of many Volvo dealers, each assigned by Volvo to a geographic territory. Reeder's territory encompassed ten counties in Arkansas and two in Oklahoma. *374 F.3d at 709*. Although nothing prohibits a Volvo dealer from bidding outside its territory, *ibid.,* Reeder rarely bid against another Volvo dealer, see *id., at 705*; 5 App. in No. 02-2462 (CA8), pp 1621-1622 (hereinafter C. A. App.). In the atypical event that the same retail customer solicited a bid from more than one Volvo dealer, Volvo's stated policy was to provide the same price concession to each dealer competing head to head for the same sale. 4 *id*. 1161-1162; 5 *id.*, at 1619, 1621.

In 1997, Volvo announced a program it called "Volvo Vision," in which the company addressed problems it faced in the market for heavy trucks, among them, the company's assessment that it had too many dealers. Volvo projected enlarging the size of its dealers' markets and reducing the number of dealers from 146 to 75. *374 F.3d at 705*. Coincidentally, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically **[****16]** received, and "Reeder came to suspect it was one of the dealers Volvo sought to eliminate." *Ibid.* Reeder filed suit against Volvo in February 2000, alleging losses attributable to Volvo's violation of the Arkansas Franchise Practices Act and the Robinson-Patman Act.

At trial, Reeder's vice-president, William E. Heck, acknowledged that Volvo's policy was to offer equal concessions to Volvo dealers bidding against one another for a particular contract, but he contended that the policy "was not executed." 4 C. A. App. 1162. Reeder presented evidence concerning two instances over the five-year course of its authorized dealership when Reeder bid against other Volvo dealers for a particular sale. *374 F.3d at 705, 708-709*. One of the two instances involved Reeder's bid on a sale to **[*172]** Tommy Davidson Trucking. 4 C. A. App. 1267-1268. Volvo initially offered Reeder a concession of 17%, which Volvo, unprompted, increased to 18.1% and **[***673]** then, one week later, to 18.9%, to match the concession Volvo had offered to another of its dealers. 5 *id.*, at 1268-1272. Neither dealer won the bid. *Id.*, at 1272. The other instance involved **[****17]** Hiland Dairy, which solicited bids from both Reeder and Southwest Missouri Truck Center. *Id.*, at 1626-1627. Per its written policy, Volvo offered the two dealers the same concession, and Hiland selected Southwest Missouri, a dealer from which Hiland had previously purchased trucks. *Ibid.* After selecting Southwest Missouri, Hiland insisted on the price Southwest Missouri had bid prior to a general increase in Volvo's prices; Volvo obliged by increasing the size of the discount. *Id.*, at 1627. See also *id.*, at 1483-1488; *374 F.3d at 720* (Hansen, J., concurring in part and dissenting in part).

Reeder dominantly relied on comparisons between concessions Volvo offered when Reeder bid against non-Volvo dealers, with concessions accorded to other Volvo dealers similarly bidding against non-Volvo dealers for other sales. Reeder's **[**868]** evidence compared concessions Reeder received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks), with more favorable concessions other successful Volvo dealers received in connection with bidding processes in which Reeder did not participate. *Id., at 705-706*. Reeder **[****18]** also compared concessions offered by Volvo on several occasions when Reeder bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks), with more favorable concessions received by other Volvo dealers who gained contracts on which Reeder did not bid. *Id., at 706-707*.

Reeder's vice-president, Heck, testified that Reeder did not look for instances in which it received a *larger* concession than another Volvo dealer, although he acknowledged it was "quite possible" that such instances occurred. 5 C. A. App. 1462. Nor did Reeder endeavor to determine by any statistical **[*173]** analysis whether Reeder was disfavored on average as compared to another dealer or set of dealers. *Id.*, at 1462-1464.

The jury found that there was a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo truck dealers, and that Volvo's discriminatory pricing injured Reeder. App. 480-486. It further found that Reeder's damages from Volvo's Robinson-Patman Act violation exceeded $1.3 million.

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[1] To shield its ability to compete with other manufacturers, Volvo keeps confidential its precise method for calculating concessions offered to dealers. *374 F.3d 701, 704-705 (CA8 2004)*; App. 337-338.

Id., at 486. [2] The District Court summarily denied Volvo's motion for judgment as a matter **[****19]** of law and the company's alternative motion for new trial or remittitur, awarded treble damages on the Robinson-Patman Act claim, and entered judgment.

A divided Court of Appeals for the Eighth Circuit affirmed. The appeals court noted that, "as a threshold matter[,] Reeder had to show [that] it was a 'purchaser' within the meaning of the [Act]," *374 F.3d at 708*, *i.e.*, that "there were actual sales at two different prices[,] . . . a sale to **[***674]** [Reeder] and a sale to another Volvo dealer," *id., at 707-708*. Rejecting Volvo's contention that competitive bidding situations do not give rise to claims under the Robinson-Patman Act, *id., at 708-709*, the Court of Appeals observed that Reeder **[****20]** was "more than an unsuccessful bidder," *id., at 709*. The four instances in which Reeder "actually purchased Volvo trucks following successful bids on contracts," the court concluded, sufficed to render Reeder a purchaser within the meaning of the Act. *Ibid.*

The Court of Appeals next determined that a jury could reasonably decide that Reeder was "in actual competition" with favored dealers. *Ibid.* "[A]s of the time the price differential was imposed," the court reasoned, "the favored **[*174]** and disfavored purchasers competed at the same functional level . . . and within the same geographic market." *Ibid.* (quoting *Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 585 (CA2 1987)*). The court further held that the jury could properly find from the evidence that Reeder had proved competitive injury from price discrimination. Specifically, the court pointed to evidence showing that (1) Volvo intended to reduce the number of its dealers; (2) Reeder lost the Hiland Dairy contract, for which it competed head to head with another Volvo dealer; (3) Reeder would have earned more profits, had it received the concessions other dealers **[****21]** received; **[**869]** and (4) Reeder's sales had declined over a period of time. *374 F.3d at 711-712*. The court also affirmed the award of treble damages to Reeder. *Id., at 712-714*.

Judge Hansen dissented as to the Robinson-Patman Act claim. "Traditional [Robinson-Patman Act] cases," he observed, "involve sellers and purchasers that carry inventory or deal in fungible goods." *Id., at 718*. The majority, Judge Hansen commented, "attempt[ed] to fit a square peg into a round hole," *ibid.,* when it extended the Act's reach to the marketplace for heavy-duty trucks, where "special-order products are sold to individual, pre-identified customers only after competitive bidding," *ibid.* There may be competition among dealers for the opportunity to bid on potential sales, he noted, but "[o]nce bidding begins, . . . the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." *Id., at 719*. Violation of the Act, in Judge Hansen's view, could not be predicated on the instances Reeder identified in which it was a purchaser, for "there was no actual competition **[****22]** between" Reeder and another Volvo dealer at the time of Reeder's purchases. *Ibid.* "Without proof of actual competition" for the same customer when the requisite purchases were made, he concluded, "Reeder cannot **[*175]** demonstrate a reasonable possibility of competitive injury." *Ibid.*

We granted certiorari, *544 U.S. 903, 125 S. Ct. 1596, 161 L. Ed. 2d 276 (2005)*, to resolve this question: May ***HN1***[] a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer? Satisfied that the Court of Appeals erred in answering that question in the affirmative, we reverse the Eighth Circuit's judgment.

[*675]** II

Section 2, "when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543, 80 S. Ct. 1267, 4 L. Ed. 2d 1385, and n. 6 (1960)* (citing H. R. Rep. No. 627, 63d Cong., 2d Sess., 8 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., 2-4

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[2] The jury also awarded Reeder damages of $513,750 on Reeder's state-law claim under the Arkansas Franchise Practices Act. No question is before us respecting that claim, which trained on Volvo's alleged design to eliminate Reeder as a Volvo dealer. See *supra, at 171, 163 L. Ed. 2d, at 672-673, 126 S. Ct. 860*.

(1914)). **[****23]** Augmenting that provision in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand. See 14 H. Hovenkamp, ***Antitrust Law*** P 2302, p 11 (2d ed. 2006) (hereinafter Hovenkamp); P. Areeda & L. Kaplow, Antitrust Analysis P 602, pp 908-909 (5th ed. 1997) (hereinafter Areeda). The Act provides, in relevant part:

> *HN2*[] "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly **[*176]** receives the benefit of such discrimination, or with customers of either of them . . . ." *15 U.S.C. § 13(a)*.

HN3[] Pursuant to *§ 4* of the Clayton Act, a private plaintiff may recover threefold for actual injury sustained as a **[****24]** result of a **[**870]** violation of the Robinson-Patman Act. See *15 U.S.C. § 15(a)*; *J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562, 101 S. Ct. 1923, 68 L. Ed. 2d 442 (1981)*.

LEdHN[2][] [2] Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that *HN4*[] Robinson-Patman does not "ban all price differences charged to different purchasers of commodities of like grade and quality," *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)* (internal quotation marks omitted); rather, the Act proscribes "price discrimination only to the extent that it threatens to injure competition," *ibid.* Our decisions describe three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary line, secondary line, and tertiary line. Primary-line cases entail conduct--most conspicuously, predatory pricing--that injures competition at the level of the discriminating seller and its direct competitors. See, *e.g.*, *id., at 220-222, 113 S. Ct. 2578, 125 L. Ed. 2d 168*; see also Hovenkamp P 2301a, pp 4-6. Secondary-line cases, of which this is one, involve price discrimination that injures competition among the discriminating **[****25]** seller's customers (here, Volvo's dealerships); cases in this category typically refer to "favored" and "disfavored" purchasers. See *ibid*.; *Texaco Inc. v. Hasbrouck, 496 U.S. 543, 558, n. 15, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990)*. Tertiary-line cases involve injury to competition at the level of the purchaser's customers. See Areeda P 601e, p 907.

HN5[] To establish the secondary-line **[***676]** injury of which it complains, Reeder had to show that (1) the relevant Volvo truck sales were made in interstate commerce; (2) the trucks were of "like grade and quality"; (3) Volvo "discriminate[d] in price between" Reeder and another purchaser of Volvo trucks; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored **[*177]** purchaser, *i.e.*, one who "receive[d] the benefit of such discrimination." *15 U.S.C. § 13(a)*. It is undisputed that Reeder has satisfied the first and second requirements. Volvo and the United States, as *amicus curiae*, maintain that Reeder cannot satisfy the third and fourth requirements, because Reeder has not identified any differentially priced transaction in which it was both a "purchaser" under the Act **[****26]** and "in actual competition" with a favored purchaser for the same customer.

HN6[] *LEdHN[3]*[] [3] A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. *FTC v. Sun Oil Co., 371 U.S. 505, 518-519, 83 S. Ct. 358, 9 L. Ed. 2d 466 (1963)* (evidence showed patronage shifted from disfavored dealers to favored dealers); *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 437-438, 103 S. Ct. 1282, 75 L. Ed. 2d 174, and n. 8 (1983)* (complaint "supported by direct evidence of diverted sales"). We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. See *FTC v. Morton Salt Co., 334 U.S. 37, 49-51, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948)*; *Falls City Industries, 460 U.S., at 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174*. Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act.

III

LEdHN[1B][] [1B] The evidence Reeder offered at trial falls into three categories: (1) comparisons of concessions Reeder received for four successful bids against *non-Volvo* **[**871]** dealers, **[****27]** with larger concessions other successful Volvo dealers received for *different sales* on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to Reeder in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for *different sales* on which Reeder did not bid (offer-to-purchase **[*178]** comparisons); and (3) evidence of two occasions on which Reeder bid against another Volvo dealer (head-to-head comparisons). The Court of Appeals concluded that Reeder demonstrated competitive injury under the Act because Reeder competed with favored purchasers "at the same functional level . . . and within the same geographic market." 374 F.3d at 709 (quoting Best Brands, 842 F.2d at 585). As we see it, however, selective comparisons of the kind Reeder presented do not show the injury to competition targeted by the Robinson-Patman Act.

A

Both the purchase-to-purchase and the offer-to-purchase comparisons fall short, for in none of the discrete instances on which Reeder relied did Reeder compete with beneficiaries of **[***677]** the alleged discrimination **[****28]** *for the same customer.* Nor did Reeder even attempt to show that the compared dealers were consistently favored vis-a-vis Reeder. Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months. See 374 F.3d at 706, 710.

We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. See Tr. of Oral Arg. 34-35, 55. No similar risk of manipulation occurs in cases kin to the chainstore paradigm. Here, there is no discrete "favored" dealer comparable to a chainstore or a large independent department store--at least, Reeder's evidence is insufficient to support an inference of such a dealer or set of dealers. For all we know, Reeder, on occasion, might have gotten a better deal vis-a-vis one or more of the dealers in its comparisons. See supra, at 172, 163 L. Ed. 2d, at 673, 126 S. Ct. 860.

Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic **[****29]** area. At that initial stage, however, competition is **[*179]** not affected by differential pricing; a dealer in the competitive bidding process here at issue approaches Volvo for a price concession only after it has been selected by a retail customer to submit a bid. Competition for an opportunity to bid, we earlier observed, is based on a variety of factors, including the existence *vel non* of a relationship between the potential bidder and the customer, geography, and reputation. See supra, at 170, 163 L. Ed. 2d, at 671-672, 126 S. Ct. 860.[3] We reiterate in this regard an observation made by Judge Hansen, dissenting from the Eighth Circuit's Robinson-Patman holding: Once a retail customer has chosen the particular dealers from which it will solicit bids, "the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." **[**872]** 374 F.3d at 719. That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales. In sum, the purchase-to-purchase and offer-to-purchase comparisons fail to show that Volvo sold at a lower price to Reeder's "competitors," hence those **[****30]** comparisons do not support an inference of competitive injury. See Falls City Industries, 460 U.S., at 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (inference of competitive injury under *Morton Salt* arises from "proof of a substantial price discrimination between *competing purchasers* over time" (emphasis added)).

B

[3] A dealer's reputation for securing favorable concessions, we recognize, may influence the customer's bidding invitations. Cf. post, at 183, n 2, 163 L. Ed. 2d, at 680, 126 S. Ct. 860. We do not pursue that point here, however, because Reeder did not present--or even look for--evidence that Volvo consistently disfavored Reeder while it consistently favored certain other dealers. See supra, at 172-173, 163 L. Ed. 2d, at 673, 126 S. Ct. 860.

Reeder did offer evidence of two instances in which it competed head to head with another Volvo dealer. See *supra, at 171-172, 163 L. Ed. 2d, at 673, 126 S. Ct. 860*. When multiple dealers bid for the business of the *same* customer, **[***678]** only one dealer will win the business and thereafter purchase the supplier's product to fulfill its **[*180]** contractual commitment. Because Robinson-Patman "prohibits **[****31]** only discrimination 'between different *purchasers*,'" Brief for Petitioner 26 (quoting *15 U.S.C. § 13(a)*; emphasis added), Volvo and the United States argue, the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. See Brief for Petitioner 27; Brief for United States as *Amicus Curiae* 9, 17-20. We need not decide that question today. Assuming the Act applies to the head-to-head transactions, Reeder did not establish that it was *disfavored* vis-a-vis other Volvo dealers in the rare instances in which they competed for the same sale--let alone that the alleged discrimination was substantial. See 1 ABA Section of ***Antitrust Law***, ***Antitrust Law*** Developments 478-479 (5th ed. 2002) ("No inference of injury to competition is permitted when the discrimination is not substantial." (collecting cases)).

Reeder's evidence showed loss of only one sale to another Volvo dealer, a sale of 12 trucks that would have generated $30,000 in gross profits for Reeder. *374 F.3d at 705*. Per its policy, Volvo initially offered Reeder and the other dealer the same concession. Volvo ultimately **[****32]** granted a larger concession to the other dealer, but only after it had won the bid. In the only other instance of head-to-head competition Reeder identified, Volvo increased Reeder's initial 17% discount to 18.9%, to match the discount offered to the other competing Volvo dealer; neither dealer won the bid. See *supra, at 172, 163 L. Ed. 2d, at 672-673, 126 S. Ct. 860*. In short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the "favored" Volvo dealer.

IV

HN7[] ***LEdHN[1C]***[] [1C] ***LEdHN[4]***[] [4] ***LEdHN[5A]***[] [5A] Interbrand competition, our opinions affirm, is the "primary concern of ***antitrust law***." *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51-52, n. 19, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. The Robinson-Patman Act signals no large departure from that **[*181]** main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition.* [4] **[****34]** In the **[**873]** case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to **[****33]** large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. See *id., at 51-52, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (observing that the market impact of a vertical practice, such as a change in a supplier's distribution system, may be a "simultaneous reduction of intrabrand competition **[***679]** and stimulation of interbrand competition"). By declining to extend *Robinson-Patman*'s governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws." *Brooke Group, 509 U.S., at 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168* (quoting *Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80, n. 13, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)*); see *Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 63, 73 S. Ct. 1017, 97 L. Ed. 1454, 49 F.T.C. 1763 (1953)* (cautioning against Robinson-Patman constructions that "extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation"). [5]

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[4] ***LEdHN[5B]***[] [5B] The dissent assails Volvo's decision to reduce the number of its dealers. *Post, at 183, 163 L. Ed. 2d, at 680, 681, 126 S. Ct 860*. But Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations. If Volvo did not honor its obligations to Reeder as its franchisee, "[a]ny remedy . . . lies in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act." Brief for United States as *Amicus Curiae* 28.

[5] See also Hovenkamp P 2333c, p 109 (commenting that the Eighth Circuit's expansive interpretation "views the [Robinson-Patman Act] as a guarantee of equal profit margins on sales actually made," and thereby exposes manufacturers to treble damages unless they "charge uniform prices to their dealers").

[*182] * * *

For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: STEVENS

Dissent

Justice **Stevens,** with whom Justice **Thomas** joins, dissenting.

Franchised dealers who sell Volvo trucks, like those who sell automobiles, farm equipment, washing machines, and a variety of other expensive items, routinely engage in negotiations with prospective purchasers. Sometimes the prospect is simultaneously negotiating with two Volvo dealers, sometimes with a Volvo dealer and a dealer representing another manufacturer, and still other times a satisfied customer who is generally familiar with the options available in a competitive market **[****35]** may negotiate with only one dealer at a time. Until today, the Robinson-Patman Act's prohibition of price discrimination [1] would have protected the dealer's ability to negotiate in all those situations. Today, however, by adopting a novel, transaction-specific concept of competition, the Court eliminates that statutory protection in all but those rare situations in which a prospective purchaser is negotiating with two Volvo dealers at the same time.

[**36]** I

Setting aside for the moment the fact that the case involves goods specially ordered **[**874]** for particular customers **[*183]** rather than goods stocked in inventory, the case is a rather ordinary Robinson-Patman suit. Respondent Reeder alleged a violation of the Act; the parties submitted a good deal of conflicting evidence to the **[***680]** jury; the trial judge properly instructed the jurors on the elements of price discrimination, competitive injury, and damages; and the jury returned a verdict resolving all issues in Reeder's favor. The Court of Appeals found no error in either the instructions or the sufficiency of the evidence. *374 F.3d 701 (CA8 2004)*.

Two issues of fact bear particular mention.

First, Volvo does not challenge the jury's finding of price discrimination. Reeder's theory of the case was that Volvo sought to cut back its number of dealers and deemed Reeder expendable. To avoid possible violations of franchise agreements and state laws, Volvo chose to accomplish this goal by offering Reeder worse prices than other regional dealers.

Reeder introduced substantial evidence of this theory. It showed that Volvo had an explicit business strategy, known as the "Volvo Vision, **[****37]** " of "fewer dealers, larger markets." App. 34. It showed that Volvo could afford to lose sales as it squeezed dealers out, since the boom years of the late 1990's left Volvo with about as many orders as it could fill. *Id., at 256-257, 113 S. Ct. 2578, 125 L. Ed. 2d 168*And it showed that Volvo frequently gave worse prices to it than to other regional dealers. On at least four occasions, Volvo sold trucks to Reeder at significantly higher prices than to other dealers buying similar trucks around the same time. [2] To give one example,

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[1] Section 2 of the Clayton Act, as amended by *§ 1* of the Robinson-Patman Act, provides in relevant part: "It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 38 Stat. 730, as amended, 49 Stat. 1526, *15 U.S.C. § 13(a)*.

in the spring of 1998 Volvo sold 20 trucks to Reeder at a 9% concession, but sold similar trucks to a Texas dealer at a 12.3% concession. *Id.,* at 132-134. This left Reeder paying $2,606 more per truck. *Id.*, at 134. Although the Court chides Reeder **[*184]** for failing to perform statistical analyses, see *ante, at 172-173, 178, 163 L. Ed. 2d, at 673, 677, 126 S. Ct. 860*, the jury clearly had a sufficient basis for finding price discrimination. It could infer that Volvo's pricing policies were comparable to a secret catalog listing one set of low prices for its "A" dealers and a higher set for its "B" dealers like Reeder, with an exception providing for the same prices where an "A" dealer and a "B" dealer were engaged in negotiations **[****38]** with the same customer at the same time.

Second, the jury found that the favored dealers at issue in these comparisons were competitive players in the same geographic market as Reeder. This conclusion is implicit in the jury's finding of competitive injury, since the jury instruction on that element required Reeder to prove

> "a substantial difference in price in sales by defendant to plaintiff and other competing Volvo dealers over a significant period of time. This requires plaintiff to show that it and the other Volvo dealer(s) were retail dealers within the same geographic market and that the effect of the price differential was to allow the other Volvo dealer(s) to draw sales or profits away from plaintiff. **[****39]** " App. 480, Instruction No. 18.

Volvo does not dispute that the evidence was sufficient to support the jury finding that Reeder and the favored dealers operated in the same **[***681]** geographic market. [3] Volvo's **[**875]** restraint is wise, as Reeder offered evidence that truck buyers are unsurprisingly mobile, that it delivered trucks to purchasers throughout the region, and that customers would sometimes solicit bids from more than one regional Volvo dealer.

[*185] II

For decades, juries have routinely inferred the requisite injury to competition under the Robinson-Patman Act from the fact that a manufacturer sells goods to one retailer at a higher price than to its competitors. This rule dates back to the following **[****40]** discussion of competitive injury in Justice Black's opinion for the Court in *FTC v. Morton Salt Co., 334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948)*:

> "It is argued that the findings fail to show that respondent's discriminatory discounts had in fact caused injury to competition. There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy, or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' *Corn Products Refining Co. v. FTC, 324 U.S. 726, 742, 65 S. Ct. 961, 89 L. Ed. 1320, 40 F.T.C. 892 (1945)*Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than **[****41]** their competitors had to pay. The findings are adequate." *Id., at 45-47, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499* (footnote omitted).

We have treated as competitors those who sell "in a single, interstate retail market." *Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 436, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983)*; cf. *Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961)*. Under this approach--uncontroversial until today--Reeder **[*186]** would readily prevail. There is ample evidence that Volvo charged Reeder higher

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[2] Additionally, on more than 12 other occasions, Volvo offered worse deals to Reeder than it gave to dealers who made comparable purchases. Arguably due to Volvo's stingy concessions, Reeder failed to close with its customers in these instances and thus never ended up buying the trucks at issue from Volvo.

[3] Similarly, and despite its selective discussion of the extensive evidentiary record, *ante, at 170-173, 163 L. Ed. 2d, at 671-673, 126 S. Ct. 860*, the Court does not question the sufficiency of the evidence supporting the jury's finding that Volvo engaged in price discrimination against Reeder relative to other regional Volvo dealers for a significant period of time.

prices than it charged to competing dealers in the same market over a period of many months. That those higher prices impaired Reeder's ability to compete with those dealers is just as obvious as the injury to competition described by the Court in *Morton Salt.*

Volvo nonetheless argues that no competitive injury could have occurred because it never discriminated against Reeder when Reeder and another Volvo dealer were seeking concessions with regard to the same ultimate customer. In Volvo's view, each transaction was a separate market, one defined by the customer and those dealers whom it had **[***682]** asked for bids. For each specific customer who has solicited bids, Reeder's **[****42]** only "competitors" were the other dealers making bids. Accordingly, if none of these other dealers were Volvo dealers, then Reeder suffered no competitive harm (relative to other Volvo dealers) when Volvo gave it a discriminatorily high price.

Unlike the Court, I cannot accept Volvo's vision. Nothing in the statute or in **[**876]** our precedent suggests that "competition" is evaluated by a transaction-specific inquiry, and such an approach makes little sense. It requires us to ignore the fact that competition among truck dealers is a continuing war waged over time rather than a series of wholly discrete events. Each time Reeder managed to resell trucks it had purchased at discriminatorily high prices, it was forced either to accept lower profit margins than were available to favored Volvo dealers or to pass on the higher costs to its customers (who then might well go to a different dealer the next time). And we have long indicated that lost profits relative to a competitor are a proper basis for permitting the *Morton Salt* inference. See, *e.g*., *Falls City Industries, 460 U.S., at 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174* (noting that to overcome the *Morton Salt* inference, a defendant needs "evidence breaking **[****43]** the causal connection between a price differential and lost sales *or profits*" (emphasis added)). By ignoring these commonsense points, **[*187]** the Court gives short shrift to the Robinson-Patman Act's prophylactic intent. See *15 U.S.C. § 13(a)* (barring price discrimination where "the effect of such discrimination *may* be substantially to lessen competition" (emphasis added)); see also, *e.g.*, *Morton Salt, 334 U.S., at 46, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499*

The Court appears to hold that, absent head-to-head bidding with a favored dealer, a dealer in a competitive bidding market can suffer no competitive injury. [4] It is unclear whether that holding is limited to franchised dealers who do not maintain inventories, or excludes virtually all franchisees from the effective protection of the Act. In either event, it is not faithful to the statutory text.

[**44]** III

As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of serious debate, but may well merit Judge Bork's characterization as "wholly mistaken economic theory." [5] I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a decision refusing to adhere to the text of the Act in a **[***683]** case in which the jury credited evidence that discriminatory **[*188]** prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if Judge Bork's evaluation (with which I happen to agree) is completely accurate.

[**45]** Accordingly, I respectfully dissent.

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[4] Indeed, if Volvo's argument about the meaning of "purchaser," see *ante, at 179-180, 163 L. Ed. 2d, at 677-678, 126 S. Ct. 860*, ultimately meets with this Court's approval, then the Robinson-Patman Act will simply not apply in the special-order context. Any time a special-order dealer fails to complete a transaction because the high price drives away its ultimate customer, there will be no Robinson-Patman violation because the dealer will not meet the "purchaser" requirement, and any time the dealer completes the transaction but at a discriminatorily high price, there will be no violation because the dealer has no "competition" (as the majority sees it) for that specific transaction at the moment of purchase.

[5] R. Bork, The Antitrust Paradox 382 (1978).

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 205, *206*, *209*

15 U.S.C.S. § 13(a)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 41

L Ed Index, Robinson-Patman Act

Annotation References

Construction and application of "good faith meeting competition" defense of Clayton Act, as amended by Robinson-Patman Act (*15 U.S.C.S. § 13(b)*). *59 L. Ed. 2d 810*.

Construction of the cost-justification proviso of the Robinson-Patman Act (*15 U.S.C.S. § 13(a)*)--federal cases. *8 L. Ed. 2d 1033*.

Robinson-Patman Act as construed by Supreme Court. *2 L. Ed. 2d 1737* **[****46]** .

Proof of injury to competition as jurisdictional requirement under § 2(a) of the Clayton Act as amended by the Robinson-Patman Act (*15 U.S.C.A. § 13(a)* [*15 U.S.C.S. § 13(a)*]). 47 A.L.R. Fed. 846.

Texaco Inc. v. Dagher

Supreme Court of the United States

January 10, 2006, Argued ; February 28, 2006, Decided

(No. 04-805), (No. 04-814)

Reporter
547 U.S. 1 *; 126 S. Ct. 1276 **; 164 L. Ed. 2d 1 ***; 2006 U.S. LEXIS 2023 ****; 74 U.S.L.W. 4147; 2006-1 Trade Cas. (CCH) P75,143; 19 Fla. L. Weekly Fed. S 115

TEXACO INC., Petitioner v. FOUAD N. DAGHER, et al. SHELL OIL COMPANY, Petitioner v. FOUAD N. DAGHER, et al.

Subsequent History: **[****1]** Subsequent appeal at *Dagher v. Saudi Ref., 466 F.3d 1120, 2006 U.S. App. LEXIS 26300 (9th Cir. Cal., Oct. 24, 2006)*

Prior History: ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Dagher v. Saudi Ref., Inc., 369 F.3d 1108, 2004 U.S. App. LEXIS 10624 (9th Cir. Cal., 2004)

Disposition: Reversed.

Core Terms

Oil, joint venture, gasoline, pricing, price fixing, brand, products

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN1[] **Sherman Act, Scope**

Section 1 of the Sherman Act, *15 U.S.C.S. § 1*, prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. The United States Supreme Court has not taken a literal approach to this language, however. Instead, the Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality. Accordingly, the Court has expressed reluctance to adopt per se rules where the economic impact of certain practices is not immediately obvious.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Sherman Act

HN2[] **Per Se Rule & Rule of Reason, Per Se Violations**

Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN3[] **Antitrust, Antitrust Statutes**

When persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit such joint ventures are regarded as a single firm competing with other sellers in the market.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

HN4[] **Regulated Practices, Price Fixing & Restraints of Trade**

When two partners set the price of their goods or services they are literally "price fixing," but they are not per se in violation of the Sherman Act.

Lawyers' Edition Display

Decision

[*1]** Joint venture by two previously competing companies held not to have engaged in price fixing that was per se unlawful under § 1 of Sherman Act (*15 U.S.C.S. § 1*) by setting single price for both companies' brands of gasoline.

Summary

Two previously competing companies formed a joint venture to refine and sell gasoline in the western United States under the two companies' original brand names. The joint venture set a single price for both companies' brands of gasoline.

A class of service station owners who sold the companies' gasoline, bringing suit against the companies in the United States District Court for the Central District of California, alleged that the companies had engaged in price fixing that either (1) was per se illegal under § 1 of the Sherman Act (*15 U.S.C.S. § 1*); or (2) violated *§ 1* under the quick-look doctrine, which had been applied to business activities that were so plainly anticompetitive that courts needed to undertake only a cursory examination before imposing antitrust liability.

The District Court, in awarding summary judgment to the companies, concluded that (1) the claim was governed (a) not by a per se rule or the quick-look doctrine, but rather (b) by the rule of reason, under which antitrust plaintiffs had to demonstrate that a particular contract or combination was in fact unreasonable and anticompetitive before it would be found unlawful; and (2) the plaintiffs had failed to raise a triable issue of fact.

[*2]** The United States Court of Appeals for the Ninth Circuit, in reversing in pertinent part, concluded that plaintiffs had presented sufficient evidence to create a triable issue of fact as to whether the unified pricing scheme was a per se violation of *§ 1*, given (1) an asserted absence of persuasive evidence to show a pro-competitive justification for initiating the scheme, and (2) evidence that assertedly showed anti-competitive effects (*369 F.3d 1108*).

On certiorari, the United States Supreme Court reversed. In an opinion by Thomas, J., expressing the unanimous opinion of the eight participating members of the court, it was held that the joint venture had not engaged in price fixing that was per se unlawful under *§ 1*--nor could the companies could be held liable under the quick-look doctrine--for:

(1) The companies (a) were not competing with one another in the relevant market, but instead were participating in that market jointly through their investments in the joint venture; and (b) shared in the profits of joint venture's activities in their role as investors, not competitors.

(2) The pricing policy in question thus amounted to little more than price setting by a single entity, not a pricing agreement between competing entities with respect to their competing products. Therefore, although the policy might have been price fixing in a literal sense, the policy was not price fixing in the antitrust sense.

(3) This conclusion was confirmed by the plaintiffs' apparent concession that there would have been no per se liability if the joint venture had chosen to sell its gasoline under a single brand.

Alito, J., did not participate.

Headnotes

[*3]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §37 > -- price setting -- joint venture > Headnote:

LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]

It is not per se illegal under § 1 of the Sherman Act (*15 U.S.C.S. § 1*) for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. Thus, a joint venture by two previously competing companies to refine and sell gasoline in the western United States, under the two companies' original brand names, did not engage in price fixing that was per se unlawful under *§ 1* when the joint venture set a single price for both companies' brands of gasoline, for:

(1) The companies (a) were not competing with one another in the relevant market, but instead were participating in that market jointly through their investments in the joint venture; and (b) shared in the profits of joint venture's activities in their role as investors, not competitors.

(2) The pricing policy in question thus amounted to little more than price setting by a single entity, not a pricing agreement between competing entities with respect to their competing products. Therefore, although the policy might have been price fixing in a literal sense, the policy was not price fixing in the antitrust sense.

(3) This conclusion was confirmed by the challenging parties' apparent concession that there would have been no per se liability if the joint venture had chosen to sell its gasoline under a single brand.

(4) The ancillary-restraints doctrine, governing the validity of restrictions imposed by a legitimate joint venture on nonventure activities, did not require the opposite conclusion, as (a) the challenged business practice involved the core activity of the joint venture itself, that is, the pricing of the very goods produced and sold by the joint venture; and (b) even if the doctrine were to be invoked, the pricing policy was clearly ancillary to the sale of the joint venture's own products.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > -- rule of reason -- per se rule > Headnote:
LEdHN[2][] [2]

In applying § 1 of the Sherman Act (*15 U.S.C.S. § 1*)--which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States"--the United States Supreme Court presumptively applies rule-of-reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. Per se liability is reserved for only those agreements that are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > -- price fixing > Headnote:
LEdHN[3][] [3]

Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are per se unlawful under § 1 of the Sherman Act (*15 U.S.C.S. § 1*).

APPEAL §1289 > -- presumptions > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]

On certiorari to review a Federal Court of Appeals' judgment as to whether it was per se illegal under § 1 of the Sherman Act (*15 U.S.C.S. § 1*) for a lawful, economically integrated joint venture to set the prices at which the venture sold its products, the United States Supreme Court presumed that the joint venture at issue was a lawful one, as (1) the venture's formation had been approved by federal and state regulators, and (2) there was no contention before the Supreme Court that the venture was a sham.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > -- joint venture > Headnote:
LEdHN[5][] [5]

For purposes of ***antitrust law***, when persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit, such joint ventures are regarded as a single firm competing with other sellers in the market.

[*4]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §37 > -- price fixing -- quick-look doctrine > Headnote:
LEdHN[6A][] [6A]***LEdHN[6B]***[] [6B]

Just as it was not per se illegal, under § 1 of the Sherman Act (*15 U.S.C.S. § 1*), for a joint venture by two previously competing companies to refine and sell gasoline in the western United States under the two companies' original brand names with a single price for both brands, the companies could not be held liable under the quick-look doctrine, which had been applied to business activities that were so plainly anticompetitive that courts needed to undertake only a cursory examination before imposing antitrust liability.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > -- ancillary-restraints doctrine > Headnote:
LEdHN[7][] [7]

Under the ancillary-restraints doctrine--which governs the validity, under ***antitrust law***, of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities--courts must determine whether the nonventure restriction is (1) a naked restraint on trade, and thus invalid; or (2) one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid.

Syllabus

Petitioners, Texaco Inc. and Shell Oil Co., collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western **[***5]** United States under the two companies' original brand names. After Equilon set a single price for both brands, respondents, Texaco and Shell Oil service station owners, brought suit alleging that, by unifying gas prices under the two brands, petitioners had violated the *per se* rule against price fixing long recognized under *§ 1 of the Sherman Act*, see, *e.g., Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580*. Granting petitioners summary judgment, the District **[****2]** Court determined that the rule of reason, rather than a *per se* rule, governs respondents' claim, and that, by eschewing rule of reason analysis, respondents had failed to raise a triable issue of fact. The Ninth Circuit reversed, characterizing petitioners' position as a request for an exception to the *per se* price-fixing prohibition, and rejecting that request.

Held:

It is not *per se* illegal under *§ 1 of the Sherman Act* for a lawful, economically integrated joint venture to set the prices at which it sells its products. Although *§ 1* prohibits "[e]very contract [or] combination . . . in restraint of trade," *15 U.S.C. § 1*, this Court has not taken a literal approach to that language, recognizing, instead, that Congress intended to outlaw only *unreasonable* restraints, *e.g., State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Under rule of reason analysis, antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive. See, *e.g., id., at 10-19, 118 S. Ct. 275, 139 L. Ed. 2d 199*. *Per se* liability is reserved for "plainly anticompetitive" agreements. *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637.* **[****3]** While "horizontal" price-fixing agreements between two or more competitors are *per se* unlawful, see, *e.g., Catalano, supra, at 647, 100 S.*

Ct. 1925, 64 L. Ed. 2d 580, this litigation does not present such an agreement, because Texaco and Shell Oil did not compete with one another in the relevant market--*i.e.,* gasoline sales to western service stations--but instead participated in that market jointly through Equilon. When those who would otherwise be competitors pool their capital and share the risks of loss and opportunities for profit, they are regarded as a single firm competing with other sellers in the market. *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 356, 102 S. Ct. 2466, 73 L. Ed. 2d 48*. As such, Equilon's pricing policy may be price fixing in a literal sense, but it is not price fixing in the antitrust sense. The court below erred in reaching the opposite conclusion under the ancillary restraints doctrine, which governs the validity of restrictions imposed by a legitimate joint venture on nonventure activities. That doctrine has no application here, where the challenged business practice involves the core activity of the joint venture itself--the pricing of the very goods produced **[****4]** and sold by Equilon.

369 F.3d 1108, reversed.

Counsel: Glen D. Nager argued the cause for petitioners.

Jeffrey P. Minear argued the cause for the United States, as amicus curiae, by special leave of court.

Joseph M. Alioto argued the cause for respondents.

Judges: Thomas, J., delivered the opinion of the Court, in which all other Members joined, except Alito, J., who took no part in the consideration or decision of the cases.

Opinion by: THOMAS

Opinion

[*3] [*6] [**1278]** Justice **Thomas** delivered the opinion of the Court.

LEdHN[1A][] [1A] From 1998 until 2002, petitioners Texaco Inc. and Shell Oil Co. collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the original Texaco and Shell Oil brand names. Respondents, a class of Texaco and Shell Oil service station owners, allege that petitioners engaged in unlawful price fixing when Equilon set a single price for both Texaco and Shell Oil brand gasoline. We granted certiorari to determine whether it is *per se* illegal under § 1 of the Sherman Act, *15 U.S.C. § 1*, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. We conclude that it is not, and accordingly we reverse the contrary judgment of the Court of Appeals.

I

Historically, Texaco and Shell Oil have competed with one another in the national and international **[****5]** oil and gasoline **[*4]** markets. Their business activities include refining crude oil into gasoline, as well as marketing gasoline to downstream purchasers, such as the service stations represented in respondents' class action.

In 1998, Texaco and Shell Oil formed a joint venture, Equilon, to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline. Under the joint venture agreement, Texaco and Shell Oil agreed to pool their resources and share the risks of and profits from Equilon's activities. Equilon's board of directors would comprise representatives of Texaco and Shell Oil, and Equilon gasoline would be sold to downstream purchasers under the original Texaco and Shell Oil **[**1279]** brand names. The formation of Equilon was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission, see *In re Shell Oil Co., 125 F. T. C. 769*

(1998), as well as by the state attorneys general of California, Hawaii, Oregon, and Washington. Notably, the decrees imposed no restrictions on the pricing of Equilon gasoline.

After the joint venture **[****6]** began to operate, respondents brought suit in District Court, alleging that, by unifying gasoline prices under the two brands, petitioners had violated the *per se* rule against price fixing that this Court has long recognized under § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, *15 U.S.C. § 1*. See, *e.g., Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (per curiam).* The District Court awarded summary judgment to Texaco and Shell Oil. It determined that the rule of reason, rather than a *per se* rule or the quick look doctrine, governs respondents' claim, and that, by eschewing rule of reason analysis, respondents had failed to raise a triable issue of fact. The Ninth Circuit reversed, characterizing petitioners' position as a request for an "exception to the *per se* prohibition on price fixing," and rejecting that request. *Dagher v.* ***[*5]*** *Saudi Refining, Inc., 369 F.3d 1108, 1116 (2004)*. We consolidated Texaco's and Shell Oil's separate petitions and granted certiorari to determine the extent to which the **[***7]** *per se* rule against price fixing applies to an important and increasingly popular **[****7]** form of business organization, the joint venture. *545 U.S. 1138, 125 S. Ct. 2957, 162 L. Ed. 2d 887 (2005)*.

II

HN1[] *Section 1 of the Sherman Act*prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U.S.C. § 1*. This Court has not taken a literal approach to this language, however. See, *e.g., State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)* ("[T]his Court has long recognized that Congress intended to outlaw only *unreasonable* restraints" (emphasis added)). Instead, this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. See, *e.g., id., at 10-19, 118 S. Ct. 275, 139 L. Ed. 2d 199. Per se* liability is reserved for only those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978).* **[****8]** Accordingly, "we have expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'" *State Oil, supra, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199* (quoting *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986))*.

HN2[] ***LEdHN[1B]***[] [1B] ***LEdHN[3]***[] [3] ***LEdHN[4A]***[] [4A] ***LEdHN[5]***[] [5] Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful. See, *e.g., Catalano, supra, at 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580*. These cases do not present such an agreement, however, because Texaco and Shell Oil did not compete with one another in the relevant market--namely, the sale of gasoline to service stations in the western United States--but instead participated in that **[*6]** market jointly through their investments **[**1280]** in Equilon. [1] In other words, the pricing policy challenged here amounts to little more than price setting by a single entity--albeit within the context of a joint venture--and not a pricing agreement between competing entities with respect to their competing products. Throughout Equilon's existence, Texaco and Shell Oil shared in the profits of Equilon's activities **[****9]** in their role as investors, not competitors. ***HN3***[] When "persons who **[***8]** would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 356, 102*

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[1] ***LEdHN[4B]***[] [4B] We presume for purposes of these cases that Equilon is a lawful joint venture. Its formation has been approved by federal and state regulators, and there is no contention here that it is a sham. As the court below noted: "There is a voluminous record documenting the economic justifications for creating the joint ventures. [T]he defendants concluded that numerous synergies and cost efficiencies would result" by creating Equilon as well as a parallel venture, Motiva Enterprises, in the eastern United States, and "that nationwide there would be up to $800 million in cost savings annually." *369 F.3d 1108, 1111 (CA9 2004)*. Had respondents challenged Equilon itself, they would have been required to show that its creation was anticompetitive under the rule of reason. See *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

S. Ct. 2466, 73 L. Ed. 2d 48 (1982). As such, though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense. See **HN4**[] Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act").

[**10]** **LEdHN[1C]**[] [1C] **LEdHN[6A]**[] [6A] This conclusion is confirmed by respondents' apparent concession that there would be no *per se* liability had Equilon simply chosen to sell its gasoline under a single brand. See Tr. of Oral Arg. 34. We see no reason to treat Equilon differently just because it chose to sell gasoline under two distinct **[*7]** brands at a single price. As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price. If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason. [2] But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful. [3]

[**11]** **LEdHN[1D]**[] [1D] **LEdHN[7]**[] [7] The court below reached the opposite conclusion by invoking the ancillary restraints doctrine. 369 F.3d at 1118-1124. That doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities. See, *e.g.,* **[**1281]** National Collegiate Athletic Assn. v. Board of Regents, 468 U.S. 85, 113-115, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984); Citizen Publishing Co. v. United States, 394 U.S. 131, 135-136, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969). Under the doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid. We agree with petitioners that the ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself--namely, the pricing of the very **[*8]** goods produced and sold by Equilon. And even if we were to invoke the doctrine in these cases, Equilon's pricing policy is clearly ancillary to the sale of its own products. Judge Fernandez, dissenting **[****12]** **[***9]** from the ruling of the court below, put it well:

> "In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?" 369 F.3d at 1127.

See also Broadcast Music, supra, at 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 ("Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all").

* * *

LEdHN[1E][] [1E] Because the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under § 1 of the Sherman Act, respondents' antitrust claim cannot prevail. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

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[2] Respondents have not put forth a rule of reason claim. 369 F.3d at 1113. Accordingly, we need not address petitioners' alternative argument that § 1 of the Sherman Act is inapplicable to joint ventures.

[3] **LEdHN[6B]**[] [6B] Respondents alternatively contend that petitioners should be held liable under the quick look doctrine. To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability. See California Dental Ass'n v. FTC, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). But for the same reasons that *per se* liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.

Justice **Alito** took no part in the consideration or decision of these cases.

References

[**13]**

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 71, *75*

15 U.S.C.S. § 1

1 Antitrust Laws and Trade Regulation, Second Edition §§ 12.02-12.04, 13.02 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 37

L Ed Index, Joint Ventures; Price Control or Discrimination

Annotation References

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. §§ 1 et seq.*). *64 L. Ed. 2d 997*.

Business units or persons within single, commonly owned enterprise as conspiring with each other in violation of *§ 1* or *§ 3* of Sherman Act (*15 U.S.C.A. §§ 1*, *3* [*15 U.S.C.S. §§ 1*, *3* **[****14]**]). 20 A.L.R. Fed. 682.

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Ill. Tool Works Inc. v. Indep. Ink, Inc.

Supreme Court of the United States

November 29, 2005, Argued ; March 1, 2006, Decided

No. 04-1329

Reporter

547 U.S. 28 *; 126 S. Ct. 1281 **; 164 L. Ed. 2d 26 ***; 2006 U.S. LEXIS 2024 ****; 77 U.S.P.Q.2D (BNA) 1801; 74 U.S.L.W. 4154; 2006-1 Trade Cas. (CCH) P75,144; 19 Fla. L. Weekly Fed. S 116

ILLINOIS TOOL WORKS INC., et al., Petitioners v. INDEPENDENT INK, INC.

Subsequent History: **[****1]** On remand at *Indep. Ink, Inc. v. Ill. Tool Works, Inc., 177 Fed. Appx. 974, 2006 U.S. App. LEXIS 10770 (Fed. Cir., Apr. 13, 2006)*

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT.

Indep. Ink, Inc. v. Ill. Tool Works, Inc., 396 F.3d 1342, 2005 U.S. App. LEXIS 1205 (Fed. Cir., 2005)

Disposition: *396 F.3d 1342*, vacated and remanded.

Core Terms

patent, market power, tying arrangement, Salt, unpatented, patent misuse, cases, antitrust, patentee, monopoly, tying product, ink, Sherman Act, anti trust law, purchasers, license, confer, products, seller, restrain, tie, patent infringement, per se violation, relevant market, per se rule, conditions, decisions, presume, misuse, buy

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Evidence > Inferences & Presumptions > Presumptions

HN1[] **Inequitable Conduct, Anticompetitive Conduct**

The United States Supreme Court has repeated the well-settled proposition that 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. This presumption of market power, applicable in the antitrust context when a seller conditions its sale of a patented product (the "tying" product) on the purchase of a second product (the "tied" product), has its foundation in the judicially created patent misuse doctrine. In 1988, Congress substantially undermined that foundation, amending the Patent Act to eliminate the market power presumption in patent misuse cases. *35 U.S.C.S. § 271(d)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN2[] Price Fixing & Restraints of Trade, Tying Arrangements

Four different rules of law have supported challenges to tying arrangements. They have been condemned as improper extensions of the patent monopoly under the patent misuse doctrine, as unfair methods of competition under § 5 of the Federal Trade Commission Act, *15 U.S.C.S. § 45*, as contracts tending to create a monopoly under § 3 of the Clayton Act, *15 U.S.C.S. § 13a*, and as contracts in restraint of trade under *§ 1* of the Sherman Act, *15 U.S.C.S. § 1*. In all of those instances, the justification for the challenge rested on either an assumption or a showing that the defendant's position of power in the market for the tying product was being used to restrain competition in the market for the tied product. The United States Supreme Court's 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN3[] Price Fixing & Restraints of Trade, Tying Arrangements

Over the years, the United States Supreme Court's strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the tying product. Its early opinions consistently assumed that tying arrangements serve hardly any purpose beyond the suppression of competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN4[] Tying Arrangements, Per Se Rule

In rejecting the application of a per se rule that all tying arrangements constitute antitrust violations, the United States Supreme Court has explained that it has 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. 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. 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.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Evidence > Inferences & Presumptions > Presumptions

HN5[] Inequitable Conduct, Anticompetitive Conduct

Congress has amended the Patent Code to eliminate the patent-equals-market-power presumption in the patent misuse context. *35 U.S.C.S. § 271(d)(5)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN6[] **Tying Arrangements, Per Se Rule**

See *35 U.S.C.S. § 271(d)(5)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > General Overview

HN7[] **Price Fixing & Restraints of Trade, Tying Arrangements**

In all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

Lawyers' Edition Display

Decision

[*26]** For antitrust purposes under § 1 of Sherman Act (15 U.S.C.S. § 1), mere fact that tying product was patented held not necessarily to confer market power upon patentee, so that such market power had to be proved, rather than presumed.

Summary

For purposes of applying ***antitrust law***, under provisions such as § 1 of the Sherman Act (*15 U.S.C.S. § 1*), to a tying arrangement under which a seller conditioned its sale of a patented product (the "tying" product) on the purchase of a second product, some United States Supreme Court decisions supported a presumption that the seller had market power.

A printing-ink company included a claim, in an antitrust suit filed in the United States District Court for the Central District of California, that the defendants had violated *§ 1* of the Sherman Act through an alleged tying arrangement whereby the defendants assertedly (1) manufactured and marketed printing systems that included (a) some patented components, and (b) specially designed, but unpatented, ink; and (2) sold these systems, for incorporation into printers, to licensed equipment manufacturers who agreed that (a) they would purchase ink exclusively from the defendants, and (b) neither the manufacturers nor their customers would refill the systems' containers with ink of any kind. However, the District Court, in granting summary judgment to the defendants, rejected the plaintiff company's argument that, as a matter of law, the defendants necessarily had market power in the market for the tying product, solely by virtue of the pertinent patent (*210 F. Supp. 2d 1155*).

On appeal, the United States Court of Appeals for the Federal Circuit--in reversing in pertinent part and in ordering a remand--expressed the view it was the Court of Appeals' duty to follow the Supreme Court's precedents (*396 F.3d 1342*).

[*27]** On certiorari, the Supreme Court vacated and remanded. In an opinion by Stevens, J., expressing the unanimous view of the eight participating members of the court, it was held that:

(1) For antitrust purposes under provisions such as *§ 1* of the Sherman Act, the mere fact that a tying product is patented does not necessarily confer market power upon the patentee--and thus, in all antitrust cases involving such an alleged tying arrangement, the plaintiff must prove that the defendant has market power in the tying product--for:

(a) The Supreme Court's prior market-power presumption had its foundation in the judicially created patent-misuse doctrine.

(b) In 1988, Congress substantially undermined this foundation by amending the Patent Act (in *35 U.S.C.S. § 271(d)*) to eliminate the market-power presumption in patent-misuse cases.

(c) The imposition of a requirement to prove market power accords with the vast majority of academic literature on the subject.

(d) Federal antitrust-enforcement agencies have concluded that a patent does not necessarily confer market power upon the patentee.

(2) Because the plaintiff company had reasonably relied on the Supreme Court's prior opinions in moving for summary judgment, when the case at hand returned to the District Court, the company ought to be given a fair opportunity to develop and introduce evidence on the market-power issue, as well as any other issues that were relevant to the company's remaining *§ 1* claims.

Alito, J., did not participate.

Headnotes

[*28]**

EVIDENCE §343.5 > -- antitrust -- patent-related tying arrangement -- proof of market power -- lack of presumption

> Headnote:

LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]***LEdHN[1D]***[] [1D]***LEdHN[1E]***[] [1E]***LEdHN[1F]***[] [1F]***LEdHN[1G]***[] [1G]***LEdHN[1H]***[] [1H]***LEdHN[1I]***[] [1I]***LEdHN[1J]***[] [1J]***LEdHN[1K]***[] [1K]

For purposes of applying ***antitrust law***, under provisions such as § 1 of the Sherman Act (*15 U.S.C.S. § 1*), to a tying arrangement under which a seller conditions its sale of a patented product (the "tying" product) on the purchase of a second product, the mere fact that a tying product is patented does not necessarily confer market power upon the patentee. Thus, in all antitrust cases involving such an alleged tying arrangement, the plaintiff must prove that the defendant has market power in the tying product, for:

(1) While some prior United States Supreme Court opinions supported a presumption of market power, this antitrust presumption (a) had its foundation in the judicially created patent-misuse doctrine, and (b) was a vestige of the Supreme Court's historical distrust of tying arrangements.

(2) In 1988, Congress substantially undermined this foundation by amending the Patent Act (in *35 U.S.C.S. § 271(d)*) to eliminate the market-power presumption in patent-misuse cases, where (a) previously, Congress, in codifying the patent laws for the first time, had excluded some conduct from the scope of the patent-misuse doctrine; (b) the directly-relevant 1988 amendment was enacted 4 years after a Supreme Court decision repeated the patent-equals-market-power presumption for antitrust purposes; (c) while the 1988 amendment did not expressly refer to the antitrust laws, the amendment invited a reappraisal of the Supreme Court's antitrust rule; (d) it would be absurd to assume that Congress intended to provide that the use of a patent that would merit punishment as a felony (for antitrust purposes under *§ 1*) would not constitute "misuse" under *§ 271(d)*, as amended; and (e) it

would be anomalous to preserve the market-power presumption in antitrust cases after Congress eliminated the presumption's patent-misuse foundation.

(3) The imposition of a requirement to prove market power accords with the vast majority of academic literature on the subject.

(4) Some proposed alternatives--involving a more limited presumption and a differentiation between certain types of tying arrangements--are not persuasive.

(5) Federal antitrust-enforcement agencies have (a) changed the Federal Government's position; and (b) concluded (in some antitrust guidelines issued jointly by the Department of Justice and the Federal Trade Commission in 1995) that a patent does not necessarily confer market power upon the patentee.

APPEAL §1750.6 > -- remand -- civil antitrust case -- additional evidence > Headnote:
LEdHN[2A][] [2A]***LEdHN[2B]***[] [2B]

On certiorari to review a Federal Court of Appeals' reversal of a Federal District Court's grant of summary judgment to the defendants in a civil antitrust case, with respect to the plaintiff company's claim that an alleged patent-related tying arrangement violated § 1 of the Sherman Act (*15 U.S.C.S. § 1*)--where the United States Supreme Court departed from some prior opinions and held that for antitrust purposes, the mere fact that a tying product was patented did not necessarily confer market power upon the patentee--the Supreme Court, in vacating the Court of Appeals' judgment and in remanding the case at hand for further proceedings, further held that (1) the plaintiff company had reasonably relied on the Supreme Court's prior opinions in moving for summary judgment without (a) offering evidence defining the relevant market, or (b) proving that the defendants possessed power within that market; and (2) when the case returned to the District Court, the company therefore ought to be given a fair opportunity to develop and introduce evidence on that issue, as well as any other issues that were relevant to the company's remaining § 1 claims.

[*29]**

PATENTS §225 > PATENTS §242 > -- license or sale conditions -- misuse -- market power > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

In the patent-misuse context under patent law, a 1988 amendment to *35 U.S.C.S. § 271(d)* makes it clear that Congress did not intend the mere existence of a patent to constitute the requisite market power, where a clause in *§ 271(d)*, as amended, prohibits a patent owner from being denied relief for infringement or contributory infringement, by reason of certain patent-related license or sale conditions, "unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned."

COURTS §775.5 > -- statutory precedent -- reappraisal > Headnote:
LEdHN[4A][] [4A]***LEdHN[4B]***[] [4B]***LEdHN[4C]***[] [4C]

While a congressional invitation (by means of 1988 amendment to a patent-misuse provision in *35 U.S.C.S. § 271(d)*) was not necessary for a United States Supreme Court reappraisal with respect to antitrust cases arising under § 1 of the Sherman Act (*15 U.S.C.S. § 1*), this invitation was sufficient to warrant the court's re-evaluation of the court's precedent.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.6 > -- tying arrangements > Headnote:
LEdHN[5][] [5]

Under antitrust provisions such as § 1 of the Sherman Act (*15 U.S.C.S. § 1*), some tying arrangements involving patented products are unlawful, such as those that are created through a true monopoly or a marketwide conspiracy.

EVIDENCE §979 > -- price -- antitrust effect > Headnote:
LEdHN[6][] [6]

For purposes of applying ***antitrust law***, under provisions such as § 1 of the Sherman Act (*15 U.S.C.S. § 1*), to a tying arrangement involving a patented product, price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has charged an above-market price for the tied package.

[*30]**

STATUTES §158.8 > STATUTES §186 > -- antitrust -- agency guidelines -- lenity > Headnote:
LEdHN[7][] [7]

With respect to some antitrust guidelines issued jointly by two enforcement agencies (the United States Department of Justice and the Federal Trade Commission) in 1995--in which guidelines the agencies stated that in the exercise of their prosecutorial discretion, they would not presume that a patent, copyright, or trade secret necessarily conferred market power upon its owner--while this choice was not binding on the United States Supreme Court for purposes of interpreting § 1 of the Sherman Act (*15 U.S.C.S. § 1*), it would be unusual for the judiciary to replace the normal rule of lenity that was applied in criminal cases with a rule of severity for a special category of antitrust cases.

Syllabus

[1801] Petitioners manufacture and market printing systems that include a patented printhead and ink container and unpatented ink, which they sell to original equipment manufacturers who agree that they will purchase ink exclusively from petitioners and that neither they nor their customers will refill the patented containers with ink of any kind. Respondent developed ink with the same chemical composition as petitioners' ink. After petitioner Trident's infringement action was dismissed, respondent filed suit seeking a judgment of noninfringement and invalidity of Trident's patents on the ground that petitioners are engaged in **[****2]** illegal "tying" and monopolization in violation of *§§ 1* and *2* of the Sherman Act. Granting petitioners summary judgment, the District Court rejected respondent's argument that petitioners necessarily have market power as a matter of law by virtue of the patent on their printhead system, thereby rendering the tying arrangements *per se* violations of the antitrust laws. After carefully reviewing this Court's tying-arrangements decisions, the Federal Circuit reversed as to the *§ 1* claim, concluding that it had to follow this Court's precedents until overruled by this Court.

Held:

Because a patent does not necessarily confer market power upon the patentee, in all cases involving a tying arrangement, the **[***31]** plaintiff must prove that the defendant has market power in the tying product.

(a) Over the years, this Court's strong disapproval of tying arrangements has substantially diminished, as the Court has moved from relying on assumptions to requiring a showing of market power in the tying product. The assumption in earlier decisions that such "arrangements serve hardly any purpose beyond the suppression of competition," *Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305-306, 69 S. Ct. 1051, 93 L. Ed. 1371,* **[****3]** was rejected in *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 622,* ***[1802]*** *97 S. Ct. 861, 51 L. Ed. 2d 80 (Fortner II)*, and again in *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2*, both of which involved unpatented tying products. Nothing in *Jefferson Parish* suggested a rebuttable presumption of market power applicable to tying arrangements involving a patent on the tying good.

(b) The presumption that a patent confers market power arose outside the antitrust context as part of the patent misuse doctrine, and migrated to ***antitrust law*** in *International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20*. See also *Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363, 1942 Dec. Comm'r Pat. 733*; *United States v. Loew's Inc., 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11*.

(c) When Congress codified the patent laws for the first time, it initiated the untwining of the patent misuse doctrine and antitrust jurisprudence. At the same time that this Court's antitrust jurisprudence continued to rely on the assumption that tying arrangements generally serve no legitimate business purpose, Congress began chipping away at that assumption **[****4]** in the patent misuse context from whence it came. Then, four years after *Jefferson Parish* repeated the presumption that patents confer market power, Congress amended the Patent Code to eliminate it in the patent misuse context. While that amendment does not expressly refer to the antitrust laws, it invites reappraisal of *International Salt*'s *per se* rule. After considering the congressional judgment reflected in the amendment, this Court concludes that tying arrangements involving patented products should be evaluated under the standards of cases like *Fortner II* and *Jefferson Parish* rather than the *per se* rule in *Morton Salt* and *Loew's.* Any conclusion that an arrangement is unlawful must be supported by proof of power in the relevant market rather than by a mere presumption thereof.

(d) Respondent's alternatives to retention of the *per se* rule--that the Court endorse a rebuttable presumption that patentees possess market power when they condition the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee, or differentiate between tying arrangements involving requirements ties and other **[****5]** types of tying arrangements--are rejected.

(e) Because respondent reasonably relied on this Court's prior opinions in moving for summary judgment without offering evidence of the relevant market or proving petitioners' power within that market, respondent should be given a fair opportunity to develop and introduce evidence on that issue, as well as other **[***32]** relevant issues, when the case returns to the District Court. *396 F.3d 1342*

, vacated and remanded.

Counsel: Andrew J. Pincus argued the cause for petitioners.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

Kathleen M. Sullivan argued the cause for respondent.

Judges: Stevens, J., delivered the opinion of the Court, in which all other Members joined, except Alito, J., who took no part in the consideration or decision of the case.

Opinion by: STEVENS

Opinion

[1284] [*31]** Justice **Stevens** delivered the opinion of the Court.

LEdHN[1A][] [1A] ***LEdHN[2A]***[] [2A] In *Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)*, ***HN1***[] we repeated the well-settled proposition that "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." *Id., at 16, 104 S. Ct. 1551, 80 L. Ed. 2d 2*. This presumption of market power, applicable in the antitrust context when a seller conditions its sale of **[****6]** a patented product (the "tying" product) on the purchase of a second product (the "tied" product), has its foundation in the judicially created patent misuse doctrine. See *United States v. Loew's Inc., 371 U.S. 38, 46, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962)*. In 1988, Congress substantially undermined that foundation, amending the Patent Act to eliminate the market power presumption in patent misuse cases. See 102 Stat. 4676, codified at *35 U.S.C. § 271(d)*. The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of ***antitrust law*** despite its demise in patent law. We conclude that the mere fact that a tying product is patented does not support such a presumption.

I

Petitioners, Trident, Inc., and its parent, Illinois Tool Works Inc., manufacture and market printing systems that include three relevant components: (1) a patented piezoelectric impulse ink jet printhead; (2) a patented ink container, consisting of a bottle and valved cap, which attaches to the printhead; and (3) specially designed, but unpatented, ink. **[*32]** Petitioners sell their **[**1285]** systems to original equipment manufacturers (OEMs) who are licensed **[****7]** to incorporate the printheads and containers into printers that are in turn sold to companies for use in printing barcodes on cartons and packaging materials. The OEMs agree that they will purchase their ink exclusively from petitioners, and that neither they nor their customers **[1803]** will refill the patented containers with ink of any kind.

Respondent, Independent Ink, Inc., has developed an ink with the same chemical composition as the ink sold by petitioners. After an infringement action brought by Trident against Independent was dismissed for lack of personal jurisdiction, Independent filed suit against Trident seeking a judgment of noninfringement and invalidity of Trident's patents. [1] In an amended complaint, it alleged that petitioners are engaged in illegal tying and monopolization in violation **[***33]** of §§ 1 and 2 of the Sherman Act. *15 U.S.C. §§ 1*, *2*.

After discovery, the **[****8]** District Court granted petitioners' motion for summary judgment on the Sherman Act claims. *Independent Ink, Inc. v. Trident, Inc., 210 F. Supp. 2d 1155, 1177 (CD Cal. 2002)*. It rejected respondent's submission that petitioners "necessarily have market power in the market for the tying product as a matter of law solely by virtue of the patent on their printhead system, thereby rendering [the] tying arrangements *per se* violations of the antitrust laws." *Id., at 1159*. Finding that respondent had submitted no affirmative evidence defining the relevant market or establishing petitioners' power within it, the court concluded that respondent could not prevail on either antitrust claim. *Id., at 1167, 1173, 1177*. The parties settled their other claims, and respondent appealed.

After a careful review of the "long history of Supreme Court consideration of the legality of tying arrangements," *396 F.3d 1342, 1346 (2005)*, the Court of Appeals for the **[*33]** Federal Circuit reversed the District Court's decision as to respondent's *§ 1* claim, *id., at 1354*. Placing special reliance on our decisions in *International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947),* **[****9]** and *Loew's, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11*, as well as our *Jefferson Parish* dictum, and after taking note of the academic criticism of those cases, it concluded that the "fundamental error" in petitioners' submission was its disregard of "the duty of a court of appeals to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them."

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[1] Illinois Tool did not acquire Trident until February 19, 1999, approximately six months after this action commenced.

396 F.3d at 1351. We granted certiorari to undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements. *545 U.S. 1127, 125 S. Ct. 2937, 162 L. Ed. 2d 865 (2005)*. Our review is informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws.

II

American courts first encountered tying arrangements in the course of patent infringement litigation. See, e.g., *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 F. 288, 1897 Dec. Comm'r Pat. 216 (CA6 1896)*. Such a case came before this Court in *Henry v. A. B. Dick Co., 224 U.S. 1, 32 S. Ct. 364, 56 L. Ed. 645, 1912 Dec. Comm'r Pat. 575 (1912)*, in which, as in the case we decide today, unpatented ink was the product that was "tied" to the use of a patented product through the use of **[****10]** a licensing agreement. Without commenting **[**1286]** on the tying arrangement, the Court held that use of a competitor's ink in violation of a condition of the agreement--that the rotary mimeograph "'may be used only with the stencil, paper, ink and other supplies made by A. B. Dick Co.'"--constituted infringement of the patent on the machine. *Id., at 25-26, 32 S. Ct. 364, 56 L. Ed. 645, 1912 Dec. Comm'r Pat. 575*Chief Justice White dissented, explaining his disagreement with the Court's approval of a practice that he regarded as an "attempt to increase the scope of the monopoly granted by a patent . . . which tend[s] to increase monopoly and to burden the public in the exercise of their common rights." *Id., at 70, 32 S. Ct. 364, 56 L. Ed. 645, 1912 Dec. Comm'r Pat. 575*Two years later, Congress **[*34]** endorsed Chief Justice White's disapproval of tying arrangements, enacting *§ 3* of the Clayton Act. See 38 Stat. 731 (applying **[***34]** to "patented or unpatented" products); see also *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 517-518, 37 S. Ct. 416, 61 L. Ed. 871, 1917 Dec. Comm'r Pat. 391 (1917)* (explaining that, in light of *§ 3* of the Clayton Act, *A. B. Dick* "must be regarded as overruled"). And in this Court's subsequent cases reviewing the legality of tying arrangements we, too, embraced **[****11]** Chief Justice White's disapproval of those arrangements. See, e.g., *Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 305-306, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949)*; *Mercoid Corp. v. Mid-Continent Investment Co., 320 U.S. 661, 664-665, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641 (1944)*.

In the years since *A. B. Dick*, ***HN2***[] four different rules of law have supported challenges to tying arrangements. They have been condemned as improper extensions of the patent monopoly under the patent misuse doctrine, as unfair methods of competition under § 5 of the Federal Trade Commission Act, *15 U.S.C. § 45*, as contracts tending to create a monopoly under § 3 of the Clayton Act, *15 U.S.C. § 14*, and as contracts in restraint of **[1804]** trade under *§ 1* of the Sherman Act. [2] In all of those instances, the justification for the challenge rested on either an assumption or a showing that the defendant's position of power in the market for the tying product was being used to restrain competition in the market for the tied product. As we explained in *Jefferson Parish, 466 U.S., at 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2*, "[o]ur cases have concluded that the essential characteristic of an invalid tying arrangement **[****12]** 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 **[*35]** either did not want at all, or might have preferred to purchase elsewhere on different terms."

HN3[] Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing **[****13]** of market power in the tying product. Our early opinions consistently assumed that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co., 337 U.S., at 305-306, 69 S. Ct. 1051, 93 L. Ed. 1371*. In 1962, in *Loew's, 371 U.S., at 47-48, 83 S. Ct. 97, 9 L. Ed. 2d 11*, the Court relied on this assumption despite evidence of significant competition in the market for the tying product. And

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[2] See, *e.g., Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984)* (Sherman Act); *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)* (Federal Trade Commission Act); *International Salt Co. v. United States, 332 U.S. 392, 395-396, 68 S. Ct. 12, 92 L. Ed. 20 (1947)* (Clayton Act and Sherman Act); *Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 494, 62 S. Ct. 402, 86 L. Ed. 363, 1942 Dec. Comm'r Pat. 733 (1942)* (patent misuse); *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 516, 37 S. Ct. 416, 61 L. Ed. 871, 1917 Dec. Comm'r Pat. 391 (1917)* (same).

as recently as 1969, Justice Black, writing for the majority, relied on the assumption as support for the proposition "that, at least **[**1287]** when certain prerequisites are met, arrangements of this kind are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required." *Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 498-499, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)(Fortner I).* Explaining the Court's decision to allow the suit to proceed to trial, he stated that "decisions rejecting the need for proof of truly **[***35]** dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint **[****14]** on competition provides a sufficient reason for invalidating the tie." *Id., at 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495*.

Reflecting a changing view of tying arrangements, four Justices dissented in *Fortner I*, arguing that the challenged "tie"--the extension of a $2 million line of credit on condition that the borrower purchase prefabricated houses from the defendant--might well have served a legitimate purpose. *Id., at 510, 89 S. Ct. 1252, 22 L. Ed. 2d 495* (opinion of White, J.); *id., at 520, 89 S. Ct. 1252, 22 L. Ed. 2d 495* (opinion of Fortas, J.). In his opinion, Justice White noted that promotional tie-ins may provide "uniquely advantageous deals" to purchasers. *Id., at 519, 89 S. Ct. 1252, 22 L. Ed. 2d 495*. And Justice Fortas concluded that the **[*36]** arrangement was best characterized as "a sale of a single product with the incidental provision of financing." *Id., at 522, 89 S. Ct. 1252, 22 L. Ed. 2d 495*.

The dissenters' view that tying arrangements may well be procompetitive ultimately prevailed; indeed, it did so in the very same lawsuit. After the Court remanded the suit in *Fortner I*, a bench trial resulted in judgment for the plaintiff, and the case eventually made its way back to this Court. Upon return, we unanimously held that the plaintiff's failure **[****15]** of proof on the issue of market power was fatal to its case--the plaintiff had proved "nothing more than a willingness to provide cheap financing in order to sell expensive houses." *United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 622, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) (Fortner II).*

LEdHN[1B][] [1B] The assumption that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition," rejected in *Fortner II*, has not been endorsed in any opinion since. Instead, it was again rejected just seven years later in *Jefferson Parish*, where, as in *Fortner II*, we unanimously reversed a Court of Appeals judgment holding that an alleged tying arrangement constituted a *per se* violation of *§ 1* of the Sherman Act. *466 U.S., at 5, 104 S. Ct. 1551, 80 L. Ed. 2d 2*. Like the product at issue in the *Fortner* cases, the tying product in *Jefferson Parish*--hospital services--was unpatented, and our holding again rested on the conclusion that the plaintiff had failed to prove sufficient power in the tying product market to restrain competition in the market for the tied product--services of anesthesiologists. *466 U.S., at 28-29, 104 S. Ct. 1551, 80 L. Ed. 2d 2*.

HN4[] In rejecting the application of **[****16]** a *per se* rule that all tying arrangements constitute antitrust violations, we explained:

> "[W]e 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. . . .
>
> **[1805] [*37]** "*Per se* condemnation--condemnation without inquiry into actual market conditions--is only appropriate if the existence of forcing is probable. Thus, application of the **[***36]** *per se* rule focuses on the probability of anticompetitive consequences. . . .
>
> **[**1288]** "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. *United States v. Loew's Inc., 371 U.S., at 45-47, 83 S. Ct. 97, 9 L. Ed. 2d 11*. 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. **[****17]** " *Id., at 13-16, 104 S. Ct. 1551, 80 L. Ed. 2d 2* (footnote omitted).

Notably, nothing in our opinion suggested a rebuttable presumption of market power applicable to tying arrangements involving a patent on the tying good. See *infra, at 44, 164 L. Ed. 2d, at 40*; cf. *396 F.3d at 1352*.

Instead, it described the rule that a contract to sell a patented product on condition that the purchaser buy unpatented goods exclusively from the patentee is a *per se* violation of *§ 1* of the Sherman Act.

Justice O'Connor wrote separately in *Jefferson Parish*, concurring in the judgment on the ground that the case did not involve a true tying arrangement because, in her view, surgical services and anesthesia were not separate products. *466 U.S., at 43, 104 S. Ct. 1551, 80 L. Ed. 2d 2*. In her opinion, she questioned not only the propriety of treating any tying arrangement as a *per se* violation of the Sherman Act, *id., at 35, 104 S. Ct. 1551, 80 L. Ed. 2d 2*, but also the validity of the presumption that a patent always gives the patentee significant market power, observing that the presumption was actually a product of our patent misuse cases rather than **[*38]** our antitrust jurisprudence, *id., at 37-38, n. 7, 104 S. Ct. 1551, 80 L. Ed. 2d 2*. It is that presumption, a vestige of the **[****18]** Court's historical distrust of tying arrangements, that we address squarely today.

III

LEdHN[1C][] [1C] Justice O'Connor was, of course, correct in her assertion that the presumption that a patent confers market power arose outside the antitrust context as part of the patent misuse doctrine. That doctrine had its origins in *Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 37 S. Ct. 416, 61 L. Ed. 871, 1917 Dec. Comm'r Pat. 391 (1917)*, which found no support in the patent laws for the proposition that a patentee may "prescribe by notice attached to a patented machine the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent," *id., at 509, 37 S. Ct. 416, 61 L. Ed. 871, 1917 Dec. Comm'r Pat. 391* Although *Motion Picture Patents Co.* simply narrowed the scope of possible patent infringement claims, it formed the basis for the Court's subsequent decisions creating a patent misuse defense to infringement claims when a patentee uses its patent "as the effective means of restraining competition with its sale of an unpatented article." *Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 490, 62 S. Ct. 402, 86 L. Ed. 363, 1942 Dec. Comm'r Pat. 733 (1942)*; see also, *e.g.*, *Carbice **[***37]** Corp. of America v. American Patents Development Corp., 283 U.S. 27, 31, 51 S. Ct. 334, 75 L. Ed. 819, 1931 Dec. Comm'r Pat. 727 (1931).* **[****19]**

Without any analysis of actual market conditions, these patent misuse decisions assumed that, by tying the purchase of unpatented goods to the sale of the patented good, the patentee was "restraining competition," *Morton Salt, 314 U.S., at 490, 62 S. Ct. 402, 86 L. Ed. 363, 1942 Dec. Comm'r Pat. 733*, or "secur[ing] a limited monopoly of an unpatented material," *Mercoid, 320 U.S., at 664, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641*; see also *Carbice, 283 U.S., at 31-32, 51 S. Ct. 334, 75 L. Ed. 819, 1931 Dec. Comm'r Pat. 727* In other words, these decisions presumed "[t]he requisite economic power" over the tying product such that the patentee **[**1289]** could "extend [its] economic control to unpatented products." *Loew's, 371 U.S., at 45-46, 83 S. Ct. 97, 9 L. Ed. 2d 11*.

The presumption that a patent confers market power migrated from patent law to ***antitrust law*** in **[*39]** *International Salt Co. v. United States, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947)*. In that case, we affirmed a District Court decision holding that leases of patented machines requiring the lessees to use the defendant's unpatented salt products violated *§ 1* of the Sherman Act and *§ 3* of the Clayton Act as a matter of law. *Id., at 396, 68 S. Ct. 12, 92 L. Ed. 20*. Although the Court's opinion does not discuss market power or the patent misuse doctrine, it assumes **[****20]** that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *Ibid.*

The assumption that tying contracts "ten[d] . . . to accomplishment of monopoly" can be traced to the Government's brief in *International Salt*, which relied heavily on our earlier patent misuse decision in *Morton Salt.* The Government described *Morton Salt* as "present[ing] a factual situation almost identical with the instant case," and it asserted that **[1806]** "although the Court in that case did not find it necessary to decide whether the antitrust laws were violated, its language, its reasoning, and its citations indicate that the policy underlying the decision was the same as that of the Sherman Act." Brief for United States in *International Salt Co.* v. *United States*, O. T. 1947, No. 46, p 19 (United States Brief). Building on its assertion that *International Salt* was logically indistinguishable from *Morton Salt*, the Government argued that this Court should place tying arrangements involving patented products in the category of *per se* violations of the Sherman **[****21]** Act. United States Brief 26-33.

Our opinion in *International Salt* clearly shows that we accepted the Government's invitation to import the presumption of market power in a patented product into our antitrust jurisprudence. While we cited *Morton Salt* only for the narrower proposition that the defendant's patents did not confer any right to restrain competition in unpatented salt or afford the defendant any immunity from the antitrust laws, *International Salt, 332 U.S., at 395-396, 68 S. Ct. 12, 92 L. Ed. 20*, given the fact that **[*40]** the defendant was selling its unpatented salt at competitive prices, *id., at 396-397, 68 S. Ct. 12, 92 L. Ed. 20*, the rule adopted in *International Salt* necessarily accepted the Government's submission that the earlier patent misuse cases supported the **[***38]** broader proposition "that this type of restraint is unlawful on its face under the Sherman Act," United States Brief 12.

Indeed, later in the same Term we cited *International Salt* for the proposition that the license of "a patented device on condition that unpatented materials be employed in conjunction with the patented device" is an example of a restraint that is "illegal *per se.*" *United States v. Columbia Steel Co., 334 U.S. 495, 522-523, 68 S. Ct. 1107, 92 L. Ed. 1533, and n. 22 (1948).* **[****22]** And in subsequent cases we have repeatedly grounded the presumption of market power over a patented device in *International Salt. See, e.g.*, *Loew's, 371 U.S., at 45-46, 83 S. Ct. 97, 9 L. Ed. 2d 11*; *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 608, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *Standard Oil Co., 337 U.S., at 304, 69 S. Ct. 1051, 93 L. Ed. 1371*.

IV

LEdHN[1D][] [1D] Although the patent misuse doctrine and our antitrust jurisprudence became intertwined in *International Salt*, subsequent **[**1290]** events initiated their untwining. This process has ultimately led to today's reexamination of the presumption of *per se* illegality of a tying arrangement involving a patented product, the first case since 1947 in which we have granted review to consider the presumption's continuing validity.

Three years before we decided *International Salt*, this Court had expanded the scope of the patent misuse doctrine to include not only supplies or materials used by a patented device, but also tying arrangements involving a combination patent and "unpatented material or [a] device [that] is itself an integral part of the structure embodying the patent." *Mercoid, 320 U.S., at 665, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641*; see also *Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 188-198, 100 S. Ct. 2601, 65 L. Ed. 2d 696 (1980)* **[****23]** (describing in detail *Mercoid* and the cases leading up to it). In reaching this conclusion, the Court explained that it could see "no **[*41]** difference in principle" between cases involving elements essential to the inventive character of the patent and elements peripheral to it; both, in the Court's view, were attempts to "expan[d] the patent beyond the legitimate scope of its monopoly." *Mercoid, 320 U.S., at 665, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641*

Shortly thereafter, Congress codified the patent laws for the first time. See 66 Stat. 792, codified at *35 U.S.C. § 1 et seq. (2000 ed. and Supp. III)*. At least partly in response to our *Mercoid* decision, Congress included a provision in its codification that excluded some conduct, such as a tying arrangement involving the sale of a patented product tied to an "essential" or "nonstaple" product that has no use except as part of the patented product or method, from the scope of the patent misuse doctrine. *§ 271(d)*; see also *Dawson, 448 U.S., at 214, 100 S. Ct. 2601, 65 L. Ed. 2d 696*. Thus, at the same time that our antitrust jurisprudence continued to rely on the assumption that "tying arrangements generally serve no legitimate business purpose," **[****24]** *Fortner I, 394 U.S., at 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495*, Congress began chipping away at the assumption in the patent misuse context from whence it came.

LEdHN[1E][] [1E] ***LEdHN[3A]***[] [3A] ***LEdHN[4A]***[] [4A] It is Congress' most recent narrowing of the patent misuse defense, however, that is directly **[***39]** relevant to this case. Four years after our decision in *Jefferson Parish* repeated the patent-equals-market-power presumption, ***HN5***[] *466 U.S., at 16, 104 S. Ct. 1551, 80 L. Ed. 2d 2*, Congress amended the Patent Code to eliminate that presumption in the patent misuse context, 102 Stat. 4676. The relevant provision reads:

> ***HN6***[] "(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (5) conditioned the license of any rights **[1807]** to the patent or

> the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, *unless, in view of the circumstances, the patent owner has* ***[*42]*** *market power in the relevant market for the patent or patented product on which the license or sale is conditioned.*" 35 U.S.C. § 271(d)(5) **[****25]** (emphasis added).

The italicized clause makes it clear that Congress did not intend the mere existence of a patent to constitute the requisite "market power." Indeed, fairly read, it provides that without proof that Trident had market power in the relevant market, its conduct at issue in this case was neither "misuse" nor an "illegal extension of the patent right."

LEdHN[1F][] [1F] ***LEdHN[3B]***[] [3B] ***LEdHN[4B]***[] [4B] While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites a reappraisal of the *per se* **[**1291]** rule announced in *International Salt.* [3] A rule denying a patentee the right to enjoin an infringer is significantly less severe than a rule that makes the conduct at issue a federal crime punishable by up to 10 years in prison. See 15 U.S.C. § 1. It would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute "misuse." Moreover, given the fact that the patent misuse doctrine provided the basis for the market power presumption, it would be anomalous to preserve the presumption in antitrust after Congress has eliminated its foundation. Cf. 10 P. Areeda, H. Hovenkamp, & E. Elhauge, ***Antitrust*** **[****26]** ***Law*** P 1737c (2d ed. 2004) (hereinafter Areeda).

LEdHN[1G][] [1G] ***LEdHN[5]***[] [5] After considering the congressional judgment reflected in the 1988 amendment, we conclude that tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in *Morton Salt* and *Loew's* While some such arrangements are still unlawful, **[*43]** such as those that are the product of a true monopoly or a marketwide conspiracy, see, *e.g.*, *United States v. Paramount Pictures, Inc., 334 U.S. 131, 145-146, 68 S. Ct. 915, 92 L. Ed. 1260 (1948),* **[****27]** that conclusion must be supported by proof of power in the relevant market **[***40]** rather than by a mere presumption thereof. [4]

V

LEdHN[1I][] [1I] Rather than arguing that we should retain the rule of *per se* illegality, respondent contends that we should endorse a **[****28]** rebuttable presumption that patentees possess market power when they condition the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee. Cf. *supra, at 37-38, 164 L. Ed. 2d, at 35-36*. Respondent recognizes that a large number of valid patents have little, if any, commercial significance, but submits that those that are used to impose tying arrangements on unwilling purchasers likely do exert significant market power. Hence, in respondent's view, the presumption would have no impact on patents of only slight value and would be justified, subject to being rebutted by evidence offered by the patentee, in cases in which the patent has sufficient value to enable the patentee to insist on acceptance of the tie.

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[3] ***LEdHN[4C]***[] [4C] While our opinions have made clear that such an invitation is not necessary with respect to cases arising under the Sherman Act, see *State Oil Co. v. Khan, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*, it is certainly sufficient to warrant reevaluation of our precedent, *id., at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199* ("[T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question").

[4] ***LEdHN[1H]***[] [1H] Our imposition of this requirement accords with the vast majority of academic literature on the subject. See, *e.g.*, 10 Areeda P 1737a ("[T]here is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent"); Burchfiel, Patent Misuse and Antitrust Reform: "Blessed be the Tie?" *4 Harv. J. L. & Tech. 1, 57*, and n 340 (1991) (noting that the market power presumption has been extensively criticized and citing sources); 1 H. Hovenkamp, M. Janis, & M. Lemley, IP and Antitrust § 4.2a (2005 Supp.) ("[C]overage of one's product with an intellectual property right does not confer a monopoly"); W. Landes & R. Posner, The Economic Structure of Intellectual Property Law 374 (2003) (hereinafter Landes & Posner).

Respondent also offers a narrower alternative, suggesting that we differentiate between tying arrangements involving the simultaneous purchase of two products that are arguably two components of a single product--such as the provision of **[**1292]** **[*44]** surgical services and anesthesiology in the same operation, *Jefferson Parish, 466 U.S., at 43, 104 S. Ct. 1551, 80 L. Ed. 2d 2* (O'Connor, J., concurring in judgment), or the licensing of one copyrighted film on condition that the licensee **[****29]** take a package of several films in the same transaction, *Loew's, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11* --and a tying arrangement involving the purchase of unpatented goods over a period of time, a so-called "requirements tie." See also Brief for Barry Nalebuff et al. as *Amici Curiae.* According to respondent, we should recognize a presumption of market power when faced with the latter type of arrangements because they provide a means for **[1808]** charging large volume purchasers a higher royalty for use of the patent than small purchasers must pay, a form of discrimination that "is strong evidence of market power." Brief for Respondent 27; see generally *Jefferson Parish, 466 U.S., at 15, n. 23, 104 S. Ct. 1551, 80 L. Ed. 2d 2* (discussing price discrimination of this sort and citing sources).

The opinion that imported the "patent equals market power" presumption into our antitrust jurisprudence, however, provides no support for respondent's proposed alternative. In *International Salt*, it was the existence of the patent on the tying product, rather than the use of a requirements tie, that led the Court to presume market power. *332 U.S., at 395, 68 S. Ct. 12, 92 L. Ed. 20* ("The appellant's patents confer a limited monopoly **[****30]** of the invention they reward"). Moreover, the requirements **[***41]** tie in that case did not involve any price discrimination between large volume and small volume purchasers or evidence of noncompetitive pricing. Instead, the leases at issue provided that if any competitor offered salt, the tied product, at a lower price, "the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price." *Id., at 396, 68 S. Ct. 12, 92 L. Ed. 20*.

LEdHN[1J][] [1J] ***LEdHN[6]***[] [6] As we have already noted, the vast majority of academic literature recognizes that a patent does not necessarily confer market power. See n 4, *supra.* Similarly, while price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has **[*45]** charged an above-market price for the tied package, see, *e.g.*, 10 Areeda P 1769c, it is generally recognized that it also occurs in fully competitive markets, see, *e.g.*, Baumol & Swanson, The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power, 70 Antitrust L. J. 661, 666 (2003); 9 Areeda P 1711; Landes & Posner 374-375. We are not persuaded that the combination of these **[****31]** two factors should give rise to a presumption of market power when neither is sufficient to do so standing alone. Rather, the lesson to be learned from *International Salt* and the academic commentary is the same: Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market. For this reason, we reject both respondent's proposed rebuttable presumption and their narrower alternative.

LEdHN[1K][] [1K] ***LEdHN[7]***[] [7] It is no doubt the virtual consensus among economists that has persuaded the enforcement agencies to reject the position that the Government took when it supported the *per se* rule that the Court adopted in the 1940's. See *supra, at 39, 164 L. Ed. 2d, at 36*. In antitrust guidelines issued jointly by the Department of Justice and the Federal Trade Commission in 1995, the enforcement agencies stated that in the exercise of their prosecutorial discretion they "will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner." U. S. Dept. of Justice and FTC, Antitrust Guidelines for the Licensing of Intellectual Property § 2.2 (Apr. 6, 1995), *http://www.usdoj.gov/atr/public/guidelines/0558.pdf* (as visited **[**1293]** **[****32]** Feb. 24, 2006, and available in Clerk of Court's case file). While that choice is not binding on the Court, it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with a rule of severity for a special category of antitrust cases.

Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. **[*46]** Today, we reach the same conclusion, and therefore hold that, ***HN7***[] in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

VI

LEdHN[2B][] [2B] In this case, respondent reasonably relied on our prior opinions in moving for summary judgment without offering evidence defining the relevant market or proving that petitioners possess power within it.

When the case returns to the District **[***42]** Court, respondent should therefore be given a fair opportunity to develop and introduce evidence on that issue, as well as any other issues that are relevant to its remaining *§ 1* claims. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent **[****33]** with this opinion.

It is so ordered.

Justice **Alito** took no part in the consideration or decision of this case.

References

54 Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 96, *97*, *102-104*, *106*, *133*, *596*, *736*, *737*; *60 Am Jur 2d, Patents §§ 895*, *896*

15 U.S.C.S. § 1 **[****34]** ; *35 U.S.C.S. § 271(d)*

1 Antitrust Laws and Trade Regulation, Second Edition §§ 22.01-22.03 (Matthew Bender)

4 Antitrust Laws and Trade Regulation, Second Edition §§ 73.01, 74.01, 75.01 (Matthew Bender)

5 Chisum on Patents § 17.05 (Matthew Bender)

6 Chisum on Patents § 19.04 (Matthew Bender)

L Ed Digest, Evidence § 343.5

L Ed Index, Tying Arrangements

Annotation References

United States Supreme Court's views as to retroactive effect of its own decisions announcing new rules. *65 L. Ed. 2d 1219*.

Supreme Court's views as to the "rule of lenity" in the construction of criminal statutes. *62 L. Ed. 2d 827*.

What constitutes "sufficient economic power" to make tying arrangement unlawful restraint of trade violative of § 1 of Sherman Act (*15 U.S.C.S. § 1*)--Supreme Court cases. *51 L. Ed. 2d 826*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

Supreme Court's view as to weight and effect to be **[****35]** given, on subsequent judicial construction, to prior administrative construction of statute. *39 L. Ed. 2d 942*.

Anza v. Ideal Steel Supply Corp.

Supreme Court of the United States

March 27, 2006, Argued ; June 5, 2006, Decided

No. 04-433

Reporter

547 U.S. 451 *; 126 S. Ct. 1991 **; 164 L. Ed. 2d 720 ***; 2006 U.S. LEXIS 4510 ****; 74 U.S.L.W. 4278; 19 Fla. L. Weekly Fed. S 218

JOSEPH ANZA, et al., Petitioners v. IDEAL STEEL SUPPLY CORP.

Subsequent History: **[****1]** Related proceeding at *Ideal Steel Supply Corp. v. Beil, 2007 N.Y. Misc. LEXIS 5160 (2007)*

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Ideal Steel Supply Corp. v. Anza, 373 F.3d 251, 2004 U.S. App. LEXIS 13742 (2d Cir. N.Y., 2004)

Disposition: Reversed in part, vacated in part, and remanded.

Core Terms

customers, competitor, damages, organized crime, predicate act, proximate-cause, petitioners', cases, broker-dealers, sales tax, injuries, pattern of racketeering activity, proximate cause, lower price, treble-damages, prices, proximate causation, mail fraud, racketeering, ascertain, indirect, alleges, wire fraud, enterprise, common law, common-law, funds, harms, legitimate business, defrauding

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > General Overview

HN1[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961- 1968*, prohibits certain conduct involving a pattern of racketeering activity. *18 U.S.C.S. § 1962*. One of RICO's enforcement mechanisms is a private right of action, available to any person injured in his business or property by reason of a violation of the Act's substantive restrictions. *18 U.S.C.S. § 1964(c)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN2[] Private Actions, Racketeer Influenced & Corrupt Organizations

The United States Supreme Court has held that a plaintiff may sue under *18 U.S.C.S. § 1964(c)* only if the alleged violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961- 1968*, was the proximate cause of the plaintiff's injury.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > Fraud

HN3[] Claims, Fraud

Mail fraud and wire fraud are forms of "racketeering activity" for purposes of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961- 1968*. *18 U.S.C.S. § 1961(1)(B)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN4[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1962(c) makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN5[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. § 1962(a) makes it unlawful for any person who has received income derived from a pattern of racketeering activity to use or invest that income in acquisition of any interest in, or the establishment or operation of, an enterprise engaged in or affecting interstate or foreign commerce.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN6[] Private Actions, Racketeer Influenced & Corrupt Organizations

18 U.S.C.S. 1962(c) forbids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. The United States Supreme Court has indicated the compensable injury flowing from a violation of that provision necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN7[] Private Actions, Racketeer Influenced & Corrupt Organizations

The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961- 1968*, can be expected to vindicate the laws by pursuing their own claims.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

***HN8*[]** **Private Actions, Racketeer Influenced & Corrupt Organizations**

A Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961- 1968*, plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

***HN9*[]** **Private Actions, Racketeer Influenced & Corrupt Organizations**

Private actions for violations of *18 U.S.C.S. § 1962(a)*, like actions for violations of *§ 1962(c)*, must be asserted under *18 U.S.C.S. § 1964(c)*. It likewise is true that a claim is cognizable under *§ 1964(c)* only if the defendant's alleged violation proximately caused the plaintiff's injury. The proximate-cause inquiry, however, requires careful consideration of the relation between the injury asserted and the injurious conduct alleged.

Lawyers' Edition Display

Decision

[*720]** Corporation's asserted injury from competitor's alleged violation of RICO provision (18 U.S.C.S. § 1962(c)) held to lack direct relation to alleged violation necessary to satisfy requirement of proximate causation.

Summary

The Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C.S. §§ 1961 et seq.*) (1) in *18 U.S.C.S. § 1962(c)*, prohibited certain conduct performed "through a pattern of racketeering activity"; (2) in *18 U.S.C.S. § 1962(a)*, generally prohibited use or investment of income derived from a pattern of racketeering activity; and (3) in *18 U.S.C.S. § 1964(c)*, made a private right of action available to a party injured in the party's business or property "by reason of" a violation of RICO's substantive restrictions. In *Holmes v. Securities Investor Protection Corp. (1992) 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532*, the United States Supreme Court held that a plaintiff was allowed to sue under *§ 1964(c)* only if the alleged RICO violation was the proximate cause of the plaintiff's injury.

A corporation that operated stores in New York City brought, against a competitor in the United States District Court for the Southern District of New York, an action alleging that the competitor had violated (1) *§ 1962(c)* by failing to charge New York state sales tax to cash-paying customers--thus allowing the competitor to reduce its prices without affecting its profit margin--and submitting fraudulent state tax returns to conceal that conduct, and (2) *§ 1962(a)* by using funds generated by the fraudulent tax scheme to open a store that caused the corporation to lose business and market share.

The District Court granted the competitor's motion to dismiss (*254 F. Supp. 2d 464*). The United States Court of Appeals for the Second Circuit (1) concluded that the corporation had adequately pleaded both the *§ 1962(a)* **[***721]** claim and the *§ 1962(c)* claim; and (2) vacated the District Court's judgment (*373 F. 3d 251*).

On certiorari, the Supreme Court reversed as to the *§ 1962(c)* claim, vacated as to the *§ 1962(a)* claim, and remanded. In an opinion by Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Souter, Ginsburg, and Alito, JJ., it was held that under the principles of Holmes, the corporation was not allowed to maintain its *§ 1962(c)* claim, as:

(1) Holmes indicated that *§ 1964(c)* demanded some direct relation between the RICO injury asserted and the injurious conduct alleged.

(2) The direct victim of the alleged conduct in question was New York state, not the corporation.

(3) Difficulty could arise when a court attempted to ascertain the damages caused by some remote action, where, for example, in the instant case (a) the competitor might have lowered its prices for reasons unconnected to the asserted fraud; and (b) the corporation's asserted lost sales might have resulted from factors other than the alleged fraud.

(4) A court considering the corporation's claim would have to engage in speculation by calculating (a) the portion of the competitor's price drop attributable to the alleged pattern of racketeering activity; and (b) the portion of the corporation's lost sales attributable to the relevant part of the price drop.

(5) If left unchecked, RICO claims brought by economic competitors could blur the line between RICO and the antitrust laws.

(6) In the case at hand, the state could be expected to vindicate the laws by pursuing its own claim.

Scalia, J., concurring, expressed the view that it was inconceivable that the injury alleged in the corporation's *§ 1962(c)* claim was within the zone of interests protected by the RICO cause of action for fraud perpetrated upon New York state.

Thomas, J., concurring in part and dissenting in part, said that the stringent proximate-causation requirement expressed by the Supreme Court in the case at hand (1) succeeded in precluding recovery in cases alleging a violation of *§ 1962(c)* that, like the case at hand, had nothing to do with organized crime, the target of RICO; but (2) also eliminated recovery for plaintiffs whose injuries were precisely those that Congress aimed to remedy through the authorization of civil RICO suits.

Breyer, J., concurring in part and dissenting in part, expressed the view that (1) RICO's civil-damages remedy did not cover claims of injury by one competitor where the legitimate pro-competitive activity of another competitor immediately caused that injury; and (2) because the case at hand was such a case, (a) neither the corporation's *§ 1962(c)* count nor its *§ 1962(a)* count stated a RICO private claim, and (b) the Court of Appeals' judgment ought to have been reversed on both counts.

Headnotes

PARTIES §3 > PROXIMATE CAUSE §11 > -- RICO -- private action -- requirement of direct injury -- defrauding of state > Headnote:
LEdHN[1A][] [1A]***LEdHN[1B]***[] [1B]***LEdHN[1C]***[] [1C]

Under the principles of *Holmes v. Securities Investor Protection Corp. (1992) 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532*--which held that a plaintiff was allowed to sue for damages alleged resulting from conduct prohibited by a Racketeer Influenced and Corrupt Organizations Act (RICO) provision (*18 U.S.C.S. § 1962(c)*) only if the alleged RICO violation was the proximate cause of the plaintiff's injury--a corporation was not allowed to maintain its *§ 1962(c)* claim against a competitor, as:

(1) Holmes indicated that a RICO provision (*18 U.S.C.S. § 1964(c)*)--making a private right of action available to persons injured "by reason of" a violation of substantive RICO provisions such as *§ 1962(c)*--demanded some direct relation between the injury asserted and the injurious conduct alleged, not merely "but for" causation.

(2) The corporation alleged that the competitor had violated *§ 1962(c)* by failing to charge state sales tax to cash-paying customers (thus allowing the competitor to reduce its prices without affecting its profit margin) and submitting fraudulent state tax returns to conceal that conduct.

(3) The direct victim of this alleged conduct was the state, not the corporation.

(4) One motivating principle for the Holmes directness requirement was the difficulty that could arise when a court attempted to ascertain the damages caused by some remote action, where, for example, in the instant case (a) the competitor might have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud; and (b) the corporation's asserted lost sales might have resulted from factors other than the competitor's alleged acts of fraud.

(5) A court considering the corporation's claim would have to engage in speculation by calculating (a) the portion of the competitor's price drop attributable to the alleged pattern of racketeering activity; and (b) the portion of the corporation's lost sales attributable to the relevant part of the price drop.

(6) The element of proximate causation recognized in Holmes (a) was meant to prevent these types of intricate, uncertain inquiries from overrunning RICO (*18 U.S.C.S. §§ 1961 et seq.*) litigation; and (b) had particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.

(7) The requirement of a direct causal connection was especially warranted where the immediate victim of an alleged RICO violation, such as the state in the instant case, could be expected to vindicate the laws by pursuing the victim's own claim.

(Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Souter, Ginsburg, and Alito, JJ.)

[*723]**

APPEAL §1293 > -- motion to dismiss > Headnote:
LEdHN[2][] [2]

On certiorari to determine whether a corporation was allowed to maintain an action under a Racketeer Influenced and Corrupt Organizations Act provision (*18 U.S.C.S. § 1962(c)*), the United States Supreme Court accepted as true the factual allegations in the amended complaint, because the case had arisen from a motion to dismiss. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Souter, Ginsburg, and Alito, JJ.)

PROXIMATE CAUSE §11 > -- private RICO action -- direct injury > Headnote:
LEdHN[3A][] [3A]***LEdHN[3B]***[] [3B]

For purposes of the United States Supreme Court's holding in *Holmes v. Securities Investor Protection Corp. (1992) 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532*--that a plaintiff was allowed to sue for damages allegedly resulting from conduct prohibited by a Racketeer Influenced and Corrupt Organizations Act (RICO) provision (*18 U.S.C.S. § 1962(c)*) only if the alleged RICO violation was the proximate cause of the plaintiff's injury--a RICO plaintiff asserting damages resulting from the conduct of an economic competitor may not circumvent the proximate-cause requirement simply by claiming that the competitor's aim was to increase market share at the plaintiff's expense. When a court evaluates a RICO claim for proximate causation, (1) the proximate-cause inquiry requires careful consideration of the relation between the injury asserted and the injurious conduct alleged, and (2) the central question that the court must ask is whether the alleged violation led directly to the plaintiff's injuries. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Souter, Ginsburg, and Alito, JJ.)

APPEAL §1692.3 > -- remand -- issue not decided below -- RICO action -- proximate cause > Headnote:
LEdHN[4][] [4]

On certiorari to review the part of a Federal Court of Appeals' judgment to the effect that a corporation was allowed to maintain an action for damages against a competitor under a Racketeer Influenced and Corrupt Organizations Act (RICO) provision (*18 U.S.C.S. § 1962(c)*), the United States Supreme (1) declined to consider the corporation's additional claim under another RICO provision (*18 U.S.C.S. § 1962(a)*); (2) vacated the part of the Court of Appeals' judgment to the effect that the corporation also could maintain an action under *§ 1962(a)*; and *(3)* remanded the case for determination whether petitioners' alleged violation of *§ 1962(a)* had proximately caused the corporation's alleged injuries, as:

(1) The competitor asserted that the proximate-cause analysis ought to function identically for purposes of the *§ 1962(a)* and *§ 1962(c)* claims.

(2) The Court of Appeals had not addressed proximate causation.

(3) The parties had devoted nearly all their attention in the Supreme Court to the *§ 1962(c)* claim.

(4) Because *§ 1962(a)* and *§ 1962(c)* set forth distinct prohibitions, it was at least debatable whether the two claims ought to be analyzed in an identical fashion for proximate-cause purposes. (Kennedy, J., joined by Roberts, Ch. J., and Stevens, Scalia, Souter, Ginsburg, Alito, and Thomas, JJ.)

Syllabus

[*724]** The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits certain conduct involving a "pattern of racketeering activity," *18 U.S.C. § 1962*, and makes a private right of action available to "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive restrictions, *§ 1964(c)*, provided that the alleged violation was the proximate cause of the injury, *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Respondent Ideal Steel Supply Corporation (Ideal) has stores in Queens and the Bronx. **[****2]** Petitioner National Steel Supply, Inc. (National), owned by petitioners Joseph and Vincent Anza, has stores in the same locations and is Ideal's principal competitor. Ideal filed suit in the District Court, claiming that National failed to charge New York's sales tax to cash-paying customers, allowing it to reduce its prices without affecting its profit margin; and that it submitted fraudulent state **[***725]** tax returns to conceal the conduct, which involved committing mail and wire fraud, both forms of "racketeering activity" under RICO. Ideal alleged that the Anzas violated *§ 1962(c)*, which forbids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. It also claimed that all the petitioners violated *§ 1962(a)* --which makes it unlawful for a person "to use or invest" income derived from a pattern of racketeering activity in an enterprise engaged in or affecting interstate or foreign commerce--when they used funds generated by the fraudulent tax scheme to open National's Bronx location, causing Ideal to lose business and market share. The District Court granted petitioners' motion to dismiss under *Federal Rule of Civil Procedure 12(b)(6)*, **[****3]** concluding that Ideal had not shown reliance on petitioners' misrepresentations, as required in RICO mail and wire fraud claims. Vacating, the Second Circuit held, with regard to the *§ 1962(c)* claim, that a complaint alleging a pattern of racketeering activity designed to give a defendant a competitive advantage adequately pleaded proximate cause even where the scheme depended on fraudulent communications made to a third party; and held that Ideal adequately pleaded its § 1962(a) claim by alleging injury resulting from petitioners' use and investment of racketeering proceeds.

Held:

1. Ideal cannot maintain its § 1962(c) claim. Under *Holmes,* proximate cause for § 1964(c) purposes requires "some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532. The direct victim of the alleged RICO violation is the State of New York, not Ideal. Ideal's claim is too attenuated to satisfy *Holmes*' requirement of directness. This result is confirmed by the directness requirement's underlying premises, one of which is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote **[****4]** action. Ideal claims lost sales because of National's decreased prices, but National could have lowered prices for reasons unrelated to the asserted tax fraud, and Ideal's lost sales could have resulted from other factors as well. The attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes.* Further illustrating the absence of proximate cause is the speculative nature of the proceedings that would follow if Ideal were permitted to maintain its claim. A court would have to calculate the portion of National's price drop attributable to the pattern of racketeering activity and then calculate the portion of lost sales attributable to the relevant part of the price drop, but *Holmes*' proximate causation element was meant to prevent such intricate, uncertain inquiries from overrunning RICO litigation. A direct causal connection is especially warranted where the immediate victims can be expected to vindicate the laws by pursuing their own claims. Contrary to the Second Circuit's rationale, a RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to **[****5]** increase market share at a competitor's expense. Because Ideal has not satisfied that requirement, this Court has no occasion to address the substantial **[***726]** question whether a plaintiff asserting a RICO claim predicated on mail or wire fraud must show that it relied on the defendant's misrepresentations.

2. The Second Circuit's judgment with respect to Ideal's § 1962(a) claim is vacated so that court can determine on remand whether petitioners' alleged § 1962(a) violation proximately caused Ideal's asserted injuries.

373 F.3d 251, reversed in part, vacated in part, and remanded.

Counsel: David C. Frederick argued the cause for petitioners.

Kevin P. Roddy argued the cause for respondent.

Judges: Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Stevens, Scalia, Souter, Ginsburg, and Alito, JJ., joined, and in which Thomas, J., joined as to Part III. Scalia, J., filed a concurring opinion, *post*, p. ___. Thomas, J., *post*, p. ___, and Breyer, J., *post*, p. ___, filed opinions concurring in part and dissenting in part.

Opinion by: KENNEDY

Opinion

[*453] **[**1994]** Justice **Kennedy** delivered the opinion of the Court.

HN1[] **LEdHN[1A]**[] [1A] The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2000 ed. and Supp. III), prohibits certain conduct involving a "pattern of racketeering **[****6]** activity." § 1962 (2000 ed.). One of RICO's enforcement mechanisms is a private right of action, available to "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive restrictions. § 1964(c).

In *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*,**HN2**[] this Court held that a plaintiff may sue under *§ 1964(c)* only if the alleged RICO violation was the proximate cause of the plaintiff's injury. The instant case requires us to apply the principles discussed in *Holmes* to a dispute between two competing businesses.

I

LEdHN[2][] [2] Because this case arises from a motion to dismiss, we accept as true the factual allegations in the amended complaint. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*.

Respondent Ideal Steel Supply Corporation (Ideal) sells steel mill products along with related supplies and services. It operates two store locations in New York, one in Queens and the other in the Bronx. Petitioner National Steel Supply, **[*454]** Inc. (National), owned by petitioners Joseph and Vincent Anza, is Ideal's principal competitor. National **[****7]** offers a similar array of products and services, and it, too, operates one store in Queens and one in the Bronx.

Ideal sued petitioners in the United States District Court for the Southern District of New York. It claimed petitioners were engaged in an unlawful racketeering scheme aimed at "gain[ing] sales and market share at Ideal's expense." App. 7. According to Ideal, National adopted a practice of failing to charge the requisite New York sales tax to cash-paying customers, even when conducting transactions that were not exempt from sales tax under state law. This practice allowed National to reduce its prices without affecting its profit margin. Petitioners allegedly submitted fraudulent tax returns to the New York State Department **[***727]** of Taxation and Finance in an effort to conceal their conduct.

[1995]** Ideal's amended complaint contains, as relevant here, two RICO claims. The claims assert that petitioners, by submitting the fraudulent tax returns, committed various acts of mail fraud (when they sent the returns by mail) and wire fraud (when they sent them electronically). See *18 U.S.C. §§ 1341*, *1343 (2000 ed., Supp. III)*. **HN3**[] Mail fraud and wire fraud are forms of "racketeering **[****8]** activity" for purposes of RICO. *§ 1961(1)(B)*. Petitioners' conduct allegedly constituted a "pattern of racketeering activity," see *§ 1961(5)* (2000 ed.), because the fraudulent returns were submitted on an ongoing and regular basis.

Ideal asserts in its first cause of action that Joseph and Vincent Anza violated **HN4**[] *§ 1962(c)*, which makes it unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." The complaint states that the Anzas' goal, which **[*455]** they achieved, was to give National a competitive advantage over Ideal.

The second cause of action is asserted against all three petitioners. It alleges a violation of **HN5**[] *§ 1962(a)*, which makes it unlawful for any person who has received income derived from a pattern of racketeering activity "to use or invest" that income "in acquisition of any interest in, or the establishment or operation of," an enterprise engaged in or affecting interstate or foreign commerce. As described in the **[****9]** complaint, petitioners used funds generated by their fraudulent tax scheme to open National's Bronx location. The opening of this new facility caused Ideal to lose "significant business and market share." App. 18.

Petitioners moved to dismiss Ideal's complaint under *Federal Rules of Civil Procedure 12(b)(6)* and *9(b)*. The District Court granted the *Rule 12(b)(6)* motion, holding that the complaint failed to state a claim upon which relief could be granted. The court began from the proposition that to assert a RICO claim predicated on mail fraud or wire fraud, a plaintiff must have relied on the defendant's misrepresentations. Ideal not having alleged that it relied on petitioners' false tax returns, the court concluded Ideal could not go forward with its RICO claims.

Ideal appealed, and the Court of Appeals for the Second Circuit vacated the District Court's judgment. *373 F.3d 251 (2004)*. Addressing Ideal's *§ 1962(c)* claim, the court held that where a complaint alleges a pattern of racketeering activity "that was intended to and did give the defendant a competitive advantage over the plaintiff, the complaint adequately pleads proximate cause, and the plaintiff has standing **[****10]** to pursue a civil RICO claim." *Id., at 263*. This is the case, the court explained, "even where the scheme depended on fraudulent communications directed to and relied on by a third party rather than the plaintiff." *Ibid.*

The court reached the same conclusion with respect to Ideal's *§ 1962(a)* claim. It reasoned that Ideal adequately **[*456]** pleaded its claim because it alleged an injury by reason of petitioners' **[***728]** use and investment of racketeering proceeds, "as distinct from injury traceable simply to the predicate acts of racketeering alone or to the conduct of the business of the enterprise." *Id., at 264*.

We granted certiorari. *546 U.S. 1029, 126 S. Ct. 713, 163 L. Ed. 2d 567 (2005)*.

II

Our analysis begins--and, as will become evident, largely ends--with *Holmes.* **[**1996]** That case arose from a complaint filed by the Securities Investor Protection Corporation (SIPC), a private corporation with a duty to reimburse the customers of registered broker-dealers who became unable to meet their financial obligations. SIPC claimed that the petitioner, Robert Holmes, conspired with others to manipulate stock prices. When the market detected the fraud, the share prices plummeted, and the "decline **[****11]** caused [two] broker-dealers' financial difficulties resulting in their eventual liquidation and SIPC's advance of nearly $13 million to cover their customers' claims." *503 U.S., at 262, 263, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. SIPC sued on several theories, including that Holmes participated in the conduct of an enterprise's affairs through a pattern of racketeering activity in violation of *§ 1962(c)* and conspired to do so in violation of *§ 1962(d)*.

LEdHN[1B][] [1B] The Court held that SIPC could not maintain its RICO claims against Holmes for his alleged role in the scheme. The decision relied on a careful interpretation of *§ 1964(c)*, which provides a civil cause of action to persons injured "by reason of" a defendant's RICO violation. The Court recognized the phrase "by reason of" could be read broadly to require merely that the claimed violation was a "but for" cause of the plaintiff's injury. *Id., at 265-266, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. It rejected this reading, however, noting the "unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." *Id., at 266, 112 S. Ct. 1311, 117 L. Ed. 2d 532*.

[*457] Proper interpretation of *§ 1964(c)* required consideration of the statutory history, which revealed that "Congress modeled *§ 1964(c)* **[****12]** on the civil-action provision of the federal antitrust laws, *§ 4* of the Clayton Act." *Id., at 267, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. In *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, the Court held that "a plaintiff's right to sue under *§ 4* required a showing that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes, supra, at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532* (citing *Associated Gen. Contractors, supra, at 534, 103 S. Ct. 897, 74 L. Ed. 2d 723*). This reasoning, the Court noted in *Holmes*, "applies just as readily to *§ 1964(c)*." *503 U.S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*.

The *Holmes* Court turned to the common-law foundations of the proximate-cause requirement, and specifically the "demand for some direct relation between the injury asserted and the injurious conduct alleged." *Ibid.* It concluded that even if SIPC were subrogated to the rights of certain aggrieved customers, the RICO claims could not satisfy this requirement of directness. The deficiency, the Court explained, was that "the link is too remote between the stock manipulation alleged and the **[***729]** customers' harm, being purely contingent on the **[****13]** harm suffered by the broker-dealers." *Id., at 271, 112 S. Ct. 1311, 117 L. Ed. 2d 532*.

Applying the principles of *Holmes* to the present case, we conclude Ideal cannot maintain its claim based on *§ 1962(c)*. ***HN6***[] *Section 1962(c)*, as noted above, forbids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. The Court has indicated the compensable injury flowing from a violation of that provision "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 497, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*.

Ideal's theory is that Joseph and Vincent Anza harmed it by defrauding the **[**1997]** New York tax authority and using the **[*458]** proceeds from the fraud to offer lower prices designed to attract more customers. The RICO violation alleged by Ideal is that the Anzas conducted National's affairs through a pattern of mail fraud and wire fraud. The direct victim of this conduct was the State of New York, not Ideal. It was the State that was being defrauded and the State that lost tax revenue **[****14]** as a result.

The proper referent of the proximate-cause analysis is an alleged practice of conducting National's business through a pattern of defrauding the State. To be sure, Ideal asserts it suffered its own harms when the Anzas failed to charge customers for the applicable sales tax. The cause of Ideal's asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State). The attenuation between the plaintiff's harms and the claimed RICO violation arises from a different source in this case than in *Holmes*, where the alleged violations were linked to the asserted harms only through the broker-dealers' inability to meet their financial obligations. Nevertheless, the absence of proximate causation is equally clear in both cases.

This conclusion is confirmed by considering the directness requirement's underlying premises. See *503 U.S., at 269-270, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. One motivating principle is the difficulty that can arise when a court attempts to ascertain the damages caused by some remote action. See *id., at 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532* ("[T]he less direct an injury is, the more difficult it becomes to ascertain the **[****15]** amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors"). The instant case is illustrative. The injury Ideal alleges is its own loss of sales resulting from National's decreased prices for cash-paying customers. National, however, could have lowered its prices for any number of reasons unconnected to the asserted pattern of fraud. It may have received a cash inflow from some other source or concluded that the additional sales would justify a smaller profit margin. Its lowering of prices **[*459]** in no sense required it to defraud the state tax authority. Likewise, the fact that a company commits tax fraud does not mean the company will lower its prices; the additional cash could go anywhere from asset acquisition to research and development to dividend payouts. Cf. **[***730]** *id., at 271, 112 S. Ct. 1311, 117 L. Ed. 2d 532* ("The broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the nonpurchasing customers and general creditors").

There is, in addition, a second discontinuity between the RICO violation and the asserted injury. Ideal's lost sales could have resulted from factors **[****16]** other than petitioners' alleged acts of fraud. Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of Ideal's lost sales were the product of National's decreased prices. Cf. *id., at 272-273, 112 S. Ct. 1311, 117 L. Ed. 2d 532* ("If the nonpurchasing customers were allowed to sue, the district court would first need to determine the extent to which their inability to collect from the broker-dealers was the result of the alleged conspiracy to manipulate, as opposed to, say, the broker-dealers' poor business practices or their failures to anticipate developments in the financial markets").

The attenuated connection between Ideal's injury and the Anzas' injurious conduct thus implicates fundamental concerns expressed in *Holmes.* Notwithstanding the lack of any appreciable risk of duplicative recoveries, which is another consideration relevant to the proximate-cause inquiry, **[**1998]** see *id., at 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532*, these concerns help to illustrate why Ideal's alleged injury was not the direct result of a RICO violation. Further illustrating this point is the speculative nature of the proceedings that would follow if Ideal were permitted to **[****17]** maintain its claim. A court considering the claim would need to begin by calculating the portion of National's price drop attributable to the alleged pattern of racketeering activity. It next would have to calculate the portion of Ideal's lost sales attributable to the relevant part of the price drop. **[*460]** The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.

HN7[] The requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims. See *id., at 269-270, 112 S. Ct. 1311, 117 L. Ed. 2d 532* ("[D]irectly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely"). Again, the instant case is instructive. Ideal accuses the Anzas of defrauding the State of New York out of a substantial amount of money. If the **[****18]** allegations are true, the State can be expected to pursue appropriate remedies. The adjudication of the State's claims, moreover, would be relatively straightforward; while it may be difficult to determine facts such as the number of sales Ideal lost due to National's tax practices, it is considerably easier to make the initial calculation of how much tax revenue the Anzas withheld from the State. There is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly.

[*731]** ***LEdHN[1C]***[] [1C] ***LEdHN[3A]***[] [3A] The Court of Appeals reached a contrary conclusion, apparently reasoning that because the Anzas allegedly sought to gain a competitive advantage over Ideal, it is immaterial whether they took an indirect route to accomplish their goal. See *373 F.3d, at 263*. This rationale does not accord with *Holmes* ***HN8***[] A RICO plaintiff cannot circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense. See *Associated Gen. Contractors, 459 U.S., at 537, 103 S. Ct. 897, 74 L. Ed. 2d 723* ("We are also satisfied that an allegation of improper motive **[*461]** . . . is not a panacea that will enable any complaint **[****19]** to withstand a motion to dismiss"). When a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries. In the instant case, the answer is no. We hold that Ideal's *§ 1962(c)* claim does not satisfy the requirement of proximate causation.

Petitioners alternatively ask us to hold, in line with the District Court's decision granting petitioners' motion to dismiss, that a plaintiff may not assert a RICO claim predicated on mail fraud or wire fraud unless it demonstrates it relied on the defendant's misrepresentations. They argue that RICO's private right of action must be interpreted in light of common-law principles, and that at common law a fraud action requires the plaintiff to prove reliance. Because Ideal has not satisfied the proximate-cause requirement articulated in *Holmes*, we have no occasion to address the substantial question whether a showing of reliance is required. Cf. *503 U.S., at 275-276, 112 S. Ct. 1311, 117 L. Ed. 2d 532*.

[1999]** III

The amended complaint also asserts a RICO claim based on a violation of *§ 1962(a)*. The claim alleges petitioners' tax scheme provided them with funds to open a **[****20]** new store in the Bronx, which attracted customers who otherwise would have purchased from Ideal.

LEdHN[3B][] [3B] ***LEdHN[4]***[] [4] In this Court petitioners contend that the proximate-cause analysis should function identically for purposes of Ideal's *§ 1962(c)* claim and its *§ 1962(a)* claim. (Petitioners also contend that "a civil RICO plaintiff does not plead an injury proximately caused by a violation of *§ 1962(a)* merely by alleging that a corporate defendant reinvested profits back into itself," Brief for Petitioners 20, n 5, but this argument has not been developed, and we decline to address it.) It is true that ***HN9***[] private actions for violations of *§ 1962(a)*, like actions for violations of *§ 1962(c)*, must be asserted under **[*462]** *§ 1964(c)*. It likewise is true that a claim is cognizable under *§ 1964(c)* only if the defendant's alleged violation proximately caused the plaintiff's injury. The proximate-cause inquiry, however, requires careful consideration of the "relation between the injury asserted and the injurious conduct alleged." *Holmes, supra, at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Because *§ 1962(c)* and *§ 1962(a)* set forth distinct prohibitions, it is at least debatable whether Ideal's two claims should be analyzed in **[****21]** an identical fashion for proximate-cause purposes.

The Court of Appeals held that Ideal adequately pleaded its *§ 1962(a)* claim, see *373 F.3d, at 264*, **[***732]** but the court did not address proximate causation. We decline to consider Ideal's *§ 1962(a)* claim without the benefit of the Court of Appeals' analysis, particularly given that the parties have devoted nearly all their attention in this Court to the *§ 1962(c)* claim. We therefore vacate the Court of Appeals' judgment with respect to Ideal's *§ 1962(a)* claim. On remand, the court should determine whether petitioners' alleged violation of *§ 1962(a)* proximately caused the injuries Ideal asserts.

* * *

The judgment of the Court of Appeals is reversed in part and vacated in part. The case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: SCALIA; THOMAS (In Part); BREYER (In Part)

Concur

Justice **Scalia,** concurring.

I join the opinion of the Court. I also note that it is inconceivable that the injury alleged in the *18 U.S.C. § 1962(c)* claim at issue here is within the zone of interests protected by the RICO cause of action for fraud perpetrated upon New York State. **[****22]** See *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 286-290, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)* (Scalia, J., concurring in judgment).

Dissent by: THOMAS (In Part); BREYER (In Part)

Dissent

[*463] Justice **Thomas,** concurring in part and dissenting in part.

The Court today limits the lawsuits that may be brought under the civil enforcement provision of the Racketeer Influenced and Corrupt Organizations Act (RICO or Act), *18 U.S.C. § 1961 et seq. (2000 ed. and Supp. III)*, by adopting a theory of proximate causation that is supported neither by the Act nor by our decision in *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*, on which the Court principally relies. The Court's stringent proximate-causation requirement succeeds in precluding recovery in cases alleging a violation of *§ 1962(c)* that, like the present one, have nothing to do with organized crime, the target of the RICO statute. However, the Court's approach **[**2000]** also eliminates recovery for plaintiffs whose injuries are precisely those that Congress aimed to remedy through the authorization of civil RICO suits. Because this frustration of congressional intent **[****23]** is directly contrary to the broad language Congress employed to confer a RICO cause of action, I respectfully dissent from Part II of the Court's opinion.

I

The language of the civil RICO provision, which broadly permits recovery by "[a]ny person injured in his business or property by reason of a violation" of the Act's substantive restrictions, *§ 1964(c)* (2000 ed.), plainly covers the lawsuit brought by respondent. Respondent alleges that it was injured in its business, and that this injury was the direct result of petitioners' violation of *§ 1962(c)*. [1] App. 12-17. In **[*464]** *Holmes*, however, we held that a RICO plaintiff is required **[***733]** to show that the RICO violation "not only was a 'but for' cause of his injury, but was the proximate cause as well." *503 U.S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. We employed the term "'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Ibid.* These tools reflect "'ideas of what justice demands, or of what is administratively possible and convenient.'" *Ibid.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p 264 (5th ed. **[****24]** 1984) (hereinafter Prosser & Keeton)).

[1] Respondent also alleges that petitioners injured its business through a violation of *§ 1962(a)*, although the parties dedicate little attention to this issue. In light of the Court's disposition of the *§ 1962(c)* claim and the limited discussion of *§ 1962(a)* by the parties, I agree with the Court that we should give the Court of Appeals the first opportunity to reconsider the *§ 1962(a)* claim. Accordingly, I join Part III of the Court's opinion.

Invoking one of the common-law proximate-cause considerations, we held that a RICO plaintiff must prove "some direct relation between the injury asserted and the injurious conduct alleged." 503 U.S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532. Today the Court applies this formulation to conclude that the "attenuated relationship" between the violation of § 1962(c) and Ideal's injury "implicates fundamental concerns expressed in Holmes" and that the absence of proximate causation is equally clear in both cases. Ante, at ____, 164 L. Ed. 2d, at 729. But the Court's determination **[****25]** relies on a theory of "directness" distinct from that adopted by *Holmes.*

In *Holmes*, the Court explained that "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." 503 U.S., at 268-269, 112 S. Ct. 1311, 117 L. Ed. 2d 532. The plaintiff in *Holmes* was indirect in precisely this sense. The defendant was alleged to have participated in a stock manipulation scheme that disabled two broker-dealers from meeting their obligations to customers. Accordingly, the plaintiff, Securities Investor Protection Corporation (SIPC), had to advance nearly $13 million to cover the claims of customers of those broker-dealers. SIPC attempted to sue based on the claim that it was subrogated to the rights of those customers of the broker-dealers who did not purchase manipulated securities. We held that **[*465]** the nonpurchasing customers' injury was not proximately caused by the defendant's conduct, because "the conspirators have allegedly injured these customers only insofar as the stock manipulation first injured the broker-dealers and left them without the wherewithal to pay customers' claims. **[****26]** " Id., at 271, 112 S. Ct. 1311, 117 L. Ed. 2d 532. [2]

[2001]** Here, in contrast, it was not *New York's injury* that caused respondent's damages; rather, it was petitioners' own conduct--namely, their underpayment of tax--that permitted them to undercut respondent's prices and thereby take away its business. Indeed, the Court's acknowledgment that there is no appreciable **[***734]** risk of duplicative recovery here, in contrast to *Holmes,* ante, at ____, 164 L. Ed. 2d, at 730, is effectively a concession that petitioners' damages **[****27]** are not indirect, as that term is used in *Holmes.* See 503 U.S., at 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532 ("[R]ecognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries"). The mere fact that New York is a direct victim of petitioners' RICO violation does not preclude Ideal's claim that it too is a direct victim. Because the petitioners' tax underpayment directly caused respondent's injury, *Holmes* does not bar respondent's recovery.

The Court nonetheless contends that respondent has failed to demonstrate proximate cause. It does so by relying on our observation in *Holmes* that the directness requirement is appropriate because "'[t]he less direct an injury is, the more difficult it becomes to ascertain the amount of a **[*466]** plaintiff's damages attributable to the violation, as distinct from other, independent, factors.'" Ante, at ____, 164 L. Ed. 2d, at 729 (quoting Holmes, supra, at 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532, in turn, citing Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)). In *Holmes*, we noted that **[****28]** it would be hard for the District Court to determine how much of the broker-dealers' failure to pay their customers was due to the fraud and how much was due to other factors affecting the broker-dealers' business success. 503 U.S., at 273-274, 112 S. Ct. 1311, 117 L. Ed. 2d 532. The Court contends that here, as in *Holmes*, it is difficult to "ascertain the damages caused by some remote action." Ante, at ____, 164 L. Ed. 2d, at 729.

The Court's reliance on the difficulty of ascertaining the amount of Ideal's damages caused by petitioners' unlawful acts to label those damages indirect is misguided. *Holmes* and *Associated General Contractors* simply held that one reason that *indirect* injuries should not be compensable is that such injuries are difficult to ascertain. Holmes, supra, at 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532; Associated Gen. Contractors, supra, at 542. We did not adopt

[2] Sutherland's treatise on damages, on which the Court relied in *Holmes*, labels the same type of claims indirect: those where one party is injured, and it is that very injury--and not the wrongful behavior by the tortfeasor--that causes the injury to the plaintiff. See 1 J. Sutherland, Law of Damages 55 (1882) (hereinafter Sutherland). Indeed, every example cited in Sutherland in illustration of this principle parallels *Holmes;* the plaintiff would not be injured absent the injury to another victim. See Sutherland 55-56.

the converse proposition that any injuries that are difficult to ascertain must be classified as indirect for purposes of determining proximate causation. [3]

[**29]** Proximate cause and certainty of damages, while both related to the plaintiff's responsibility to prove that the amount of damages he seeks is fairly attributable to the defendant, are distinct requirements **[**2002]** for recovery in tort. [4] See 4 *Restatement (Second) of Torts § 912* **[*467]** (1977) (certainty **[***735]** of damages); 2 *id.,* §§ 430-431 (1963-1964) (proximate causation). That is, to recover, a plaintiff must show *both* that his injury is sufficiently connected to the tort that "the moral judgment and practical sense of mankind [will] recognize responsibility in the domain of morals," Sutherland 18, and that the specific pecuniary advantages, the loss of which is alleged as damages, "would have resulted, and, therefore, that the act complained of prevented them," *id.*, at 106-107. *Holmes* and *Associated General Contractors* dealt primarily with the former showing. The Court's discussion of the union's "highly speculative" damages in *Associated General Contractors* focused not on the difficulty of proving the precise amount of damages, but with "the tenuous and speculative character of the relationship between the alleged antitrust violation and the Union's alleged injury." *459 U.S., at 545, 103 S. Ct. 897, 74 L. Ed. 2d 723.* **[****30]** Here, the relationship between the alleged RICO violation and the alleged injury is clear: Petitioners underpaid sales tax, permitting them to undercharge sales tax, inflicting competitive injury on respondent. The question with which the Court expresses concern--whether Ideal can prove the amount of its actual damages "with sufficient certainty," Sutherland 106, 107, to permit recovery--is simply not before the Court.

It is nonetheless worth noting that the Court overstates the difficulties of proof faced by respondent in this case. Certainly the plaintiff in this case, as in all tort **[****31]** cases involving damage to business, must demonstrate that he suffered a harm caused by the tort, and not merely by external market conditions. See generally Prosser & Keeton § 130, at 1014-1015, and nn 92-99 (gathering cases authorizing liability for torts that "depriv[e] the plaintiff of customers or other prospects"); cf. *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 342,* ***[*468]*** *125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)* ("[A]n inflated purchase price will not itself constitute or proximately cause the relevant economic loss," absent evidence that it was the inflated price that actually caused harm). But under the facts as alleged by Ideal, National did not generally lower its prices, so the Court need not inquire into "any number of reasons," *ante, at ____, 164 L. Ed. 2d, at 730*, that it might have done so. [5] Instead, it simply *ceased charging tax* on cash sales, allegedly, and logically, because it had ceased reporting those sales and accordingly was not itself paying sales tax on them. App. 11-13. Nor is it fatal to Ideal's proof of damages that National could have continued to charge taxes to its customers and invested the additional money elsewhere. *Ante, at ____, 164 L. Ed. 2d, at 730*. Had National actually done so, it might be difficult **[****32]** to ascertain the damages suffered by Ideal as a result of that investment. But the mere fact that **[**2003]** National **[***736]** *could have* committed tax fraud without readily ascertainable injury to Ideal does not mean that its tax fraud *necessarily* caused no readily ascertainable injury in this case. Likewise, the Court is undoubtedly correct that "Ideal's lost sales could have resulted from factors other than petitioners' alleged acta of fraud." *Ibid.* However, the means through which the fraudulent scheme was carried out--with sales tax charged on noncash sales, but no tax charged on cash sales--renders the damages more ascertainable than in the typical case of lost business. In any event, it is well within the expertise of a district

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[3] Indeed, in *Associated General Contractors*, we did not even squarely hold that the reason that indirect damages are not compensable was that the damages were not easily ascertainable; instead, we merely recognized the empirical fact that "[p]artly because it is indirect, and partly because the alleged effects on the Union may have been produced by independent factors, the Union's damages claim is also highly speculative." *459 U.S., at 542, 103 S. Ct. 897, 74 L. Ed. 2d 723*.

[4] Sutherland described the interrelation between the two concepts: "A fatal uncertainty may infect a case where an injury is easily provable, but the alleged responsible cause cannot be sufficiently established as to the whole or some part of that injury. So it may exist where a known and provable wrong or violation of contract appears, but the alleged loss or injury as a result of it cannot be certainly shown." Sutherland 94.

[5] Nor is it fair to require a plaintiff to prove that the tort caused the lowering of prices at the motion to dismiss stage. Ideal's complaint alleges that petitioners "pass on to National's customers the sales tax 'savings' that National realizes as a result of its false returns." App. 16. This allegation that, as a factual matter, National was able to charge a lower price after tax because of its fraud suffices to permit Ideal to survive a motion to dismiss on the question whether the prices were lowered due to the fraud, as opposed to other factors.

court to evaluate testimony and evidence and determine what portion of **[*469]** Ideal's lost sales are attributable to National's lower prices and what portion to other factors.

[**33]** The Court also relies on an additional reason *Holmes* gave for limiting recovery to direct victims--namely, that "[t]he requirement of a direct causal connection is especially warranted where the immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims." *Ante, at ____, 164 L. Ed. 2d, at 730* (citing *Holmes, 503 U.S., at 269-270, 112 S. Ct. 1311, 117 L. Ed. 2d 532*). Certainly, New York can sue here and vindicate the law, rendering respondent's enforcement of the law less necessary than it would be if respondent were the only direct victim of the illegal activity. But our recognition in *Holmes* that limiting recovery to direct victims would not undermine deterrence does not support the conclusion that any victim whose lawsuit is unnecessary for deterrence is an indirect victim. Indeed, in any tort case with multiple possible plaintiffs, a single plaintiff's lawsuit could suffice to vindicate the law. If multiple plaintiffs are direct victims of a tort, it would be unjust to declare some of their lawsuits unnecessary for deterrence, absent any basis for doing so in the relevant statute. Because respondent's injuries result from petitioners' fraud, and not from New **[****34]** York's injuries, respondent has a right to recover equal to that of New York.

Application of common-law principles of proximate causation beyond the directness requirement likewise supports a finding that causation was sufficiently pleaded in this case. Though the *Holmes* Court noted that directness was "one of [the] central elements" it had considered in evaluating causation, it recognized that proximate causation took "many shapes" at common law. *Id., at 268, 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Cf. Prosser & Keeton § 42, at 273 (noting "two contrasting theories of legal cause," one extending liability to, but not beyond, "the scope of the 'foreseeable risks,'" and the other extending liability to, but not beyond, all "'directly traceable'" consequences **[*470]** and those indirect consequences that are foreseeable). [6] The proximate-cause limitation serves to ensure that "a defendant is not answerable for anything beyond the natural, ordinary and reasonable consequences of his conduct." Sutherland 57. "If one's fault happens to concur with something extraordinary, and therefore not likely to be foreseen, he will not be answerable for such unexpected result." *Ibid.* Based on this principle, courts have **[****35]** **[***737]** historically found proximate causation for injuries from natural causes, if a wrongful act "rendered it probable that such an injury will occur," *id.*, at 62; for injuries where the plaintiff's reliance is the immediate cause, such as in an action for fraud, so long as the reliance was "reasonably induced by the prior misconduct of the defendant," *id.*, at 62, 63; and for injuries where an innocent third party intervenes between the tortfeasor and the **[**2004]** victim, such that the innocent third party is the *immediate* cause of the injury, so long as the tortfeasor "contributed so effectually to [the injury] as to be regarded as the efficient or at least concurrent and responsible cause," *id.*, at 64, 65 (emphasis deleted).

The Court of Appeals, by limiting RICO plaintiffs to those who are "'the targets, competitors and intended victims of the racketeering **[****36]** enterprise,'" *373 F.3d 251, 260 (CA2 2004)* (quoting *Lerner v. Fleet Bank, N. A., 318 F.3d 113, 124 (CA2 2003))*, outlined a proximate-causation standard that falls well in line both with the reasoning behind having a proximate-cause requirement at all, and with the traditional applications of this standard to tortfeasors who caused injury only through a two-step process. The Court, in contrast, permits a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior. A defendant may do so simply by concocting a scheme under which a further, lawful and **[*471]** intentional step *by the defendant* is required to inflict the injury. Such a rule precludes recovery for injuries for which the defendant is plainly morally responsible and which are suffered by easily identifiable plaintiffs. There is no basis in the RICO statute, in common-law tort, or in *Holmes* for reaching this result.

II

Because neither the plain language of the civil RICO provision nor our precedent supports the Court's holding, it must be rejected. It is worth noting, however, that while the Court's holding in **[****37]** the present case may prevent litigation in an area far removed from the concerns about organized crime that led to RICO's enactment,

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[6] Prosser and Keeton appear to use "direct" in a broader sense than that adopted by the Court in *Holmes.* See Prosser & Keeton § 43, at 273, 293-297.

that holding also precludes civil recovery for losses sustained by business competitors as a result of quintessential organized criminal activity, cases Congress indisputably intended its broad language to reach.

Congress plainly enacted RICO to address the problem of organized crime, and not to remedy general state-law criminal violations. See *H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 245, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*. There is some evidence, to be sure, that the drafters knew that RICO would have the potential to sweep more broadly than organized crime and did not find that problematic. *Id., at 246-248, 109 S. Ct. 2893, 106 L. Ed. 2d 195*. Nevertheless, the Court has recognized that "in its private civil version, RICO is evolving into something quite different from the original conception of its enactors." *Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 500, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*.

Judicial sentiment that civil RICO's evolution is undesirable is **[***738]** widespread. [7] Numerous Justices have expressed dissatisfaction **[*472]** with either the breadth of RICO's application, **[****38]** *id., at 501, 105 S. Ct. 3275, 87 L. Ed. 2d 346* (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting) ("The Court's interpretation of the civil RICO statute quite simply revolutionizes **[**2005]** private litigation; it validates the federalization of broad areas of state common law of frauds, and it approves the displacement of well-established federal remedial provisions. . . . [T]here is no indication that Congress even considered, much less approved, the scheme that the Court today defines"), or its general vagueness at outlining the conduct it is intended to prohibit, *H. J. Inc., supra, at 255-256, 109 S. Ct. 2893, 106 L. Ed. 2d 195* (Scalia, J., joined by Rehnquist, C. J., and O'Connor and Kennedy, JJ., concurring in judgment) ("No constitutional challenge to this law has been raised in the present case . . . . That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance bodes ill for the day when that challenge is presented"). Indeed, proposals for curtailing civil RICO have been introduced in Congress; for example, the Private Securities Litigation Reform Act, enacted in 1995, removed securities fraud as a predicate act under RICO. *Pub. L. 104-67, §* ***[****39]*** *107, 109 Stat. 758*, amending *18 U.S.C. § 1964(c)*; see also Abrams, Crime Legislation and the Public Interest: Lessons from Civil RICO, *50 SMU L. Rev. 33, 34 (1996)*.

This case, like the majority of civil RICO cases, has **[****40]** no apparent connection to organized crime. See *Sedima, 473 U.S., at 499, 105 S. Ct. 3275, 87 L. Ed. 2d 346, n. 16* (quoting an ABA Task Force determination that, over the period reviewed, only 9% of civil RICO cases at the trial court level involved "'allegations of criminal activity of a type generally associated with professional criminals'"). Given the distance the facts of this case lie **[*473]** from the prototypical organized criminal activity that led to RICO's enactment, it is tempting to find in the Act a limitation that will keep at least this and similar cases out of court.

The Court's attempt to exclude this case from the reach of civil RICO, however, succeeds in eliminating not only cases that lie far outside the harm RICO was intended to correct, but also those that were at the core of Congress' concern in enacting the statute. The Court unanimously recognized in *Sedima* that one reason--and, for the dissent, the principal reason--Congress enacted RICO was to protect businesses against competitive injury from organized crime. See *id., at 500-523, 105 S. Ct. 3275, 87 L. Ed. 2d 346* (Marshall, J., dissenting) (concluding that the provision conferring a right of action on individual plaintiffs had as its "principal **[****41]** target . . . the economic power of racketeers, and its toll on legitimate **[***739]** businessmen"); *id., at 494-500, 105 S. Ct. 3275, 87 L. Ed. 2d 346*.

The unanimous view of the *Sedima* Court is correct. The sponsor of a Senate precursor to RICO noted that "'*the* evil to be curbed is the unfair competitive advantage inherent in the large amount of illicit income available to organized crime.'" *Id., at 514, 105 S. Ct. 3275, 87 L. Ed. 2d 346* (Marshall, J., dissenting) (quoting 113 Cong. Rec.

[7] See Rehnquist, Remarks of the Chief Justice, 21 St. Mary's L. J. 5, 13 (1989) ("I think that the time has arrived for Congress to enact amendments to civil RICO to limit its scope to the sort of wrongs that are connected to organized crime, or have some other reason for being in federal court"); Sentelle, Civil RICO: The Judges' Perspective, and Some Notes on Practice for North Carolina Lawyers, 12 Campbell L. Rev. 145, 148 (1990) ("[E]very single district judge with whom I have discussed the subject (and I'm talking in the dozens of district judges from across the country) echoes the entreaty expressed in the Chief Justice's title in *The Wall Street Journal*[, Get RICO Cases Out of My Courtroom, May 19, 1989, p A14, col. 4]").

17999 (1967) (remarks of Sen. Hruska); some emphasis deleted); see also *473 U.S., at 515, 105 S. Ct. 3275, 87 L. Ed. 2d 346* (Marshall, J., dissenting) ("'When organized crime moves into a business, it brings all the techniques of violence and intimidation which it used in its illegal businesses. Competitors are eliminated and customers confined to sponsored suppliers'"). Upon adding a provision for a civil remedy in a subsequently proposed bill, Senator Hruska noted:

> "'[This] bill also creates civil remedies for the honest businessman who has been damaged by unfair competition from the racketeer businessman. Despite the willingness of the courts to apply the Sherman Anti-Trust Act to organized crime activities, as a practical matter the legitimate **[****42]** businessman does not have adequate civil remedies available **[**2006]** under that act. This bill fills that **[*474]** gap.'" *Id., at 516, 105 S. Ct. 3275, 87 L. Ed. 2d 346* (Marshall, J., dissenting) (quoting 115 Cong. Rec. 6993 (1969); emphasis deleted).

A portion of these bills was ultimately included in RICO, which was attached as Title IX to the Organized Crime Control Act. The Committee Report noted that the Title "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce." S. Rep. No. 91-617, p 76 (1969).

The observations of the President's Commission on Law Enforcement and Administration of Justice, the source of much of the congressional concern over organized crime, are consistent with these statements. Its chapter on organized crime noted that "organized crime is also extensively and deeply involved in legitimate business. . . . [I]t employs illegitimate methods--monopolization, terrorism, extortion, tax evasion--to drive out or control lawful ownership and leadership and to exact illegal profits from the public." The Challenge of Crime in a Free Society, 187 (1967). The report noted that "[t]he millions **[****43]** of dollars [organized crime] can throw into the legitimate economic system gives it power to manipulate the price of shares on the stock market, to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier or harder for businessmen to continue in business." *Ibid.*

It is not difficult to imagine a competitive injury to a business that would result from the kind of organized crime that *Sedima*, Congress, and the Commission all recognized as the principal concern of RICO, yet that would fail the Court's restrictive proximate-cause test. For example, an organized crime group, running a legitimate business, could, through threats of violence, persuade its supplier to sell goods to it at cost, so that it could resell those goods at a lower price to drive its competitor out of the business. Honest businessmen **[***740]** would be unable to compete, as they do not engage in **[*475]** threats of violence to lower their costs. Civil RICO, if it was intended to do anything at all, was intended to give those businessmen a cause of action. Cf. *Sedima, 473 U.S., at 521-522, 105 S. Ct. 3275, 87 L. Ed. 2d 346* (Marshall, J., dissenting). Yet just like respondent, **[****44]** those businessmen would not themselves be the immediate target of the threats; the target would be the supplier. Like respondent's injury, their injury would be most immediately caused by the lawful activity of price competition, not the unlawful activity of threatening the supplier. Accordingly, under the Court's view, the honest businessman competitor would be just an "indirect" victim, whose injury was not proximately caused by the RICO violation. [8] Civil RICO would thus confer no right to sue on the individual who did not himself suffer the threats of violence, even if the threats caused him harm.

As a result, after today, civil RICO plaintiffs that suffer precisely the kind of injury that motivated the adoption of the civil RICO **[****45]** provision will be unable to obtain relief. If this result was compelled by the text of the statute, the interference with congressional intent would be unavoidable. Given that the language is not even fairly susceptible of such a reading, however, I cannot agree with this frustration of congressional intent.

[2007]** III

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[8] The honest businessman would likewise fail Justice Scalia's theory of proximate causation, because laws against threats of violence are intended to protect those who are so threatened, not other parties that might suffer as a consequence. *Ante, at 462, 164 L. Ed. 2d, at 732* (concurring opinion).

Because I conclude that Ideal has sufficiently pleaded proximate cause, I must proceed to the question which the Court does not reach: whether reliance is a required element of a RICO claim predicated on mail or wire fraud and, if it is, whether that reliance must be by the plaintiff. The Court of Appeals held that reliance is required, but that "a RICO claim based on mail fraud may be proven where the misrepresentations were relied on by a third person, rather than **[*476]** by the plaintiff." *373 F.3d, at 262, 263*. I disagree with the conclusion that reliance is required at all. In my view, the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim.

Petitioners are correct that the common law generally **[****46]** required a showing of justifiable reliance before a plaintiff could recover for damages caused by fraud. See *Neder v. United States, 527 U.S. 1, 24-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)*; Prosser & Keeton § 105, at 728. But RICO does not confer on private plaintiffs a right to sue defendants who engage in any act of common-law fraud; instead, racketeering activity includes, as relevant to this case, "any act which is indictable under [*18 U.S.C. §] 1341* (relating to mail fraud) [and *§] 1343* (relating to wire fraud)." *§ 1961(1)* (2000 ed., Supp. III). And we have recognized that these criminal fraud statutes "did not incorporate *all* the elements of common-law fraud." *Neder, 527 U.S., at 24, 119 S. Ct. 1827, 144 L. Ed. 2d 35*. Instead, the criminal mail **[***741]** fraud statute applies to anyone who, "having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office . . . any matter or thing whatever to be sent or delivered by the Postal Service . . . ." *§ 1341*. See *§ 1343* (similar language for wire fraud). We have specifically noted that "[b]y prohibiting the 'scheme to defraud,' rather than the completed **[****47]** fraud, the element of reliance . . . would clearly be inconsistent with the statutes Congress enacted." *Id., at 25, 119 S. Ct. 1827, 144 L. Ed. 2d 35*.

Because an individual can commit an indictable act of mail or wire fraud even if no one relies on his fraud, he can engage in a pattern of racketeering activity, in violation of *§ 1962*, without proof of reliance. Accordingly, it cannot be disputed that the Government could prosecute a person for such behavior. The terms of *§ 1964(c)* (2000 ed.), which broadly authorize suit by "[a]ny person injured in his business or **[*477]** property by reason of a violation of *section 1962*," permit no different conclusion when an individual brings a civil action against such a RICO violator.

It is true that our decision in *Holmes* to apply the common-law proximate-cause requirement was likewise not compelled by the broad language of the statute. But our decision in that case was justified by the "very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." *503 U.S., at 266, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. This unlikelihood stems, in part, from the nature of proximate cause, which is "not only a general condition of civil liability at common law but is almost **[****48]** essential to shape and delimit a rational remedy." *Systems Management, Inc. v. Loiselle, 303 F.3d 100, 104 (CA1 2002)*. We also decided *Holmes* in light of Congress' decision to use the same words to impose civil liability under RICO as it had in *§ 7 of the Sherman Act, 26 Stat. 210*, into which federal courts had implied a proximate-cause limitation. *503 U.S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Accordingly, it was fair to interpret the broad language "by **[**2008]** reason of" as meaning, in all civil RICO cases, that the violation must be both the cause-in-fact and the proximate cause of the plaintiff's injury.

Here, by contrast, the civil action provision cannot be read to always require that the plaintiff have relied on the defendant's action. Reliance is not a general limitation on civil recovery in tort; it "is a specialized condition that happens to have grown up with common law fraud." *Loiselle, supra, at 104*. For most of the predicate acts underlying RICO violations, it cannot be argued that the common law, if it even recognized such acts as civilly actionable, required proof of reliance. See *§ 1961* (2000 ed., Supp. III). In other words, there is no **[****49]** language in *§ 1964(c)* (2000 ed.) that could fairly be read to add a reliance requirement in fraud cases only. Nor is there any reason to believe that Congress would have defined "racketeering activity" to include acts indictable under the mail and wire fraud statutes, if it intended fraud-related acts to be predicate acts under RICO only **[*478]** when those acts would have been actionable under the common law.

Because reliance cannot be read into *§§ 1341* and *1343*, nor into RICO itself, it is not an element of a civil RICO claim. This is not to say that, **[***742]** in the general case, a plaintiff will not have to prove that someone relied on the predicate act of fraud as part of his case. If, for example, New York had not believed petitioners' misrepresentation with respect to their sales, Ideal may well not have been injured by petitioners' scheme, which would have faltered at the first step. Indeed, petitioners recognize that "in the ordinary misrepresentation case, the reliance requirement simply functions as a necessary prerequisite to establishing the causation required by the language of *§ 1964(c)*." Brief for Petitioners 29. But the fact that proof of reliance is often used to prove an element of the **[****50]** plaintiff's cause of action, such as the element of causation, does not transform reliance itself into an element of the cause of action. See *Loiselle, supra, at 104* ("Reliance is doubtless the most obvious way in which fraud can cause harm, but it is not the only way"). Because respondent need not allege reliance at all, its complaint, which alleges that New York relied on petitioners' misrepresentations, App. 16, is more than sufficient.

* * *

The Congress that enacted RICO may never have intended to reach cases like the one before us, and may have "federalize[d] a great deal of state common law" without any intention of "produc[ing] these far-reaching results." *Sedima, 473 U.S., at 506, 105 S. Ct. 3275, 87 L. Ed. 2d 346* (Marshall, J., dissenting). But this Court has always refused to ignore the language of the statute to limit it to "the archetypal, intimidating mobster," and has instead recognized that "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it simply because plaintiffs are not taking advantage of it in its more difficult applications." *Id., at 499-500, 105 S. Ct. 3275, 87 L. Ed. 2d 346*. **[*479]** Today, however, the Court not only eliminates private **[****51]** RICO actions in some situations Congress may have inadvertently regulated, but it substantially limits the ability of civil RICO to reach even those cases that motivated Congress' enactment of this provision in the first place. I respectfully dissent. Justice **Breyer,** concurring in part and dissenting in part.

In my view, the civil damages remedy in the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961-1968 (2000 ed. and Supp. III)*, does not cover claims of injury by one **[**2009]** competitor where the legitimate pro-competitive activity of another competitor immediately causes that injury. I believe that this is such a case and would consequently hold that RICO does not authorize the private action here at issue.

I

A

RICO essentially seeks to prevent organized criminals from taking over or operating legitimate businesses. Its language, however, extends its scope well beyond those central purposes. RICO begins by listing certain predicate acts, called "'racketeering activity,'" which consist of other crimes, ranging from criminal copyright activities, the facilitation of gambling, and mail fraud to arson, kidnapping, and murder. *§ 1961*(2000 ed., Supp. III). **[****52]** It then defines a "'pattern of racketeering activity'" to include engaging in "at least two" predicate acts in a 10-year period. *§ 1961(5)* (2000 ed.). And **[***743]** it forbids certain business-related activities involving such a "pattern" and an "enterprise." The forbidden activities include using funds derived from a "pattern of racketeering activity" in acquiring, establishing, or operating any enterprise, and conducting the affairs of any enterprise through such "a pattern." *§§ 1962(a)*, *(c)*.

[*480] RICO, a federal criminal statute, foresees criminal law enforcement by the Federal Government. *§ 1963* (2000 ed., Supp. III). It also sets forth civil remedies. *§ 1964* (2000 ed.). District courts "have jurisdiction to prevent and restrain [RICO] violations." *§ 1964(a)*. And a person "injured in his business or property by reason of a [RICO] violation" may seek treble damages and attorney's fees. *§ 1964(c)*.

B

The present case is a private RICO treble-damages action. A steel supply company, Ideal Steel, has sued a competing steel supply company, National Steel, and its owners, Joseph and Vincent Anza (to whom I shall refer collectively as "National"). Ideal says that National committed mail fraud **[****53]** by regularly filing false New York state sales tax returns in order to avoid paying sales tax that it owed--activity that amounts to a "pattern of racketeering activity." This activity enabled National to charge lower prices without reducing its profit margins. Ideal says National used some of these excess profits to fund the building of a new store. Both the lower prices and the new outlet attracted Ideal customers, thereby injuring Ideal. Hence, says Ideal, it was injured "in [its] business . . .

by reason of" violations of two RICO provisions, the provision that forbids conducting an "enterprise's affairs" through a "pattern of racketeering activity" and the provision that forbids investing funds derived from such a "pattern" in an "enterprise." *§§ 1962(c)*, *(a)*, *1964(c).* The question before us is whether RICO permits Ideal to bring this private treble-damages claim.

II

This Court, in *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*, held that RICO's private treble-damages provision "demand[ed] . . . some direct relation between the injury asserted and the injurious conduct alleged." The Court then determined that the injury **[*481]** alleged by **[****54]** the plaintiff in that case was too remote from the injurious conduct to satisfy this requirement.

I do not agree with the majority insofar as it believes that *Holmes*' holding in respect to the fact pattern there at issue virtually dictates the answer to the question here. In my view, the "causal connection" between the forbidden conduct and **[**2010]** plaintiff's harm is, in certain key ways, more direct here than it was in *Holmes.* In *Holmes,* the RICO plaintiff was a surrogate for creditors of broker-dealers that went bankrupt after losing money in stocks that had been overvalued due to fraudulent statements made by the RICO defendant and others. Put in terms of "proximate cause," the plaintiff's harm (an ordinary creditor loss) differed in kind from the harm that the "predicate acts" (securities fraud) would ordinarily cause (stock-related monetary losses). The harm was "indirect" in the sense that it was entirely derivative of the more **[***744]** direct harm the defendant's actions had caused the broker-dealers; and, there were several steps between the violation and the harm (misrepresentation--broker-dealer losses--broker-dealer business failure--ordinary creditor loss). Here, however, **[****55]** the plaintiff alleges a harm (lost customers) that flows directly from the lower prices and the opening of a new outlet--actions that were themselves allegedly caused by activity that Congress designed RICO to forbid (conducting a business through a "pattern" of "predicate acts" and investing in business funds derived from such a "pattern"). In this sense, the causal links before us are more "direct" than those in *Holmes.* See *ante, at ____ - ____, 164 L. Ed. 2d, at 733-734* (Thomas, J., concurring in part and dissenting in part).

Nonetheless, I agree with the majority that *Holmes* points the way. That case makes clear that RICO contains important limitations on the scope of private rights of action. It specifies that RICO does not provide a private right of action "simply on showing that the defendant violated *§ 1962*, the plaintiff was injured, and the defendant's violation was a 'but for' cause of [the] plaintiff's injury." *503 U.S., at 265-266, 112 S. Ct. 1311, 117 L. Ed. 2d 532* **[*482]** (footnote omitted). Pointing out "the very unlikelihood that Congress meant to allow *all* factually injured plaintiffs to recover," *id., at 266, 112 S. Ct. 1311, 117 L. Ed. 2d 532* (emphasis added), *Holmes* concludes that RICO imposes a requirement of "proximate **[****56]** cause," a phrase that "label[s] generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts," *id., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. It recognizes that these tools seek to discern "'what justice demands, or . . . what is administratively possible and convenient.'" *Ibid.* (quoting W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 41, p 264 (5th ed. 1984)). It also explains that "proximate cause" demands "directness," while specifying that "directness" is only one of "the many shapes this concept took at common law." *503 U.S., at 268, 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. And it points to ***antitrust law***, both as a source of RICO's treble-damages provisions and as an aid to their interpretation. *Ibid.*

In my view, the "antitrust" nature of the treble-damages provision's source, taken together with both RICO's basic objectives and important administrative concerns, implies that a cause is "indirect," *i.e.*, it is not a "proximate cause," if the causal chain from forbidden act to the injury caused a competitor proceeds through a legitimate business' ordinary competitive activity. To use a physical metaphor, ordinary competitive **[****57]** actions undertaken by the defendant competitor cut the *direct* causal link between the plaintiff competitor's injuries and the forbidden acts.

The basic objective of ***antitrust law*** is to encourage the competitive process. In particular, that law encourages businesses to compete by offering lower prices, better products, better methods of production, and better systems of distribution. See, *e.g.,* 1 P. Areeda & H. Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application P 100a, pp 3-4 **[**2011]** (2d ed. 2000). As I shall explain, these principles suggest that RICO does not permit private action based solely upon this **[***745]** competitive type of harm, *i.e.*, **[*483]** harm a plaintiff suffers only because the defendant was able to attract customers through normal competitive methods, such as lower prices, better products, better methods of production, or better systems of distribution. In such cases, the harm falls outside the limits that RICO's private treble-damages provision's "proximate-cause" requirement imposes. In such cases the distance between the harm and the predicate acts that funded (or otherwise enabled) such ordinary competitive activity is too distant. The harm **[****58]** is not "direct."

At the same time, those principles suggest that other types of competitive injuries not within their protective ambit could lie within, not outside, "proximate-cause" limits. Where, for example, a RICO defendant attracts customers in ways that involve illegitimate competitive means, *e.g.,* by threatening violence, a claim may still lie. Claims involving RICO violations that objectively target a particular competitor, *e.g.,* bribing an official to harass a competitor, could also be actionable.

Several considerations lead to this conclusion. First, I have found no case (outside the Second Circuit, from which this case arose) in which a court has authorized a private treble-damages suit based upon no more than a legitimate business' ordinary procompetitive activity (even where financed by the proceeds of a RICO predicate act).

Second, an effort to bring harm caused by ordinary competitive activity within the scope of RICO's private treble-damages action provision will raise serious problems of administrability. Ante, at ____ - ____, 164 L. Ed. 2d, at 729-730 (majority opinion); see also Holmes, supra, at 269, 112 S. Ct. 1311, 117 L. Ed. 2d 532. To demonstrate that a defendant's lower price caused a plaintiff **[****59]** to lose customers (or profits) requires the plaintiff to show what would have happened in its absence. Would customers have changed suppliers irrespective of the price change because of other differences in the suppliers? Would other competing firms have lowered their prices? Would higher prices have attracted **[*484]** new entry? Would demand for the industry's product, or the geographic scope of the relevant market, have changed? If so, how? To answer such questions based upon actual market circumstances and to apportion damages among the various competitors harmed is difficult even for plaintiffs trying to trace harm caused by a defendants' *anti*-competitive behavior. Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 542, 544, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) (the possibility that harm "may have been produced by independent factors" and "the danger of complex apportionment of damages" weigh against finding the requisite causal connection in an antitrust case). To answer such questions in the context of better functioning markets, where prices typically reflect competitive conditions, would likely prove yet more difficult.

Third, where other victims, say, victims of the underlying **[****60]** RICO "predicate acts" are present, there is no pressing need to provide such an action. Those alternative victims (here the State of New York) typically "could be counted on to bring suit for the law's vindication." Holmes, supra, at 273, 112 S. Ct. 1311, 117 L. Ed. 2d 532. They could **[***746]** thus fulfill Congress' aim in adopting the civil remedy of "turn[ing victims] into prosecutors, 'private attorneys general,' dedicated to eliminating racketeering activity." Rotella v. Wood, 528 U.S. 549, 557, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000) (citing Klehr v. A. O. Smith Corp., 521 U.S. 179, 187, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)).

[2012]** Fourth, this approach to proximate cause would retain private actions aimed at the heart of Congress' relevant RICO concerns. RICO's sponsors, in reporting their underlying reasons for supporting RICO, emphasized, not the fair, ordinary competition that an infiltrated business might offer its competitors, but the risk that such a business would act corruptly, exercising *unfair* methods of competition. S. Rep. No. 91-617, pp 76-78 (1969); see also Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 165, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). RICO focuses upon the "infiltration of legitimate business by **[****61]** organized crime," in significant part because, when "'organized crime moves into a business, it brings all the techniques of **[*485]** violence and intimidation which it used in its illegal businesses.'" Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 517, 515, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (Marshall, J., dissenting) (quoting 113 Cong. Rec. 17999 (1967)).

My approach would not rule out private actions in such cases. Nor would it rule out three of the four suits mentioned by Justice Marshall, dissenting in *Sedima*, when he describes RICO's objectives. It would not rule out lawsuits by injured competitors or legitimate investors if a racketeer, "uses '[t]hreats, arson and assault . . . to force competitors out of business'"; "uses arson and threats to induce honest businessmen to pay protection money, or to purchase certain goods, or to hire certain workers"; or "displace[s]" an "honest investor" when he "infiltrates and obtains control of a legitimate business . . . through fraud" or the like. 473 U.S., at 521, 522, 105 S. Ct. 3275, 87 L. Ed. 2d 346.

I concede that the approach would rule out a competitor's lawsuit based on no more than an "infiltrated enterprise" operating a legitimate business to a businessman's **[****62]** competitive disadvantage because unlawful predicate acts helped that legitimate business build a "strong economic base." And I recognize that this latter kind of suit at least arguably would have provided helpful deterrence had the view of *Sedima's dissenting Justices* prevailed. Id., at 500-523, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (Marshall, J., dissenting) (arguing that RICO's private action provision did not authorize suits based on harm flowing directly from predicate acts); id., at 523-530, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (Powell, J., dissenting) (same). But the dissent did not prevail, and the need for deterrence consequently offers only weakened support for a reading of RICO that authorizes private suits in this category.

Fifth, without this limitation, RICO enforcement and basic antitrust policy could well collide. Firms losing the competitive battle might find bases for a RICO attack on their more successful competitors in claimed misrepresentations or even comparatively minor misdeeds by that competitor. Firms **[*486]** that fear such treble-damages suits might hesitate to compete vigorously, particularly in concentrated industries where **[***747]** harm to a competitor is more easily traced but where the consumer's need for **[****63]** vigorous competition is particularly strong. The ultimate victim of any such tendency to pull ordinary competitive punches of course would be not the competing business, but the consumer. Although Congress did not intend its RICO treble-damages provision as a simple copy of the antitrust laws' similar remedies, see, *e.g.,* Sedima, supra, at 498-499, 105 S. Ct. 3275, 87 L. Ed. 2d 346, there is no sound reason to interpret RICO's treble-damages provision as if Congress intended to set it and its antitrust counterpart at cross-purposes.

For these reasons, I would read into the private treble-damages provision a "proximate-cause" limitation that places outside the provision harms that are traceable to **[**2013]** an unlawful act only through a form of legitimate competitive activity.

III

Applying this approach to the present case, I would hold that neither of Ideal's counts states a RICO private treble-damages claim. National is a legitimate business. Another private plaintiff (the State of New York) is available. The question is whether Ideal asserts a harm caused directly by something other than ordinary competitive activity, *i.e.*, lower prices, a better product, a better distribution system, or a better **[****64]** production method.

Ideal's second count claims injury caused by National's (1) having taken customers (2) attracted by its new store (3) that it financed in part through profits generated by the tax fraud scheme, and the financing is the relevant violation. § 1962(a). The opening of a distribution outlet is a legitimate competitive activity. It benefits the firm that opens it by making it more convenient for customers to purchase from that supplier. That ordinary competitive process is all the complaint describes. And for the reasons I have given **[*487]** in Part II, *supra,* I believe that the financing of a new store--even with funds generated by unlawful activities--is not sufficient to create a private cause of action as long as the activity funded amounts to legitimate competitive activity. Ideal must look for other remedies, *e.g.*, bringing the facts to the attention of the United States Attorney or the State of New York.

Ideal's first count presents a more difficult question. It alleges that National filed false sales tax returns to the State of New York. As an action indictable under the federal mail fraud statute, that action is a predicate act under RICO. See § 1961(1) **[****65]** (2000 ed., Supp. III). National passed these savings on to its cash customers by not charging them sales tax, thereby attracting more cash customers than it would have without the scheme. Is this a form of injury caused, not by ordinary competitive activity, but simply by the predicate act itself?

In my view, the answer to this question is "no." The complaint alleges predicate acts that amount simply to the facts that National did not "charge" or "pay" sales taxes or accurately "report" sales figures to the State. National did not tell its customers, "We shall not pay sales taxes." Rather, it simply charged the customer a lower price, say, $100 rather than $100 plus $8 tax. Consider a retailer who advertises to the customer a $100 table and adds, "We pay all sales taxes." Such a retailer **[***748]** is telling the customer that he will charge the customer a lower price by the amount of the tax, *i.e.*, about $92. The retailer implies that he, the retailer, will pay the tax to the State, taking the requisite amount owed to the State from the $100 the customer paid for the item.

The defendants here have done no more. They have in effect cut the price of the item by the amount of the sales **[****66]** tax and then kept the money instead of passing it on to the State. They funded the price cut from the savings, but the **[*488]** source of the savings is, in my view, beside the point as long as the price cut itself is legitimate. I can find nothing in the complaint that suggests it is not.

For these reasons, I would reverse the decision of the Court of Appeals on both counts.

References

31A Am Jur 2d, Extortion, Blackmail, and Threats § 184

18 U.S.C.S. § 1962(c)

Civil RICO §§ 5.04, *6.04* (Matthew Bender)

L Ed Digest, Parties § 3; Proximate Cause § 11

L Ed Index, Parties; Proximate Cause; Racketeering

Annotation References

Validity, construction, and application of Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C.S. §§ 1961 et seq.*)--Supreme Court cases. *139 L. Ed. 2d 945*.

Civil action for damages under *18 U.S.C.S. § 1964(c)* **[****67]** of the Racketeer Influenced and Corrupt Organizations Act (RICO, *18 U.S.C.S. §§ 1961 et seq.*), for injuries sustained by reason of racketeering activity. 70 A.L.R. Fed. 538.

Validity, construction, and application of *18 U.S.C.S. § 1962*, making unlawful certain acts involving "pattern of racketeering activity" or "collection of an unlawful debt." 29 A.L.R. Fed. 826.

Bell Atl. Corp. v. Twombly

Supreme Court of the United States

November 27, 2006, Argued ; May 21, 2007, Decided

No. 05-1126

Reporter

550 U.S. 544 *; 127 S. Ct. 1955 **; 167 L. Ed. 2d 929 ***; 2007 U.S. LEXIS 5901 ****; 75 U.S.L.W. 4337; 2007-1 Trade Cas. (CCH) P75,709; 68 Fed. R. Serv. 3d (Callaghan) 661; 20 Fla. L. Weekly Fed. S 267; 41 Comm. Reg. (P & F) 567

BELL ATLANTIC CORPORATION, et al., Petitioners v.WILLIAM TWOMBLY, et al.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Twombly v. Bell Atl. Corp., 425 F.3d 99, 2005 U.S. App. LEXIS 21390 (2d Cir., 2005)

Disposition: Reversed and remanded.

Core Terms

conspiracy, discovery, allegations, antitrust, set of facts, pleadings, markets, district court, federal rule, Sherman Act, territory, network, cases, local telephone, Telecommunications, compete, resist, factual allegations, motion to dismiss, civil procedure, antitrust case, competitors, entitle, decisions, appears, survive, summary judgment stage, alleged conspiracy, internet service, legal conclusion

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN1[] **Sherman Act, Scope**

Liability under *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act requires a contract, combination, or conspiracy, in restraint of trade or commerce.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN2[] **Sherman Act, Scope**

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN3[] Sherman Act, Scope

Because § 1 (15 U.S.C.S. § 1) of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN4[] Complaints, Requirements for Complaint

Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of a claim showing that the pleader is entitled to relief, in order to give a defendant fair notice of what the claim is and the grounds upon which it rests.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN5[] Motions to Dismiss, Failure to State Claim

While a complaint attacked by a Fed. R. Civ. P. 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN6[] Sherman Act, Scope

Stating a claim under § 1 (15 U.S.C.S. § 1) of the Sherman Act requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, courts have the benefit of the prior rulings and considered views of leading commentators that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN7[] **Sherman Act, Scope**

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement in violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act reflects the threshold requirement of *Fed. R. Civ. P. 8(a)(2)* that a plain statement possess enough heft to show that the pleader is entitled to relief. A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a claim under *§ 1* of the Sherman Act; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a *§ 1* complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN8[] **Motions to Dismiss, Failure to State Claim**

When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN9[] **Motions to Dismiss, Failure to State Claim**

A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.

Evidence > Burdens of Proof > General Overview

HN10[] **Evidence, Burdens of Proof**

Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN11[] **Motions to Dismiss, Failure to State Claim**

When a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.

Lawyers' Edition Display

Decision

[*929]** Telephone and Internet service subscribers held to have failed to state claim against local exchange carriers for alleged parallel billing and contracting designed to discourage competition in asserted violation of § 1 of Sherman Act (*15 U.S.C.S. § 1*).

Summary

Procedural posture: Respondent subscribers to local telephone and Internet services brought an action against petitioner local exchange carriers, alleging that the carriers engaged in parallel conduct to preclude competition in violation of § 1 of the Sherman Act, *15 U.S.C.S. § 1*. Upon the grant of a writ of certiorari, the carriers appealed the judgment of the U.S. Court of Appeals for the Second Circuit which held that the subscribers sufficiently stated a claim.

Overview: The subscribers asserted that the carriers were former local monopolies which engaged in parallel billing and contracting misconduct designed to discourage new competitors from entering their markets through sharing of the carriers' networks. The subscribers also alleged that the carriers agreed not to compete outside their own markets. The U.S. Supreme Court held that the subscribers' allegations that the carriers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, were insufficient to state a claim under *§ 1* of the Sherman Act. To state such a violation, allegations of parallel conduct were required to be placed in a factual context which raised a plausible suggestion of a preceding agreement rather than identical independent action. Further, the subscribers' complaint did not indicate that the carriers' resistance to competitors was anything more than the natural, unilateral reaction of each carrier which was intent on keeping its regional dominance. Also, the alleged **[***930]** anti-competitive conduct of the carriers itself indicated that a carrier's attempt to compete in another carrier's market would not be profitable.

Outcome: The judgment finding that the subscribers' complaint stated a claim was reversed, and the case was remanded for further proceedings.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 5 > SHERMAN ACT LIABILITY > Headnote:
LEdHN[1][] [1]

Liability under § 1 (*15 U.S.C.S. § 1*) of the Sherman Act requires a contract, combination, or conspiracy, in restraint of trade or commerce. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 5 > SHERMAN ACT PROHIBITIONS > Headnote:
LEdHN[2][] [2]

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 14 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 15 > SHERMAN ACT -- TRADE RESTRAINTS PROHIBITED -- PARALLEL BUSINESS BEHAVIOR > Headnote:
LEdHN[3][] [3]

Because § 1 (*15 U.S.C.S. § 1*) of the Sherman Act does not prohibit all unreasonable restraints of trade, but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting a Sherman Act offense. Even conscious parallelism, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and output decisions is not in itself unlawful. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 130 > PLEADING -- PLAIN STATEMENT > Headnote:
LEdHN[4][] [4]

Fed. R. Civ. P. 8(a)(2) requires only a short and plain statement of a claim showing that the pleader is entitled to relief, in order to give a defendant fair notice of what the claim is and the grounds upon which it rests. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

[*931]**

PLEADING § 103 > COMPLAINT -- MOTION TO DISMISS > Headnote:
LEdHN[5][] [5]

While a complaint attacked by a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES § 63 > SHERMAN ACT -- STATING ANTITRUST CLAIM -- ILLEGAL AGREEMENT -- PARALLEL CONDUCT > Headnote:
LEdHN[6][] [6]

Stating a claim under § 1 (*15 U.S.C.S. § 1*) of the Sherman Act requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely. In identifying facts that are suggestive enough to render a *§ 1* conspiracy plausible, courts have the benefit of the prior rulings and considered views of leading commentators that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 176 > PLEADING -- ANTITRUST ALLEGATIONS -- ENTITLEMENT TO RELIEF > Headnote:
LEdHN[7][] [7]

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement in violation of § 1 (*15 U.S.C.S. § 1*) of the Sherman Act reflects the threshold requirement of *Fed. R. Civ. P. 8(a)(2)* that a plain statement possess enough heft to show that the pleader is entitled to relief. A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a claim under *§ 1* of the Sherman Act; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of entitlement to relief. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

[*932]**

PLEADING § 106 > FAILURE TO RAISE CLAIM > Headnote:
LEdHN[8][] [8]

When the allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 103 > PLEADING -- SPECIFICITY > Headnote:
LEdHN[9][] [9]

A district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

PLEADING § 130 > PLEADING -- CONSISTENT FACTS > Headnote:
LEdHN[10][] [10]

Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

[*933]**

PLEADING § 103 > DISMISSAL OF COMPLAINT > Headnote:
LEdHN[11][] [11]

When a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. (Souter, J., joined by Roberts, Ch. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ.)

Syllabus

The 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business left a system of regional service monopolies, sometimes called Incumbent Local Exchange Carriers (ILECs), and a separate long-distance market from which the ILECs were excluded. The Telecommunications Act of 1996 withdrew approval of the ILECs' monopolies, "fundamentally restructur[ing] local telephone markets" and "subject[ing] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834*. It also authorized them to enter the long-distance market. **[****2]** "Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with" competitive local exchange carriers (CLECs). *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823*.

Respondents (hereinafter plaintiffs) represent a class of subscribers of local telephone and/or high speed Internet services in this action against petitioner ILECs for claimed violations of *§ 1* of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The complaint alleges that the ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs; and (2) by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in contiguous markets and by a statement by one ILEC's chief executive officer that competing in another ILEC's territory did not seem right. The District Court dismissed the complaint, concluding that parallel business conduct **[****3]** allegations, taken alone, do not state a claim under *§ 1*; plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. Reversing, the Second Circuit held that plaintiffs' parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

Held:

1. Stating a *§ 1* claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Pp. 6-17

(a) Because *§ 1* prohibits "only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement," *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540, 74 S. Ct. 257, 98 L.* ***[***934]*** *Ed. 273*.

While **[****4]** a showing of parallel "business behavior is admissible circumstantial evidence from which" agreement may be inferred, it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id., at 540-541, 540, 74 S. Ct. 257, 98 L. Ed. 273*. The inadequacy of showing parallel conduct or interdependence, without more, mirrors the behavior's ambiguity: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Thus, this Court has hedged against false inferences from identical behavior at a number of points in the trial sequence, *e.g.,* at the summary judgment stage, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538*.

(b) This case presents the antecedent question of what a plaintiff must plead in order to state a *§ 1* claim. *Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80.* **[****5]** While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, *ibid.,* a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint's allegations are true. Applying these general standards to a § 1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects *Rule 8(a)(2)*'s threshold requirement that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A parallel conduct allegation gets the § 1 complaint close to stating a claim, but without further factual enhancement **[****6]** it stops short of the line between possibility and plausibility. The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with "'a largely groundless claim'" from "'tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577*. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed Internet service in an action against America's largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7-year period. It is no answer to say that a claim just shy of plausible **[***935]** entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest. Plaintiffs' main **[****7]** argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley*'s statement construing *Rule 8*: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*. The "no set of facts" language has been questioned, criticized, and explained away long enough by courts and commentators, and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley* described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.

2. Under the plausibility standard, plaintiffs' claim of conspiracy in restraint of trade comes up short. First, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct, not on any independent allegation of actual agreement **[****8]** among the ILECs. The nub of the complaint is the ILECs' parallel behavior, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience. Nothing in the complaint invests either the action or inaction alleged with a plausible conspiracy suggestion. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, the District Court correctly found that nothing in the complaint intimates that resisting the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on preserving its regional dominance. The complaint's general collusion premise fails to answer the point that there was no need for joint encouragement to resist the 1996 Act, since each ILEC had reason to try to avoid dealing with CLECs and would

have tried to keep them out, regardless of the other ILECs' actions. Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act to enter into their competitors' territories, leaving the relevant market highly compartmentalized geographically, with minimal competition. This parallel conduct did **[****9]** not suggest conspiracy, not if history teaches anything. Monopoly was the norm in telecommunications, not the exception. Because the ILECs were born in that world, doubtless liked it, and surely knew the adage about him who lives by the sword, a natural explanation for the noncompetition is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same. Antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim. This analysis does not run counter to *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, 122 S. Ct. 992, 152 L. Ed. 2d 1*, which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination." Here, the Court is not requiring heightened fact **[***936]** pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

425 F.3d 99, reversed and remanded.

Counsel: Michael Kellogg argued the cause for petitioners.

Thomas O. Barnett argued the cause for the United States, as amicus curiae, by special leave of court.

J. Douglas Richards argued the cause for respondents.

Judges: Souter, J., delivered the opinion **[****10]** of the Court, in which Roberts, C. J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, in which Ginsburg, J., joined, except as to Part IV, *post*, p. 570.

Opinion by: SOUTER

Opinion

[*548] **[**1961]** Justice **Souter** delivered the opinion of the Court.

HN1[] ***LEdHN[1]***[] [1] Liability under *§ 1* of the Sherman Act, *15 U.S.C. § 1*, requires a "contract, combination . . ., or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a *§ 1* complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to **[*549]** competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade **[****11]** later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), *110 Stat. 56*, which "fundamentally restructure[d] local telephone markets" and "subject[ed] [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)*. In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See *47 U.S.C. § 271*.

"Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with competitors," *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, which came to be known as "competitive local exchange carriers" (CLECs), Pet. for Cert. 6, n 1. A CLEC could make use of an ILEC's network in any of three ways: by (1) "purchas[ing] local telephone services at wholesale rates for resale to end users," (2) "leas[ing] elements of the [ILEC's] network 'on an unbundled basis,'" or (3) "interconnect[ing] its own facilities with the [ILEC's] network." *Iowa Utilities Bd., supra, at 371, 119 S. Ct. 721, 142 L. Ed. 2d 834* (quoting *47 U.S.C. § 251(c)* **[****12]**). Owing to the "considerable expense and effort" required to make unbundled network elements available to rivals at wholesale prices, *Trinko, supra, at 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) **[***937]** three times **[*550]** revised **[**1962]** its regulations to narrow the range of network elements to be shared with the CLECs. See *Covad Communs. Co. v. FCC, 450 F.3d 528, 533-534 (CADC 2006)* (summarizing the 10-year-long regulatory struggle between the ILECs and CLECs).

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) P 53, App. 28 (hereinafter Complaint). In this action against petitioners, a group of ILECs,[1] plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of *§ 1* of the Sherman Act, ch. 647, 26 Stat. 209, as amended, ***HN2***[] ***LEdHN[2]***[] [2]*15 U.S.C. § 1*, which prohibits "[e]very contract, **[****13]** combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth **[****14]** of upstart CLECs. Complaint P 47, App. 23-26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs' **[*551]** "compelling common motivatio[n]" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "[h]ad any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . ., the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.*, P 50, App. 26-27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursu[e]" "attractive business opportunit[ies]" in contiguous markets where they possessed "substantial competitive advantages," *id.*, PP 40-41, App. 21-22, and from a statement of Richard Notebaert, chief executive officer **[****15]** (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "'might be a good way to turn a quick dollar but that doesn't make it right,'" *id.*, P 42, App. 22.

The complaint couches its ultimate allegations this way:

> "In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within **[***938]** their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information **[**1963]** and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local

[1] The 1984 divestiture of AT&T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Complaint P 21, App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.*, P 48, App. 26.

> telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.*, P 51, App. 27.[2]

[*552] [**16]** The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement," but emphasized that "while '[c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, . . .] "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.'" *313 F. Supp. 2d 174, 179 (2003)* (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*; alterations in original). Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under *§ 1*; plaintiffs must allege additional facts that "ten[d] to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." *313 F. Supp. 2d, at 179*. The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate **[****17]** because "the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id., at 183*. As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not "alleg[e] facts . . . suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not rais[e] an inference that [the ILECs'] actions were the result of a conspiracy." *Id., at 188*.

[*553] The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." *425 F.3d 99, 114 (2005)* (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct **[****18]** fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a **[***939]** plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Ibid.*

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, *548 U.S. 903, 126 S. Ct. 2965, 165 L. Ed. 2d 949 (2006)*, and now reverse.

[1964]** II

A

HN3[] ***LEdHN[3]***[] [3] Because *§ 1* of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement, tacit or express," *Theatre Enterprises, 346 U.S., at 540, 74 S. Ct. 257, 98 L. Ed. 273*. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establish[ing] agreement or . . . itself constitut[ing] a Sherman Act offense." *Id., at 540-541, 74 S. Ct. 257, 98 L. Ed. 273*. Even "conscious **[****19]** parallelism," a common reaction of "firms in a concentrated market [that] recogniz[e]

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[2] In setting forth the grounds for § 1 relief, the complaint repeats these allegations in substantially similar language:

> "Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of *Section 1* of the Sherman Act." Id., P 64, App. 30-31.

their shared economic interests and their interdependence with respect to price and output decisions" **[*554]** is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; see 6 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 1433a, p 236 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act *§ 1*"); Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655, 672 (1962) ("[M]ere interdependence of basic price decisions is not conspiracy").

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, *e.g.*, AEI-Brookings Joint Center for Regulatory Studies, Epstein, Motions to Dismiss **[****20]** Antitrust Cases: Separating Fact from Fantasy, Related Publication 06-08, pp 3-4 (2006) (discussing problem of "false positives" in § 1 suits). Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises, supra;* proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*; and at the summary judgment stage a *§ 1* plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. **[***940]**

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under *§ 1* of the **[*555]** Sherman Act. ***HN4***[] ***LEdHN[4]***[] [4]*Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in **[****21]** order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. ***HN5***[] ***LEdHN[5]***[] [5] While a complaint attacked by a *Rule 12(b)(6)* motion to dismiss does not need detailed factual allegations, *ibid.; Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 40 F.3d 247, 251 (CA7 1994)*, a plaintiff's obligation to provide the **[**1965]** "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986)* (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp 235-236 (3d ed. 2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"),[3] on the assumption that all the allegations **[****22]** in the complaint are true (even if doubtful in fact), see, *e.g.*, *Swierkiewicz v.* ***[*556]*** *Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; *Neitzke v. Williams, 490 U.S. 319, 327, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989)* ("*Rule 12(b)(6)* does not countenance . . . dismissals based on a judge's disbelief of a complaint's factual allegations"); *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)* (a well-pleaded complaint may proceed even if it appears "that a recovery is very remote and unlikely").

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[3] The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. See *post, at 580, 167 L. Ed. 2d, at 955* (opinion of Stevens, J.) (pleading standard of Federal Rules "does not require, or even invite, the pleading of facts"). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant "set out *in detail* the facts upon which he bases his claim," *Conley v. Gibson, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)* (emphasis added), *Rule 8(a)(2)* still requires a "showing," rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (*Rule 8(a)* "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it").

[**23]** In applying these general standards to a § 1 claim, we hold that ***HN6***[] ***LEdHN[6]***[] [6] stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.[4] And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof **[***941]** of those facts is improbable, and "that a recovery is very remote and unlikely." *Ibid.* In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit **[**1966]** of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without **[*557]** more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when **[****24]** allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

LEdHN[7][] [7] **[****25]** ***HN7***[] The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of *Rule 8(a)(2)* that the "plain statement" possess enough heft to "sho[w] that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitle[ment] to relief." Cf. *DM Research, Inc. v. College of Am. Pathologists, 170 F.3d 53, 56 (CA1 1999)* ("[T]erms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation--for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court **[****26]** is not required to accept such terms as a sufficient basis for a complaint").[5]

We alluded to the practical significance of the *Rule 8* entitlement requirement in *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*, when we explained that something beyond the mere possibility of loss causation must be **[*558]** alleged, lest a plaintiff with "'a largely groundless claim'" be allowed to "'take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.'" *Id., at 347, 125 S. Ct. 1627,* ***[***942]*** *161 L. Ed. 2d 577* (quoting *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975))*. So, ***HN8***[] ***LEdHN[8]***[] [8] when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "'this basic deficiency **[****27]** should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'" 5 Wright & Miller § 1216, at 233-234 (quoting *Daves v. Hawaiian Dredging Co., 114 F. Supp. 643, 645 (Haw. 1953))*; see also *Dura, supra, at 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577*; *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc., 289 F. Supp. 2d 986, 995 (ND Ill. 2003)* (Posner, J., sitting by designation) ("[S]ome

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[4] Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, *e.g.*, 6 Areeda & Hovenkamp P 1425, at 167-185 (discussing "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties"); Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N. Y. L. S. L. Rev. 881, 899 (1979) (describing "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement"). The parties in this case agree that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason," would support a plausible inference of conspiracy. Brief for Respondents 37; see also Reply Brief for Petitioners 12.

[5] The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability.

threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. **[**1967]** *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*, but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 528, n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, ***HN9***[] ***LEdHN[9]***[] [9]"a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy **[****28]** to proceed." See also *Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1106 (CA7 1984)* ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, *78 N. Y. U. L. Rev. 1887, 1898-1899 (2003)* (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, **[*559]** Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all **[****29]** subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management," *post, at 573, 167 L. Ed. 2d, at 951*, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e.g.*, Easterbrook, Discovery as Abuse, *69 B. U. L. Rev. 635, 638 (1989)* ("Judges can do little about impositional discovery when parties control the legal claims **[***943]** to be presented and conduct the discovery themselves"). And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of evidence at the summary judgment stage," much less "lucid instructions to juries," *post, at 573, 167 L. Ed. 2d, at 951*; the threat of discovery expense will push cost-conscious defendants to settle even **[****30]** anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a § 1 claim. *Dura,* ***[*560]*** *544 U.S., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577* (quoting *Blue Chip Stamps, supra, at 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539*; alteration in *Dura*).[6]

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[6] The dissent takes heart in the reassurances of plaintiffs' counsel that discovery would be ""phased"" and "limited to the existence of the alleged conspiracy and class certification." *Post, at 593, 167 L. Ed. 2d, at 963*. But determining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line-drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in ***antitrust law***. Given the system that we have, the hope of effective judicial supervision is slim: "The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not--cannot--know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown. Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be,

[**31]** **[**1968]** Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises, Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible **[*561]** conflict with an early statement of ours construing *Rule 8*. Justice Black's opinion for the Court in *Conley* v. *Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see *425 F.3d at 106, 114* (invoking *Conley*'s "no set **[****32]** of **[***944]** facts" language in describing the standard for dismissal).[7]

[**33]** On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint **[**1969]** does not set forth a single **[*562]** fact in a context that suggests an agreement. *425 F.3d, at 106, 114*. It seems fair to say that this approach to pleading would dispense with any showing of a "'reasonably founded hope'" that a plaintiff would be able to make a case, see *Dura, 544 U.S., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577* (quoting *Blue Chip Stamps, 421 U.S., at 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539*); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, *e.g.*, *Car Carriers, 745 F.2d at 1106* ("*Conley* has never been interpreted literally" and, "[i]n practice, a complaint . . . must contain either direct or **[****34]** inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original); *Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1155 (CA9 1989)* (tension between *Conley*'s "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien v. Di Grazia, 544 F.2d 543, 546, n. 3 (CA1 1976)* ("[W]hen a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional . . . action into a substantial one"); *McGregor v. Industrial Excess Landfill, Inc., 856 F.2d 39, 42-43 (CA6 1988)* (quoting *O'Brien*'s analysis); Hazard, From Whom No Secrets Are Hid, *76 Texas L. Rev. 1665, 1685 (1998)* (describing *Conley* as having "turned *Rule 8* on its head"); Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, *86 Colum. L. Rev. 433, 463-465 (1986)* (noting tension between **[****35]** *Conley* and subsequent understandings of *Rule 8*).

We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's **[*563]** concrete allegations, which the Court quite reasonably understood as amply stating a claim for **[***945]** relief. But the passage so often quoted

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hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive' discovery except in theory, because in practice we lack essential information." Easterbrook, Discovery as Abuse, *69 B. U. L. Rev. 635, 638-639 (1989)* (footnote omitted).

[7] The Court of Appeals also relied on Chief Judge Clark's suggestion in *Nagler v. Admiral Corp., 248 F.2d 319 (CA2 1957)*, that facts indicating parallel conduct alone suffice to state a claim under *§ 1*. *425 F.3d at 114* (citing *Nagler, supra, at 325*). But *Nagler* gave no explanation for citing *Theatre Enterprises* (which upheld a denial of a directed verdict for plaintiff on the ground that proof of parallelism was not proof of conspiracy) as authority that pleading parallel conduct sufficed to plead a Sherman Act conspiracy. Now that *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)*, and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*, have made it clear that neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy, it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.

fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: ***HN10***[] ***LEdHN[10]***[] [10]once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan, 40 F.3d at 251* (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"); accord, *Swierkiewicz, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1*; *National Organization for Women, Inc. v. Scheidler, 510 U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994)*; **[****36]** *H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-250, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*; *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*. *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.[8]

[*946]**

[**37]** **[**1970]** **[*564]** III

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra, at 550-551, 167 L. Ed. 2d, at 937-938*. Although in form a few stray statements speak directly of agreement,[9] on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint **[*565]** first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from

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[8] Because *Conley*'s "'no set of facts'" language was one of our earliest statements about pleading under the Federal Rules, it is no surprise that it has since been "cited as authority" by this Court and others. *Post, at 577, 167 L. Ed. 2d, at 953*. Although we have not previously explained the circumstances and rejected the literal reading of the passage embraced by the Court of Appeals, our analysis comports with this Court's statements in the years since *Conley*. See *Dura Pharmaceuticals, Inc. v Broudo, 544 U.S., at 336, 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)* (requiring "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support the claim (alteration in *Dura*) (quoting *Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)*; alteration in *Dura*)); *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)* ("It is not . . . proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged"); *Wilson v. Schnettler, 365 U.S. 381, 383, 81 S. Ct. 632, 5 L. Ed. 2d 620 (1961)* ("In the absence of . . . an allegation [that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed . . . a narcotics offense"). Nor are we reaching out to decide this issue in a case where the matter was not raised by the parties, see *post, at 579, 167 L. Ed. 2d, at 955*, since both the ILECs and the Government highlight the problems stemming from a literal interpretation of *Conley*'s "no set of facts" language and seek clarification of the standard. Brief for Petitioners 27-28; Brief for United States as *Amicus Curiae* 22-25; see also Brief for Respondents 17 (describing "[p]etitioners and their amici" as mounting an "attack on *Conley*'s 'no set of facts' standard")

The dissent finds relevance in Court of Appeals precedents from the 1940s, which allegedly gave rise to Conley's "no set of facts" language. *See post, at 580-583, 167 L. Ed. 2d, at 955-957*. Even indulging this line of analysis, these cases do not challenge the understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct. See, e.g., *Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302, 305 (CA8 1940)* ("'[I]f, in view of what is alleged, it can reasonably be conceived that the plaintiffs . . . could, upon a trial, establish a case which would entitle them to . . . relief, the motion to dismiss should not have been granted'"); *Continental Collieries, Inc. v. Shober, 130 F.2d 631, 635 (CA3 1942)* ("No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it"). Rather, these cases stand for the unobjectionable proposition that, ***HN11***[] ***LEdHN[11]***[] [11] when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. Cf. *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)* (a district court weighing a motion to dismiss asks "not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

[9] See Complaint PP 51, 64, App. 27, 30-31 (alleging that ILECs engaged in a "contract, combination or conspiracy" and agreed not to compete with one another).

CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another." Complaint P 51, App. 27.[10] **[****39]** The nub of the **[**1971]** complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out **[****38]** and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.[11]

[*566] We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at **[***947]** wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 **[****40]** Act in all the ways the plaintiffs allege, see *id.,* P 47, App. 23-24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." *Id.,* P 50, App. 26-27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." *313 F. Supp. 2d, at 184*; cf. *Kramer v. Pollock-Krasner Foundation, 890 F. Supp. 250, 256 (SDNY 1995)* (while the **[****41]** plaintiff "may believe the defendants conspired . . ., the defendants' allegedly conspiratorial actions **[*567]** could equally have been prompted by lawful, independent goals which do not constitute a conspiracy").[12]

[1972]** Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was **[****42]** supposedly passed in the "'hop[e] that the large incumbent local

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[10] If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by *Rule 8*. Apart from identifying a 7-year span in which the § 1 violations were supposed to have occurred (*i.e.*, "[b]eginning at least as early as February 6, 1996, and continuing to the present," *id.,* P 64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. *Post, at 576, 167 L. Ed. 2d, at 953*. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the *§ 1* context would have little idea where to begin.

[11] The dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized. See *313 F. Supp. 2d 174, 182 (SDNY 2003)*; *425 F.3d 99, 102-104 (CA2 2005)*.

[12] From the allegation that the ILECs belong to various trade associations, see Complaint P 46, App. 23, the dissent playfully suggests that they conspired to restrain trade, an inference said to be "buttressed by the common sense of Adam Smith." *Post, at 591, 594, 167 L. Ed. 2d, at 962, 963-964*. If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

monopoly companies . . . might attack their neighbors' service areas, as they are the best situated to do so.'" Complaint P 38, App. 20 (quoting Consumer Federation of America, Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster, p 12 (Feb. 2000)). Contrary to hope, the ILECs declined "'to enter each other's service territories in any significant way,'" Complaint P 38, App. 20, and the local telephone and high speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.,* P 40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, **[****43]** but here we have an obvious alternative **[***948]** explanation. In the decade **[*568]** preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communs., Inc. v. FCC, 535 U.S. 467, 477-478, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002)* (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up "especially attractive business opportunit[ies]" by declining to compete as CLECs against other ILECs, Complaint P 40, App. 21, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,[13] **[****45]** and **[**1973]** the complaint is replete with indications that any CLEC faced **[****44]** nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id.*, P 47, App. **[*569]** 23-26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, "[f]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." Areeda & Hovenkamp P 307d, at 155 (Supp. 2006) (commenting on the case at bar). The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.[14]

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[13] The complaint quoted a reported statement of Qwest's CEO, Richard Notebaert, to suggest that the ILECs declined to compete against each other despite recognizing that it "'might be a good way to turn a quick dollar.'" P 42, App. 22 (quoting Chicago Tribune, Oct. 31, 2002, Business Section, p 1). This was only part of what he reportedly said, however, and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See *Fed. Rule Evid. 201*. Notebaert was also quoted as saying that entering new markets as a CLEC would not be "a sustainable economic model" because the CLEC pricing model is "just . . . nuts." Chicago Tribune, Oct. 31, 2002, Business Section, p 1 (cited at Complaint P 42, App. 22). Another source cited in the complaint quotes Notebaert as saying he thought it "unwise" to "base a business plan" on the privileges accorded to CLECs under the 1996 Act because the regulatory environment was too unstable. Chicago Tribune, Dec. 19, 2002, Business Section, p 2 (cited at Complaint P 45, App. 23).

[14] In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of *Federal Rule of Civil Procedure 9*, which can only be accomplished "'by the process of amending the Federal Rules, and not by judicial interpretation.'" *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 515, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)* (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993))*. On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than *Rule 8* requires. *Fed. Rules Civ. Proc. 9(b)-(c)*. Here, our concern is not that the allegations in the complaint were insufficiently "particular[ized]," *ibid.;* rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

Plaintiffs say that our analysis runs counter to *Swierkiewicz v. Sorema N. A., 534 U.S. at 508, 122 S. Ct. 992,* ***[***949]*** *152 L. Ed. 2d 1*, which held that "a complaint in an employment discrimination **[****46]** lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*." They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," *Swierkiewicz, supra, at 512, 122 S. Ct. 992, 152 L. Ed. 2d 1*, "transpos[ing] 'plus factor' summary judgment analysis woodenly into a rigid *Rule 12(b)(6)* pleading standard . . . would be unwise," Brief for Respondents 39. As the District Court **[*570]** correctly understood, however, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." *313 F. Supp. 2d, at 181* (citation and footnote omitted). Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed **[****47]** his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1*. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyondthose necessary to state his **[**1974]** claim and the grounds showing entitlement to relief. *Id., at 508, 122 S. Ct. 992, 152 L. Ed. 2d 1*.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Dissent by: STEVENS

Dissent

Justice **Stevens,** with whom Justice **Ginsburg** joins except as to Part IV, dissenting.

In the first paragraph of its 23-page opinion the Court states that the question to be **[****48]** decided is whether allegations that "major telecommunications providers engaged in certain **[*571]** parallel conduct unfavorable to competition" suffice to state a violation of *§ 1* of the Sherman Act. *Ante, at 548-549, 167 L. Ed. 2d, at 936*. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal citing *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*, would adequately resolve **[***950]** this case. As *Theatre Enterprises* held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal. *Id., at 540-542, 74 S. Ct. 257, 98 L. Ed. 273*.

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. The plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason **[****49]** for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

> "entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) P 51, App. 27 (hereinafter Complaint).

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have **[*572]** refused to permit nonincumbent competitors to access their networks. The complaint quotes Richard Notebaert, the former chief executive officer of one such ILEC, as saying that competing in a neighboring ILEC's territory "'might be a good way to turn a quick dollar but that doesn't make it right.'" *Id.,* P 42, App. 22. Moreover, respondents allege that petitioners "communicate **[****50]** amongst themselves" through numerous industry associations. *Id.,* P 46, App. 23. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* **[**1975]** violation of the Sherman Act. See Reportof the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises*, a judge ruling on a defendant's motion to dismiss a complaint "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*; see *Overstreet v. North Shore Corp., 318 U.S. 125, 127, 63 S. Ct. 494, 87 L. Ed. 656 (1943)*. But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery--and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement--the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that **[****51]** "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," *ante, at 566, 167 L. Ed. 2d, at 947*; that "there was just no need for joint encouragement **[***951]** to resist the 1996 Act," *ibid.*; and that the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *ante, at 568, 167 L. Ed. 2d, at 948*.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence **[*573]** of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," *ante, at 564, 167 L. Ed. 2d, at 946*; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural **[****52]** law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of *Federal Rule of Civil Procedure 12(b)(6)* that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The Rule did not come about by happenstance, and its language is not inadvertent. The English experience with Byzantine special pleading rules **[****53]** --illustrated by the hypertechnical Hilary rules of **[*574]** 1834[1] -- made **[**1976]** obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N. Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence").

[**54]** **[***952]** A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted,

> "it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, Comments on Procedural Reform: Drafting Pleading Rules, 57 Colum. L. Rev. 518, 520-521 (1957).

See also Cook, Statements of Fact in Pleading Under the Codes, 21 Colum. L. Rev. 416, 417 (1921) (hereinafter Cook) ("[T]here is no logical distinction between statements which are grouped by the courts under the phrases 'statements of **[*575]** fact' and 'conclusions of law'"). *Rule 8* was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions." See 5 C. **[****55]** Wright & A. Miller, Federal Practice and Procedure § 1216, p 207 (3d ed. 2004) (hereinafter Wright & Miller) ("The substitution of 'claim showing that the pleader is entitled to relief' for the code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions' . . .").

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1* ("The liberal notice pleading of *Rule 8(a)* is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim"). Charles E. Clark, the "principal draftsman" of the Federal Rules,[2] put it thus:

> "Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so **[****56]** that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." The **[**1977]** New Federal Rules of Civil Procedure: The Last Phase--Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure, 23 A. B. A. J. 976, 977 (1937) (hereinafter Clark, New Federal Rules).

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, **[*576]** a complaint for negligence. As relevant, the Form 9 complaint states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then **[***953]** crossing said highway." Form 9, Complaint for Negligence, Forms App., Fed. Rules Civ. Proc., 28 U.S.C. App., p 829 (hereinafter Form 9). The complaint then describes the plaintiff's injuries and

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[1] See 9 W. Holdsworth, History of English Law 324-327 (1926).

[2] *Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 283, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988)*.

demands judgment. The asserted ground for relief--namely, the defendant's negligent driving--would have been called a "'conclusion of law'" under the code pleading of old. See, *e.g.*, Cook 419. But that bare allegation suffices under a system that "restrict[s] the pleadings to **[****57]** the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial."[3] *Hickman v. Taylor, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947)*; see also *Swierkiewicz, 534 U.S., at 513, n. 4, 122 S. Ct. 992, 152 L. Ed. 2d 1* (citing Form 9 as an example of "'the simplicity and brevity of statement which the rules contemplate'"); *Thomson v. Washington, 362 F.3d 969, 970 (CA7 2004)* (Posner, J.) ("The federal rules replaced fact pleading with notice pleading").

II

[**58]** It is in the context of this history that *Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*, must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing **[*577]** for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of *Rule 8*. *Id., at 47-48, 78 S. Ct. 99, 2 L. Ed. 2d 80*. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*.

Consistent with the design of the Federal Rules, *Conley*'s "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond **[****59]** would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley*'s "no set of facts " language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," *ante, at 562, 167 L. Ed. 2d, at 944*, the Court dismisses it as careless composition.

[1978]** If *Conley*'s "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzl[ed] the profession for 50 years," *ante, at 563, 167 L. Ed. 2d, at 945*, has been cited as authority in a dozen opinions of this Court and four separate **[***954]** writings.[4] **[****61]** In not one of **[*578]** those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion

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[3] The Federal Rules do impose a "particularity" requirement on "all averments of fraud or mistake," *Fed. Rule Civ. Proc. 9(b)*, neither of which has been alleged in this case. We have recognized that the canon of *expressio unius est exclusio alterius* applies to *Rule 9(b)*. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*.

[4] *SEC v. Zandford, 535 U.S. 813, 818, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002)*; *Davis v. Monroe County Bd. of Ed., 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999)*; *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 811, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)*; *Brower v. County of Inyo, 489 U.S. 593, 598, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989)*; *Hughes v. Rowe, 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980)* *(per curiam); McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)*; *Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976)*; *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)*; *Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*; *Cruz v. Beto, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972)* *(per curiam); Haines v. Kerner, 404 U.S. 519, 521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972)* *(per curiam); Jenkins v. McKeithen, 395 U.S. 411, 422, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969)* (plurality opinion); see also *Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 554, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985)* (Brennan, J., concurring in part and dissenting in part); *Hoover v. Ronwin, 466 U.S. 558, 587, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)* (Stevens, J., dissenting); *United Air Lines, Inc. v. Evans, 431 U.S. 553, 561, n. 1, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977)* (Marshall, J., dissenting); *Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 55, n. 6, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976)* (Brennan, J., concurring in judgment).

is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language **[****60]** the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief.[5]

[**62] [**1979] [*579]** Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed **[***955]** briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process--a rulemaking process--for revisions of that order. See 28 U.S.C. §§ 2072-2074 (2000 ed. and Supp. IV).

Today's majority calls *Conley*'s "'no set of facts'" language "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be **[*580]** supported by showing any set of facts consistent with the allegations in the complaint." Ante, at 563, 167 L. Ed. 2d, at 945. This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.[6] The "pleading standard"

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[5] See, *e.g.*, EB Invs., LLC v. Atlantis Development, Inc., 930 So. 2d 502, 507 (Ala. 2005); Department of Health & Social Servs. v. Native Village of Curyung, 151 P. 3d 388, 396 (Alaska 2006); Newman v. Maricopa Cty., 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App. 1991); Public Serv. Co. of Colo. v. Van Wyk, 27 P. 3d 377, 385-386 (Colo. 2001) (en banc); Clawson v. St. Louis Post-Dispatch, LLC, 906 A.2d 308, 312 (D. C. 2006); Hillman Constr. Corp. v. Wainer, 636 So. 2d 576, 578 (Fla. App. 1994); Kaplan v. Kaplan, 266 Ga. 612, 613, 469 S. E. 2d 198, 199 (1996); Wright v. Home Depot U.S.A., Inc., 111 Haw. 401, 406, 142 P. 3d 265, 270 (2006); Taylor v. Maile, 142 Idaho 253, 257, 127 P. 3d 156, 160 (2005); Fink v. Bryant, 2001-CC-0987, p. 4 (La. 11/28/01), 801 So. 2d 346, 349; Gagne v. Cianbro Corp., 431 A.2d 1313, 1318-1319 (Me. 1981); Gasior v. Massachusetts Gen. Hospital, 446 Mass. 645, 647, 846 N.E.2d 1133, 1135 (2006); Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 893 (Miss. 2006); Jones v. Montana Univ. System, 337 Mont. 1, 7, 155 P. 3d 1247, 1252 (2007); Johnston v. Neb. Dep't of Corr. Servs., 270 Neb. 987, 989, 709 N.W.2d 321, 324 (2006); Blackjack Bonding v. Las Vegas Munic. Ct., 116 Nev. 1213, 1217, 14 P. 3d 1275, 1278 (2000); Shepard v. Ocwen Fed. Bank, 361 N. C. 137, 139, 638 S. E. 2d 197, 199 (2006); Rose v. United Equitable Ins. Co., 2001 ND 154, P10, 632 N.W.2d 429, 434; State ex rel. Turner v. Houk, 112 Ohio St. 3d 561, 562, 2007-Ohio-814, P5, 862 N.E.2d 104, 105 *(per curiam)*; Moneypenney v. Dawson, 2006 OK 53, P2, 141 P. 3d 549, 551; Gagnon v. State, 570 A.2d 656, 659 (R. I. 1990); Osloond v. Farrier, 2003 SD 28, P4, 659 N.W.2d 20, 22 *(per curiam)*; Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 471 (Tenn. 1986); Association of Haystack Property Owners, Inc. v. Sprague, 145 Vt. 443, 446, 494 A.2d 122, 124 (1985); In re Coday, 156 Wn. 2d 485, 497, 130 P. 3d 809, 815 (2006) (en banc); Haines v. Hampshire Cty. Comm'n, 216 W. Va. 499, 502, 607 S. E. 2d 828, 831 (2004); Warren v. Hart, 747 P.2d 511, 512 (Wyo. 1987); see also Malpiede v. Townson, 780 A.2d 1075, 1082-1083 (Del. 2001) (permitting dismissal only "where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint" (internal quotation marks omitted)); Canel v. Topinka, 212 Ill. 2d 311, 318, 818 N.E.2d 311, 317, 288 Ill. Dec. 623 (2004) (replacing "appears beyond doubt" in the *Conley* formulation with "is clearly apparent"); In re Young, 522 N.E.2d 386, 388 (Ind. 1988) *(per curiam)* (replacing "appears beyond doubt" with "appears to a certainty"); Barkema v. Williams Pipeline Co., 666 N.W.2d 612, 614 (Iowa 2003) (holding that a motion to dismiss should be sustained "only when there exists no conceivable set of facts entitling the non-moving party to relief"); Pioneer Village v. Bullitt Cty., 104 S. W. 3d 757, 759 (Ky. 2003) (holding that judgment on the pleadings should be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief"); Corley v. Detroit Bd. of Ed., 470 Mich. 274, 277, 681 N.W.2d 342, 345 (2004) *(per curiam)* (holding that a motion for judgment on the pleadings should be granted only "'if no factual development could possibly justify recovery'"); Oberkramer v. Ellisville, 706 S.W.2d 440, 441 (Mo. 1986) (en banc) (omitting the words "beyond doubt" from the *Conley* formulation); Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990) (holding that a motion to dismiss is appropriate "only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim"); NRC Mgmt. Servs. Corp. v. First Va. Bank - Southwest, 63 Va. Cir. 68, 70 (2003) ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it").

[6] The majority is correct to say that what the Federal Rules require is a "'showing'" of entitlement to relief. Ante, at 555, n 3, 167 L. Ed. 2d, at 940. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." See supra, at 570-571, 167 L. Ed. 2d, at 949. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they

label the majority gives to what it reads into the *Conley* opinion--a statement of the permissible factual support for an adequately **[****63]** pleaded complaint--would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was "appraising the *sufficiency* of **[**1980]** the complaint." *355 U.S., at 45, 78 S. Ct. 99, 2 L. Ed. 2d 80* (emphasis added). It was, to paraphrase today's majority, describing "the minimum standard of adequate pleading to govern a complaint's survival," *ante, at 563, 167 L. Ed. 2d, at 945*.

[**64]** We can be triply sure as to *Conley*'s meaning by examining the three Court of Appeals cases the *Conley* Court cited as support for the "accepted rule" that "a complaint should not **[*581]** be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of **[***956]** facts in support of his claim which would entitle him to relief." *355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80*. In the first case, *Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (CA8 1940)*, the plaintiff alleged that she was the beneficiary of a life insurance plan and that the insurance company was wrongfully withholding proceeds from her. In reversing the District Court's grant of the defendant's motion to dismiss, the Eighth Circuit noted that court's own longstanding rule that, to warrant dismissal, "'it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.'" *Id., at 305* (quoting *Winget v. Rockwood, 69 F.2d 326, 329 (CA8 1934))*.

The *Leimer* court viewed the Federal Rules--specifically *Rules 8(a)(2)*, *12(b)(6)*, *12(e)* (motion for **[****65]** a more definite statement), and 56 (motion for summary judgment)--as reinforcing the notion that "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." *108 F.2d at 306*. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: "No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint." *Ibid.*

The Third Circuit relied on *Leimer*'s admonition in *Continental Collieries, Inc. v. Shober, 130 F.2d 631 (1942)*, which the *Conley* Court also cited in support of its "no set of facts" formulation. In a diversity action the plaintiff alleged breach of contract, but the District Court dismissed the complaint on the ground that the contract appeared to be unenforceable under state **[****66]** law. The Court of Appeals reversed, **[*582]** concluding that there were facts in dispute that went to the enforceability of the contract, and that the rule at the pleading stage was as in *Leimer:* "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." *130 F.2d at 635*.

The third case the *Conley* Court cited approvingly was written by Judge Clark himself. In *Dioguardi v. Durning, 139 F.2d 774 (CA2 1944)*, the *pro se* plaintiff, an importer of "tonics," charged the customs inspector with auctioning off the plaintiff's former merchandise for less than was bid for it--and indeed for an amount equal to the plaintiff's own bid--and complained that two cases of tonics went missing three weeks before the sale. The inference, hinted at by the averments but never stated in so many words, was that the defendant fraudulently denied the plaintiff his rightful claim to the tonics, which, if true, would have violated federal law. Writing six years after the adoption of the Federal Rules he held the lead rein in drafting, Judge Clark said that the defendant **[****67]**

> "could have disclosed the facts from his point of view, in advance of a trial if he **[**1981]** chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so **[***957]** firmly believes and what for present purposes defendant must be taken as admitting." *Id., at 775*.

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did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.

As any civil procedure student knows, Judge Clark's opinion disquieted the defense bar and gave rise to a movement to revise Rule 8 to require a plaintiff to plead a "'cause of action.'" See 5 Wright & Miller § 1201, at 86-87. The movement failed, see *ibid.; Dioguardi* was explicitly approved in *Conley;* and "[i]n retrospect the case itself seems to be a **[*583]** routine application of principles that are universally accepted," 5 Wright & Miller § 1220, at 284-285.

In light of *Leimer, Continental Collieries*, and *Dioguardi, Conley*'s statement that a complaint is not to be dismissed unless "no set of facts" in support thereof would entitle the plaintiff to relief is hardly "puzzling," *ante, at 562-563, 167 L. Ed. 2d, at 945*. It reflects a philosophy that, unlike **[****68]** in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley.* For example, in *Scheuer v. Rhodes, 416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*, we reversed the Court of Appeals' dismissal on the pleadings when the respondents, the Governor and other officials of the State of Ohio, argued that the petitioners' claims were barred by sovereign immunity. In a unanimous opinion by then-Justice Rehnquist, we emphasized:

> "[W]hen a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*" *Id., at 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90* (emphasis added). **[****69]**

The *Rhodes* plaintiffs had "alleged generally and in conclusory terms" that the defendants, by calling out the National Guard to suppress the Kent State University student protests, "were guilty of wanton, wilful and negligent conduct." *Krause v. Rhodes, 471 F.2d 430, 433 (CA6 1972)*. We reversed the Court of Appeals on the ground that "[w]hatever **[*584]** the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure," were not barred by the *Eleventh Amendment* because they were styled as suits against the defendants in their individual capacities. *416 U.S., at 238, 94 S. Ct. 1683, 40 L. Ed. 2d 90*.

We again spoke with one voice against efforts to expand pleading requirements beyond their appointed limits in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*. Writing for the unanimous Court, Chief Justice Rehnquist rebuffed the Fifth Circuit's effort to craft a standard for pleading municipal liability that accounted for "the enormous expense involved today in litigation," **[****70]** *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit,* ***[***958]*** *954 F.2d 1054, 1057 (1992)* (internal quotation marks omitted), by requiring a plaintiff to "state with factual **[**1982]** detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity," *507 U.S., at 167, 113 S. Ct. 1160, 122 L. Ed. 2d 517* (internal quotation marks omitted). We found this language inconsistent with *Rules 8(a)(2)* and *9(b)* and emphasized that motions to dismiss were not the place to combat discovery abuse: "In the absence of [an amendment to *Rule 9(b)*], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id., at 168-169,113 S. Ct. 1160, 122 L. Ed. 2d 517*.

Most recently, in *Swierkiewicz, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1*, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting **[****71]** evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. *See, e.g.*, *Trans World Airlines, Inc. v. Thurston,* ***[*585]*** *469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)*. Swierkiewicz alleged that he had been terminated on account of national origin in violation of Title VII of the Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a prima facie case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Swierkiewicz, 534 U.S., at 511, 122 S. Ct. 992, 152 L. Ed. 2d 1*. We also observed that *Rule 8(a)(2)* does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious **[****72]** claims." *Id., at 512, 122 S. Ct. 992, 152 L. Ed. 2d 1*; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz* v. *Sorema N. A.*, O. T. 2001, No. 00-1853, p 10 (stating that a *Rule 12(b)(6)* motion is not "an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint" (internal quotation marks omitted)).[7]

As in the discrimination context, we have developed **[****73]** an evidentiary framework for evaluating claims under *§ 1* of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita **[***959]** Elec. Industrial **[*586]** Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a *Rule 56* motion, a *§ 1* plaintiff "must present evidence 'that tends **[**1983]** to exclude the possibility' that the alleged conspirators acted independently.'" *Id., at 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538* (quoting *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. That is, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action." *475 U.S., at 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538*.

Everything today's majority says would therefore make perfect sense if it were ruling on a *Rule 56* motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* **[****74]** that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because--in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior--the claimed conspiracy is "conceivable" but not "plausible," *ante, at 570, 167 L. Ed. 2d, at 949*. I have my doubts about the majority's assessment of the plausibility of this alleged conspiracy. See Part III, *infra.* But even if the majority's speculation is correct, its "plausibility" standard is irreconcilable with *Rule 8* and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman*, fear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence.

This case is a poor vehicle for the Court's new pleading rule, for we have observed that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample **[*587]** opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)* **[****75]** (quoting *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962))*; see also *Knuth v. Erie-Crawford Dairy Cooperative Asso., 395 F.2d 420, 423 (CA3 1968)* ("The 'liberal' approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings"). Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. See *Radovich v. National Football League, 352 U.S. 445, 454, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)* ("Congress itself has placed the private antitrust litigant in a most favorable position . . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws"). It is therefore more, not less, important in antitrust cases to resist the urge to **[***960]** engage in armchair economics at the pleading stage.

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[7] See also 5 Wright & Miller § 1202, at 89-90 ("[P]leadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this; indeed, history shows that no more can be performed successfully by the pleadings" (footnotes omitted)).

The same year we decided *Conley* **[****76]** , Judge Clark wrote, presciently,

> "I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular.*" Special Pleading in the "Big Case"? in Procedure--The Handmaid of Justice 147, 148 (C. Wright & H. Reasoner eds. 1965) (hereinafter **[**1984]** Clark, Special Pleading in the Big Case) (emphasis added).

[*588] In this "Big Case," the Court succumbs to the temptation that previous Courts have steadfastly resisted.[8] While the majority assures us that it is not applying any "'heightened'" pleading standard, see *ante, at 569, n 14, 167 L. Ed. 2d, at 948-949*, I shall now explain why I have a difficult time understanding its opinion any other way.

[**77]** III

The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws, *see, e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 526-527, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489-490, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*. Rather, the theory on which the Court permits **[*589]** dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

As the Court explains, prior to the enactment of the Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the regional monopolists **[***961]** to take affirmative steps to facilitate entry to new competitors, see *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*; it also permitted the existing firms to compete with each **[****78]** other and to expand their operations into previously forbidden territory. See *47 U.S.C. § 271*. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, PP 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court **[**1985]** recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)." *Ante, at 555, 167 L. Ed. 2d, at 940*.

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations

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[8] Our decision in *Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*, is not to the contrary. There, the plaintiffs failed adequately to allege loss causation, a required element in a private securities fraud action. Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to "provid[e] the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577*. Here, the failure the majority identifies is not a failure of notice--which "notice pleading" rightly condemns--but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of *notice* but of *proof*, it should not be answered without first hearing from the defendants (as apart from their lawyers). Similarly, in *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, in which we also found an antitrust complaint wanting, the problem was not that the injuries the plaintiffs alleged failed to satisfy some threshold of plausibility, but rather that the injuries as alleged were not "the type that the antitrust statute was intended to forestall." *Id., at 540, 103 S. Ct. 897, 74 L. Ed. 2d 723*; see *id., at 526, 103 S. Ct. 897, 74 L. Ed. 2d 723* ("As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged").

by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel **[****79]** conduct. *Ante, at 564, 167 L. Ed. 2d, at 946*. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era, *supra, at 574-576, 167 L. Ed. 2d, at 938-939*. That distinction was a defining feature of code pleading, see generally Clark, The Complaint in **[*590]** Code Pleading, 35 Yale L. J. 259 (1925-1926), but was conspicuously abolished when the Federal Rules were enacted in 1938. See *United States v. Employing Plasterers Ass'n, 347 U.S. 186, 188, 74 S. Ct. 452, 98 L. Ed. 618 (1954)* (holding, in an antitrust case, that the Government's allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint "[w]hether these charges be called 'allegations of fact' or 'mere conclusions of the pleader'"); *Brownlee v. Conine, 957 F.2d 353, 354 (CA7 1992)* ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, . . . so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliche means, does not automatically condemn it"); *Walker Distributing Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 3-4 (CA9 1963)* ("[O]ne purpose of *Rule 8* **[****80]** was to get away from the highly technical distinction between statements of fact and conclusions of law . . ."); *Oil, Chemical & Atomic Workers Int'l Union v. Delta, 277 F.2d 694, 697 (CA6 1960)* ("Under the notice system of pleading established by the Rules of Civil Procedure, . . . the ancient distinction between pleading 'facts' and 'conclusions' is no longer significant"); 5 Wright & Miller § 1218, at 267 ("[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties"). "Defendants entered into a contract" is no more a legal conclusion than "defendant negligently drove," see Form 9; *supra, at* ***[***962]*** *575-576, 167 L. Ed. 2d, at 952*. Indeed it is less of one.[9]

[**81]** **[*591]** Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, An Inquiry Into the Nature and Causes of the Wealth of Nations, in 39 Great Books of the Western World 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint **[**1986]** points not only to petitioners' numerous opportunities to meet with each other, Complaint P 46, App. 23,[10] but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right," *id.,* P 42, App. 22. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest **[****82]** to compete with its brethren, he had agreed with his competitors not to do so. According to the complaint, that is how the Illinois Coalition for Competitive Telecom construed Notebaert's statement, *id.,* P 44, App. 22 (calling the statement "evidence of potential collusion among regional Bell phone monopolies to not compete **[*592]** against one another and kill off potential competitors in local phone service"), and that is how Members of Congress construed his company's behavior, *id.,* P 45, App. 23 (describing a letter to the Justice Department requesting an investigation into the possibility that the ILECs'"very apparent non-competition policy'" was coordinated).

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[9] The Court suggests that the allegation of an agreement, even if credited, might not give the notice required by *Rule 8* because it lacks specificity. *Ante, at 565, n 10, 167 L. Ed. 2d, at 946*. The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a *Rule 12(e)* motion for a more definite statement. See *Swierkiewicz v. Sorema N. A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*. Petitioners made no such motion and indeed have conceded that "[o]ur problem with the current complaint is not a lack of specificity, it's quite specific." Tr. of Oral Arg. 14. Thus, the fact that "the pleadings mentioned no specific time, place, or persons involved in the alleged conspiracies," *ante, at 565, n 10, 167 L. Ed. 2d, at 946*, is, for our purposes, academic.

[10] The Court describes my reference to the allegation that the defendants belong to various trade associations as "playfully" suggesting that the defendants conspired to restrain trade. *Ante, at 567, n 12, 167 L. Ed. 2d, at 947*. Quite the contrary: An allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with--though not sufficient to prove--the plaintiffs' entirely serious and unequivocal allegation that the defendants entered into an unlawful agreement. Indeed, if it were true that the plaintiffs "rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs," *ante, at 564, 167 L. Ed. 2d, at 946*, there would have been no purpose in including a reference to the trade association meetings in the amended complaint.

[**83]** Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. See Brief for Petitioners 36. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other **[***963]** quotes from that and other articles and decides that what he meant was that entering new markets as a competitive local exchange carrier would not be a "'sustainable economic model.'" *Ante, at 568, n 13, 167 L. Ed. 2d, at 948*. Never mind that--as anyone ever interviewed knows--a newspaper article is hardly a verbatim transcript; the writer selects quotes to package his story, not to record a subject's views for posterity. But more importantly the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor.[11] See *Allen v. Wright, 468 U.S. 737, 767-768, n. 1, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)* (Brennan, J., dissenting). The inference the statement supports--that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to **[*593]** do so were the product of an agreement--sits comfortably within **[****84]** the realm of possibility. That is all the Rules require.

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint **[**1987]** without requiring the defendants to answer the charge that they "have agreed not to compete with **[****85]** one another and otherwise allocated customers and markets to one another."[12] Complaint, P 51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

Respondents in this case proposed a plan of "'phased discovery'" limited to the existence of the alleged conspiracy and class certification. Brief for Respondents 25-26. Two petitioners rejected the plan. *Ibid.* Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation.[13] Given the charge in the

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[11] It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing to a rule of evidence, *ante, at 568, n 13, 167 L. Ed. 2d, at 948*. Under *Federal Rule of Evidence 201(b)*, a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.

[12] The Court worries that a defendant seeking to respond to this "conclusory" allegation "would have little idea where to begin." *Ante, at 565, n 10, 167 L. Ed. 2d, at 946*. A defendant could, of course, begin by either denying or admitting the charge.

[13] The potential for "sprawling, costly, and hugely time-consuming" discovery, *ante, at 560, n 6, 167 L. Ed. 2d, at 943*, is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal. Before discovery even begins, the court may grant a defendant's *Rule 12(e)* motion; *Rule 7(a)* permits a trial court to order a plaintiff to reply to a defendant's answer, see *Crawford-El v. Britton, 523 U.S. 574, 598, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)*; and *Rule 23* requires "rigorous analysis" to ensure that class certification is appropriate, *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982)*; see *In re Initial Public Offering Securities Litigation, 471 F.3d 24 (CA2 2006)* (holding that a district court may not certify a class without ruling that each *Rule 23* requirement is met, even if a requirement overlaps with a merits issue). *Rule 16* invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, "the elimination of frivolous claims or defenses," *Rule 16(c)(1)*; "the necessity or desirability of amendments to the pleadings," *Rule 16(c)(2)*; "the control and scheduling of discovery," *Rule 16(c)(6)*; and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," *Rule 16(c)(12)*. Subsequently, *Rule 26* confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. See *523 U.S., at 598-599, 118 S. Ct. 1584, 140 L. Ed. 2d 759*. Indeed, *Rule 26(c)* specifically permits a court to take actions "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope. In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations

complaint **[*594]** --buttressed **[***964]** by the common sense of Adam Smith--I cannot say that the possibility that joint discussions **[****86]** **[**1988]** and perhaps some agreements played a role in petitioners' decisionmaking process is so implausible that dismissing the complaint before any defendant has denied the charge is preferable to granting respondents even a minimal opportunity **[*595]** to prove their claims. See Clark, New Federal Rules 977 ("[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function").

[**87]** I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar--among whom "lament" as to inadequate judicial supervision of discovery is most "common," see *ante, at 559, 167 L. Ed. 2d, at 942*--should lobby for this state of affairs. But "we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public." Clark, Special Pleading in the Big Case 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules--not our interpretation of them.[14] See *Swierkiewicz, 534 U.S., at 515, 122 S. Ct. 992, 152 L. **[***965]** Ed. 2d 1*; *Crawford-El v. Britton, 523 U.S. 574, 595, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998)*; *Leatherman, 507 U.S., at 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517*.

[**88]** IV

Just a few weeks ago some of my colleagues explained that a strict interpretation of the literal text of statutory language **[*596]** is essential to avoid judicial decisions that are not faithful to the intent of Congress. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, *ante*, p. 108 (Scalia, J., dissenting). I happen to believe that there are cases in which other tools of construction are more reliable than text, but I agree of course that congressional intent should guide us in matters of statutory interpretation. *Ante, at 106* (Stevens, J., concurring). This is a case in which the intentions of the drafters of three important sources of law--the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure--all point unmistakably in the same direction, yet the Court marches resolutely the other way. Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to **[****89]** respond **[**1989]** to any congressional command is glaringly obvious.

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for their plausibility vel non without requiring an answer from the defendant. See Societe Internationale pour Participations Industrielles et *Commerciales, S. A. v. Rogers, 357 U.S. 197, 206, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958)* ("*Rule 34* is sufficiently flexible to be adapted to the exigencies of particular litigation"). And should it become apparent over the course of litigation that a plaintiff's filings bespeak an in terrorem suit, the district court has at its call its own in terrorem device, in the form of a wide array of *Rule 11* sanctions. See *Rules 11(b)*, *(c)* (authorizing sanctions if a suit is presented "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991)* (holding that *Rule 11* applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys); *Atkins v. Fischer, 232 F.R.D. 116, 126 (DC 2005)* ("As possible sanctions pursuant to *Rule 11*, the court has an arsenal of options at its disposal").

[14] Given his "background in ***antitrust law***," *ante, at 560, n 6, 167 L. Ed. 2d, at 943*, Judge Easterbrook has recognized that the most effective solution to discovery abuse lies in the legislative and rulemaking arenas. He has suggested that the remedy for the ills he complains of requires a revolution in the rules of civil procedure:

> "Perhaps a system in which judges pare away issues and focus on investigation is too radical to contemplate in this country--although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority . . . . If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery--impositional and otherwise." Discovery as Abuse, *69 B. U. L. Rev. 635, 645 (1989)*.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants--who in this case are some of the wealthiest corporations in our economy--from the burdens of pretrial discovery. *Ante, at 558-560, 167 L. Ed. 2d, at 942-943*. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their *Rule 12(b)* motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners,[15] that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly **[*597]** serious factual allegations, that could account for this stark break from precedent.

[**90]** If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental--and unjustified--change in the character of pretrial practice.

Accordingly, I respectfully dissent.

References

15 U.S.C.S. § 1

Antitrust Laws and Trade Regulation §§ 11.02, 164.01, 164.02 (Matthew Bender)

Moore's Federal Practice §§ 8.02, *12.03* (Matthew Bender 3d ed.)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices *§ 45*

L Ed Index, Sherman Act

Supreme Court's construction and application of *Rules 8* and *9 of Federal Rules of Civil Procedure*, concerning general rules of pleading and pleading special matters. *122 L. Ed. 2d 897*.

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. § 1 et seq.*). *64 L. Ed. 2d 997*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

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[15] It would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs. See *Fed. Rule Civ. Proc. 54(d)(1)* ("[C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs").

Credit Suisse Sec. (USA) LLC v. Billing

Supreme Court of the United States

March 27, 2007, Argued ; June 18, 2007, Decided

No. 05-1157

Reporter

551 U.S. 264 *; 127 S. Ct. 2383 **; 168 L. Ed. 2d 145 ***; 2007 U.S. LEXIS 7724 ****; 75 U.S.L.W. 4449; 2007-1 Trade Cas. (CCH) P75,738; Fed. Sec. L. Rep. (CCH) P94,334; 20 Fla. L. Weekly Fed. S 369

CREDIT SUISSE SECURITIES (USA) LLC, fka CREDIT SUISSE FIRST BOSTON LLC, et al., Petitioners v. GLEN BILLING et al.

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Billing v. Credit Suisse First Boston Ltd., 426 F.3d 130, 2005 U.S. App. LEXIS 21019 (2d Cir. N.Y., 2005)

Disposition: Reversed.

Core Terms

antitrust, underwriters, securities law, shares, anti trust law, investors, syndicate, practices, remedies, regulations, saving clause, complaints, courts, commissions, marketing, lawsuit, prices, rights, forbid, rates, customer, buy, immunity, Stock, incompatible, respondents', precludes, securities-related, anticompetitive, provisions

LexisNexis® Headnotes

Antitrust & Trade Law > General Overview

HN1[] **Antitrust & Trade Law**

Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN2[] Regulated Industries, Financial Institutions

Where possible, courts should reconcile the operation of both antitrust and securities statutory schemes rather than holding one completely ousted. The United States Supreme Court has set forth a standard, namely that repeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Exchanges & Other Markets > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN3[] Regulated Industries, Financial Institutions

The United States Supreme Court has noted that the Securities and Exchange Commission lacks jurisdiction under the securities law to review particular instances of enforcement of exchange rules and that nothing has been built into the regulatory scheme which performs the antitrust function of insuring that rules that injure competition are nonetheless justified as furthering legitimate regulatory "ends."

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Rules & Regulations

HN4[] Regulated Industries, Financial Institutions

An "implied repeal" of the antitrust laws will be found only where there is a plain repugnancy between the antitrust and regulatory provisions. The securities law gives the Securities and Exchange Commission direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN5[] Regulated Industries, Financial Institutions

The United States Supreme Court has found that the securities law precludes antitrust liability even in respect to a practice that both ***antitrust law*** and securities law might forbid.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Civil Liability Considerations > Securities Litigation Reform & Standards > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN6[] **Regulated Industries, Financial Institutions**

It is wrong to regard *15 U.S.C.S. §§ 77p(a)* and *78bb(a)* as saving clauses so broad as to preserve all antitrust actions.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Securities Law > Postoffering & Secondary Distributions > Scope of Provisions > Statutory Application & Interpretation

HN7[] **Regulated Industries, Financial Institutions**

When a court decides whether securities law precludes ***antitrust law***, it is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint--or whether the two are "clearly incompatible." Moreover, in finding sufficient incompatibility to warrant an implication of preclusion, the United States Supreme Court has treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In prior decisions, the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.

Securities Law > ... > Remedies > Damages > Compensatory Damages

Securities Law > Initial Offerings of Securities > General Overview

HN8[] **Damages, Compensatory Damages**

The Securities and Exchange Commission possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages. *15 U.S.C.S. §§ 78bb*, *78u-4*, *77k*.

Securities Law > Initial Offerings of Securities > General Overview

HN9[] **Securities Law, Initial Offerings of Securities**

In respect to "laddering" the Securities and Exchange Commission (SEC) forbids an underwriter to solicit customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for initial public offering stock, *17 C.F.R. §§ 242.100-242.105*. But at the same time the SEC permits, indeed encourages, underwriters (as part of the "bookbuilding" process) to inquire as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity.

Securities Law > Initial Offerings of Securities > General Overview

HN10[] **Securities Law, Initial Offerings of Securities**

In respect to "tying" and other efforts to obtain an increased commission from future sales, the Securities and Exchange Commission (SEC) has sought to prohibit an underwriter from demanding an offer from their customers of any payment or other consideration such as the purchase of a different security in addition to the security's stated consideration. But the SEC would permit a firm to allocate initial public offering shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services.

Antitrust & Trade Law > Regulated Industries > Financial Institutions > General Overview

Business & Corporate Compliance > ... > Regulators > US Securities & Exchange Commission > Rules & Regulations

HN11[] **Regulated Industries, Financial Institutions**

The Securities and Exchange Commission (SEC) is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior. *15 U.S.C.S. §§ 77b(b)*, *78w(a)(2)*. *15 U.S.C.S. § 77b(b)* instructs the SEC to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The SEC shall consider among other matters the impact any such rule or regulation would have on competition. *15 U.S.C.S. § 78w(a)(2)*.

Lawyers' Edition Display

Decision

[*145]** Federal securities laws held to implicitly preclude application of antitrust laws to allegedly illegal conduct of underwriters during initial public offerings of shares of some companies.

Summary

Procedural posture: Respondent investors filed antitrust class-action lawsuits against petitioner underwriters under the Sherman Act, the Clayton Act, as amended by the Robinson-Patman Act, and state antitrust laws. The district court dismissed the complaints based on incompatibility with securities laws. The United States Court of Appeals for the Second Circuit reversed and reinstated the complaints. The underwriters' petition for certiorari was granted.

Overview: The investors alleged that the underwriters, during initial public offerings, unlawfully agreed with one another that they would not sell shares of a popular new issue to an investor unless that investor committed (1) to buy additional shares of that security later at escalating prices ("laddering"), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities ("tying"). The Court determined that the securities laws implicitly precluded the application of the antitrust laws to the conduct alleged because the securities laws were "clearly incompatible" with the application of the antitrust laws in this context since (1) the conduct was squarely within the heartland of securities regulations, (2) the Securities and Exchange Commission (SEC) had a clear and adequate authority to regulate the conduct, (3) the SEC actively enforced the rules and regulations regarding the conduct, and (4) there was a serious conflict between the antitrust and regulatory regimes. An **[***146]** antitrust action in this context would be accompanied by a substantial risk of injury to the securities markets.

Outcome: The Court reversed the appellate court's judgment.

Headnotes

STATUTES §248.5 > REGULATORY STATUTES -- ANTITRUST > Headnote:
LEdHN[1][] [1]

Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STATUTES §248.5 > ANTITRUST LAWS -- IMPLIED REPEAL -- SECURITIES STATUTES > Headnote:
LEdHN[2][] [2]

Where possible, courts should reconcile the operation of both antitrust and securities statutory schemes rather than holding one completely ousted. The United States Supreme Court has set forth a standard, namely that repeal of the antitrust laws is to be regarded as implied only if necessary to make the Securities Exchange Act work, and even then only to the minimum extent necessary. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STOCK AND COMMODITIES EXCHANGES §5 > SECURITIES EXCHANGE COMMISSION -- EXCHANGE RULES > Headnote:
LEdHN[3][] [3]

The United States Supreme Court has noted that the Securities and Exchange Commission lacks jurisdiction under the securities law to review particular instances of enforcement of exchange rules and that nothing has been built into the regulatory scheme which performs the antitrust function of insuring that rules that injure competition are nonetheless justified as furthering legitimate regulatory "ends." (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STATUTES §248.5STOCK AND COMMODITIES EXCHANGES §5 > ANTITRUST LAWS -- IMPLIED REPEAL -- SECURITIES EXCHANGES > Headnote:
LEdHN[4][] [4]

An "implied repeal" of the antitrust laws will be found only where there is a plain repugnancy between the antitrust and regulatory provisions. The securities law gives the Securities and Exchange Commission direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > ANTITRUST LIABILITY -- SECURITIES LAW > Headnote:
LEdHN[5][] [5]

The United States Supreme Court has found that the securities law precludes antitrust liability even in respect to a practice that both ***antitrust law*** and securities law might forbid. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

[*147]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §20 > ANTITRUST ACTIONS -- SECURITIES LAW > Headnote:
LEdHN[6][] [6]

It is wrong to regard *15 U.S.C.S. §§ 77p(a)* and *78bb(a)* as saving clauses so broad as to preserve all antitrust actions. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

STATUTES §248.5 > ***ANTITRUST LAW*** -- IMPLIED PRECLUSION BY SECURITIES LAW > Headnote:
LEdHN[7][] [7]

When a court decides whether securities law precludes ***antitrust law***, it is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint--or whether the two are "clearly incompatible." Moreover, in finding sufficient incompatibility to warrant an implication of preclusion, the United States Supreme Court has treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In prior decisions, the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

SECURITIES REGULATION §6 SECURITIES REGULATION §15 > REGULATION OF UNDERWRITERS -- DAMAGES > Headnote:
LEdHN[8][] [8]

The Securities and Exchange Commission possesses considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages. *15 U.S.C.S. §§ 78bb*, *78u-4*, *77k*. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

SECURITIES REGULATION §6 > REGULATION OF UNDERWRITERS -- "LADDERING" -- "BOOK BUILDING" > Headnote:
LEdHN[9][] [9]

In respect to "laddering" the Securities and Exchange Commission (SEC) forbids an underwriter to solicit customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for initial public offering stock, *17 C.F.R. §§ 242.100-242.105*. But at the same time the SEC permits, indeed encourages, underwriters (as part of the "book building" process) to inquire as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

[*148]**

SECURITIES REGULATION §6 > REGULATION OF UNDERWRITERS -- "TYING" > Headnote:
LEdHN[10][] [10]

In respect to "tying" and other efforts to obtain an increased commission from future sales, the Securities and Exchange Commission (SEC) has sought to prohibit an underwriter from demanding an offer from their customers of any payment or other consideration such as the purchase of a different security in addition to the security's stated consideration. But the SEC would permit a firm to allocate initial public offering shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

SECURITIES REGULATION §10 > SECURITIES AND EXCHANGE COMMISSION -- COMPETITIVE CONSIDERATIONS > Headnote:
LEdHN[11][] [11]

The Securities and Exchange Commission (SEC) is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior. *15 U.S.C.S. §§ 77b(b)*, *78w(a)(2)*. *15 U.S.C.S. § 77b(b)* instructs the SEC to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation. The SEC shall consider among other matters the impact any such rule or regulation would have on competition. *15 U.S.C.S. § 78w(a)(2)*. (Breyer, J., joined by Roberts, Ch. J., and Scalia, Souter, Ginsburg, and Alito, JJ.)

Syllabus

[*149]** Respondent investors filed suit, alleging that petitioner investment banks, acting as underwriters, violated antitrust laws when they formed syndicates to help execute initial public offerings for several hundred technology-related companies. Respondents claim that the underwriters unlawfully agreed that they would not sell newly issued securities to a buyer unless the buyer committed (1) to buy additional shares of that security later at escalating prices (known as "laddering"), (2) to pay unusually high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable **[****2]** securities (known as "tying"). The underwriters moved to dismiss, claiming that federal securities law impliedly precludes application of antitrust laws to the conduct in question. The District Court dismissed the complaints, but the Second Circuit reversed.

Held: The securities law implicitly precludes the application of the antitrust laws to the conduct alleged in this case. Pp. 4-20.

(a) Where regulatory statutes are silent in respect to antitrust, courts must determine whether, and in what respects, they implicitly preclude the antitrust laws' application. Taken together, *Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389*; *Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463*; and *United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (NASD)*, make clear that a court deciding this preclusion issue is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint, *i.e.,* whether the two are "clearly incompatible." Moreover, *Gordon* and *NASD*, in finding sufficient incompatibility to warrant an implication **[****3]** of preclusion, treated as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct. In addition, (4) in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that securities law seeks to regulate. Pp. 4-10.

(b) Several considerations--the underwriters' efforts jointly to promote and sell newly issued securities is central to the proper functioning of well-regulated capital markets; the law grants the Securities and Exchange Commission (SEC) authority to supervise such activities; and the SEC has continuously exercised its legal authority to regulate this type of conduct--show that the first, second, and fourth conditions are satisfied in this case. This leaves the third condition: whether there is a conflict rising to the level of incompatibility. Pp. 10-12.

(c) The complaints here can be read as attacking the *manner* in **[****4]** which the underwriters jointly seek to collect "excessive" commissions through the practices of laddering, tying, and collecting excessive commissions, which according to respondents the SEC itself has already disapproved and, in all likelihood, will not approve in the foreseeable future. Nonetheless, certain considerations, taken together, **[***150]** lead to the conclusion that securities law and ***antitrust law*** are clearly incompatible in this context. Pp. 12-19.

(1) First, to permit antitrust actions such as this threatens serious securities-related harm. For one thing, a fine, complex, detailed line separates activity that the SEC permits or encourages from activity that it forbids. And the SEC has the expertise to distinguish what is forbidden from what is allowed. For another thing, reasonable but contradictory inferences may be drawn from overlapping evidence that shows both unlawful antitrust activity and lawful securities marketing activity. Further, there is a serious risk that antitrust courts, with different nonexpert judges and different nonexpert juries, will produce inconsistent results. Together these factors mean there is no practical way to confine antitrust suits so that **[****5]** they challenge only the kind of activity the investors seek to target, which is presently unlawful and will likely remain unlawful under the securities law. Rather, these considerations suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And that threat means that underwriters must act to avoid not simply conduct that the securities law forbids, but also joint conduct that the securities law permits or encourages. Thus, allowing an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities market. Pp. 14-17.

(2) Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, investors harmed by underwriters' unlawful practices may sue and obtain damages under the securities law. Finally, the fact that the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations makes it somewhat less necessary to rely on antitrust actions to address anticompetitive behavior. Pp. 17-18.

(3) **[****6]** In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between application of the antitrust laws and proper enforcement of the securities law. The Solicitor General's proposal to avoid this conflict does not convincingly address these concerns. Pp. 18-19.

426 F.3d 130, reversed.

Counsel: Stephen M. Shapiro argued the cause for petitioners.

Paul D. Clement argued the cause for the United States, as amicus curiae, by special leave of court.

Christopher Lovell argued the cause for respondents.

Judges: Breyer, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Souter, Ginsburg, and Alito, JJ., joined. Stevens, J., filed an opinion concurring in the judgment; post, p. 285. Thomas, J., filed a dissenting opinion; post, p. 287. Kennedy, J., took no part in the consideration or decision of the case.

Opinion by: Breyer

Opinion

[*267] **[**2387]** Justice **Breyer** delivered the opinion of the Court.

A group of buyers of newly issued securities have filed an antitrust lawsuit against underwriting firms that market and distribute those issues. The buyers claim that the underwriters unlawfully agreed with one another that they would not sell shares of a popular new issue to a buyer unless that buyer committed (1) to buy additional **[****7]** shares of that security later at escalating prices (a practice called "laddering"), (2) to pay unusually **[***151]** high commissions on subsequent security purchases from the underwriters, or (3) to purchase from the underwriters other less desirable securities (a practice called "tying"). The question before us is whether there is a "'plain repugnancy'" between these antitrust claims and the federal securities law. See *Gordon v. New York Stock Exchange, Inc., 422 U.S. 659, 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975)* (quoting *United States v. Philadelphia Nat. Bank, 374 U.S. 321, 350-351, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (1963))*. We conclude that there is. Consequently we must interpret the securities laws as implicitly precluding the application of the antitrust laws to the conduct alleged **[*268]** in this case. See *422 U.S., at 682, 689, 691, 95 S. Ct. 2598, 45 L. Ed. 2d 463*; see also *United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)* *(NASD)*; *Silver v.* ***[**2388]*** *New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*.

I

A

The underwriting practices at issue take place during the course of an initial public offering (IPO) of shares in a company. An IPO presents an opportunity to raise capital for a new enterprise **[****8]** by selling shares to the investing public. A group of underwriters will typically form a syndicate to help market the shares. The syndicate will investigate and estimate likely market demand for the shares at various prices. It will then recommend to the firm a price and the number of shares it believes the firm should offer. Ultimately, the syndicate will promise to buy from the firm all the newly issued shares on a specified date at a fixed, agreed-upon price, which price the syndicate will then charge investors when it resells the shares. When the syndicate buys the shares from the issuing firm, however, the firm gives the syndicate a price discount, which amounts to the syndicate's commission. See generally L. Loss & J. Seligman, Fundamentals of Securities Regulation 66-72 (4th ed. 2001).

At the heart of the syndicate's IPO marketing activity lie its efforts to determine suitable initial share prices and quantities. At first, the syndicate makes a preliminary estimate that it submits in a registration statement to the Securities and Exchange Commission (SEC). It then conducts a "road show" during which syndicate underwriters and representatives of the offering firm meet potential **[****9]** investors and engage in a process that the industry calls "bookbuilding." During this time, the underwriters and firm representatives present information to investors about the company and the stock. And they attempt to gauge the strength of the investors' interest in purchasing the stock. For this purpose, underwriters **[*269]** might well ask the investors how their interest would vary depending upon price and the number of shares that are offered. They will learn, among other things, which investors might buy shares, in what quantities, at what prices, and for how long each is likely to hold purchased shares before selling them to others.

On the basis of this kind of information, the members of the underwriting syndicate work out final arrangements with the issuing firm, fixing the price per share and specifying the number of shares for which the underwriters will be jointly responsible. **[***152]** As we have said, after buying the shares at a discounted price, the syndicate resells the shares to investors at the fixed price, in effect earning its commission in the process.

B

In January 2002, respondents, a group of 60 investors, filed two antitrust class-action lawsuits against petitioners, **[****10]** 10 leading investment banks. They sought relief under § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, *15 U.S.C. § 1*; § 2(c) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1527, *15 U.S.C. § 13(c)*; and state antitrust laws. App. 1, 14. The investors stated that between March 1997 and December 2000 the banks had acted as underwriters, forming syndicates that helped execute the IPOs of several hundred technology-related companies. *Id.,* at 22. Respondents' antitrust complaints allege that the underwriters "abused the . . . practice of combining into underwriting syndicates" by agreeing among themselves to impose harmful conditions upon potential investors--conditions that the investors apparently were willing to accept in order to obtain an allocation of new shares that were in high demand. *Id.,* at 12.

[2389]** These conditions, according to respondents, consist of a requirement that the investors pay "additional anticompetitive charges" over and above the agreed-upon IPO share price plus underwriting commission. In particular, these additional **[*270]** charges took the form of (1) investor promises "to place **[****11]** bids . . . in the aftermarket at prices above the IPO price" (*i.e.*, "laddering" agreements); (2) investor "commitments to purchase other, less attractive securities" (*i.e.*, "tying" arrangements); and (3) investor payment of "non-competitively determined" (*i.e.*, excessive) "commissions," including the "purchas[e] of an issuer's shares in follow-up or 'secondary' public offerings (for which the underwriters would earn underwriting discounts)." *Id.,* at 12-13. The complaint added that the underwriters' agreement to engage in some or all of these practices artificially inflated the share prices of the securities in question. *Id.,* at 32.

The underwriters moved to dismiss the investors' complaints on the ground that federal securities law impliedly precludes application of antitrust laws to the conduct in question. (The antitrust laws at issue include the commercial bribery provisions of the Robinson-Patman Act.) The District Court agreed with petitioners and dismissed the complaints against them. See *In re Initial Public Offering Antitrust Litigation, 287 F. Supp. 2d 497, 524-525 (SDNY 2003) (IPO Antitrust).* The Court of Appeals for the Second **[****12]** Circuit reversed, however, and reinstated the complaints. *426 F.3d 130, 170, 172 (2005)*. We granted the underwriters' petition for certiorari. And we now reverse the judgment of the Court of Appeals.

II

A

Sometimes regulatory statutes explicitly state whether they preclude application of the antitrust laws. Compare, *e.g.*, Webb-Pomerene Act, *15 U.S.C. § 62* (expressly providing antitrust immunity) with § 601(b)(1) of the Telecommunications Act of 1996, *47 U.S.C. § 152* (stating that antitrust laws remain applicable). See also *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko,* ***[***153]*** *LLP, 540 U.S. 398, 406-407, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* (analyzing the antitrust saving clause of the **[*271]** Telecommunications Act). ***HN1***[] ***LEdHN[1]***[] [1] Where regulatory statutes are silent in respect to antitrust, however, courts must determine whether, and in what respects, they implicitly preclude application of the antitrust laws. Those determinations may vary from statute to statute, depending upon the relation between the antitrust laws and the regulatory program set forth in the particular statute, and the relation of the specific conduct at issue to both sets of laws. Compare **[****13]** *Gordon, 422 U.S., at 689, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (finding implied preclusion of antitrust laws); and NASD, 422 U.S., at 729-730, 95 S. Ct. 2427, 45 L. Ed. 2d 486 (same), with Otter Tail Power Co. v. United States, 410 U.S. 366, 374-375, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973) (finding no implied immunity); Philadelphia Nat. Bank, 374 U.S., at 352, 83 S. Ct. 1715, 10 L. Ed. 2d 915 (same); and Silver, 373 U.S., at 360, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (same). See also Phonetele, Inc. v. American Tel. & Tel. Co., 664 F.2d 716, 727 (CA9 1981).

Three decisions from this Court specifically address the relation of securities law to ***antitrust law***. In *Silver* the Court considered a dealer's claim that, by expelling him from the New York Stock Exchange, the exchange had violated the antitrust prohibition against group "boycott[s]." 373 U.S., at 347, 83 S. Ct. 1246, 10 L. Ed. 2d 389. The Court wrote that, ***HN2***[] ***LEdHN[2]***[] [2] where possible, courts should "reconcil[e] the operation of both [*i.e.*, antitrust and securities] statutory schemes . . . **[**2390]** rather than holding one completely ousted." Id., at 357, 83 S. Ct. 1246, 10 L. Ed. 2d 389. It also set forth a standard, namely, that "[r]epeal [of the antitrust laws] is to be regarded as implied only if necessary to make the Securities Exchange **[****14]** Act work, and even then only to the minimum extent necessary." *Ibid.* And it held that the securities law did *not* preclude application of the antitrust laws to the claimed boycott *insofar as the exchange denied the expelled dealer a right to fair procedures.* Id., at 359-360, 83 S. Ct. 1246, 10 L. Ed. 2d 389.

In reaching this conclusion, ***HN3***[] ***LEdHN[3]***[] [3] the Court noted that the SEC lacked jurisdiction under the securities law "to review particular instances of enforcement of exchange rules"; that "nothing [was] built into the regulatory scheme which performs the antitrust function of insuring" that rules that injure **[*272]** competition are nonetheless "justified as furthering" legitimate regulatory "ends"; that the expulsion "would clearly" violate "the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act"; and that it could find *no such justifying purpose* where the exchange took "anticompetitive collective action . . . *without according fair procedures.*" Id., at 357-358, 364, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (emphasis added).

In *Gordon* the Court considered an antitrust complaint that essentially alleged "price fixing" among stockbrokers. It charged that members of the New York **[****15]** Stock Exchange had agreed to fix their commissions on sales under $ 500,000. And it sought damages and an injunction forbidding future agreements. 422 U.S., at 661, and n 3, 95 S. Ct. 2598, 45 L. Ed. 2d 463. The lawsuit was filed at a time when regulatory attitudes toward fixed stockbroker commissions were changing. The fixed commissions challenged in the complaint were applied during a **[***154]** period when the SEC approved of the practice of fixing broker-commission rates. But Congress and the SEC had both subsequently disapproved for the future the fixing of some of those rates. See id., at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463.

In deciding whether antitrust liability could lie, the Court repeated *Silver*'s general standard in somewhat different terms: It said that ***HN4***[] ***LEdHN[4]***[] [4] an "implied repeal" of the antitrust laws would be found only "where there is a 'plain repugnancy between the antitrust and regulatory provisions.'" 422 U.S., at 682, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (quoting Philadelphia Nat. Bank, supra, at 350-351, 83 S. Ct. 1715, 10 L. Ed. 2d 915). It then held that the securities laws impliedly precluded application of the antitrust laws in the case at hand. The Court rested this conclusion on three sets of considerations. For one thing, the securities law "gave the **[****16]** SEC direct regulatory power over exchange rules and practices with respect to the fixing of reasonable rates of commission." 422 U.S., at 685, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (internal quotation marks omitted). For another, the SEC had "taken an active role in review of proposed rate changes during the last 15 years," and had engaged in "continuing **[*273]** activity" in respect to the regulation of commission rates. *Ibid.* Finally, without antitrust immunity, "the exchanges and their members" would be subject to "conflicting standards." Id., at 689, 95 S. Ct. 2598, 45 L. Ed. 2d 463.

This last consideration--the conflict--was complicated due to Congress', and the agency's, changing views about the validity of fixed commissions. As far as the *past* fixing of rates was concerned, the conflict was clear: The ***antitrust law*** had forbidden the very thing that the securities law had then permitted, namely, an anticompetitive ratesetting process. In respect to the future, however, the conflict was less apparent. That was because the SEC's new (congressionally authorized) prohibition of (certain) fixed rates would take effect in **[**2391]** the near-term future.

And after that time the SEC and the ***antitrust law*** would *both* likely prohibit **[****17]** some of the ratefixing to which the plaintiff's injunction would likely apply. See *id., at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463*.

Despite the likely compatibility of the laws in the future, the Court nonetheless expressly found *conflict.* The conflict arose from the fact that the law permitted the SEC to supervise the competitive setting of rates and to "*reintroduc[e] . . . fixed rates,*" *id., at 691, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (emphasis added), under certain conditions. The Court consequently wrote that "failure to imply repeal would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates." *Ibid.* The upshot is that, in light of potential future conflict, ***HN5***[] ***LEdHN[5]***[] [5] the Court found that the securities law precluded antitrust liability even in respect to a practice that both ***antitrust law*** and securities law might forbid.

In *NASD* the Court considered a Department of Justice antitrust complaint claiming that mutual fund companies had agreed with securities broker-dealers (1) to fix "resale" prices, *i.e.*, the prices at which a broker-dealer would sell a mutual fund's shares to an investor or buy mutual fund shares from a fund investor (who wished to **[****18]** redeem the shares); (2) to fix other terms of sale including those related **[*274]** to when, how, to whom, and from whom the broker-dealers **[***155]** might sell and buy mutual fund shares; and (3) to prohibit broker-dealers from freely selling to, and buying shares from, one another. See *422 U.S., at 700-703, 95 S. Ct. 2427, 45 L. Ed. 2d 486*.

The Court again found "clear repugnancy," and it held that the securities law, by implication, precluded all parts of the antitrust claim. *Id., at 719, 95 S. Ct. 2427, 45 L. Ed. 2d 486*. In reaching this conclusion, the Court found that ***antitrust law*** (*e.g.*, forbidding resale price maintenance) and securities law (*e.g.*, permitting resale price maintenance) were in conflict. In deciding that the latter trumped the former, the Court relied upon the same kinds of considerations it found determinative in *Gordon.* In respect to the last set of allegations (restricting a free market in mutual fund shares among brokers), the Court said that (1) the relevant securities law "enables [the SEC] to monitor the activities questioned"; (2) "the history of Commission regulations suggests no laxity in the exercise of this authority"; and hence (3) allowing an antitrust suit to proceed that is "so directly **[****19]** related to the SEC's responsibilities" would present "a substantial danger that [broker-dealers and other defendants] would be subjected to duplicative and inconsistent standards." *NASD, 422 U.S., at 734-735, 95 S. Ct. 2427, 45 L. Ed. 2d 486*.

As to the other practices alleged in the complaint (concerning, *e.g.*, resale price maintenance), the Court emphasized that (1) the securities law "vested in the SEC final authority to determine whether and to what extent" the relevant practices "should be tolerated," *id., at 729, 95 S. Ct. 2427, 45 L. Ed. 2d 486*; (2) although the SEC has not actively supervised the relevant practices, that is only because the statute "reflects a clear congressional determination that, subject to Commission oversight, mutual funds should be allowed to retain the initiative in dealing with the potentially adverse effects of disruptive trading practices," *id., at 727, 95 S. Ct. 2427, 45 L. Ed. 2d 486*; and (3) the SEC has supervised the funds insofar as its "acceptance of fund-initiated restrictions for more than three decades . . . manifests an informed administrative **[*275]** judgment that the contractual restrictions . . . were appropriate means for combating the problems of the industry," *id., at 728, 95 S. Ct. 2427, 45 L. Ed. 2d 486.* **[****20]** The Court added that, in these respects, the SEC had engaged in "precisely the kind of **[**2392]** administrative oversight of private practices that Congress contemplated." *Ibid.*

As an initial matter these cases make clear that Justice Thomas ***HN6***[] ***LEdHN[6]***[] [6] is wrong to regard *§§ 77p(a)* and *78bb(a)* as saving clauses so broad as to preserve all antitrust actions. See *post*, p. 287, 168 L. Ed. 2d, at ____ (dissenting opinion). The United States advanced the same argument in *Gordon.* See Brief for United States as *Amicus Curiae* in *Gordon* v. *New York Stock Exchange, Inc.*, O. T. 1974, No. 74-304, pp 8, 42. And the Court, in finding immunity, necessarily rejected it. See also *NASD, supra, at 694, 95 S. Ct. 2427, 45 L. Ed. 2d 463* (same holding); *Herman & MacLean v. Huddleston, 459 U.S. 375, 383, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)* (finding saving clause applicable to overlap between *securities* laws where that "overlap [was] neither unusual nor unfortunate" (internal quotation marks omitted)). Although one party has made the argument in this Court, it was not presented in the courts below. And we shall not reexamine it.

[*156]** This Court's prior decisions also make clear that, ***HN7***[] ***LEdHN[7]***[] [7] when a court decides whether securities law precludes ***antitrust*** **[****21]** ***law***, it is deciding whether, given context and likely consequences, there is a "clear repugnancy" between the securities law and the antitrust complaint--or as we shall subsequently describe the matter, whether the two are "clearly incompatible." Moreover, *Gordon* and *NASD*, in finding sufficient incompatibility to warrant an implication of preclusion, have treated the following factors as critical: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; and (3) a resulting risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, **[*276]** duties, privileges, or standards of conduct. We also note (4) that in *Gordon* and *NASD* the possible conflict affected practices that lie squarely within an area of financial market activity that the securities law seeks to regulate.

B

These principles, applied to the complaints before us, considerably narrow our legal task. For the parties cannot reasonably dispute the existence here of several of the conditions that this Court previously regarded as crucial **[****22]** to finding that the securities law impliedly precludes the application of the antitrust laws.

First, the activities in question here--the underwriters' efforts jointly to promote and to sell newly issued securities--is central to the proper functioning of well-regulated capital markets. The IPO process supports new firms that seek to raise capital; it helps to spread ownership of those firms broadly among investors; it directs capital flows in ways that better correspond to the public's demand for goods and services. Moreover, financial experts, including the securities regulators, consider the general kind of joint underwriting activity at issue in this case, including road shows and bookbuilding efforts essential to the successful marketing of an IPO. See Memorandum *Amicus Curiae* of SEC in *IPO Antitrust,* Case No. 01 CIV 2014 (WHP) (SDNY), pp 15, 39-40, App. D to Pet. for Cert. 124a, 138a, 155a-157a (hereinafter Brief for SEC). Thus, the antitrust complaints before us concern practices that lie at the very heart of the securities marketing enterprise.

Second, the law grants the SEC authority to supervise all of the activities here in question. Indeed, ***HN8***[] ***LEdHN[8]***[] [8] the SEC possesses **[****23]** considerable power to forbid, permit, encourage, discourage, tolerate, limit, and otherwise regulate virtually every aspect of the practices in which underwriters engage. **[**2393]** See, *e.g.*, *15 U.S.C. §§ 77b(a)(3)*, *77j*, *77z-2* (granting SEC power to regulate the process of bookbuilding, solicitations **[*277]** of "indications of interest," and communications between underwriting participants and their customers, including those that occur during road shows); *§ 78o(c)(2)(D)* (granting SEC power to define and prevent through rules and regulations acts and practices that are fraudulent, deceptive, or manipulative); *§ 78i(a)(6)* (similar); *§ 78j(b)* (similar). Private individuals who suffer harm as a result of a violation of pertinent statutes and regulations may also recover damages. See *§§ 78bb*, *78u-4*, *77k*.

Third, the SEC has continuously exercised its legal authority to regulate conduct of the general kind now **[***157]** at issue. It has defined in detail, for example, what underwriters may and may not do and say during their road shows. Compare, *e.g.*, Guidance Regarding Prohibited Conduct in Connection with *IPO Allocations, 70 Fed. Reg. 19672 (2005)*, with Regulation M, **[****24]** *17 CFR §§ 242.100-242.105 (2006)*. It has brought actions against underwriters who have violated these SEC regulations. See Brief for SEC 13-14, App. D to Pet. for Cert. 136a-138a. And private litigants, too, have brought securities actions complaining of conduct virtually identical to the conduct at issue here; and they have obtained damages. *See, e.g., In re Initial Pub. Offering Securities Litigation, 241 F. Supp. 2d 281 (SDNY 2003)*.

The preceding considerations show that the first condition (legal regulatory authority), the second condition (exercise of that authority), and the fourth condition (heartland securities activity) that were present in *Gordon* and *NASD* are satisfied in this case as well. Unlike *Silver,* there is here no question of the existence of appropriate regulatory authority, nor is there doubt as to whether the regulators have exercised that authority. Rather, the question before us concerns the third condition: Is there a conflict that rises to the level of incompatibility? Is an antitrust suit such as this likely to prove practically incompatible with the SEC's administration of the Nation's securities laws?

[*278] III

A

Given the **[****25]** SEC's comprehensive authority to regulate IPO underwriting syndicates, its active and ongoing exercise of that authority, and the undisputed need for joint IPO underwriter activity, we do not read the complaints as attacking the bare existence of IPO underwriting syndicates or any of the joint activity that the SEC considers a necessary component of IPO-related syndicate activity. See Brief for SEC 15, 39-40, App. D to Pet. for Cert. 138a, 155a-157a. See also *IPO Antitrust, 287 F. Supp. 2d, at 507* (discussing the history of syndicate marketing of IPOs); App. 12 (complaint attacks underwriters "*abus[e]*" of "the preexisting practice of combining into underwriting syndicates" (emphasis added)); H. R. Rep. No. 1383, 73d Cong., 2d Sess., 6-7 (1934); S. Rep. No. 792, 73d Cong., 2d Sess., 5 (1934) (law must give to securities agencies freedom to regulate agreements among syndicate members). Nor do we understand the complaints as questioning underwriter agreements to fix the levels of their commissions, whether or not the resulting price is "excessive." See *Gordon, 422 U.S., at 688-689, 95 S. Ct. 2598, 45 L. Ed. 2d 463* (securities law conflicts with, and therefore precludes, antitrust attack **[****26]** on the fixing of commissions where the SEC has not approved, but later *might* approve, the practice).

We nonetheless can read the complaints as attacking the *manner* in which the underwriters jointly seek to collect "excessive" commissions. The complaints attack **[**2394]** underwriter efforts to collect commissions through certain practices (*i.e.*, laddering, tying, collecting excessive commissions in the form of later sales of the issued shares), which according to respondents the SEC itself has already disapproved and, in all likelihood, will not approve in the foreseeable future. In respect to this set of claims, they contend that there is no possible "conflict" **[***158]** since both securities law and ***antitrust law*** aim to prohibit the same undesirable activity. Without a **[*279]** conflict, they add, there is no "repugnance" or "incompatibility," and this Court may not imply that securities law precludes an antitrust suit.

B

We accept the premises of respondents' argument--that the SEC has full regulatory authority over these practices, that it has actively exercised that authority, but that the SEC has *disapproved* (and, for argument's sake, we assume that it will continue to disapprove) the conduct **[****27]** that the antitrust complaints attack. Nonetheless, we cannot accept respondents' conclusion. Rather, several considerations taken together lead us to find that, even on these prorespondent assumptions, securities law and ***antitrust law*** are clearly incompatible.

First, to permit antitrust actions such as the present one *still* threatens serious securities-related harm. For one thing, an unusually serious legal line-drawing problem remains unabated. In the present context only a fine, complex, detailed line separates activity that the SEC permits or encourages (for which respondents must concede antitrust immunity) from activity that the SEC must (and inevitably will) forbid (and which, on respondents' theory, should be open to antitrust attack).

For example, ***HN9***[] ***LEdHN[9]***[] [9] in respect to "laddering" the SEC forbids an underwriter to "[s]olici[t] customers prior to the completion of the distribution regarding whether and at what price and in what quantity they intend to place immediate aftermarket orders for IPO stock," *70 Fed. Reg. 19675-19676* (emphasis deleted); *17 CFR §§ 242.100-242.105*. But at the same time the SEC permits, indeed encourages, underwriters (as part of the "bookbuilding" **[****28]** process) to "inquir[e] as to a customer's desired future position in the longer term (for example, three to six months), and the price or prices at which the customer might accumulate that position without reference to immediate aftermarket activity." *70 Fed. Reg. 19676*.

[*280] It will often be difficult for someone who is not familiar with accepted syndicate practices to determine with confidence whether an underwriter has insisted that an investor buy more shares in the immediate aftermarket (forbidden), or has simply allocated more shares to an investor willing to purchase additional shares of that issue in the long run (permitted). And who but a securities expert could say whether the present SEC rules set forth a virtually permanent line, unlikely to change in ways that would permit the sorts of "laddering-like" conduct that it now seems to forbid? Cf. *Gordon, supra, at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463*.

Similarly, ***HN10***[] ***LEdHN[10]***[] [10] in respect to "tying" and other efforts to obtain an increased commission from future sales, the SEC has sought to prohibit an underwriter "from demanding . . . an offer from [its] customers of any payment or other consideration [such as the purchase of a different **[****29]** security] in addition to the security's stated consideration." *69 Fed. Reg. 75785 (2004)*. But the SEC would permit a firm to "allocat[e] IPO shares to a customer because the customer has separately retained the firm for other services, when the customer has not paid excessive compensation in relation to those services." *Ibid., and* n 108. The **[**2395]** National Association of Securities Dealers (NASD), over which the SEC exercises supervisory authority, **[***159]** has also proposed a rule that would prohibit a member underwriter from "offering or threatening to withhold" IPO shares "as consideration or inducement for the receipt of compensation that is excessive in relation to the services provided." *Id., at 77810*. The NASD would allow, however, a customer legitimately to compete for IPO shares by increasing the level and quantity of compensation it pays to the underwriter. See *ibid.* (describing NASD Proposed Rule 2712(a)).

Under these standards, to distinguish what is forbidden from what is allowed requires an understanding of just when, in relation to services provided, a commission is "excessive," indeed, so "excessive" that it will remain *permanently* forbidden, **[*281]** see *Gordon, 422 U.S., at 690-691, 95 S. Ct. 2598, 45 L. Ed. 2d 463.* **[****30]** And who but the SEC itself could do so with confidence?

For another thing, evidence tending to show unlawful antitrust activity and evidence tending to show lawful securities marketing activity may overlap, or prove identical. Consider, for instance, a conversation between an underwriter and an investor about how long an investor intends to hold the new shares (and at what price), say, a conversation that elicits comments concerning both the investor's short and longer term plans. That exchange might, as a plaintiff sees it, provide evidence of an underwriter's insistence upon "laddering" or, as a defendant sees it, provide evidence of a lawful effort to allocate shares to those who will hold them for a longer time. See Brief for United States as *Amicus Curiae* 27.

Similarly, the same somewhat ambiguous conversation might help to establish an effort to collect an unlawfully high commission through atypically high commissions on later sales or through the sales of less popular stocks. Or it might prove only that the underwriter allocates more popular shares to investors who will help stabilize the aftermarket share price. See, *e.g., Department of Enforcement v. Respondent,* Disciplinary Proc. **[****31]** No. CAF030014, (NASD Hearing Mar. 3, 2006), pp. 12-13 (redacted decision), called for review, Complaint No. CAFD30014 (NASD Nat. Adjudicatory Council, Apr. 11, 2006).

Further, antitrust plaintiffs may bring lawsuits throughout the Nation in dozens of different courts with different nonexpert judges and different nonexpert juries. In light of the nuanced nature of the evidentiary evaluations necessary to separate the permissible from the impermissible, it will prove difficult for those many different courts to reach consistent results. And, given the fact-related nature of many such evaluations, it will also prove difficult to ensure that the different courts evaluate similar fact patterns consistently. The result is an unusually high risk that different **[*282]** courts will evaluate similar factual circumstances differently. See Hovenkamp, Antitrust Violations in Securities Markets, 28 J. Corp. L. 607, 629 (2003) ("Once regulation of an industry is entrusted to jury trials, the outcomes of antitrust proceedings will be inconsistent with one another . . .").

Now consider these factors together--the fine securities-related lines separating the permissible from the impermissible; the need for securities-related expertise (particularly to determine whether an SEC rule is **[****32]** likely permanent); the overlapping evidence from which reasonable but contradictory inferences may be drawn; and the risk of inconsistent court results. Together these factors mean there is no practical way to **[***160]** confine antitrust suits so that they challenge only activity of the kind the investors seek to target, activity that is presently unlawful and will likely remain unlawful under the securities law. Rather, **[**2396]** these factors suggest that antitrust courts are likely to make unusually serious mistakes in this respect. And the threat of antitrust mistakes, *i.e.*, results that stray outside the narrow bounds that plaintiffs seek to set, means that underwriters must act in ways that will avoid not simply conduct that the securities law forbids (and will likely continue to forbid), but also a wide range of joint conduct that the securities law permits or encourages (but which they fear could lead to an antitrust lawsuit and the risk of treble damages). And therein lies the problem.

This kind of problem exists to some degree in respect to other antitrust lawsuits. But here the factors we have mentioned make mistakes unusually likely (a matter relevant to Congress' determination of which **[****33]** institution should regulate a particular set of market activities). And the role that joint conduct plays in respect to the marketing of IPOs, along with the important role IPOs themselves play in relation to the effective functioning of capital markets, means that the securities-related costs of mistakes is unusually high. It is no wonder, then, that the SEC told the District Court (consistent **[*283]** with what the Government tells us here) that a "failure to hold that the alleged conduct was immunized would threaten to disrupt the full range of the Commission's ability to exercise its regulatory authority," adding that it would have a "chilling effect" on "lawful joint activities . . . of tremendous importance to the economy of the country." Brief for SEC 39-40, App. D to Pet. for Cert. 157a.

We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten **[****34]** serious harm to the efficient functioning of the securities markets.

Second, any enforcement-related need for an antitrust lawsuit is unusually small. For one thing, the SEC actively enforces the rules and regulations that forbid the conduct in question. For another, as we have said, investors harmed by underwriters' unlawful practices may bring lawsuits and obtain damages under the securities law. See *supra, at 276-277, 168 L. Ed. 2d, at 156-157*. Finally, ***HN11***[] ***LEdHN[11]***[] [11] the SEC is itself required to take account of competitive considerations when it creates securities-related policy and embodies it in rules and regulations. And that fact makes it somewhat less necessary to rely upon antitrust actions to address anticompetitive behavior. See *15 U.S.C. § 77b(b)* (instructing the SEC to consider, "in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation"); *§ 78w(a)(2)* (the SEC "shall consider among other matters the impact any such rule or regulation would have on competition"); *Trinko, 540 U.S., at 412, 124 S. Ct. 872, 157 L. Ed. 2d 823* ("[T]he additional benefit to competition provided by antitrust enforcement will tend to be small" where other laws **[****35]** and regulatory structures **[***161]** are "designed to deter and remedy anticompetitive harm").

[*284] We also note that Congress, in an effort to weed out unmeritorious securities lawsuits, has recently tightened the procedural requirements that plaintiffs must satisfy when they file those suits. To permit an antitrust lawsuit risks circumventing these requirements by permitting plaintiffs to dress what is essentially a securities complaint in antitrust clothing. See generally Private Securities Litigation Reform Act of 1995, *109 Stat. 737*; Securities Litigation **[**2397]** Uniform Standards Act of 1998, *112 Stat. 3227*.

In sum, an antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct. Together these considerations indicate a serious conflict between, on the one hand, application of the antitrust laws and, on the other, proper enforcement of the securities law.

We are aware that the Solicitor General, while recognizing the conflict, suggests a procedural device that he believes will avoid it (in effect, a compromise between the differing positions that the SEC and Antitrust **[****36]** Division of the Department of Justice took in the courts below). Compare Brief for Dept. of Justice, Antitrust Division, as *Amicus Curiae* in Case No. 01 CIV 2014, p 23 (seeking no preclusion of the antitrust laws), with Brief for SEC 39-40, App. D to Pet. for Cert. 155a-157a (seeking total preclusion of the antitrust laws). He asks us to remand this case to the District Court so that it can determine "whether respondents' allegations of prohibited conduct can, as a practical matter, be separated from conduct that is permitted by the regulatory scheme," and in doing so, the lower court should decide whether SEC-permitted and SEC-prohibited conduct are "inextricably intertwined." See Brief for United States as *Amicus Curiae* 9, 26. The Solicitor General fears that otherwise, we might read the law as totally precluding application of the ***antitrust law*** to underwriting syndicate behavior, even were underwriters, say, overtly to divide markets.

[*285] The Solicitor General's proposed disposition, however, does not convincingly address the concerns we have set forth here--the difficulty of drawing a complex, sinuous line separating securities-permitted from securities-forbidden conduct, the **[****37]** need for securities-related expertise to draw that line, the likelihood that litigating parties will depend upon the same evidence yet expect courts to draw different inferences from it, and the serious risk that antitrust courts will produce inconsistent results that, in turn, will overly deter syndicate practices important in the marketing of new issues. (We also note that market divisions appear to fall well outside the heartland of activities related to the underwriting process than the conduct before us here, and we express no view in respect to that kind of activity.)

The upshot is that all four elements present in *Gordon* are present here: (1) an area of conduct squarely within the heartland of securities regulations; (2) clear and adequate SEC authority to regulate; (3) active and ongoing agency regulation; and (4) a serious conflict between the antitrust and regulatory regimes. We therefore **[***162]** conclude that the securities laws are "clearly incompatible" with the application of the antitrust laws in this context.

The Second Circuit's contrary judgment is reversed.

Justice **Kennedy** took no part in the consideration or decision of this case.

Concur by: Stevens

Concur

Justice **Stevens, [****38]** concurring in the judgment.

When investment bankers cooperate in underwriting an initial public offering (IPO), they increase the amount of capital available to firms producing goods and services and make additional securities available for purchase. By agglomerating networks of investors and spreading the risk of overvaluation, syndicates make positive contributions to the economy that could not be achieved through independent action. See *426 F.3d 130, 137-138 (CA2 2005)*. **[**2398]** In my view, agreements **[*286]** among underwriters on how best to market IPOs, including agreements on price and other terms of sale to initial investors, should be treated as procompetitive joint ventures for purposes of antitrust analysis. In all but the rarest of cases, they cannot be conspiracies in restraint of trade within the meaning of § 1 of the Sherman Act, *15 U.S.C. § 1*.

After the initial purchase, the prices of newly issued stocks or bonds are determined by competition among the vast multitude of other securities traded in a free market. To suggest that an underwriting syndicate can restrain trade in that market by manipulating the terms of IPOs is frivolous. See *United States v. Morgan, 118 F. Supp. 621, 689 (SDNY 1953)* **[****39]** (Medina, J.) ("[T]he syndicate system has no effect whatever on general market prices, nor do the participating underwriters and dealers intend it to have any. On the contrary, it is the general market prices of securities of comparable rating and quality which control the public offering price . . . . The particular issue, even if a large one, is but an infinitesimal unit of trade in the ocean of security issues running into the billions, which constitutes the general market"); see also Hovenkamp, Antitrust Violations in Securities Markets, 28 J. Corp. L. 607, 615-618 (2003). It is possible, of course, that the practices described in the complaints in these two cases may have enabled the underwriters to divert some of the benefits of the offerings from the issuers to themselves, thus breaching the agents' fiduciary obligations to their principals. But if such an injury did occur, it is not an "antitrust injury" giving rise to a damages claim by investors. See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977)*.

Nor do I believe that the so-called "laddering" and "tying" described in the complaints constitute vertical restraints that **[****40]** violate either the Sherman Act or § 2(c) of the Robinson-Patman Act, *15 U.S.C. § 13(c)*. Given the magnitude of the market these practices are alleged to have influenced, I think it obvious as a matter of law that there has **[*287]** been no injury to any relevant competition. Unlike in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*, there is no need to **[***163]** engage in discovery to determine whether there is any merit to the plaintiffs' claims. See *id., at 593-595, 127 S. Ct. 1955, 1974-1989*(Stevens, J., dissenting).

The defendants moved to dismiss for failure to state a claim on the ground, among others, that the plaintiffs' claims challenge "the ordinary activities of participants in underwriting syndicates, which are recognized to be completely lawful and procompetitive." Record, Doc. 98, p 72. I agree and would hold, as we did in *Parker v. Brown, 317 U.S. 341, 351-352, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, that the defendants' alleged conduct does not violate the antitrust laws, rather than holding that Congress has implicitly granted them immunity from those laws. Surely I would not suggest, as the Court did in *Twombly*, and as it does again today, **[****41]** that either the burdens of antitrust litigation or the risk "that antitrust courts are likely to make unusually serious mistakes," *ante, at 282, 168 L. Ed. 2d, at 160*, should play any role in the analysis of the question of law presented in a case such as this.

Accordingly, I concur in the Court's judgment but not in its opinion.

Dissent by: Thomas

Dissent

Justice **Thomas,** dissenting.

The Court believes it must decide whether the securities laws implicitly preclude application of the antitrust laws because **[**2399]** the securities statutes "are silent in respect to antitrust." See *ante, at 271, 168 L. Ed. 2d, at 153*. I disagree with that basic premise. The securities statutes are not silent. Both the Securities Act and the Securities Exchange Act contain broad saving clauses that preserve rights and remedies existing outside of the securities laws.

Section 16 of the Securities Act of 1933 states that "the rights and remedies provided by this subchapter shall be in addition to any and all other rights and remedies that may exist at law or in equity." *15 U.S.C. § 77p(a)*. In parallel **[*288]** fashion, *§ 28* of the Securities Exchange Act of 1934 states that "the rights and remedies provided by this chapter shall be in addition to **[****42]** any and all other rights and remedies that may exist at law or in equity." *§ 78bb(a)*. This Court has previously characterized those clauses as "confirm[ing] that the remedies in each Act were to be supplemented by 'any and all' additional remedies." *Herman & MacLean v. Huddleston, 459 U.S. 375, 383, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)*.

The Sherman Act was enacted in 1890. See *26 Stat. 209*. Accordingly, rights and remedies under the federal antitrust laws certainly would have been thought of as "rights and remedies" that existed "at law or in equity" by the Congresses that enacted that Securities Act and the Securities Exchange Act in the early 1930's. See *§ 77p*; *§ 78bb*. Therefore, both statutes explicitly save the very remedies the Court holds to be impliedly precluded. There is no convincing argument for why these saving provisions should not resolve this case in respondents' favor.

The Court's opinion overlooks the saving clauses seemingly because they do not "explicitly state whether they preclude application of the antitrust laws." *Ante, at 270, 168 L. Ed. 2d, at 152*; see also Brief for Petitioners **[***164]** 33, n 5. [1] As the Court observes, some statutes contain saving clauses specific to antitrust. See, **[****43]** *e.g., Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 406, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*("'[N]othing in this Act or the amendments made by this Act shall be construed to modify, impair, or supersede the applicability of **[*289]** any of the antitrust laws' (quoting Telecommunications Act of 1996, § 601(b)(1), 110 Stat. 143, note following *47 U.S.C. § 152*")). But the mere existence of targeted saving clauses does not demonstrate--or even suggest--that antitrust remedies are not included within the "any and all" other remedies to which the securities saving clauses refer. Although Congress may have singled out antitrust remedies

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[1] The Court suggests that the argument advanced in my opinion was not preserved by respondents. See *ante, at 275, 168 L. Ed. 2d, at 155*. Respondents' principal contention in the Court of Appeals below was that "[t]he federal securities laws do not expressly immunize Defendants' alleged conduct from prosecution under the federal antitrust laws." See, *e.g.*, Brief for Appellants in No. 03-9288 (CA2), pp 15-16. Because a full reading of the securities laws is essential to analyzing respondents' central argument, I do not consider arguments based on the saving clauses unpreserved. Cf. *United States v. Morton, 467 U.S. 822, 828, 104 S. Ct. 2769, 81 L. Ed. 2d 680 (1984)* ("[W]e read statutes as a whole").

for special treatment in some statutes, it is not precluded from using more general saving provisions that encompass antitrust and other remedies. Surely Congress is not required to enumerate every cause of action--state and federal--that may be brought. When Congress wants to preserve all other remedies, using the word "all" is sufficient.

[**44]** Petitioners also argue that the saving clauses should not apply because the clauses did not play a role in the Court's prior securities-antitrust pre-emption cases. Brief for Petitioners 33, n 5 ("[N]either **[**2400]** provision was found to bar immunity in *Gordon [v. New York Stock Exchange, Inc., 422 U.S. 659, 95 S. Ct. 2598, 45 L. Ed. 2d 463 (1975),]* or *[United States v. National Assn. of Securities Dealers, Inc., 422 U.S. 694 , 95 S. Ct. 2427, 45 L. Ed. 2d 486 (1975)(NASD)]*"). Be that as it may, none of the opinions in *Silver v. New York Stock Exchange, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963)*, *Gordon*, or *NASD*--majority or dissent--offered any analysis of the saving clauses. Omitted reasoning has little claim to precedential value. Absent any indication that these omissions were the product of reasoned analysis instead of inadvertent oversight, I would not allow the Court's prior silence on this issue to erect a perpetual bar to arguments based on a full reading of the statute's relevant text.

Finally, it might be argued that the saving clauses preserve only state-law rights and remedies. This argument has no textual basis. If Congress had intended to limit the clauses to state law, it surely would **[****45]** not have phrased them to preserve "*any and all*" rights and remedies. Other provisions in both Acts, including a later sentence in the section containing the Securities Exchange Act's saving clause, **[*290]** suggest that Congress explicitly referred to States when it intended to impose a state-law limitation. See, *e.g.*, *15 U.S.C. § 77v(a)* (referring to "State and Territorial courts"); *§ 78bb(a)* (referring to the "securities commission . . . of any State"); cf. *17 U.S.C. § 301(b)* ("Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State . . ."). Given Congress' demonstrated ability **[***165]** to limit provisions of the securities laws to States and the lack of any such limitation here, the saving clauses cannot be understood as limited only to state-law rights and remedies. [2]

[**46]** A straightforward application of the saving clauses to this case leads to the conclusion that respondents' antitrust suits must proceed. Accordingly, we do not need to reconcile any conflict between the securities laws and the antitrust laws. I respectfully dissent.

References

15 U.S.C.S. §§ 77p(a), *78bb(a)*

Antitrust Law and Trade Regulation §§ 66.01, 66.02 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 20

L Ed Index, Robinson-Patman Act; Securities Regulation; Sherman Act

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

The doctrine of primary administrative jurisdiction as defined and applied by the Supreme Court. *38 L. Ed. 2d 796*.

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[2] The Court's suggestion that the clauses were intended to save only securities-related rights and remedies is subject to many of the same criticisms. See *ante, at 275, 168 L. Ed. 2d, at 155-156*. The Securities Act of 1933 provided no private federal remedy for fraud in the purchase or sale of registered securities. On the Court's proposed reading of *§ 77p*, however, a federal action for mail or wire fraud and a state-law action for fraud, which are not securities-related rights or remedies, would not have been included within the Securities Act's saving provision.

Leegin Creative Leather Prods. v. PSKS, Inc.

Supreme Court of the United States

March 26, 2007, Argued ; June 28, 2007, Decided

No. 06-480

Reporter

551 U.S. 877 *; 127 S. Ct. 2705 **; 168 L. Ed. 2d 623 ***; 2007 U.S. LEXIS 8668 ****; 75 U.S.L.W. 4643; 2007-1 Trade Cas. (CCH) P75,753; 35 A.L.R. Fed. 2d 631; 20 Fla. L. Weekly Fed. S 466

LEEGIN CREATIVE LEATHER PRODUCTS, INC., Petitioner v. PSKS, INC., dba KAY'S KLOSET . . . KAY'S SHOES

Subsequent History: **[****1]** On remand at, Remanded by *PSKS, Inc. v. Leegin Creative Leather Prods., 498 F.3d 486, 2007 U.S. App. LEXIS 20957 (5th Cir. Tex., Aug. 30, 2007)*

Prior History: ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PSKS, Inc. v. Leegin Creative Leather Prods., 171 Fed. Appx. 464, 2006 U.S. App. LEXIS 6879 (5th Cir. Tex., 2006)

Disposition: Reversed and remanded.

Core Terms

resale price, manufacturer, retailers, vertical, consumers, per se rule, prices, antitrust, rule of reason, dealers, overruling, producer, courts, anticompetitive, distributors, brand, effects, cases, anti trust law, procompetitive, products, benefits, riding, cartel, Sherman Act, common-law, horizontal, Amici, discount, repealed

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN1[] **Sherman Act, Scope**

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. While *§ 1* could be interpreted to proscribe all contracts, the United States Supreme Court has never taken a literal approach to its language. Rather, the Supreme Court has repeated time and again that *§ 1* outlaws only unreasonable restraints.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] Per Se Rule & Rule of Reason, Sherman Act

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN3[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The rule of reason does not govern all restraints. Some types are deemed unlawful per se. The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, and, it must be acknowledged, the per se rule can give clear guidance for certain conduct. Restraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN4[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Resort to per se rules is confined to restraints that would always or almost always tend to restrict competition and decrease output. To justify a per se prohibition a restraint must have "manifestly anticompetitive" effects, and lack any redeeming virtue. As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that the United States Supreme Court has expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. And a departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN5[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The United States Supreme Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. The state of the common law 400 or even 100 years ago is irrelevant to the issue of the effect of the antitrust laws upon vertical distributional restraints in the American economy today.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN6[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The United States Supreme Court has rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. The Supreme Court's recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Cartels & Horizontal Restraints > Price Fixing

HN7[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

HN8[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition and decrease output. Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN9[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The United States Supreme Court has explained that administrative advantages are not sufficient in themselves to justify the creation of per se rules, and has relegated their use to restraints that are "manifestly anticompetitive." There are traditional "demanding standards" for adopting per se rules.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN10[] Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason

The antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN11[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints.

Governments > Courts > Judicial Precedent

HN12[] **Courts, Judicial Precedent**

Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. And concerns about maintaining settled law are strong when the question is one of statutory interpretation.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN13[] **Sherman Act, Scope**

The general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act. From the beginning the United States Supreme Court has treated the Sherman Act as a common-law statute. Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraints of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. Likewise, the boundaries of the doctrine of per se illegality should not be immovable.

Antitrust & Trade Law > General Overview

Governments > Courts > Judicial Precedent

HN14[] **Antitrust & Trade Law**

In the antitrust context the fact that a decision has been "called into serious question" justifies a court's reevaluation of it.

Governments > Courts > Judicial Precedent

HN15[] **Courts, Judicial Precedent**

The United States Supreme Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN16[] **Vertical Restraints, Price Fixing**

A manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Nonprice Restraints

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The United States Supreme Court has overturned the per se rule for vertical nonprice restraints, adopting the rule of reason in its stead.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN18[] **Sherman Act, Claims**

The United States Supreme Court has required that antitrust plaintiffs alleging a *15 U.S.C.S. § 1* price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN19[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The per se rule applies only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

HN20[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Vertical maximum price-fixing agreements should be evaluated under the traditional rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN21[] **Per Se Rule & Rule of Reason, Sherman Act**

The text of the Consumer Goods Pricing Act did not codify the rule of per se illegality for vertical price restraints. It rescinded statutory provisions that made them per se legal. Congress once again placed these restraints within the ambit of *§ 1* (*15 U.S.C.S. § 1*) of the Sherman Act. And Congress intended *§ 1* to give courts the ability to develop governing principles of law in the common-law tradition.

Antitrust & Trade Law > General Overview

Governments > Courts > Judicial Precedent

HN22[] **Antitrust & Trade Law**

Antitrust doctrines evolve with new circumstances and new wisdom.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN23[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The rule of reason is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as per se legal.

Antitrust & Trade Law > General Overview

HN24[] **Antitrust & Trade Law**

The purpose of the antitrust laws is the protection of competition, not competitors.

Governments > Courts > Judicial Precedent

HN25[] **Courts, Judicial Precedent**

Reliance on a judicial opinion is a significant reason to adhere to it, especially in cases involving property and contract rights.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Price Fixing

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Vertical Restraints > Resale Price Maintenance

HN26[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The United States Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911)*, is now overruled. Vertical price restraints are to be judged according to the rule of reason.

Lawyers' Edition Display

Decision

[*623]** Manufacturer's agreement with distributor on minimum price that distributor could charge for manufacturer's goods held not per se illegal under § 1 of Sherman Act (*15 U.S.C.S. § 1*); vertical price restraints held required to be judged by rule of reason.

Summary

Procedural posture: Respondent retailer sued petitioner manufacturer, alleging an antitrust violation under § 1 (*15 U.S.C.S. § 1*) of the Sherman Act. Under the per se rule, the district court excluded the manufacturer's expert testimony regarding the procompetitive effects of its pricing policy. A jury found for the retailer, and the district court trebled the damages. The United States Court of Appeals for the Fifth Circuit affirmed. Certiorari was granted.

Overview: The manufacturer instituted a retail pricing and promotion policy, refusing to sell to retailers that discounted its goods below suggested prices. The manufacturer planned to introduce expert testimony describing the procompetitive effects of its pricing policy, but the district court excluded the testimony, relying on the rule that it was per se illegal under the Sherman Act for a manufacturer to agree with its distributor to set the minimum price the distributor could charge for the manufacturer's goods. The United States Supreme Court decided to overrule the per se rule and determined that vertical price restraints were to be judged according to the rule of reason. The rule of reason was the appropriate standard to judge vertical price restraints and vertical minimum resale price maintenance agreements because (1) procompetitive justifications existed for a manufacturer's use of resale price maintenance, (2) the primary purpose of the antitrust laws was to protect interbrand competition, (3) administrative advantages were not sufficient in themselves to justify the creation of per se rules, and (4) stare decisis did not compel the Court's continued adherence to the per se rule.

[*624] Outcome:** The Court reversed the appellate court's judgment and remanded the case for further proceedings.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > UNREASONABLE RESTRAINTS OF TRADE > Headnote:
LEdHN[1][] [1]

Section 1 of the Sherman Act prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States. *15 U.S.C.S. § 1*. While § 1 could be interpreted to proscribe all contracts, the United States Supreme Court has never taken a literal approach to its language. Rather, the Supreme Court has repeated time and again that § 1 outlaws only unreasonable restraints.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > RESTRAINTS OF TRADE -- RULE OF REASON > Headnote:
LEdHN[2][] [2]

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1 (*15 U.S.C.S. § 1*) of the Sherman Act. Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Appropriate factors to take into account include specific information about the relevant business and the restraint's history, nature, and effect. Whether the businesses involved have market power is a further, significant consideration. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36 > RESTRAINTS OF TRADE -- RULE OF REASON -- PER SE ILLEGALITY > Headnote:
LEdHN[3][] [3]

The rule of reason does not govern all restraints. Some types are deemed unlawful per se. The per se rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, and, it must be acknowledged, the per se rule can give clear guidance for certain conduct. Restraints that are per se unlawful include horizontal agreements among competitors to fix prices or to divide markets.

[*625]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > RESTRAINTS OF TRADE -- PER SE ILLEGALITY -- INVALIDITY UNDER RULE OF REASON > Headnote:
LEdHN[4][] [4]

Resort to per se rules is confined to restraints that would always or almost always tend to restrict competition and decrease output. To justify a per se prohibition a restraint must have "manifestly anticompetitive" effects, and lack any redeeming virtue. As a consequence, the per se rule is appropriate only after courts have had considerable experience with the type of restraint at issue, and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason. It should come as no surprise, then, that the United States Supreme Court has expressed reluctance to adopt per se rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious. And a departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than upon formalistic line drawing.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > VERTICAL RESTRAINTS OF TRADE -- COMMON LAW > Headnote:
LEdHN[5][] [5]

The United States Supreme Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. The state of the common law 400 or even 100 years ago is irrelevant to the issue of the effect of the antitrust laws upon vertical distributional restraints in the American economy today.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > RESTRAINTS OF TRADE -- HORIZONTAL -- VERTICAL > Headnote:
LEdHN[6][] [6]

The United States Supreme Court has rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. The Supreme Court's recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements.

EVIDENCE §979RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > PRICES -- RESTRAINTS OF TRADE -- HORIZONTAL -- VERTICAL > Headnote:
LEdHN[7][] [7]

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, per se unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL RESTRAINTS OF TRADE -- RESALE PRICE > Headnote:
LEdHN[8][] [8]

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance always or almost always tends to restrict competition and decrease output. Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed.

[*626]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > RESTRAINTS OF TRADE -- PER SE ILLEGALITY > Headnote:
LEdHN[9][] [9]

The United States Supreme Court has explained that administrative advantages are not sufficient in themselves to justify the creation of per se rules, and has relegated their use to restraints that are "manifestly anticompetitive." There are traditional "demanding standards" for adopting per se rules.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.3 > ANTITRUST -- INTERBRAND COMPETITION > Headnote:
LEdHN[10][] [10]

The antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- RULE OF REASON > Headnote:
LEdHN[11][] [11]

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints.

COURTS §766 COURTS §775.5 > COURTS -- STARE DECISIS > Headnote:
LEdHN[12][] [12]

Stare decisis reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right. And concerns about maintaining settled law are strong when the question is one of statutory interpretation.

EVIDENCE §343.5RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §7 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 > SHERMAN ACT -- RULE OF REASON -- PER SE ILLEGALITY > Headnote:
LEdHN[13][] [13]

The general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act. From the beginning the United States Supreme Court has treated the Sherman Act as a common-law statute. Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraints of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. Likewise, the boundaries of the doctrine of per se illegality should not be immovable.

COURTS §775.5 > ANTITRUST -- REEVALUATION OF JUDICIAL DECISION > Headnote:
LEdHN[14][] [14]

In the antitrust context the fact that a decision has been "called into serious question" justifies a court's reevaluation of it.

COURTS §776 > SUPREME COURT -- OVERRULING PRECEDENTS > Headnote:
LEdHN[15][] [15]

The United States Supreme Court has overruled its precedents when subsequent cases have undermined their doctrinal underpinnings.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > ANTITRUST -- SUGGESTED RESALE PRICE > Headnote:
LEdHN[16][] [16]

A manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §29 > NONPRICE RESTRAINTS OF TRADE -- RULE OF REASON > Headnote:
LEdHN[17][] [17]

The United States Supreme Court has overturned the per se rule for vertical nonprice restraints, adopting the rule of reason in its stead.

[*627]**

EVIDENCE §979 > EVIDENCE OF ANTITRUST VIOLATION > Headnote:
LEdHN[18][] [18]

The United States Supreme Court has required that antitrust plaintiffs alleging a *15 U.S.C.S. § 1* price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > PRICES -- RESTRAINTS OF TRADE -- PER SE ILLEGALITY > Headnote:
LEdHN[19][] [19]

The per se rule applies only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > PRICE FIXING -- RULE OF REASON > Headnote:
LEdHN[20][] [20]

Vertical maximum price-fixing agreements should be evaluated under the traditional rule of reason.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §7 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- PER SE ILLEGALITY > Headnote:
LEdHN[21][] [21]

The text of the Consumer Goods Pricing Act did not codify the rule of per se illegality for vertical price restraints. It rescinded statutory provisions that made them per se legal. Congress once again placed these restraints within the ambit of § 1 (*15 U.S.C.S. § 1*) of the Sherman Act. And Congress intended § 1 to give courts the ability to develop governing principles of law in the common-law tradition.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §4 > ANTITRUST DOCTRINES -- EVOLUTION > Headnote:
LEdHN[22][] [22]

Antitrust doctrines evolve with new circumstances and new wisdom.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- RULE OF REASON > Headnote:
LEdHN[23][] [23]

The rule of reason is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as per se legal.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §6 > ANTITRUST LAWS -- PURPOSE > Headnote:
LEdHN[24][] [24]

The purpose of the antitrust laws is the protection of competition, not competitors.

COURTS §775 > COURTS -- ADHERENCE TO PRIOR DECISION > Headnote:
LEdHN[25][] [25]

Reliance on a judicial opinion is a significant reason to adhere to it, especially in cases involving property and contract rights.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41 > VERTICAL PRICE RESTRAINTS -- OVERRULING PRIOR DECISION > Headnote:
LEdHN[26][] [26]

The United States Supreme Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, is now overruled. Vertical price restraints are to be judged according to the rule of reason.

Syllabus

[*628]** Given its policy of refusing to sell to retailers that discount its goods below suggested prices, petitioner (Leegin) stopped selling to respondent's (PSKS) store. PSKS filed suit, alleging, *inter alia,* that Leegin violated the antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices. The District Court excluded expert testimony about Leegin's pricing policy's procompetitive effects on the ground that *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502*, makes it *per se* illegal under *§ 1* of the Sherman Act for a manufacturer and **[****2]** its distributor to agree on the minimum price the distributor can charge for the manufacturer's goods. At trial, PSKS alleged that Leegin and its retailers had agreed to fix prices, but Leegin argued that its pricing policy was lawful under *§ 1*. The jury found for PSKS. On appeal, the Fifth Circuit declined to apply the rule of reason to Leegin's vertical price-fixing agreements and affirmed, finding that *Dr. Miles*' *per se* rule rendered irrelevant any procompetitive justifications for Leegin's policy.

Held:

Dr. Miles is overruled, and vertical price restraints are to be judged by the rule of reason. Pp. 5-28.

[*629]** (a) The accepted standard for testing whether a practice restrains trade in violation of *§ 1* is the rule of reason, which requires the factfinder to weigh "all of the circumstances," *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, including "specific information about the relevant business" and "the restraint's history, nature, and effect," *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. The rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive **[****3]** effect that are in the consumer's best interest. However, when a restraint is deemed "unlawful *per se,*" *ibid.,* the need to study an individual restraint's reasonableness in light of real market forces is eliminated, *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. Resort to *per se* rules is confined to restraints "that would always or almost always tend to restrict competition and decrease output." *Ibid.* Thus, a *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1*, and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason, see *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48*. Pp. 5-7.

(b) Because the reasons upon which *Dr. Miles* relied do not justify a *per se* rule, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices and to determine whether the *per se* rule is **[****4]** nonetheless appropriate. Were this Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints. Pp. 7-19.

(1) Economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance, and the few recent studies on the subject also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition among retailers selling the same brand. This is important because the antitrust laws' "primary purpose . . . is to protect interbrand competition," *Khan, supra, at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199*. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers. **[****5]** Resale price maintenance may also give consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between. Absent vertical price restraints, retail services that enhance interbrand competition might be underprovided because discounting retailers can free ride on retailers who furnish services and then capture some of the demand those services generate. Retail price maintenance can also increase interbrand competition **[***630]** by facilitating market entry for new firms and brands and by encouraging retailer services that would not be provided even absent free riding. Pp. 9-12.

(2) Setting minimum resale prices may also have anticompetitive effects; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel or be used to organize retail cartels. It can also be abused by a powerful manufacturer or retailer. Thus, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated. Pp. 12-14.

(3) Notwithstanding the risks of unlawful conduct, it cannot be stated **[****6]** with any degree of confidence that retail price maintenance "always or almost always tend[s] to restrict competition and decrease output," *Business Electronics, supra, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. Vertical retail price agreements have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed; and the limited empirical evidence available does not suggest efficient uses of the agreements are infrequent or hypothetical. A *per se* rule should not be adopted for administrative convenience alone. Such rules can be counterproductive, increasing the antitrust system's total cost by prohibiting procompetitive conduct the antitrust laws should encourage. And a *per se* rule cannot be justified by the possibility of higher prices absent a further showing of anticompetitive conduct. The antitrust laws primarily are designed to protect interbrand competition from which lower prices can later result. Respondent's argument overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. Resale price maintenance has economic dangers. If the rule of reason were to apply, courts would have to **[****7]** be diligent in eliminating their anticompetitive uses from the market. Factors relevant to the inquiry are the number of manufacturers using the practice, the restraint's source, and a manufacturer's market power. The rule of reason is designed and used to ascertain whether transactions are anticompetitive or procompetitive. This standard principle applies to vertical price restraints. As courts gain experience with these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Pp. 14-19.

(c) *Stare decisis* does not compel continued adherence to the *per se* rule here. Because the Sherman Act is treated as a common-law statute, its prohibition on "restraint[s] of trade" evolves to meet the dynamics of present economic conditions. The rule of reason's case-by-case adjudication implements this common-law approach. Here, respected economics authorities suggest that the *per se* rule is inappropriate. And both the Department of Justice and the Federal Trade Commission recommend replacing the **[****8]** *per se* rule with the rule of reason. In addition, this Court has "overruled [its] precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson v. United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405*. It is not surprising that the Court has distanced itself from *Dr. Miles*' rationales, for the case was decided not long **[***631]** after the Sherman Act was enacted, when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, the Court reined in the decision, holding that a manufacturer can suggest resale prices and refuse to deal with distributors who do not follow them, *United States v. Colgate & Co., 250 U.S. 300, 307-308, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460*; and more recently the Court has tempered, limited, or overruled once strict vertical restraint prohibitions, see, *e.g., GTE Sylvania, 433 U.S., at 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with the Court's other vertical restraint cases. Deciding that procompetitive effects of resale price maintenance are insufficient to overrule *Dr. Miles* would call into question cases such **[****9]** as *Colgate* and *GTE Sylvania.* Respondent's arguments for reaffirming *Dr. Miles* based on *stare decisis* do not require a different result. Pp. 19-28.

171 Fed. Appx. 464, reversed and remanded.

Counsel: Theodore B. Olson argued the cause for petitioner.

Thomas G. Hungar argued the cause for the United States, as amicus curiae, by special leave of court.

Robert W. Coykendall argued the cause for respondent.

Barbara D. Underwood argued the cause for New York, et al., as amici curiae, by special leave of court.

Judges: Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Thomas, and Alito, JJ., joined. Breyer, J., filed a dissenting opinion, in which Stevens, Souter, and Ginsburg, JJ., joined, post, p. 908.

Opinion by: KENNEDY

Opinion

[*881] **[**2710]** Justice **Kennedy** delivered the opinion of the Court.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act, *15 U.S.C. § 1*, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. The question presented by the instant case is **[*882]** whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of *§ 1*. The Court has abandoned the rule of *per se* illegality for other vertical restraints **[****10]** a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.

I

Petitioner, Leegin Creative Leather Products, Inc. (Leegin), designs, manufactures, and distributes leather goods and accessories. In 1991, Leegin began to sell belts under the brand name "Brighton." The Brighton brand has now expanded into a variety of women's fashion accessories. It is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. Leegin's president, Jerry Kohl, also has an interest in about 70 stores that sell Brighton products. Leegin asserts that, at least for its products, small retailers treat customers better, **[**2711]** provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers. Kohl explained: "[W]e want the consumers to get a different experience than they get in Sam's Club or in Wal-Mart. And you can't get that kind of experience or support or **[****11]** customer service from a store like Wal-Mart." 5 Record 127.

[*632]** Respondent, PSKS, Inc. (PSKS), operates Kay's Kloset, a women's apparel store in Lewisville, Texas. Kay's Kloset buys from about 75 different manufacturers and at one time sold the Brighton brand. It first started purchasing Brighton goods from Leegin in 1995. Once it began selling the brand, the store promoted Brighton. For example, it ran Brighton advertisements and had Brighton days in the store. **[*883]** Kay's Kloset became the destination retailer in the area to buy Brighton products. Brighton was the store's most important brand and once accounted for 40 to 50 percent of its profits.

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy." 4 *id.,* at 939. Following the policy, Leegin refused to sell to retailers that discounted Brighton goods below suggested prices. The policy contained an exception for products not selling well that the retailer did not plan on reordering. In the letter to retailers establishing the policy, Leegin stated:

> "In this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support **[****12]** of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.
> "We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.
>
> "We realize that half the equation is Leegin producing great Brighton product and the other half is you, our retailer, creating great looking stores selling our products in a quality manner." *Ibid.*

Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation.

A year after instituting the pricing policy Leegin introduced a marketing strategy known as the "Heart Store Program." See *id.,* at 962-972. It offered retailers incentives to become Heart Stores, and, in exchange, retailers pledged, among other things, to sell at Leegin's suggested prices. Kay's Kloset became a Heart Store soon after Leegin created **[*884]** the program. After a Leegin **[****13]** employee visited the store and found it unattractive, the parties appear to have agreed that Kay's Kloset would not be a Heart Store beyond 1998. Despite losing this status, Kay's Kloset continued to increase its Brighton sales.

In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by 20 percent. Kay's Kloset contended it placed Brighton products on sale to compete with nearby retailers who also were undercutting Leegin's suggested prices. Leegin, nonetheless, requested that Kay's Kloset cease discounting. Its request refused, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales.

[2712]** PSKS sued Leegin in the United States District Court for the Eastern District of Texas. It alleged, among other claims, that Leegin had violated the antitrust laws by "enter[ing] into **[***633]** agreements with retailers to charge only those prices fixed by Leegin." *Id.,* at 1236. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The District Court excluded the testimony, relying on the *per se* rule established by *Dr. Miles.* At trial **[****14]** PSKS argued that the Heart Store program, among other things, demonstrated Leegin and its retailers had agreed to fix prices. Leegin responded that it had established a unilateral pricing policy lawful under *§ 1*, which applies only to concerted action. See *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. The jury agreed with PSKS and awarded it $1.2 million. Pursuant to *15 U.S.C. § 15(a)*, the District Court trebled the damages and reimbursed PSKS for its attorney's fees and costs. It entered judgment against Leegin in the amount of $3,975,000.80.

The Court of Appeals for the Fifth Circuit affirmed. *171 Fed. Appx. 464 (2006) (per curiam).* On appeal Leegin did not dispute that it had entered into vertical price-fixing agreements with its retailers. Rather, it contended that the **[*885]** rule of reason should have applied to those agreements. The Court of Appeals rejected this argument. *Id., at 466-467*. It was correct to explain that it remained bound by *Dr. Miles* "[b]ecause [the Supreme] Court has consistently applied the *per se* rule to [vertical minimum price-fixing] agreements." *171 Fed. Appx., at 466*. **[****15]**

On this premise the Court of Appeals held that the District Court did not abuse its discretion in excluding the testimony of Leegin's economic expert, for the *per se* rule rendered irrelevant any procompetitive justifications for Leegin's pricing policy. *Id., at 467*. We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful. *549 U.S. 1092, 127 S. Ct. 763, 166 L. Ed. 2d 590 (2006)*

II

HN1[] **LEdHN**[] *Section 1* of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." Ch. 647, 26 Stat. 209, as amended, *15 U.S.C. § 1*. While *§ 1* could be interpreted to proscribe all contracts, see, *e.g., Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*, the Court has never "taken a literal approach to [its] language," *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Rather, the Court has repeated time and again that *§ 1* "outlaw[s] only unreasonable restraints." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

HN2[] **LEdHN[2]**[] [2] The rule of reason **[****16]** is the accepted standard for testing whether a practice restrains trade in violation of *§ 1*. See *Texaco, supra, at 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Appropriate factors to take into account include "specific information about the relevant business" and "the restraint's history, nature, and effect." *Khan, supra, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Whether the businesses **[*886]** involved have market power is **[***634]** a further, significant consideration. See, *e.g., Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (equating the rule of **[**2713]** reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect"); see also *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 45-46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating **[****17]** competition that are in the consumer's best interest.

HN3[] **LEdHN[3]**[] [3] The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*." *Khan, supra, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, *Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, see *Texaco, supra, at 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*, or to divide markets, see *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* *(per curiam).*

HN4[] **LEdHN[4]**[] [4] Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics, supra, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808* (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, **[****18]** *GTE Sylvania, supra, at 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, and "lack . . . any redeeming virtue," *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)* (internal quotation marks omitted).

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*, and only if courts can predict with confidence that it would be invalidated **[*887]** in all or almost all instances under the rule of reason, see *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Khan, supra, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199* (internal quotation marks omitted); see also White Motor Co. v. United States, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963) (refusing to adopt a *per se* rule for a vertical nonprice restraint **[****19]** because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a *per se* rule). And, as we have stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." GTE Sylvania, supra, at 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568.

[*635]** III

The Court has interpreted Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502, as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices. See, *e.g.,* Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). In *Dr. Miles* the plaintiff, a manufacturer of medicines, sold its products only to distributors **[**2714]** who agreed to resell them at set prices. The Court found the manufacturer's control of resale prices to be unlawful. It relied on the common-law rule that "a general restraint upon alienation is ordinarily invalid." 220 U.S., at 404-405, 31 S. Ct. 376, 55 L. Ed. 2d 502. The Court then explained that the agreements would advantage the distributors, not the manufacturer, and were analogous to a combination **[****20]** among competing distributors, which the law treated as void. Id., at 407-408, 31 S. Ct. 376, 55 L. Ed. 2d 502.

The reasoning of the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based. By relying on the common-law rule against restraints on alienation, id., at 404-405, 31 S. Ct. 376, 55 L. Ed. 2d 502, the Court justified its decision **[*888]** based on "formalistic" legal doctrine rather than "demonstrable economic effect," GTE Sylvania, 433 U.S., at 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568. The Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints. Yet the Sherman Act's use of "restraint of trade" "invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." Business Electronics, supra, at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808. The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here. Usually associated with land, not chattels, the rule arose from restrictions removing real property **[****21]** from the stream of commerce for generations. ***HN5***[] ***LEdHN[5]***[] [5] The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." GTE Sylvania, supra, at 53, n. 21, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (internal quotation marks omitted).

Dr. Miles, furthermore, treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. See 220 U.S., at 407-408, 31 S. Ct. 376, 55 L. Ed. 2d 502. In later cases, however, ***HN6***[] ***LEdHN[6]***[] [6] the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. See, *e.g.,* Business Electronics, supra, at 734, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (disclaiming the "notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality"); Maricopa County, supra, at 348, n 18, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (noting that "horizontal restraints are generally less defensible than vertical restraints"). Our recent **[****22]** cases formulate antitrust principles in accordance with the appreciated **[***636]** differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider.

[*889] The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate. See Business Electronics, 485 U.S., at 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808.

A

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. See, *e.g.,* Brief for Economists as *Amici Curiae* 16 ("In the theoretical literature, it is essentially undisputed **[**2715]** that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects"); Brief for United States as *Amicus Curiae* 9 ("[T]here is a widespread consensus that permitting a manufacturer to control **[****23]** the price at which its goods are sold may promote *inter*brand competition and consumer welfare in a variety of ways"); ABA Section of ***Antitrust Law***, ***Antitrust Law*** and Economics of Product Distribution 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes"); see also H. Hovenkamp, The Antitrust Enterprise: Principle and Execution 184-191 (2005) (hereinafter Hovenkamp); R. Bork, The Antitrust Paradox 288-291 (1978) (hereinafter Bork). Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects. See, *e.g.,* Brief for William S. Comanor et al. as *Amici Curiae* 3 ("[G]iven [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted"); F.Scherer & D. Ross, Industrial Market Structure and Economic Performance 558 (3d ed. 1990) (hereinafter Scherer & Ross) ("The overall balance **[*890]** between benefits and costs [of resale price maintenance] is probably close").

The few recent studies documenting the competitive **[****24]** effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. See Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 170 (1983) (hereinafter Overstreet) (noting that "[e]fficient uses of [resale price maintenance] are evidently not unusual or rare"); see also Ippolito, Resale Price Maintenance: Empirical Evidence From Litigation, 34 J. Law & Econ. 263, 292-293 (1991) (hereinafter Ippolito).

The justifications for vertical price restraints are similar to those for other vertical restraints. See *GTE Sylvania, 433 U.S., at 54-57, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Minimum resale price maintenance can stimulate interbrand competition--the competition among manufacturers selling different brands of the same type of product--by reducing intrabrand competition--the competition among retailers selling the same brand. See *id., at 51-52, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. The promotion **[***637]** of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition." *Khan, 522 U.S., at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199*. A single manufacturer's use of vertical price restraints **[****25]** tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. *GTE Sylvania, supra, at 55, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Consumers might learn, for example, about **[*891]** the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. R. Posner, ***Antitrust Law*** 172-173 (2d ed. 2001) (hereinafter Posner). Or consumers might decide to buy the product because **[**2716]** they see it in a retail establishment that has a reputation for selling high-quality merchandise. Marvel & McCafferty, Resale **[****26]** Price Maintenance and Quality Certification, 15 Rand J. Econ. 346, 347-349 (1984) (hereinafter Marvel & McCafferty). If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *GTE Sylvania, supra, at 55, 97 S. Ct. 2549, 53 L. Ed. 2d*

568; see Marvel & McCafferty 349 (noting that reliance on a retailer's reputation "will decline **[****27]** as the manufacturer's brand becomes better known, so that [resale price maintenance] may be particularly important as a competitive device for new entrants"). New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not **[*892]** be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the **[***638]** most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services. See Mathewson & Winter, The Law and Economics of Resale Price Maintenance, 13 Rev. Indus. Org. 57, 74-75 (1998) (hereinafter Mathewson & Winter); Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265, 295 (1988); **[****28]** see also Deneckere, Marvel, & Peck, Demand Uncertainty, Inventories, and Resale Price Maintenance, 111 Q. J. Econ. 885, 911 (1996) (noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer's goods in the face of uncertain consumer demand).

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever-present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. See *Business Electronics, 485 U.S., at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to **[**2717]** consumers. See *ibid.;* see also Posner 172; Overstreet 19-23.

[*893] Vertical price restraints also "might **[****29]** be used to organize cartels at the retailer level." *Business Electronics, supra, at 725-726, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. See Posner 172; Overstreet 13-19. Historical examples suggest this possibility is a legitimate concern. See, *e.g.,* Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985) (hereinafter Marvel) (providing an example of the power of the National Association of Retail Druggists to compel manufacturers to use resale price maintenance); Hovenkamp 186 (suggesting that the retail druggists in *Dr. Miles* formed a cartel and used manufacturers to enforce it).

HN7[] ***LEdHN[7]***[] [7] A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition **[****30]** in order to increase price is, and ought to be, *per se* unlawful. See *Texaco, 547 U.S., at 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *GTE Sylvania, 433 U.S., at 58, n 28, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

[*639]** Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's **[*894]** distribution network. See Overstreet 31; 8 P. Areeda & H. Hovenkamp, ***Antitrust Law*** 47 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); cf. *Toys "R" Us, Inc. v. FTC, 221 F.3d 928, 937-938 (CA7 2000)*. A manufacturer with market power, by comparison, might use resale price maintenance to give **[****31]** retailers an incentive not to sell the products of smaller rivals or new entrants. See, *e.g.,* Marvel 366-368. As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

HN8[] ***LEdHN[8]***[] [8] Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output." *Business Electronics, supra, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808* (internal quotation marks omitted). Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. See Overstreet 170; see also *id.,* at 80 (noting that for the majority of enforcement actions brought by the Federal Trade Commission between 1965 and 1982, "the use of [resale price maintenance] was not likely motivated by collusive dealers who had successfully coerced their suppliers"); Ippolito 292 (reaching a similar conclusion). **[****32] [**2718]** As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

Respondent contends, nonetheless, that vertical price restraints should be *per se* unlawful because of the administrative convenience of *per se* rules. See, *e.g., GTE Sylvania, supra, at 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (noting "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system"). That argument suggests **[*895]** *per se* illegality is the rule rather than the exception. This misinterprets our ***antitrust law***. *Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage. See Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 158 (1984) (hereinafter Easterbrook). They also may increase litigation costs by promoting frivolous suits against legitimate practices. ***HN9***[] ***LEdHN[9]***[] [9] The Court has thus explained that administrative "advantages are not sufficient **[****33]** in themselves to justify the creation of *per se* rules," *GTE Sylvania, 433 U.S., at 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, and has relegated their use to restraints that are "manifestly anticompetitive," *id., at 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Were the Court now to conclude **[***640]** that vertical price restraints should be *per se* illegal based on administrative costs, we would undermine, if not overrule, the traditional "demanding standards" for adopting *per se* rules. *Id., at 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Any possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.

Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods. See also Overstreet 160 (noting that "price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold"). Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. *id.,* at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with **[****34]** both procompetitive and anticompetitive theories"). For, as has been indicated already, ***HN10***[] ***LEdHN[10]***[] [10] the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. See *Khan, 522 U.S., at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199*. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be **[*896]** increased in the course of promoting procompetitive effects. See, *e.g., Business Electronics, 485 U.S., at 728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. And resale price maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful. See *infra*, at 902-904, 168 L. Ed. 2d, at 643-646; see also Marvel 371.

Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See *GTE Sylvania, 433 U.S., at 56, n 24, 97 S. Ct. 2549, 53 L. Ed. 2d 568*; see also *id., at 56, 97 S. Ct. 2549, 53 L. Ed. 2d 568* **[****35]** ("Economists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer **[**2719]** has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." *Id., at 52, n 19, 97 S. Ct. 2549, 53 L. Ed. 2d 568*; see *Business Electronics, supra, at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price." Mathewson & Winter 67.

The implications of respondent's position are far reaching. Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising **[****36]** agency to **[***641]** promote awareness of its goods. Yet no one would think these actions violate the **[*897]** Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. See Overstreet 22; Bork 294. Likewise, a retailer cartel is unlikely when only a single manufacturer **[****37]** in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. See Posner 172; Bork 292. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice. Cf. Scherer & Ross 558 (noting that "except when [resale price maintenance] spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets, most [resale price maintenance arrangements] are probably innocuous"); Easterbrook 162 (suggesting that "every one of the potentially-anti-competitive outcomes of vertical arrangements depends on the uniformity of the practice").

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus **[*898]** for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. See Brief for William S. Comanor et al. as *Amici Curiae* 7-8. If, by contrast, a manufacturer adopted **[****38]** the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. Cf. Posner 177 ("It makes all the difference whether minimum retail prices are imposed by the manufacturer in order to evoke point-of-sale services or by the dealers in order to obtain monopoly profits"). A manufacturer also has an incentive to protest inefficient retailer-induced **[**2720]** price restraints because they can harm its competitive position.

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. See also *Business Electronics, supra, at 727, n. 2, 108 S. Ct. 1515, 99 L. Ed. 2d 808* (noting "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers"). And if a manufacturer lacks market power, there is less likelihood it can use the practice **[***642]** to keep competitors away from distribution outlets.

HN11[] ***LEdHN[11]***[] [11] The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard **[****39]** principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions **[*899]** where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

For all of the foregoing reasons, we think that were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.

IV

We do not write on a clean slate, for the decision in *Dr. Miles* is almost a century old. So there is an argument for its retention on the basis of **[****40]** *stare decisis* alone. Even if *Dr. Miles* established an erroneous rule, ***HN12***[] ***LEdHN[12]***[] [12] "*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Khan, 522 U.S., at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199* (internal quotation marks omitted). And concerns about maintaining settled law are strong when the question is one of statutory interpretation. See, *e.g., Hohn v. United States, 524 U.S. 236, 251, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998)*.

Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. *Khan, supra, at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199* (***HN13***[] ***LEdHN[13]***[] [13] "[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. See *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; see also *Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77, 98, n 42, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981)* ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal **[****41]** statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. See *National Soc. of Professional* ***[*900]*** *Engineers, supra, at 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. Likewise, the boundaries of **[**2721]** the doctrine of *per se* illegality should not be immovable. For "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics,* ***[***643]*** *485 U.S., at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808*.

A

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. See, *e.g.,* Brief for Economists **[****42]** as *Amici Curiae* 16. It is also significant that both the Department of Justice and the Federal Trade Commission--the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance--have recommended that this Court replace the *per se* rule with the traditional rule of reason. See Brief for United States as *Amicus Curiae* 6. ***HN14***[] ***LEdHN[14]***[] [14] In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it. *Khan, supra, at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199*.

Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, ***HN15***[] ***LEdHN[15]***[] [15] "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson v. United States, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)*. The Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach. We have distanced ourselves from the opinion's rationales. See *supra,* at 887-889, 168 L. Ed. 2d, at 635; see also *Khan, supra, at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199* (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480-481, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)* **[****43]** (same). This is unsurprising, for the case was decided not long after enactment of the **[*901]** Sherman Act when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, moreover, the Court reined in the decision by holding that ***HN16***[] ***LEdHN[16]***[] [16] a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them. *Colgate, 250 U.S., at 307-308, 39 S. Ct. 465, 63 L. Ed. 2d 992*.

In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints. In 1977, ***HN17***[] ***LEdHN[17]***[] [17] the Court overturned the *per se* rule for vertical nonprice restraints, adopting the rule of reason in its stead. *GTE Sylvania, 433 U.S., at 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (overruling *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967))*; see also *433 U.S., at 58, n 29, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (noting "that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms"). While the Court in a footnote in *GTE Sylvania* suggested that differences between vertical price and nonprice restraints could support different legal treatment, see *id., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, **[****44]** the central part of the opinion relied on authorities and arguments that find unequal treatment "difficult to justify," *id., at 69-70, 97 S. Ct. 2549, 53 L. Ed. 2d 568* (White, J., concurring in judgment).

Continuing in this direction, in two cases in the 1980's the Court defined legal rules to limit the reach of *Dr.* **[***644]** *Miles* and to accommodate the doctrines enunciated in **[**2722]** *GTE Sylvania* and *Colgate.* See *Business Electronics, supra, at 726-728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; *Monsanto, 465 U.S., at 763-764, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. In *Monsanto*, ***HN18***[] ***LEdHN[18]***[] [18] the Court required that antitrust plaintiffs alleging a *§ 1* price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner. *Id., at 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. Unlike Justice Brennan's concurrence, which rejected arguments that *Dr. Miles* should be overruled, see *465 U.S., at 769, 104 S. Ct. 1464, 79 L. Ed. 2d 775*, the Court "decline[d] to reach the question" whether vertical agreements fixing resale prices always should be unlawful because neither party suggested otherwise, *id., at 761-762, n 7, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. In **[*902]** *Business Electronics* the Court further narrowed the scope of *Dr. Miles.* It held that ***LEdHN[19]***[] [19] **[****45]** ***HN19***[] the *per se* rule applied only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor. *485 U.S., at 726-727, 735-736, 108 S. Ct. 1515, 99 L. Ed. 2d 808*.

Most recently, in 1997, after examining the issue of vertical maximum price-fixing agreements in light of commentary and real experience, the Court overruled a 29-year-old precedent treating those agreements as *per se* illegal. *Khan, 522 U.S., at 22, 118 S. Ct. 275, 139 L. Ed. 2d 199* (overruling *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968))*. It held instead that ***HN20***[] ***LEdHN[20]***[] [20] they should be evaluated under the traditional rule of reason. *522 U.S., at 22, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Our continued limiting of the reach of the decision in *Dr. Miles* and our recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained.

The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints. If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and **[****46]** *GTE Sylvania* themselves would be called into question. These later decisions, while they may result in less intrabrand competition, can be justified because they permit manufacturers to secure the procompetitive benefits associated with vertical price restraints through other methods. The other methods, however, could be less efficient for a particular manufacturer to establish and sustain. The end result hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.

The manufacturer has a number of legitimate options to achieve benefits similar to those provided by vertical price restraints. A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. See *250 U.S., at 307, 39 S. Ct. 465, 63 L. Ed. 2d 992*. The economic effects of unilateral **[*903]** and concerted price setting are in general the same. See, *e.g., Monsanto, 465 U.S., at 762-764, 104 S. Ct. 1464, 79 L. Ed. 2d 775*. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages **[****47]** and potential criminal liability. *Ibid.; Business Electronics, supra,* ***[***645]*** *at 728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. Even with the stringent standards in

Monsanto and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures. See, *e.g.,* Brief for PING, Inc., as *Amicus Curiae* 9-18. A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. See *ibid.* The increased costs these burdensome **[**2723]** measures generate flow to consumers in the form of higher prices.

Furthermore, depending on the type of product it sells, a manufacturer might be able to achieve the procompetitive benefits of resale price maintenance by integrating downstream and selling its products directly to consumers. *Dr. Miles* tilts the relative costs of vertical integration and vertical agreement by making the former more attractive based on the *per se* rule, not on real market conditions. See *Business Electronics, supra, at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; see generally Coase, The Nature **[****48]** of the Firm, 4 Economica, New Series 386 (1937). This distortion might lead to inefficient integration that would not otherwise take place, so that consumers must again suffer the consequences of the suboptimal distribution strategy. And integration, unlike vertical price restraints, eliminates all intrabrand competition. See, *e.g., GTE Sylvania, supra, at 57, n 26, 97 S. Ct. 2549, 53 L. Ed. 2d 568*.

There is yet another consideration. A manufacturer can impose territorial restrictions on distributors and allow only one distributor to sell its goods in a given region. Our cases have recognized, and the economics literature confirms, that these vertical nonprice restraints have impacts similar to **[*904]** those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services. See, *e.g., Business Electronics, supra, at 728, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; *Monsanto, supra, at 762-763, 104 S. Ct. 1464, 79 L. Ed. 2d 775*; see also Brief for Economists as *Amici Curiae* 17-18. Cf. Scherer & Ross 560 (noting that vertical nonprice restraints "can engender inefficiencies at least as serious as those imposed upon the consumer by resale price maintenance"); Steiner, How Manufacturers Deal with the Price-Cutting **[****49]** Retailer: When Are Vertical Restraints Efficient? 65 Antitrust L. J. 407, 446-447 (1997) (indicating that "***antitrust law*** should recognize that the consumer interest is often better served by [resale price maintenance]--contrary to its per se illegality and the rule-of-reason status of vertical nonprice restraints"). The same legal standard (*per se* unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect. There is likewise little economic justification for the current differential treatment of vertical price and nonprice restraints. Furthermore, vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition. See Brief for Economists as *Amici Curiae* 17-18.

In sum, it is a flawed antitrust doctrine that serves the interests of lawyers--by creating legal distinctions that operate as traps for the **[***646]** unwary--more than the interests of consumers--by requiring manufacturers to choose second-best options to achieve sound business objectives.

B

Respondent's **[****50]** arguments for reaffirming *Dr. Miles* on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law **[*905]** enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632 . In 1975, however, Congress repealed both Acts. Consumer Goods Pricing Act, *89 Stat. 801* . That the *Dr. Miles* rule applied to vertical **[**2724]** price restraints in 1975, according to respondent, shows Congress ratified the rule.

This is not so. ***HN21***[] ***LEdHN[21]***[] [21] The text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal. Congress once again placed these restraints within the ambit of *§ 1* of the Sherman Act. And, as has been discussed, Congress intended *§ 1* to give courts the ability "to develop **[****51]** governing principles of law" in the common-law tradition. *Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 643, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981)*; see *Business Electronics, 485 U.S., at 731, 108 S. Ct. 1515, 99 L. Ed. 2d 808* ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted"). Congress could have set the *Dr. Miles* rule in stone, but it chose a more flexible option. We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with traditional *§ 1* principles, including the principle that our ***HN22***[] ***LEdHN[22]***[] [22] antitrust doctrines "evolv[e] with new circumstances and new wisdom." *Business Electronics, supra, at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808*; see also Easterbrook 139.

HN23[] ***LEdHN[23]***[] [23] The rule of reason, furthermore, is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as *per se* legal. In this respect, the justifications for the prior exemption are illuminating. Its goal "was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102, **[*906]** 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*. **[****52]** The state fair trade laws also appear to have been justified on similar grounds. See Areeda & Hovenkamp 298. The rationales for these provisions are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete. ***HN24***[] ***LEdHN[24]***[] [24] The purpose of the antitrust laws, by contrast, is "the protection of *competition*, not *competitors.*" *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (internal quotation marks omitted). To the extent Congress repealed the exemption for some vertical price restraints to end its prior practice of encouraging anti-competitive **[***647]** conduct, the rule of reason promotes the same objective.

Respondent also relies on several congressional appropriations in the mid-1980's in which Congress did not permit the Department of Justice or the Federal Trade Commission to use funds to advocate overturning *Dr. Miles.* See, *e.g., 97 Stat. 1071*. We need not pause long in addressing this argument. The conditions on funding are no longer in place, see, *e.g.,* Brief for United States as *Amicus Curiae* 21, and they were ambiguous at best. As **[****53]** much as they might show congressional approval for *Dr. Miles*, they might demonstrate a different proposition: that Congress could not pass legislation codifying the rule and reached a short-term compromise instead.

Reliance interests do not require us to reaffirm *Dr. Miles.* To be sure, ***HN25***[] ***LEdHN[25]***[] [25] reliance on a judicial opinion is a significant reason to adhere to it, *Payne v. Tennessee, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*, especially "in cases involving property and contract rights," *Khan, 522 U.S., at 20, 118 S. Ct. 275, 39 L. Ed. 2d 199*. The reliance interests here, however, like the reliance interests in *Khan,* cannot justify an inefficient rule, especially because the narrowness of the rule has allowed manufacturers **[**2725]** to set minimum resale prices in other ways. And while the *Dr. Miles* rule is longstanding, resale price maintenance was legal under fair trade laws **[*907]** in a majority of States for a large part of the past century up until 1975.

It is also of note that during this time "when the legal environment in the [United States] was most favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts." **[****54]** Overstreet 6; see also *id.,* at 169 (noting that "no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States]"); Scherer & Ross 549 (noting that "[t]he fraction of U.S. retail sales covered by [resale price maintenance] in its heyday has been variously estimated at from 4 to 10 percent"). To the extent consumers demand cheap goods, judging vertical price restraints under the rule of reason will not prevent the market from providing them. Cf. Easterbrook 152-153 (noting that "S.S. Kresge (the old K-Mart) flourished during the days of manufacturers' greatest freedom" because "discount stores offer a combination of price and service that many customers value" and that "[n]othing in restricted dealing threatens the ability of consumers to find low prices"); Scherer & Ross 557 (noting that "for the most part, the effects of the [Consumer Goods Pricing Act] were imperceptible because the forces of competition had already repealed the [previous antitrust exemption] in their own quiet way").

For these reasons ***HN26***[] ***LEdHN[26]***[] [26] the Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911),* **[****55]** is now overruled. Vertical price restraints are to be judged according to the rule of reason.

V

Noting that Leegin's president has an ownership interest in retail stores that sell Brighton, respondent claims Leegin participated in an unlawful horizontal cartel with competing **[*908]** retailers. Respondent did not make this **[***648]** allegation in the lower courts, and we do not consider it here.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Dissent by: BREYER

Dissent

Justice **Breyer,** with whom Justice **Stevens,** Justice **Souter,** and Justice **Ginsburg** join, dissenting.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 394, 408-409, 31 S. Ct. 376, 55 L. Ed. 502 (1911)*, this Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was "invalid . . . under the [Sherman Act, *15 U.S.C. § 1*]." This Court has consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are *per se* illegal. See, *e.g., United States v. Trenton Potteries Co., 273 U.S. 392, 399-401, 47 S. Ct. 377, 71 L. Ed. 700 (1927)*; *NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)*. **[****56]** That *per se* rule is one upon which the legal profession, business, and the public have relied for close to a century. Today the Court holds that courts must determine the lawfulness of minimum resale price maintenance by applying, not a bright-line *per se* rule, but a circumstance-specific "rule of reason." *Ante*, at 907, 168 L. Ed. 2d, at 647. And in doing so it overturns *Dr. Miles.*

The Court justifies its departure from ordinary considerations of *stare decisis* by **[**2726]** pointing to a set of arguments well known in the antitrust literature for close to half a century. See *ante*, at 889-892, 168 L. Ed. 2d, at 636-638. Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule. See, *e.g.*, Hearings on H. R. 10527 et al. before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 74-76, 89, 99, 101-102, 192-195, 261-262 (1958). And, **[*909]** in my view, they do not warrant the Court's now overturning so well-established a legal precedent.

I

The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular **[****57]** those enforced by agreement among private firms. The law assumes that such a marketplace, free of private restrictions, will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire. In determining the lawfulness of particular practices, courts often apply a "rule of reason." They examine both a practice's likely anticompetitive effects and its beneficial business justifications. See, *e.g., National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 109-110, and n 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*; *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688-691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*.

Nonetheless, sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, **[***649]** *e.g.*, so difficult to prove) that courts have departed from a pure "rule of reason" approach. And sometimes this Court has imposed a rule of *per se* unlawfulness--a rule that instructs courts to find the practice unlawful all (or nearly all) **[****58]** the time. See, *e.g., NYNEX, supra, at 133, 119 S. Ct. 493, 142 L. Ed. 2d 510*; *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 343-344, and n 16, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*; *United States v. Topco Associates, Inc., 405 U.S. 596, 609-611, 92 S. Ct. 1126, 31 L. Ed. 2d

515 (1972); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 213-214, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (citing and quoting Trenton Potteries, supra, at 397-398, 47 S. Ct. 377, 71 L. Ed. 700).

The case before us asks which kind of approach the courts should follow where minimum resale price maintenance is at issue. Should they apply a *per se* rule (or a variation) that **[*910]** would make minimum resale price maintenance always (or *almost* always) unlawful? Should they apply a "rule of reason"? Were the Court writing on a blank slate, I would find these questions difficult. But, of course, the Court is not writing on a blank slate, and that fact makes a considerable legal difference.

To best explain why the question would be difficult were we deciding it afresh, I briefly summarize several classical arguments for and against the use of a *per se* rule. The arguments **[****59]** focus on three sets of considerations, those involving: (1) potential anticompetitive effects, (2) potential benefits, and (3) administration. The difficulty arises out of the fact that the different sets of considerations point in different directions. See, *e.g.*, 8 P. Areeda, ***Antitrust Law*** PP 1628-1633, pp 330-392 (1st ed. 1989) (hereinafter Areeda); 8 P. Areeda & H. Hovenkamp, ***Antitrust Law*** PP 1628-1633, pp 288-339 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 146-152 (1984) **[**2727]** (hereinafter Easterbrook); Pitofsky, In Defense of Discounters: The No-Frills Case for a *Per Se* Rule Against Vertical Price Fixing, 71 Geo. L. J. 1487 (1983) (hereinafter Pitofsky); Scherer, The Economics of Vertical Restraints, 52 Antitrust L. J. 687, 706-707 (1983) (hereinafter Scherer); Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L. Rev. 6, 22-26 (1981); Brief for William S. Comanor et al. as *Amici Curiae* 7-10.

On the one hand, agreements setting minimum resale prices may have serious **[****60]** anticompetitive consequences. *In respect to dealers:* Resale price maintenance agreements, rather like horizontal price agreements, can diminish or eliminate price competition among dealers of a single brand or (if practiced generally by manufacturers) among multibrand dealers. In doing so, they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes **[*911]** in demand, say, falling demand, by cutting prices; they can encourage dealers to substitute service, for price, competition, thereby threatening wastefully to attract too many resources into that portion of the industry; they can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient **[***650]** modes of retailing; and so forth. See, *e.g.*, 8 Areeda & Hovenkamp P 1632c, at 319-321; Steiner, The Evolution and Applications of Dual-Stage Thinking, 49 The Antitrust Bulletin 877, 899-900 (2004); Comanor, Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy, 98 Harv. L. Rev. 983, 990-1000 (1985).

In respect to producers: Resale **[****61]** price maintenance agreements can help to reinforce the competition-inhibiting behavior of firms in concentrated industries. In such industries firms may tacitly collude, *i.e.*, observe each other's pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all. See 8 Areeda & Hovenkamp P 1632d, at 321-323; P. Areeda & L. Kaplow, Antitrust Analysis PP 231-233, pp 276-283 (4th ed. 1988) (hereinafter Areeda & Kaplow). Cf. United States v. Container Corp. of America, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969); Areeda & Kaplow PP 247-253, at 327-348. Where that is so, resale price maintenance can make it easier for each producer to identify (by observing retail markets) when a competitor has begun to cut prices. And a producer who cuts wholesale prices *without* lowering the minimum resale price will stand to gain little, if anything, in increased profits, because the dealer will be unable to stimulate increased consumer demand by passing along the producer's price cut to consumers. In either case, resale price maintenance agreements will tend to prevent price competition from "breaking out"; and they will thereby tend to stabilize producer **[****62]** prices. See Pitofsky 1490-1491. Cf., *e.g.,* Container Corp., supra, at 336-337, 89 S. Ct. 510, 21 L. Ed. 2d 526.

[*912] Those who express concern about the potential anticompetitive effects find empirical support in the behavior of prices before, and then after, Congress in 1975 repealed the Miller-Tydings Fair Trade Act, 50 Stat. 693 , and the McGuire Act, 66 Stat. 631 . Those Acts had permitted (but not required) individual States to enact "fair trade" laws authorizing minimum resale price maintenance. At the time of repeal minimum resale price maintenance was lawful in 36 States; it was unlawful in 14 States. See Hearings on S. 408 before the

Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 173 (1975) **[**2728]** (hereinafter Hearings on S. 408) (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division). Comparing prices in the former States with prices in the latter States, the Department of Justice argued that minimum resale price maintenance had raised prices by 19% to 27%. See Hearings on H. R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975) **[****63]** (hereinafter Hearings on H. R. 2384) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

After repeal, minimum resale price maintenance agreements were unlawful *per se* in every State. The Federal Trade Commission (FTC) staff, after studying numerous price surveys, wrote that collectively the surveys "indicate[d] that [resale price maintenance] in most cases increased the prices of products sold with [resale price maintenance]." Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical **[***651]** Evidence 160 (1983) (hereinafter Overstreet). Most economists today agree that, in the words of a prominent antitrust treatise, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case." 8 Areeda & Hovenkamp P 1604b, at 40 (finding "[t]he evidence . . . persuasive on this point"). See also Brief for William S. Comanor et al. as *Amici Curiae* 4 ("It is uniformly **[*913]** acknowledged that [resale price maintenance] and other vertical restraints lead to higher consumer prices").

On the other hand, those favoring resale price maintenance have long **[****64]** argued that resale price maintenance agreements can provide important consumer benefits. The majority lists two: First, such agreements can facilitate new entry. *Ante*, at 891, 168 L. Ed. 2d, at 637-638. For example, a newly entering producer wishing to build a product name might be able to convince dealers to help it do so--if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer succeed. See 8 Areeda & Hovenkamp PP 1617a, 1631b, at 193-196, 308. The result might be increased competition at the producer level, *i.e.*, greater *inter*-brand competition, that brings with it net consumer benefits.

Second, without resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call "free riding. **[****65]** " *Ante*, at 890-891, 168 L. Ed. 2d, at 636-637. Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image, and so forth. Without resale price maintenance, some dealers might take a "free ride" on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under these circumstances, dealers might prove unwilling to invest in the provision of necessary services. See, *e.g.*, 8 Areeda & Hovenkamp PP 1611-1613, **[*914]** 1631c, at 126-165, 309-313; R. Posner, ***Antitrust Law*** 172-173 (2d ed. 2001); R. Bork, The Antitrust Paradox 290-291 (1978) (hereinafter Bork); Easterbrook 146-149.

[2729]** Moreover, where a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some such benefits exist. That is because, other things being equal, producers should want to encourage price competition among their dealers. By doing so they will often increase profits by selling more of their product. See *Sylvania, 433 U.S., at 56, n. 24, 97 S. Ct. 2549, 53 L. Ed. 2d 568*; **[****66]** Bork 290. And that is so, even if the producer possesses sufficient market power to earn a supernormal profit. That is to say, other things being equal, the producer will benefit by charging his dealers a competitive (or even a higher-than-competitive) wholesale price while encouraging price competition **[***652]** among them. Hence, if the producer is the moving force, the producer must have some special reason for wanting resale price maintenance; and in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilize wholesale prices), that special reason may well reflect the special circumstances just described: new entry, "free riding," or variations on those themes.

The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits. See, *e.g.*, Brief for Economists as *Amici Curiae* 16; 8 Areeda & Hovenkamp PP 1631-1632, at

306-328; Pitofsky 1495; Scherer 706-707. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from **[****67]** the antitrust goats?

Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform ***antitrust law***. But ***antitrust law*** cannot, and should not, precisely replicate **[*915]** economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits. See, *e.g.*, F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 335-339 (3d ed. 1990) (hereinafter Scherer & Ross) (describing some circumstances under which price-fixing agreements could be more beneficial than "unfettered competition," but also noting potential costs of moving from a *per se* ban to a rule of reasonableness assessment of such agreements).

I have already described studies and analyses that suggest **[****68]** (though they cannot prove) that resale price maintenance can cause harms with some regularity--and certainly when dealers are the driving force. But what about benefits? How often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. There is a consensus in the literature that "free riding" takes place. But "free riding" often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a "free ride" on investments that others have made in building a product's name and reputation. The question is how often the "free riding" problem is serious enough significantly to deter dealer investment.

[2730]** To be more specific, one can easily *imagine* a dealer who refuses to provide important presale services, say, a detailed explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that "free" service (or **[*916]** enjoy the psychological benefit arising when **[****69]** a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. Sometimes this must happen in reality. But does **[***653]** it happen often? We do, after all, live in an economy where firms, despite *Dr. Miles*' *per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

All this is to say that the ultimate question is not whether, but *how much,* "free riding" of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain "sometimes." See, *e.g.*, Brief for William S. Comanor et al. as *Amici Curiae* 6-7 (noting "skepticism in the economic literature about how often [free riding] actually occurs"); Scherer & Ross 551-555 (explaining the "severe limitations" of the free-rider justification for resale price maintenance); Pitofsky, Why *Dr. Miles* Was Right, 8 Regulation, No. 1, pp 27, 29-30 (Jan./Feb. 1984) (similar analysis).

How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.* For one thing, it is often difficult to **[****70]** identify *who*--producer or dealer--is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favor (say, by allocating better shelf space) the goods of other producers who practice resale price maintenance. Who "initiated" this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.

[*917] I recognize that scholars have sought to develop checklists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. See, *e.g.*, 8 Areeda & Hovenkamp PP 1633c-1633e, at 330-339. See also Brief for William S. Comanor et al. as *Amici Curiae* 8-10. But applying these criteria in court **[****71]** is often easier said than done. The Court's invitation to consider the existence of "market power," for example, *ante*, at 898, 168 L. Ed. 2d, at 641, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs. See, *e.g.*, H. Hovenkamp, The Antitrust Enterprise 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"). See also Bok, *Section 7* of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226, 238-247 (1960) (describing lengthy FTC efforts to apply complex criteria in a merger case).

[2731]** Are there special advantages to a bright-line rule? Without such a rule, it is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings. And since enforcement resources are limited, **[****72]** that loss may tempt some producers **[***654]** or dealers to enter into agreements that are, on balance, anticompetitive.

Given the uncertainties that surround key items in the overall balance sheet, particularly in respect to the "administrative" questions, I can concede to the majority that the problem is difficult. And, if forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable **[*918]** and temporary condition of "new entry." See Pitofsky 1495. But I am not now forced to decide this question. The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century.

II

We write, not on a blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases, massive amounts of advice that lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice. See, *e.g., United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 721, 64 S. Ct. 805, 88 L. Ed. 1024 (1944)*; **[****73]** *Sylvania, 433 U.S., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568* ("The *per se* illegality of [vertical] price restrictions has been established firmly for many years . . ."). Indeed, a Westlaw search shows that *Dr. Miles* itself has been cited dozens of times in this Court and hundreds of times in lower courts. Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof. See *Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)* (noting, in declining to overrule an earlier case interpreting *§ 4* of the Clayton Act, that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I am not aware of any case in which this Court has overturned so well-established a statutory precedent. Regardless, I do not see how the Court can claim that ordinary criteria for overruling an earlier case have been met. See, *e.g., Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 854-855, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992)*. See also *Federal Election Comm'n v. Wisconsin Right to Life, Inc., ante, at 500-503, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515* (Scalia, J., concurring **[****74]** in part and concurring in judgment).

[*919] A

I can find no change in circumstances in the past several decades that helps the majority's position. In fact, there has been one important change that argues strongly to the contrary. In 1975, Congress repealed the McGuire and Miller-Tydings Acts. See Consumer Goods Pricing Act of 1975, 89 Stat. 801. And it thereby consciously *extended Dr. Miles' per se* rule. Indeed, at that time the Department of Justice and the FTC, then urging application of the *per se* rule, discussed virtually every argument presented now to this Court as well as others not here presented. And they explained to Congress why Congress should reject them. See Hearings on S. 408, at 176-177 (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *id.*, at 170-172 (testimony of Lewis A. Engman, Chairman of the FTC); Hearings on H. R. 2384, at 113-114 (testimony **[***655]** **[**2732]** of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division). Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller-Tydings would be to make minimum resale price maintenance *per se* unlawful. See, *e.g.*, S. **[****75]** Rep. No. 94-466, pp 1-3 (1975) ("Without [the exemptions authorized by the Miller-Tydings and McGuire Acts,] the agreements they authorize would violate the antitrust laws . . . . [R]epeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices"). See also Sylvania, supra, at 51, n 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568 ("Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States").

Congress did not prohibit this Court from reconsidering the *per se* rule. But enacting major legislation premised upon the existence of that rule constitutes important public **[*920]** reliance upon that rule. And doing so aware of the relevant arguments constitutes even stronger reliance upon the Court's keeping the rule, at least in the absence of some significant change in respect to those arguments.

Have there been any such changes? There have been a few economic studies, described in some of the briefs, that argue, contrary to the testimony of the Justice Department and the FTC to Congress in 1975, that resale price **[****76]** maintenance is not harmful. One study, relying on an analysis of litigated resale price maintenance cases from 1975 to 1982, concludes that resale price maintenance does not ordinarily involve producer or dealer collusion. See Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. Law & Econ. 263, 281-282, 292 (1991). But this study equates the failure of plaintiffs to *allege* collusion with the *absence* of collusion--an equation that overlooks the superfluous nature of allegations of horizontal collusion in a resale price maintenance case and the tacit form that such collusion might take. See H. Hovenkamp, Federal Antitrust Policy § 11.3c, p 464, n 19 (3d ed. 2005); *supra*, at 911, 168 L. Ed. 2d, at 649-650.

The other study provides a theoretical basis for concluding that resale price maintenance "need not lead to higher retail prices." Marvel & McCafferty, The Political Economy of Resale Price Maintenance, 94 J. Pol. Econ. 1074, 1075 (1986). But this study develops a theoretical model "under the assumption that [resale price maintenance] is efficiency-enhancing." *Ibid.* Its only empirical support is a 1940 study that the authors acknowledge is much criticized. **[****77]** See *id.*, at 1091. And many other economists take a different view. See Brief for William S. Comanor et al. as *Amici Curiae* 4.

Regardless, taken together, these studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances.

Petitioner and some *amici* have also presented us with newer studies that show that resale price maintenance sometimes **[*921]** brings consumer benefits. Overstreet 119-129 (describing numerous case studies). But the proponents of a *per se* rule have always conceded as much. What is remarkable about the majority's arguments is that *nothing* in this respect **[***656]** *is new.* See *supra*, at 910, 919, 168 L. Ed. 2d, at 649, 654 (citing articles and congressional testimony going back several decades). The only new feature of these arguments lies in the fact that the most current advocates of overruling *Dr. Miles* have abandoned a host of **[**2733]** other not-very-persuasive arguments upon which prior resale price maintenance proponents used to rely. See, *e.g.*, 8 Areeda P 1631a, at 350-352 (listing "'[t]raditional' justifications" for resale price maintenance).

The one arguable exception consists of the majority's **[****78]** claim that "even absent free riding," resale price maintenance "may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." *Ante*, at 892, 168 L. Ed. 2d, at 637-638. I cannot count this as an exception, however, because I do not understand how, in the absence of free riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not "expand" its "market share" as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand.

No one claims that the American economy has changed in ways that might support the majority. Concentration in retailing has increased. See, *e.g.*, Brief for Respondent 18 (since minimum resale price maintenance was banned nationwide in 1975, the total number of retailers has dropped while the growth in sales **[****79]** per store has risen); Brief for American Antitrust Institute as *Amicus Curiae* 17, n 20 (citing private study reporting that the combined sales of the 10 largest **[*922]** retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers;

also quoting 1999 Organisation for Economic Co-operation and Development report stating that the "'last twenty years have seen momentous changes in retail distribution including significant increases in concentration'"); Mamen, Facing Goliath: Challenging the Impacts of Supermarket Consolidation on our Local Economies, Communities, and Food Security, The Oakland Institute, 1 Policy Brief, No. 3, pp 1, 2 (Spring 2007), http://www.oaklandinstitute.org/pdfs/facing_goliath.pdf (as visited June 25, 2007, and available in Clerk of Court's case file) (noting that "[f]or many decades, the top five food retail firms in the U. S. controlled less than 20 percent of the market"; from 1997 to 2000, "the top five firms increased their market share from 24 to 42 percent of all retail sales"; and "[b]y 2003, they controlled over half of all grocery sales"). That change, other things being equal, may enable (and motivate) more retailers, accounting for **[****80]** a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.

Nor has anyone argued that concentration among manufacturers that might use resale price maintenance has diminished significantly. And as far as I can tell, it has not. Consider household electrical appliances, which a study from the late 1950's **[***657]** suggests constituted a significant portion of those products subject to resale price maintenance at that time. See Hollander, United States of America, in Resale Price Maintenance 67, 80-81 (B. Yamey ed. 1966). Although it is somewhat difficult to compare census data from 2002 with that from several decades ago (because of changes in the classification system), it is clear that at least some subsets of the household electrical appliance industry are *more* concentrated, in terms of manufacturer market power, now than they were then. For instance, the top eight domestic manufacturers of household cooking appliances accounted for 68% **[**2734]** **[*923]** of the domestic market (measured by value of shipments) in 1963 (the earliest date for which I was able to find **[****81]** data), compared with 77% in 2002. See Dept. of Commerce, Bureau of Census, 1972 Census of Manufactures, Special Report Series, Concentration Ratios in Manufacturing, No. MC72(SR)-2, p SR2-38 (1975) (hereinafter 1972 Census); Dept. of Commerce, Bureau of Census, 2002 Economic Census, Concentration Ratios: 2002, No. EC02-31SR-1, p 55 (2006) (hereinafter 2002 Census). The top eight domestic manufacturers of household laundry equipment accounted for 95% of the domestic market in 1963 (90% in 1958), compared with 99% in 2002. 1972 Census, at SR2-38; 2002 Census, at 55. And the top eight domestic manufacturers of household refrigerators and freezers accounted for 91% of the domestic market in 1963, compared with 95% in 2002. 1972 Census, at SR2-38; 2002 Census, at 55. Increased concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful. At the very least, the majority has not explained how these, or other changes in the economy, could help support its position.

In sum, there is no relevant change. And without some such change, there is no ground for abandoning a well-established **[****82]** antitrust rule.

B

With the preceding discussion in mind, I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case. Justice Scalia, writing separately in another of our cases this Term, well summarizes that law. See *Wisconsin Right to Life, Inc., ante, at 500-503, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515* (opinion concurring in part and concurring in judgment). And every relevant factor he mentions argues against overruling *Dr. Miles* here.

First, the Court applies *stare decisis* more "rigidly" in statutory than in constitutional cases. See *Glidden Co. v.* ***[*924]*** *Zdanok, 370 U.S. 530, 543, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962)*; *Illinois Brick Co., 431 U.S., at 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. This is a statutory case.

Second, the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago. As Justice Scalia put it, "[o]verruling a *constitutional* case decided just a few years earlier is far from unprecedented." *Wisconsin Right to Life, ante, at 501, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515* (emphasis added). We here overrule one *statutory* case, *Dr. Miles*, decided 100 years ago, and we overrule the cases that reaffirmed its *per se* rule in the intervening years. See, *e.g.,* **[****83]** *Trenton Potteries, 273 U.S.,* ***[***658]*** *at 399-401, 47 S. Ct. 377, 71 L. Ed. 700*; *Bausch & Lomb, 321 U.S., at 721, 64 S. Ct. 805, 88 L. Ed. 2d 1024*; *United States v. Parke,* Davis & Co., 362 U.S. 29, 45-47, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960); Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 16-17, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964).

Third, the fact that a decision creates an "unworkable" legal regime argues in favor of overruling. See Payne v. Tennessee, 501 U.S. 808, 827-828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); Swift & Co. v. Wickham, 382 U.S. 111, 116, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). Implementation of the *per se* rule, even with the complications attendant the exception allowed for in United States v. Colgate & Co., 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919), has proved practical over the course of the last century, particularly when compared with the many complexities of litigating a case under the "rule of reason" regime. No one has shown how moving from the *Dr. Miles* regime to "rule of reason" analysis **[**2735]** would make the legal regime governing minimum resale price maintenance more "administrable," Wisconsin Right to Life, ante, at 501, 127 S. Ct. 2652, 168 L. Ed. 2d 329, 2007 U.S. LEXIS 8515 (opinion of Scalia, J.), particularly since *Colgate* would remain good law with respect to *unreasonable* **[****84]** price maintenance.

Fourth, the fact that a decision "unsettles" the law may argue in favor of overruling. See Sylvania, 433 U.S., at 47, 97 S. Ct. 2549, 53 L. Ed. 568; Wisconsin Right to Life, ante, at 502, 127 S. Ct. 2652, 168 L. Ed. 2d 3291, 2007 U.S. LEXIS 8515 (opinion of Scalia, J.). The *per se* rule is well-settled law, as the Court itself has previously recognized. Sylvania, supra, at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 568. It is the majority's change here that will unsettle the law.

[*925] Fifth, the fact that a case involves property rights or contract rights, where reliance interests are involved, argues against overruling. Payne, supra, at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 . This case involves contract rights and perhaps property rights (consider shopping malls). And there has been considerable reliance upon the *per se* rule. As I have said, Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller-Tydings and McGuire. *Supra*, at 919-920, 168 L. Ed. 2d, at 654-655. The Executive Branch argued for repeal on the assumption that *Dr. Miles* stated the law. *Supra,* at 919-920. Moreover, whole sectors of the economy have come to rely upon the *per se* rule. A factory outlet store tells us that the rule "form[s] an essential part of the regulatory background against which **[****85]** [that firm] and many other discount retailers have financed, structured, and operated their businesses." Brief for Burlington Coat Factory Warehouse Corp. as *Amicus Curiae* 5. The Consumer Federation of America tells us that large low-price retailers would not exist without *Dr. Miles*; minimum resale price maintenance, "by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators." Brief for Consumer Federation of America as *Amicus Curiae* 5, 7-9 (discussing, *inter alia*, comments by Wal-Mart's founder 25 years ago that relaxation of the *per se* ban on minimum resale price maintenance would be a '"great danger"' to Wal-Mart's then-relatively-nascent business). See also Brief for American Antitrust Institute as *Amicus Curiae* 14-15, and sources **[***659]** cited therein (making the same point). New distributors, including internet distributors, have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans.

This Court's overruling of the *per se* rule jeopardizes this reliance, and more. What about malls built on the assumption that a discount distributor **[****86]** will remain an anchor tenant? What about home buyers who have taken a home's distance **[*926]** from such a mall into account? What about Americans, producers, distributors, and consumers, who have understandably assumed, at least for the last 30 years, that price competition is a legally guaranteed way of life? The majority denies none of this. It simply says that these "reliance interests . . ., like the reliance interests in State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997), cannot justify an inefficient rule." *Ante*, at 906, 168 L. Ed. 2d, at 647.

The Court minimizes the importance of this reliance, adding that it "is also of note" that at the time resale price maintenance contracts were lawful '"no more than a tiny fraction of manufacturers ever employed"' the practice. *Ante*, at 907 (quoting Overstreet 6). By "tiny" the Court means manufacturers that accounted for up to '"ten percent of consumer goods purchases"' annually. *Ante*, at 907. That figure in today's economy equals just over $300 billion. **[**2736]** See Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2007, p 649 (126th ed.) (over $3 trillion in U. S. retail sales in 2002). Putting the Court's estimate together with the Justice Department's early 1970's study translates a **[****87]** legal regime that permits all resale price maintenance into retail bills that are higher by an average of roughly $750 to $1,000 annually for an American family of four. Just how much higher retail bills will be after the Court's decision today, of course, depends upon what is now unknown, namely, how courts will decide future cases under a "rule of reason." But these figures indicate that the amounts involved are important to American families and cannot be dismissed as "tiny."

Sixth, the fact that a rule of law has become "embedded" in our "national culture" argues strongly against overruling. *Dickerson v. United States, 530 U.S. 428, 443-444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000)*. The *per se* rule forbidding minimum resale price maintenance agreements has long been "embedded" in the law of antitrust. It involves price, the economy's "'central nervous system.'" *National Soc. of Professional Engineers, 435 U.S., at 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637* **[*927]** (quoting *Socony-Vacuum Oil, 310 U.S., at 226, n. 59, 60 S. Ct. 811, 84 L. Ed. 2d 1129*). It reflects a basic antitrust assumption (that consumers often prefer lower prices to more service). It embodies a basic antitrust objective (providing consumers with a free choice about **[****88]** such matters). And it creates an easily administered and enforceable bright line, "Do not agree about price," that businesses as well as lawyers have long understood.

The only contrary *stare decisis* factor that the majority mentions consists of its claim that this Court has "[f]rom the beginning . . . treated the Sherman Act as a common-law statute," and has previously overruled antitrust precedent. *Ante*, at 899, 900-902, 168 L. Ed. 2d, at 642, 643-644. It points in support to *State Oil Co. v. Khan, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*, overruling *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L.* **[***660]** *Ed. 2d 998 (1968)*, in which this Court had held that *maximum* resale price agreements were unlawful *per se*, and to *Sylvania*, overruling *United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)*, in which this Court had held that producer-imposed territorial limits were unlawful *per se.*

The Court decided *Khan,* however, 29 years after *Albrecht*--still a significant period, but nowhere close to the century *Dr. Miles* has stood. The Court specifically noted the *lack* of any significant reliance upon *Albrecht*, *522 U.S., at 18-19, 118 S. Ct. 275, 139 L. Ed. 2d 199* (*Albrecht* has had "little **[****89]** or no relevance to ongoing enforcement of the Sherman Act"). *Albrecht* had far less support in traditional antitrust principles than did *Dr. Miles.* Compare, *e.g.*, 8 Areeda & Hovenkamp P 1632, at 316-328 (analyzing potential harms of minimum resale price maintenance), with *id.,* P 1637, at 352-361 (analyzing potential harms of maximum resale price maintenance). See also, *e.g.*, Pitofsky 1490, n 17. And Congress had nowhere expressed support for *Albrecht*'s rule. *Khan, supra, at 19, 118 S. Ct. 275, 139 L. Ed. 2d 199*.

In *Sylvania*, the Court, in overruling *Schwinn*, explicitly distinguished *Dr. Miles* on the ground that while Congress had "recently . . . expressed its approval of a *per se* analysis of vertical price restrictions" by repealing the Miller-Tydings **[*928]** and McGuire Acts, "[n]o similar expression of congressional intent exists for nonprice restrictions." *433 U.S., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568*. Moreover, the Court decided *Sylvania* only a decade after *Schwinn.* And it based its overruling on a generally perceived need to avoid "confusion" in the law, **[**2737]** *433 U.S., at 47-49, 97 S. Ct. 2549, 53 L. Ed. 2d 568*, a factor totally absent here.

The Court suggests that it is following "the common-law **[****90]** tradition." *Ante*, at 905, 168 L. Ed. 2d, at 646. But the common law would not have permitted overruling *Dr. Miles* in these circumstances. Common-law courts rarely overruled well-established earlier rules outright. Rather, they would over time issue decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest. One can argue that modifying the *per se* rule to make an exception, say, for new entry, see Pitofsky 1495, could prove consistent with this approach. To swallow up a century-old precedent, potentially affecting many billions of dollars of sales, is not. The reader should compare today's "common-law" decision with Justice Cardozo's decision in *Allegheny College v. National Chautauqua Cty. Bank of Jamestown, 246 N. Y. 369, 159 N. E. 173 (1927)*, and note a gradualism that does not characterize today's decision.

Moreover, a Court that rests its decision upon economists' views of the economic merits should also take account of legal scholars' views about common-law overruling. Professors Hart and Sacks list 12 factors (similar to those I have mentioned) that support judicial "adherence to prior **[****91]** holdings." They all support adherence to *Dr. Miles* here. See H. Hart & A. Sacks, The Legal Process 568-569 (W. Eskridge & P. Frickey eds. 1994). Karl Llewellyn has written that the common-law judge's "conscious reshaping" of prior law "must so move as to hold the degree of movement down to the degree to which need truly presses." The Bramble Bush 156 (1960). Where here is the pressing **[***661]** need? The Court notes that the FTC argues here in favor of a rule of reason. See *ante*, at 900, 168 L. Ed. 2d, at 642-643. But both Congress and the FTC, **[*929]** unlike courts, are well equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs.

In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here. It is difficult for me to understand how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies overruling a recent constitutional decision, *Wisconsin Right to Life, Inc., ante, at 500-503, 127 S. Ct. 2652, 168 L. Ed. 2d 3291, 2007 U.S. LEXIS 8515* (Scalia, J., joined by Kennedy and Thomas, JJ., concurring in part and concurring in judgment), but (2) failing **[****92]** to satisfy any of those same concerns nonetheless permits overruling a longstanding statutory decision. Either those concerns are relevant or they are not.

* * *

The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles. I do not believe that the majority has shown new or changed conditions sufficient to warrant overruling a decision of such long standing. All ordinary *stare decisis* considerations indicate the contrary. For these reasons, with respect, I dissent.

References

15 U.S.C.S. § 1

Antitrust Laws and Trade Regulation §§ 18.02, 18.03 (Matthew Bender)

Antitrust Laws and Trade Regulation: Desk Edition § 2.04 (Matthew Bender)

Federal ***Antitrust Law*** §§ 12.1-12.8, 48.16, 48.18 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 41

L Ed Index, Dealers; Price Control or Discrimination

Supreme Courts views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. § 1 et seq.*). *64 L. Ed. 2d 997*.

End of Document

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Pac. Bell Tel. Co. v. linkLine Communs., Inc.

Supreme Court of the United States

December 8, 2008, Argued; February 25, 2009, Decided

No. 07-512

Reporter
555 U.S. 438 *; 129 S. Ct. 1109 **; 172 L. Ed. 2d 836 ***; 2009 U.S. LEXIS 1635 ****; 77 U.S.L.W. 4130; 2009-1 Trade Cas. (CCH) P76,500; 21 Fla. L. Weekly Fed. S 654; 47 Comm. Reg. (P & F) 472

PACIFIC BELL TELEPHONE COMPANY, dba AT&T CALIFORNIA, et al., Petitioners v. LINKLINE COMMUNICATIONS, INC., ET AL.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Linkline Communs., Inc. v. Cal., Inc., 503 F.3d 876, 2007 U.S. App. LEXIS 21719 (9th Cir. Cal., 2007)

Disposition: Reversed and remanded.

Core Terms

prices, squeeze, price-squeeze, antitrust, wholesale, predatory, retail, retail price, Sherman Act, rivals, wholesale price, firms, competitors, anti trust law, plaintiffs', monopolist, monopoly, upstream, transport, inputs, amici, antitrust liability, no duty, monopolize, customers, regulated, margins, courts, amended complaint, leave to amend

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN1[] **Sherman Act, Claims**

A price-squeeze claim may not be brought under *§ 2* of the Sherman Act when a defendant is under no antitrust obligation to sell the inputs to a plaintiff in the first place.

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN2[] Regulated Practices, Monopolies & Monopolization

Section 2 of the Sherman Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. Ch. 647, 26 Stat. 209, 15 U.S.C.S. § 2. Simply possessing monopoly power and charging monopoly prices does not violate § 2; rather, the statute targets 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.

Antitrust & Trade Law > Sherman Act > Claims

HN3[] Sherman Act, Claims

If a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN4[] Sherman Act, Claims

Cutting prices in order to increase business often is the very essence of competition. In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are especially costly because they chill the very conduct the antitrust laws are designed to protect. To avoid chilling aggressive price competition, the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low are carefully limited. Specifically, to prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) the prices complained of are below an appropriate measure of its rival's costs; and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Pricing

HN5[] Anticompetitive & Predatory Practices, Predatory Pricing

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > Predatory Hiring & Price Squeezes

HN6[] Anticompetitive & Predatory Practices, Predatory Hiring & Price Squeezes

An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; ***antitrust law*** does not forbid lawfully obtained monopolies from charging monopoly prices. Similarly, the Sherman Act does not forbid--indeed, it encourages--aggressive price competition at the retail level, as long as the prices being charged are not predatory. If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price.

Lawyers' Edition Display

Decision

[*836]** Internet service providers' (ISPs') claim that digital subscriber line (DSL) providers "squeezed" ISPs' profit margins held not cognizable under *15 U.S.C.S. § 2*, as (1) DSL providers lacked antitrust obligation to sell wholesale service to ISPs; and (2) there was no showing of retail predatory pricing.

Summary

Procedural posture: Respondent Internet service providers (ISPs) brought an action against petitioner providers of digital subscriber line (DSL) service for connecting to the Internet, alleging that the providers "squeezed" the ISPs' profit margins in setting retail prices. Upon the grant of a writ of certiorari, the providers appealed the judgment of the U.S. Court of Appeals for the Ninth Circuit which held that the claim was cognizable under *15 U.S.C.S. § 2*.

Overview: The providers participated in both the wholesale and retail markets for DSL service and, while the providers were otherwise not required to deal with the ISPs, federal approval of a prior merger required the providers to provide wholesale DSL service to the ISPs at a price no greater than retail. The ISPs contended that the providers raised wholesale prices while cutting retail prices, resulting in the ISPs being forced to pay the higher wholesale price while cutting their own retail prices to compete with the providers. The U.S. Supreme Court held that the ISPs' price-squeeze claim could not brought under *§ 2* since the providers were under no antitrust obligation to sell wholesale DSL service to the ISPs and there was no showing of predatory retail pricing. The providers' duty to sell to the ISPs arose from federal regulations rather than antitrust obligations under *§ 2*, there was no allegation that the providers' retail price was below cost, and, in the absence of a duty to deal at the wholesale level and no predatory pricing at the retail level, the providers **[***837]** were not required to set both wholesale and retail prices in a manner which preserved the ISPs' profit margins.

Outcome: The judgment which held that the ISPs' price-squeeze claim was cognizable under *§ 2* was reversed and the case was remanded for further proceedings. 5-4 Decision; 1 concurrence in the judgment.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 > PRICE SQUEEZE > Headnote:
LEdHN[1][] [1]

A price-squeeze claim may not be brought under *§ 2* of the Sherman Act when a defendant is under no antitrust obligation to sell the inputs to a plaintiff in the first place. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > SHERMAN ACT -- MONOPOLIZATION > Headnote:
LEdHN[2][] [2]

Section 2 of the Sherman Act makes it unlawful to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. 15 U.S.C.S. § 2. Simply possessing monopoly power and charging monopoly prices does not violate § 2; rather, the statute targets 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. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §30.3 > REFUSAL TO DEAL > Headnote:
LEdHN[3][] [3]

If a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41.5 > PREDATORY PRICING -- SHERMAN ACT > Headnote:
LEdHN[4][] [4]

Cutting prices in order to increase business often is the very essence of competition. In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are especially costly because they chill the very conduct the antitrust laws are designed to protect. To avoid chilling aggressive price competition, the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low are carefully limited. Specifically, to prevail on a predatory pricing claim, a plaintiff must demonstrate that: (1) the prices complained of are below an appropriate measure of its rival's costs; and (2) there is a dangerous probability that the defendant will be able to recoup its investment in below-cost prices. Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.) **[***838]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.5 > PRICE CUTTING > Headnote:
LEdHN[5][] [5]

As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §36.7 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §41.5 > WHOLESALE PRICES -- PREDATORY PRICES > Headnote:
LEdHN[6][] [6]

An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; ***antitrust law*** does not forbid lawfully obtained monopolies from charging monopoly prices. Similarly, the Sherman Act does not forbid--indeed, it encourages--aggressive price competition at the retail level, as long as the prices being charged are not predatory. If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price. (Roberts, Ch. J., joined by Scalia, Kennedy, Thomas, and Alito, JJ.)

Syllabus

[*438] **[***839]** **[**1112]** Petitioners (hereinafter AT&T) own infrastructure and facilities needed to provide "DSL" service, a method of connecting to the Internet at high speeds over telephone lines. As a condition for a recent merger, the Federal Communications Commission requires AT&T to provide wholesale DSL transport service to independent firms at a price no greater than the retail price of AT&T's DSL service. The plaintiffs in this case, respondents here, are independent Internet service providers that compete with AT&T in the retail DSL market in California. The plaintiffs do not own all the facilities needed to supply DSL service, and must lease wholesale DSL transport service from AT&T. They filed suit under *§ 2* of the Sherman Act, asserting that AT&T unlawfully "squeezed" their profit margins by setting a high price for the wholesale DSL transport service it sells and a low price for its own retail DSL service. This maneuver allegedly placed the plaintiffs at a competitive disadvantage, allowing AT&T to maintain monopoly power in the DSL market. AT&T moved for judgment on the pleadings, **[****2]** arguing that the plaintiffs' claims were foreclosed by *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*, in which this Court held that a firm with no antitrust duty to deal with its rivals has no obligation to provide those rivals with a "sufficient" level of service. The District Court found that AT&T had no antitrust duty to deal with the plaintiffs, but nonetheless denied the motion, holding that *Trinko* did not address price-squeeze claims. The court certified its order for interlocutory appeal on the question whether *Trinko* bars price-squeeze claims when the parties are required to deal by federal communications law, but not ***antitrust law***. The Ninth Circuit affirmed, holding that *Trinko* did not address the viability of price-squeeze claims, and thus the plaintiffs' complaint stated a potentially valid *§ 2* claim.

Held:

1. The case is not moot. The plaintiffs now agree that their claims must meet the *Brooke Group* test for predatory pricing, apparently apart from their price-squeeze theory. That test established two requirements for predatory pricing: below-cost retail pricing and a "'dangerous **[*439]** probability'" that the defendant will recoup any lost **[****3]** profits, see *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. Despite the plaintiffs' new position, the parties continue to seek different relief: AT&T seeks reversal of the decision below and dismissal of the complaint, while the plaintiffs seek leave to amend their complaint to allege a *Brooke Group* claim. It is also not clear that the plaintiffs have unequivocally abandoned their price-squeeze **[***840]** claims. Prudential concerns favor answering the question presented; absent a decision on the merits, the Circuit conflict that this Court **[**1113]** granted certiorari to resolve would persist. Pp. 5-7.

2. A price-squeeze claim may not be brought under *§ 2* when the defendant has no antitrust duty to deal with the plaintiff at wholesale. Pp. 7-17.

(a) Businesses are generally free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. See *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460* But in rare circumstances, a dominant firm may incur antitrust liability for purely unilateral conduct, such as charging "predatory" prices. *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. There are also limited circumstances in which a firm's unilateral **[****4]** refusal to deal with its rivals can give rise to antitrust liability. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467*. Here, plaintiffs do not allege predatory pricing, and the District Court concluded that there was no antitrust duty to deal. Plaintiffs challenge a different type of unilateral conduct in which a firm "squeezes" its competitors' profit margins. This requires the defendant to operate in both the wholesale ("upstream") and retail ("downstream") markets. By raising the wholesale price of inputs while cutting its own retail prices, the defendant can raise competitors' costs while putting downward pressure on their revenues. Price-squeeze plaintiffs assert that defendants must leave them a "fair" or "adequate" margin between wholesale and retail prices. Pp. 7-9.

(b) Where there is no duty to deal at the wholesale level and no predatory pricing at the retail level, a firm is not required to price both of these services in a manner that preserves its rivals' profit margins. Pp. 9-12.

(i) Any challenge to AT&T's *wholesale* prices is foreclosed by a straightforward application of *Trinko.* The claim in *Trinko* addressed the quality of Verizon's support **[****5]** services, while the claims in this case challenge AT&T's pricing structure. But for antitrust purposes, there is no meaningful distinction between price and nonprice components of a transaction. The nub of the complaint in both cases is identical--the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing **[*440]** effectively in the retail market. But a firm with no antitrust duty to deal in the wholesale market has no obligation to deal under terms and conditions favorable to its competitors. See *Trinko, supra, at 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Had AT&T simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Thus, it was not required to offer this service at the wholesale prices the plaintiffs would have preferred. Pp. 9-10.

(ii) The other component of a price-squeeze claim is the assertion that the defendant's *retail* prices are "too low." Here too plaintiffs' claims find no support in existing antitrust doctrine. "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538*. **[****6]** To avoid chilling aggressive price competition, the Court has carefully limited the **[***841]** circumstances under which plaintiffs can state a Sherman Act claim by alleging that the defendant's prices are too low. See *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. The complaint at issue here has no allegation that AT&T's conduct met either *Brooke Group* requirement. Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the **[**1114]** precise harm the Court sought to avoid in *Brooke Group*: Firms might raise retail prices or refrain from aggressive price competition to avoid potential antitrust liability. See *509 U.S., at 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. Pp. 11-12.

(c) Institutional concerns also counsel against recognizing such claims. This Court has repeatedly emphasized the importance of clear rules in ***antitrust law***. Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. Courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze. Moreover, firms seeking to avoid price-squeeze liability will have no safe harbor for their pricing **[****7]** practices. The most commonly articulated standard for price squeezes is that the defendant must leave its rivals a "fair" or "adequate" margin between wholesale and retail prices; this test is nearly impossible for courts to apply without conducting complex proceedings like rate-setting agencies. Some *amici* argue that a price squeeze should be presumed if the defendant's wholesale price exceeds its retail price. But if both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price is greater than or equal to its retail price. Pp. 12-15.

(d) The District Court on remand should consider whether an amended complaint filed by the plaintiffs states a claim upon which relief may be granted under the pleading standard articulated in *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929*; whether plaintiffs should be **[*441]** given leave to amend their complaint to bring a *Brooke Group* claim; and such other matters properly before it. Pp. 15-17.

503 F.3d 876, reversed and remanded.

Counsel: Aaron Panner argued the cause for petitioners. **Deanne E. Maynard** argued the cause for the United States, as amicus curiae, by special leave of court. **Maxwell M. Blecher** argued the cause for respondents. **Richard M. Brunell** argued the cause for the American Antitrust Institute, as amicus curiae, by special leave of court.

Judges: Roberts, C. J., delivered the opinion of the Court, in which Scalia, Kennedy, Thomas, and Alito, JJ., **[****8]** joined. Breyer, J., filed an opinion concurring in the judgment, in which Stevens, Souter, and Ginsburg, JJ., joined *post*, p.___.

Opinion by: ROBERTS

Opinion

[*442] Chief Justice **Roberts** delivered the opinion of the Court.

The plaintiffs in this case, respondents here, allege that a competitor subjected them to a "price squeeze" in violation of *§ 2* of the Sherman Act. They assert that such a claim can arise when a vertically integrated firm sells inputs at wholesale and also sells finished goods or services at retail. If that firm has power in the wholesale market, it can simultaneously raise the wholesale price of inputs and cut the retail price of the finished good. This will have the effect of "squeezing" the profit margins of any competitors in the retail market. Those firms will have to pay more for the inputs they need; at the same time, they will have to cut their retail **[***842]** prices to match the other firm's prices. The question before us is whether such ***HN1***[] ***LEdHN[1]***[] [1] a **[**1115]** price-squeeze claim may be brought under *§ 2* of the Sherman Act when the defendant is under no antitrust obligation to sell the inputs to the plaintiff in the first place. We hold that no such claim may be brought.

I

This case involves the market for digital subscriber line **[****9]** (DSL) service, which is a method of connecting to the Internet at high speeds over telephone lines. AT&T[1] owns much of the infrastructure and facilities needed to provide DSL service in California. In particular, AT&T controls most of what is known as the "last mile"--the lines that connect homes and businesses to the telephone network. Competing DSL providers must generally obtain access to AT&T's facilities in order to serve their customers.

Until recently, the Federal Communications Commission (FCC) required incumbent phone companies such as AT&T **[*443]** to sell transmission service to independent DSL providers, under the theory that this would spur competition. See *In re Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14868 (2005)*. In 2005, the FCC largely abandoned this forced-sharing requirement in light of the emergence of a competitive market beyond DSL for high-speed Internet service; DSL now **[****10]** faces robust competition from cable companies and wireless and satellite services. *Id., at 14879-14887*. As a condition for a recent merger, however, AT&T remains bound by the mandatory interconnection requirements, and is obligated to provide wholesale "DSL transport" service to independent firms at a price no greater than the retail price of AT&T's DSL service. *In re AT&T Inc., 22 FCC Rcd. 5662, 5814 (2007)*.

The plaintiffs are four independent Internet service providers (ISPs) that compete with AT&T in the retail DSL market. Plaintiffs do not own all the facilities needed to supply their customers with this service. They instead lease DSL transport service from AT&T pursuant to the merger conditions described above. AT&T thus participates in the DSL market at both the wholesale and retail levels; it provides plaintiffs and other independent ISPs with wholesale DSL transport service, and it also sells DSL service directly to consumers at retail.

In July 2003, the plaintiffs brought suit in District Court, alleging that AT&T violated *§ 2* of the Sherman Act, *15 U.S.C. § 2*, by monopolizing the DSL market in California. The complaint alleges that AT&T refused to deal **[****11]** with the plaintiffs, denied the plaintiffs access to essential facilities, and engaged in a "price squeeze." App. 18-19. Specifically, plaintiffs contend that AT&T squeezed their profit margins by setting a high wholesale price for DSL transport and a low retail price for DSL Internet service. This maneuver allegedly "exclude[d] and

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[1] Petitioners consist of several corporate entities and subsidiaries, and their names and corporate structures have changed frequently over the course of this litigation. For simplicity, we will refer to all the petitioners as "AT&T."

unreasonably impede[d] competition," **[*444]** thus allowing AT&T to "preserve and maintain its monopoly control of DSL access to the Internet." *Ibid.*

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP,* ***[***843]*** *540 U.S. 398, 410, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, we held that a firm with no antitrust duty to deal with its rivals at all is under no obligation to provide those rivals with a "sufficient" level of service. Shortly after we issued that decision, AT&T moved for judgment on the pleadings, arguing **[**1116]** that plaintiffs' claims in this case were foreclosed by *Trinko.* The District Court held that AT&T had no antitrust duty to deal with plaintiffs, App. to Pet. for Cert. 77a-85a, but it denied the motion to dismiss with respect to the price-squeeze claims, *id.*, at 86a-90a. The court acknowledged that AT&T's argument "has a certain logic to it," but held that *Trinko* "simply **[****12]** does not involve price-squeeze claims." App. to Pet. for Cert. 86a. The District Court also noted that price-squeeze claims have been recognized by several Circuits and "are cognizable under existing antitrust standards." *Id.*, at 89a, and n 27.

At the District Court's request, plaintiffs then filed an amended complaint providing greater detail about their price-squeeze claims. AT&T again moved to dismiss, arguing that price-squeeze claims could only proceed if they met the two established requirements for predatory pricing: below-cost retail pricing and a "'dangerous probability'" that the defendant will recoup any lost profits. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. The District Court did not reach the issue whether *all* price-squeeze claims must meet the *Brooke Group* requirements, because it concluded that the amended complaint, "generously construed," satisfied those criteria. App. to Pet. for Cert. 46a-49a, 56a. The court also certified its earlier order for interlocutory appeal on the question whether "*Trinko* bars price squeeze claims where the parties are compelled to deal under the federal communications laws." *Id.*, at 56a-57a.

[*445] On interlocutory **[****13]** appeal, the Court of Appeals for the Ninth Circuit affirmed the District Court's denial of AT&T's motion for judgment on the pleadings on the price-squeeze claims. *linkLine Communications, Inc. v. SBC California, Inc., 503 F.3d 876 (2007)*. The court emphasized that "*Trinko* did not involve a price squeezing theory." *Id., at 883*. Because "a price squeeze theory formed part of the fabric of traditional* ***antitrust law*** prior to *Trinko*," the Court of Appeals concluded that "those claims should remain viable notwithstanding either the telecommunications statutes or *Trinko.*" *Ibid.* Based on the record before it, the court held that plaintiffs' original complaint stated a potentially valid claim under *§ 2* of the Sherman Act.

Judge Gould dissented, noting that "the notion of a 'price squeeze' is itself in a squeeze between two recent Supreme Court precedents." *Id., at 886*. A price-squeeze claim involves allegations of both a high wholesale price and a low retail price, so Judge Gould analyzed each component separately. He concluded that "*Trinko* insulates from antitrust review the setting of the upstream price." *Id., at 886-887*. With respect to the downstream price, he argued that "the retail side of a price squeeze cannot be considered to create an **[****14]** antitrust violation if the retail pricing does not satisfy the requirements of *Brooke Group*, which set unmistakable limits on what can be considered to be predatory within the meaning of the antitrust laws." *Id., at 887* (citing *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*). Judge Gould concluded that the plaintiffs' complaint did not **[***844]** satisfy these requirements because it contained no allegations that the retail price was set below cost and that those losses could later be recouped. *503 F.3d, at 887*. Judge Gould would have allowed the plaintiffs to amend their complaint if they could, in good faith, raise predatory pricing claims meeting the *Brooke Group* requirements. *503 F.3d, at 887*.

We granted certiorari, *554 U.S. 916, 128 S. Ct. 2957, 171 L. Ed. 2d 883 (2008)*, to resolve a conflict over whether a plaintiff can bring price-squeeze **[*446]** claims under *§ 2* of the Sherman Act when the defendant **[**1117]** has no antitrust duty to deal with the plaintiff. See *Covad Communs. Co. v. Bell Atl. Corp., 398 F.3d 666, 673-674, 365 U.S. App. D.C. 78 (CADC 2005)* (holding that *Trinko* bars such claims). We reverse.

II

This case has assumed an unusual posture. The plaintiffs now assert that they agree with Judge Gould's dissenting position that price-squeeze claims must meet the *Brooke Group* **[****15]** requirements for predatory pricing. They ask us to vacate the decision below in their favor and remand with instructions that they be given leave to amend their complaint to allege a *Brooke Group* claim. In other words, plaintiffs are no longer pleased with their initial theory of the case, and ask for a mulligan to try again under a different theory. Some *amici* argue that the case is moot in light of this confession of error. They contend that "[w]ith both petitioners and respondents now aligned on [the same] side of the question presented, *no party* with a concrete stake in this case's outcome is advocating for the contrary position." Brief for COMPTEL 6.

We do not think this case is moot. First, the parties continue to seek different relief. AT&T asks us to reverse the judgment of the Court of Appeals and remand with instructions to dismiss the complaint at issue. The plaintiffs ask that we vacate the judgment and remand with instructions that they be given leave to amend their complaint. The parties thus continue to be adverse not only in the litigation as a whole, but in the specific proceedings before this Court.

Second, it is not clear that the plaintiffs have unequivocally abandoned **[****16]** their price-squeeze claims. In their brief and at oral argument, the plaintiffs continue to refer to their "pricing squeeze claim." See Brief for Respondents 13. They appear to acknowledge that those claims must meet the *Brooke Group* requirements, but it is not clear whether they believe the necessary showing can be made in at least partial **[*447]** reliance on the sort of pricesqueeze theory accepted by the Court of Appeals. At one point, for example, the plaintiffs suggest that "the DSL transport price" may be pertinent to their claims going forward under the theory of Judge Gould's dissent; that opinion, however, concluded that *Trinko* "in essence takes the issu[e] of wholesale pricing out of the case." *503 F.3d at 886*. Given this ambiguity, the case before us remains a live dispute appropriate for decision. Cf. *Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)* (a party's voluntary conduct renders a case moot only if it is "'absolutely clear'" the party will take that course of action).

Amici also argue that we should dismiss the writ of certiorari because of the "lack of adversarial presentation" by an interested party. Brief for **[***845]** COMPTEL 7. To **[****17]** the contrary, prudential concerns favor our answering the question presented. Plaintiffs defended the Court of Appeals' decision at the certiorari stage, and the parties have invested a substantial amount of time, effort, and resources in briefing and arguing the merits of this case. In the absence of a decision from this Court on the merits, the Court of Appeals' decision would presumably remain binding precedent in the Ninth Circuit, and the Circuit conflict we granted certiorari to resolve would persist. Two *amici* have submitted briefs defending the Court of Appeals' decision on the merits, and we granted the motion of one of those *amici* to participate in oral argument. *555 U.S. 1029, 129 S. Ct. 617, 172 L. Ed. 2d 454 (2008)*. We think it appropriate to proceed to address the question presented.

[1118]** III

A

HN2[🡅] ***LEdHN[2]***[🡅] [2] *Section 2* of the Sherman Act makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations." Ch. 647, 26 Stat. 209, *15 U.S.C. § 2*. Simply possessing **[*448]** monopoly power and charging monopoly prices does not violate *§ 2*; rather, the statute targets "the willful acquisition or maintenance of that power **[****18]** 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. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*.

As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing. See *United States v. Colgate & Co., 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919)*. But there are rare instances in which a dominant firm may incur antitrust liability for purely unilateral conduct. For example, we have ruled that firms may not charge "predatory" prices--below-cost prices that drive rivals out of the market and allow the monopolist to raise its prices later and recoup its losses. *Brooke Group, 509 U.S., at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. Here, however, the complaint at issue does not contain allegations meeting those requirements. App. 10-24.

There are also limited circumstances in which a firm's unilateral refusal to deal with its rivals can give rise to antitrust liability. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 608-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*. Here, however, the District Court held that AT&T had no such antitrust duty to deal with its competitors, App. to Pet. for **[****19]** Cert. 84a-85a, and this holding was not challenged on appeal.[2]

[*449] The challenge here focuses on retail prices--where there is no predatory pricing--and the terms of dealing--where there is no duty to **[***846]** deal. Plaintiffs' price-squeeze claims challenge a different type of unilateral conduct in which a firm "squeezes" the profit margins of its competitors. This requires the defendant to be operating in two markets, a wholesale ("upstream") market and a retail ("downstream") market. A firm with market power in the upstream market can squeeze its downstream competitors **[****20]** by raising the wholesale price of inputs while cutting its own retail prices. This will raise competitors' costs (because they will have to pay more for their inputs) and lower their revenues (because they will have to match the dominant firm's low retail price). Price-squeeze plaintiffs assert that defendants must leave them a "fair" or "adequate" margin between the wholesale price and the retail price. In this case, we consider whether a plaintiff can state a price-squeeze claim when the defendant has no obligation under the antitrust laws to deal with the plaintiff at wholesale.

[1119]** B

1. A straightforward application of our recent decision in *Trinko* forecloses any challenge to AT&T's *wholesale* prices. In *Trinko*, Verizon was required by statute to lease its network elements to competing firms at wholesale rates. *540 U.S., at 402-403, 124 S. Ct. 872, 157 L. Ed. 2d 823*. The plaintiff--a customer of one of Verizon's rivals--asserted that Verizon denied its competitors access to interconnection support services, making it difficult for those competitors to fill their customers' orders. *Id., at 404-405, 124 S. Ct. 872, 157 L. Ed. 2d 823*. The complaint alleged that this conduct in the upstream market violated *§ 2* of the Sherman Act by impeding the ability **[****21]** of independent carriers to compete in the downstream market for local telephone service. *Ibid.*

We held that the plaintiff's claims were not actionable under *§ 2*. Given that Verizon had no antitrust duty to deal with its rivals at all, we concluded that "Verizon's alleged **[*450]** insufficient assistance in the provision of service to rivals" did not violate the Sherman Act. *Id., at 410, 124 S. Ct. 872, 157 L. Ed. 2d 823*. *Trinko* thus makes clear that ***HN3***[] ***LEdHN[3]***[] [3] if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.

In this case, as in *Trinko*, the defendant has no antitrust duty to deal with its rivals at wholesale; any such duty arises only from FCC regulations, not from the Sherman Act. See *supra, at 448, 172 L. Ed. 2d, at 845-846*. There is no meaningful distinction between the "insufficient assistance" claims we rejected in *Trinko* and the plaintiffs' price-squeeze claims in the instant case. The *Trinko* plaintiff challenged the quality of Verizon's interconnection service, while this case involves a challenge to AT&T's pricing structure. But for antitrust purposes, there is no reason to distinguish between price and nonprice components of **[****22]** a transaction. See, *e.g.*, *American Telephone & Telegraph Co. v. Central Office Telephone, Inc., 524 U.S. 214, 223, 118 S. Ct. 1956, 141 L. Ed. 2d 222 (1998)* ("Any claim for excessive rates can be couched as a claim for inadequate services and vice versa"). The nub of the complaint in both *Trinko* and this case is identical--the plaintiffs alleged that the defendants (upstream monopolists) abused their power in the wholesale market to prevent rival firms from competing effectively in **[***847]** the retail market. *Trinko* holds that such claims are not cognizable under the Sherman Act in the absence of an antitrust duty to deal.

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[2] The Court of Appeals assumed that any duty to deal arose only from FCC regulations, *503 F.3d 876, 878-879, n 6*(CA9 2007), and the question on which we granted certiorari made the same assumption. Even aside from the District Court's reasoning, App. to Pet. for Cert. 77a-85a, it seems quite unlikely that AT&T would have an antitrust duty to deal with the plaintiffs. Such a duty requires a showing of monopoly power, but--as the FCC has recognized, *In re Appropriate Framework for Broadband Access to Internet Over Wireline Facilities, 20 FCC Rcd. 14853, 14879-14887* --the market for high-speed Internet service is now quite competitive; DSL providers face stiff competition from cable companies and wireless and satellite providers.

The District Court and the Court of Appeals did not regard *Trinko* as controlling because that case did not directly address price-squeeze claims. *503 F.3d at 883*; App. to Pet. for Cert. 86a; see also Brief for COMPTEL as *Amicus Curiae* 27-30. This is technically true, but the reasoning of *Trinko* applies with equal force to price-squeeze claims. AT&T could have squeezed its competitors' profits just as effectively by providing poor-quality interconnection service to the plaintiffs, as Verizon allegedly did in *Trinko.* But a firm with no duty to deal in the wholesale market has no **[*451]** obligation to deal under terms and conditions **[****23]** favorable to its competitors. If AT&T had simply stopped providing DSL transport service to the plaintiffs, it would not have run afoul of the Sherman Act. Under these circumstances, AT&T was not required to offer this service at the wholesale prices the plaintiffs would have preferred.

2. The other component of a price-squeeze claim is the assertion that the defendant's *retail* prices are "too low." **[**1120]** Here too plaintiffs' claims find no support in our existing antitrust doctrine.

HN4[] ***LEdHN[4]***[] [4] "[C]utting prices in order to increase business often is the very essence of competition." *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*. In cases seeking to impose antitrust liability for prices that are too low, mistaken inferences are "especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Ibid.*; see also *Brooke Group, 509 U.S., at 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168*; *Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 121-122, n 17, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986)*. To avoid chilling aggressive price competition, we have carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low. Specifically, to prevail on a predatory **[****24]** pricing claim, a plaintiff must demonstrate that: (1) "the prices complained of are below an appropriate measure of its rival's costs"; and (2) there is a "dangerous probability" that the defendant will be able to recoup its "investment" in below-cost prices. *Brooke Group, supra, at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)*.

In the complaint at issue in this interlocutory appeal, App. 10-24, there is no allegation that AT&T's conduct met either of the *Brooke Group* requirements. Recognizing a price-squeeze claim where the defendant's retail price remains above cost would invite the precise harm we sought to avoid **[*452]** in *Brooke Group*: Firms might raise their retail prices or refrain from aggressive price competition to avoid potential antitrust liability. See *509 U.S., at 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168* (***HN5***[] ***LEdHN[5]***[] [5] "As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability **[****25]** of a judicial tribunal to control without **[***848]** courting intolerable risks of chilling legitimate price cutting").

3. Plaintiffs' price-squeeze claim, looking to the relation between retail and wholesale prices, is thus nothing more than an amalgamation of a meritless claim at the retail level and a meritless claim at the wholesale level. If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins.[3]

C

[3] Like the Court of Appeals, *503 F.3d at 880*, *amici* argue that price-squeeze claims have been recognized by Courts of Appeals for many years, beginning with Judge Hand's opinion in *United States v. Aluminum Co. of America, 148 F.2d 416 (CA2 1945)* (*Alcoa*). In that case, the Government alleged that Alcoa was using its monopoly power in the upstream aluminum ingot market to squeeze the profits of downstream aluminum sheet fabricators. The court concluded: "That it was unlawful to set the price of 'sheet' so low and hold the price of ingot so high, seems to us unquestionable, provided, as we have held, that on this record the price of ingot must **[****26]** be regarded as higher than a 'fair price.'" *Id., at 438*. Given developments in economic theory and antitrust jurisprudence since *Alcoa*, we find our recent decisions in *Trinko* and *Brooke Group* more pertinent to the question before us.

1. Institutional concerns also counsel against recognition of such claims. We have repeatedly emphasized the importance **[**1121]** of clear rules in ***antitrust law***. Courts are ill suited "to act as central planners, identifying the proper price, quantity, and other terms of dealing." *Trinko, 540 U.S., at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*. "'No court should impose a duty to deal that it cannot **[*453]** explain or adequately and reasonably supervise. The problem should be deemed irremedia[ble] by ***antitrust law*** when compulsory access requires the court to assume the day-to-day controls characteristic of a regulatory agency.'" *Id., at 415, 124 S. Ct. 872, 157 L. Ed. 2d 823* (quoting Areeda, Essential Facilities: An Epithet in Need of Limiting Principles, 58 Antitrust L. J. 841, 853 (1989)); see also *Concord v. Boston Edison Co., 915 F.2d 17, 25 (CA1 1990)* (Breyer, C. J.) ("[A]ntitrust courts normally avoid direct price administration, relying on rules and remedies . . . that are easier to administer").

It is difficult enough for courts **[****27]** to identify and remedy an alleged anticompetitive practice at one level, such as predatory pricing in retail markets or a violation of the duty-to-deal doctrine at the wholesale level. See *Brooke Group, supra, at 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168* (predation claims "requir[e] an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will"); *Trinko, supra, at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Recognizing price-squeeze claims would require courts simultaneously to police both the wholesale and retail prices to ensure that rival firms are not being squeezed. And courts would be aiming at a moving target, since it is the *interaction* between these two prices that may result in a squeeze.

Perhaps most troubling, firms that seek to avoid price-squeeze liability will have no safe harbor for their pricing practices. See *Concord, supra, at 22* (antitrust rules "must be clear enough for lawyers to explain them to clients"). At least in the predatory pricing context, firms know they will not incur liability as long as their retail prices are above cost. *Brooke Group, supra, at 223, 113 **[***849]** S. Ct. 2578, 125 L. Ed. 2d 168*. No such guidance is available for price-squeeze **[****28]** claims. See, *e.g.*, 3B P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 767c, p 138 (3d ed. 2008) ("[A]ntitrust faces a severe problem not only in recognizing any *§ 2* [price-squeeze] offense, but also in formulating a suitable remedy").

[*454] The most commonly articulated standard for price squeezes is that the defendant must leave its rivals a "fair" or "adequate" margin between the wholesale price and the retail price. See *Concord, supra, at 23-25*; *Alcoa, 148 F.2d 416, 437-438 (CA2 1945)*. One of our colleagues has highlighted the flaws of this test in Socratic fashion:

> "[H]ow is a judge or jury to determine a 'fair price?' Is it the price charged by other suppliers of the primary product? None exist. Is it the price that competition 'would have set' were the primary level not monopolized? How can the court determine this price without examining costs and demands, indeed without acting like a rate-setting regulatory agency, the rate-setting proceedings of which often last for several years? Further, how is the court to decide the proper size of the price 'gap?' Must it be large enough for all independent competing firms to make a 'living profit,' no matter how inefficient they may be? . . **[****29]** . And how should the court respond when costs or demands change over time, as they inevitably will?" *Concord, supra, at 25*.

Some *amici* respond to these concerns by proposing a "transfer price test" for identifying an unlawful price squeeze: A price squeeze should be presumed if the upstream monopolist could **[**1122]** not have made a profit by selling at its retail rates if it purchased inputs at its own wholesale rates. Brief for American Antitrust Institute (AAI) 30; Brief for COMPTEL 16-19; see *Ray v. Indiana & Mich. Elec. Co., 606 F. Supp. 757, 776-777 (ND Ill. 1984)*. Whether or not that test is administrable, it lacks any grounding in our antitrust jurisprudence. ***HN6***[] ***LEdHN[6]***[] [6] An upstream monopolist with no duty to deal is free to charge whatever wholesale price it would like; ***antitrust law*** does not prohibit lawfully obtained monopolies from charging monopoly prices. *Trinko, supra, at 407, 124 S. Ct. 872, 157 L. Ed. 2d 823* ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it **[*455]** is an important element of the free-market system"). Similarly, the Sherman Act does not forbid--indeed, it *encourages*--aggressive price competition at the retail level, as long as the prices **[****30]** being charged are not predatory. *Brooke Group, 509 U.S., at 223-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. If both the wholesale price and the retail price are independently lawful, there is no basis for imposing antitrust liability simply because a vertically integrated firm's wholesale price happens to be greater than or equal to its retail price.

2. *Amici* assert that there are circumstances in which price squeezes may harm competition. For example, they assert that price squeezes may raise entry barriers that fortify the upstream monopolist's position; they also contend that price squeezes may impair nonprice competition and innovation in the downstream market by driving independent firms out of business. See Brief for AAI 11-15; *Concord, supra, at 23-24*.

The problem, however, is that *amici* have not identified any independent **[***850]** competitive harm caused by price squeezes above and beyond the harm that would result from a duty-to-deal violation at the wholesale level or predatory pricing at the retail level. See 3A P. Areeda & H. Hovenkamp, ***Antitrust Law*** P 767c, p 126 (2d ed. 2002) ("[I]t is difficult to see any *competitive* significance [of a price squeeze] apart from the consequences of vertical integration itself"). **[****31]** To the extent a monopolist violates one of these doctrines, the plaintiffs have a remedy under existing law. We do not need to endorse a new theory of liability to prevent such harm.

IV

Lastly, as mentioned above, plaintiffs have asked us for leave to amend their complaint to bring a *Brooke Group* predatory pricing claim. We need not decide whether leave to amend should be granted. Our grant of certiorari was limited to the question whether price-squeeze claims are cognizable in the absence of an antitrust duty to deal. The **[*456]** Court of Appeals addressed only AT&T's motion for judgment on the pleadings on the plaintiffs' *original* complaint.[4] For the reasons stated, **[**1123]** we hold that the price-squeeze claims set forth in that complaint are not cognizable under the Sherman Act.

Plaintiffs have also filed an amended complaint, and the District Court concluded that this complaint, generously construed, could be read as alleging conduct that met the *Brooke Group* requirements for predatory pricing. App. to Pet. for Cert. 47a-52a, 56a. That order, however, applied the "no set of facts" pleading standard that we have since rejected as too lenient. See *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 561-563, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. It is for the District Court on remand to consider whether the amended complaint states a claim upon which relief may be granted in light of the new pleading standard **[****33]** we articulated in *Twombly*, whether plaintiffs should be given leave to amend their complaint to bring a claim under *Brooke Group*, and such other matters properly before it. Even if the amended complaint is further amended to add a *Brooke Group* claim, it may not survive a motion to dismiss. For if AT&T can bankrupt the plaintiffs by refusing to deal altogether, the plaintiffs must demonstrate why the law prevents AT&T from putting them out of **[*457]** business by pricing them out of the market. Nevertheless, such questions are for the District Court to decide in the first instance. We do not address these issues here, as they are outside the scope of the question presented and were not addressed by the Court of Appeals in the decision below. See *Cutter v. Wilkinson, 544 U.S. 709, 718, n 7, 125 S. Ct. 2113, 161 L. Ed. 2d* ***[***851]*** *1020 (2005)* ("[W]e are a court of review, not of first view").

* * *

Trinko holds that a defendant with no antitrust duty to deal with its rivals has no duty to deal under the terms and conditions preferred by those rivals. *540 U.S., at 409-410, 124 S. Ct. 872, 157 L. Ed. 2d 823*. *Brooke Group* holds that low prices are only actionable under the Sherman Act when the prices are below cost and there is a dangerous probability that the predator will be **[****34]** able to recoup the profits it loses from the low prices. *509 U.S., at 222-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. In this case, plaintiffs have not stated a duty-to-deal claim under *Trinko* and have not stated a predatory pricing claim under *Brooke Group.* They have nonetheless tried to join a wholesale

[4] We note a procedural irregularity with this case: Normally, an amended complaint supersedes the original complaint. See 6 C. Wright & A. Miller, Federal Practice & Procedure § 1476, pp 556-557 (2d ed. 1990). Here, the District Court addressed the amended complaint in its 2005 order, App. to Pet. for Cert. 36a-52a, but the court only certified its 2004 order--addressing the *original* complaint--for interlocutory appeal, **[****32]** *id.*, at 56a-57a. Both parties, as well as the Solicitor General, have expressed confusion about whether the amended complaint and the 2005 order are properly before this Court. See Brief for Petitioners 9, n 6 (noting "some ambiguity" about which order was certified); Brief for United States as *Amicus Curiae* 17 ("[I]t is unclear whether the 2005 Order and the amended complaint are properly at issue in this interlocutory appeal"); Brief for Respondents 8-10. The Court of Appeals majority did not address any of the District Court's holdings from the 2005 order, so we decline to consider those issues at this time.

claim that cannot succeed with a retail claim that cannot succeed, and alchemize them into a new form of antitrust liability never before recognized by this Court. We decline the invitation to recognize such claims. Two wrong claims do not make one that is right.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Concur by: BREYER

Concur

Justice **Breyer** with whom Justice **Stevens** Justice **Souter** and Justice **Ginsburg** join, concurring in the judgment.

I would accept respondents' concession that the Ninth Circuit majority's "price squeeze" holding is wrong, I would vacate the Circuit's decision, and I would remand the case in order to allow the District Court to determine whether respondents may proceed with their "predatory pricing" claim **[*458]** as set forth in Judge Gould's dissenting Ninth Circuit opinion. *linkline Communs., Inc. v. SBC Cal, Inc., 503 F.3d 876, 887 (2007)*.

[1124]** A **[****35]** "price squeeze" claim finds its natural home in a Sherman Act *§ 2* monopolization case where the Government as plaintiff seeks to show that a defendant's monopoly power rests, not upon "skill, foresight and industry," *United States v. Aluminum Co. of America, 148 F.2d 416, 430 (CA2 1945)* *(Alcoa)*, but upon exclusionary conduct, *United States v. Grinnell Corp., 384 U.S. 563, 576, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. As this Court pointed out in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, the "'means of illicit exclusion, like the means of legitimate competition, are myriad.'" *Id., at 414, 124 S. Ct. 872, 157 L. Ed. 2d 823* (quoting *United States v. Microsoft Corp., 346 U.S. App. D.C. 330, 253 F.3d 34, 58 (CADC 2001)* (en banc) *(per curiam)*). They may involve a "course of dealing" that, even if profitable, indicates a "willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko, supra, at 409, 124 S. Ct. 872, 157 L. Ed. 2d 823*. See, *e.g.*, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 610-611, 105 S. Ct. 2847, 86 L. Ed. 2d 467 (1985)*; Complaint in *United States* v. *International Business Machines Corp.*, Civil Action No. 69 Civ. 200 (SDNY, filed Jan. 17, 1969), P 20(c), reprinted in F. Fisher, J. McGowan, & J. Greenwood, **[***852]** Folded, Spindled, and Mutilated: Economic **[****36]** Analysis and *U. S.* v. *IBM*, App. 357 (1983). And, as Judge Hand wrote many years ago, a "price squeeze" may fall within that latter category. *Alcoa, supra, at 437-438*. As a matter of logic, it may be that a particular price squeeze can only be exclusionary if a refusal by the monopolist to sell to the "squeezed customer" would also be exclusionary. But a court, faced with a price squeeze rather than a refusal to deal, is unlikely to find the latter (hypothetical) question any easier to answer than the former.

I would try neither to answer these hypothetical questions here nor to foreshadow their answer. We have before us a regulated firm. During the time covered by the complaint, **[*459]** petitioners were required to provide wholesale digital subscriber line (DSL) transport service as a common carrier, charging "just and reasonable" rates that were not "unreasonabl[y] discriminat[ory]." *47 U.S.C. §§ 201(b)*, *202(a) (2000 ed.)*. And, in my view, a purchaser from a regulated firm (which, if a natural monopolist, is lawfully such) cannot win an antitrust case simply by showing that it is "squeezed" between the regulated firm's wholesale price (to the plaintiff) and its retail price (to customers for whose **[****37]** business both firms compete). When a regulatory structure exists to deter and remedy anticompetitive harm, the costs of antitrust enforcement are likely to be greater than the benefits. See *Concord v. Boston Edison Co., 915 F.2d 17, 26-29 (CA1 1990)*. Cf. 3 P. Areeda & D. Turner, ***Antitrust Law*** PP 834-836, pp 344-355 (1978) (whether a particular course of conduct counts as "exclusionary" for antitrust purposes depends upon a host of factors, including, for example, the market position of the defendant, the nature of the market, and the nature of the defendant's conduct).

Unlike *Concord,* the regulators here controlled prices only at the wholesale level. See *915 F.2d at 29*. But respondents do not claim that that regulatory fact makes any difference; and rightly so, for as far as I can tell, respondents could have gone to the regulators and asked for petitioners' wholesale prices to be lowered in light of the alleged price squeeze. Cf. *FPC v. Conway Corp., 426 U.S. 271, 279, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976)*; 3 Areeda & Turner, *supra*, P 726e, at 219-220.

Respondents now seek to show only that the defendant engaged in predatory pricing, within the terms of this Court's decision **[**1125]** in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*. **[****38]** The District Court can determine whether there is anything in the procedural history of this case that bars respondents from asserting their predatory pricing claim. And if not, it can decide the merits of that claim. As I said, I would remand the case so that it can do so.

References

15 U.S.C.S. § 2

1 Antitrust Laws and Trade Regulation § 2.03 (Matthew Bender 2d ed.)

2 Antitrust Laws and Trade Regulation § 27.04 (Matthew Bender 2d ed.)

1 Antitrust Laws and Trade Regulation: Desk Edition § 3.02 (Matthew Bender)

2 Federal ***Antitrust Law*** § 14.18 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices §§ 36.7, 41.5

L Ed Index, Internet; Wholesale and Wholesalers

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. §§ 1 et seq.*). *64 L. Ed. 2d 997*.

End of Document

Hemi Group, LLC v. City of New York

Supreme Court of the United States

November 3, 2009, Argued; January 25, 2010, Decided

No. 08-969

Reporter

559 U.S. 1 *; 130 S. Ct. 983 **; 175 L. Ed. 2d 943 ***; 2010 U.S. LEXIS 768 ****; 78 U.S.L.W. 4130; 22 Fla. L. Weekly Fed. S 113

HEMI GROUP, LLC and KAI GACHUPIN, Petitioners v. CITY OF NEW YORK, NEW YORK

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 2008 U.S. App. LEXIS 18930 (2d Cir. N.Y., Sept. 2, 2008)

Disposition: Reversed and remanded.

Core Terms

Jenkins Act, customers, taxes, cigarettes, foreseeable, tax revenue, misrepresentations, proximate cause, predicate act, causation, failure to file, bidders, collecting, cases, mail, investors, tobacco, circumstances, violations, defrauded, proximate, harmed, prices, bid, fraudulent, direct relation, mail fraud, wire fraud, out-of-state, racketeering

LexisNexis® Headnotes

Antitrust & Trade Law > Consumer Protection > Tobacco Products > General Overview

Tax Law > ... > Alcohol & Tobacco Products > Tobacco Products Taxes > General Overview

HN1[] **Consumer Protection, Tobacco Products**

The Jenkins Act, *15 U.S.C.S. § 375 et seq.*, requires out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN2[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides a private cause of action for any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962*. *18 U.S.C.S. § 1964(c)*. *Section 1962*, in turn, contains RICO's criminal provisions. Specifically, *§ 1962(c)* makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined to include a number of so-called predicate acts, including mail and wire fraud. *18 U.S.C.S. § 1961(1)*.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN3[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

To state a claim under the civil Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff is required to show that a RICO predicate offense not only was a "but for" cause of his injury, but was the proximate cause as well. Proximate cause for RICO purposes is evaluated in light of its common-law foundations; proximate cause thus requires some direct relation between the injury asserted and the injurious conduct alleged. A link that is too remote, purely contingent, or indirect is insufficient.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

Civil Procedure > Remedies > Damages > General Overview

HN4[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The general tendency of the law, in regard to damages at least, is not to go beyond the first step. The general tendency applies with full force to proximate cause inquiries under Racketeer Influenced and Corrupt Organizations Act.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN5[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

One consideration relevant to the requirement of a direct relationship between the fraud and the harm under the Racketeer Influenced and Corrupt Organizations Act is whether better situated plaintiffs would have an incentive to sue.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Remedies

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN6[] **Racketeer Influenced & Corrupt Organizations, Remedies**

The compensable injury flowing from a violation of the Racketeer Influenced and Corrupt Organizations Act necessarily is the harm caused by the predicate acts of racketeering.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > Scope

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act is interpreted broadly, consistent with its terms, but its reach is limited by the requirement of a direct causal connection between the predicate wrong and the harm.

Lawyers' Edition Display

Decision

[*943]** City held to have failed to allege RICO (*18 U.S.C.S. § 1961 et seq.*) violation by online cigarette vendor, as vendor's alleged failure to report sales to state, which then informed city of sales to city residents, was not direct cause of asserted harm to city from lost revenue from its cigarette tax.

Summary

Procedural posture: Respondent city brought an action against petitioners, an out-of-state vendor of cigarettes and its owner, alleging that the vendor's failure to report cigarette sales to the state caused the city to lose tax revenue. Upon a writ of certiorari, the vendor and owner appealed the judgment of the U.S. Court of Appeals for the Second Circuit which held that the city stated a claim under the Racketeer Influenced and Corrupt Organizations Act (RICO).

Overview: The city alleged that the vendor and the owner committed mail and wire fraud by selling cigarettes to city residents without reporting the sales to the state as required by federal law, and thus the state was prevented from providing information to allow the city to identify residents who failed to pay city cigarette taxes. The U.S. Supreme Court held, however, that the city's causal theory could not satisfy the RICO requirement of a direct relationship between the city's lost tax revenue and the vendor's failure to report cigarette sales to the state. The failure of the residents to pay the cigarette tax was the direct harm to the city, and the vendor's unlawful conduct in failing to provide sales reports caused direct harm to the state, not the city. Thus, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud, and the city's theory of liability rested not only on separate actions, but separate actions carried out by separate parties. Further, the city's allegation that the vendor and the owner engaged in a systematic scheme to thwart tax **[***944]** collection did not negate the requirement that the RICO violation directly cause the city's harm.

Outcome: The judgment holding that the city stated a RICO claim was reversed, and the case was remanded for further proceedings. 5-3 decision; 1 concurrence, 1 dissent.

Headnotes

SALES AND USE TAXES §5 > CIGARETTE PURCHASES -- REGISTRATION > Headnote:
LEdHN[1][] [1]

The Jenkins Act, *15 U.S.C.S. § 375 et seq.*, requires out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents. (Roberts, Ch. J., joined by Scalia, Thomas, and Alito, JJ.)

EXTORTION, BLACKMAIL, AND RACKETEERING §5 EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- CRIMINAL ACTIVITY -- PRIVATE CAUSE OF ACTION > Headnote:
LEdHN[2][] [2]

The Racketeer Influenced and Corrupt Organizations Act (RICO) provides a private cause of action for any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962*. *18 U.S.C.S. § 1964(c)*. *Section 1962*, in turn, contains RICO's criminal provisions. Specifically, *§ 1962(c)* makes it unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. Racketeering activity is defined to include a number of so-called predicate acts, including mail and wire fraud. *18 U.S.C.S. § 1961(1)*. (Roberts, Ch. J., joined by Scalia, Thomas, and Alito, JJ.)

PARTIES §3TORTS §2.3 > PRIVATE RICO ACTION -- PROXIMATE CAUSE > Headnote:
LEdHN[3][] [3]

To state a claim under the civil Racketeer Influenced and Corrupt Organizations Act (RICO), a plaintiff is required to show that a RICO predicate offense not only was a "but for" cause of his injury, but was the proximate cause as well. Proximate cause for RICO purposes is evaluated in light of its common-law foundations; proximate cause thus requires some direct relation between the injury asserted and the injurious conduct alleged. A link that is too remote, purely contingent, or indirect is insufficient. (Roberts, Ch. J., joined by Scalia, Thomas, and Alito, JJ.)

TORTS §2.3 > PRIVATE RICO ACTION -- DAMAGES -- PROXIMATE CAUSE > Headnote:
LEdHN[4][] [4]

The general tendency of the law, in regard to damages at least, is not to go beyond the first step. The general tendency applies with full force to proximate cause inquiries under Racketeer Influenced and Corrupt Organizations Act. (Roberts, Ch. J., joined by Scalia, Thomas, and Alito, JJ.)

[*945]**

PARTIES §3 > PRIVATE RICO ACTION -- INCENTIVE TO SUE > Headnote:
LEdHN[5][] [5]

One consideration relevant to the requirement of a direct relationship between the fraud and the harm under the Racketeer Influenced and Corrupt Organizations Act is whether better situated plaintiffs would have an incentive to sue. (Roberts, Ch. J., joined by Scalia, Thomas, and Alito, JJ.)

EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- COMPENSABLE INJURY > Headnote:
LEdHN[6][] [6]

The compensable injury flowing from a violation of the Racketeer Influenced and Corrupt Organizations Act necessarily is the harm caused by the predicate acts of racketeering. (Roberts, Ch. J., joined by Scalia, Thomas, and Alito, JJ.)

EXTORTION, BLACKMAIL, AND RACKETEERING §4 > RICO -- INTERPRETATION > Headnote:
LEdHN[7][] [7]

The Racketeer Influenced and Corrupt Organizations Act is interpreted broadly, consistent with its terms, but its reach is limited by the requirement of a direct causal connection between the predicate wrong and the harm. (Roberts, Ch. J., joined by Scalia, Thomas, and Alito, JJ.)

Syllabus

[*1] [*946] [**984]** Respondent New York City taxes the possession of cigarettes. Petitioner Hemi Group, based in New Mexico, sells cigarettes online to residents of the City. Neither state nor city law requires out-of-state sellers such as Hemi to charge, collect, or remit the City's tax; instead, the City must recover its tax on out-of-state sales directly from the purchasers. But the Jenkins Act, *15 U.S.C. §§ 375-378*, requires out-of-state sellers to submit customer information to the States into which they ship cigarettes, and New York State has agreed to forward that information to the City. That information helps the City track down cigarette purchasers who do not pay their taxes. Against that backdrop, the City filed this lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that Hemi's failure to file the Jenkins Act reports with the State constituted mail and wire fraud, which are defined as "racketeering activit[ies]," *18 U.S.C. § 1961(1)*, subject to enforcement under civil *RICO, § 1964(c)*. The District Court dismissed the claims, but the Second **[****2]** Circuit vacated the judgment and remanded. Among other things, the Court of Appeals held that the City's asserted injury--lost tax revenue--came about "by reason of" the predicate mail and wire frauds. It accordingly determined that the City had stated a valid RICO claim.

[*2] *Held:* The judgment is reversed, and the case is remanded.

541 F.3d 425, reversed and remanded.

Chief Justice Roberts delivered the opinion of the Court in part, concluding that because the City cannot show that it lost tax revenue "by reason of" the alleged RICO violation, it cannot state a RICO claim. *Pp. ____ - ____, 175 L. Ed. 2d, at 950-956*.

(a) To establish that an injury came about "by reason of" a RICO violation, a plaintiff must show that a predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Proximate cause for RICO purposes should be evaluated **[**985]** in light of its common-law foundations; it thus requires "some direct relation between the injury asserted and the injurious conduct alleged." *Ibid.* A link that is "too remote," "purely contingent," or "indirec[t]" is insufficient. *Id., at 271, 274, 112 S. Ct. 1311, 117 L. Ed. 2d 532*.

The City's causal theory cannot **[****3]** satisfy RICO's direct relationship requirement. Indeed, the causal link here is far more attenuated than the one the Court rejected as "purely contingent" and "too remote" in *Holmes*. *Id., at 271, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, it could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected. As the Court reiterated in *Holmes*, "[t]he general tendency of the law, in regard **[***947]** to damages at least, is not to go beyond the first step," *id., at 271-272, 112 S. Ct. 1311, 117 L. Ed. 2d 532*, and that "general tendency" applies with full force to proximate cause inquiries under RICO, *e.g., ibid.* Because the City's causation theory requires the Court to move well beyond the first step, **[****4]** that theory cannot satisfy RICO's direct relationship requirement.

The City's claim suffers from the same defect as the RICO claim rejected in *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 458-461, 126 S. Ct. 1991, 164 L. Ed. 2d 720*, where the conduct directly causing the harm was distinct from the conduct giving rise to the fraud, see *id., at 458, 126 S. Ct. 1991, 164 L. Ed. 2d 720*. Indeed, the disconnect between the asserted injury and the alleged fraud in this case is even sharper. In *Anza,* the same party had both engaged in the harmful conduct and committed the fraudulent act. Here, the City's theory of liability rests not just on separate *actions*, but separate actions carried out by separate **[*3]** *parties.* The City's theory thus requires that the Court extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi's obligation was to file Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi. The **[****5]** Court has never before stretched the causal chain of a RICO violation so far, and declines to do so today. See, *e.g., id., at 460-461, 126 S. Ct. 1991, 164 L. Ed. 2d 720*. *Pp. ____ - ____, 175 L. Ed. 2d, at 950-953*.

(b) The City attempts to avoid this conclusion by characterizing the violation not merely as Hemi's failure to file Jenkins Act reports with the State, but as a more general systematic scheme to defraud the City of tax revenue. But if the City could escape the proximate-cause requirement merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct, the Court's RICO proximate cause precedent would become a mere pleading rule. That precedent makes clear that "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'" *Anza, supra, at 457, 126 S. Ct. 1991, 164 L. Ed. 2d 720*. Because the only fraudulent *conduct* alleged here is a violation of the Jenkins Act, the City must, but cannot, **[**986]** show that Hemi's failure to file the Jenkins Act reports led directly to its injuries.

The City also errs in relying on *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*. There, the plaintiffs' causation theory was "straightforward": The causal link in *Bridge* involved a direct and easily identifiable **[****6]** connection between the fraud at issue and the plaintiffs' injury, *id., at 647, 658, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*; the plaintiffs there "were the *only* parties injured by petitioners' misrepresentations," *id., at 658, 128 S. Ct. 2131, 2144, 170 L. Ed. 2d 1012, 1027*; and there were "no independent factors that account[ed] for [the] injury," *ibid.*. The City's theory in this case is anything but straightforward: Multiple steps separate the alleged fraud **[***948]** from the asserted injury. And in contrast to *Bridge*, where there were "no independent factors that account[ed] for [the plaintiffs'] injury," *ibid.*, here there certainly were: The City's theory of liability rests on the independent actions of third and even fourth parties. *Pp. ____ - ____, 175 L. Ed. 2d, at 953-956*.

Roberts, C. J., delivered the opinion of the Court in part, in which Scalia, Thomas, and Alito, JJ., joined, and in which Ginsburg, J., joined in part. Ginsburg, J., filed an opinion concurring in part and concurring in the judgment, post, p. ___. Breyer, J., filed a dissenting opinion, in which Stevens and Kennedy, JJ., joined, post, p. ___. Sotomayor, J., took no part in the consideration or decision of the case.

Counsel: Randolph H. Barnhouse argued the cause for the petitioner.

Leonard J. Koerner argued the cause for the respondent.

Judges: Roberts, C. J., delivered the opinion of the Court in part, in which Scalia, Thomas, and Alito, JJ., joined, and in which Ginsburg, J., joined in part. Ginsburg, J., filed an opinion concurring in part and concurring in the judgment. Breyer, J., filed a dissenting opinion, in which Stevens and Kennedy, JJ., joined. Sotomayor, J., took no part in the consideration or decision of the case.

Opinion by: Roberts

Opinion

[*4] Chief Justice **Roberts** delivered the opinion of the Court in part.

The City of New York taxes the possession of cigarettes. Hemi Group, based **[****7]** in New Mexico, sells cigarettes online to residents of the City. Neither state nor city law requires Hemi to charge, collect, or remit the tax, and the purchasers seldom pay it on their own. Federal law, however, requires out-of-state vendors such as Hemi to submit customer information to the States into which they ship the cigarettes.

Against that backdrop, the City filed this lawsuit under the Racketeer Influenced and Corrupt Organizations Act (RICO), alleging that Hemi failed to file the required customer information with the State. That failure, the City argues, constitutes mail and wire fraud, which caused it to lose tens of millions of dollars in unrecovered cigarette taxes. Because the City cannot show that it lost the tax revenue **[*5]** "by reason of" the alleged RICO violation, *18 U.S.C. § 1964(c)*, we hold that the City cannot state a claim under RICO. We therefore reverse the Court of Appeals' decision to the contrary.

I

A

This case arises from a motion to dismiss, and so we accept as true the factual **[**987]** allegations in the City's second amended complaint. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 164, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)*.

New York State authorizes the **[****8]** City of New York to impose its own taxes on cigarettes. N. Y. Unconsol. Law Ann. § 9436(1) (West Supp. 2009). Under that authority, the City has levied a $1.50 per pack tax on each standard pack of cigarettes possessed within the City for sale or use. *N. Y. C. Admin. Code § 11-1302(a) (2008)*; see also Record A1016. When purchasers buy cigarettes from in-state vendors, the seller is responsible for charging, collecting, and remitting the tax. *N. Y. Tax Law Ann. § 471(2) (West Supp. 2009)*. Out-of-state vendors, however, are not. *Ibid.*; see *City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 432-433 (CA2 2008)*. Instead, the City is responsible for recovering, directly from the customers, use taxes on cigarettes sold outside New York. That can be difficult, **[***949]** as those customers are often reluctant to pay and tough to track down. One way the City can gather information that would assist it in collecting the back taxes is through ***HN1***[] ***LEdHN[1]***[] [1] the Jenkins Act, ch. 699, 63 Stat. 884, as amended by 69 Stat. 627. That Act requires out-of-state cigarette sellers to register and to file a report with state tobacco tax administrators listing the name, address, and quantity of cigarettes purchased by state residents. **[****9]** *15 U.S.C. §§ 375-378*.

New York State and the City have executed an agreement under which both parties undertake to "cooperate fully with **[*6]** each other and keep each other fully and promptly informed with reference to any person or transaction subject to both State and City cigarette taxes including [i]nformation obtained which may result in additional cigarette tax revenue to the State or City provided that the disclosure of that information is permissible under existing laws and agreements." Record A1003. The City asserts that under that agreement, the State forwards Jenkins Act information to the City. *Id.,* at A998; Second Amended Compl. P 54. That information helps the City track down purchasers who do not pay their taxes. *Id.*, PP 58-59.

Hemi Group is a New Mexico company that sells cigarettes online. Hemi, however, does not file Jenkins Act information with the State. The City alleges that this failure has cost it "tens if not hundreds of millions of dollars a year in cigarette excise tax revenue." Record A996. Based on Hemi's failure to file the information with the State, the City filed this federal RICO claim.

B

HN2[] ***LEdHN[2]***[] [2] RICO provides a private cause of action for "[a]ny person injured in his **[****10]** business or property by reason of a violation of *section 1962* of this chapter." *18 U.S.C. § 1964(c)*. *Section 1962*, in turn, contains RICO's criminal provisions. Specifically, *§ 1962(c)*, which the City invokes here, makes it "unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate . . . commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." "[R]acketeering activity" is defined to include a number of so-called predicate acts, including the two at issue in this case--mail and wire fraud. See *§ 1961(1)*.

The City alleges that Hemi's "interstate sale of cigarettes and the failure to file Jenkins Act reports identifying those sales" constitute the RICO predicate offenses of mail and **[*7]** wire fraud in violation of *§ 1962(c)*, for which *§ 1964(c)* provides a private cause of action. Record A980. Invoking that private cause of action, the **[**988]** City asserts that it has suffered injury in the form of lost tax revenue--its "business or property" in RICO terms--"by reason of" Hemi's fraud.

Hemi does not contest the City's characterization **[****11]** of the Jenkins Act violations as predicate offenses actionable under *§ 1964(c)*. (We therefore assume, without deciding, that failure to file Jenkins Act material can serve as a RICO predicate offense.) Instead, Hemi argues that the City's asserted injury--lost tax revenue--is not "business or property" under RICO, and that the City cannot show that it suffered any injury "by reason of" the failure to file Jenkins Act reports.

[*950]** The District Court dismissed the City's RICO claims, determining that Hemi owner and officer Kai Gachupin did not have an individual duty to file Jenkins Act reports, and thus could not have committed the alleged predicate acts. *City of New York v. Nexicon, Inc., No. 03 CV 383 (DAB), 2006 U.S. Dist. LEXIS 10295, 2006 WL 647716, *7-*8 (SDNY, Mar. 15, 2006)*. The District Court therefore held that the City could not establish that Hemi and Gachupin formed an "enterprise" as required to establish RICO liability. *2006 U.S. Dist. LEXIS 10295, [WL] at *7-*10*. Because it dismissed on that ground, the District Court did not address whether the City's loss of tax revenue constitutes an injury to its "business or property" under *§ 1964*, or whether that injury was caused "by reason of" Hemi's failure to file the Jenkins Act reports.

The **[****12]** Second Circuit vacated the District Court's judgment and remanded for further proceedings. The Court of Appeals held that the City had established that Gachupin and Hemi operated as an "enterprise" and that the enterprise committed the predicate RICO acts of mail and wire fraud, based on the failure to file the Jenkins Act material with the State. *541 F.3d at 447-448*. The court also determined that the City's asserted injury, lost tax revenue, was "business **[*8]** or property" under RICO. *Id., at 444-445*. And that injury, the court concluded, came about "by reason of" the predicate mail and wire frauds. *Id., at 440-444*. The City thus had stated a viable RICO claim. Judge Winter dissented on the ground that the alleged RICO violation was not the proximate cause of the City's injury. *Id., at 458-461*.

Hemi filed a petition for certiorari, asking this Court to determine whether the City had been "directly injured in its 'business or property'" by reason of the alleged mail and wire frauds. Pet. for Cert. i. We granted that petition. *556 U.S. 1220, 129 S. Ct. 2159, 173 L. Ed. 2d 1155 (2009)*.

II

Though framed as a single question, Hemi's petition for certiorari raises two distinct issues: First, whether a loss in tax revenue is "business **[****13]** or property" under *18 U.S.C. § 1964(c)*; and second, whether the City's asserted injury came about "by reason of" the allegedly fraudulent conduct, as required by *§ 1964(c)*. We determine that the City cannot satisfy the causation requirement--that any injury the City suffered must be "by reason of" the alleged frauds--and therefore do not decide whether the City's allegations of lost tax revenue constitute an injury to its "business or property."

A

In *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*, we set forth the standard of causation that applies to civil RICO claims. In that case, we addressed a RICO claim brought by Securities Investor Protection Corporation (SIPC) against defendants whom SIPC alleged had manipulated stock prices. *Id., **[**989]** at 262-263, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. SIPC had a duty to reimburse customers of certain registered broker-dealers in the event the broker-dealers were unable to meet their financial obligations. *Id., at 261, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. When the conspiracy by the stock manipulators was detected, stock prices collapsed, and two broker-dealers were unable to meet **[*9]** their obligations to their customers. SIPC, as insurer against that loss, ultimately **[***951]** was on the hook for nearly **[****14]** $13 million to cover the customers' claims. The Court held that SIPC could not recover against the conspirators because it could not establish that it was injured "by reason of" the alleged fraud, as that phrase is used in RICO.

We explained that, ***HN3***[] ***LEdHN[3]***[] [3] to state a claim under civil RICO, the plaintiff is required to show that a RICO predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Proximate cause for RICO purposes, we made clear, should be evaluated in light of its common-law foundations; proximate cause thus requires "some direct relation between the injury asserted and the injurious conduct alleged." *Ibid.* A link that is "too remote," "purely contingent," or "indirec[t]" is insufficient. *Id., at 271, 274, 112 S. Ct. 1311, 117 L. Ed. 2d 532*.

Applying that standard, we rejected SIPC's RICO claim. The alleged conspiracy, we held, directly harmed only the broker-dealers; SIPC's injury, on the other hand, was "purely contingent" on that harm. *Id., at 271, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. The connection between the alleged conspiracy and SIPC's injury was therefore "too remote" to satisfy RICO's direct relationship requirement. *Ibid.*

The City's causal theory is far more attenuated than the one we **[****15]** rejected in *Holmes.* According to the City, Hemi committed fraud by selling cigarettes to city residents and failing to submit the required customer information to the State. Without the reports from Hemi, the State could not pass on the information to the City, even if it had been so inclined. Some of the customers legally obligated to pay the cigarette tax to the City failed to do so. Because the City did not receive the customer information, the City could not determine which customers had failed to pay the tax. The City thus could not pursue those customers for payment. The City thereby was injured in the amount of the portion of back taxes that were never collected. See Record A996.

[*10] But as we reiterated in *Holmes*, ***HN4***[] ***LEdHN[4]***[] [4] "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step." *503 U.S., at 271-272, 112 S. Ct. 1311, 117 L. Ed. 2d 532* (quoting *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U.S. 519, 534, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*, in turn quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U.S. 531, 533, 38 S. Ct. 186, 62 L. Ed. 451 (1918)* internal quotation marks omitted). Our cases confirm that the "general tendency" applies with full force to proximate cause inquiries under RICO. *Holmes, supra, at 271-272, 112 S. Ct. 1311, 117 L. Ed. 2d 532*; **[****16]** see also *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 657, 659, 128 S. Ct. 2131, 170 L. Ed. 2d 1012 (2008)*; *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 460-461, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*. Because the City's theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement.

Our decision in *Anza, supra*, confirms that the City's theory of causation is far too indirect. There we considered a RICO claim brought by Ideal Steel Supply against its competitor, National Steel Supply. Ideal alleged that National had defrauded New York State by failing to **[**990]** charge and remit sales taxes, and that National **[***952]** was thus able to undercut Ideal's prices. The lower prices offered by National, Ideal contended, allowed National to attract customers at Ideal's expense. *Id., at 458, 126 S. Ct. 1991, 164 L. Ed. 2d 720*.

Finding the link between the fraud alleged and injury suffered to be "attenuated," we rejected Ideal's claim. *Id., at 459, 126 S. Ct. 1991, 164 L. Ed. 2d 720*. "The direct victim of this conduct," we held, was "the State of New York, not Ideal." *Id., at 458, 126 S. Ct. 1991, 164 L. Ed. 2d 720*. "It was the State that was being defrauded and the State that lost tax revenue as a result." *Ibid.* We recognized that Ideal had asserted "its own harms when

[National] failed to charge **[****17]** customers for the applicable sales tax." *Ibid.* But the cause of Ideal's harm was "a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State)." *Ibid.* The alleged violation therefore had not "led directly to the plaintiff's injuries," and Ideal accordingly had failed to meet RICO's "requirement of a direct **[*11]** causal connection" between the predicate offense and the alleged harm. *Id., at 460-461, 126 S. Ct. 1991, 164 L. Ed. 2d 720*.

The City's claim suffers from the same defect as the claim in *Anza.* Here, the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file Jenkins Act reports. Thus, as in *Anza*, the conduct directly causing the harm was distinct from the conduct giving rise to the fraud. See *id., at 458, 126 S. Ct. 1991, 164 L. Ed. 2d 720*.

Indeed, the disconnect between the asserted injury and the alleged fraud in this case is even sharper than in *Anza.* There, we viewed the point as important because the same party--National Steel--had both engaged in the harmful conduct and committed the fraudulent act. We nevertheless found the distinction between the relevant acts sufficient to defeat **[****18]** Ideal's RICO claim. Here, the City's theory of liability rests not just on separate *actions*, but separate actions carried out by separate *parties.*

The City's theory thus requires that we extend RICO liability to situations where the defendant's fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first place if they decided not to pay taxes they were legally obligated to pay. Put simply, Hemi's obligation was to file the Jenkins Act reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi. We have never before stretched the causal chain of a RICO violation so far, and we decline to do so today. See *id., at 460-461, 126 S. Ct. 1991, 164 L. Ed. 2d 720*; cf. *Associated Gen. Contractors, supra, at 541, n. 46, 103 S. Ct. 897, 74 L. Ed. 2d 723* (finding no proximate cause in the antitrust context where the plaintiff's "harm stems most directly from the conduct of persons who are not victims of the conspiracy").

HN5[] ***LEdHN[5]***[] [5] One consideration we have highlighted as relevant to the RICO "direct relationship" requirement is whether better situated **[*12]** plaintiffs would have an incentive **[****19]** to sue. See *Holmes, supra, at 269-270, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. The State certainly is better situated than the City to seek recovery from Hemi. And the State has an incentive to sue--the **[***953]** State imposes its own $2.75 per pack tax on cigarettes possessed within the State, nearly double what the City charges. *N. Y. Tax Law Ann. § 471(1) (West Supp. 2009)*. We do not opine on whether the State could bring a RICO action for any lost tax revenue. Suffice it to say that the State would have concrete incentives to try. See **[**991]** *Anza, supra, at 460, 126 S. Ct. 1991, 164 L. Ed. 2d 720* ("Ideal accuses the Anzas of defrauding the State of New York out of a substantial amount of money. If the allegations are true, the State can be expected to pursue appropriate remedies").

The dissent would have RICO's proximate cause requirement turn on foreseeability, rather than on the existence of a sufficiently "direct relationship" between the fraud and the harm. It would find that the City has satisfied that requirement because "the harm is foreseeable; it is a consequence that Hemi intended, indeed desired; and it falls well within the set of risks that Congress sought to prevent." *Post, at ____, 175 L. Ed. 2d, at 960* (opinion of Breyer, J.). If this line of reasoning sounds familiar, it should. **[****20]** It is precisely the argument lodged against the majority opinion in *Anza.* There, the dissent criticized the majority's view for "permit[ting] a defendant to evade liability for harms that are not only foreseeable, but the *intended* consequences of the defendant's unlawful behavior." *547 U.S., at 470, 126 S. Ct. 1991, 164 L. Ed. 2d 720* (Thomas, J., concurring in part and dissenting in part). But the dissent there did not carry the day, and no one has asked us to revisit *Anza.*

The concepts of direct relationship and foreseeability are of course two of the "many shapes [proximate cause] took at common law," *Holmes, 503 U. S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Our precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm. Indeed, *Anza* and *Holmes* never even mention the concept of foreseeability.

[*13] B

The City offers a number of responses. It first challenges our characterization of the violation at issue. In the City's view, the violation is not merely Hemi's failure to file Jenkins Act information with the State, but a more general "systematic scheme to defraud the City of tax revenue." Brief for Respondent 42. Having broadly defined the violation, the City contends that it has been directly **[****21]** harmed by reason of that systematic scheme. *Ibid.*

But the City cannot escape the proximate cause requirement merely by alleging that the fraudulent scheme embraced all those indirectly harmed by the alleged conduct. Otherwise our RICO proximate cause precedent would become a mere pleading rule. In *Anza*, for example, Ideal alleged that National's scheme "was to give National a competitive advantage over Ideal." *547 U.S., at 454-455, 126 S. Ct. 1991, 164 L. Ed. 2d 720*. But that allegation did not prevent the Court from concluding that National's fraud directly harmed only the State, not Ideal. As the Court explained, Ideal could not "circumvent the proximate-cause requirement simply by claiming that the defendant's aim was to increase market share at a competitor's expense." *Id., **[***954]** at 460, 126 S. Ct. 1991, 164 L. Ed. 2d 720*.[1]

Our precedent makes clear, moreover, that ***HN6***[] ***LEdHN[6]***[] [6] "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'" *Id., at 457, 126 S. Ct. 1991, 164 L. Ed. 2d 720* (quoting *Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 497, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985))*. In its RICO statement, the City alleged that Hemi's failure to file Jenkins Act reports **[**992]** constituted the predicate act of mail and wire fraud. Record A980. The City went on to **[*14]** allege that this predicate act "directly caused" its harm, *id.,* at A996, but that assertion is a legal conclusion about proximate cause--indeed, the very legal conclusion before us. The only fraudulent *conduct* alleged here is a violation of the Jenkins Act. See *541 F.3d at 459* (Winter, J., dissenting). Thus, the City must show that Hemi's failure to file the Jenkins Act reports with the State led directly to its injuries. This it cannot do.

The City also relies on *Bridge, 553 U.S. 639, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*. *Bridge* reaffirmed the requirement that there must be "a sufficiently direct relationship between the defendant's wrongful conduct and the plaintiff's injury." *Id., at 657, 128 S. Ct. 2131, 2144, 170 L. Ed. 2d 1012, 1027*. The case involved competing bidders at a county **[****23]** tax-lien auction. Because the liens were profitable even at the lowest possible bid, multiple bidders offered that low bid. (The bidding took the form of the percentage tax penalty the bidder would require the property owner to pay, so the lowest possible bid was 0%.) To decide which bidder would be awarded the lien, the county devised a plan to allocate the liens "on a rotational basis." *Id., at 643, 128 S. Ct. 2131, 2135, 170 L. Ed. 2d 1012, 1017* (internal quotation marks omitted). But as we noted in that case, this created a "perverse incentive": "Bidders who, in addition to bidding themselves, sen[t] agents to bid on their behalf [would] obtain a disproportionate share of liens." *Ibid.* The county therefore prohibited bidders from using such agents. *Ibid.*

A losing bidder alleged that a competitor had defrauded the county by employing shadow bidders to secure a greater proportion of liens than it was due. We held that the bidder-plaintiff had met RICO's causation requirement. Distinguishing that claim from the one at issue in *Anza*, we noted that the plaintiff's theory of causation in *Bridge* was "straightforward": Because of the zero-sum nature of the auction, and because the county awarded bids on a rotational basis, **[****24]** each time a fraud-induced bid was awarded, a particular legitimate bidder was necessarily passed over. *553 U.S., at 647, 658, 128 S. Ct. 2131, 170 L. Ed. 2d 1012* The losing bidders, moreover, "were the *only* **[*15]** parties injured by petitioners' misrepresentations." *Id., at 658, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*. The county was not; it received the same revenue regardless of which bidder prevailed.

The City's theory in this case is anything but straightforward: Multiple steps, as we have detailed, separate **[***955]** the alleged fraud from the asserted injury. And in contrast to *Bridge,* where there were "no independent factors that account[ed] for [the plaintiff's] injury," *ibid.,* here there certainly were: The City's theory of liability rests on the independent actions of third and even fourth parties.

[1] Even if we were willing to look to Hemi's intent, as the dissent suggests we should, the City would fare no better. Hemi's aim was not to defraud the City (or the State, for that matter) of tax revenue, but to sell more cigarettes. Hemi itself neither owed taxes nor was obliged to collect and remit them. This all suggests that Hemi's alleged fraud was aimed at Hemi's competitors, not the City. But *Anza* teaches that the competitors' injuries **[****22]** in such a case are too attenuated to state a RICO claim.

The City at various points during the proceedings below described its injury as the lost "opportunity to tax" rather than "lost tax revenue." It is not clear that there is a substantive distinction between the two descriptions. In any event, before this Court, the City's argument turned on lost revenue, not a lost opportunity to collect it. See, *e.g.*, Brief for Respondent *i* ("Counter-Question Presented[:] Does the City of New York have standing under RICO because lost **[****25]** tax revenue constitutes a direct injury to the City's 'business or property' in accord with the statute, *18 U.S.C. § 1964(c)*, and this Court's authority?"); *id.*, at 40 ("[T]he City alleges that it has been injured (the loss of tax revenues) by defendants' RICO violations"). Indeed, in its entire brief on the merits, the City never uses the word "opportunity" (or anything similar) to describe its injury.

Perhaps the City articulated its argument in terms of the lost revenue itself to meet Hemi's contention that an injury to **[**993]** the mere "opportunity to collect" taxes fell short of RICO's injury to "property" requirement. Brief for Petitioners 25 ("The opportunity to collect taxes from those who did owe them . . . falls within a class of expectation interests that do not qualify as injury to business or property and therefore do not confer civil RICO standing" (internal quotation marks omitted)); see *Cleveland v. United States, 531 U.S. 12, 15, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)* ("It does not suffice . . . that the object of the fraud may become property in the recipient's hands; for **[*16]** purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim").

That is not to say, however, that **[****26]** the City would fare any better on the causation question had it framed its argument in terms of a lost opportunity. Hemi's filing obligation would still be to the State, and any harm to the City would still be caused directly by the customers' failure to pay their taxes. See *541 F.3d at 461* (Winter, J., dissenting). Whatever the City's reasons for framing its merits arguments as it has, we will not reformulate them for it now.[2]

In a final effort to save its claim, the City has shifted course before this Court. In its second amended complaint and RICO statement, the City relied solely on Hemi's failure to file Jenkins Act reports with the State to form the basis of the predicate act mail and wire frauds. See Second Amended Compl. PP 99, 101, 118, 125; Record A980-A982. Before this **[***956]** Court, however, the City contends that Hemi made affirmative misrepresentations to City residents, which, the City now argues, comprise part of the RICO predicate mail and wire frauds. See Brief for Respondent 42-43. The City's counsel pressed the point at oral argument, asserting that the City's injury was "caused by the seller's misrepresentation, which encourages the purchasers not to pay taxes." Tr. of Oral Arg. 44.

[*17] The City, however, affirmatively disavowed below any reliance on misrepresentations to form the predicate RICO violation. The alleged false statements, the City there stated, "are evidence of the scheme to defraud, but are not part of the **[****28]** fraud itself. . . . [T]he scheme to defraud would exist even absent the statements." Record A980. The City reiterated the point: "The scheme consists of the interstate sale of cigarettes and the failure to file Jenkins Act reports indentifying those sales." *Ibid.* "Related to the fraud, but not a circumstance 'constituting' the fraud, the defendants inform customers that [their] purchases will be concealed, and also seek to convince their customers that no taxes are owed by claiming, falsely, that the sales are tax-free." *Id.,* at A982. Not only did the City disclaim any reliance upon misrepresentations to the customers to form the predicate acts under RICO, but the City made clear in its second amended complaint that its two RICO **[**994]** claims rested solely on the Jenkins Act violations as the predicate acts. See Second Amended Compl. PP 118, 125. Because the City defined the predicate act before the District Court as Hemi's failure to file the Jenkins Act reports, and expressly disavowed reliance on the alleged misrepresentations themselves as predicate acts, we decline to consider Hemi's alleged misstatements as predicate acts at this late stage.

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[2] The dissent recognizes that its position poses the troubling specter of turning RICO into a tax collection statute. *Post, at ____-____, 175 L. Ed. 2d, at 963-964* (opinion of Breyer, J.). The dissent's answer looks largely to prosecution policy set forth in the Federal Department of Justice Guidelines, which are, of course, not only changeable, but have no applicability whatever to state or local governments. Under the decision below and the dissent's position, RICO could be used as a tax collection device based solely on the failure to file reports under the Jenkins Act, which itself provides quite limited remedies. See *15 U.S.C. § 377* (providing that a violation of the Jenkins Act may be punished as a misdemeanor with a fine up to $1,000 and imprisonment for no more than six months). **[****27]** And that device would be available not only to the State, to which the reports were due, but also to the City, to which Hemi owed no duty under the Act and to which it owed no taxes.

* * *

It bears remembering what this case is **[****29]** about. It is about the RICO liability of a company for lost taxes it had no obligation to collect, remit, or pay, which harmed a party to whom it owed no duty. It is about imposing such liability to substitute for or complement a governing body's uncertain ability or desire to collect taxes directly from those who owe them. And it is about the fact that the liability comes with treble damages and attorney's fees attached. ***HN7***[] ***LEdHN[7]***[] [7] This Court has interpreted RICO broadly, consistent with its terms, but we have also held that its reach is limited by the "requirement **[*18]** of a direct causal connection" between the predicate wrong and the harm. *Anza, 547 U.S., at 460, 126 S. Ct. 1991, 164 L. Ed. 2d 720*. The City's injuries here were not caused directly by the alleged fraud, and thus were not caused "by reason of" it. The City, therefore, has no RICO claim.

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice **Sotomayor** took no part in the consideration or decision of this case.

Concur by: GINSBURG

Concur

[*957]** Justice **Ginsburg,** concurring in part and concurring in the judgment.

As the Court points out, this is a case "about the RICO liability **[****30]** of a company for lost taxes it had no obligation to collect, remit, or pay." *Ante, at ____, 175 L. Ed. 2d, at 956*. New York City (or City) cannot, consistent with the *Commerce Clause*, compel Hemi Group, an out-of-state seller, to collect a City sales or use tax. See *Quill Corp. v. North Dakota, 504 U.S. 298, 301, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992)*; *National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U.S. 753, 758, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967)*. Unable to impose its tax on Hemi Group, or to require Hemi Group to collect its tax, New York City is attempting to use the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. § 1964(c)*, in combination with the Jenkins Act, *15 U.S.C. §§ 375-378*, to overcome that disability.

Hemi Group committed fraud only insofar as it violated the Jenkins Act by failing to report the names and addresses of New York purchasers to New York State. There is no other grounding for the City's charge that it was defrauded by Hemi Group. "Absent the Jenkins Act, [Hemi Group] would have owed no duty to disclose [its] sales to anyone, and [its] failure to disclose could not conceivably be deemed fraud of any kind." *City of New York v. Smokes-Spirits.com, Inc.,* ***[*19]*** *541 F.3d 425, 460 (CA2 2008)* (Winter, J., dissenting in part and concurring **[****31]** in part).

Because "the alleged fraud is based on violations of . . . the Jenkins Act, . . . the nature and consequences of the fraud are [properly] determined solely by the scope of that Act." *Id., at 459*. But "conspicuously absent from the City's pleadings is any claim brought pursuant to the Jenkins Act itself, rather than RICO, seeking enforcement of the Jenkins Act." *Id., at 460*. The City thus effectively admits that its claim is outside the scope of the very statute on which it builds its RICO suit.

[995]** I resist reading RICO to allow the City to end-run its lack of authority to collect tobacco taxes from Hemi Group or to reshape the "quite limited remedies" Congress has provided for violations of the Jenkins Act, see *ante, at ____, n 2, 175 L. Ed. 2d, at 955*. Without subscribing to the broader range of the Court's proximate cause analysis, I join the Court's opinion to the extent it is consistent with the above-stated view, and I concur in the Court's judgment.

Dissent by: BREYER

Dissent

Justice **Breyer,** with whom Justice **Stevens** and Justice **Kennedy** join, dissenting.

In my view, the Hemi Group's failure to provide New York State with the names and addresses of its New York City cigarette customers proximately caused New York City **[****32]** to lose tobacco tax revenue. I dissent from the Court's contrary holding.

I

A

Although the ultimate legal issue is a simple one, the statutory framework within which it arises is complex. As the majority points out, *ante, at ____, 175 L. Ed. 2d, at 949*, the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961-1968*, provides a private cause of action (and treble damages) to "[a]ny **[***958]** person injured in" that person's "business or property *by reason of*" conduct that involves a "pattern of racketeering **[*20]** activity." *§§ 1964(c)* (emphasis added), 1962. RICO defines "racketeering activity" to include violations of various predicate criminal statutes including mail and wire fraud. *§ 1961(1)*. The "pattern of racketeering" at issue here consists of repeated instances of mail fraud, which in turn consist largely of violations of the federal Jenkins Act, *15 U.S.C. §§ 375-378*. That Act seeks to help States collect tobacco taxes by requiring out-of-state cigarette sellers, such as Hemi, to file reports with state tobacco tax administrators identifying the names and addresses of in-state customers and the amounts they purchased. The violations consist of Hemi's intentional failure to do so.

As the majority points **[****33]** out, we must assume for present purposes that an intentional failure to file Jenkins Act reports counts as mail fraud (at least where the failure is part of a scheme that includes use of the mails). *Ante, at ____, 175 L. Ed. 2d, at 950*. Lower courts have sometimes so held. See *United States v. Melvin, 544 F.2d 767, 773-777 (CA5 1977)*; *United States v. Brewer, 528 F.2d 492, 497-498 (CA4 1975)*. The Court of Appeals here so held. *City of New York v. Smokes-Spirits.com, Inc., 541 F.3d 425, 446 (CA2 2008)*. And no one has challenged that holding.

We must also assume that Hemi's "intentiona[l] conceal[ment]" of the name/address/purchase information, Second Am. Compl. PP 103, 104, is the legal equivalent of an affirmative representation that Hemi had no New York City customers. See *Restatement (Second) of Torts § 551, p. 119 (1976)* (a person "who fails to disclose . . . a fact" may be "subject to . . . liability" as if "he had represented the nonexistence of the matter that he has failed to disclose"); cf. *Stewart v. Wyoming Cattle Ranche Co., 128 U.S. 383, 388, 9 S. Ct. 101, 32 L. Ed. 439 (1888)* (concealment or suppression of material fact equivalent to a false representation). On these assumptions, the question before us is whether New York City's **[****34]** loss of tax revenues constitutes an injury to its "business or property by reason of" Hemi's Jenkins Act misrepresentations.

[*21] B

The case arises as a result of the District Court's dismissal of New York City's **[**996]** RICO complaint. *Fed. Rule Civ. Proc. 12(b)(6)*. Hence we must answer the question in light of the facts alleged, taking as true the facts pleaded in the complaint (along with the "RICO statement" submitted pursuant to the District Court's rule). *Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 642, n. 1, 128 S. Ct. 2131, 2135, 170 L. Ed. 2d 1012, 1017 (2008)*. Those facts (as I interpret them) include the following:

1. New York State (or State) and New York City (or City) both impose tobacco taxes on New York cigarette buyers. Second Am. Compl. P 37.

2. Both City and State normally collect the taxes from in-state cigarette sellers, who, in turn, charge retail customers. *Id.,* PP 4, 6.

3. Hemi, an out-of-state company, sells cigarettes over the Internet to in-state buyers at prices that are lower than in-state cigarette prices. The difference in price is almost entirely attributable to the fact that Hemi's prices do not include any charge for New York taxes. Hemi advertises its cigarettes as "tax free" **[***959]** and often **[****35]** adds that it "does not report any sales activity to any State taxing authority." *Id.,* PP 2, 6, 108b (internal quotation marks omitted; emphasis deleted).

4. New York State normally receives Jenkins Act reports from out-of-state sellers. It is contractually obliged to pass the information on to New York City (and I assume it normally does so). *Id.,* PP 8-9, 11, 54-57.

5. When it receives Jenkins-Act-type information, New York City writes letters to resident customers asking them to pay the tobacco tax they owe. As a result, New York City collects about 40% of the tax due. (By doing so, in 2005 the City obtained $400,000 out of $1 million owed.) *Id.,* PP 58-59.

6. Hemi has consistently and intentionally failed to file Jenkins Act reports in order to prevent both State and **[*22]** City from collecting the tobacco taxes that Hemi's in-state customers owe and which otherwise many of those customers would pay. *Id.,* PP 13, 24, 58.

II

A

The majority asks whether New York City stated a valid cause of action in alleging that it lost tobacco tax revenue "by reason of" Hemi's unlawful misrepresentations. The facts just set forth make clear that we must answer that question affirmatively. For one thing, no one denies **[****36]** that Hemi's misrepresentation was a "but-for" condition of New York City's loss. In the absence of the misrepresentation, *i.e.*, had Hemi told New York State the truth about its New York City customers, New York City would have written letters to the purchasers and obtained a significant share of the tobacco taxes buyers owed.

For another thing, New York City's losses are "reasonably foreseeable" results of the misrepresentation. It is foreseeable that, without the name/address/purchase information, New York City would not be able to write successful dunning letters, and it is foreseeable that, with that information, it would be able to write successful dunning letters. Indeed, that is a natural inference from, among other things, the complaint's assertion that Hemi advertised that it did not "report" sales information to "State taxing authorit[ies]." See, *e.g.*, *Smith v. Bolles, 132 U.S. 125, 130, 10 S. Ct. 39, 33 L. Ed. 279 (1889)* (for causation purposes, "'those results are proximate which the wrong-doer from his position must **[**997]** have contemplated as the probable consequence of his fraud or breach of contract'" (quoting *Crater v. Binninger, 33 N. J. L. 513, 518 (Ct. Errors and Appeals 1869)*); see also W. Keeton, **[****37]** D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts § 110, p 767 (5th ed. 1984) (hereinafter Prosser and Keeton); 3 S. Speiser, C. Krause, & A. Gans, The American Law of Torts § 11:3, p 68 (2008) ("By far the most treated and most **[*23]** discussed aspect of the law of proximate or legal cause is the so-called doctrine of foreseeability"). But cf. *ante, at ____, 175 L. Ed. 2d, at 953* ("The dissent would have RICO's proximate cause requirement turn on foreseeability . . .").

Further, Hemi misrepresented the relevant facts *in order to* bring about New York City's relevant loss. It knew the loss would occur; it *intended* the loss to occur; one might even say it *desired* the loss to occur. It is difficult to find common-law cases denying liability **[***960]** for a wrongdoer's intended consequences, particularly where those consequences are also foreseeable. Cf. *Bridge, supra, at 649-650, 128 S. Ct. 2131, 170 L. Ed. 2d 1012* ("[S]uppose an enterprise that wants to get rid of rival businesses mails representations about them to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business 'by reason **[****38]** of' a pattern of mail fraud . . ."); *N. M. ex rel. Caleb v. Daniel E., 2008 UT 1, P7, n. 3, 175 P. 3d 566, 569, n. 3* ("[I]f an unskilled marksman were to shoot a single bullet at a distant individual with the intent of killing her, that individual's injury or death may not be the natural and probable consequence of the [shooter's] act[,] . . . [but] the harm would not be an accident because the shooter intended the harm, even though the likelihood of success was improbable"); 1 F. Harper & F. James, The Law of Torts, § 7.13, p 584 (1956) (explaining that, ordinarily, "all intended consequences" of an intentional act "are proximate").

In addition, New York City's revenue loss falls squarely within the bounds of the kinds of harms that the Jenkins Act (essentially the predicate statute) seeks to prevent. The statute is entitled "An Act To assist States in collecting sales and use taxes on cigarettes." ch. 699, *63 Stat. 884*. I have no reason to believe the Act intends any different result with respect to collection of a city's tobacco tax assessed under the authority of state law. See N. Y. Unconsol. Law Ann. § 9436(1) (West Supp. 2009) (authorizing cities with **[*24]** over one million inhabitants to **[****39]** impose their own cigarette taxes). The Restatement (Second) of Torts explains that where

> "a statute requires information to be furnished . . . for the protection of a particular class of persons, one who makes a fraudulent misrepresentation . . . is subject to liability to the persons for pecuniary loss . . . in a transaction of the kind in which the statute is intended to protect them." Restatement *§ 536, at 77 (1976)*.

See also, *id.*, *§ 536*, Appendix (citing supporting cases in the Reporter's Note).

Finally, we have acknowledged that "Congress modeled *§ 1964(c)* on the civil-action provision of the federal antitrust laws," and we have therefore looked to those laws as an interpretive aid in RICO cases. *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 267, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. I can find no antitrust analogy that suggests any lack of causation here, nor has the majority referred to any such analogical antitrust circumstance.

The upshot is that the harm is foreseeable; it is a consequence that Hemi intended, indeed desired; and it falls well within the set of risks that Congress sought to **[**998]** prevent. Neither antitrust analogy nor any statutory policy of which I am aware precludes a finding of "proximate **[****40]** cause." I recognize that some of our opinions may be read to suggest that the words "by reason of" in RICO do not perfectly track common-law notions of proximate cause. See, *e.g.*, *Bridge, 553 U.S., at 655-657, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*But where so much basic common law argues in favor of such a finding, how can the Court avoid that conclusion here?

[*961]** B

The majority bases its contrary conclusion upon three special circumstances and its reading of two of this Court's prior cases. In my view, none of the three circumstances precludes finding causation (indeed two are not even relevant **[*25]** to the causation issue). Nor can I find the two prior cases controlling.

The three circumstances are the following: First, the majority seems to argue that the intervening voluntary acts of third parties, namely, the customers' own independent failures to pay the tax, cuts the causal chain. *Ante, at ____, 175 L. Ed. 2d, at 952* ("[T]he City's harm was directly caused by the customers, not Hemi"); see *Saugerties Bank v. Delaware & Hudson Co., 236 N. Y. 425, 430, 141 N. E. 904, 905 (1923)* (third party's forgery of a bill of lading an intervening cause); Prosser and Keeton § 44, at 313-314 (collecting cases on intervening intentional or criminal **[****41]** acts). But an intervening third-party act, even if criminal, does not cut a causal chain where the intervening act is foreseeable and the defendant's conduct *increases* the risk of its occurrence. See *Lillie v. Thompson, 332 U.S. 459, 462, 68 S. Ct. 140, 92 L. Ed. 73 (1947)* *(per curiam)*; *Horan v. Watertown, 217 Mass. 185, 186, 104 N. E. 464, 465 (1914)*; see also *Restatement (Second) of Torts § 435A, at 454 (1963-1964)* (intentional tortfeasor liable for intended harm "except where the harm results from an outside force the risk of which is not increased by the defendant's act"). Hemi's act here did increase the risk that New York City would not be paid; and not only was the risk foreseeable, but Hemi's advertising strongly suggests that Hemi actually knew nonreporting would likely bring about this very harm.

The majority claims that "directness," rather than foreseeability, should be our guide in assessing proximate cause, and that the lack of a "direct" relationship in this case precludes a finding of proximate causation. *Ante, at _____-____, 175 L. Ed. 2d, at 952-953*. But courts used this concept of directness in tort law to expand liability (for direct consequences) *beyond* what was foreseeable, not to eliminate liability for what was foreseeable. **[****42]** Thus, under the "directness" theory of proximate causation, there is liability for both "all 'direct' (or 'directly traceable') consequences *and those indirect consequences that are foreseeable.*" Prosser and Keeton § 42, at 273 (emphasis added); **[*26]** see also *id.,* § 43, at 294, and n 17 (citing *Nunan v. Bennett, 184 Ky. 591, 212 S. W. 570 (1919))*. I do not read this Court's opinions in *Holmes* or *Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006)*, to invoke anything other than this traditional understanding.

Second, the majority correctly points out that Hemi misrepresented the situation to the State, not to the City--a circumstance which, the majority believes, significantly separates misrepresentation from harm. *Ante, at ____, 175 L. Ed. 2d, at 952*. But how could that be so? New York State signed a contract promising to relay relevant information to the City. In respect to that relevant information, the State is a conduit, indeed roughly analogous to a postal employee. This Court has recognized specifically that "under **[**999]** the common law a fraud may be established when the defendant has made use of a third party to reach the target of the fraud." *Tanner v. **[***962]** United States, 483 U.S. 107, 129, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987)*. The treatises **[****43]** say the same. See, *e.g.,* Prosser and Keeton § 107, at 743-745; 26 C. J. S., Fraud § 47, p 1121 (1921) (collecting cases); see also Prosser, Misrepresentation and Third Parties, 19 Vand. L. Rev. 231, 240-241, and nn. 56-59, 62-64 (1966) (collecting cases). This Court has never suggested the contrary, namely, that a defendant is *not* liable for (foreseeable) harm (intentionally) caused to the target of a scheme to defraud *simply because* the misrepresentation was transmitted via a third (or even a fourth or fifth) party. Cf. Terry, Intent To Defraud, 25 Yale L. J. 87, 93 (1915) ("When a representation is communicated through one person to another in such circumstances that it can be deemed to be directed to the latter, it makes no difference through how many persons or by how circuitous a route it reaches the latter . . .").

Third, the majority places great weight upon its view that Hemi tried to defraud the State, not the City. *Ante, at ____ - ____, 175 L. Ed. 2d, at 952-953*. Hemi, however, sought to defraud both. Third Amended RICO Statement P d (explaining that "[e]very other State or local government that imposes a use tax on cigarettes and **[*27]** whose residents purchase cigarettes" from Hemi is a victim of its scheme to **[****44]** defraud). Hemi sought to prevent the State from collecting state taxes; and it sought to prevent the City from collecting city taxes. Here we are concerned only with the latter. In respect to the latter, the State was an information conduit. The fact that state taxes were also involved is beside the point.

The two Supreme Court cases to which the majority refers involve significantly different causal circumstances. *Ante, at ____ - ____, 175 L. Ed. 2d, at 950-952*. The predicate acts in *Holmes*--the defendant's acts that led to the plaintiff's harm--consisted of securities frauds. The defendant misrepresented the prospects of one company and misled the investing public into falsely believing that it could readily buy and sell the stock of another. When the truth came out, stock prices fell, investors (specifically, stockbrokers) lost money, and since the stockbrokers could not pay certain creditors, those creditors also lost money. *503 U.S., at 262-263, 112 S. Ct. 1311, 117 L. Ed. 2d 532*. Claiming subrogation to stand in the shoes of the creditors, the Securities Investor Protection Corporation sued. *Id., at 270-271, 112 S. Ct. 1311, 117 L. Ed. 2d 532*.

Since the creditors had not bought the securities, there was little reason to believe the defendant intended their harm. And the securities **[****45]** statutes seek, first and foremost, to protect investors, not creditors of those who sell stock to those investors. The latter harm (a broker's creditor's loss) differs in kind from the harm that the "predicate act" statute primarily seeks to avoid and that its violation would ordinarily cause (namely, investors' stock-related monetary losses). As Part II-A, *supra,* points out, neither of these circumstances is present here.

In *Anza*, the plaintiff was a business competitor of the defendants. The plaintiff claimed that the defendants falsely told state officials that they did not owe sales tax. The plaintiff added that, had the defendants paid the tax they owed, the defendants would have had less money available to run their business, and the plaintiff consequently would **[*28]** have been able to compete against them **[***963]** more effectively. *547 U.S., at 454, 457-458, 126 S. Ct. 1991, 164 L. Ed. 2d 720*.

Again, in *Anza* the *kind of harm* that the plaintiff alleged is not the *kind of harm* that the tax statutes primarily seek **[**1000]** to prevent. Rather, it alleged a kind of harm (competitive injury) that tax violations do not ordinarily cause and which ordinarily flows from the regular operation of a competitive marketplace. Thus, in both *Holmes* and **[****46]** *Anza,* unlike the present case, plaintiffs alleged special harm, neither squarely within the class of harms at which the relevant statutes were directed, nor of a kind that typical violators would intend or even foresee.

Bridge, which the majority seeks to distinguish, *ante, at ____ - ____, 175 L. Ed. 2d, at 954-955*, is a more closely analogous case. The defendants in that case directed agents to misrepresent to a county that they qualified as independent bidders at a county-run property auction. They consequently participated in the auction. And the plaintiffs, facing additional bidders, lost some of the property that they otherwise would have won--all to their financial disadvantage. *553 U.S., at 643-644, 128 S. Ct. 2131, 170 L. Ed. 2d 1012*The harm was foreseeable; it was intended; and it was precisely the kind of harm that the county's bidding rules sought to prevent. Thus this Court held that the harm was "a foreseeable and natural consequence of [the defendants'] scheme." *Id., at 658, 128 S. Ct. 2131, 2144, 170 L. Ed. 2d 1012, 1027*

In sum, the majority recognizes that "[p]roximate cause for RICO purposes . . . should be evaluated in light of its common law foundations," *ante, at ____, 175 L. Ed. 2d, at 951*, but those foundations do not support the majority's view. Moreover, the majority's **[****47]** rationale would free from RICO liability defendants who would appear to fall within its intended scope. Consider, for example, a group of defendants who use a marketing firm (in RICO terms, an "enterprise") to perpetrate a variation on a "pump and dump" scheme. See, *e.g., United States v. Salmonese, 352 F.3d 608, 612 (CA2 2003)*. They deliberately and repeatedly make egregiously fraudulent misrepresentations **[*29]** to inflate the price of securities that, unbeknownst to investors, they own. After the stock price rises, the defendants sell at an artificial profit. When the fraud is revealed, the price crashes, to the investors' detriment. Suppose the defendants have intentionally spoken directly only to intermediaries who simply *repeated* the information to potential investors, and have not had any contact with the investors themselves. Under the majority's reasoning, these defendants apparently did not proximately cause the investors' losses and are not liable under RICO.

III

If there is causation, we must decide whether, for RICO purposes, the City's loss of tax revenue is "'business or property' under *18 U.S.C. § 1964(c)*." *Ante, at ____, 175 L. Ed. 2d, at 950* (acknowledging, but not reaching, this second issue). The **[****48]** question has led to concern among the lower courts. Some fear that an affirmative answer would turn RICO into a tax collection statute, permitting States to bring RICO actions and recover treble damages for behavior that amounts to no more than a failure to pay taxes due. See, *e.g., Michigan,* ***[***964]*** *Dept. of Treasury, Revenue Div. v. Fawaz, 848 F.2d 194, 1988 WL 44736, *2 (CA6 1988)* (holding that tax revenue is not RICO "property" lest district courts become "collection agencies for unpaid state taxes"); *Illinois Dep't of Revenue v. Phillips, 771 F.2d 312, 312 (CA7 1985)* (holding, "reluctantly," that "a state's Department of Revenue may file suit in federal court for treble damages under [RICO] against a retailer who files fraudulent state sales tax returns").

In a related context, however, the Department of Justice has taken steps to avoid the "tax collection agency" problem without reading all tax-related frauds out of similar federal criminal statutes. The **[**1001]** Department's prosecution guidelines require prosecutors considering a tax-related mail fraud or wire fraud or bank fraud prosecution (or a related RICO prosecution) to obtain approval from high-level Department **[*30]** officials. And those **[****49]** guidelines specify that the Department will grant that approval only where there is at issue "a large fraud loss or a substantial pattern of conduct" and will not do so, absent "unusual circumstances," in cases involving simply "one person's tax liability." Dept. of Justice, United States Attorneys' Manual § 6-4.210(A) (2007), online at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title6/4mtax.htm (as visited Jan. 20, 2010, and available in Clerk of Court's case file); see also § 6-4.210(B) (explaining that the Department "will not authorize the use of mail, wire or bank fraud charges to convert routine tax prosecutions into RICO . . . cases").

This case involves an extensive pattern of fraudulent conduct, large revenue losses, and many different unrelated potential taxpayers. The Department's guidelines would appear to authorize prosecution in these circumstances. And limiting my consideration to these circumstances, I would find that this RICO complaint asserts a valid harm to "business or property." I need not and do not express a view as to how or whether RICO's civil action provisions apply to simpler instances of individual tax liability.

This conclusion is virtually **[****50]** compelled by *Pasquantino v. United States, 544 U.S. 349, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005)*, a case that we decided only five years ago. We there pointed out that the right to uncollected taxes is an "entitlement to collect money . . ., the possession of which is 'something of value.'" *Id., at 355, 125 S. Ct. 1766, 161 L. Ed. 2d 619* (quoting *McNally v. United States, 483 U.S. 350, 358, 107 S. Ct. 2875, 97 L. Ed. 2d 292 (1987))*. Such an entitlement "has long been thought to be a species of property." *544 U.S., at 356, 125 S. Ct. 1766, 161 L. Ed. 2d 619* (citing 3 W. Blackstone, Commentaries on the Laws of England 153-155 (1768)). And "fraud at common law included a scheme to deprive a victim of his entitlement to money." *544 U.S., at 356, 125 S. Ct. 1766, 161 L. Ed. 2d 619*. We observed that tax evasion "inflict[s] an economic injury no less than" the "embezzle[ment] [of] funds from the . . . treasury." *Ibid.* And we consequently held that "Canada's right to uncollected excise taxes on the liquor petitioners imported into **[*31]** Canada" is "'property'" within the terms of the mail fraud statute. *Id., at 355, 125 S. Ct. 1766, 161 L. Ed. 2d 619*.

Hemi points in reply to our decision in *Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 92 S. Ct. 885, 31 L. Ed. 2d 184 (1972)*. But that case involved **[***965]** not a loss of tax revenues, but "injury to the general economy of a State"--insofar as it was threatened by violations of ***antitrust law***. **[****51]** *Id., at 260, 92 S. Ct. 885, 31 L. Ed. 2d 184*. Hawaii's interest, both more general and derivative of harm to individual businesses, differs significantly from the particular tax loss at issue in *Pasquantino* and directly at issue here.

We have previously made clear that the compensable injury for RICO purposes is the harm caused by the predicate acts. See generally *Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 495-496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)*; cf. *Cleveland v. United States, 531 U.S. 12, 25, 121 S. Ct. 365, 148 L. Ed. 2d 221 (2000)*. I can find no convincing reason in the context of this case to distinguish in the circumstances present here between "property" as used in the mail fraud statute and "property" as used in RICO. Hence, I would postpone for another day the question whether RICO covers instances where little more than the liability of an individual taxpayer is at issue. And **[**1002]** I would find in the respondent's favor here.

With respect, I dissent.

References

18 U.S.C.S. § 1964

Business Crime §§ 24.05, 24.07 (Matthew Bender)

Civil RICO PP6.04, 9.05, 10.04 (Matthew Bender)

L Ed Digest, Extortion, Blackmail, and Racketeering § 6

L Ed Index, Racketeering; Tobacco and Tobacco Products

Validity, construction, and application of Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C.S. § 1961 et seq.*)--Supreme Court cases. *139 L. Ed. 2d 945*.

Validity, under Federal Constitution, of state or local sales or use tax provisions requiring one **[****52]** person to collect tax imposed upon another--Supreme Court cases. *119 L. Ed. 2d 629*.

Validity, construction, and application of federal mail fraud statute (*18 U.S.C.S. § 1341*, and similar predecessor provisions)--Supreme Court cases. *97 L. Ed. 2d 863*.

End of Document

Am. Needle, Inc. v. NFL

Supreme Court of the United States

January 13, 2010, Argued; May 24, 2010, Decided

No. 08-661

Reporter

560 U.S. 183 *; 130 S. Ct. 2201 **; 176 L. Ed. 2d 947 ***; 2010 U.S. LEXIS 4166 ****; 94 U.S.P.Q.2D (BNA) 1673; 78 U.S.L.W. 4431; 2010-1 Trade Cas. (CCH) P77,019; 79 A.L.R. Fed. 2d 591; 22 Fla. L. Weekly Fed. S 347

AMERICAN NEEDLE, INC., Petitioner v. NATIONAL FOOTBALL LEAGUE et al.

Subsequent History: On remand at, Remanded by *Am. Needle, Inc. v. NFL, 391 Fed. Appx. 564, 2010 U.S. App. LEXIS 18067 (7th Cir. Ill., Aug. 24, 2010)*

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Am. Needle, Inc. v. NFL, 538 F.3d 736, 2008 U.S. App. LEXIS 17553 (7th Cir. Ill., 2008)

Disposition: Reversed and remanded.

Core Terms

teams, cooperation, conspiracy, licensing, entities, joint venture, decisions, intellectual property, football, concerted action, single entity, Sherman Act, decisionmaking, antitrust, independent action, restraint of trade, competitors, trademarks, parties, league, concerted, profits, concerted activity, common interest, economic power, manufacturers, marketplace, conspiring, deprives, pursuing

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN1[ ] **Regulated Practices, Price Fixing & Restraints of Trade**

Every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade is made illegal by *15 U.S.C.S. § 1* of the Sherman Act.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN2[] Regulated Practices, Price Fixing & Restraints of Trade

Even though, read literally, 15 U.S.C.S. § 1 would address the entire body of private contract, that is not what the statute means. The United States Supreme Court has not taken a literal approach to that language. Not every instance of cooperation between two people is a potential contract, combination, or conspiracy, in restraint of trade. 15 U.S.C.S. § 1.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN3[] Regulated Practices, Price Fixing & Restraints of Trade

The meaning of the term "contract, combination, or conspiracy" under 15 U.S.C.S. § 1 is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes § 1 of the Sherman Act from 15 U.S.C.S. § 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action monopolizes, 15 U.S.C.S. § 2, or threatens actual monopolization, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action. Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN4[] Regulated Practices, Price Fixing & Restraints of Trade

In 15 U.S.C.S. § 1 Congress treats concerted behavior more strictly than unilateral behavior. This is so because unlike independent action, concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition. Concerted activity is thus judged more sternly than unilateral activity under 15 U.S.C.S. § 2. For these reasons, § 1 prohibits any concerted action in restraint of trade or commerce, even if the action does not threaten monopolization. And therefore, an arrangement must embody concerted action in order to be a "contract, combination, or conspiracy" under § 1.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN5[] **Regulated Practices, Price Fixing & Restraints of Trade**

Concerted action under *15 U.S.C.S. § 1* does not turn simply on whether the parties involved are legally distinct entities. Instead, such formalistic distinctions have been eschewed in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. As a result, instances have repeatedly been found in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. A court seeks the central substance of the situation, and therefore the court is moved by the identity of the persons who act, rather than the label of their hats.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN6[] **Regulated Practices, Price Fixing & Restraints of Trade**

There is not necessarily concerted action for purposes of *15 U.S.C.S. § 1* simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," cooperation between legally separate entities was once treated as necessarily covered by *§ 1*, a court now embarks on a more functional analysis.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Corporations > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN7[] **Regulated Practices, Price Fixing & Restraints of Trade**

As an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that *15 U.S.C.S. § 1* is designed to police, a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. Although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not deprive the marketplace of independent centers of decisionmaking, and as a result, an agreement between them does not constitute a "contract, combination, or conspiracy" for the purposes of *§ 1*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN8[] **Regulated Practices, Price Fixing & Restraints of Trade**

Substance, not form, should determine whether an entity is capable of conspiring under *15 U.S.C.S. § 1*. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination, or conspiracy" is concerted action--that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination, or conspiracy" amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition. The central evil addressed by Sherman Act *§ 1* is the elimination of competition that would otherwise exist.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Business & Corporate Law > Corporations > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Law > ... > Corporate Governance > Directors & Officers > General Overview

HN9[] **Regulated Practices, Price Fixing & Restraints of Trade**

While the president and a vice president of a firm can (and regularly do) act in combination, their joint action generally is not the sort of "combination" that *15 U.S.C.S. § 1* is intended to cover. Such agreements might be described as really unilateral behavior flowing from decisions of a single enterprise. Nor, for this reason, does *§ 1* cover internally coordinated conduct of a corporation and one of its unincorporated divisions, because a division within a corporate structure pursues the common interests of the whole, and therefore coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests. Nor, for the same reasons, is the coordinated activity of a parent and its wholly owned subsidiary covered. They have a complete unity of interest and thus, with or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN10[] **Regulated Practices, Price Fixing & Restraints of Trade**

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged *15 U.S.C.S. § 1* violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under *§ 1*, and a court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

HN11[] **Regulated Practices, Price Fixing & Restraints of Trade**

An ongoing *15 U.S.C.S. § 1* violation cannot evade *§ 1* scrutiny simply by giving the ongoing violation a name and label.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

***HN12*[] Regulated Practices, Price Fixing & Restraints of Trade**

A history of concerted activity does not immunize conduct from *15 U.S.C.S. § 1* scrutiny. Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

***HN13*[] Regulated Practices, Price Fixing & Restraints of Trade**

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. A "contract, combination, or conspiracy," *15 U.S.C.S. § 1*, that is necessary or useful to a joint venture is still a "contract, combination, or conspiracy" if it deprives the marketplace of independent centers of decisionmaking. Joint ventures have no immunity from antitrust laws. Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to *§ 1* analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that firms operate jointly in some sense does not mean that they are immune.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > Scope > General Overview

***HN14*[] Regulated Practices, Price Fixing & Restraints of Trade**

Agreements within a single firm are generally treated as independent action for purposes of *15 U.S.C.S. § 1* on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

***HN15*[] Antitrust, Antitrust Statutes**

Competitors cannot simply get around antitrust liability by acting through a third-party intermediary or "joint venture."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Mergers & Acquisitions Law > Antitrust > Antitrust Statutes > General Overview

HN16[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

When restraints on competition are essential if the product is to be available at all, per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible rule of reason. In such instances, the agreement is likely to survive the rule of reason. Joint ventures and other cooperative arrangements are not usually unlawful where the agreement is necessary to market a product at all. And depending upon the concerted activity in question, the rule of reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The true test of legality under *15 U.S.C.S. § 1* is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question a court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Lawyers' Edition Display

Decision

[*947]** Licensing activities of league (unincorporated association of separately owned professional football teams) held to constitute concerted action that was (1) not categorically beyond coverage of § 1 of Sherman Act (*15 U.S.C.S. § 1*), and (2) to be judged under rule of reason.

Summary

Procedural posture: Petitioner former licensee sued respondents, including a professional football league, its teams, and a licensor, alleging antitrust violations under *15 U.S.C.S. §§1* and *2* of the Sherman Act. The district court granted summary judgment for respondents on the § 1 claim, and the United States Court of Appeals for the Seventh Circuit affirmed. The United States Supreme Court granted certiorari.

Overview: The teams formed the licensor to license their intellectual property. The licensee alleged that the agreements among respondents violated *§ 1*. The district court and the Seventh Circuit found that *§ 1* did not apply because the league, the teams, and the licensor acted as a single entity with regard to the licensing of intellectual property. The Supreme Court held that the licensing activities constituted concerted action that was not categorically beyond the coverage of *§ 1*, and the legality of that action had to be judged under the rule of reason. The relevant inquiry was whether there was a “contract, combination, or conspiracy” among separate economic actors pursuing separate economic interests. If an agreement joined together independent centers of decisionmaking, the entities were capable of conspiring under *§ 1*. The teams competed in the market for intellectual property, and decisions to collectively license their separately owned trademarks deprived the market **[***948]** place of independent centers of decisionmaking. The licensor's decisions constituted concerted action, as the licensor acted as an instrumentality of the teams in making licensing decisions.

Outcome: In a unanimous decision, the Court reversed the Seventh Circuit's judgment and remanded the case for further proceedings.

Headnotes

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > SHERMAN ACT -- PROHIBITIONS > Headnote:
LEdHN[1][] [1]

Every contract, combination in the form of a trust or otherwise, or, conspiracy, in restraint of trade is made illegal by *15 U.S.C.S. § 1* of the Sherman Act.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > SHERMAN ACT -- MEANING OF PROHIBITIONS > Headnote:
LEdHN[2][] [2]

Even though, read literally, *15 U.S.C.S. § 1* would address the entire body of private contract, that is not what the statute means. The United States Supreme Court has not taken a literal approach to that language. Not every instance of cooperation between two people is a potential contract, combination, or conspiracy, in restraint of trade. *15 U.S.C.S. § 1*.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > SHERMAN ACT PROHIBITIONS -- DIFFERENT SECTIONS > Headnote:
LEdHN[3][] [3]

The meaning of the term “contract, combination, or conspiracy” under *15 U.S.C.S. § 1* is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes *§ 1* of the Sherman Act from *15 U.S.C.S. § 2*. *Section 1* applies only to concerted action that restrains trade. *Section 2*, by contrast, covers both concerted and independent action, but only if that action monopolizes, *15 U.S.C.S. § 2*, or threatens actual monopolization, a category that is narrower than restraint of trade. Monopoly power may be equally harmful whether it is the product of joint action or individual action. Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

[*949]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9 > CONCERTED BEHAVIOR -- SHERMAN ACT TREATMENT > Headnote:
LEdHN[4][] [4]

In *15 U.S.C.S. § 1* Congress treats concerted behavior more strictly than unilateral behavior. This is so because unlike independent action, concerted activity inherently is fraught with anticompetitive risk insofar as it deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be remedied simply through prohibition. Concerted activity is thus judged more sternly than unilateral activity under *15 U.S.C.S. § 2*. For these reasons, § 1 prohibits any concerted action in restraint of trade or commerce, even if the action does not threaten monopolization. And therefore, an arrangement must embody concerted action in order to be a “contract, combination, or conspiracy” under *§ 1*.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > CONCERTED ACTION -- FUNCTIONAL CONSIDERATION > Headnote:
LEdHN[5][] [5]

Concerted action under *15 U.S.C.S. § 1* does not turn simply on whether the parties involved are legally distinct entities. Instead, such formalistic distinctions have been eschewed in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate. As a result, instances have repeatedly been found in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. A court seeks the central substance of the situation, and therefore the court is moved by the identity of the persons who act, rather than the label of their hats.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > CONCERTED ACTION -- FUNCTIONAL ANALYSIS > Headnote:
LEdHN[6][] [6]

There is not necessarily concerted action for purposes of *15 U.S.C.S. § 1* simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the “intraenterprise conspiracy doctrine,” cooperation between legally separate entities was once treated as necessarily covered by *§ 1*, a court now embarks on a more functional analysis.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > PARENT AND SUBSIDIARY -- AGREEMENT AS NOT COVERED > Headnote:
LEdHN[7][] [7]

As an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that *15 U.S.C.S. § 1* is designed to police, a parent corporation and its wholly owned subsidiary are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act. Although a parent corporation and its wholly owned subsidiary are “separate” for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct by two such entities does not deprive the marketplace of independent centers of decisionmaking, and as a result, an agreement between them does not constitute a "contract, combination, or conspiracy" for the purposes of *§ 1*.

[*950]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > CONCERTED ACTIVITY -- RELEVANT INQUIRY -- SEPARATE ECONOMIC ACTORS > Headnote:
LEdHN[8][] [8]

Substance, not form, should determine whether an entity is capable of conspiring under *15 U.S.C.S. § 1*. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination, or conspiracy" is concerted action--that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination, or conspiracy" amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition. The central evil addressed by Sherman Act *§ 1* is the elimination of competition that would otherwise exist.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > ACTIONS NOT COVERED -- OFFICERS OF FIRM -- CORPORATION AND DIVISION -- PARENT AND SUBSIDIARY > Headnote:
LEdHN[9][] [9]

While the president and a vice president of a firm can (and regularly do) act in combination, their joint action generally is not the sort of "combination" that *15 U.S.C.S. § 1* is intended to cover. Such agreements might be described as really unilateral behavior flowing from decisions of a single enterprise. Nor, for this reason, does *§ 1* cover internally coordinated conduct of a corporation and one of its unincorporated divisions, because a division within a corporate structure pursues the common interests of the whole, and therefore coordination between a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests. Nor, for the same reasons, is the coordinated activity of a parent and its wholly owned subsidiary covered. They have a complete unity of interest and thus, with or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > COVERAGE -- JOINDER OF INDEPENDENT CENTERS > Headnote:
LEdHN[10][] [10]

Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged *15 U.S.C.S. § 1* violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together independent centers of decisionmaking. If it does, the entities are capable of conspiring under *§ 1*, and a court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > SCRUTINY -- LABEL > Headnote:
LEdHN[11][] [11]

An ongoing *15 U.S.C.S. § 1* violation cannot evade § 1 scrutiny simply by giving the ongoing violation a name and label.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 > HISTORY OF CONCERTED ACTIVITY > Headnote:
LEdHN[12][] [12]

A history of concerted activity does not immunize conduct from *15 U.S.C.S. § 1* scrutiny. Absence of actual competition may simply be a manifestation of the anticompetitive agreement itself.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §12 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > JUSTIFICATION FOR COOPERATION -- JOINT VENTURES > Headnote:
LEdHN[13][] [13]

The justification for cooperation is not relevant to whether that cooperation is concerted or independent action. A "contract, combination, or conspiracy," *15 U.S.C.S. § 1*, that is necessary or useful to a joint venture is still a "contract, combination, or conspiracy" if it deprives the marketplace of independent centers of decisionmaking. Joint ventures have no immunity from antitrust laws. Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to § 1 analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that firms operate jointly in some sense does not mean that they are immune.

[*951]**

EVIDENCE §343.5 > AGREEMENTS WITHIN SINGLE FIRM -- TRADE RESTRAINT -- PRESUMPTION > Headnote:
LEdHN[14][] [14]

Agreements within a single firm are generally treated as independent action for purposes of *15 U.S.C.S. § 1* on the presumption that the components of the firm will act to maximize the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself, and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > LIABILITY -- INTERMEDIARY -- JOINT VENTURE > Headnote:
LEdHN[15][] [15]

Competitors cannot simply get around antitrust liability by acting through a third-party intermediary or "joint venture."

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §16 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §33.6 > RULE OF REASON -- WHEN APPLICABLE -- JOINT VENTURES > Headnote:
LEdHN[16][] [16]

When restraints on competition are essential if the product is to be available at all, per se rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible rule of reason. In such instances, the agreement is likely to survive the rule of reason. Joint ventures and other cooperative arrangements are not usually unlawful where the agreement is necessary to market a product at all. And depending upon the concerted activity in question, the rule of reason may not require a detailed analysis; it can sometimes be applied in the twinkling of an eye.

[*952]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §14 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §15 > LEGALITY -- TEST -- FACTORS -- INTENT > Headnote:
LEdHN[17][] [17]

The true test of legality under *15 U.S.C.S. § 1* is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question a court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Syllabus

[*183] [1674] Respondent National Football League (NFL) is an unincorporated association of 32 separately owned professional football teams, also respondents here. The teams, each of which owns its own name, colors, logo, trademarks, and related intellectual property, formed respondent National Football League Properties (NFLP) to develop, license, and market that property. At first, NFLP granted nonexclusive licenses to petitioner and other vendors to manufacture and sell team-labeled apparel. In December 2000, however, the teams authorized NFLP to grant exclusive licenses. NFLP granted an exclusive license to respondent Reebok International Ltd. **[***953]** to produce and sell trademarked headwear for all 32 teams. When petitioner's license was not renewed, it filed this action alleging that the agreements between respondents violated the Sherman Act, *§ 1* of which makes "[e]very contract, combination . . . , or conspiracy, in restraint of trade" illegal. Respondents answered that they were incapable of conspiring within *§ 1*'s meaning because the NFL and its teams are, in ***antitrust law*** jargon, **[****2]** a single entity with respect to the conduct challenged. The District Court granted respondents summary judgment, and the Seventh Circuit affirmed.

Held: The alleged conduct related to licensing of intellectual property constitutes concerted action that is not categorically beyond *§ 1*'s coverage. *Pp. 189-204, 176 L. Ed. 2d, at 956-966*.

(a) The meaning of "contract, combination . . . , or conspiracy" in *§ 1* of the Sherman Act is informed by the Act's " 'basic distinction between concerted and independent action.' *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. *Section 1* "treat[s] concerted behavior more strictly than unilateral behavior," *id., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, because, unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands," *id., at 768-769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. That creates less risk of deterring a firm's necessary **[*184]** conduct and leaves courts to examine only discrete agreements. An arrangement must therefore embody concerted action in order **[****3]** to be a "contract, combination . . . , or conspiracy" under *§ 1*. *Pp. 189-191, 176 L. Ed. 2d, at 956-958*.

(b) In determining whether there is concerted action under *§ 1*, the Court has eschewed formalistic distinctions, such as whether the alleged conspirators are legally distinct entities, in favor of a functional consideration of how they actually operate. The Court has repeatedly found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. See, *e.g., United States v. Sealy, Inc., 388 U.S. 350, 352-356, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. Conversely, the Court has found that although the entities may be "separate" for purposes of incorporation or formal title, if they are controlled by a single center of decisionmaking and they control a single aggregation of economic power, an agreement between them does not constitute a "contract, combination . . . , or conspiracy." *Copperweld, 467 U.S., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. *Pp. 191-194, 176 L. Ed. 2d, at 958-960*.

(c) The relevant inquiry is therefore one of substance, not form, which does not turn on whether the alleged parties to contract, combination, or conspiracy are part of a legally single entity or seem like one firm **[****4]** or multiple firms in any metaphysical sense. The inquiry is whether the agreement in question joins together "separate economic actors pursuing separate economic interests," *Copperweld, 467 U.S., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, such that it "deprives the marketplace of independent centers **[***954]** of decisionmaking," *id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, and therefore of diversity of entrepreneurial interests and thus of actual or potential competition. If it does, then there is concerted action covered by *§ 1*, and the court must decide whether the restraint of trade is unreasonable and therefore illegal. *Pp. 195-196, 176 L. Ed. 2d, at 960-961*.

(d) The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each of them is a substantial, independently owned, independently managed business, whose "general corporate actions are guided or determined" by "separate corporate consciousnesses," and whose "objectives are" not "common." *Copperweld, 467 U.S., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. They compete with one another, **[1675]** not only on the playing field, but to attract fans, for gate receipts, and for contracts with managerial and playing personnel. See, *e.g., Brown v. Pro Football, Inc., 518 U.S. 231, 249, 116 S. Ct. 2116, 135 L. Ed. 2d 521*. Directly **[****5]** relevant here, the teams are potentially competing suppliers in the market for intellectual property. When teams license such property, they are not pursuing the "common interests of the whole" league, but, instead, the interests of each "corporation itself." *Copperweld, 467 U.S., at 770, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. It is not dispositive, as respondents argue, that, by forming NFLP, they have formed a single entity, **[*185]** akin to a merger, and market their NFL brands through a single outlet. Although the NFL respondents may be similar in some sense to a single enterprise, they are not similar in the relevant functional sense. While teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. Nor does it matter that the teams may find the alleged cooperation necessary to compete against other forms of entertainment. Although decisions made by NFLP are not as easily classified as concerted activity, NFLP's decisions about licensing the teams' separately owned intellectual property are concerted activity and thus covered by *§ 1* for the same reason that decisions made directly by the 32 **[****6]** teams are covered by *§ 1*. In making the relevant licensing decisions, NFLP is "an instrumentality" of the teams. *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. *Pp. 196-202, 176 L. Ed. 2d, at 961-965*.

(e) Football teams that need to cooperate are not trapped by ***antitrust law***. The fact that the NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate to produce games, provides a perfectly sensible justification for making a host of collective decisions. Because some of these restraints on competition are necessary to produce the NFL's product, the Rule of Reason generally should apply, and teams' cooperation is likely to be permissible. And depending upon the activity in question, the Rule of Reason can at times be applied without detailed analysis. But the activity at issue in this case is still concerted activity covered for *§ 1* purposes. *Pp. 202-204, 176 L. Ed. 2d, at 965-966*.

538 F.3d 736, reversed and remanded.

Counsel: Glen D. Nager argued the cause for petitioner.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

Gregg H. Levy argued the cause for respondents.

Judges: Stevens, J., delivered the opinion for a unanimous Court.

Opinion by: Stevens

Opinion

[*186] [*955]**

[2206]** Justice **Stevens** delivered the opinion of the Court.

HN1[] ***LEdHN[1]***[] [1] “Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade” is made illegal by *§ 1* of the Sherman Act, ch. 647, 26 Stat. 209, as amended, **[****7]** *15 U.S.C. § 1*. The question whether an arrangement is a contract, combination, or conspiracy is different from and antecedent to the question whether it unreasonably restrains trade. This case raises that antecedent question about the business of the 32 teams in the National Football League (NFL) and a corporate entity that they formed to manage their intellectual property. We conclude that the NFL's licensing activities **[**2207]** constitute concerted action that is not categorically beyond the coverage of *§ 1*. The legality of that concerted action must be judged under the Rule of Reason.

[*187] I

Originally organized in 1920, the NFL is an unincorporated association that now includes 32 separately owned professional football teams.[1] Each team has its own name, colors, and logo, and owns related intellectual property. Like each of the other teams in the league, the New Orleans Saints and the Indianapolis Colts, for example, have their own distinctive names, colors, and marks that are well known to millions of sports fans.

Prior to 1963, the teams made their own arrangements for licensing their intellectual property and marketing trademarked items such as caps and jerseys. In 1963, the teams formed National Football League Properties (NFLP) to develop, license, and market their intellectual property. Most, but not all, of the substantial revenues generated by NFLP have either been given to charity or shared equally among the teams. However, the teams are able to and have at times sought to withdraw from this arrangement.

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[1] The NFL was founded in Canton, Ohio, as the “American Professional Football Association.” *United States Football League v. National Football League, 842 F.2d 1335, 1343 (CA2 1988)*. **[****8]** It took its current name in 1922. *Ibid.* Forty-one franchises failed in the first 41 years of the league's existence. *Ibid.*

Between 1963 and 2000, NFLP granted nonexclusive licenses to a number of vendors, permitting them to manufacture and sell apparel **[1676]** bearing team insignias. Petitioner, American Needle, Inc., was one of those licensees. In December 2000, the teams voted to authorize NFLP to grant exclusive licenses, and NFLP granted Reebok International Ltd. an exclusive 10-year license to manufacture and sell trademarked headwear for all 32 teams. It thereafter declined to renew American Needle's nonexclusive license.

American Needle filed this action in the Northern District of **[****9]** Illinois, alleging that the agreements between the NFL, its teams, NFLP, and Reebok violated *§§ 1* and *2* of the Sherman Act. In their answer to the complaint, the defendants averred **[*188]** that the teams, NFL, and NFLP were incapable of conspiring within the meaning of *§ 1* "because they are a single economic enterprise, at least with respect to the conduct challenged." App. 99. After limited discovery, the District Court granted summary judgment on the question "whether, with regard to the facet of their operations **[***956]** respecting exploitation of intellectual property rights, the NFL and its 32 teams are, in the jargon of ***antitrust law***, acting as a single entity." *American Needle, Inc. v. New Orleans La. Saints, 496 F. Supp. 2d 941, 943 (2007)*. The court concluded "that in that facet of their operations they have so integrated their operations that they should be deemed a single entity rather than joint ventures cooperating for a common purpose." *Ibid.*

The Court of Appeals for the Seventh Circuit affirmed. The panel observed that "in some contexts, a league seems more aptly described as a single entity immune from antitrust scrutiny, while in others a league appears to be a joint venture between **[****10]** independently owned teams that is subject to review under *§ 1*." *538 F.3d 736, 741 (2008)*. Relying on Circuit precedent, the court limited its inquiry to the particular conduct at issue, licensing of teams' intellectual property. The panel agreed with petitioner that "when making a single-entity determination, courts must examine whether the conduct in question **[**2208]** deprives the marketplace of the independent sources of economic control that competition assumes." *Id., at 742*. The court, however, discounted the significance of potential competition among the teams regarding the use of their intellectual property because the teams "can function only as one source of economic power when collectively producing NFL football." *Id., at 743*. The court noted that football itself can only be carried out jointly. See *ibid.* ("Asserting that a single football team could produce a football game . . . is a Zen riddle: Who wins when a football team plays itself "). Moreover, "NFL teams share a vital economic interest in collectively promoting **[*189]** NFL football . . . [to] compet[e] with other forms of entertainment." *Ibid.* "It thus follows," the court found, "that only one source of economic power controls the **[****11]** promotion of NFL football," and "it makes little sense to assert that each individual team has the authority, if not the responsibility, to promote the jointly produced NFL football." *Ibid.* Recognizing that NFL teams have "license[d] their intellectual property collectively" since 1963, the court held that *§ 1* did not apply. *Id., at 744*.

We granted certiorari. *557 U.S. 933, 129 S. Ct. 2859, 174 L. Ed. 2d 575 (2009)*.

II

As the case comes to us, we have only a narrow issue to decide: whether the NFL respondents are capable of engaging in a "contract, combination . . . , or conspiracy" as defined by *§ 1* of the Sherman Act, *15 U.S.C. § 1*, or, as we have sometimes phrased it, whether the alleged activity by the NFL respondents "must be viewed as that of a single enterprise for purposes of *§ 1*." *Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*.

Taken literally, the applicability of *§ 1* to "every contract, combination . . . , or conspiracy" could be understood to cover every conceivable agreement, whether it be a group of competing firms fixing prices or a single firm's chief executive telling her subordinate how to price their company's product. But ***HN2***[] ***LEdHN[2]***[] [2] even though, "read literally," *§ 1* would address "the entire **[****12]** body of private contract," that is not what the statute means. *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 688, 98 S.* ***[***957]*** *Ct. 1355, 55 L. Ed. 2d 637 (1978)*; see also *Texaco Inc. v. Dagher, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)* ("This Court has not taken a literal approach to this language"); cf. *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)* (reasoning that the term "restraint of trade" in *§ 1* cannot possibly refer to any restraint on competition because "[e]very agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence"). Not every instance **[*190]** of cooperation between two people is a potential **[1677]** "contract, combination . . . , or conspiracy, in restraint of trade." *15 U.S.C. § 1*.

HN3[] ***LEdHN[3]***[] [3] The meaning of the term "contract, combination . . . , or conspiracy" is informed by the " 'basic distinction' " in the Sherman Act " 'between concerted and independent action' " that distinguishes *§ 1* of the Sherman Act from *§ 2*. *Copperweld, 467 U.S., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628* (quoting *Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984))*. *Section 1* applies only to concerted action that restrains trade. *Section 2*, by contrast, covers both concerted and independent action, but **[****13]** only if that action "monopolize[s]," *15 U.S.C. § 2*, or "threatens actual monopolization," *Copperweld, 467 U.S., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, a category that is narrower than restraint of trade. **[**2209]** Monopoly power may be equally harmful whether it is the product of joint action or individual action.

Congress used this distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations. The distinction also avoids judicial scrutiny of routine, internal business decisions.

Thus, ***HN4***[] ***LEdHN[4]***[] [4] in *§ 1* Congress "treated concerted behavior more strictly than unilateral behavior." *Id., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. This is so because unlike independent action, "[c]oncerted activity inherently is fraught with anticompetitive risk" insofar as it "deprives the marketplace of independent centers of decisionmaking that competition assumes and demands." *Id., at 768-769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. And because concerted action is discrete and distinct, a limit on such activity leaves untouched a vast amount of business conduct. As a result, there is less risk of deterring a firm's necessary conduct; courts need only examine discrete agreements; and such conduct may be **[****14]** remedied simply through prohibition.[2] See Areeda & Hovenkamp **[*191]** P1464c, at 206. Concerted activity is thus "judged more sternly than unilateral activity under **[***958]** *§ 2*," *Copperweld, 467 U.S., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. For these reasons, *§ 1* prohibits any concerted action "in restraint of trade or commerce," even if the action does not "threate[n] monopolization," *ibid*. And therefore, an arrangement must embody concerted action in order to be a "contract, combination . . . , or conspiracy" under *§ 1*.

III

We have long held that ***HN5***[] ***LEdHN[5]***[] [5] concerted action under *§ 1* does not turn simply on whether the parties involved are legally distinct entities. Instead, we have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate.

As a result, we have repeatedly found instances in which members of a legally single entity violated *§ 1* when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity. In *United States v. Sealy, Inc., 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238 (1967)*, for example, a group of mattress manufacturers operated and controlled Sealy, Inc., a company that licensed the Sealy trademark to the manufacturers, and dictated that each operate within a specific geographic area. *Id., at 352-353, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. The Government alleged that the licensees and Sealy were conspiring in violation of *§ 1*, and we **[****16]** agreed. *Id., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. We explained that "[w]e seek the central substance of the situation" and **[*192]** therefore "we are moved by the identity of the persons who act, rather than

[2] If Congress prohibited independent action that merely restrains trade (even if it does not threaten monopolization), that prohibition could deter perfectly competitive conduct by firms that are fearful of litigation costs and judicial error. See *Copperweld, 467 U.S., at 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628* ("Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur"); cf. *United States v. United States Gypsum Co., 438 U.S. 422, 441, 98 S. Ct. 2864, 57 L. Ed. 2d 854 (1978)* ("[S]alutary and procompetitive conduct . . . might be shunned by businessmen who chose to be excessively cautious in the face of uncertainty"). Moreover, if every unilateral action that restrained trade were subject to **[****15]** antitrust scrutiny, then courts would be forced to judge almost every internal business decision. See 7 P. Areeda & H. Hovenkamp, ***Antitrust Law*** P1464c, p. 206 (2d ed. 2003) (hereinafter Areeda & Hovenkamp) (unilateral behavior is "often difficult to evaluate or remedy").

the label **[**2210]** of their hats." *Id., at 353, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. We thus held that Sealy was not a "separate entity, but . . . an instrumentality of the individual manufacturers." *Id., at 356, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. In similar circumstances, we have found other formally distinct business organizations covered by *§ 1*. See, *e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985)*; *National Collegiate Athletic Ass'n v. Board of Regents, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984) (NCAA);United States v. Topco Associates, Inc., 405 U.S. 596, 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *Associated Press v. United States, 326 U.S. 1, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945)*; *id.,* ***[1678]*** *at 26, 65 S. Ct. 1416, 89 L. Ed. 2013* (Frankfurter, J., concurring); *United States v. Terminal R. Ass'n, 224 U.S. 383, 32 S. Ct. 507, 56 L. Ed. 810 (1912)*; see also Rock, Corporate Law Through an Antitrust Lens, *92 Colum. L. Rev. 497, 506-510 (1992)* (discussing cases). We have similarly looked past the form of a legally "single entity" when competitors were part of professional organization[3] or trade groups.[4]

[*959]** Conversely, ***HN6***[] ***LEdHN[6]***[] [6] there is not necessarily concerted action simply because more than one legally distinct entity is involved. Although, under a now-defunct doctrine known as the "intraenterprise conspiracy doctrine," we once treated cooperation between legally separate entities as necessarily covered by *§ 1*, we now embark on a more functional analysis.

The roots of this functional analysis can be found in the very decision that established the intraenterprise conspiracy doctrine. In *United States v. Yellow Cab Co., 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*, we observed that "corporate interrelationships . . . **[*193]** are not determinative of the applicability of the Sherman Act" because the Act "is aimed at substance rather than form." *Id., at 227, 67 S. Ct. 1560, 91 L. Ed. 2010*. We nonetheless held that cooperation between **[****18]** legally separate entities was necessarily covered by *§ 1* because an unreasonable restraint of trade "may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." *Ibid.;* see also *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*.

The decline of the intraenterprise conspiracy doctrine began in *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 82 S. Ct. 1130, 8 L. Ed. 2d 305 (1962)*. In that case, several agricultural cooperatives that were owned by the same farmers were sued for violations of *§ 1* of the Sherman Act. *Id., at 24-25, 82 S. Ct. 1130, 8 L. Ed. 2d 305*. Applying a specific immunity provision for agricultural cooperatives, we held that the three cooperatives were "in practical effect" one "organization," even though the controlling farmers "have formally organized themselves into three separate legal entities." *Id., at 29,* ***[**2211]*** *82 S. Ct. 1130, 8 L. Ed. 2d 305*. "To hold otherwise," we explained, "would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect" insofar as "use of separate corporations had [no] economic significance." *Ibid.*

Next, in *United States v. Citizens & Southern Nat. Bank, 422 U.S. 86, 95 S. Ct. 2099, 45 L. Ed. 2d 41 (1975)*, **[****19]** a large bank, Citizens and Southern (C&S), formed a holding company that operated *de facto* suburban branch banks in the Atlanta area through ownership of the maximum amount of stock in each local branch that was allowed by law, "ownership of much of the remaining stock by parties friendly to C, use by the suburban banks of the C logogram and all of C's banking services, and close C oversight of the operation and governance of the suburban banks." *Id., at 89, 95 S. Ct. 2099, 45 L. Ed. 2d 41* (footnote omitted). The Government challenged the cooperation between the banks. In our analysis, we observed that " 'corporate interrelationships . . . **[*194]** are not determinative,' *id., at 116, 95 S. Ct. 2099, 45 L. Ed. 2d 41*, "looked to economic substance," and observed that

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[3] See, *e.g.*, *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*; **[****17]** *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; *National Soc. of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*; *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*.

[4] See, *e.g.*, *Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 81 S. Ct. 365, 5 L. Ed. 2d 358 (1961) (per curiam); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 61 S. Ct. 703, 85 L. Ed. 949, 32 F.T.C. 1856 (1941)*.

"because the sponsored banks were not set up to be competitors, *§ 1* did not compel them to compete." Areeda & Hovenkamp ¶ 1463g, at 200-201; see also *Citizens & Southern, 422 U.S., at 119-120, 95 S. Ct. 2099, 45 L. Ed. 2d 41*; Areeda, Intraenterprise Conspiracy in Decline, *97 Harv. L. Rev. 451, 461 (1983)*.

We finally reexamined the intraenterprise conspiracy doctrine in *Copperweld Corp. v. Independence Tube **[***960]** Corp., 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*, and concluded that it was inconsistent with the " 'basic distinction between concerted and **[****20]** independent action.' *Id., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. Considering it "perfectly plain that ***HN7***[] ***LEdHN[7]***[] [7] an internal agreement to implement a single, unitary firm's policies does not raise the antitrust dangers that *§ 1* was designed to police," *id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, we held that a parent corporation and its wholly owned subsidiary "are incapable of conspiring with each other for purposes of *§ 1* of the Sherman Act," *id., at 777, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. We explained that although a parent corporation and its wholly owned subsidiary are "separate" for the purposes of incorporation or formal title, they are controlled by a single center of decisionmaking and they control a single aggregation of economic power. Joint conduct **[1679]** by two such entities does not "depriv[e] the marketplace of independent centers of decisionmaking," *id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, and as a result, an agreement between them does not constitute a "contract, combination . . . , or conspiracy" for the purposes of *§ 1*.[5]

[*195] IV

As *Copperweld* exemplifies, ***HN8***[] ***LEdHN[8]***[] [8] "substance, not form, should determine whether a[n] . . . entity is capable of conspiring under *§ 1*." *467 U.S., at 773, n. 21, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. This inquiry is sometimes described as asking whether the alleged conspirators are a single entity. That is perhaps a misdescription, however, because the question is not whether the defendant is a legally single entity or has a single name; nor is the question whether the **[**2212]** parties involved "seem" like one firm or multiple firms in any metaphysical sense. The key is whether the alleged "contract, combination . . . , or conspiracy" is concerted action--that is, whether it joins together separate decisionmakers. The relevant inquiry, therefore, is whether there is a "contract, combination . . . , or conspiracy" amongst "separate economic actors pursuing separate economic interests," *id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, such that the agreement "deprives the marketplace of independent centers **[****22]** of decisionmaking," *ibid.*, and therefore of "diversity of entrepreneurial interests," *Fraser v. Major League Soccer, L. L. C., 284 F.3d 47, 57 (CA1 2002)* (Boudin, C. J.), and thus of actual or potential competition, see *Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1148-1149 (CA9 2003)* (Kozinski, J.); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214-215, 253 U.S. App. D.C. 142 (CADC 1986)* (Bork, J.); see also Areeda & Hovenkamp P1462b, at 193-194 (noting that the "central evil addressed by Sherman Act *§ 1* is the "elimin[ation of] competition that would otherwise exist").

Thus, ***HN9***[] ***LEdHN[9]***[] [9] while the president and a vice president of a firm could (and regularly do) act in combination, their joint action generally is not the sort of "combination" that *§ 1* is intended to **[***961]** cover. Such agreements might be described as "really unilateral behavior flowing from decisions of a single enterprise." *Copperweld, 467 U.S., at 767, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. Nor, for this reason, does *§ 1* cover "internally coordinated conduct of a corporation and one of its unincorporated divisions," *id., at 770, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, because **[*196]** "[a] division within a corporate structure pursues the common interests of the whole," *ibid.*, and therefore "coordination between **[****23]** a corporation and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests," *id., at 770-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. Nor, for the same reasons, is "the coordinated activity of a parent and its wholly owned subsidiary" covered. See *id., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. They "have a complete unity of interest" and

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[5] This focus on "substance, not form," *Copperweld, 467 U.S., at 773, n. 21, 104 S. Ct. 2731, 81 L. Ed. 2d 628*, can also be seen in our cases about whether a company and its agent are capable of conspiring under *§ 1*. See, *e.g.*, *Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 20-21, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964)*; see also E. Elhauge & D. Geradin, **[****21]** Global ***Antitrust Law*** and Economics 787-788, and n. 7 (2007) (hereinafter Elhauge & Geradin) (explaining the functional difference between *Simpson and United States v. General Elec. Co., 272 U.S. 476, 47 S. Ct. 192, 71 L. Ed. 362 (1926)*, in which we treated a similar agreement as beyond the reach of *§ 1*).

thus "[w]ith or without a formal 'agreement,' the subsidiary acts for the benefit of the parent, its sole shareholder." *Ibid.*

HN10[] LEdHN[10][] [10] Because the inquiry is one of competitive reality, it is not determinative that two parties to an alleged § 1 violation are legally distinct entities. Nor, however, is it determinative that two legally distinct entities have organized themselves under a single umbrella or into a structured joint venture. The question is whether the agreement joins together "independent centers of decisionmaking." *Id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. If it does, the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one.

V

The NFL teams do not possess either the unitary decisionmaking quality or the single aggregation of economic power characteristic of independent action. Each **[****24]** of the teams is a substantial, independently owned, and independently managed business. "[T]heir general corporate actions are guided or determined" by "separate corporate consciousnesses," and "[t]heir objectives are" not "common." *Copperweld, 467 U.S., at 771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*; see also *North American Soccer League v. NFL, 670 F.2d 1249, 1252 (CA2 1982)* (discussing ways that "the financial performance of each team, while related to that of the others, does not . . . necessarily rise and fall with that of the others"). The teams compete with one another, not only on the playing field, but to attract fans, for gate **[*197]** receipts, and for contracts with managerial **[**2213]** and playing personnel. See *Brown v. Pro Football, Inc., 518 U.S. 231, 249, **[1680]** 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*; *Sullivan v. NFL, 34 F.3d 1091, 1098 (CA1 1994)*; *Mid-South Grizzlies v. NFL, 720 F.2d 772, 787 (CA3 1983)*; cf. *NCAA, 468 U.S., at 99, 104 S. Ct. 2948, 82 L. Ed. 2d 70*.

Directly relevant to this case, the teams compete in the market for intellectual property. To a firm making hats, the Saints and the Colts are two potentially competing suppliers of valuable trademarks. When each NFL team licenses its intellectual property, it is not pursuing the "common interests of the whole" league but is instead pursuing **[****25]** interests of each "corporation itself," *Copperweld, 467 U.S., at 770, 104 S. Ct. 2731, 81 L. Ed. 2d 628*; teams are acting as "separate economic actors pursuing separate economic interests," and each team therefore is a potential "independent cente[r] of decisionmaking," *id., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. Decisions by NFL teams to license **[***962]** their separately owned trademarks collectively and to only one vendor are decisions that "depriv[e] the marketplace of independent centers of decisionmaking," *ibid.*, and therefore of actual or potential competition. See *NCAA, 468 U.S., at 109, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (observing a possible § 1 violation if two separately owned companies sold their separate products through a "single selling agent"); cf. Areeda & Hovenkamp P1478a, at 318 ("Obviously, the most significant competitive threats arise when joint venture participants are actual or potential competitors").

In defense, respondents argue that by forming NFLP, they have formed a single entity, akin to a merger, and market their NFL brands through a single outlet. But it is not dispositive that the teams have organized and own a legally separate entity that centralizes the management of their intellectual property. HN11[] LEdHN[11][] [11] An ongoing § 1 violation cannot evade § 1 scrutiny simply **[****26]** by giving the ongoing violation a name and label. "Perhaps every agreement and combination in restraint of trade could be so labeled." *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*.

[*198] The NFL respondents may be similar in some sense to a single enterprise that owns several pieces of intellectual property and licenses them jointly, but they are not similar in the relevant functional sense. Although NFL teams have common interests such as promoting the NFL brand, they are still separate, profit-maximizing entities, and their interests in licensing team trademarks are not necessarily aligned. See generally Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, *1995 Colum. Bus. L. Rev. 1, 52-61 (1995)*; Shishido, Conflicts of Interest and Fiduciary Duties in the Operation of a Joint Venture, *39 Hastings L. J. 63, 69-81 (1987)*. Common interests in the NFL brand "*partially* unit[e] the economic interests of the parent firms," Broadley, Joint Ventures and Antitrust Policy, 95 Harv. L. Rev. 1521, 1526 (1982) (emphasis added), but the teams still have distinct, potentially competing interests.

It may be, as respondents argue, that NFLP "has served as the 'single driver' " **[****27]** of the teams' "promotional vehicle, 'pursu[ing] the common interests of the whole.' " Brief for NFL Respondents 28 (quoting *Copperweld, 467 U.S., at 770-771, 104 S. Ct. 2731, 81 L. Ed. 2d 628*; brackets in original). But illegal restraints often are in the common interests of the parties to the restraint, at the expense of those who are not parties. It is true, as respondents describe, that they have for some time marketed their trademarks jointly. But ***HN12***[] ***LEdHN[12]***[] [12] a history of concerted activity does not immunize conduct from *§ 1* scrutiny. "Absence of actual competition may simply be a manifestation **[**2214]** of the anticompetitive agreement itself." *Freeman, 322 F.3d, at 1149*.

Respondents argue that nonetheless, as the Court of Appeals held, they constitute a single entity because without their cooperation, there would be no NFL football. It is true that "the clubs that make up a professional sports league are not completely independent economic competitors, as they depend upon a degree of cooperation for economic survival." *Brown, 518 U.S., at 248, 116 S. Ct. 2116, 135 l. Ed. 2d 521*. But the Court of Appeals' reasoning is unpersuasive.

HN13[] ***LEdHN[13]***[] [13] **[*199]** The justification for cooperation is not relevant to whether that cooperation **[***963]** is concerted or independent action.[6] A "contract, combination **[****28]** . . . , or conspiracy," *§ 1*, that is necessary or useful to a joint venture is still a "contract, combination . . . , or conspiracy" if it "deprives the marketplace of independent centers of decisionmaking," *Copperweld, 467 U.S., at 769, 104 S. Ct. 2731, 81 L. Ed. 2d 628*. See *NCAA, 468 U.S., at 113, 104 S. Ct. 2948, 82 L. Ed. 2d 70* ("[J]oint ventures **[1681]** have no immunity from antitrust laws"). Any joint venture involves multiple sources of economic power cooperating to produce a product. And for many such ventures, the participation of others is necessary. But that does not mean that necessity of cooperation transforms concerted action into independent action; a nut and a bolt can only operate together, but an agreement between nut and bolt manufacturers is still subject to *§ 1* analysis. Nor does it mean that once a group of firms agree to produce a joint product, cooperation amongst those firms must be treated as independent conduct. The mere fact that the teams operate jointly in some sense does not mean that they are immune.[7]

[*200] The question whether **[****30]** NFLP decisions can constitute concerted activity covered by *§ 1* is closer than whether decisions made directly by the 32 teams are covered by *§ 1*. This is so both because NFLP is a separate corporation with its own management and because the record indicates that most of the revenues generated by NFLP are shared by the teams on an equal basis. Nevertheless we think it clear that for the same reasons the 32 teams' conduct is covered by *§ 1*, NFLP's actions also are subject to *§ 1*, at least with regards to its marketing of property owned by the separate teams. NFLP's licensing decisions are made by the 32 potential competitors, and each of them actually owns its share of the jointly managed assets. Cf. *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*. Apart from their agreement to cooperate in exploiting **[**2215]** those assets, including their decisions as the NFLP, there would be nothing to prevent each of the teams from making its own market decisions relating to purchases of apparel and headwear, to the sale of such items, and to the granting of licenses to use its trademarks.

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[6] As discussed *infra*, necessity of cooperation is a factor relevant to whether the agreement is subject to the Rule of Reason. See *NCAA, 468 U.S. 85, 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)* (holding that NCAA restrictions on televising college football games are subject **[****29]** to Rule of Reason analysis for the "critical" reason that "horizontal restraints on competition are essential if the product is to be available at all").

[7] In any event, it simply is not apparent that the alleged conduct was necessary at all. Although two teams are needed to play a football game, not all aspects of elaborate interleague cooperation are necessary to produce a game. Moreover, even if leaguewide agreements are necessary to produce football, it does not follow that concerted activity in marketing intellectual property is necessary to produce football.

The Court of Appeals carved out a zone of antitrust immunity for conduct arguably related to league operations by reasoning that coordinated team trademark sales are necessary to produce "NFL football," a single NFL brand that competes against other forms of entertainment. But defining the product as "NFL football" puts the cart before the horse: Of course the NFL produces NFL football; but that does not mean that cooperation amongst NFL teams is immune from *§ 1* scrutiny. Members of any cartel could insist that their cooperation is necessary to produce the "cartel product" and compete with other products.

HN14[] **LEdHN[14]**[] [14] We generally treat agreements within a single firm as independent action on the presumption that the components of the firm will act to **[***964]** maximize **[****31]** the firm's profits. But in rare cases, that presumption does not hold. Agreements made within a firm can constitute concerted action covered by *§ 1* when the parties to the agreement act on interests separate from those of the firm itself,[8] and the intrafirm agreements may simply be a formalistic shell for ongoing concerted action. **[*201]** See, *e.g.*, *Topco Associates, Inc., 405 U.S., at 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515*; *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*.

For that reason, decisions by NFLP regarding the teams' separately owned intellectual property constitute concerted action. Thirty-two teams operating independently through the vehicle of NFLP are not like the components of a single firm that act to maximize the **[****32]** firm's profits. The teams remain separately controlled, potential competitors with economic interests that are distinct from NFLP's financial well-being. See generally Hovenkamp, *1995 Colum. Bus. L. Rev., at 52-61*. Unlike typical decisions by corporate shareholders, NFLP licensing decisions effectively require the assent of more than a mere majority of shareholders. And each team's decision reflects not only an interest in NFLP's profits but also an interest in the team's individual profits. See generally Shusido*, 39 Hastings L. J., at 69-71*. The 32 teams capture individual economic benefits separate and apart from NFLP profits as a result of the decisions they make for NFLP. NFLP's decisions thus affect each team's profits from licensing its own intellectual property. “Although the business interests of” the teams “will *often* coincide with those of ” NFLP “as an entity in itself, that commonality of interest exists in every cartel.” *Los Angeles Memorial* ***[1682]*** *Coliseum Comm'n v. NFL, 726 F.2d 1381, 1389 (CA9 1984)* (emphasis added). In making the relevant licensing decisions, NFLP is therefore “an instrumentality” of the teams. *Sealy, 388 U.S., at 352-354, 87 S. Ct. 1847, 18 L. Ed. 2d 1238*; see also *Topco Associates, Inc., 405 U.S., at 609, 92 S. Ct. 1126, 31 L. Ed. 2d 515*.

If **[****33]** the fact that potential competitors shared in profits or losses from a venture meant that the venture was immune from *§ 1*, then any cartel “could evade the antitrust laws simply by creating a 'joint venture' to serve as the exclusive seller of their competing products.” *Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F.3d 290, 335 (CA2 2008)* (Sotomayor, J., concurring in judgment). “So long as no agreement,” other than one made by the cartelists sitting **[*202]** on the board of the joint venture, “explicitly listed the prices to be charged, the companies could act as monopolies through the 'joint venture.' ” *Ibid.* (Indeed, a joint venture with a single management structure is generally a better way to operate a cartel because it decreases the risks of a party to an illegal agreement defecting from that agreement). However, **HN15**[] **LEdHN[15]**[] [15] competitors “cannot **[**2216]** simply get around” antitrust liability by acting “through a **[***965]** third-party intermediary or 'joint venture'.” *Id., at 336*.[9]

VI

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[8] See Areeda & Hovenkamp P1471; Elhauge & Geradin 786-787, and n. 6; see also *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., Inc., 996 F.2d 537, 544 (CA2 1993)*; *Bolt v. Halifax Hospital Medical Center, 891 F.2d 810, 819 (CA11 1990)*; *Oksanen v. Page Memorial Hospital, 945 F.2d 696, 706 (CA4 1991)*; *Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380, 387-388 (CA10 1985)*; *Victorian House, Inc. v. Fisher Camuto Corp., 769 F.2d 466, 469 (CA8 1985)*; *Weiss v. York Hospital, 745 F.2d 786, 828 (CA3 1984)*.

[9] For the purposes of resolving this case, there is no need to pass upon the Government's position that entities are incapable of conspiring under *§ 1* if they “have effectively merged the relevant aspect of their operations, **[****34]** thereby eliminating actual and potential competition . . . in that operational sphere” and “the challenged restraint [does] not significantly affect actual or potential competition . . . outside their merged operations.” Brief for United States as *Amicus Curiae* 17. The Government urges that the choices “to offer only a blanket license” and “to have only a single headwear licensee” might not constitute concerted action under its test. *Id., at 32*. However, because the teams still own their own trademarks and are free to market those trademarks as they see fit, even those two choices were agreements amongst potential competitors and would constitute concerted action under the Government's own standard. At any point, the teams could decide to license their own trademarks. It is significant, moreover, that the teams here control NFLP. The two choices that the Government might treat as independent action, although nominally made by NFLP, are for all functional purposes choices made by the 32 entities with potentially competing interests.

Football teams that need to cooperate are not trapped by ***antitrust law***. "[T]he special characteristics of this industry may provide a justification" for **[****35]** many kinds of agreements. *Brown, 518 U.S., at 252, 116 S. Ct. 2116, 135 L. Ed. 2d 521* (Stevens, J., dissenting). The fact that NFL teams share an interest in making the entire league successful and profitable, and that they must cooperate in the production and scheduling of games, provides a perfectly sensible justification for making a host of collective decisions. But the conduct at issue in this case is still concerted **[*203]** activity under the Sherman Act that is subject to *§ 1* analysis.

HN16[] ***LEdHN[16]***[] [16] When "restraints on competition are essential if the product is to be available at all," *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason.[10] *NCAA, 468 U.S., at 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70*; see *id., at 117* ("Our decision not to apply a *per se* rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved"); see also *Dagher, 547 U.S., at 6, 126 S. Ct. 1276, 164 L. Ed. 2d 1*. In such instances, the agreement is likely to survive the Rule of Reason. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)* ("Joint ventures and other cooperative arrangements **[****36]** are also not usually unlawful. . . where the agreement . . . is necessary to market the product at all"). And depending upon the concerted activity **[***966]** in question, **[**2217]** the Rule of Reason may not require a detailed analysis; it "can sometimes be applied in the twinkling of an eye." *NCAA, 468 U.S., at 110, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70*.

[*204] Other features of the NFL may also save agreements amongst the teams. We have recognized, **[1683]** for example, "that the interest in maintaining a competitive balance" among "athletic teams is legitimate and important," *id. at 117, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. While that same interest applies to the teams in the NFL, it does not justify treating them as a single entity for *§ 1* purposes when it comes to the marketing of the teams' individually owned intellectual property. It is, however, unquestionably an interest that may well justify a variety of collective decisions made by the teams. What role it properly plays in applying the Rule of Reason to the allegations in this case is a matter to be considered on remand.

* * *

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

References

15 U.S.C.S. § 1

3 Antitrust Laws and Trade Regulation §§56.01, 56.02 (Matthew Bender 2d ed.)

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[10] Justice Brandeis provided the classic formulation of the Rule of Reason in *Board of Trade of Chicago v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*:

LEdHN[17][] [17] "***HN17***[] The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent **[****37]** may help the court to interpret facts and to predict consequences." See also *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 885-887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; *National Soc. of Professional Engineers, 435 U.S., at 688-691, 98 S. Ct. 1355, 55 L. Ed. 2d 637*.

10 Federal ***Antitrust Law*** §§74.1, 74.3, 74.8 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices §§9, 14, 16, 33.6

L Ed Index, Football; Sherman Act

Supreme Court's views as to what constitutes per se illegal “price fixing” **[****38]** under the Sherman Act (*15 U.S.C.S. §§1 et seq.*). *64 L. Ed. 2d 997*.

FTC v. Phoebe Putney Health Sys.

Supreme Court of the United States

November 26, 2012, Argued; February 19, 2013, Decided

No. 11-1160F

Reporter

568 U.S. 216 *; 133 S. Ct. 1003 **; 185 L. Ed. 2d 43 ***; 2013 U.S. LEXIS 1064 ****; 81 U.S.L.W. 4075; 2013-1 Trade Cas. (CCH) P78,269; 24 Fla. L. Weekly Fed. S 8

FEDERAL TRADE COMMISSION, Petitioner v. PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.

Subsequent History: Later proceeding at *FTC v. Phoebe Putney Health Sys., 2013 U.S. Dist. LEXIS 65932 (M.D. Ga., May 8, 2013)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FTC v. Phoebe Putney Health Sys., 663 F.3d 1369, 2011 U.S. App. LEXIS 24458 (11th Cir. Ga., 2011)

Disposition: Reversed and remanded.

Core Terms

hospital authority, anticompetitive, immunity, state-action, articulated, displace, powers, state policy, authorities, acquisitions, anti trust law, municipalities, delegated, acquire, effects, lease, government entity, clear-articulation, foreseeable, regulation, antitrust, anticompetitive conduct, entities, state legislature, facilities, private corporation, corporate powers, hospital service, respondents', monopoly

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

Under the state-action immunity doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws.

Governments > Local Governments > Duties & Powers

Public Health & Welfare Law > Healthcare > General Overview

HN2[] **Local Governments, Duties & Powers**

The Georgia Constitution allows political subdivisions to provide health care services. The Hospital Authorities Law (Law), *O.C.G.A. § 31-7-70 et seq.* (2012), provides a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of the state. *O.C.G.A. § 31-7-76(a)*. The purpose of the constitutional provision and the statute based thereon is to create an organization which could carry out and make more workable the duty which the state owed to its indigent sick. The Law authorizes each county and municipality, and certain combinations of counties or municipalities, to create a public body corporate and politic called a hospital authority. *O.C.G.A. § 31-7-72(a)*, *(d)*. Hospital authorities are governed by five- to nine-member boards that are appointed by the governing body of the county or municipality in their area of operation. *§ 31-7-72(a)*.

Governments > Local Governments > Duties & Powers

Public Health & Welfare Law > Healthcare > General Overview

HN3[] **Local Governments, Duties & Powers**

Under the Hospital Authorities Law (Law), *O.C.G.A. § 31-7-70 et seq.* (2012), a hospital authority exercises public and essential governmental functions and is delegated all the powers necessary or convenient to carry out and effectuate the Law's purposes. *O.C.G.A. § 31-7-75*. Giving more content to that general delegation, the Law enumerates 27 powers conferred upon hospital authorities, including the power to acquire by purchase, lease, or otherwise and to operate projects, *§ 31-7-75(4)*, which are defined to include hospitals and other public health facilities, *O.C.G.A. § 31-7-71(5)*; to construct, reconstruct, improve, alter, and repair projects, *§ 31-7-75(5)*; to lease for operation by others any project provided certain conditions are satisfied, *§ 31-7-75(7)*; and to establish rates and charges for the services and use of the facilities of the authority, *§ 31-7-75(10)*. Hospital authorities may not operate or construct any project for profit, and accordingly they must set rates so as only to cover operating expenses and create reasonable reserves. *O.C.G.A. § 31-7-77*.

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

Constitutional Law > ... > Case or Controversy > Mootness > General Overview

HN4[] **Mootness, Real Controversy Requirement**

A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Governments > State & Territorial Governments > Claims By & Against

Healthcare Law > Healthcare Litigation > Antitrust Actions > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] **Parker State Action Doctrine, Local Governments & Private Parties**

Because nothing in the language of the Sherman Act, *15 U.S.C.S. §1 et seq.*, or in its history suggests that Congress intends to restrict the sovereign capacity of the states to regulate their economies, the Sherman Act is not read to bar states from imposing market restraints as an act of government. Under certain circumstances, immunity from the federal antitrust laws may extend to no-state actors carrying out the state's regulatory program.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN6[] **Parker State Action Doctrine, Local Governments & Private Parties**

Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication. Consistent with this preference, a court recognizes state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the state's own. Accordingly, closer analysis is required when the activity at issue is not directly that of the state itself, but rather is carried out by others pursuant to state authorization. When determining whether the anticompetitive acts of private parties are entitled to immunity, the court employs a two-part test, requiring first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the state.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] **Exemptions & Immunities, Parker State Action Doctrine**

Because municipalities and other political subdivisions are not themselves sovereign, state-action antitrust immunity does not apply to them directly. At the same time, however, substate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public service. This rule preserves to the states their freedom to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the nation's free-market goals.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN8[] **Parker State Action Doctrine, Local Governments & Private Parties**

As with private parties, antitrust immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. But unlike private parties, such entities are not subject to the requirement for active state supervision because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN9[] **Exemptions & Immunities, Parker State Action Doctrine**

To pass the clear-articulation test for antitrust immunity, a state legislature need not expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. Rather, state-action immunity applies if the anticompetitive effect was the foreseeable result of what the state authorized.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN10[] **Exemptions & Immunities, Parker State Action Doctrine**

State-law authority to act is insufficient to establish state-action antitrust immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anti-competitively.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN11[] **Exemptions & Immunities, Parker State Action Doctrine**

For purposes of antitrust immunity, when a state's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive, the state cannot be said to have contemplated those anticompetitive actions.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN12[] **Exemptions & Immunities, Parker State Action Doctrine**

Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns. As a result, a state that has delegated such general powers can hardly be said to have contemplated that they will be used anti-competitively.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN13[] **Exemptions & Immunities, Parker State Action Doctrine**

It embodies an unrealistic view of how legislatures work and of how statutes are written to require state legislatures to explicitly authorize specific anticompetitive effects before state-action antitrust immunity can apply. No legislature can be expected to catalog all of the anticipated effects of a statute delegating authority to a substate governmental entity. Instead, the clear-articulation inquiry is approached more practically, but without diluting the ultimate requirement that the state must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the state itself. Thus, a state policy to displace federal ***antitrust law*** is sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the state must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN14[] **Parker State Action Doctrine, Local Governments & Private Parties**

For purposes of state-action antitrust immunity, simple permission to play in a market does not foreseeably entail permission to roughhouse in that market unlawfully. When a state grants some entity general power to act, whether it is a private corporation or a public entity, it does so against the backdrop of federal ***antitrust law***. Of course, both private parties and local governmental entities conceivably may transgress antitrust requirements by exercising their general powers in anticompetitive ways. But a reasonable legislature's ability to anticipate that (potentially undesirable) possibility falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative.

Lawyers' Edition Display

Decision

[*43]** Local government entity to which state granted power to purchase hospitals, and which owned one hospital, held not to have state-action immunity to Federal Trade Commission's antitrust action concerning entity's proposed purchase of only other hospital in its jurisdiction.

Summary

Procedural posture: Petitioner Federal Trade Commission (FTC) brought an action against respondent hospital authority which owned one hospital alleging that the authority's proposed purchase of the only other hospital in the authority's jurisdiction violated antitrust laws. Upon the grant of a writ of certiorari, the FTC appealed the judgment of the U.S. Court of Appeals for the Eleventh Circuit which upheld the authority's claim of state-action antitrust immunity.

Overview: The authority contended that legislation permitting the authority to purchase hospitals clearly contemplated the possibility of anticompetitive effects, and thus the legislation was state action which granted the authority immunity from antitrust violations. The U.S. Supreme Court unanimously held that, because state did not clearly articulate and affirmatively express a policy allowing the authority to make acquisitions that substantially lessened competition, state-action antitrust immunity did not apply. While the state was not precluded from imposing market restraints which extended to the authority in carrying out the state's regulatory program, the state's general grant allowing the authority to acquire hospitals did not constitute a grant of the power to acquire hospitals on an anticompetitive basis. Further, the displacement of competition was not an inherent, logical, or ordinary result of granting the authority the power to acquire hospitals, and thus it could not be said that the state must have foreseen and implicitly endorsed the anticompetitive effects as being consistent with the state's policy goals in furthering the availability of affordable health care.

Outcome: The judgment upholding the authority's state-action antitrust immunity was reversed, and the case was remanded for further proceedings. Unanimous Decision.

Headnotes

[*44]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY -- LOCAL GOVERNMENT ENTITY > Headnote:
LEdHN[1][] [1]

Under the state-action immunity doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws.

SAFETY AND HEALTH §1 > STATE LAW -- HOSPITAL AUTHORITIES > Headnote:
LEdHN[2][] [2]

The Georgia Constitution allows political subdivisions to provide health care services. The Hospital Authorities Law (Law), *O.C.G.A. § 31-7-70 et seq.* (2012), provides a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of the state. *O.C.G.A. § 31-7-76(a)*. The purpose of the constitutional provision and the statute based thereon is to create an organization which could carry out and make more workable the duty which the state owed to its indigent sick. The Law authorizes each county and municipality, and certain combinations of counties or municipalities, to create a public body corporate and politic called a hospital authority. *O.C.G.A. § 31-7-72(a)*, *(d)*. Hospital authorities are governed by five- to nine-member boards that are appointed by the governing body of the county or municipality in their area of operation. *§ 31-7-72(a)*.

SAFETY AND HEALTH §1 > STATE LAW -- HOSPITAL AUTHORITIES > Headnote:
LEdHN[3][] [3]

Under the Hospital Authorities Law (Law), *O.C.G.A. § 31-7-70 et seq.* (2012), a hospital authority exercises public and essential governmental functions and is delegated all the powers necessary or convenient to carry out and effectuate the Law's purposes. *O.C.G.A. § 31-7-75*. Giving more content to that general delegation, the Law enumerates 27 powers conferred upon hospital authorities, including the power to acquire by purchase, lease, or otherwise and to operate projects, *§ 31-7-75(4)*, which are defined to include hospitals and other public health facilities, *O.C.G.A. § 31-7-71(5)*; to construct, reconstruct, improve, alter, and repair projects, *§ 31-7-75(5)*; to lease for operation by others any project provided certain conditions are satisfied, *§ 31-7-75(7)*; and to establish rates and charges for the services and use of the facilities of the authority, *§ 31-7-75(10)*. Hospital authorities may not operate or construct any project for profit, and accordingly they must set rates so as only to cover operating expenses and create reasonable reserves. *O.C.G.A. § 31-7-77*.

APPEAL §1222 > MOOTNESS > Headnote:
LEdHN[4][] [4]

A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.

[*45]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY
> Headnote:
LEdHN[5][] [5]

Because nothing in the language of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, or in its history suggests that Congress intends to restrict the sovereign capacity of the states to regulate their economies, the Sherman Act is not read to bar states from imposing market restraints as an act of government. Under certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the state's regulatory program.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY > Headnote:
LEdHN[6][] [6]

Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication. Consistent with this preference, a court recognizes state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the state's own. Accordingly, closer analysis is required when the activity at issue is not directly that of the state itself, but rather is carried out by others pursuant to state authorization. When determining whether the anticompetitive acts of private parties are entitled to immunity, the court employs a two-part test, requiring first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the state.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY -- POLITICAL SUBDIVISIONS > Headnote:
LEdHN[7][] [7]

Because municipalities and other political subdivisions are not themselves sovereign, state-action antitrust immunity does not apply to them directly. At the same time, however, substate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public service. This rule preserves to the states their freedom to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the nation's free-market goals.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > IMMUNITY -- LOCAL GOVERNMENT ENTITIES -- POLICY -- SELF-INTEREST > Headnote:
LEdHN[8][] [8]

As with private parties, antitrust immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition. But unlike private parties, such entities are not subject to the requirement for active state supervision because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY > Headnote:
LEdHN[9][] [9]

To pass the clear-articulation test for antitrust immunity, a state legislature need not expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. Rather, state-action immunity applies if the anticompetitive effect was the foreseeable result of what the state authorized.

[*46]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY > Headnote:
LEdHN[10][] [10]

State-law authority to act is insufficient to establish state-action antitrust immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anti-competitively.

[*46]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY > Headnote:
LEdHN[11][] [11]

For purposes of antitrust immunity, when a state's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive, the state cannot be said to have contemplated those anticompetitive actions.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY > Headnote:
LEdHN[12][] [12]

Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns. As a result, a state that has delegated such general powers can hardly be said to have contemplated that they will be used anti-competitively.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY -- ANTICOMPETITIVE EFFECTS > Headnote:
LEdHN[13][] [13]

It embodies an unrealistic view of how legislatures work and of how statutes are written to require state legislatures to explicitly authorize specific anticompetitive effects before state-action antitrust immunity can apply. No legislature can be expected to catalog all of the anticipated effects of a statute delegating authority to a substate governmental entity. Instead, the clear-articulation inquiry is approached more practically, but without diluting the ultimate requirement that the state must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the state itself. Thus, a state policy to displace federal ***antitrust law*** is sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the state must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.

[*47]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE ACTION -- IMMUNITY -- DISPLACEMENT OF COMPETITION > Headnote:
LEdHN[14][] [14]

For purposes of state-action antitrust immunity, simple permission to play in a market does not foreseeably entail permission to roughhouse in that market unlawfully. When a state grants some entity general power to act, whether it is a private corporation or a public entity, it does so against the backdrop of federal ***antitrust law***. Of course, both private parties and local governmental entities conceivably may transgress antitrust requirements by exercising their general powers in anticompetitive ways. But a reasonable legislature's ability to anticipate that (potentially undesirable) possibility falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative.

Syllabus

[*216] **[**1004]** Under Georgia's Hospital Authorities Law (Law), political subdivisions may create special-purpose public entities called hospital authorities to provide "for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state." The Law permits authorities to "exercise public and essential governmental functions" and delegates to them numerous general powers, including the ability to acquire and lease hospitals and other public health facilities. *Ga. Code Ann. §31-7-75*.

The Hospital Authority of Albany-Dougherty County (Authority) owns **[**1005]** Phoebe Putney Memorial Hospital (Memorial), one of two hospitals in the county. The Authority formed two private nonprofit corporations to manage Memorial: Phoebe Putney Health System, Inc. (PPHS), and **[***48]** Phoebe Putney Memorial Hospital, Inc. (PPMH). After the Authority decided to purchase the second hospital in the county and lease it to a subsidiary of PPHS, the Federal Trade Commission (FTC) issued an administrative complaint alleging that the transaction would substantially reduce **[****2]** competition in the market for acute-care hospital services, in violation of *§5* of the Federal Trade Commission Act and *§7 of the Clayton Act*. The FTC and Georgia subsequently sued the Authority, PPHS, PPMH, and others (collectively respondents), seeking to enjoin the transaction pending administrative proceedings. The District Court denied the request for a preliminary injunction and granted respondents' motion to dismiss, holding that respondents are immune from antitrust liability under the state-action doctrine. The Eleventh Circuit affirmed. It concluded that the Authority, as a local governmental entity, was entitled to state-action immunity because the challenged anticompetitive conduct was a foreseeable result of the Law. The court reasoned that the state legislature could have readily anticipated an anticompetitive effect, given the breadth of the powers delegated to hospital authorities, particularly leasing and acquisition powers that could lead to consolidation of hospital ownership.

Held: Because Georgia has not clearly articulated and affirmatively expressed a policy allowing hospital authorities to make acquisitions that **[*217]** substantially lessen competition, state-action immunity **[****3]** does not apply. *Pp. 224-226, 185 L. Ed. 2d, at 53-60*.

(a) This Court recognized in *Parker v. Brown, 317 U.S. 341, 350-352, 63 S. Ct. 307, 87 L. Ed. 315*, that the federal antitrust laws do not prevent States from imposing market restraints "as an act of government . . . ." Under the state-action doctrine, immunity from federal ***antitrust law*** may extend to nonstate actors carrying out the State's regulatory program. See, *e.g., Patrick v. Burget, 486 U.S. 94, 99-100, 108 S. Ct. 1658, 100 L. Ed. 2d 83*. But given the antitrust laws' values of free enterprise and economic competition, "state-action immunity is disfavored," *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*, and is recognized only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to the "State's own" regulatory scheme, *id., at 635, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Immunity will attach only to activities of substate governmental entities that are undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. Community Communications Co. v. Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810. A state legislature need not "expressly state" that intent, Hallie v. Eau Claire, 471 U.S. 34, 43, 105 S. Ct. 1713, 85 L. Ed. 2d 24, but the anticompetitive effect must have been the "foreseeable result" of what the State authorized, id., at 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24. **[****4]** Pp. ___ - ___, 185 L. Ed. 2d, at 53-54.

(b) Respondents' state-action immunity defense fails under the clear-articulation test because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership. The Authority's powers, including its acquisition and leasing powers, mirror general powers routinely conferred by state law on private corporations. **[***49]** More is required to establish state-action immunity; the Authority must show that it has been delegated authority not just to act, but to act or regulate anticompetitively. Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 372, 111 S. Ct. 1344, 113 L. Ed. 2d 382. In **[**1006]** *Boulder*, this Court concluded that a Colorado law granting municipalities the power to enact ordinances governing local affairs did not satisfy the clear-articulation test, 455 U.S., at 55-56, 102 S. Ct. 835, 70 L. Ed. 2d 810, because, when a State's position "is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive," the State cannot be said to have " 'contemplated' " those anticompetitive actions, id., at 55, 102 S. Ct. 835, 70 L. Ed. 2d 810.

That principle controls here. Grants of general corporate power allowing substate governmental entities to participate in a competitive marketplace **[****5]** are typically used without raising federal antitrust concerns, so a State cannot be said to have contemplated that such powers will be used anticompetitively. Here, though the Law allows the Authority to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition. Pp. 227-228, 185 L. Ed. 2d, at 55-56.

[*218] (c) In concluding otherwise, the Eleventh Circuit applied the concept of "foreseeability" too loosely. This Court, recognizing that no legislature "can be expected to catalog all of the anticipated effects" of a statute delegating authority to a substate governmental entity, Hallie, 471 U.S., at 43, 105 S. Ct. 1713, 85 L. Ed. 2d 24, has approached the clear-articulation inquiry practically, but without diluting the ultimate requirement that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the "state itself," Parker, 317 U.S., at 352, 63 S. Ct. 307, 87 L. Ed. 315. Thus, the Court has found a state policy to displace federal ***antitrust law*** was sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary **[****6]** result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. See Hallie, 471 U.S., at 41, 105 S. Ct. 1713, 85 L. Ed. 2d 24; Omni, 499 U.S., at 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382. By contrast, when a State grants an entity a general power to act, it does so against the backdrop of federal ***antitrust law***. Entities might transgress antitrust requirements by exercising their powers anticompetitively, but a reasonable legislature's ability to anticipate that possibility falls well short of clearly articulating an affirmative state policy to displace competition. The Eleventh Circuit's argument, echoed by respondents, that the case falls within the foreseeability standard used in *Hallie* and *Omni* is rejected. Pp.229-232, 185 L. Ed. 2d, at 56-58.

(d) Respondents' additional arguments are also unpersuasive. They contend that because hospital authorities are granted unique powers and responsibilities to fulfill Georgia's objective of providing access to adequate and affordable health care, it was foreseeable that they would decide that the best way to serve their **[***50]** communities was to acquire an existing local hospital, instead of incurring **[****7]** the additional expense and regulatory burden of expanding, or constructing, a facility. But even though the authorities may differ from private corporations offering hospital services, neither the Law nor any other state-law provision clearly articulates a state policy allowing authorities to exercise their general corporate powers without regard to anticompetitive effects. Respondents also contend that when there is doubt about whether the clear-articulation test is satisfied, federal courts should err on the side of recognizing immunity to avoid improper interference with state policy choices. But the Law here is not ambiguous, and respondents' suggestion is inconsistent with the principle that "state-action immunity is disfavored," **[**1007]** *Ticor Title, 504 U.S., at 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. *Pp. 232-236, 185 L. Ed. 2d, at 58-60*.

663 F.3d 1369, reversed and remanded.

Counsel: Benjamin J. Horwich argued the cause for petitioner.

Seth P. Waxman argued the cause for respondents.

Judges: Sotomayor, J., delivered the opinion for a unanimous Court.

Opinion by: Sotomayor

Opinion

[*219] Justice **Sotomayor** delivered the opinion of the Court.

HN1[] ***LEdHN[1]***[] [1] Under this Court's state-action immunity doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws. In this **[****8]** case, we must decide whether a Georgia **[*220]** law that creates special-purpose public entities called hospital authorities and gives those entities general corporate powers, including the power to acquire hospitals, clearly articulates and affirmatively expresses a state policy to permit acquisitions that substantially lessen competition. Because Georgia's grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, we hold that the clear-articulation test is not satisfied and state-action immunity does not apply.

I

A

HN2[] ***LEdHN[2]***[] [2] In 1941, the State of Georgia amended its Constitution to allow political subdivisions to provide health care services. 1941 Ga. Laws p. 50. The State concurrently enacted the Hospital Authorities Law (Law), *id.*, at 241, *Ga. Code Ann. §31-7-70 et seq.* (2012), "to provide a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state." *§31-7-76(a)*. "The purpose of the constitutional provision and the statute based thereon was to . . . create an organization which could carry out and make more workable the duty which the State owed to its indigent **[****9]** sick." *DeJarnette v. Hospital Auth. of Albany, 195 Ga. 189, 200, 23 S.E.2d 716, 723 (1942)* (citations omitted). As amended, the Law authorizes each county and municipality, and certain combinations of counties or municipalities, to create "a public body corporate and politic" called a "hospital authority." *§§31-7-72(a)*, *(d)*. Hospital authorities are governed by five- to nine-member boards that are appointed by the governing body of the county or municipality in their area of operation. *§31-7-72(a)*.

[*51]** ***LEdHN[3]***[] [3] ***HN3***[] Under the Law, a hospital authority "exercise[s] public and essential governmental functions" and is delegated "all the powers necessary or convenient to carry out and effectuate" the Law's purposes. *§31-7-75*. Giving more content to **[*221]** that general delegation, the Law enumerates 27 powers conferred upon hospital authorities, including the power "[t]o acquire by purchase, **[**1008]** lease, or otherwise and to operate projects," *§31-7-75(4)*, which are defined to include hospitals and other public health facilities, *§31-7-71(5)*; "[t]o construct, reconstruct, improve, alter, and repair projects," *§31-7-75(5)*; "[t]o lease . . . for operation by others any project" provided certain conditions are satisfied, *§31-7-75(7)*; **[****10]** and "[t]o establish rates and charges for the services and use of the facilities of the authority," *§31-7-75(10)*. Hospital authorities may not operate or construct any project for profit, and accordingly they must set rates so as only to cover operating expenses and create reasonable reserves. §31-7-77.

B

In the same year that the Law was adopted, the city of Albany and Dougherty County established the Hospital Authority of Albany-Dougherty County (Authority) and the Authority promptly acquired Phoebe Putney Memorial Hospital (Memorial), which has been in operation in Albany since 1911. In 1990, the Authority restructured its operations by forming two private nonprofit corporations to manage Memorial: Phoebe Putney Health System, Inc. (PPHS), and its subsidiary, Phoebe Putney Memorial Hospital, Inc. (PPMH). The Authority leased Memorial to PPMH for $1 per year for 40 years. Under the lease, PPMH has exclusive authority over the operation of Memorial, including the ability to set rates for services. Consistent with §31-7-75(7), PPMH is subject to lease conditions that require provision of care to the indigent sick and limit its rate of return.

Memorial is one of two hospitals in Dougherty **[****11]** County. The second, Palmyra Medical Center (Palmyra), was established in Albany in 1971 and is located just two miles from Memorial. At the time suit was brought in this case, Palmyra was operated by a national for-profit hospital network, HCA, Inc. (HCA). Together, Memorial and Palmyra account **[*222]** for 86 percent of the market for acute-care hospital services provided to commercial health care plans and their customers in the six counties surrounding Albany. Memorial accounts for 75 percent of that market on its own.

In 2010, PPHS began discussions with HCA about acquiring Palmyra. Following negotiations, PPHS presented the Authority with a plan under which the Authority would purchase Palmyra with PPHS controlled funds and then lease Palmyra to a PPHS subsidiary for $1 per year under the Memorial lease agreement. The Authority unanimously approved the transaction.

The Federal Trade Commission (FTC) shortly thereafter issued an administrative complaint alleging that the proposed purchase-and-lease transaction would create a virtual monopoly and would substantially reduce competition in the market for acute-care hospital services, in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719,, **[****12]** 15 U.S.C. §45, and §7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. §18. The FTC, **[***52]** along with the State of Georgia,[1] subsequently filed suit against the Authority, HCA, Palmyra, PPHS, PPMH, and the new PPHS subsidiary created to manage Palmyra (collectively respondents), seeking to enjoin the transaction pending administrative proceedings. See 15 U.S.C. §§26, 53(b).

The United States District Court for the Middle District of Georgia denied the request for a preliminary injunction and **[**1009]** granted respondents' motion to dismiss. 793 F. Supp. 2d 1356 (2011). The District Court held that respondents are immune from antitrust liability under the state-action doctrine. See id., at 1366-1381.

The United States Court of Appeals for the Eleventh Circuit affirmed. 663 F.3d 1369 (2011). As an initial matter, the court "agree[d] with the [FTC] that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially **[*223]** lessen competition or tend to create, if not create, a monopoly." Id., at 1375. But the court concluded that the transaction was immune from antitrust liability. See id., at 1375-1378. **[****13]** The Court of Appeals explained that as a local governmental entity, the Authority was entitled to state-action immunity if the challenged anticompetitive conduct was a " 'foreseeable result' " of Georgia's legislation. Id., at 1375. According to the court, anticompetitive conduct is foreseeable if it could have been " 'reasonably anticipated' " by the state legislature; it is not necessary, the court reasoned, for an anticompetitive effect to " be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.' " Id., at 1375-1376 (quoting FTC v. Hospital Bd. of Directors of Lee Cty., 38 F.3d 1184, 1188, 1190-1191 (CA11 1994)). Applying that standard, the Court of Appeals concluded that the Law contemplated the anticompetitive conduct challenged by the FTC. The court noted the "impressive breadth" of the powers given to hospital authorities, which include traditional powers of private corporations and a few additional capabilities, such as the power to exercise eminent domain.

[1] Georgia did not join the notice of appeal filed by the FTC and is no longer a party in the case.

See 663 F.3d, at 1376. More specifically, the court reasoned that the Georgia Legislature must have anticipated that the grant of power to hospital authorities **[****14]** to acquire and lease projects would produce anticompetitive effects because "[f]oreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them." Id., at 1377.[2]

[*224] The Court of Appeals also rejected the FTC's alternative argument that state-action immunity did not apply because the transaction in substance involved a transfer of control over Palmyra from one private entity to another, with the Authority acting as a mere conduit for the sale to evade antitrust liability. See id., at 1376, n. 12.

We granted certiorari on two questions: whether the Georgia Legislature, **[***53]** through **[****15]** the powers it vested in hospital authorities, clearly articulated and affirmatively expressed a state policy to displace competition in the market for hospital services; and if so, whether state-action immunity is nonetheless inapplicable as a result of the Authority's minimal participation in negotiating the terms of the sale of Palmyra and the Authority's limited supervision of the two hospitals' operations. See *567 U.S. 933, 133 S. Ct. 28, 183 L. Ed. 2d 674 (2012)*. Concluding that the answer to the first question is "no," we reverse without reaching the second question.[3]

[1010]** II

In *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*, this Court held that ***HN5***[] ***LEdHN[5]***[] [5] because "nothing in the language of the Sherman Act [15 U.S.C. §1 et seq.] or in its history" suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints "as an act of government." Id., at 350, 352, 63 S. Ct. 307, 87 L. Ed. 315. Following *Parker*, we have held that under certain circumstances, immunity from **[*225]** the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program. See *Patrick v. Burget, 486 U.S. 94, 99-100, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*; *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 56-57, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*.

But ***HN6***[] ***LEdHN[6]***[] [6] given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, "state-action immunity is disfavored, much as are repeals by implication." *FTC v. Ticor Title Ins. Co., 504 U.S. 621, 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. Consistent with this preference, we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant **[****17]** to a regulatory scheme that "is the State's own." *Id., at 635, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Accordingly, "[c]loser analysis is required when the activity at issue is not directly that of" the State itself, but rather "is carried out by others pursuant to state authorization." *Hoover v. Ronwin, 466 U.S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984)*. When determining whether the anticompetitive acts of private parties are entitled to immunity, we employ a two-part test, requiring first that "the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy," and second that "the policy . . . be actively supervised by the State." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)* (internal quotation marks omitted).

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[2] In tension with the Court of Appeals' decision, other Circuits have held in analogous circumstances that substate governmental entities exercising general corporate powers were not entitled to state-action immunity. See *Kay Elec. Cooperative v. Newkirk, 647 F.3d 1039, 1043, 1045-1047 (CA10 2011)*; *First Am. Title Co. v. Devaugh, 480 F.3d 438, 456-457 (CA6 2007)*; *Surgical Care Center of Hammond, L. C. v. Hospital Serv. Dist. No. 1, 171 F.3d 231, 235-236 (CA5 1999)* (en banc); *Lancaster Community Hospital v. Antelope Valley Hospital Dist., 940 F.2d 397, 402-403 (CA9 1991)*.

[3] After issuing its decision, the Court of Appeals dissolved the temporary injunction that it had granted pending appeal and the transaction closed. The case is not moot, however, because the District Court on remand could enjoin respondents from taking actions that would disturb the status quo and impede a final remedial decree. See *Knox v. Service Employees, 567 U.S. 298, 307, 132 S. Ct. 2277, 183 L. Ed. 2d 281, 295 (2012)* (***HN4***[] ***LEdHN[4]***[] [4] "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party" (internal quotation marks omitted)); see also ***FTC v. Whole Foods Market, Inc., 548 F.3d 1028, 1033-1034 (CADC 2008)*** (opinion **[****16]** of Brown, J.) (rejecting a mootness argument in a similar posture).

This case involves allegedly anticompetitive conduct undertaken by a **[***54]** substate governmental entity. ***HN7***[] ***LEdHN[7]***[] [7] Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly. See *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 370, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)*; *Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 411-413, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978)* (plurality opinion). At the same time, however, substate governmental **[****18]** entities do receive immunity from antitrust scrutiny when they act "pursuant to state policy to displace competition with regulation or monopoly public service." **[*226]** *Id., at 413, 98 S. Ct. 1123, 55 L. Ed. 2d 364*.[4] This **[**1011]** rule "preserves to the States their freedom . . . to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id., at 415-416, 98 S. Ct. 1123, 55 L. Ed. 2d 364*.

HN8[] ***LEdHN[8]***[] [8] As with private parties, immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a **[****19]** "clearly articulated and affirmatively expressed" state policy to displace competition. *Community Communications Co. v. Boulder, 455 U.S. 40, 52, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982)*. But unlike private parties, such entities are not subject to the "active state supervision requirement" because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies. *Hallie v. Eau Claire, 471 U.S. 34, 46-47, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*.[5]

HN9[] ***LEdHN[9]***[] [9] "[T]o pass the 'clear articulation' test," a state legislature need not "expressly state in a statute or its legislative history that the legislature intends for **[****20]** the delegated action to have anticompetitive effects." *Id., at 43, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. Rather, we explained **[*227]** in *Hallie* that state-action immunity applies if the anticompetitive effect was the "foreseeable result" of what the State authorized. *Id., at 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. We applied that principle in *Omni*, where we concluded that the clear-articulation test was satisfied because the suppression of competition in the billboard market was the foreseeable result of a state statute authorizing municipalities to adopt zoning ordinances regulating the construction of buildings and other structures. *499 U.S., at 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382*.

[*55]** III

A

Applying the clear-articulation test to the Law before us, we conclude that respondents' claim for state-action immunity fails because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership. The acquisition and leasing powers exercised by the Authority in the challenged transaction, which were the principal powers relied upon by the Court of Appeals in finding state-action immunity, see *663 F.3d, at 1377*, mirror general powers routinely conferred by state law upon private corporations.[6] Other powers possessed by hospital **[****21]** authorities that the Court of Appeals

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[4] An *amicus curiae* contends that we should recognize and apply a "market participant" exception to state-action immunity because Georgia's hospital authorities engage in proprietary activities. Brief for National Federation of Independent Business 6-24; see also *Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 374-375, 379, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991)* (leaving open the possibility of a market participant exception). Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it. *United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 60, n. 2, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (1981)*.

[5] The Eleventh Circuit has held that while Georgia's hospital authorities are "unique entities" that lie "somewhere between a local, general-purpose governing body (such as a city or county) and a corporation," they qualify as "an instrumentality, agency, or 'political subdivision' of Georgia for purposes of state action immunity." *Crosby v. Hospital Auth. of Valdosta & Lowndes Cty., 93 F.3d 1515, 1524-1526 (1996)*. The FTC has not challenged that characterization of Georgia's hospital authorities, and we accordingly operate from the assumption that hospital authorities are akin to political subdivisions.

[6] Compare *Ga. Code Ann. §§31-7-75(4)*, *(7)* (2012) (authorizing hospital authorities to acquire projects and enter lease agreements) with *§14-2-302* (outlining general powers of private corporations in Georgia, which include the ability to acquire and

characterized as having "impressive breadth," id., at 1376, also fit this pattern, **[**1012]** including the ability to make and execute contracts, §31-7-75(3), to set rates for services, §31-7-75(10), to sue and be sued, §31-7-75(1), to borrow money, §31-7-75(17), and the residual authority to exercise any or all powers possessed by private corporations, §31-7-75(21).

[*228] Our case law makes clear that ***HN10***[] ***LEdHN[10]***[] [10] state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively. See Omni, 499 U.S., at 372, 111 S. Ct. 1344, 113 L. Ed. 2d 382. In *Boulder*, we held that Colorado's Home Rule Amendment allowing municipalities to govern local affairs did not satisfy the clear-articulation test. 455 U.S., at 55-56, 102 S. Ct. 835, 70 L. Ed. 2d 810. **[****22]** There was no doubt in that case that the city had authority as a matter of state law to pass an ordinance imposing a moratorium on a cable provider's expansion of service. Id., at 45-46, 102 S. Ct. 835, 70 L. Ed. 2d 810. But we rejected the proposition that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances" because such an approach "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." Id., at 56, 102 S. Ct. 835, 70 L. Ed. 2d 810. We explained that ***HN11***[] ***LEdHN[11]***[] [11] when a State's position "is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive," the State cannot be said to have " 'contemplated' " those anticompetitive actions. Id., at 55, 102 S. Ct. 835, 70 L. Ed. 2d 810.

The principle articulated in *Boulder* controls this case. ***HN12***[] ***LEdHN[12]***[] [12] Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns. As a result, a State that has delegated such general powers "can hardly be said to have 'contemplated' " that they will be used anticompetitively. *Ibid*. See also 1A P. Areeda & H. Hovenkamp, ***Antitrust*** **[****23]** ***Law*** P225a, p. 131 (3d ed. 2006) (hereinafter Areeda & Hovenkamp) ("When a state grants power to an inferior entity, it presumably grants **[***56]** the power to do the thing contemplated, but not to do so anticompetitively"). Thus, while the Law does allow the Authority to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition.

[*229] B

In concluding otherwise, and specifically in reasoning that the Georgia Legislature "must have anticipated" that acquisitions by hospital authorities "would produce anticompetitive effects," 663 F.3d, at 1377, the Court of Appeals applied the concept of "foreseeability" from our clear-articulation test too loosely.

In *Hallie*, we recognized that ***HN13***[] ***LEdHN[13]***[] [13] it would "embod[y] an unrealistic view of how legislatures work and of how statutes are written" to require state legislatures to explicitly authorize specific anticompetitive effects before state-action immunity could apply. 471 U.S., at 43, 105 S. Ct. 1713, 85 L. Ed. 2d 24. "No legislature," we explained, "can be expected to catalog all of the anticipated effects" of a statute delegating authority to a substate governmental **[****24]** entity. *Ibid.* Instead, we have approached the clear-articulation inquiry more practically, but without diluting the ultimate requirement that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the "state itself." Parker, 317 U.S., at 352, 63 S. Ct. 307, 87 L. Ed. 315. Thus, we have concluded that a state policy to displace federal ***antitrust*** **[**1013]** ***law*** was sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.

For example, in *Hallie*, Wisconsin statutory law regulating the municipal provision of sewage services expressly permitted cities to limit their service to surrounding unincorporated areas. See 471 U.S., at 41, 105 S. Ct. 1713, 85 L. Ed. 2d 24. While unincorporated towns alleged that the city's exercise of that power constituted an unlawful tying arrangement, an unlawful refusal to deal, and an abuse of monopoly power, we had no trouble concluding that

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lease property), §14-2-1101 (allowing corporate mergers), and §§14-2-1201, 14-2-1202 (allowing sales of corporate assets to other corporations).

these alleged anticompetitive effects were affirmatively **[****25]** contemplated by the State because it was **[*230]** "clear" that they "logically would result" from the grant of authority. *Id., at 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. As described by the Wisconsin Supreme Court, the state legislature " 'viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area.' " *Id., at 44-45, n. 8, 105 S. Ct. 1713, 85 L. Ed. 2d 24* (quoting *Hallie v. Chippewa Falls, 105 Wis. 2d 533, 540-541, 314 N. W. 2d 321, 325 (1982))*. Without immunity, federal ***antitrust law*** could have undermined that arrangement and taken completely off the table the policy option that the State clearly intended for cities to have.

Similarly, in *Omni*, where the respondents alleged that the city had used its zoning power to protect an incumbent billboard provider against competition, we found that the clear-articulation test was easily satisfied even though the state statutes delegating zoning authority to the city **[***57]** did not explicitly permit the suppression of competition. We explained that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition" and that a **[****26]** zoning ordinance regulating the size, location, and spacing of billboards "necessarily protects existing billboards against some competition from newcomers." *499 U.S., at 373, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. Other cases in which we have found a "clear articulation" of the State's intent to displace competition without an explicit statement have also involved authorizations to act or regulate in ways that were inherently anticompetitive.[7]

[*231] By contrast, ***HN14***[] ***LEdHN[14]***[] [14] "simple permission to play in a market" does not "foreseeably entail permission to roughhouse in that market unlawfully." *Kay Elec. Cooperative v. Newkirk, 647 F.3d 1039, 1043 (CA10 2011)*. When a State grants some entity general power to act, whether it is a private corporation or a public entity like the Authority, it does so against the backdrop of federal ***antitrust law***. See *Ticor Title, 504 U.S., at 632, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Of course, both private parties and local governmental **[**1014]** entities conceivably may transgress antitrust requirements by exercising their general powers in anticompetitive ways. But a reasonable legislature's ability to anticipate that (potentially undesirable) possibility falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative.

Believing that this case falls within the scope of the foreseeability standard applied in *Hallie* and *Omni*, the Court of Appeals stated that "[i]t defies imagination to suppose the [state] legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive **[****28]** consequences." *663 F.3d, at 1377*. Respondents echo this argument, noting that each of Georgia's 159 counties covers a small geographical area and that most of them are sparsely populated, with nearly three-quarters having fewer than 50,000 residents as of the 2010 Census. Brief for Respondents 46.

Even accepting, *arguendo*, the premise that facts about a market could make the anticompetitive use of general corporate powers "foreseeable," we reject the Court of Appeals' and respondents' conclusion because only a relatively small subset of the conduct permitted as a matter of state law by *Ga. Code Ann. §31-7-75(4)* has the potential to negatively affect competition. Contrary to the Court of Appeals' and **[*232]** respondents' characterization, *§31-7-75(4)* is not principally concerned with hospital authorities' ability to acquire multiple hospitals and consolidate their operations. *Section 31-7-75(4)* **[***58]** allows authorities to acquire "projects," which includes not only "hospitals," but also "health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities." *§31-7-71(5)*. Narrowing **[****29]** our focus to the market for hospital services, the power to acquire hospitals still

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[7] See *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64, 65, and n. 25, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)* (finding that a state commission's decision to encourage collective ratemaking by common carriers was entitled to state-action immunity where the legislature had left "[t]he details of the inherently anticompetitive rate-setting process . . . to the agency's discretion"); *Hallie v. Eau Claire, 471 U.S. 34, 42, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)* (describing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978)*, as a case where there was not an "express intent to displace the antitrust laws" but where the regulatory structure at issue restricting the establishment or relocation of automobile dealerships "inherently displaced unfettered business freedom" (internal quotation marks and brackets **[****27]** omitted)).

does not ordinarily produce anticompetitive effects. *Section 31-7-75(4)* was, after all, the source of power for newly formed hospital authorities to acquire a hospital in the first instance--a transaction that was unlikely to raise any antitrust concerns even in small markets because the transfer of ownership from private to public hands does not increase market concentration. See 1A Areeda & Hovenkamp P224e(c), at 126 ("[S]ubstitution of one monopolist for another is not an antitrust violation"). While subsequent acquisitions by authorities have the potential to reduce competition, they will raise federal antitrust concerns only in markets that are large enough to support more than one hospital but sufficiently small that the merger of competitors would lead to a significant increase in market concentration. This is too slender a reed to support the Court of Appeals' and respondents' inference.

IV

A

Taking a somewhat different approach than the Court of Appeals, respondents insist that the Law should not be read as a mere authorization for hospital authorities to participate in the hospital-services market **[****30]** and exercise general corporate powers. Rather, they contend that hospital authorities are granted unique powers and responsibilities to fulfill the State's objective of providing all residents with access to adequate **[*233]** and affordable health and hospital care. See, *e.g., Ga. Code Ann. §31-7-75(22)*. Respondents argue that in view of hospital authorities' statutory objective, their specific attributes, and the regulatory context in which they operate, it was foreseeable that authorities facing capacity **[**1015]** constraints would decide they could best serve their communities' needs by acquiring an existing local hospital rather than incur the additional expense and regulatory burden of expanding a facility or constructing a new one. See Brief for Respondents 33-39.

In support of this argument, respondents observe that hospital authorities are simultaneously empowered to act in ways private entities cannot while also being subject to significant regulatory constraints. On the power side, as the Court of Appeals noted, *663 F.3d, at 1376-1377*, hospital authorities may acquire through eminent domain property that is "essential to the [authority's] purposes." *§31-7-75(12)*.[8] On the restraint side, hospital **[****31]** authorities are managed by a publicly accountable board, *§§31-7-74.1*, *31-7-76*; they **[***59]** must operate on a nonprofit basis, *§31-7-77;*, and they may only lease a project for others to operate after determining that doing so will promote the community's public health needs and that the lessee will not receive more than a reasonable rate of return on its investment, *§31-7-75(7)*. Moreover, hospital authorities operate within a broader regulatory context in which Georgia requires any party seeking to establish or significantly expand certain medical facilities, including **[*234]** hospitals, to obtain a certificate of need from state regulators. See *§31-6-40 et seq*.[9]

We have no doubt that Georgia's hospital authorities differ materially from private corporations that offer hospital services. But nothing in the Law or any other provision of Georgia law clearly articulates **[****33]** a state policy to allow authorities to exercise their general corporate powers, including their acquisition power, without regard to negative effects on competition. The state legislature's objective of improving access to affordable health care does not logically suggest that the State intended that hospital authorities pursue that end through mergers that create

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[8] The Court of Appeals also invoked *Ga. Code Ann. §31-7-84*, which provides that hospital authorities do not have the power to assess taxes, but allows the applicable governing body in the authority's area of operation to impose taxes to cover the authority's expenses. See *663 F.3d, at 1377*. This provision applies in cases in which the county or municipality has entered into a contract with a hospital authority for the use of its facilities. See *§§31-7-84(a)*, *31-7-85*. No such contract exists in this case, and respondents have not relied on **[****32]** this provision in briefing or argument before us.

[9] Georgia first adopted certificate of need legislation in 1978 in part to comply with a since-repealed federal law conditioning federal funding for a number of health care programs on a State's enactment of certificate of need laws. See 1978 Ga. Laws p. 941, as amended, *Ga. Code Ann. §31-6-40 et seq.* (2012); see also National Health Planning and Resources Development Act of 1974, 88 Stat. 2246, repealed by *§701(a), 100 Stat. 3799*. Many other States also have certificate of need laws. See National Conference of State Legislatures, Certificate of Need: State Health Laws and Programs, online at http://www.ncsl.org/issues-research/health/con-certificate-of-need-state-laws.aspx (as visited Feb. 15, 2013, and available in Clerk of Court's case file) (indicating in "States with CON Programs" table that 35 States retained some type of certificate of need program as of December 2011 while 15 other States had such programs but have repealed them).

monopolies. Nor do the restrictions imposed on hospital authorities, including the requirement that they operate on a nonprofit basis, reveal such a policy. Particularly in light of our national policy favoring competition, these restrictions should be read to reflect more modest aims. The legislature may have viewed profit generation as incompatible with its goal of providing care for the indigent sick. In addition, the legislature may have believed that some hospital authorities would operate in markets with characteristics of natural monopolies, **[**1016]** in which case the legislature could not rely on competition to control prices. See *Cantor v. Detroit Edison Co., 428 U.S. 579, 595-596, 96 S. Ct. 3110, 49 L. Ed. 2d 1141 (1976)*.

[*235] We recognize that Georgia, particularly through its certificate of need requirement, does limit competition in the market for hospital **[****34]** services in some respects. But regulation of an industry, and even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related. Thus, in *Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*, we rejected a state-action defense to price-fixing claims where a state bar adopted a compulsory minimum fee schedule. Although the State heavily regulated the practice of law, we found no evidence that it had adopted a policy to displace price competition among lawyers. *Id., at 788-792, 95 S. Ct. 2004, 44 L. Ed. 2d 572*. And in *Cantor*, we concluded that a state commission's regulation of rates for **[***60]** electricity charged by a public utility did not confer state-action immunity for a claim that the utility's free distribution of light bulbs restrained trade in the light-bulb market. *428 U.S., at 596, 96 S. Ct. 3110, 49 L. Ed. 2d 1141*.

In this case, the fact that Georgia imposes limits on entry into the market for medical services, which apply to both hospital authorities and private corporations, does not clearly articulate a policy favoring the consolidation of existing hospitals that are engaged **[****35]** in active competition. Accord, *FTC v. University Health, Inc., 938 F.2d 1206, 1213, n. 13 (CA11 1991)*. As to the Authority's eminent domain power, it was not exercised here and we do not find it relevant to the question whether the State authorized hospital authorities to consolidate market power through potentially anticompetitive acquisitions of existing hospitals.

B

Finally, respondents contend that to the extent there is any doubt about whether the clear-articulation test is satisfied in this context, federal courts should err on the side of recognizing immunity to avoid improper interference with **[*236]** state policy choices. See Brief for Respondents 43-44. But we do not find the Law ambiguous on the question whether it clearly articulates a policy authorizing anticompetitive acquisitions; it does not.

More fundamentally, respondents' suggestion is inconsistent with the principle that “state-action immunity is disfavored.” *Ticor Title, 504 U.S., at 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. *Parker* and its progeny are premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies **[****36]** and provide services to their citizens. But federalism and state sovereignty are poorly served by a rule of construction that would allow “essential national policies” embodied in the antitrust laws to be displaced by state delegations of authority “intended to achieve more limited ends.” *504 U.S., at 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. As an *amici* brief filed by 20 States in support of the FTC contends, loose application of the clear-articulation test would attach significant unintended consequences to States' frequent delegations of corporate authority to local bodies, effectively requiring States to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct. Brief for State of Illinois et al. 12-17; see also **[**1017]** *Surgical Care Center of Hammond, L. C. v. Hospital Serv. Dist. No. 1, 171 F.3d 231, 236 (CA5 1999)* (en banc). We decline to set such a trap for unwary state legislatures.

* * *

We hold that Georgia has not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings **[****37]** consistent with this opinion.

It is so ordered.

References

15 U.S.C.S. § 1 et seq.

3 Antitrust Laws and Trade Regulation §§49.01-49.03 (Matthew Bender 2d ed.)

10 Federal ***Antitrust Law*** 10 Federal ***Antitrust Law*** §§76.5-76.7 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 9.5

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices

Applicability of “state action” doctrine granting immunity from federal antitrust laws for activities of, or directed by, state governments--Supreme Court cases. *119 L. Ed. 2d 641*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

What circumstances render civil case, or issues arising therein, moot so as to preclude Supreme Court's consideration of their merits. *44 L. Ed. 2d 745*.

Comcast Corp. v. Behrend

Supreme Court of the United States

November 5, 2012, Argued; March 27, 2013, Decided

No. 11-864

Reporter

569 U.S. 27 *; 133 S. Ct. 1426 **; 185 L. Ed. 2d 515 ***; 2013 U.S. LEXIS 2544 ****; 81 U.S.L.W. 4217; 2013-1 Trade Cas. (CCH) P78,316; 85 Fed. R. Serv. 3d (Callaghan) 118; 24 Fla. L. Weekly Fed. S 125; 57 Comm. Reg. (P & F) 1487; 2013 WL 1222646

COMCAST CORPORATION, et al., Petitioners v. CAROLINE BEHREND et al.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Behrend v. Comcast Corp., 655 F.3d 182, 2011 U.S. App. LEXIS 17524 (3d Cir. Pa., 2011)

Disposition: Reversed.

Core Terms

damages, antitrust, prices, overbuilder, district court, classwide, certification, predominance, calculated, clustering, class action, measurement, subscribers, class certification, anti trust law, benchmark, questions, Appeals, cable, petitioners', respondents', methodology, parties, merits, anticompetitive conduct, market share, competitors, class member, high prices, anticompetitive

LexisNexis® Headnotes

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN1[] **Class Actions, Certification of Classes**

Fed. R. Civ. P. 23(b)(3) permits certification of a class only if a court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN2[] Class Actions, Certification of Classes

A class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with *Fed. R. Civ. P. 23*. *Rule 23* does not set forth a mere pleading standard. Rather, a party must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*. The party must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*. *Rule 23(b)(3)* requires a court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > General Overview

HN3[] Class Actions, Certification of Classes

It may be necessary for a court to probe behind the pleadings before coming to rest on a class certification question, and certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Fed. R. Civ. P. 23(a)* have been satisfied. Such an analysis will frequently entail overlap with the merits of a plaintiff's underlying claim. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.

Civil Procedure > Special Proceedings > Class Actions > Certification of Classes

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

HN4[] Class Actions, Certification of Classes

Calculations of damages need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to alleged anticompetitive effect of the violation. For purposes of *Fed. R. Civ. P. 23*, courts must conduct a rigorous analysis to determine whether that is so.

Civil Procedure > Remedies > Damages > General Overview

HN5[] Remedies, Damages

The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event.

Lawyers' Edition Display

Decision

[*515]** Proposed class action held improperly certified under *Rule 23(b)(3) of Federal Rules of Civil Procedure*, as named plaintiffs failed to establish that damages could be measured classwide.

Summary

Procedural posture: Respondent subscribers of cable-television services brought a putative class action against petitioner cable-television service providers alleging that the providers violated antitrust laws by swapping services with competitors in order to serve certain areas. Upon the grant of a writ of certiorari, the providers appealed the judgment of the U.S. Court of Appeals for the Third Circuit which upheld certification of the class.

Overview: Although other theories of antitrust impact were rejected, the subscribers asserted that by swapping service areas the providers reduced competition and consolidated monopolistic services. The subscribers contended that a regression model of damages from all of the providers' anticompetitive activities indicated that damages could be measured on a classwide basis. The U.S. Supreme Court held that the class of subscribers was improperly certified since the subscribers failed to show that common issues of damages predominated in the action as required by *Fed. R. Civ. P. 23(b)(3)*. The damages model did not isolate damages for the providers' alleged swapping activities from other theories of antitrust impact which were rejected, the model thus could not establish that damages attributable to the accepted theory were susceptible of measurement across the entire class, and it was permissible as well as necessary to make some inquiry into the merits of the damages calculation to determine whether common issues of damages predominated.

Outcome: The judgment upholding certification of the subscriber's class was reversed. 5-4 Decision; 1 Dissent.

Headnotes

CLASS ACTIONS §16 > CERTIFICATION > Headnote:
LEdHN[1][] [1]

Fed. R. Civ. P. 23(b)(3) permits certification of a class only if a court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.

[*516]**

CLASS ACTIONS §7 CLASS ACTIONS §8 CLASS ACTIONS §8.5 CLASS ACTIONS §9 > CIVIL PROCEDURE RULE 23 -- PREREQUISITES > Headnote:
LEdHN[2][] [2]

A class action is an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only. To come within the exception, a party seeking to maintain a class action must affirmatively demonstrate his compliance with *Fed. R. Civ. P. 23*. *Rule 23* does not set forth a mere pleading standard. Rather, a party must not only be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*. The party must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*. *Rule 23(b)(3)* requires a court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

CLASS ACTIONS §16 > PROPRIETY OF CERTIFICATION -- ANALYSIS > Headnote:
LEdHN[3][] [3]

It may be necessary for a court to probe behind the pleadings before coming to rest on a class certification question, and certification is proper only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Fed. R. Civ. P. 23(a)* have been satisfied. Such an analysis will frequently entail overlap with the merits of a plaintiff's underlying claim. That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

CLASS ACTIONS §16 > CERTIFICATION -- DAMAGES CALCULATION > Headnote:
LEdHN[4][] [4]

Calculations of damages need not be exact, but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case, particularly with respect to alleged anticompetitive effect of the violation. For purposes of *Fed. R. Civ. P. 23*, courts must conduct a rigorous analysis to determine whether that is so. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

DAMAGES §29 > CALCULATION > Headnote:
LEdHN[5][] [5]

The first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event. (Scalia, J., joined by Roberts, Ch. J., and Kennedy, Thomas, and Alito, JJ.)

Syllabus

[*27] [*517] [**1428]** Petitioners, Comcast Corporation and its subsidiaries, allegedly “cluster” their cable-television operations within a particular region by swapping their systems outside the region for competitor systems inside the region. Respondents, named plaintiffs in this class-action antitrust suit, claim that they and other Comcast subscribers in the Philadelphia “cluster” are harmed because Comcast's strategy lessens competition and leads to supra competitive prices. They sought class certification under *Federal Rule of Civil Procedure 23(b)(3)*, which requires that “questions of law or fact common to class members predominate over any questions affecting only individual members.” The District Court required them to show (1) that the “antitrust impact” of the violation could be proved at trial through evidence common to the class and (2) that the damages were measurable on a classwide basis through a “common methodology.” The court accepted only one of respondents' four proposed theories of antitrust impact: that Comcast's actions lessened competition from “overbuilders,” *i.e.,* companies **[****2]** that build competing networks in areas where an incumbent cable company already operates. It then certified the class, finding that the damages from overbuilder deterrence could be calculated on a classwide basis, even though respondents' expert acknowledged that his regression model did not isolate damages resulting from any one of respondents' theories. In affirming, the Third Circuit refused to consider petitioners' argument that the model failed to attribute damages to overbuilder deterrence because doing so would require reaching the merits of respondents' claims at the class-certification stage.

Held: Respondents' class action was improperly certified under *Rule 23(b)(3)*. *Pp. ____ - ____, 185 L. Ed. 2d, at 521-524*.

(a) A party seeking to maintain a class action must be prepared to show that Rule 23(a)'s numerosity, commonality, typicality, and adequacy-of-representation requirements have been met, Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 564 U.S. 338, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 391, and must satisfy through evidentiary proof at least one of Rule 23(b)'s provisions. The same analytical principles govern certification **[**1429]** under both Rule 23(a) and Rule 23(b). Courts may have to " 'probe **[****3]** behind the pleadings before coming to rest on the certification question,' and [a] certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that **[***518]** [Rule 23's] prerequisites **[*28]** . . . have been satisfied.' " *Ibid.* The analysis will frequently "overlap with the merits of the plaintiff's underlying claim" because a " 'class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Ibid.* Pp. ___ - ___, 185 L. Ed. 2d, at 521.

(b) The Third Circuit ran afoul of this Court's precedents when it refused to entertain arguments against respondents' damages model that bore on the propriety of class certification simply because they would also be pertinent to the merits determination. If they prevail, respondents would be entitled only to damages resulting from reduced overbuilder competition. A model that does not attempt to measure only those damages attributable to that theory cannot establish that damages are susceptible of measurement across the entire class for Rule 23(b)(3) purposes. The lower courts' contrary reasoning flatly contradicts this Court's cases, which require a determination that Rule 23 is satisfied, **[****4]** even when that requires inquiry into the merits of the claim. Wal-Mart, supra, at 350-351, and n. 6, 131 S. Ct. 2541, 180 L. Ed. 2d 374. Pp. ___ - ___, 185 L. Ed. 2d, at 521-522.

(c) Under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages can be measured classwide. The figure respondents' expert used was calculated assuming the validity of all four theories of antitrust impact initially advanced by respondents. Because the model cannot bridge the differences between supra competitive prices in general and supra competitive prices attributable to overbuilder deterrence, Rule 23(b)(3) cannot authorize treating subscribers in the Philadelphia cluster as members of a single class. Pp. ___ - ___, 185 L. Ed. 2d, at 522-524.

655 F.3d 182, reversed.

Counsel: Miguel Estrada argued the cause for petitioners.

Barry Barnett argued the cause for respondents.

Judges: Scalia, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, and Alito, JJ., joined. Ginsburg and Breyer, JJ., filed a dissenting opinion, in which Sotomayor and Kagan, JJ., joined, *post*, p.___.

Opinion by: SCALIA

Opinion

[*29] Justice **Scalia** delivered the opinion of the Court.

The District Court and the Court of Appeals approved certification of a class of more than 2 million current and former Comcast subscribers who seek damages **[**1430]** for alleged violations of the federal antitrust laws. We consider **[****5]** whether certification was appropriate under Federal Rule of Civil Procedure 23(b)(3).

I

Comcast Corporation and its subsidiaries, petitioners here, provide cable-television services to residential and commercial customers. From 1998 to 2007, petitioners engaged in a series of transactions that the parties have described as "clustering," a strategy of concentrating operations within a particular region. The region at issue here, which the parties have referred to as the Philadelphia "cluster" or the Philadelphia "Designated Market Area" (DMA), includes 16 counties located in Pennsylvania, **[***519]** Delaware, and New Jersey.[1] Petitioners pursued their clustering strategy by acquiring competitor cable providers in the region and swapping their own systems outside the region for competitor systems located in the region. For instance, in 2001, petitioners **[*30]** obtained Adelphia Communications' cable systems in the Philadelphia DMA, along with its 464,000 subscribers; in exchange, petitioners sold to Adelphia their systems in Palm Beach, Florida, and Los Angeles, California. As a result of nine clustering transactions, petitioners' share of subscribers in the region allegedly increased from 23.9 percent **[****6]** in 1998 to 69.5 percent in 2007. See *264 F.R.D. 150, 156, n. 8, 160 (ED Pa. 2010)*.

The named plaintiffs, respondents here, are subscribers to Comcast's cable-television services. They filed a class-action antitrust suit against petitioners, claiming that petitioners entered into unlawful swap agreements, in violation of *§1* of the Sherman Act, and monopolized or attempted to monopolize services in the cluster, in violation of *§2*. Ch. 647, 26 Stat. 209, as amended, *15 U.S.C. §§1*, *2*. Petitioners' clustering scheme, respondents contended, harmed subscribers in the Philadelphia cluster by eliminating competition and holding prices for cable services above competitive levels.

HN1[] ***LEdHN[1]***[] [1] Respondents sought to certify a class under *Federal Rule of Civil Procedure 23(b)(3)*. That provision permits certification only if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members." The District Court held, and it is uncontested here, that to meet **[****7]** the predominance requirement respondents had to show (1) that the existence of individual injury resulting from the alleged antitrust violation (referred to as "antitrust impact") was "capable of proof at trial through evidence that [was] common to the class rather than individual to its members"; and (2) that the damages resulting from that injury were measurable "on a class-wide basis" through use of a "common methodology." *264 F.R.D., at 154*.[2]

[*31] Respondents proposed four theories of antitrust impact: First, Comcast's clustering made it profitable for Comcast to withhold local sports programming from its competitors, resulting in decreased market penetration by direct broadcast satellite providers. Second, Comcast's activities reduced the level of competition from "overbuilders," **[**1431]** companies that build competing cable networks in areas where an **[****8]** incumbent cable company already operates. Third, Comcast reduced the level of "benchmark" competition on which cable customers rely to compare prices. Fourth, clustering increased Comcast's bargaining power relative to content providers. Each of these forms of impact, respondents alleged, increased cable subscription rates throughout the Philadelphia DMA.

The District Court accepted the **[***520]** overbuilder theory of antitrust impact as capable of classwide proof and rejected the rest. *Id., at 165, 174, 178, 181*. Accordingly, in its certification order, the District Court limited respondents' "[p]roof of antitrust impact" to "the theory that Comcast engaged in anticompetitive clustering conduct, the effect of which was to deter the entry of overbuilders in the Philadelphia DMA." App. to Pet. for Cert. 192a-193a.[3]

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[1] A "Designated Market Area" is a term used by Nielsen Media Research to define a broadcast-television market. Strictly speaking, the Philadelphia DMA comprises 18 counties, not 16.

[2] Respondents sought certification for the following class: "All cable television customers who subscribe or subscribed at any times since December 1, 1999, to the present to video programming services (other than solely to basic cable services) from Comcast, or any of its subsidiaries or affiliates in Comcast's Philadelphia cluster." App. 35a.

[3] The District Court did not hold that the three alternative theories of liability failed to establish antitrust impact, but merely that those theories could not be determined in a manner common to all the class plaintiffs. The other theories of liability may well be available for the plaintiffs to pursue as individual actions. Any contention that the plaintiffs should be allowed to recover **[****9]** damages attributable to all four theories in this class action would erroneously suggest one of two things--either that the plaintiffs may *also* recover such damages in individual actions or that they are precluded from asserting those theories in individual actions.

The District Court further found that the damages resulting from overbuilder-deterrence impact could be calculated on a classwide basis. To establish such damages, respondents had relied solely on the testimony of Dr. James McClave. **[*32]** Dr. McClave designed a regression model comparing actual cable prices in the Philadelphia DMA with hypothetical prices that would have prevailed but for petitioners' allegedly anticompetitive activities. The model calculated damages of $875,576,662 for the entire class. App. 1388a (sealed). As Dr. McClave acknowledged, however, the model did not isolate damages resulting from any one theory of antitrust impact. *Id.*, at 189a-190a. The District Court nevertheless certified the class.

A divided panel of the Court of Appeals affirmed. On appeal, petitioners contended the class was improperly certified because the model, among other shortcomings, failed to attribute damages resulting from overbuilder **[****10]** deterrence, the only theory of injury remaining in the case. The court refused to consider the argument because, in its view, such an "attac[k] on the merits of the methodology [had] no place in the class certification inquiry." *655 F.3d 182, 207 (CA3 2011)*. The court emphasized that, "[a]t the class certification stage," respondents were not required to "tie each theory of antitrust impact to an exact calculation of damages." *Id., at 206*. According to the court, it had "not reached the stage of determining on the merits whether the methodology is a just and reasonable inference or speculative." *Ibid*. Rather, the court said, respondents must "assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Ibid.* In the court's view, that burden was met because respondents' model calculated "supra-competitive prices regardless of the type of anticompetitive conduct." *Id., at 205*.

We granted certiorari. *567 U.S. 933, 133 S. Ct. 24, 183 L. Ed. 2d 673 (2012)*.[4]

[*33] **[**1432]** **[***521]** II

HN2[] ***LEdHN[2]***[] [2] The class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki, 442 U.S. 682, 700-701, 99 S. Ct. 2545, 61 L. Ed. 2d 176 (1979)*. To come within the exception, a party seeking to maintain a class **[****12]** action "must affirmatively demonstrate his compliance" with *Rule 23*. *Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350, 131 S. Ct. 2541, 180 L. Ed. 2d 374, 390 (2011)*. The Rule "does not set forth a mere pleading standard." *Ibid.* Rather, a party must not only "be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact," typicality of claims or defenses, and adequacy of representation, as required by *Rule 23(a)*. *Ibid.* The party must also satisfy through evidentiary proof at least one of the provisions of *Rule 23(b)*. The provision at issue here is *Rule 23(b)(3)*, which requires a court to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members."

Repeatedly, we have emphasized that ***HN3***[] ***LEdHN[3]***[] [3] it " 'may be necessary for the court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of *Rule 23(a)* have been satisfied.' " *Id. at 350-351* (quoting *General Telephone Co. of Southwest v. Falcon, 457 U.S. 147, 160-161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982))*. Such an analysis will frequently entail "overlap **[****13]** with the **[*34]** merits of the plaintiff's underlying claim." *564 U.S., at 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374*. That is so because the " 'class

[4] The question presented reads: "Whether a district court may certify a class action without resolving whether the plaintiff class had introduced admissible evidence, **[****11]** including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." ***567 U.S., at 933, 133 S. Ct. 24, 183 L. Ed. 2d, at 674***. Respondents contend that petitioners forfeited their ability to answer this question in the negative because they did not make an objection to the admission of Dr. McClave's testimony under the Federal Rules of Evidence. See *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*. Such a forfeit would make it impossible for petitioners to argue that Dr. McClave's testimony was not "admissible evidence" under the Rules; but it does not make it impossible for them to argue that the evidence failed "to show that the case is susceptible to awarding damages on a class-wide basis." Petitioners argued below, and continue to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis. That is the question we address here.

determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.' " *Ibid.* (quoting *Falcon, supra, at 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740*).

The same analytical principles govern *Rule 23(b)*. If anything, *Rule 23(b)(3)*'s predominance criterion is even more demanding than *Rule 23(a)*. *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623-624, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*. *Rule 23(b)(3)*, as an " 'adventuresome innovation,' " is designed for situations " 'in which "class-action treatment is not as clearly called for." ' *Wal-Mart, supra, at 362, 131 S. Ct. 2541, 180 L. Ed. 2d 374* (quoting *Amchem, 521 U.S., at 614-615, 117 S. Ct. 2231, 138 L. Ed. 2d 689*). That explains Congress's addition of procedural safeguards for *(b)(3)* class members beyond those provided for *(b)(1)* or *(b)(2)* class members (*e.g.,* an opportunity to opt out), and the court's duty to take a " 'close look' " at whether common questions predominate over individual ones. *Id., at 615, 117 S. Ct. 2231, 138 L. Ed. 2d 689*.

III

Respondents' class action was improperly certified under *Rule 23(b)(3)*. By refusing to entertain arguments against respondents' damages model **[***522]** that bore on the propriety **[****14]** of class certification, **[**1433]** simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry. And it is clear that, under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of measurement on a classwide basis. Without presenting another methodology, respondents cannot show *Rule 23(b)(3)* predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class. This case thus turns on the straightforward application of class-certification principles; it provides no occasion for the dissent's extended discussion, *post, at ___ - ___, 185 L. Ed. 2d, at 527-530* (Ginsburg and Breyer, JJ., dissenting), of substantive ***antitrust law***.

[*35] A

We start with an unremarkable premise. If respondents prevail on their claims, they would be entitled only to damages resulting from reduced overbuilder competition, since that is the only theory of antitrust impact accepted for class-action treatment by the District Court. It follows that a model purporting to serve as evidence of damages in this class action must measure only those **[****15]** damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of *Rule 23(b)(3)*. ***HN4***[] ***LEdHN[4]***[] [4] Calculations need not be exact, see *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563, 51 S. Ct. 248, 75 L. Ed. 544 (1931)*, but at the class-certification stage (as at trial), any model supporting a "plaintiff's damages case must be consistent with its liability case, particularly with respect to the alleged anticompetitive effect of the violation." ABA Section of ***Antitrust Law***, Proving Antitrust Damages: Legal and Economic Issues 57, 62 (2d ed. 2010); see, *e.g., Image Tech. Servs. v. Eastman Kodak Co., 125 F.3d 1195, 1224 (CA9 1997)*. And for purposes of *Rule 23*, courts must conduct a " 'rigorous analysis' " to determine whether that is so. *Wal-Mart, supra, at 351, 131 S. Ct. 2541, 180 L. Ed. 2d 374*.

The District Court and the Court of Appeals saw no need for respondents to "tie each theory of antitrust impact" to a calculation of damages. *655 F.3d, at 206*. That, they said, would involve consideration of the "merits" having "no place in the class certification inquiry." *Id., at 206-207*. That reasoning **[****16]** flatly contradicts our cases requiring a determination that *Rule 23* is satisfied, even when that requires inquiry into the merits of the claim. *Wal-Mart, 564 U.S., at 350-351, and n. 6, 131 S. Ct. 2541, 180 L. Ed. 2d 374*. The Court of Appeals simply concluded that respondents "provided a method to measure and quantify damages on a class-wide basis," finding it unnecessary to decide "whether the methodology [was] a just and reasonable inference or speculative." *655 F.3d, at 206*. Under that **[*36]** logic, at the class-certification stage *any* method of measurement is acceptable so long as it can be applied classwide, no matter how arbitrary the measurements may be. Such a proposition would reduce *Rule 23(b)(3)*'s predominance requirement to a nullity.

B

There is no question that the model failed to measure damages resulting **[***523]** from the particular antitrust injury on which petitioners' liability in this action is premised. [5] The scheme devised by respondents' **[**1434]** expert, Dr. McClave, sought to establish a "but for" baseline--a figure that would show what the competitive prices would have been if there had been no antitrust violations. Damages would then be determined by comparing to that baseline what the actual prices **[****17]** were during the charged period. The "but for" figure was calculated, however, by assuming a market that contained none of the four distortions that respondents attributed to petitioners' actions. In other words, the model assumed the validity of all four theories of antitrust impact initially advanced by respondents: decreased penetration by satellite providers, overbuilder deterrence, lack of benchmark competition, and increased bargaining power. At the evidentiary hearing, Dr. McClave expressly admitted that the model calculated damages resulting from "the alleged anticompetitive conduct **[*37]** as a whole" and did not attribute damages to any one particular theory of anticompetitive impact. App. 189a-190a, 208a.

This methodology might have been sound, and might have produced commonality of damages, if all four of those alleged distortions remained in the case. But as Judge Jordan's partial dissent pointed out:

> "[B]ecause the only surviving theory of antitrust impact is that clustering reduced overbuilding, for Dr. McClave's comparison to be relevant, his benchmark counties must reflect the conditions that would have prevailed in the Philadelphia DMA but for the alleged reduction in overbuilding. In all respects unrelated to reduced overbuilding, the benchmark counties should reflect the actual conditions in the Philadelphia DMA, or else the model will identify 'damages' that are not the result of reduced overbuilding, or, in other words, that are not the certain result of the wrong." *655 F.3d, at 216* **[****19]** (internal quotation marks omitted).

The majority's only response to this was that "[a]t the class certification stage we do not require that Plaintiffs tie each theory of antitrust impact to an exact calculation of damages, but instead that they assure us that if they can prove antitrust impact, the resulting damages are capable of measurement and will not require labyrinthine individual calculations." *Id., at 206*. But such assurance is not provided by a methodology that identifies damages that are not the result of the wrong. For all we know, cable subscribers in Gloucester County may have been overcharged because of petitioners' alleged elimination of satellite competition (a theory of liability that is not capable of classwide proof); while subscribers in Camden County may have paid elevated prices because of petitioners' increased bargaining **[***524]** power vis-a-vis content providers (another theory that is not capable of classwide proof); while yet other subscribers in Montgomery County may have paid rates produced by the combined effects **[*38]** of multiple forms of alleged antitrust harm; and so on. The permutations involving four theories of liability **[**1435]** and 2 million subscribers located in 16 **[****20]** counties are nearly endless.

In light of the model's inability to bridge the differences between supra competitive prices in general and supra competitive prices attributable to the deterrence of overbuilding, *Rule 23(b)(3)* cannot authorize treating subscribers within the Philadelphia cluster as members of a single class.[6] Prices whose level above what an expert deems "competitive" has been caused by factors unrelated to an accepted theory of antitrust harm are not "anticompetitive"

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[5] The dissent is of the view that what an econometric model proves is a "question of fact" on which we will not "undertake to review concurrent findings . . . by two courts below in the absence of a very obvious and exceptional showing of error." *Post, at ___, 185 L. Ed. 2d, at 529* (quoting *United States v. Virginia, 518 U.S. 515, 589, n. 5, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)* (Scalia, J., dissenting); internal quotation marks omitted). To begin with, neither of the courts below found that the model established damages attributable **[****18]** to overbuilding alone. Second, while the data contained within an econometric model may well be "questions of fact" in the relevant sense, what those data prove is no more a question of fact than what our opinions hold. And finally, even if it were a question of fact, concluding that the model here established damages attributable to overbuilding alone would be "obvious[ly] and exceptional[ly]" erroneous.

[6] We might add that even if the model had identified subscribers who paid more solely because of the deterrence of overbuilding, it still would not have established the requisite commonality of damages unless it plausibly showed that the extent of overbuilding (absent deterrence) would have been the same in all counties, or that the extent is irrelevant **[****21]** to effect upon ability to charge supra competitive prices.

in any sense relevant here. ***HN5***[] ***LEdHN[5]***[] [5] "The first step in a damages study is the translation of the *legal theory of the harmful event* into an analysis of the economic impact *of that event*." Federal Judicial Center, Reference Manual on Scientific Evidence 432 (3d ed. 2011) (emphasis added). The District Court and the Court of Appeals ignored that first step entirely.

The judgment of the Court of Appeals for the Third Circuit is reversed.

It is so ordered.

Dissent by: Ginsburg

Dissent

Justice **Ginsburg** and Justice **Breyer**, with whom Justice **Sotomayor** and Justice **Kagan** join, dissenting.

Today the Court reaches out to decide a case hardly fit for our consideration. On both procedural and substantive grounds, we dissent.

I

This case comes to the Court infected by our misguided reformulation of the question presented. For that reason **[*39]** alone, we would dismiss the writ of certiorari as improvidently granted.

Comcast sought review of the following question: "[W]hether a district court may certify a class action without resolving 'merits arguments' that bear on [*Federal Rule of Civil Procedure] 23*'s prerequisites for certification, including whether purportedly common issues predominate over individual ones under *Rule 23(b)(3)*." Pet. for Cert. i. We granted review of a different question: "Whether a district court may certify a class action without resolving *whether the plaintiff class has introduced admissible evidence*, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." **[****22]** *567 U.S. 933, 133 S. Ct. 24, 183 L. Ed. 2d 673 (2012)* (emphasis added).

Our rephrasing shifted the focus of the dispute from the District Court's *Rule 23(b)(3)* analysis to its attention (or lack thereof) to the admissibility of expert testimony. The parties, responsively, **[***525]** devoted much of their briefing to the question whether the standards for admissibility of expert evidence set out in *Federal Rule of Evidence 702* and *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, apply in class certification proceedings. See Brief for Petitioners 35-49; Brief for Respondents 24-37. Indeed, respondents confirmed at oral argument that they understood our rewritten question to center on admissibility, not *Rule 23(b)(3)*. See, *e.g.*, Tr. of Oral Arg. 25.

As it turns out, our reformulated question was inapt. To preserve a claim of error in the admission of evidence, a party must timely object to or move to strike the evidence. *Fed. Rule Evid. 103(a)(1)*. In **[**1436]** the months preceding the District Court's class certification order, Comcast did not object to the admission of Dr. McClave's damages model under *Rule 702* or *Daubert*. Nor did Comcast move to strike his testimony and expert report. Consequently, Comcast forfeited any **[****23]** objection to the admission of Dr. McClave's model at the certification stage. At this late date, Comcast may **[*40]** no longer argue that respondents' damages evidence was inadmissible.

Comcast's forfeiture of the question on which we granted review is reason enough to dismiss the writ as improvidently granted. See *Rogers v. United States, 522 U.S. 252, 259, 118 S. Ct. 673, 139 L. Ed. 2d 686 (1998)* (O'Connor, J., concurring in result) ("[W]e ought not to decide the question if it has not been cleanly presented."); *The Monrosa v. Carbon Black Export, Inc., 359 U.S. 180, 183, 79 S. Ct. 710, 3 L. Ed. 2d 723 (1959)* (dismissal appropriate in light of "circumstances . . . not fully apprehended at the time certiorari was granted" (internal quotation marks omitted)). The Court, however, elects to evaluate whether respondents "failed to show that the case is susceptible to awarding damages on a class-wide basis." *Ante, at ___, n. 4, 185 L. Ed. 2d, at 521* (internal quotation marks omitted). To justify this second revision of the question presented, the Court observes that Comcast "argued below, and continue[s] to argue here, that certification was improper because respondents had failed to establish that damages could be measured on a classwide basis." *Ibid.* And so *Comcast* did, in addition **[****24]** to endeavoring to address the question on which we granted review. By treating the first part of our reformulated question as though it did not exist, the Court is hardly fair to respondents.

Abandoning the question we instructed the parties to brief does "not reflect well on the processes of the Court." *Redrup v. New York, 386 U.S. 767, 772, 87 S. Ct. 1414, 18 L. Ed. 2d 515 (1967)* (Harlan, J., dissenting). Taking their cue from our order, respondents did not train their energies on defending the District Court's finding of predominance in their briefing or at oral argument. The Court's newly revised question, focused on predominance, phrased only after briefing was done, left respondents without an unclouded opportunity to air the issue the Court today decides against them. And by resolving a complex and fact-intensive question without the benefit of full briefing, the Court invites the error into which it has fallen. See *infra, at ___ - ___, 185 L. Ed. 2d, at 521-524.*

[*41] II

While the Court's decision to review the merits of the District Court's certification **[***526]** order is both unwise and unfair to respondents, the opinion breaks no new ground on the standard for certifying a class action under *Federal Rule of Civil Procedure 23(b)(3)*. In particular, the **[****25]** decision should not be read to require, as a prerequisite to certification, that damages attributable to a classwide injury be measurable " 'on a class-wide basis.' " See *ante, at ___ - ___, 185 L. Ed. 2d, at 519* (acknowledging Court's dependence on the absence of contest on the matter in this case); Tr. of Oral Arg. 41.

To gain class-action certification under *Rule 23(b)(3)*, the named plaintiff must demonstrate, and the District Court must find, "that the questions of law or fact common to class members predominate over any questions affecting only individual members." This predominance requirement is meant to "tes[t] whether proposed classes are sufficiently cohesive to warrant adjudication by representation," *Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997)*, but it scarcely demands commonality as to all questions. See 7AA C. Wright, A. Miller, & M. Kane, Federal Practice **[**1437]** and Procedure § 1778, p. 121 (3d ed. 2005) (hereinafter Wright, Miller, & Kane). In particular, when adjudication of questions of liability common to the class will achieve economies of time and expense, the predominance standard is generally satisfied even if damages are not provable in the aggregate. See Advisory Committee's 1966 Notes **[****26]** on *Fed. Rule Civ. Proc. 23*, 28 U.S.C. App., p. 141 ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and it may remain so despite the need, if liability is found, for separate determination of the damages suffered by individuals within the class."); 7AA Wright, Miller, & Kane § 1781, at 235-237.[*]

[*42] Recognition that individual damages calculations do not preclude class certification under *Rule 23(b)(3)* is well-nigh universal. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, p. 205 (5th ed. 2012) (ordinarily, "individual damage[s] calculations should not scuttle class certification under *Rule 23(b)(3)*"). Legions of appellate decisions across a range of substantive claims are illustrative. **[****27]** See, *e.g.*, *Tardiff v. Knox County, 365 F.3d 1, 6 (CA1 2004)* (*Fourth Amendment*); *Chiang v. Veneman, 385 F.3d 256, 273, 46 V.I. 679 (CA3 2004)* (Equal Credit Opportunity Act); *Bertulli v. Independent Assn. of Continental Pilots, 242 F.3d 290, 298 (CA5 2001)* (Labor-Management Reporting and Disclosure Act and Railway Labor Act); *Beattie v. CenturyTel, Inc., 511 F.3d 554, 564-566 (CA6 2007)* (Federal Communications Act); *Arreola v. Godinez, 546 F.3d 788, 801 (CA7 2008)* (*Eighth Amendment*). Antitrust cases, which typically involve common allegations of antitrust violation, antitrust impact, and the fact of damages, are classic examples. See *In re Visa Check/MasterMoney Antitrust Litigation, 280 F.3d 124,*

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[*] A class may be divided into subclasses for adjudication of damages. *Fed. Rule Civ. Proc. 23(c)(4)-(5)*. Or, at the outset, a class may be certified for liability purposes only, leaving individual damages calculations to subsequent proceedings. See 2 W. Rubenstein, Newberg on Class Actions § 4:54, pp. 206-208 (5th ed. 2012). Further, a certification order may be altered or amended as the case unfolds. *Rule 23(c)(1)(C)*.

139-140 (CA2 2001). See also 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, ***Antitrust*** **[***527]** ***Law*** P331, p. 56 (3d ed. 2007) (hereinafter Areeda & Hovenkamp); 6 A. Conte & H. Newberg, Newberg on Class Actions § 18:27, p. 91 (4th ed. 2002). As this Court has rightly observed, "[p]redominance is a test readily met" in actions alleging "violations of the antitrust laws." *Amchem, 521 U.S., at 625, 117 S. Ct. 2231, 138 L. Ed. 2d 689*.

The oddity of this case, in which the need to prove damages on a classwide basis through a common methodology **[****28]** was never challenged by respondents, see Brief for Plaintiffs-Appellees in No. 10-2865 (CA3), pp. 39-40, is a further reason to dismiss the writ as improvidently granted. The Court's ruling is good for this day and case only. In the mine run of cases, it remains the "black letter rule" that a **[*43]** class may obtain certification under *Rule 23(b)(3)* when liability questions common to the class predominate over damages questions unique to class members. 2 Rubenstein, *supra*, § 4:54, at 208.

III

Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of ***antitrust law***. And in doing so, it relies on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals.

A

To understand the antitrust problem, some (simplified) background discussion is **[**1438]** necessary. Plaintiffs below, respondents here, alleged that Comcast violated *§§1* and *2* of the Sherman Act. See *15 U.S.C. §§1*, *2*. For present purposes, the *§2* claim provides the better illustration. A firm is guilty of monopolization under *§2* if the plaintiff proves (1) "the possession of monopoly power in the relevant market" and (2) **[****29]** "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. 563, 570-571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. A private plaintiff seeking damages must also show that (3) the monopolization caused "injur[y]." *15 U.S.C. §15*. We have said that antitrust injuries must be "of the type the antitrust laws were intended to prevent and that flo[w] from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 334, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990)* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977))*. See 2A Areeda & Hovenkamp P391a, at 320 (To prove antitrust injury, "[a] private plaintiff must identify the economic rationale for a business practice's illegality under the antitrust laws and show that its harm flows from whatever it is that makes the practice unlawful.").

[*44] As plaintiffs below, respondents attempted to meet these requirements by showing that (1) Comcast obtained a 60% or greater share of the Philadelphia market, and that its share provides it with monopoly power; (2) Comcast acquired its share through **[****30]** exclusionary conduct consisting of a series of mergers with competitors and "swaps" of customers and locations; and (3) Comcast consequently injured respondents by charging them supra competitive prices.

If, as respondents contend, Philadelphia is a separate well-defined market, and the alleged exclusionary **[***528]** conduct permitted Comcast to obtain a market share of at least 60%, then proving the *§2* violation may not be arduous. As a point of comparison, the Government considers a market shared by four firms, each of which has 25% market share, to be "highly concentrated." Dept. of Justice & Federal Trade Commission, Horizontal Merger Guidelines § 5.3, p. 19 (2010). A market, such as the one alleged by respondents, where *one* firm controls 60% is far worse. See *id.,* § 5.3, at 18-19, and n. 9 (using a concentration index that determines a market's concentration level by summing the squares of each firm's market share, one firm with 100% yielding 10,000, five firms with 20% each yielding 2,000, while a market where one firm accounts for 60% yields an index number of *at least* 3,600). The Guidelines, and any standard antitrust treatise, explain why firms in highly concentrated markets normally have **[****31]** the power to raise prices significantly above competitive levels. See, *e.g.,* 2B Areeda & Hovenkamp P503, at 115.

B

So far there is agreement. But consider the last matter respondents must prove: Can they show that Comcast injured them by charging higher prices? After all, a firm with monopoly power will not necessarily exercise that power by charging higher prices. It could instead act less competitively in other ways, such as by leading the quiet life. See J. Hicks, Annual Survey of Economic Theory: **[*45]** The Theory of Monopoly, 3 Econometrica 1, 8 (1935) ("The best of all monopoly profits is a quiet life.").

It is at this point that Dr. McClave's model enters the scene. His model first selects a group of comparable *outside*-Philadelphia **[**1439]** "benchmark" counties, where Comcast enjoyed a lower market share (and where satellite broadcasting accounted for more of the local business). Using multiple-regression analysis, McClave's model measures the effect of the anticompetitive conduct by comparing the class counties to the benchmark counties. The model concludes that the prices Philadelphia area consumers would have paid had the Philadelphia counties shared the properties of the benchmark counties **[****32]** (including a diminished Comcast market share) would have been 13.1% lower than those they actually paid. Thus, the model provides evidence that Comcast's anticompetitive conduct, which led to a 60% market share, caused the class to suffer injuriously higher prices.

C

1

The special antitrust-related difficulty present here stems from the manner in which respondents attempted to prove their antitrust injuries. They proffered four "non-exclusive mechanisms" that allegedly "cause[d] the high prices" in the Philadelphia area. App. 403a. Those four theories posit that (1) due to Comcast's acquisitions of competitors, customers found it more difficult to compare prices; (2) one set of potential competitors, namely, Direct Broadcast Satellite companies, found it more difficult to obtain access to local sports broadcasts and consequently decided not to enter the Philadelphia market; (3) Comcast's ability to obtain programming material at lower prices permitted it to raise prices; and (4) a number of potential competitors (called "overbuilders"), whose presence in the market would have limited Comcast's power **[***529]** to raise prices, were ready to enter some parts of the market but decided not to do so **[****33]** in light of Comcast's **[*46]** anticompetitive conduct. *264 F.R.D. 150, 161-162 (ED Pa. 2010)*.

For reasons not here relevant, the District Court found the first three theories inapplicable and limited the liability-phase proof to the "overbuilder" theory. See App. to Pet. for Cert. 192a-193a. It then asked the parties to brief whether doing so had any impact on the viability of McClave's model as a measure of classwide damages. See *264 F.R.D., at 190*. After considering the parties' arguments, the District Court found that striking the three theories "does not impeach Dr. McClave's damages model" because "[a]ny anticompetitive conduct is reflected in the [higher Philadelphia] price [which Dr. McClave's model determines], not in the [model's] selection of the comparison counties, [*i.e.*, the lower-price 'benchmark counties' with which the Philadelphia area prices were compared]." *Id., at 190-191*. The court explained that "whether or not we accepted all [four] . . . theories . . . is inapposite to Dr. McClave's methods of choosing benchmarks." *Ibid.* On appeal, the Third Circuit held that this finding was not an abuse of discretion. *655 F.3d 182, 207 (2011)*.

2

The Court, however, concludes **[****34]** that "the model failed to measure damages resulting from the particular antitrust injury on which petitioners' liability in this action is premised." *Ante, at ___, n. 4, 185 L. Ed. 2d, at 522*. To reach this conclusion the Court must consider fact-based matters, namely, what this econometric multiple-regression model is about, what it proves, and how it does so. And it must overturn two lower courts' related factual findings to the contrary.

We are normally "reluctant to disturb findings of fact in which two courts below have concurred." *United States v. Doe, 465 U.S. 605, 614, 104 S. Ct. 1237, 79 **[**1440]** L. Ed. 2d 552 (1984)*. See also *United States v. Virginia, 518 U.S. 515, 589, n. 5, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)* (Scalia, J., dissenting) (noting "our well-settled rule that we will not 'undertake to review concurrent findings of fact by two courts below in the **[*47]** absence of a very obvious and exceptional showing of error' " (quoting *Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275, 69 S. Ct. 535, 93 L. Ed. 672, 1949 Dec. Comm'r Pat. 527 (1949))*). Here, the District Court found

McClave's econometric model capable of measuring damages on a classwide basis, even after striking three of the injury theories. *264 F.R.D., at 190-191*. Contrary to the Court's characterization, see *ante, at ___ - ___, n. 5, 185 L. Ed. 2d, at 523*, this was not a legal conclusion **[****35]** about what the model proved; it was a factual finding about *how* the model worked. Under our typical practice, we should leave that finding alone.

In any event, as far as we can tell, the lower courts were right. On the basis of the record as we understand it, the District Court did not abuse its discretion in finding that McClave's model could measure damages suffered by the class--even if the damages were limited to those caused by deterred overbuilding. That is because respondents alleged that Comcast's anticompetitive conduct increased Comcast's market share (and market power) by deterring potential entrants, in particular, overbuilders, from entering the Philadelphia area market. See App. 43a-66a. By showing **[***530]** that this was so, respondents' proof tends to show the same in respect to other entrants. The overbuilders' failure to enter deprives the market of the price discipline that their entry would have provided in other parts via threat of the overbuilders' expansion or that of others potentially led on by their example. Indeed, in the District Court, Comcast argued that the three other theories, *i.e.*, the three rejected theories, had no impact on prices. See *264 F.R.D., at 166, 176, 180-181*. **[****36]** If Comcast was right, then the damages McClave's model found must have stemmed exclusively from conduct that deterred new entry, say, from “overbuilders.” Not surprisingly, the Court offers no support at all for its contrary conclusion, namely, that the District Court's finding was “ 'obvious[ly] and exceptional[ly]' erroneous.” *Ante, at ___ - ___, n. 5, 185 L. Ed. 2d, at 523* (quoting *Virginia, 518 U.S., at 589, n. 5, 116 S. Ct. 2264, 135 L. Ed. 2d 735* (Scalia, J., dissenting)).

[*48] We are particularly concerned about the matter because the Court, in reaching its contrary conclusion, makes broad statements about ***antitrust law*** that it could not mean to apply in other cases. The Court begins with what it calls an “unremarkable premise” that respondents could be “entitled only to damages resulting from reduced overbuilder competition.” *Ante, at ___, 185 L. Ed. 2d, at 522.* In most *§2* cases, however, the Court's starting place would seem *remarkable,* not “unremarkable.”

Suppose in a different case a plaintiff were to prove that Widget, Inc., has obtained, through anticompetitive means, a 90% share of the California widget market. Suppose the plaintiff also proves that the two small remaining firms--one in Ukiah, the other in San Diego--lack the capacity to expand their widget output to **[****37]** the point where that possibility could deter Widget, Inc., from raising its prices. Suppose further that the plaintiff introduces a model that shows California widget prices are now twice those in every other State, which, the model concludes is (after accounting for other possible reasons) the result of lack of competition in the California widget market. Why would a court hearing that case restrict damages solely to customers in the vicinity of Ukiah and San Diego?

[1441]** Like the model in this example, Dr. McClave's model does not purport to show precisely *how* Comcast's conduct led to higher prices in the Philadelphia area. It simply shows *that* Comcast's conduct brought about higher prices. And it measures the amount of subsequent harm.

* * *

Because the parties did not fully argue the question the Court now answers, all Members of the Court may lack a complete understanding of the model or the meaning of related statements in the record. The need for focused argument is particularly strong here where, as we have said, the underlying considerations are detailed, technical, and fact **[*49]** based. The Court departs from our ordinary practice, risks inaccurate judicial decisionmaking, and is unfair to **[****38]** respondents and the courts below. For these reasons, we would not disturb the Court of Appeals' judgment and, instead, would dismiss the writ as improvidently granted.

References

U.S.C.S. Court Rules, *Federal Rules of Civil Procedure, Rule 23*

5 *Moore's Federal Practice §§23.83*, *23.84* (Matthew Bender 3d ed.)

L Ed Digest, Class Actions § 16

L Ed Index, Class Actions or Proceedings

Supreme Court's construction and application of *Rule 23 of Federal Rules of Civil Procedure*, concerning class actions. *144 L. Ed. 2d 889*.

FTC v. Actavis, Inc.

Supreme Court of the United States

March 25, 2013, Argued; June 17, 2013, Decided

No. 12-416

Reporter

570 U.S. 136 *; 133 S. Ct. 2223 **; 186 L. Ed. 2d 343 ***; 2013 U.S. LEXIS 4545 ****; 106 U.S.P.Q.2D (BNA) 1953; 81 U.S.L.W. 4455; 2013-1 Trade Cas. (CCH) P78,419; 2013 WL 2922122

FEDERAL TRADE COMMISSION, Petitioner v. ACTAVIS, INC., et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at, Remanded by *FTC v. Watson Pharms., Inc., 529 Fed. Appx. 985, 2013 U.S. App. LEXIS 18695 (11th Cir. Ga., 2013)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

In re Nexium (Esomeprazole) Antitrust Litig., 2013 U.S. Dist. LEXIS 10455 (D. Mass., Jan. 24, 2013)
FTC v. Watson Pharms., Inc., 677 F.3d 1298, 2012 U.S. App. LEXIS 8377 (11th Cir. Ga., 2012)

Disposition: Reversed and remanded.

Core Terms

patent, settlement, generic, antitrust, anti trust law, patentee, patent holder, monopoly, challenger, invalid, infringement, anticompetitive, manufacturer, settle, parties, competitor, patent law, Sherman Act, litigate, Pharmaceutical, effects, settlement agreement, provisions, conferred, brand-name, expiration, holder, limits, paying, cases

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN1[ ] **Sherman Act, Scope**

Reverse payment settlements can sometimes violate the antitrust laws.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN2[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

A drug manufacturer, wishing to market a new prescription drug, must submit a New Drug Application to the federal Food and Drug Administration (FDA) and undergo a long, comprehensive, and costly testing process, after which, if successful, the manufacturer will receive marketing approval from the FDA. *21 U.S.C.S. § 355(b)(1)*. *Section 355(b)(1)* requires, among other things, "full reports of investigations" into safety and effectiveness; "a full list of the articles used as components"; and a "full description" of how the drug is manufactured, processed, and packed.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN3[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Once the Food and Drug Administration (FDA) has approved a brand-name drug for marketing, a manufacturer of a generic drug can obtain similar marketing approval through use of abbreviated procedures. The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), 98 Stat. 1585, permits a generic manufacturer to file an Abbreviated New Drug Application specifying that the generic has the "same active ingredients as," and is "biologically equivalent" to, the already-approved brand-name drug. *21 U.S.C.S. §§ 355(j)(2)(A)(ii)*, *(iv)*. In this way the generic manufacturer can obtain approval while avoiding the costly and time-consuming studies needed to obtain approval for a pioneer drug. The Hatch-Waxman process, by allowing the generic to piggy-back on the pioneer's approval efforts, speeds the introduction of low-cost generic drugs to market, thereby furthering drug competition.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN4[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), 98 Stat. 1585, sets forth special procedures for identifying, and resolving, related patent disputes. It requires the pioneer brand-name manufacturer to list in its New Drug Application the "number and the expiration date" of any relevant patent. *21 U.S.C.S. § 355(b)(1)*. And it requires the generic manufacturer in its Abbreviated New Drug Application to assure the Food and Drug Administration that the generic will not infringe the brand-name's patents.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN5[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Regarding assurance that the generic will not infringe the brand-name's patents, the generic can provide this assurance in one of several ways. *21 U.S.C.S. § 355(j)(2)(A)(vii)*. It can certify that the brand-name manufacturer has not listed any relevant patents. It can certify that any relevant patents have expired. It can request approval to market beginning when any still-in-force patents expire. Or, it can certify that any listed, relevant patent is invalid or will not be infringed by the manufacture, use, or sale of the drug described in the Abbreviated New Drug Application. *21 U.S.C.S. § 355(j)(2)(A)(vii)(IV)*. Taking this last-mentioned route (called the "paragraph IV" route), automatically counts as patent infringement, *35 U.S.C.S. § 271(e)(2)(A)*, and often means provoking litigation. If the brand-name patentee brings an infringement suit within 45 days, the Food and Drug Administration (FDA) then must withhold approving the generic, usually for a 30-month period, while the parties litigate patent validity (or infringement) in court. If the courts decide the matter within that period, the FDA follows that determination; if they do not, the FDA may go forward and give approval to market the generic product. *21 U.S.C.S. § 355(j)(5)(B)(iii)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Patent Law > Infringement Actions > General Overview

HN6[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), 98 Stat. 1585, provides a special incentive for a generic to be the first to file an Abbreviated New Drug Application taking the paragraph IV route. That applicant will enjoy a period of 180 days of exclusivity (from the first commercial marketing of its drug). *21 U.S.C.S. § 355(j)(5)(B)(iv)*. *Section 355(j)(5)(B)(iv)* establishes an exclusivity period. During that period of exclusivity no other generic can compete with the brand-name drug. The 180-day exclusivity period, however, can belong only to the first generic to file. Should that first-to-file generic forfeit the exclusivity right in one of the ways specified by statute, no other generic can obtain it. *21 U.S.C.S. § 355(j)(5)(D)*.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN7[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

21 U.S.C.S. § 355(c)(2) requires that the Food and Drug Administration must publish new patent information upon submission.

Antitrust & Trade Law > Regulated Practices > Trade Practices & Unfair Competition > Federal Trade Commission Act

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

HN8[] **Trade Practices & Unfair Competition, Federal Trade Commission Act**

Section 5 (*15 U.S.C.S. § 45*) of the Federal Trade Commission Act encompasses practices that violate the Sherman Act and the other antitrust laws.

Patent Law > Infringement Actions > Exclusive Rights > Manufacture, Sale & Use

Patent Law > Infringement Actions > Exclusive Rights > Limitations

HN9[] **Exclusive Rights, Manufacture, Sale & Use**

A valid patent excludes all except its owner from the use of the protected process or product. And that exclusion 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.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN10[] **Inequitable Conduct, Anticompetitive Conduct**

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.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Infringement Actions > Exclusive Rights > General Overview

HN11[] **Sherman Act, Scope**

The United States Supreme Court has explained that the improper use of a patent monopoly is "invalid" under the antitrust laws and resolved the antitrust question in a 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. To strike that balance, the Supreme 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. 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. Enforcement of a patent procured by fraud may violate the Sherman Act.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN12[] **Sherman Act, Scope**

Rather than measure the length or amount of a restriction solely against the length of the patent's term or its earning potential, the Supreme 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 those related to patents. Whether a particular restraint lies beyond the limits of the patent monopoly is a conclusion that flows from that analysis and not its starting point.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN13[] **Sherman Act, Scope**

Patent-related settlement agreements can sometimes violate the antitrust laws.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN14[] **Sherman Act, Scope**

The Sherman Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage; the agreements, although settling patent disputes, violated the antitrust laws. 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.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN15[] **Sherman Act, Scope**

Both within the settlement context and without, the United States Supreme Court has struck down overly restrictive patent licensing agreements—irrespective of whether those agreements produced supra-patent-permitted revenues. The Supreme Court permitted a single patentee to grant to a single licensee a license containing a minimum resale price requirement. But the Supreme Court held that the antitrust laws forbid a group of patentees, each owning one or more patents, to cross-license each other, and, in doing so, to insist that each licensee maintain retail prices set collectively by the patent holders. The Supreme Court was willing to presume that the single-patentee practice approved in General Electric was a “reasonable restraint” that accords with the patent monopoly granted by the patent law, but declined to extend that conclusion to multiple-patentee agreements: As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Business & Corporate Compliance > ... > Ownership > Conveyances > Licenses

HN16[] **Sherman Act, Scope**

The United States Supreme Court has upheld cross-licensing agreements among patentees that settled actual and impending patent litigation, which agreements set royalty rates to be charged third parties for a license to practice all the patents at issue (and which divided resulting revenues). But, in doing so, Justice Brandeis, writing for the Supreme Court, warned that such an arrangement would have violated the Sherman Act had the patent holders thereby “dominated” the industry and curtailed the manufacture and supply of an unpatented product. These cases do not simply ask whether a hypothetically valid patent's holder would be able to charge, e.g., the high prices that the challenged patent-related term allowed. Rather, they seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the ***antitrust law*** policy strongly favoring competition.

Patent Law > Ownership > Conveyances > General Overview

HN17[] **Ownership, Conveyances**

There is a patent-related policy of eliminating unwarranted patent grants so the public will not continually be required to pay tribute to would-be monopolists without need or justification.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

Patent Law > Remedies > Damages > General Overview

HN18[] **Inequitable Conduct, Anticompetitive Conduct**

In the traditional examples, 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 is something quite different. "Collusion" is the supreme evil of antitrust.

Civil Procedure > Settlements > General Overview

HN19[] **Civil Procedure, Settlements**

A general legal policy favors the settlement of disputes. The public has "strong interest in settlement" of complex and expensive cases.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

HN20[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Under the Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), 98 Stat. 1585, 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.

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Civil Procedure > Settlements > General Overview

HN21[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

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 Food and Drug Administration may approve its application, just as the first filer did. 21 U.S.C.S. § 355(j)(5)(B)(iii). These features together mean that a reverse payment settlement with the first filer (or all of the initial filers) removes from consideration the most motivated challenger, and the one closest to introducing competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

HN22[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

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.

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN23[] **Inequitable Conduct, Anticompetitive Conduct**

It is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham).

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Civil Procedure > ... > Settlement Agreements > Enforcement > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN24[] **Agriculture & Food, Federal Food, Drug & Cosmetic Act**

Although 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.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN25[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

The Supreme Court declines 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."

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Business & Corporate Compliance > ... > Governments > Agriculture & Food > Federal Food, Drug & Cosmetic Act

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN26[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

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. The Supreme Court does not believe that reverse payment settlements, in a particular context, meet this criterion.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN27[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

In the antitrust context, there is always something of a sliding scale in appraising reasonableness, and as such the quality of proof required should vary with the circumstances.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Compliance > ... > Defenses > Inequitable Conduct > Anticompetitive Conduct

HN28[] **Antitrust & Trade Law, Sherman Act**

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.

Lawyers' Edition Display

Decision

[*343]** Federal Trade Commission's antitrust suit held appropriate where patent holder and generic drug manufacturers entered into reverse payment settlement agreement because reverse payment settlement could violate antitrust laws.

Summary

Procedural posture: Petitioner Federal Trade Commission (FTC) sued respondents, a patent holder and generic drug manufacturers, alleging that respondents' reverse payment settlement agreement violated the Federal Trade Commission Act (FTCA) and antitrust laws. The district court dismissed the FTC's complaint. The United States Court of Appeals for the Eleventh Circuit affirmed. Certiorari was granted.

Overview: The patent holder obtained a patent for a brand-name drug. The generic drug manufacturers filed Abbreviated New Drug Applications for a generic drug modeled after the patented drug. The patent holder initiated paragraph IV patent litigation. Respondents entered into a reverse payment settlement agreement, which allegedly violated the FTCA and antitrust laws. The Supreme Court determined that the appellate court should have allowed the FTC's lawsuit to proceed because, inter alia, (1) reverse payment settlements could sometimes violate the antitrust laws, (2) the fact that the agreement's anticompetitive effects fell within the scope of the exclusionary potential of the patent could not immunize the agreement from antitrust attack, (3) the Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), *98 Stat. 1585*, did not embody a statutory policy that supported the appellate court's view, (4) the specific restraint at issue had the potential for genuine adverse effects on competition, (5) the anticompetitive consequences would at least sometimes prove unjustified, and (6) the anticompetitive considerations outweighed the desirability of settlements.

Outcome: The Supreme Court reversed the appellate court's judgment and remanded the case for further proceedings. 5-3 Decision; 1 Dissent.

Headnotes

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > REVERSE PAYMENT SETTLEMENTS > Headnote:
LEdHN[1][] [1]

Reverse payment settlements can sometimes violate the antitrust laws. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

DRUGS, NARCOTICS AND POISONS §10 > MANUFACTURER -- NOVEL PRESCRIPTION DRUG > Headnote:
LEdHN[2][] [2]

A drug manufacturer, wishing to market a new prescription drug, must submit a New Drug Application to the federal Food and Drug Administration (FDA) and undergo a long, comprehensive, and costly testing process, after which, if successful, the manufacturer will receive marketing approval from the FDA. *21 U.S.C.S. § 355(b)(1)*. *Section 355(b)(1)* requires, among other things, “full reports of investigations” into safety and effectiveness; “a full list of the articles used as components”; and a “full description” of how the drug is manufactured, processed, and packed. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

DRUGS, NARCOTICS AND POISONS §10 > GENERIC COMPETITOR -- DRUG APPLICATION > Headnote:
LEdHN[3][] [3]

Once the Food and Drug Administration (FDA) has approved a brand-name drug for marketing, a manufacturer of a generic drug can obtain similar marketing approval through use of abbreviated procedures. The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), *98 Stat. 1585*, permits a generic manufacturer to file an Abbreviated New Drug Application specifying that the generic has the "same active ingredients as," and is "biologically equivalent" to, the already-approved brand-name drug. *21 U.S.C.S. §§355(j)(2)(A)(ii)*, *(iv)*. In this way the generic manufacturer can obtain approval while avoiding the costly and time-consuming studies needed to obtain approval for a pioneer drug. The Hatch-Waxman process, by allowing the generic to piggy-back on the pioneer's approval efforts, speeds the introduction of low-cost generic drugs to market, thereby furthering drug competition. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

DRUGS, NARCOTICS AND POISONS §10 > GENERIC DRUGS -- PATENTS > Headnote:
LEdHN[4][] [4]

The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), *98 Stat. 1585*, sets forth special procedures for identifying, and resolving, related patent disputes. It requires the pioneer brand-name manufacturer to list in its New Drug Application the "number and the expiration date" of any relevant patent. *21 U.S.C.S. § 355(b)(1)*. And it requires the generic manufacturer in its Abbreviated New Drug Application to assure the Food and Drug Administration that the generic will not infringe the brand-name's patents. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

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DRUGS, NARCOTICS AND POISONS §10 > GENERIC DRUG -- CERTIFICATION -- INFRINGEMENT > Headnote:
LEdHN[5][] [5]

Regarding assurance that the generic will not infringe the brand-name's patents, the generic can provide this assurance in one of several ways. *21 U.S.C.S. § 355(j)(2)(A)(vii)*. It can certify that the brand-name manufacturer has not listed any relevant patents. It can certify that any relevant patents have expired. It can request approval to market beginning when any still-in-force patents expire. Or, it can certify that any listed, relevant patent is invalid or will not be infringed by the manufacture, use, or sale of the drug described in the Abbreviated New Drug Application. *21 U.S.C.S. § 355(j)(2)(A)(vii)(IV)*. Taking this last-mentioned route (called the "paragraph IV" route), automatically counts as patent infringement, *35 U.S.C.S. § 271(e)(2)(A)*, and often means provoking litigation. If the brand-name patentee brings an infringement suit within 45 days, the Food and Drug Administration (FDA) then must withhold approving the generic, usually for a 30-month period, while the parties litigate patent validity (or infringement) in court. If the courts decide the matter within that period, the FDA follows that determination; if they do not, the FDA may go forward and give approval to market the generic product. *21 U.S.C.S. § 355(j)(5)(B)(iii)*. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

DRUGS, NARCOTICS AND POISONS §10 > GENERIC DRUG -- DRUG APPLICATION > Headnote:
LEdHN[6][] [6]

The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), *98 Stat. 1585*, provides a special incentive for a generic to be the first to file an Abbreviated New Drug Application taking the paragraph IV route. That applicant will enjoy a period of 180 days of exclusivity (from the first commercial marketing of its drug). *21 U.S.C.S. § 355(j)(5)(B)(iv)*. *Section 355(j)(5)(B)(iv)* establishes an exclusivity period. During that period of exclusivity no other generic can compete with the brand-name drug. The 180-day exclusivity period, however, can belong only to the first generic to file. Should that first-to-file generic forfeit the exclusivity right in one of the ways specified by statute, no other generic can obtain it. *21 U.S.C.S. § 355(j)(5)(D)*. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

DRUGS, NARCOTICS AND POISONS §10 > NEW PATENT INFORMATION > Headnote:
LEdHN[7][] [7]

21 U.S.C.S. § 355(c)(2) requires that the Food and Drug Administration must publish new patent information upon submission. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §103 > FEDERAL TRADE COMMISSION ACT -- ANTITRUST > Headnote:
LEdHN[8][] [8]

Section 5 (*15 U.S.C.S. § 45*) of the Federal Trade Commission Act encompasses practices that violate the Sherman Act and the other antitrust laws. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

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PATENTS §5 > VALID PATENT -- EXTENT OF RIGHT > Headnote:
LEdHN[9][] [9]

A valid patent excludes all except its owner from the use of the protected process or product. And that exclusion 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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > PATENT MONOPOLY -- SCOPE > Headnote:
LEdHN[10][] [10]

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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > PATENT MONOPOLY -- ANTITRUST LAWS > Headnote:
LEdHN[11][] [11]

The United States Supreme Court has explained that the improper use of a patent monopoly is “invalid” under the antitrust laws and resolved the antitrust question in a 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. To strike that balance, the Supreme 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. 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. Enforcement of a patent procured by fraud may violate the Sherman Act. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > PATENT MONOPOLY -- ANTITRUST -- ANALYSIS > Headnote:
LEdHN[12][] [12]

Rather than measure the length or amount of a restriction solely against the length of the patent's term or its earning potential, the Supreme 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 those related to patents. Whether a particular restraint lies beyond the limits of the patent monopoly is a conclusion that flows from that analysis and not its starting point. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > PATENTS -- SETTLEMENT AGREEMENTS > Headnote:
LEdHN[13][] [13]

Patent-related settlement agreements can sometimes violate the antitrust laws. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > SHERMAN ACT -- PATENT EXCEPTION > Headnote:
LEdHN[14][] [14]

The Sherman Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage; the agreements, although settling patent disputes, violated the antitrust laws. 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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §58 RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §61 > MULTIPLE PATENTEE AGREEMENTS > Headnote:
LEdHN[15][] [15]

Both within the settlement context and without, the United States Supreme Court has struck down overly restrictive patent licensing agreements--irrespective of whether those agreements produced supra-patent-permitted revenues. The Supreme Court permitted a single patentee to grant to a single licensee a license containing a minimum resale price requirement. But the Supreme Court held that the antitrust laws forbid a group of patentees, each owning one or more patents, to cross-license each other, and, in doing so, to insist that each licensee maintain retail prices set collectively by the patent holders. The Supreme Court was willing to presume that the single-patentee practice approved in General Electric was a “reasonable restraint” that accords with the patent monopoly granted by the patent law, but declined to extend that conclusion to multiple-patentee agreements: As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §61 > CROSS-LICENSING AGREEMENTS > Headnote:

LEdHN[16][] [16]

The United States Supreme Court has upheld cross-licensing agreements among patentees that settled actual and impending patent litigation, which agreements set royalty rates to be charged third parties for a license to practice all the patents at issue (and which divided resulting revenues). But, in doing so, Justice Brandeis, writing for the Supreme Court, warned that such an arrangement would have violated the Sherman Act had the patent holders thereby “dominated” the industry and curtailed the manufacture and supply of an unpatented product. These cases do not simply ask whether a hypothetically valid patent's holder would be able to charge, e.g., the high prices that the challenged patent-related term allowed. Rather, they seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the ***antitrust law*** policy strongly favoring competition. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > PATENTS -- UNWARRANTED GRANTS > Headnote:

LEdHN[17][] [17]

There is a patent-related policy of eliminating unwarranted patent grants so the public will not continually be required to pay tribute to would-be monopolists without need or justification. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > REVERSE PAYMENT SETTLEMENTS -- COLLUSION > Headnote:

LEdHN[18][] [18]

In the traditional examples, 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 is something quite different. “Collusion” is the supreme evil of antitrust. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

COURTS §759 > SETTLEMENT OF DISPUTES > Headnote:
LEdHN[19][] [19]

A general legal policy favors the settlement of disputes. The public has "strong interest in settlement" of complex and expensive cases. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

DRUGS, NARCOTICS, AND POISONS §10 > GENERIC DRUG -- FIRST CHALLENGER > Headnote:
LEdHN[20][] [20]

Under the Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act), *98 Stat. 1585*, 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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

DRUGS, NARCOTICS, AND POISONS §10 > GENERIC DRUG -- REVERSE PAYMENT SETTLEMENT > Headnote:
LEdHN[21][] [21]

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 Food and Drug Administration may approve its application, just as the first filer did. *21 U.S.C.S. § 355(j)(5)(B)(iii)*. These features together mean that a reverse payment settlement with the first filer (or all of the initial filers) removes from consideration the most motivated challenger, and the one closest to introducing competition. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §74 > DEFENDANT -- LEGITIMATE JUSTIFICATIONS > Headnote:
LEdHN[22][] [22]

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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §55 > ANTITRUST QUESTION > Headnote:
LEdHN[23][] [23]

It is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham). (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

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RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §61 > REVERSE PAYMENT SETTLEMENTS -- ANTITRUST LAWS > Headnote:
LEdHN[24][] [24]

Although 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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

EVIDENCE §343.5 > REVERSE PAYMENT SETTLEMENT AGREEMENTS -- LACK OF PRESUMPTION > Headnote:
LEdHN[25][] [25]

The Supreme Court declines 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.” (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

EVIDENCE §343.5 > PRESUMPTIVE RULES -- ANTICOMPETITIVE EFFECT > Headnote:
LEdHN[26][] [26]

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. The Supreme Court does not believe that reverse payment settlements, in a particular context, meet this criterion. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §115 > REASONABLENESS -- QUALITY OF PROOF > Headnote:
LEdHN[27][] [27]

In the antitrust context, there is always something of a sliding scale in appraising reasonableness, and as such the quality of proof required should vary with the circumstances. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §114 > STRUCTURING LITIGATION > Headnote:
LEdHN[28][] [28]

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. (Breyer, J., joined by Kennedy, Ginsburg, Sotomayor, and Kagan, JJ.)

Syllabus

[*136] [1954] [*350] [**2224]** The Drug Price Competition and Patent Term Restoration Act of 1984 (Hatch-Waxman Act) creates special procedures for identifying and resolving patent disputes between brand-name and generic drug manufacturers, one of which requires a prospective generic manufacturer to assure the Food and Drug Administration (FDA) that it will not infringe the brand-name's patents. One way to provide such assurance (the "paragraph IV" route) is by certifying that any listed, relevant patent "is invalid or will not be infringed by the manufacture, use, or sale" of the generic drug. *21 U.S.C. §355(j)(2)(A)(vii)(IV)*.

Respondent Solvay Pharmaceuticals obtained a patent for its approved brand-name drug AndroGel. Subsequently, respondents Actavis and Paddock filed applications for generic drugs modeled after **[**2225]** AndroGel and certified **[1955]** under paragraph IV that Solvay's patent was invalid and that their drugs did not infringe it. Solvay sued Actavis and Paddock, claiming patent infringement. See *35 U.S.C. §271(e)(2)(A)*. The FDA eventually approved Actavis' generic product, but instead **[****2]** of bringing its drug to market, Actavis entered into a "reverse payment" settlement agreement with Solvay, agreeing not to bring its generic to market for a specified number of years and agreeing to promote AndroGel to doctors in exchange for millions of dollars. Paddock made a similar agreement with Solvay, as did respondent Par, another manufacturer aligned in the patent litigation with Paddock.

The Federal Trade Commission (FTC) filed suit, alleging that respondents violated *§5* of the Federal Trade Commission Act by unlawfully agreeing to abandon their patent challenges, to refrain from launching their low-cost generic drugs, and to share in Solvay's monopoly profits. The District Court dismissed the complaint. The Eleventh Circuit concluded that as long as the anticompetitive effects of a settlement fall within the scope of the patent's exclusionary potential, the settlement is immune from antitrust attack. Noting that the FTC had not alleged that the challenged agreements excluded competition **[***351]** to a greater extent than would the patent, if valid, it affirmed the complaint's dismissal. It further recognized that if parties to this sort of case do **[*137]** not settle, a court might declare **[****3]** a patent invalid. But since public policy favors the settlement of disputes, it held that courts could not require parties to continue to litigate in order to avoid antitrust liability.

Held: The Eleventh Circuit erred in affirming the dismissal of the FTC's complaint. *Pp. 147-160, 186 L. Ed. 2d, at 356-364*.

(a) Although the anticompetitive effects of the reverse settlement agreement might fall within the scope of the exclusionary potential of Solvay's patent, this does not immunize the agreement from antitrust attack. For one thing, to refer simply to what the holder of a valid patent could do does not by itself answer the antitrust question. Here, the paragraph IV litigation put the patent's validity and preclusive scope at issue, and the parties' settlement--in which, the FTC alleges, the plaintiff agreed to pay the defendants millions to stay out of its market, even though the defendants had no monetary claim against the plaintiff--ended that litigation. That form of settlement is unusual, and there is reason for concern that such settlements tend to have significant adverse effects on competition. It would be incongruous to determine antitrust legality by measuring the settlement's anticompetitive effects solely **[****4]** against patent law policy, and not against procompetitive antitrust policies as well. Both are relevant in determining the scope of monopoly and antitrust immunity conferred by a patent, see, *e.g.*, *United States v. Line Material Co., 333 U.S. 287, 310, 311, 68 S. Ct. 550, 92 L. Ed. 701*, and the antitrust question should be answered by considering traditional antitrust factors. For another thing, this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust laws. See, *e.g.*, *United States v. Singer Mfg. Co., 374 U.S. 174, 83 S. Ct. 1773, 10 L. Ed. 2d 823, 1963 Dec. Comm'r Pat. 547*; *United States v. New Wrinkle, Inc., 342 U.S. 371, 72 S. Ct. 350, 96 L. Ed. 417, 1952 Dec. Comm'r Pat. 411*; *Standard Oil Co. (Indiana) v. United States, 283 U.S. 163, 51 S. Ct. 421, 75 L. Ed. 926*. Finally, the Hatch-Waxman Act's general procompetitive thrust--

facilitating challenges to a patent's validity and requiring parties to a paragraph IV dispute to report settlement terms to federal antitrust **[**2226]** regulators--suggests a view contrary to the Eleventh Circuit's. *Pp. 147-153, 186 L. Ed. 2d, at 356-360*.

(b) While the Eleventh Circuit's conclusion finds some support in a general legal policy favoring the settlement of disputes, its related underlying practical concern consists of its fear that antitrust scrutiny of a reverse payment agreement would require the parties **[****5]** to engage in time-consuming, complex, and expensive litigation to demonstrate what would have happened to competition absent the settlement. However, five sets of considerations lead to the conclusion that this concern should not determine the result here and that the FTC should have been given the opportunity to prove its antitrust claim. First, the specific restraint **[*138]** at issue has the "potential for genuine adverse effects on competition." *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445*. Payment for staying out of the market keeps prices at patentee-set levels and divides the benefit between the patentee and the challenger, while **[***352]** the consumer loses. And two Hatch-Waxman Act features--the 180-day exclusive-right-to-sell advantage given to the first paragraph IV challenger to win FDA approval, *§355(j)(5)(B)(iv)*, and the roughly 30-month period that the subsequent manufacturers would be required to wait out before **[1956]** winning FDA approval, *§355(j)(5)(B)(iii)*-mean that a reverse settlement agreement with the first filer removes from consideration the manufacturer most likely to introduce competition quickly. Second, these anticompetitive consequences will at least sometimes prove **[****6]** unjustified. There may be justifications for reverse payment that are not the result of having sought or brought about anticompetitive consequences, but that does not justify dismissing the FTC's complaint without examining the potential justifications. Third, where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely has the power to bring about that harm in practice. The size of the payment from a branded drug manufacturer to a generic challenger is a strong indicator of such power. Fourth, an antitrust action is likely to prove more feasible administratively than the Eleventh Circuit believed. It is normally not necessary to litigate patent validity to answer the antitrust question. A large, 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 patent's validity. Fifth, the fact that a large, unjustified reverse payment risks antitrust liability does not prevent litigating parties from settling their lawsuits. As in other industries, they may settle in other ways, *e.g.,* by allowing the generic manufacturer to enter the patentee's market before **[****7]** the patent expires without the patentee's paying the challenger to stay out prior to that point. *Pp. 153-158, 186 L. Ed. 2d, at 360-363*.

(c) This Court declines to hold that reverse payment settlement agreements are presumptively unlawful. Courts reviewing such agreements should proceed by applying the "rule of reason," rather than under a "quick look" approach. See *California Dental Ass'n v. FTC, 526 U.S. 756, 775, n. 12, 119 S. Ct. 1604, 143 L. Ed. 2d 935*. *Pp. 158-160, 186 L. Ed. 2d, at 364*.

677 F.3d 1298, reversed and remanded.

Counsel: **[*139]** **Malcolm L. Stewart** argued the cause for petitioner.

Jeffrey I. Weinberger argued the cause for respondents.

Judges: Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Roberts, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined, post, p 160. Alito, J., took no part in the consideration or decision of the case.

Opinion by: Breyer

Opinion

[*140] **[**2227]** Justice **Breyer** delivered the opinion of the Court.

Company A sues Company B for patent infringement. The two companies settle under terms that require (1) Company B, the claimed infringer, not to produce the patented product until the patent's term expires, and (2) Company A, the patentee, to pay B many millions of dollars. Because **[*141]** the settlement requires the patentee to pay the alleged infringer, rather than the other way around, this kind of settlement agreement is often called **[****8]** a "reverse payment" settlement agreement. And the basic question here is whether such an agreement can sometimes unreasonably diminish **[***353]** competition in violation of the antitrust laws. See, *e.g., 15 U.S.C. §1* (Sherman Act prohibition of "restraint[s] of trade or commerce"). Cf. *Palmer v. BRG of Ga., Inc., 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990)* (*per curiam*) (invalidating agreement not to compete).

In this case, the Eleventh Circuit dismissed a Federal Trade Commission (FTC or Commission) complaint claiming that a particular reverse payment settlement agreement violated the antitrust laws. In doing so, the Circuit stated that a reverse payment settlement agreement generally is "immune from antitrust attack so long as its anticompetitive effects fall within the scope of the exclusionary potential of the patent." *FTC v. Watson Pharms., Inc., 677 F.3d 1298, 1312 (2012)*. And since the alleged infringer's promise not to enter the patentee's market expired before the patent's term ended, the Circuit found the agreement legal and dismissed the FTC complaint. *Id., at 1315*. In our view, however, ***HN1***[] ***LEdHN[1]***[] [1] reverse payment settlements such as the agreement alleged in the complaint before us can sometimes violate the antitrust laws. **[****9]** We consequently hold that the Eleventh Circuit should have allowed the FTC's lawsuit to proceed.

I

A

Apparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation, and specifically in the context of suits brought under statutory provisions allowing a generic drug manufacturer (seeking speedy marketing approval) to challenge the validity of a patent owned by an already-approved brand-name drug owner. See Brief for Petitioner 29; 12 P. Areeda & **[*142]** H. Hovenkamp, ***Antitrust Law*** ¶2046, p. 338 (3d ed. 2012) (hereinafter Areeda); Hovenkamp, Sensible Antitrust **[1957]** Rules for Pharmaceutical Competition, *39 U.S. F. L. Rev. 11, 24 (2004)*. We consequently describe four key features of the relevant drug-regulatory framework established **[**2228]** by the Drug Price Competition and Patent Term Restoration Act of 1984, *98 Stat. 1585*, as amended. That Act is commonly known as the Hatch-Waxman Act.

First, ***HN2***[] ***LEdHN[2]***[] [2] a drug manufacturer, wishing to market a new prescription drug, must submit a New Drug Application to the federal Food and Drug Administration (FDA) and undergo a long, comprehensive, and costly testing process, after which, if successful, the manufacturer will receive **[****10]** marketing approval from the FDA. See *21 U.S.C. §355(b)(1)* (requiring, among other things, "full reports of investigations" into safety and effectiveness; "a full list of the articles used as components"; and a "full description" of how the drug is manufactured, processed, and packed).

Second, ***HN3***[] ***LEdHN[3]***[] [3] once the FDA has approved a brand-name drug for marketing, a manufacturer of a generic drug can obtain similar marketing approval through use of abbreviated procedures. The Hatch-Waxman Act permits a generic manufacturer to file an Abbreviated New Drug Application specifying that the generic has the "same active ingredients as," and is "biologically equivalent" to, the already-approved brand-name drug. *Caraco Pharm. Labs., Ltd. v. Novo Nordisk A/S, 566 U.S. 399, 405, 132 S. Ct. 1670, 1676, 182 L. Ed. 2d 678, 687 (2012)* (citing *21 U.S.C. §§355(j)(2)(A)(ii)*, *(iv)*). In this way the generic manufacturer can obtain approval while **[***354]** avoiding the "costly and time-consuming studies" needed to obtain approval "for a pioneer drug." See *Eli Lilly & Co. v. Medtronic, Inc., 496 U.S. 661, 676, 110 S. Ct. 2683, 110 L. Ed. 2d 605 (1990)*. The Hatch-Waxman process, by allowing the generic to piggyback on the pioneer's approval efforts, "speed[s] the introduction **[****11]** of low-cost generic drugs to market," *Caraco, supra, at 405, 132 S. Ct. 1670, 1676, 182 L. Ed. 2d 678, 687*, thereby furthering drug competition.

[*143] Third, ***HN4***[] ***LEdHN[4]***[] [4] the Hatch-Waxman Act sets forth special procedures for identifying, and resolving, related patent disputes. It requires the pioneer brand-name manufacturer to list in its New Drug Application the "number and the expiration date" of any relevant patent. See *21 U.S.C. §355(b)(1)*. And it requires the generic manufacturer in its Abbreviated New Drug Application to "assure the FDA" that the generic "will not infringe" the brand-name's patents. See *Caraco, supra, at 406 , 132 S. Ct. 1670, 1672, 182 L. Ed. 2d 678, 683*.

HN5[] ***LEdHN[5]***[] [5] The generic can provide this assurance in one of several ways. See *21 U.S.C. §355(j)(2)(A)(vii)*. It can certify that the brand-name manufacturer has not listed any relevant patents. It can certify that any relevant patents have expired. It can request approval to market beginning when any still-in-force patents expire. Or, it can certify that any listed, relevant patent "is invalid or will not be infringed by the manufacture, use, or sale" of the drug described in the Abbreviated New Drug Application. See *§355(j)(2)(A)(vii)(IV)*. Taking this last-mentioned route (called the "paragraph **[****12]** IV" route), automatically counts as patent infringement, see *35 U.S.C. §271(e)(2)(A) (2006 ed., Supp. V)*, and often "means provoking litigation." *Caraco, supra, at 407, 132 S. Ct. 1670, 1677, 182 L. Ed. 2d 678, 689*. If the brand-name patentee brings an infringement suit within 45 days, the FDA then must withhold approving the generic, usually for a 30-month period, while the parties litigate patent validity (or infringement) in court. If the courts decide the matter within that period, the FDA follows that determination; if they do not, the FDA may go forward and give approval to market the generic product. See *21 U.S.C. §355(j)(5)(B)(iii)*.

Fourth, ***HN6***[] ***LEdHN[6]***[] [6] Hatch-Waxman provides a special incentive for a generic to be the first to file an Abbreviated New Drug Application **[**2229]** taking the paragraph IV route. That applicant will enjoy a period of 180 days of exclusivity (from the first commercial marketing of its drug). See *§355(j)(5)(B)(iv)* (establishing exclusivity period). During that period of exclusivity **[*144]** no other generic can compete with the brand-name drug. If the first-to-file generic manufacturer can overcome any patent obstacle and bring the generic to market, this 180-day period of exclusivity can prove valuable, possibly **[****13]** "worth several hundred million dollars." Hemphill, Paying for Delay: Pharmaceutical Patent Settlement as a Regulatory Design Problem, *81 N. Y. U. L. Rev. 1553, 1579 (2006)*. Indeed, the Generic Pharmaceutical Association said in 2006 that the "'vast majority of potential profits for a generic drug manufacturer materialize during the 180-day exclusivity period.'" Brief for Petitioner 6 (quoting statement). The 180-day exclusivity period, however, can belong only to the first generic to file. Should that first-to-file generic **[1958]** forfeit the exclusivity right in one of the ways specified by statute, no other generic can obtain it. See *§355(j)(5)(D)*.

[*355]** B

1

In 1999, Solvay Pharmaceuticals, a respondent here, filed a New Drug Application for a brand-name drug called AndroGel. The FDA approved the application in 2000. In 2003, Solvay obtained a relevant patent and disclosed that fact to the FDA, *677 F.3d, at 1308*, as Hatch-Waxman requires. See *§355(c)(2)* (***HN7***[] ***LEdHN[7]***[] [7] requiring, in addition, that the FDA must publish new patent information upon submission).

Later the same year another respondent, Actavis, Inc. (then known as Watson Pharmaceuticals), filed an Abbreviated New Drug Application for a generic drug modeled **[****14]** after AndroGel. Subsequently, Paddock Laboratories, also a respondent, separately filed an Abbreviated New Drug Application for its own generic product. Both Actavis and Paddock certified under paragraph IV that Solvay's listed patent was invalid and their drugs did not infringe it. A fourth manufacturer, Par Pharmaceutical, likewise a respondent, did not file an application of its own but joined forces with Paddock, agreeing to share the patent litigation costs in re **[*145]** turn for a share of profits if Paddock obtained approval for its generic drug.

Solvay initiated paragraph IV patent litigation against Actavis and Paddock. Thirty months later the FDA approved Actavis' first-to-file generic product, but, in 2006, the patent-litigation parties all settled. Under the terms of the settlement Actavis agreed that it would not bring its generic to market until August 31, 2015, 65 months before Solvay's patent expired (unless someone else marketed a generic sooner). Actavis also agreed to promote AndroGel to urologists. The other generic manufacturers made roughly similar promises. And Solvay agreed to pay millions of dollars to each generic—$12 million in total to Paddock; $60 million in total **[****15]** to Par; and an estimated $19-$30 million annually, for nine years, to Actavis. See App. 46, 49-50, Complaint ¶¶66, 77. The companies described these payments as compensation for other services the generics promised to perform, but the

FTC contends the other services had little value. According to the FTC the true point of the payments was to compensate the generics for agreeing not to compete against AndroGel until 2015. See *id.*, at 50-53, Complaint ¶¶81-85.

2

On January 29, 2009, the FTC filed this lawsuit against all the settling parties, namely, Solvay, Actavis, Paddock, and Par. The FTC's complaint (as since amended) **[**2230]** alleged that respondents violated *§5* of the Federal Trade Commission Act, *15 U.S.C. §45*, by unlawfully agreeing "to share in Solvay's monopoly profits, abandon their patent challenges, and refrain from launching their low-cost generic products to compete with AndroGel for nine years." App. 29, Complaint ¶5. See generally *FTC v. Indiana Federation of Dentists, 476 U.S. 447, 454, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)* (***HN8***[] ***LEdHN[8]***[] [8] *Section 5* "encompass[es] . . . practices that violate the Sherman Act and the other antitrust laws"). The District Court held that these allegations did not set forth an ***antitrust law*** **[****16]** violation. *In re Androgel Antitrust* ***[*146]*** *Litigation (No. II), 687 F. Supp. 2d 1371, 1379 (ND Ga. 2010)*. It accordingly dismissed the FTC's complaint. The FTC appealed.

The Court of Appeals for the Eleventh Circuit affirmed the District **[***356]** Court. It wrote that "absent sham litigation or fraud in obtaining the patent, a 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." *677 F.3d, at 1312*. The court recognized that "antitrust laws typically prohibit agreements where one company pays a potential competitor not to enter the market." *Id., at 1307* (citing *Valley Drug Co. v. Geneva Pharmaceuticals, Inc., 344 F.3d 1294, 1304 (CA11 2003))*. See also *Palmer, 498 U.S., at 50, 111 S. Ct. 401, 112 L. Ed. 2d 349* (agreement to divide territorial markets held "unlawful on its face"). But, the court found that "reverse payment settlements of patent litigation presen[t] atypical cases because one of the parties owns a patent." *677 F.3d, at 1307* (internal quotation marks and second alteration omitted). Patent holders have a "lawful right to exclude others from the market," *ibid.* (internal quotation marks omitted); thus a patent "conveys **[****17]** the right to cripple competition," *id., at 1310* (internal quotation marks omitted). The court recognized that, if the parties to this sort of case do not settle, a court might declare the patent invalid. **[1959]** *Id., at 1305*. 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. *Id., at 1313-1314*.

The FTC sought certiorari. Because different courts have reached different conclusions about the application of the antitrust laws to Hatch-Waxman-related patent settlements, we granted the FTC's petition. Compare, *e.g., id., at 1312* (case below) (settlements generally "immune from antitrust attack"); *In re Ciprofloxacin Hydrochloride Antitrust Litigation, 544 F.3d 1323, 1332-1337 (CA Fed. 2008)* **[*147]** (similar); *In re Tamoxifen Citrate Antitrust Litigation, 466 F.3d 187, 212-213 (CA2 2006)* (similar), with *In re K-Dur Antitrust Litigation, 686 F.3d 197, 214-218 (CA3 2012)* (settlements presumptively unlawful).

II

A

Solvay's patent, if valid and infringed, might have permitted it to charge drug prices sufficient to recoup the reverse settlement payments **[****18]** it agreed to make to its potential generic competitors. And we are willing to take this fact as evidence that the agreement's "anticompetitive effects fall within the scope of the exclusionary potential of the patent." *677 F.3d, at 1312*. But we do not agree that that fact, or characterization, can immunize the agreement from antitrust attack.

For one thing, to refer, as the Circuit referred, simply to what the holder of a valid patent could do does not by itself **[**2231]** answer the antitrust question. The patent here may or may not be valid, and may or may not be infringed. ***HN9***[] ***LEdHN[9]***[] [9] "[A] *valid* patent excludes all except its owner from the use of the protected process or product," *United States v. Line Material Co., 333 U.S. 287, 308, 68 S. Ct. 550, 92 L. Ed. 701 (1948)* (emphasis added). And that exclusion 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 **[***357]** 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 **[****19]** 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 **[*148]** 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," *677 F.3d, at 1311, 1312*, this Court has indicated that ***HN10***[] ***LEdHN[10]***[] [10] 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, ***HN11***[] ***LEdHN[11]***[] [11] the Court in *Line Material* explained that "the improper use of [a patent] monopoly" is "invalid" under **[****20]** 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, 68 S. Ct. 550, 92 L. Ed. 701*. 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. *Id., at 311, 68 S. Ct. 550, 92 L. Ed. 701*. 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, ***HN12***[] ***LEdHN[12]***[] [12] rather than measure the length or amount of a restriction solely against the length of the patent's term or **[*149]** its earning potential, as the Court of Appeals apparently did **[1960]** here, this Court **[****21]** 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, **[**2232]** its starting point. *Post, at 162, 164-165, 186 L. Ed. 2d, at 366, 369* (dissenting opinion).

For another thing, this Court's precedents make clear that ***HN13***[] ***LEdHN[13]***[] [13] patent-related settlement agreements can sometimes violate the antitrust laws. In *United States v. Singer Mfg.* ***[***358]*** *Co., 374 U.S. 174, 83 S. Ct. 1773, 10 L. Ed. 2d 823, 1963 Dec. Comm'r Pat. 547 (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. *Id., at 190-192, 83 S. Ct. 1773, 10 L. Ed. 2d 823*. The Court did not examine whether, on the assumption that **[****22]** all three patents were valid, patent law would have allowed the patents' holders to do the same. Rather, emphasizing that ***HN14***[] ***LEdHN[14]***[] [14] the Sherman Act "imposes strict limitations on the concerted activities in which patent owners may lawfully engage," *id., at 197, 83 S. Ct. 1773, 10 L. Ed. 2d 823*, it held that the agreements, although settling patent disputes, violated the antitrust laws. *Id., at 195, 197, 83 S. Ct. 1773, 10 L. Ed. 2d 823*, 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." *Id., at 199, 83 S. Ct. 1773, 10 L. Ed. 2d 823* (White, J., concurring). See also *United States v. New Wrinkle, Inc., 342 U.S. 371, 378, 72 S. Ct. 350, 96 L. Ed. 417, 1952 Dec. Comm'r Pat. 411 (1952)* (applying antitrust scrutiny to patent settlement); *Standard Oil Co. (Indiana) v. United States, 283 U.S. 163, 51 S. Ct. 421, 75 L. Ed. 926 (1931)* (same).

[*150] Similarly, ***HN15***[] ***LEdHN[15]***[] [15] both within the settlement context and without, the Court has struck down overly restrictive patent licensing agreements—irrespective of whether those agreements produced supra-patent-permitted revenues. We concede that in *United States v. General Elec. Co., 272 U.S. 476, 489, 47 S. Ct. 192, 71 L. Ed. 362 (1926)*, the Court permitted a single patentee to grant to a single licensee a license containing a minimum **[****23]** resale price requirement. But in *Line Material, supra, at 308, 68 S. Ct. 550, 92 L. Ed. 701, 310-311*, the Court held that the antitrust laws forbid a group of patentees, each owning one or more patents, to cross-license each other, and, in doing so, to insist that each licensee maintain retail prices set collectively by the patent holders. The Court was willing to presume that the single-patentee practice approved in *General Electric* was a "reasonable restraint" that "accords with the patent monopoly granted by the patent law," *333 U.S., at 312, 68 S. Ct. 550, 92 L. Ed. 701*, but declined to extend that conclusion to multiple-patentee agreements: "As the Sherman Act prohibits agreements to fix prices, any arrangement between patentees runs afoul of that prohibition and is outside the patent monopoly," *ibid.* In *New Wrinkle, 342 U.S., at 378, 72 S. Ct. 350, 96 L. Ed. 417*, the Court held roughly the same, this time in respect to a similar arrangement in settlement of a litigation between two patentees, each of which contended that its own patent gave it the exclusive right to control production. That one or the other company (we may presume) was right about its patent did not lead the Court to confer antitrust immunity. Far from it, the agreement was found to violate the **[****24]** Sherman Act. *Id., at 380, 72 S. Ct. 350, 96 L. Ed. 417*.

Finally in *Standard Oil Co. (Indiana)*, ***HN16***[] ***LEdHN[16]***[] [16] the Court upheld cross-licensing agreements among patentees that settled actual and impending patent litigation, *283 U.S., at* ***[***359]*** *168, 51 S. Ct. 421, 75 L. Ed. 926*, which agreements set royalty rates to be charged third parties for a license to practice all the patents at issue (and which divided resulting revenues). **[**2233]** But, in doing so, Justice Brandeis, writing for the Court, warned that such an arrangement would have violated the Sherman Act had the patent **[*151]** holders thereby "dominate[d]" the industry and "curtail[ed] the manufacture and supply of an unpatented product." *Id., at 174, 51 S. Ct. 421, 75 L. Ed. 926*. These cases do not simply ask whether a hypothetically valid patent's holder would be able to charge, *e.g.*, the high prices that the challenged patent-related term allowed. Rather, they seek to accommodate patent and antitrust policies, finding challenged terms and conditions unlawful unless patent law policy offsets the ***antitrust law*** policy strongly favoring competition.

Thus, contrary to the dissent's suggestion, *post, at 163-165, 186 L. Ed. 2d, at 366-368*, there is nothing novel about our approach. What *does* appear novel are the dissent's suggestions that a patent holder may **[1961]** simply "pa[y] a competitor to **[****25]** respect its patent" and quit its patent invalidity or noninfringement claim without any antitrust scrutiny whatever, *post, at 162, 186 L. Ed. 2d, at 366*, and that "such settlements . . . are a well-known feature of intellectual property litigation," *post, at 168, 186 L. Ed. 2d, at 370*. Closer examination casts doubt on these claims. The dissent does not identify any patent statute that it understands to grant such a right to a patentee, whether expressly or by fair implication. It would be difficult to reconcile the proposed right with ***HN17***[] ***LEdHN[17]***[] [17] the patent-related policy of eliminating unwarranted patent grants so the public will not "continually be required to pay tribute to would-be monopolists without need or justification." *Lear, Inc. v. Adkins, 395 U.S. 653, 670, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)*. And 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 (2003) **[****26]** (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). **[*152]** The cited authorities also indicate that if B has a counterclaim for damages against A, the original infringement plaintiff, A might end up paying B to settle B's counterclaim. Cf. *Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc., 183 F.3d 10, 13 (CA1 1999)* (describing trademark dispute and settlement). 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. See *post, at 168-169, 186 L. Ed. 2d, at 367*. We cannot agree. ***HN18***[] ***LEdHN[18]***[] [18] In the traditional examples cited above, a **[***360]** 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 **[****27]** 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. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)* ("[C]ollusion" is "the supreme evil of antitrust").

[2234]** Finally, the Hatch-Waxman Act itself does not embody a statutory policy that supports the Eleventh Circuit's view. Rather, the general procompetitive thrust of the statute, its specific provisions facilitating challenges to a patent's validity, see Part I-A, *supra*, and its later-added provisions requiring parties to a patent dispute triggered by a paragraph IV filing to report settlement terms to the FTC and the Antitrust Division of the Department of Justice, all suggest the contrary. See *§§1112-1113, 117 Stat. 2461-2462*. Those interested in legislative history may also wish to examine the statements of individual Members of Congress condemning reverse payment settlements in advance of the 2003 amendments. **[*153]** **[*154]** See, *e.g.,* 148 Cong. Rec. 14437 (2002) (remarks of Sen. Hatch) ("It was and is very clear that the [Hatch-Waxman Act] was not designed **[****28]** to allow deals between brand and generic companies to delay competition"); 146 Cong. Rec. 18774 (2000) (remarks of Rep. Waxman) (introducing bill to deter companies from "strik[ing] collusive agreements to trade multimillion dollar payoffs by the brand company for delays in the introduction of lower cost, generic alternatives").

B

The Eleventh Circuit's conclusion finds some degree of support in ***HN19***[] ***LEdHN[19]***[] [19] a general legal policy favoring the settlement of disputes. *677 F.3d, at 1313-1314*. See also *Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1074-1075 (2005)* (same); *In re Tamoxifen Citrate, 466 F.3d, at 202* (noting public's "'strong interest in settlement'" of complex and expensive cases). 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. Any such litigation will prove time consuming, complex, and expensive. The antitrust **[1962]** game, the Circuit may believe, would not be worth that litigation candle.

We recognize the value of settlements and the patent litigation **[****29]** 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, 106 S. Ct. 2009, 90 L. Ed. 2d 445* (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 **[***361]** the patent were held invalid or not infringed by the generic product. Suppose, for example, that the exclusive right to sell produces $50 million in supracompetitive profits per year for the patentee. And suppose further that the patent has 10 more years to run. Continued litigation, if it results in patent invalidation or a finding of noninfringement, could cost the patentee $500 million in lost revenues, 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 **[****30]** 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, potentially producing the full patent-related $500 million monopoly return while dividing that return between **[**2235]** 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 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 **[****31]** 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, **[*155]** 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, ***HN20***[] ***LEdHN[20]***[] [20] 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 **[****32]** 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, ***HN21***[] ***LEdHN[21]***[] [21] 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 **[***362]** 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 174-176, 186 L. Ed. 2d, at 373-374*, 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 **[1963]** §15.3, p. **[****33]** 15-45, n. 161 (2d ed. Supp. 2011). It may well be that Hatch-Waxman's **[*156]** 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 **[**2236]** unjustified. See 7 *id*., ¶1504, at 410-415, *California Dental Ass'n v. FTC, 526 U.S. 756, 786-787, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)* (Breyer, J., concurring in part and dissenting in part). As the FTC admits, offsetting or redeeming virtues are sometimes present. Brief for Petitioner 37-39. The reverse payment, for example, may amount to no more than a rough approximation of the litigation expenses saved through the settlement. That payment may reflect compensation for other services that the generic has promised to perform—such as distributing the patented item or helping to develop **[****34]** a market for that item. There may be other justifications. 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. ***HN22***[] ***LEdHN[22]***[] [22] 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. See, *e.g., Indiana Federation of Dentists, 476 U.S., at 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445*; 7 Areeda ¶¶1504a-1504b, at 401-404.

[*157] *Third*, where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice. See *id.*, ¶1503, at 392-393. At least, the "size of the payment from a branded drug manufacturer to a prospective generic is itself a strong **[****35]** indicator of power"—namely, the power to charge prices higher than the competitive level. 12 *id.*, ¶2046, at 351. An important patent itself helps to aensure such power. Neither is a firm without that power likely to pay "large sums" to induce **[***363]** "others to stay out of its market." *Ibid.* In any event, the FTC 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. See Brief for Petitioner 45.

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, and there is no need to take that drastic step. That is because ***HN23***[] ***LEdHN[23]***[] [23] it is normally not necessary to litigate patent validity to answer the antitrust question (unless, perhaps, to determine whether the patent litigation is a sham, see *677 F.3d, at 1312*). An unexplained large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival. And that fact, in **[****36]** 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. **[*158]** In a word, the size of the unexplained reverse payment can provide a workable surrogate for a patent's **[**2237]** weakness, all without forcing a court to conduct a detailed exploration of the validity of the patent itself. 12 Areeda ¶2046, at 350-352.

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, **[1964]** without the patentee paying **[****37]** the challenger to stay out prior to that point. ***HN24***[] ***LEdHN[24]***[] [24] 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 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.

[*364]** III

The **[****38]** FTC urges us to hold that reverse payment settlement agreements are presumptively unlawful and that courts re **[*159]** viewing 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, 119 S. Ct. 1604, 143 L. Ed. 2d 935* ("[Q]uick-look analysis in effect" shifts to "a defendant the burden to show empirical evidence of procompetitive effects"); 7 Areeda ¶1508, at 435-440. ***HN25***[] ***LEdHN[25]***[] [25] We decline to do so. In *California Dental*, we held (unanimously) that ***HN26***[] ***LEdHN[26]***[] [26] 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, 119 S. Ct. 1604, 143 L. Ed. 2d 935*; *id., at 781, 119 S. Ct. 1604, 143 L. Ed. 2d 935* (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 **[****39]** 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 prodefense theory. As a leading antitrust scholar has pointed out, ***HN27***[] ***LEdHN[27]***[] [27] "'[t]here is always something of a sliding scale in appraising reasonableness,'" **[**2238]** and as such "'the quality of proof required should vary with the circumstances.'" *California Dental, supra, at 780, 119 S. Ct. 1604, 143 L. Ed. 2d 935* (quoting with approval 7 Areeda ¶1507, at 402 (1986)).

HN28[] ***LEdHN[28]***[] [28] As in **[****40]** other areas of law, trial courts can structure antitrust litigation so as to avoid, on the one hand, the use of **[*160]** 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. See 7 *id.,* ¶1508c, at 438-440. 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.

It is so ordered.

Justice Alito took no part in the consideration or decision of this case.

Dissent by: Roberts

Dissent

[*365]** Chief Justice **Roberts**, with whom Justice **Scalia** and Justice **Thomas** join, dissenting.

Solvay Pharmaceuticals holds a patent. It sued two generic drug manufacturers that it alleged were infringing that patent. Those companies counterclaimed, contending the patent was invalid and that, in any event, their products did not infringe. The parties litigated for three years before settling on these terms: Solvay agreed to pay the generics millions of dollars **[****41]** and to allow them into the market five years before the patent was set to expire; in exchange, the generics agreed to provide certain services (help with marketing and manufacturing) **[1965]** and to honor Solvay's patent. The Federal Trade Commission alleges that such a settlement violates the antitrust laws. The question is how to assess that claim.

A patent carves out an exception to the applicability of antitrust laws. The correct approach should therefore be to ask whether the settlement gives Solvay monopoly power beyond what the patent already gave it. The Court, however, departs from this approach, and would instead use ***antitrust law***'s amorphous rule of reason to inquire into the anticompetitive effects of such settlements. This novel approach **[*161]** is without support in any statute, and will discourage the settlement of patent litigation. I respectfully dissent.

I

The point of ***antitrust law*** is to encourage competitive markets to promote consumer welfare. The point of patent law is to grant limited monopolies as a way of encouraging innovation. Thus, a patent grants "the right to exclude others from profiting by the patented invention." *Dawson Chemical Co. v. Rohm & Haas Co., 448 U.S. 176, 215, 100 S. Ct. 2601, 65 L. Ed. 2d 696 (1980)*. **[****42]** In doing so it provides an exception to ***antitrust law***, and the scope of the patent—*i.e.*, the rights conferred by the patent—forms the zone within which the patent holder may operate without facing antitrust liability.

This should go without saying, in part because we've said it so many times. *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)* ("'A patent . . . is an exception to the general rule against monopolies'"); *United States v. Line Material Co., 333 U.S. 287, 300, 68 S. Ct. 550, 92 L. Ed. 701 (1948)* ("[T]he precise terms of the grant define the limits of a patentee's monopoly and the area in which the patentee is freed from competition"); **[**2239]** *United States v. General Elec. Co., 272 U.S. 476, 485,* 47 S. Ct. 192, 71 L. Ed. 362 (1926) ("It is only when . . . [the patentee] steps out of the scope of his patent rights" that he comes within the operation of the Sherman Act); Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 24, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964) (similar). Thus, although it is *per se* unlawful to fix prices under ***antitrust law***, we have long recognized that a patent holder is entitled to license a competitor to sell its product on the condition that the competitor charge a certain, fixed price. See, *e.g.,* General Elec. Co., supra, at 488-490, 47 S. Ct. 192, 71 L. Ed. 362.

We **[****43]** have never held that it violates ***antitrust law*** for a competitor to refrain from challenging a patent. And **[***366]** by extension, we have long recognized that the settlement of patent litigation does not by itself violate the antitrust laws. Standard Oil Co. (Indiana) v. United States, 283 U.S. 163, 171, 51 S. Ct. 421, 75 L. Ed. 926 **[*162]** (1931) ("Where there are legitimately conflicting claims or threatened interferences, a settlement by agreement, rather than litigation, is not precluded by the [Sherman] Act"). Like most litigation, patent litigation is settled all the time, and such settlements—which can include agreements that clearly violate ***antitrust law***, such as licenses that fix prices, or agreements among competitors to divide territory—do not ordinarily subject the litigants to antitrust liability. See 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust §7.3, pp. 7-13 to 7-15 (2d ed. 2003) (hereinafter Hovenkamp).

The key, of course, is that the patent holder—when doing anything, including settling—must act within the scope of the patent. If its actions go beyond the monopoly powers conferred by the patent, we have held that such actions are subject to antitrust scrutiny. See, *e.g.*, United States v. Singer Mfg. Co., 374 U.S. 174, 196-197, 83 S. Ct. 1773, 10 L. Ed. 2d 823, 1963 Dec. Comm'r Pat. 547 (1963). **[****44]** If its actions are within the scope of the patent, they are not subject to antitrust scrutiny, with two exceptions concededly not applicable here: (1) when the parties settle sham litigation, cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993); and (2) when the litigation involves a patent obtained through fraud on the Patent and Trademark Office. Walker Process Equipment, supra, at 177, 86 S. Ct. 347, 15 L. Ed. 2d 247.

Thus, under our precedent, this is a fairly straight forward case. Solvay paid a competitor to respect its patent—conduct which did not exceed the scope of its patent. No one alleges that there was sham litigation, or that Solvay's patent was obtained through fraud on the PTO. As in any settlement, Solvay gave its competitors something of value (money) and, in exchange, its competitors gave it something of value (dropping their legal claims). In doing so, they put an end to litigation that had been dragging on for three years. Ordinarily, we would think this a good thing.

[1966] **[*163]** II

Today, however, the Court announces a new rule. It is willing to accept that Solvay's actions did not exceed the scope of its patent. Ante, at 147, 186 L. Ed. 2d, at 356. But it does not agree that **[****45]** this is enough to "immunize the agreement from antitrust attack." *Ibid.* According to the majority, if a patent holder settles litigation by paying an alleged infringer a "large and unjustified" payment, in exchange for having the alleged infringer honor the patent, a court should employ the antitrust rule of reason to determine whether the settlement violates ***antitrust law***. Ante, at 158, 186 L. Ed. 2d, at 363.

The Court's justifications for this holding are unpersuasive. First, the majority explains that "[t]he patent here may or may **[**2240]** not be valid, and may or may not be infringed." Ante, at 147, 186 L. Ed. 2d, at 356. Because there is "uncertainty" about whether the patent is actually valid, the Court says that any questions regarding the legality of the settlement should be "measur[ed]" by "procompetitive antitrust policies," rather than "patent law policy." Ante, at 148, 186 L. Ed. **[***367]** 2d, at 357. This simply states the conclusion. The difficulty with such an approach is that a patent holder acting within the scope of its patent has an obvious defense to any antitrust suit: that its patent allows it to engage in conduct that would otherwise violate the antitrust laws. But again, that's the whole point of a patent: to confer a limited monopoly. The problem, as **[****46]** the Court correctly recognizes, is that we're not quite certain if the patent is actually valid, or if the competitor is infringing it. But that is always the case, and is plainly a question of patent law.

The majority, however, would assess those patent law issues according to "antitrust policies." According to the majority, this is what the Court did in *Line Material—i.e.*, it "accommodat[ed]" antitrust principles and struck a "balance" between patent and ***antitrust law***. *Ante, at 148, 186 L. Ed. 2d, at 357*. But the Court in *Line Material* did no such thing. Rather, it explained **[*164]** that it is "well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act *beyond the limits of the patent monopoly*." *333 U.S., at 308, 68 S. Ct. 550, 92 L. Ed. 701* (emphasis added). It then, in the very next sentence, stated that "[b]y aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act." *Ibid*. That second sentence follows only if such conduct—the aggregation of multiple patents—goes "beyond the limits of the patent monopoly," which is precisely what the Court concluded. See *id., at 312, 68 S. Ct. 550, 92 L. Ed. 701* ("There is *no suggestion in the patent* ***[****47]*** *statutes* of authority to combine with other patent owners to fix prices on articles covered by the respective patents" (emphasis added)). The Court stressed, over and over, that a patent holder does not violate the antitrust laws when it acts within the scope of its patent. See *id., at 305, 68 S. Ct. 550, 92 L. Ed. 701* ("Within the limits of the patentee's rights under his patent, monopoly of the process or product by him is authorized by the patent statutes"); *id., at 310, 68 S. Ct. 550, 92 L. Ed. 701* ("price limitations on patented devices *beyond the limits of a patent monopoly* violate the Sherman Act" (emphasis added)).

The majority suggests that "[w]hether a particular restraint lies 'beyond the limits of the patent monopoly' is a *conclusion* that flows from" applying traditional antitrust principles. *Ante, at 149, 186 L. Ed. 2d, at 357*. It seems to have in mind a regime where courts ignore the patent, and simply conduct an antitrust analysis of the settlement without regard to the validity of the patent. But a patent holder acting within the scope of its patent does not engage in any unlawful anticompetitive behavior; it is simply exercising the monopoly rights granted to it by the Government. Its behavior would be unlawful only if its patent were invalid or not **[****48]** infringed. And the scope of the patent—*i.e.*, what rights are conferred by the *patent*—should be determined by reference to *patent law*. While it is conceivable to set up a legal system where you assess the validity of patents or questions of infringement **[*165]** by bringing an antitrust suit, neither the majority nor the Government suggests that Congress has done so.

Second, the majority contends that "this Court's precedents make clear that patent-related settlement agreements can sometimes violate the antitrust **[***368]** laws." *Ibid*. For this carefully worded proposition, it cites *Singer Manufacturing Co.,* ***[**2241]*** *United States v. New Wrinkle, Inc., 342 U.S. 371, 72 S. Ct. 350, 96 L. Ed. 417, 1952 Dec. Comm'r Pat. 411 (1952)*, and *Standard Oil Co. (Indiana)*. But each of those cases stands for the same, uncontroversial point: that when a patent holder acts *outside* the scope of its patent, it is no longer protected from antitrust scrutiny by the patent.

[1967] To begin, the majority's description of *Singer* is inaccurate. In *Singer*, several patent holders with competing claims entered into a settlement agreement in which they cross-licensed their patents to each other, and did so in order to disadvantage Japanese competition. See *374 U.S., at 194-195, 83 S. Ct. 1773, 10 L. Ed. 2d 823* (finding that the **[****49]** agreement had "a common purpose to suppress the Japanese machine competition in the United States" (footnote omitted)). According to the majority, the Court in *Singer* "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." *Ante, at 149, 186 L. Ed. 2d, at 358*. Rather, the majority contends, *Singer* held that this agreement violated the antitrust laws because "in important part . . . '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.'" *Ante, at 149, 186 L. Ed. 2d, at 357* (quoting *Singer, 374 U.S., at 199, 83 S. Ct. 1773, 10 L. Ed. 2d 823* (White, J., concurring)). But the majority in *Singer* certainly *did* ask whether patent law permitted such an arrangement, concluding that it did not. See *id., at 196-197, 83 S. Ct. 1773, 10 L. Ed. 2d 823* (reiterating that it "is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act *beyond the limits of the patent monopoly*" and holding that "those limitations have been exceeded in this case" (emphasis added; internal quotation marks omitted)); **[*166]** see also Hovenkamp §7.2b, at 7-8, **[****50]** n. 15 (citing *Singer* as a quintessential case in which patent holders were subject to antitrust liability *because* their settlement agreement went beyond the scope of their patents and thus conferred monopoly power beyond what the patent lawfully authorized). Even Justice White's concurrence, on which the majority relies, emphasized that the conduct at issue in *Singer*—collusion between patent holders to exclude Japanese competition and to prevent disclosure of prior art—was not authorized by the patent laws. *374 U.S., at 197, 200, 83 S. Ct. 1773, 10 L. Ed. 2d 823*.

New Wrinkle is to the same effect. There, the Court explained that because "[p]rice control through cross-licensing [is] *barred as beyond the patent monopoly*," an "arrangement . . . made between patent holders to pool their patents and fix prices on the products for themselves and their licensees . . . plainly violate[s] the Sherman Act." 342 U.S., at 379, 380, 72 S. Ct. 350, 96 L. Ed. 417 (emphasis added). As the Court further explained, a patent holder may not, "'acting in concert with all members of an industry, . . . issue substantially identical licenses to all members of the industry under the terms of which the industry is completely regimented, the production of competitive unpatented **[****51]** products suppressed, a class of distributors squeezed out, and prices on unpatented products stabilized.'" Id., at 379-380, 72 S. Ct. 350, **[***369]** 96 L. Ed. 417 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 400, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). The majority here, however, ignores this discussion, and instead categorizes the case as "applying antitrust scrutiny to [a] patent settlement." Ante, at 149, 186 L. Ed. 2d, at 358.

Again, in *Standard Oil Co. (Indiana)*, the parties settled claims regarding "competing patented processes for manufacturing an unpatented product," which threatened to create a monopoly over the unpatented product. 283 U.S., at 175, 51 S. Ct. 421, 75 L. Ed. 926. The Court explained that "an **[**2242]** exchange of licenses for the purpose of curtailing the . . . supply of an unpatented product, is beyond the privileges conferred by the patents." Id., at 174, 51 S. Ct. 421, 75 L. Ed. 926.

[*167] The majority is therefore right to suggest that these "precedents make clear that patent-related settlement agreements can *sometimes* violate the antitrust laws." Ante, at 149, 186 L. Ed. 2d, at 367 (emphasis added). The key word is sometimes. And those some times are spelled out in our precedents. Those cases have made very clear that patent settlements—and for that matter, any agreements relating to patents—are subject to antitrust scrutiny **[****52]** if they confer benefits beyond the scope of the patent. This makes sense. A patent exempts its holder from the antitrust laws only insofar as the holder operates within the scope of the patent. When the holder steps outside the scope of the patent, he can no longer use the patent as his defense. The majority points to *no* case where a patent settlement was subject to antitrust scrutiny merely because the validity of the patent was uncertain. Not one. It is remarkable, and surely worth something, that in the 123 years since the Sherman Act was passed, we have never let ***antitrust law*** cross that Rubicon.

Next, the majority points to the "general procompetitive thrust" of the Hatch-Waxman Act, the fact that Hatch-Waxman "facilitat[es] challenges to a patent's validity," and its "provisions requiring parties to [such] patent dispute[s] . . . to report settlement terms to the FTC and the Antitrust Division of the Department **[1968]** of Justice." Ante, at 152, 186 L. Ed. 2d, at 360. The Hatch-Waxman Act surely seeks to encourage competition in the drug market. And, like every law, it accomplishes its ends through specific provisions. These provisions, for example, allow generic manufacturers to enter the market without undergoing **[****53]** a duplicative application process; they also grant a 180-day monopoly to the first qualifying generic to commercially market a competing product. See 21 U.S.C. §§355(j)(2)(A)(ii), (iv), 355(j)(5)(B)(iv). So yes, the point of these provisions is to encourage competition. But it should by now be trite—and unnecessary—to say that "no legislation pursues its purposes at all costs" and that "it frustrates rather than effectuates legislative intent simplistically **[*168]** to assume that *whatever* furthers the statute's primary objective must be the law." Rodriguez v. United States, 480 U.S. 522, 525-526, 107 S. Ct. 1391, 94 L. Ed. 2d 533 (1987) (*per curiam*). It is especially disturbing here, where the Court discerns from specific provisions a very broad policy—a "general procompetitive thrust," in its words—and uses that policy to unsettle the established relationship between patent and ***antitrust law***. Ante, at 152, 186 L. Ed. 2d, at 360. Indeed, for **[***370]** whatever it may be worth, Congress has repeatedly declined to enact legislation addressing the issue the Court takes on today. See Brief for Respondent Actavis, Inc., 57 (citing 11 such bills introduced in the House or Senate since 2006).

In addition, it is of no consequence that settlement terms must be reported to the **[****54]** FTC and the Department of Justice. Such a requirement does not increase the role of ***antitrust law*** in scrutinizing patent settlements. Rather, it ensures that such terms are scrutinized consistent with existing ***antitrust law***. In other words, it ensures that the FTC and Antitrust Division can review the settlements to make sure that they do not confer monopoly power beyond the scope of the patent.

The majority suggests that "[a]pparently most if not all reverse payment settlement agreements arise in the context of pharmaceutical drug regulation." Ante, at 141, 186 L. Ed. 2d, at 353. This claim is not supported empirically by anything the majority cites, and **[**2243]** seems unlikely. The term "reverse payment agreement"—coined to create the impression that such settlements are unique—simply highlights the fact that the party suing ends up paying. But this is no anomaly, nor is it evidence of a nefarious plot; it simply results from the fact that the patent holder plaintiff is a defendant against an invalidity counterclaim—not a rare situation in intellectual property litigation. Whatever one might call them, such settlements—paying an alleged infringer to drop its invalidity claim—are a well-known feature of intellectual **[****55]** property litigation, and reflect an intuitive way to settle such disputes. **[*169]** See *Metro-Goldwyn Mayer, Inc. v. 007 Safety Prods., Inc., 183 F.3d 10, 13 (CA1 1999)*; see also Schildkraut, Patent-Splitting Settlements and the Reverse Payment Fallacy, 71 Antitrust L. J. 1033, 1033, 1046-1049 (2003-2004); Brief for Respondent Actavis, Inc., 54, n. 20 (citing examples). To the extent there are not scores and scores of these settlements to point to, this is because such settlements—outside the context of Hatch-Waxman—are private agreements that for obvious reasons are generally not appealed, nor publicly available.

The majority suggests that reverse-payment agreements are distinct because "a party with no claim for damages . . . walks away with money simply so it will stay away from the patentee's market." Ante, at 152, 186 L. Ed. 2d, at 360. Again a distinction without a difference. While the alleged infringer may not be suing for the patent holder's *money*, it is suing for the right to use and market the (intellectual) property, which is worth money.

Finally, the majority complains that nothing in "any patent statute" gives patent holders the right to settle when faced with allegations of invalidity. Ante, at 151, 186 L. Ed. 2d, at 359. But the right to settle **[****56]** generally accompanies the right to litigate in the first place; no one contends that drivers in an automobile accident may not settle their competing claims merely because no statute grants them that authority. The majority suggests that such a right makes it harder to "eliminat[e] unwarranted patent grants." *Ibid.* That may be so, but such a result—true of all patent settlements—is no reason to adjudicate questions of patent law under antitrust principles. Our cases establish that ***antitrust law*** has no business prying into a patent settlement so long as that settlement confers to the patent holder no monopoly power **[***371]** beyond what the patent itself conferred—unless, of course, the patent was invalid, but that again is a question of patent law, not ***antitrust law***.

In sum, none of the Court's reasons supports its conclusion that a patent holder, when settling a claim that its patent is **[*170]** invalid, is not immunized by the fact that it is acting within **[1969]** the scope of its patent. And I fear the Court's attempt to limit its holding to the context of patent settlements under Hatch-Waxman will not long hold.

III

The majority's rule will discourage settlement of patent litigation. Simply put, there would **[****57]** be no incentive to settle if, immediately after settling, the parties would have to litigate the same issue—the question of patent validity—as part of a defense against an antitrust suit. In that suit, the alleged infringer would be in the especially awkward position of being for the patent after being against it.

This is unfortunate because patent litigation is particularly complex, and particularly costly. As one treatise noted, "[t]he median patent case that goes to trial costs each side $1.5 million in legal fees" alone. Hovenkamp §7.1c, at 7-5, n. 6. One study found that the cost of litigation in this specific context—a generic challenging **[**2244]** a brand name pharmaceutical patent—was about $10 million per suit. See Herman, Note, The Stay Dilemma: Examining Brand and Generic Incentives for Delaying the Resolution of Pharmaceutical Patent Litigation, *111 Colum. L. Rev. 1788, 1795, n. 41 (2011)* (citing M. Goodman, G. Nachman, & L. Chen, Morgan Stanley Equity Research, Quantifying the Impact from Authorized Generics 9 (2004)).

The Court acknowledges these problems but nonetheless offers "five sets of considerations" that it tells us overcome these concerns: (1) Sometimes patent settlements **[****58]** will have "'genuine adverse effects on competition'"; (2) "these anticompetitive consequences will at least sometimes prove unjustified"; (3) "where a reverse payment threatens to work unjustified anticompetitive harm, the patentee likely possesses the power to bring that harm about in practice"; (4) "it is normally not necessary to litigate patent validity to answer the antitrust question" because "[a]n unexplained **[*171]** large reverse payment itself would normally suggest that the patentee has serious doubts about the patent's survival," and using a "payment . . . to prevent *the risk* of competition . . . constitutes the relevant anticompetitive harm"; and (5) parties may still "settle in other ways," such as "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." *Ante, at 153-158, 186 L. Ed. 2d, at 363* (emphasis added).

Almost all of these are unresponsive to the basic problem that settling a patent claim *cannot possibly* impose unlawful anticompetitive harm if the patent holder is acting within the scope of a valid patent and therefore permitted to do precisely what the antitrust suit claims **[****59]** is unlawful. This means that in any such antitrust suit, the defendant (patent holder) will want to use the validity of his patent as a defense—in other words, he'll want to say "I can do this because I have a valid patent that lets me do this." I therefore don't see how the majority can conclude that it won't normally be "necessary to litigate patent **[***372]** validity to answer the antitrust question," *ante, at 157, 186 L. Ed. 2d, at 363*, unless it means to suggest that the defendant (patent holder) cannot raise his patent as a defense in an antitrust suit. But depriving him of such a defense—if that's what the majority means to do—defeats the point of the patent, which is to confer a *lawful* monopoly on its holder.

The majority seems to think that *even if* the patent is valid, a patent holder violates the antitrust laws merely because the settlement took away some chance that his patent would be declared invalid by a court. See *ibid*. ("payment . . . to prevent *the risk* of competition . . . constitutes the relevant anticompetitive harm" (emphasis added)). This is flawed for several reasons.

First, a patent is either valid or invalid. The parties of course don't know the answer with certainty at the outset of **[****60]** litigation; hence the litigation. But the same is true of any **[*172]** hard legal question that is yet to be adjudicated. Just because people don't know the answer doesn't mean there is no answer until a court declares one. Yet the majority would impose antitrust liability based on the parties' subjective uncertainty about that legal conclusion.

The Court does so on the assumption that offering a "large" sum is reliable evidence that the patent holder has serious doubts about the patent. Not true. A patent holder may be 95% sure about the validity of its patent, but particularly risk averse or litigation averse, and willing to pay a good deal of money to rid itself of the 5% chance of a finding of invalidity. What is actually motivating a patent holder **[**2245]** is apparently a question district courts will have to resolve on a case-by-case basis. The task of trying to discern whether a patent **[1970]** holder is motivated by uncertainty about its patent, or other legitimate factors like risk aversion, will be made all the more difficult by the fact that much of the evidence about the party's motivation may be embedded in legal advice from its attorney, which would presumably be shielded from discovery.

Second, **[****61]** the majority's position leads to absurd results. Let's say in 2005, a patent holder sues a competitor for infringement and faces a counterclaim that its patent is invalid. The patent holder determines that the risk of losing on the question of validity is low, but after a year of litigating, grows increasingly risk averse, tired of litigation, and concerned about the company's image, so it pays the competitor a "large" payment, *ante, at 157, 186 L. Ed. 2d, at 363*, in exchange for having the competitor honor its patent. Then let's say in 2006, a different competitor, inspired by the first competitor's success, sues the patent holder and seeks a similar payment. The patent holder, recognizing that this dynamic is unsustainable, litigates this suit to conclusion, all the way to the Supreme Court, which unanimously decides the patent was valid. According to the majority, the first settlement would violate the antitrust laws even though the patent was ultimately **[*173]** declared valid, because that first settlement took away some chance that the patent would be invalidated in the first go around. Under this approach, a patent holder may be found liable under ***antitrust law*** for doing what its perfectly valid patent allowed **[****62]** it to do in the first place; its sin was to settle, **[***373]** rather than prove the correctness of its position by litigating until the bitter end.

Third, this logic—that taking away any *chance* that a patent will be invalidated is itself an antitrust problem—cannot possibly be limited to reverse-payment agreements, or those that are "large." *Ibid*. The Government's brief acknowledges as much, suggesting that if antitrust scrutiny is invited for such cash payments, it may also be required for "other consideration" and "alternative arrangements." Brief for Petitioner 36, n. 7. For example, when a patent holder licenses its product to a licensee at a fixed monopoly price, surely it takes away some chance that its patent will be challenged by that licensee. According to the majority's reasoning, that's an antitrust problem that must be analyzed under the rule of reason. But see *General Elec. Co., 272 U.S., at 488, 47 S. Ct. 192, 71 L. Ed. 362* (holding that a patent holder may license its invention at a fixed price). Indeed, the Court's own solution—that patent holders should negotiate to allow generics into the market sooner, rather than paying them money—also takes away some chance that the generic would have litigated until **[****63]** the patent was invalidated.

Thus, although the question posed by this case is fundamentally a question of patent law—*i.e*., whether Solvay's patent was valid and therefore permitted Solvay to pay competitors to honor the scope of its patent—the majority declares that such questions should henceforth be scrutinized by ***antitrust law***'s unruly rule of reason. Good luck to the district courts that must, when faced with a patent settlement, weigh the "likely anticompetitive effects, redeeming virtues, market power, and potentially offsetting legal considerations present in the circumstances." *Ante, at 149, 186 L. Ed. 2d, at 357*; **[*174]** but see *Pac. Bell Tel. Co. v. linkLine Communications, Inc., 555 U.S. 438, 452, 129 S. Ct. 1109, 172 L. Ed. 2d 836 (2009)* ("We have repeatedly emphasized the importance of clear rules in ***antitrust law***").

IV

The majority invokes "procompetitive antitrust policies," *ante, at 148, 186 L. Ed. 2d, at 357*, but misses **[**2246]** the basic point that patent laws promote consumer interests in a different way, by providing protection against competition. As one treatise explains:

> "The purpose of the rule of reason is to determine whether, on balance, a practice is reasonably likely to be anticompetitive or competitively harmless—that is, whether it yields lower **[****64]** or higher marketwide output. By contrast, patent policy encompasses a set of judgments about the proper tradeoff between competition and the incentive to innovate over the *long* run. Antitrust's rule of reason was not designed for such judgments and is not adept at making them." Hovenkamp §7.3, at 7-13 (footnote omitted).

The majority recognizes that "a high reverse payment" may "signal to other potential challengers that the patentee lacks confidence in its patent, thereby provoking additional challenges." *Ante, at 154-155, 186 L. Ed. 2d, at 361*. It brushes this off, however, because of two features of Hatch-Waxman that make it "'not necessarily so.'" *Ante, at 155, 186 L. Ed. 2d, at 361*. First, it points out that the first challenger gets a 180-day exclusive period to market a generic version of the brand name drug, and **[1971]** that subsequent challengers **[***374]** cannot secure that exclusivity period—meaning when the patent holder buys off the first challenger, it has bought off its most motivated competitor. There are two problems with this argument. First, according to the Food and Drug Administration, all manufacturers who file on the first day are considered "first applicants" who share the exclusivity period. Thus, if ten generics file an application **[****65]** to market a generic drug on the first day, all will **[*175]** be considered "first applicants." See *21 U.S.C. §355(j)(5)(B)(iv)(II)(bb)*; see also FDA, Guidance for Industry: 180-Day Exclusivity When Multiple ANDAs Are Submitted on the Same Day 4 (July 2003). This is not an unusual occurrence. See Brief for Generic Pharmaceutical Association as *Amicus Curiae* 23-24 (Generic Brief) (citing FTC data indicating that some drugs "have been subject to as many as *sixteen* first-day" generic applications; that in 2005, the average number of first-day applications per drug was 11; and that between 2002 and 2008, the yearly average never dropped below three first-day applications per drug).

Second, and more fundamentally, the 180 days of exclusivity simply provides *more* incentive for generic challenges. Even if a subsequent generic would not be entitled to this additional incentive, it will have as much or nearly as much incentive to challenge the patent as a potential challenger would in any other context outside of Hatch-Waxman, where there is no 180-day exclusivity period. And a patent holder who gives away notably large sums of money because it is, as the majority surmises, concerned about the strength of its patent, **[****66]** would be putting blood in water where sharks are always near.

The majority also points to the fact that, under Hatch-Waxman, the FDA is enjoined from approving a generic's application to market a drug for 30 months if the brand name sues the generic for patent infringement within 45 days of that application being filed. *Ante, at 155, 186 L. Ed. 2d, at 361* (citing *21 U.S.C. §355(j)(5)(B)(iii)*). According to the majority, this provision will chill subsequent generics from challenging the patent (because they will have to wait 30 months before receiving FDA approval to market their drug). But this overlooks an important feature of the law: The FDA may approve the application before the 30 months are up "if before the expiration of [the 30 months,] the district court decides that the patent is invalid or not infringed." *§355(j)(5)(B)(iii)(I)*. And even if the FDA did not have to wait 30 months, it **[*176]** is far **[**2247]** from clear that a generic would want to market a drug prior to obtaining a judgment of invalidity or noninfringement. Doing so may expose it to ruinous liability for infringement.

The irony of all this is that the majority's decision may very well discourage generics from challenging pharmaceutical patents in **[****67]** the first place. Patent litigation is costly, time consuming, and uncertain. See *Cybor Corp. v. FAS Techs., Inc., 138 F.3d 1448, 1476, n. 4 (CA Fed. 1998)* (opinion of Rader, J.) (en banc) (discussing study showing that the Federal Circuit wholly or partially reversed in almost 40% of claim construction appeals in a 30-month period); Generic Brief 16 (citing a 2010 study analyzing the prior decade's cases and showing that generics prevailed in 82 cases and lost in 89 cases). Generics "enter this risky terrain **[***375]** only after careful analysis of the potential gains if they prevail and the potential exposure if they lose." *Id*., at 19. Taking the prospect of settlements off the table—or limiting settlements to an earlier entry date for the generic, which may still be many years in the future—puts a damper on the generic's expected value going into litigation, and decreases its incentive to sue in the first place. The majority assures us, with no support, that everything will be okay because the parties can settle by simply negotiating an earlier entry date for the generic drug manufacturer, rather than settling with money. *Ante, at 158, 186 L. Ed. 2d, at 362*. **[****68]** But it's a matter of common sense, confirmed by experience, that parties are more likely to settle when they have a broader set of valuable things to trade. See Brief for Mediation and Negotiation Professionals as *Amici Curiae* 6-8.

V

The majority today departs from the settled approach separating patent and ***antitrust law***, weakens the protections afforded to innovators by patents, frustrates the public policy in favor of settling, and likely undermines the very policy it seeks to promote by forcing generics who step into the litigation **[*177]** ring to do so without the prospect of cash settlements. I would keep things as they were and not subject basic questions of patent law to an unbounded inquiry under ***antitrust law***, with its treble damages and famously burdensome discovery. **[1972]** See *15 U.S.C. §15*; *Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558-559, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. I respectfully dissent.

References

21 U.S.C.S. § 355

Chisum on Patents §§10.09, 19.03 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices §§55, 115

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What constitutes vertical price fixing in violation of § 1 of Sherman Act (*15 U.S.C.S. § 1*)--Supreme Court cases. *168 L. Ed. 2d 847*.

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Applicability **[****69]** of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

Advertising of "free gifts" and representations as to price of goods as unfair method of competition or practice within *§ 5(a)* of the Federal Trade Commission Act (*15 U.S.C.S. § 45(a)*). *15 L. Ed. 2d 865*.

End of Document

Octane Fitness, LLC v. ICON Health & Fitness, Inc.

Supreme Court of the United States

February 26, 2014, Argued; April 29, 2014, Decided

No. 12-1184

Reporter

572 U.S. 545 *; 134 S. Ct. 1749 **; 188 L. Ed. 2d 816 ***; 2014 U.S. LEXIS 3107 ****; 110 U.S.P.Q.2D (BNA) 1337; 82 U.S.L.W. 4330; 24 Fla. L. Weekly Fed. S 726; 2014 WL 1672251

OCTANE FITNESS, LLC, Petitioner v. ICON HEALTH & FITNESS, INC.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: On remand at *Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 570 Fed. Appx. 936, 2014 U.S. App. LEXIS 13288 (Fed. Cir., July 14, 2014)*

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 496 Fed. Appx. 57, 2012 U.S. App. LEXIS 22096 (Fed. Cir., 2012)

Disposition: Reversed and remanded.

Core Terms

patent, bad faith, district court, baseless, exceptional case, infringement, misconduct, prevailing party, circumstances, fee-shifting, vexatious, immunity, machines, cases

LexisNexis® Headnotes

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN1[] **Collateral Assessments, Attorney Fees**

35 U.S.C.S. § 285 of the Patent Act authorizes a district court to award attorney's fees in patent litigation. It provides, in its entirety, that the court in exceptional cases may award reasonable attorney fees to the prevailing party. *35 U.S.C.S. § 285*.

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN2[] **Collateral Assessments, Attorney Fees**

In Brooks Furniture, the United States Court of Appeals for the Federal Circuit held that a case may be deemed exceptional under 35 U.S.C.S. § 285 only in two limited circumstances: when there has been some material inappropriate conduct, or when the litigation is both brought in subjective bad faith and objectively baseless. Regarding whether the Brooks Furniture framework is consistent with the statutory text, the United States Supreme Court holds that it is not.

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN3[] **Collateral Assessments, Attorney Fees**

Whereas former 35 U.S.C.S. § 70 had specified that a district court could in its discretion award reasonable attorney's fees to the prevailing party, the revised language of 35 U.S.C.S. § 285 (which remains in force today) provides that the court in exceptional cases may award reasonable attorney fees to the prevailing party. The United States Supreme Court has observed, in interpreting the damages provision of the Patent Act, that the addition of the phrase "exceptional cases" to § 285 was for purposes of clarification only. The new provision was substantially the same as § 70, and the "exceptional cases" language was added simply to express the intention of the 1946 statute as shown by its legislative history and as interpreted by the courts. The recodification did not substantively alter the meaning of the statute.

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN4[] **Collateral Assessments, Attorney Fees**

The framework for awarding attorney's fees in patent cases established by the United States Court of Appeals for the Federal Circuit in Brooks Furniture is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts.

Governments > Legislation > Interpretation

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Trademark Law > ... > Damages > Types of Damages > Costs & Attorney Fees

HN5[] **Legislation, Interpretation**

The text of 35 U.S.C.S. § 285 states that the court in exceptional cases may award reasonable attorney fees to the prevailing party. This text is patently clear. It imposes one and only one constraint on district courts' discretion to award attorney's fees in patent litigation: The power is reserved for "exceptional" cases. The Patent Act does not define "exceptional," so it is construed in accordance with its ordinary meaning. In patent law, as in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. In 1952, when Congress used the word in § 285 (and today, for that matter), "exceptional" meant uncommon, rare, or not ordinary. "Exceptional" is defined as out of the ordinary course, unusual, or special. The term "exceptional" in the Lanham Act's identical fee-shifting provision, 15 U.S.C.S. § 1117(a), has been interpreted to mean uncommon or not run-of-the-mill.

Civil Procedure > Judicial Officers > Judges > Discretionary Powers

Copyright Law > ... > Damages > Types of Damages > Costs & Attorney Fees

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN6[] **Judges, Discretionary Powers**

For purposes of awarding attorney's fees under *35 U.S.C.S. § 285*, an “exceptional” case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position, considering both the governing law and the facts of the case, or the unreasonable manner in which the case was litigated. District courts may determine whether a case is “exceptional” in the case-by-case exercise of their discretion, considering the totality of the circumstances. As in the comparable context of the Copyright Act, there is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised in light of the considerations the United States Supreme Court has identified.

Copyright Law > ... > Damages > Types of Damages > Costs & Attorney Fees

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN7[] **Types of Damages, Costs & Attorney Fees**

In determining whether to award fees under a provision in the Copyright Act similar to *35 U.S.C.S. § 285*, district courts can consider a non-exclusive list of factors, including frivolousness, motivation, objective unreasonableness, both in the factual and legal components of the case, and the need in particular circumstances to advance considerations of compensation and deterrence.

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN8[] **Collateral Assessments, Attorney Fees**

In determining whether to award attorney's fees under *35 U.S.C.S. § 285*, sanctionable conduct is not the appropriate benchmark. A district court may award fees in the rare case in which a party’s unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so “exceptional” as to justify an award of fees.

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

HN9[] **Collateral Assessments, Attorney Fees**

For purposes of *35 U.S.C.S. § 285*, a case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award.

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Scope

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom to Petition

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Antitrust & Trade Law > Exemptions & Immunities > Noerr-Pennington Doctrine > Sham Exception

HN10[] **Exemptions & Immunities, Noerr-Pennington Doctrine**

The Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. standard finds no roots in the text of *35 U.S.C.S. § 285*, and it makes little sense in the context of determining whether a case is so "exceptional" as to justify an award of attorney's fees in patent litigation. The United States Supreme Court crafted the Noerr-Pennington doctrine—and carved out only a narrow exception for "sham" litigation—to avoid chilling the exercise of the *First Amendment* right to petition the government for the redress of grievances. Those who petition government for redress are generally immune from antitrust liability. But to the extent that patent suits are similarly protected as acts of petitioning, it is not clear why the shifting of fees in an "exceptional" case would diminish that right. The threat of antitrust liability, and the attendant treble damages, *15 U.S.C.S. § 15*, far more significantly chills the exercise of the right to petition than does the mere shifting of attorney's fees. In the Noerr-Pennington context, defendants seek immunity from a judicial declaration that their filing of a lawsuit was actually unlawful; here, in the context of *§ 285*, they seek immunity from a far less onerous declaration that they should bear the costs of that lawsuit in exceptional cases.

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > Bad Faith Awards

HN11[] **Basis of Recovery, American Rule**

Brooks Furniture is so demanding that it would appear to render *35 U.S.C.S. § 285* largely superfluous. The United States Supreme Court has long recognized a common-law exception to the general "American rule" against fee-shifting—an exception, inherent in the power of the courts that applies for willful disobedience of a court order or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. The Supreme Court has twice declined to construe fee-shifting provisions narrowly on the basis that doing so would render them superfluous, given the background exception to the American rule, and the Court again declines to do so.

Evidence > Burdens of Proof > Clear & Convincing Proof

Patent Law > ... > Damages > Collateral Assessments > Attorney Fees

Evidence > Burdens of Proof > Preponderance of Evidence

HN12[] **Burdens of Proof, Clear & Convincing Proof**

The United States Supreme Court rejects the United States Court of Appeals for the Federal Circuit's requirement that patent litigants establish their entitlement to fees under *35 U.S.C.S. § 285* by clear and convincing evidence. The Supreme Court has not interpreted comparable fee-shifting statutes to require proof of entitlement to fees by clear and convincing evidence. And nothing in *§ 285* justifies such a high standard of proof. *Section 285* demands a simple discretionary inquiry; it imposes no specific evidentiary burden, much less such a high one. Indeed, patent-infringement litigation has always been governed by a preponderance of the evidence standard, and that is the standard generally applicable in civil actions, because it allows both parties to share the risk of error in roughly equal fashion.

Lawyers' Edition Display

Decision

[*816]** Federal Court of Appeals' framework for determining whether patent case was exceptional, so as to merit attorneys' fees award under *35 U.S.C.S. § 285*, held improperly to appropriate Federal District Courts' discretion to award such fees.

Summary

Procedural posture: Respondent patent owner sued defendant manufacturer for patent infringement. The district court granted summary judgment in favor of the manufacturer and denied the manufacturer's motion for attorneys' fees under *35 U.S.C.S. § 285*. The United States Court of Appeals for the Federal Circuit affirmed. The U.S. Supreme Court granted certiorari.

Overview: The patent owner alleged that the manufacturer infringed a patent for an elliptical exercise machine. The district court found that the manufacturer's machines did not infringe the patent, but declined to award attorneys' fees under the Brooks Furniture standard. The Supreme Court held that the Brooks Furniture framework was unduly rigid and impermissibly encumbered the statutory grant of discretion to district courts. *Section 285* imposed only one constraint on district courts' discretion to award attorneys' fees **[****2]** in patent litigation: the power was reserved for "exceptional" cases. An "exceptional" case was simply one that stood out from others with respect to the substantive strength of a party's litigating position or the unreasonable manner in which the case was litigated. District courts were to consider the totality of the circumstances in determining whether a case was "exceptional." It was not necessary for a district court to find independently sanctionable conduct or both objective baselessness and subjective bad faith in order to justify a fee award, nor was clear and convincing evidence required.

Outcome: The judgment was reversed and remanded. 9-0 decision; one Justice did not join as to footnotes 1-3.

Headnotes

[*817]**

COSTS AND FEES §34 > PATENT LITIGATION -- ATTORNEYS' FEES > Headnote:
LEdHN[1][] [1]

35 U.S.C.S. § 285 of the Patent Act authorizes a District Court to award attorneys' fees in patent litigation. It provides, in its entirety, that the court in exceptional cases may award reasonable attorney fees to the prevailing party. *35 U.S.C.S. § 285*.

COSTS AND FEES §34 > PATENT LITIGATION -- ATTORNEYS' FEES > Headnote:
LEdHN[2][] [2]

In Brooks Furniture, the United States Court of Appeals for the Federal Circuit held that a case may be deemed exceptional under *35 U.S.C.S. § 285* only in two limited circumstances: when there has been some material inappropriate conduct, or when the litigation is both brought in subjective bad faith and objectively baseless. Regarding whether the Brooks Furniture framework is consistent with the statutory text, the United States Supreme Court holds that it is not.

STATUTES §178 > PATENT LITIGATION -- ATTORNEYS' FEES -- EXCEPTIONAL CASES > Headnote:
LEdHN[3][] [3]

Whereas former 35 U.S.C.S. § 70 had specified that a District Court could in its discretion award reasonable attorneys' fees to the prevailing party, the revised language of *35 U.S.C.S. § 285* (which remains in force today) provides that the court in exceptional cases may award reasonable attorney fees to the prevailing party. The United States Supreme Court has observed, in interpreting the damages provision of the Patent Act, that the addition of the phrase "exceptional cases" to *§ 285* was for purposes of clarification only. The new provision was substantially the same as § 70, and the "exceptional cases" language was added simply to express the intention of the 1946 statute as shown by its legislative history and as interpreted by the courts. The recodification did not substantively alter the meaning of the statute.

COSTS AND FEES §34 > ATTORNEYS' FEES -- PATENT CASES > Headnote:
LEdHN[4][] [4]

The framework for awarding attorneys' fees in patent cases established by the United States Court of Appeals for the Federal Circuit in Brooks Furniture is unduly rigid, and it impermissibly encumbers the statutory grant of discretion to district courts.

STATUTES §166.7 > PATENT ACT -- EXCEPTIONAL CASES -- ORDINARY MEANING > Headnote:
LEdHN[5][] [5]

The text of *35 U.S.C.S. § 285* states that the court in exceptional cases may award reasonable attorney fees to the prevailing party. This text is patently clear. It imposes one and only one constraint on district courts' discretion to award attorneys' fees in patent litigation: The power is reserved for "exceptional" cases. The Patent Act does not define "exceptional," so it is construed in accordance with its ordinary meaning. In patent law, as in all statutory construction, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning. In 1952, when Congress used the word in *§ 285* (and today, for that matter), "exceptional" meant uncommon, rare, or not ordinary. "Exceptional" is defined as out of the ordinary course, unusual, or special. The term "exceptional" in the Lanham Act's identical fee-shifting provision, *15 U.S.C.S. § 1117(a)*, has been interpreted to mean uncommon or not run-of-the-mill.

[*818]**

COSTS AND FEES §34 > PATENT LITIGATION -- ATTORNEYS' FEES -- JUDICIAL DISCRETION > Headnote:
LEdHN[6][] [6]

For purposes of awarding attorneys' fees under *35 U.S.C.S. § 285*, an "exceptional" case is simply one that stands out from others with respect to the substantive strength of a party's litigating position, considering both the governing law and the facts of the case, or the unreasonable manner in which the case was litigated. District Courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances. As in the comparable context of the Copyright Act, there is no precise rule or formula for making these determinations, but instead equitable discretion should be exercised in light of the considerations the United States Supreme Court has identified.

COPYRIGHT AND LITERARY PROPERTY §22 > FEES AWARD > Headnote:
LEdHN[7][] [7]

In determining whether to award fees under a provision in the Copyright Act similar to *35 U.S.C.S. § 285*, District Courts can consider a non-exclusive list of factors, including frivolousness, motivation, objective unreasonableness, both in the factual and legal components of the case, and the need in particular circumstances to advance considerations of compensation and deterrence.

COSTS AND FEES §34 > PATENT LITIGATION -- ATTORNEYS' FEES -- SANCTIONABLE CONDUCT > Headnote:
LEdHN[8][] [8]

In determining whether to award attorneys' fees under *35 U.S.C.S. § 285*, sanctionable conduct is not the appropriate benchmark. A District Court may award fees in the rare case in which a party's unreasonable conduct--while not necessarily independently sanctionable--is nonetheless so “exceptional” as to justify an award of fees.

COSTS AND FEES §34 > PATENT ACT -- ATTORNEYS' FEES > Headnote:
LEdHN[9][] [9]

For purposes of *35 U.S.C.S. § 285*, a case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award.

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.3 STATUTES §134 > PATENT ACT -- ATTORNEYS' FEES -- NOERR-PENNINGTON DOCTRINE > Headnote:
LEdHN[10][] [10]

The Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. standard finds no roots in the text of *35 U.S.C.S. § 285*, and it makes little sense in the context of determining whether a case is so “exceptional” as to justify an award of attorneys' fees in patent litigation. The United States Supreme Court crafted the Noerr-Pennington doctrine--and carved out only a narrow exception for “sham” litigation--to avoid chilling the exercise of the *First Amendment* right to petition the government for the redress of grievances. Those who petition government for redress are generally immune from antitrust liability. But to the extent that patent suits are similarly protected as acts of petitioning, it is not clear why the shifting of fees in an “exceptional” case would diminish that right. The threat of antitrust liability, and the attendant treble damages, *15 U.S.C.S. § 15*, far more significantly chills the exercise of the right to petition than does the mere shifting of attorneys' fees. In the Noerr-Pennington context, defendants seek immunity from a judicial declaration that their filing of a lawsuit was actually unlawful; here, in the context of *§ 285*, they seek immunity from a far less onerous declaration that they should bear the costs of that lawsuit in exceptional cases.

[*819]**

COSTS AND FEES §33 > RULE AGAINST FEE SHIFTING -- EXCEPTION > Headnote:
LEdHN[11][] [11]

Brooks Furniture is so demanding that it would appear to render *35 U.S.C.S. § 285* largely superfluous. The United States Supreme Court has long recognized a common-law exception to the general "American rule" against fee-shifting--an exception, inherent in the power of the courts that applies for willful disobedience of a court order or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. The Supreme Court has twice declined to construe fee-shifting provisions narrowly on the basis that doing so would render them superfluous, given the background exception to the American rule, and the court again declines to do so.

COSTS AND FEES §34 EVIDENCE §869.7 > PATENT ACT -- ATTORNEYS' FEES -- STANDARD OF PROOF > Headnote:
LEdHN[12][] [12]

The United States Supreme Court rejects the United States Court of Appeals for the Federal Circuit's requirement that patent litigants establish their entitlement to fees under *35 U.S.C.S. § 285* by clear and convincing evidence. The Supreme Court has not interpreted comparable fee-shifting statutes to require proof of entitlement to fees by clear and convincing evidence. And nothing in *§ 285* justifies such a high standard of proof. *Section 285* demands a simple discretionary inquiry; it imposes no specific evidentiary burden, much less such a high one. Indeed, patent-infringement litigation has always been governed by a preponderance of the evidence standard, and that is the standard generally applicable in civil actions, because it allows both parties to share the risk of error in roughly equal fashion.

Syllabus

[*545] **[***820]** **[**1751]** The Patent Act's fee-shifting provision authorizes district courts to award attorney's fees to prevailing parties in "exceptional cases." *35 U. S. C. § 285*. In *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc., 393 F.3d 1378, 1381*, the Federal Circuit defined an "exceptional case" as one which either involves "material inappropriate conduct" or is both "objectively baseless" and "brought in subjective bad faith." *Brooks Furniture* also requires that parties establish the "exceptional" nature of a case by "clear and convincing evidence." *Id., at 1382*.

Respondent ICON Health & Fitness, **[****3]** Inc., sued petitioner Octane Fitness, LLC, for patent infringement. The District Court granted summary judgment to Octane. Octane then moved for attorney's fees under *§ 285*. The District Court denied the motion under the *Brooks Furniture* framework, finding ICON's claim to be neither objectively baseless nor brought in subjective bad faith. The Federal Circuit affirmed.

Held: The *Brooks Furniture* framework is unduly rigid and impermissibly encumbers the statutory grant of discretion to district courts. *Pp. 553 - 558, 188 L. Ed. 2d, at 824-828*.

(a) *Section 285* imposes one and only one constraint on district courts' discretion to award attorney's fees: The power is reserved for "exceptional" cases. Because the Patent Act does not define "exceptional," the term is construed "in accordance with [its] ordinary meaning." *Sebelius v. Cloer, 569 U.S. 369, 376, 133 S. Ct. 1886, 185 L. Ed. 2d 1003*. In 1952, when Congress used the word in *§ 285* (and today, for that matter), "[e]xceptional" meant "uncommon," "rare," or "not ordinary." Webster's New International Dictionary 889 (2d ed. 1934). An "exceptional" case, then, is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was **[****4]** litigated. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances. Cf. *Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455*. *Pp. 553 - 554, 188 L. Ed. 2d, at 824-825*.

[*546] (b) The *Brooks Furniture* framework superimposes an inflexible framework onto statutory text that is inherently flexible. *Pp. 554 - 558, 188 L. Ed. 2d, at 825-827*.
[*821]**

(1) *Brooks Furniture* is too restrictive in defining the two categories of cases in which fee awards are allowed. The first category--cases involving litigation or certain other misconduct--appears to extend largely to independently sanctionable conduct. But that is not the appropriate benchmark. A district court may award fees in the rare case in which a party's unreasonable, though not independently sanctionable, conduct is so "exceptional" as to justify an award. For litigation to fall within the second category, a district court must determine that the litigation is both objectively baseless and brought in subjective bad faith. But a case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to be "exceptional." The Federal Circuit imported this second category from **[**1752]** *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611*, but that case's standard finds no roots in *§ 285*s text **[****5]** and makes little sense in the context of the exceptional-case determination. *Pp. 554 - 557, 188 L. Ed. 2d, at 825-827*.

(2) *Brooks Furniture* is so demanding that it would appear to render *§ 285* largely superfluous. Because courts already possess the inherent power to award fees in cases involving misconduct or bad faith, see *Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141*, this Court has declined to construe fee-shifting provisions narrowly so as to avoid rendering them superfluous. See, *e.g.*, *Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419, 98 S. Ct. 694, 54 L. Ed. 2d 648*. *P. 557, 188 L. Ed. 2d, at 827*.

(3) *Brooks Furniture*'s requirement that proof of entitlement to fees be made by clear and convincing evidence is not justified by *§ 285*, which imposes no specific evidentiary burden. Nor has this Court interpreted comparable fee-shifting statutes to require such a burden of proof. See, *e.g.*, *Fogerty, 510 U.S. at 519, 114 S. Ct. 1023, 127 L. Ed. 2d 455*. *Pp. 557 - 558, 188 L. Ed. 2d, at 827*.

496 Fed. Appx. 57, reversed and remanded.

Counsel: Rudolph A. Telscher, Jr. argued the cause for petitioner.

Roman Martinez argued the cause for the United States as amicus curiae.

[*547] **Carter G. Phillips** argued the cause for respondent.

Judges: **[*548]** Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ., joined, and in which Scalia, J., joined except as to footnotes 1-3.

Opinion by: Sotomayor

Opinion

[1339] JUSTICE **Sotomayor** delivered the opinion of the Court. *

HN1[] ***LEdHN[1]***[] [1] *Section 285* of the Patent Act authorizes a district court to award attorney's fees in patent litigation. It provides, in its entirety, that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." *35 U. S. C. § 285*. ***HN2***[] ***LEdHN[2]***[] [2] In *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc., 393 F.3d 1378 (2005)*, the United States Court of Appeals for the Federal Circuit held that "[a] case may be deemed exceptional" under *§ 285* only in two limited circumstances: "when there has been some material inappropriate conduct," or when the litigation is both "brought in subjective bad faith" and "objectively baseless." *Id., at 1381*. The question **[***822]** before us is whether the *Brooks Furniture* framework **[**1753]** is consistent with the statutory text. We hold that it is not.

I

A

Prior to 1946, the Patent Act did not authorize the awarding of attorney's fees to the prevailing party in patent litigation. Rather, the "American Rule" governed: "'[E]ach litigant pa[id] his own attorney's fees, win or lose . . . .'" *Marx v. General Revenue Corp., 568 U.S. 371, 382, 133 S. Ct. 1166, 1175, 185 L. Ed. 2d 242, 253 (2013)*. In 1946, Congress amended the Patent Act to add a discretionary fee-shifting provision, then codified in § 70, which stated that a court "may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment in any patent case." 35 U. S. C. § 70 (1946 ed.). [1]

Courts did not award fees under § 70 as a matter of course. They viewed the award of fees not "as a penalty for failure to win a patent infringement suit," but as appropriate "only in extraordinary circumstances." *Park-In-Theatres, Inc. v.* ***[*549]*** *Perkins, 190 F.2d 137, 142 (CA9 1951)*. The provision enabled them to address "unfairness or bad faith in the conduct of the losing party, or some other equitable consideration of similar force," which made a case so unusual as to warrant fee shifting. *Ibid.*; see also *Pennsylvania Crusher Co. v. Bethlehem Steel Co., 193 F.2d 445, 451 (CA3 1951)* (listing as "adequate justification[s]" for fee awards "fraud practiced on the Patent Office or vexatious or unjustified litigation").

Six years later, Congress amended the fee-shifting provision and recodified it as *§ 285*. ***HN3***[] ***LEdHN[3]***[] [3] Whereas § 70 had specified that a district court could "in its discretion award reasonable attorney's fees to the prevailing party," the revised language of *§ 285* (which remains in force today) provides that "[t]he court in exceptional cases may award reasonable attorney fees to the prevailing party." We have observed, in interpreting the damages provision of the Patent Act, that the addition of the phrase "exceptional cases" to *§ 285* was "for **[****8]** purposes of clarification only." [2] *General Motors Corp. v. Devex Corp., 461 U.S. 648, 653, n. 8, 103 S. Ct. 2058, 76 L. Ed. 2d 211 (1983)*; see also *id., at 652, n. 6, 103 S. Ct. 2058, 76 L. Ed. 2d 211*. And the parties agree that the recodification did not substantively alter the meaning of the statute. [3]

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* * JUSTICE Scalia joins this opinion **[****6]** except as to footnotes 1-3.

[1] This provision did "not contemplat[e] **[****7]** that the recovery of attorney's fees [would] become an ordinary thing in patent suits . . . ." S. Rep. No. 79-1503, p. 2 (1946).

[2] The Senate Report similarly explained that the new provision was "substantially the same as" § 70, and that the "'exceptional cases'" language was added simply to "expres[s] the intention of the [1946] statute as shown by its legislative history and as interpreted by the courts." S. Rep. No. 82-1979, p. 30 (1952).

[3] See Brief for Petitioner 35 ("[T]his amendment was not intended to create a stricter standard for fee awards, but instead was intended to clarify and endorse the already-existing statutory standard"); Brief for Respondent 17 ("When it enacted *§ 285*, as the historical notes to this provision make clear, Congress adopted the standards applied by courts interpreting that statute's predecessor, § 70 of the 1946 statute. Congress explained that *§ 285* 'is substantially the same as the corresponding provision in' § 70").

For three decades after the enactment of *§ 285*, courts applied it—as they had applied § 70—in a discretionary manner, assessing various factors to determine whether a given case **[*550]** was sufficiently "exceptional" to **[***823]** warrant a fee award. See, *e.g., True Temper Corp. v. CF&I Steel Corp., 601 F.2d 495, 508-509 (CA10 1979)*; *Kearney & Trecker Corp. v. Giddings & Lewis, Inc., 452 F.2d 579, 597 (CA7 1971)*; **[**1754]** *Siebring v. Hansen, 346 F.2d 474, 480-481 (CA8 1965)*.

In 1982, Congress **[****9]** created the Federal Circuit and vested it with exclusive appellate jurisdiction in patent cases. *28 U. S. C. §1295*. In **[1340]** the two decades that followed, the Federal Circuit, like the regional circuits before it, instructed district courts to consider the totality of the circumstances when making fee determinations under *§ 285*. See, *e.g., Rohm & Haas Co. v. Crystal Chemical Co., 736 F.2d 688, 691 (1984)* ("Cases decided under *§ 285* have noted that 'the substitution of the phrase "in exceptional cases" has not done away with the discretionary feature'"); *Yamanouchi Pharmaceutical Co., Ltd. v. Danbury Pharmacal, Inc., 231 F.3d 1339, 1347 (2000)* ("In assessing whether a case qualifies as exceptional, the district court must look at the totality of the circumstances").

In 2005, however, the Federal Circuit abandoned that holistic, equitable approach in favor of a more rigid and mechanical formulation. In *Brooks Furniture Mfg., Inc. v. Dutailier Int'l, Inc., 393 F.3d 1378 (2005)*, the court held that a case is "exceptional" under *§ 285* only "when there has been some material inappropriate conduct related to the matter in litigation, such as willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates *Fed. R. Civ. P. 11*, or like infractions." *Id., at 1381*. "Absent misconduct in conduct of the litigation or in securing the patent," the Federal Circuit continued, fees "may be imposed **[****10]** against the patentee only if both (1) the litigation is brought in subjective bad faith, and (2) the litigation is objectively baseless." *Ibid.* The Federal Circuit subsequently clarified that litigation is objectively baseless only if it is "so unreasonable that no reasonable litigant could believe it would **[*551]** succeed," *iLOR, LLC v. Google, Inc., 631 F.3d 1372, 1378 (2011)*, and that litigation is brought in subjective bad faith only if the plaintiff "actually know[s]" that it is objectively baseless, *id., at 1377*. [4]

Finally, *Brooks Furniture* held that because "[t]here is a presumption that the assertion of infringement of a duly granted patent is made in good faith[,] . . . the underlying improper conduct and the characterization of the case as exceptional must be established by clear and convincing evidence." *393 F.3d, at 1382*.

B

The parties to this litigation are manufacturers of exercise equipment. **[***824]** Respondent, ICON Health & Fitness, Inc., owns U. S. Patent No. 6,019,710 ('710 patent), which discloses an elliptical exercise machine that allows for adjustments to fit the individual stride paths of users. ICON is a major manufacturer of exercise equipment, **[**1755]** but it has never commercially sold the machine disclosed in the '710 patent. Petitioner, Octane Fitness, LLC, also manufactures exercise equipment, including elliptical machines known as the Q45 and Q47.

[*552] ICON sued Octane, alleging that the Q45 and Q47 infringed several claims of the '710 patent. The District Court granted Octane's motion for summary judgment, concluding that Octane's machines did not infringe ICON's patent. *Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 2011 U.S. Dist. LEXIS 64770, 2011 WL 2457914 (D*

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[4] In *Kilopass Technology, Inc. v. Sidense Corp., 738 F.3d 1302 (CA Fed. 2013)* decided after our grant of certiorari but before we heard oral argument in this case—the Federal Circuit appeared to cut back on the "subjective bad faith" inquiry, holding that the language in *iLOR* was dictum and that "actual knowledge of baselessness is not required." *738 F.3d, at 1310*. Rather, the court held, "a defendant need only prove reckless conduct to satisfy the subjective component of the *§ 285* analysis," *ibid.*, and courts may "dra[w] an inference of bad faith from circumstantial evidence thereof when a patentee pursues claims that are devoid of merit," *id., at 1311*. Most importantly, the Federal Circuit stated that "[o]bjective baselessness alone can create a sufficient inference of bad faith to establish exceptionality under *§ 285*, unless the circumstances as a whole show a lack of **[****11]** recklessness on the patentee's part." *Id., at 1314*. Chief Judge Rader wrote a concurring opinion that sharply criticized, *738 F.3d, at 1318-1320*; the court, he said, "should have remained true to its original reading of" *§ 285*, *id., at 1320*.

Minn., June 17, 2011). **[****12]** Octane then moved for attorney's fees under § 285. Applying the *Brooks Furniture* standard, the District Court denied Octane's motion. Icon Health & Fitness, Inc. v. Octane Fitness, LLC, 2011 U.S. Dist. LEXIS 100113, 2011 WL 3900975 (D Minn., Sept. 6, 2011). It determined that Octane could show neither that ICON's claim was objectively baseless nor that ICON had brought it in subjective bad faith. As to objective baselessness, the District Court rejected Octane's argument that the judgment of noninfringement "should have been a foregone conclusion to anyone who visually inspected" Octane's machines. Id., at *2, 2011 U.S. Dist. LEXIS 100113, *5. The court explained that although it had rejected ICON's infringement arguments, they were neither "frivolous" nor "objectively baseless." Id., at *2-*3, 2011 U.S. Dist. LEXIS 100113. The court also found no subjective bad faith on ICON's part, dismissing as insufficient **[1341]** both "the fact that [ICON] is a bigger company which never commercialized the '710 patent" and an e-mail exchange between two ICON sales executives, which Octane had offered as evidence that ICON had brought the infringement action "as a matter of commercial strategy." [5] Id., at *4, 2011 U.S. Dist. LEXIS 100113, *10.

[*553] ICON appealed the judgment of noninfringement, and Octane cross-appealed the denial of attorney's fees. The Federal Circuit affirmed both orders. 496 Fed. Appx. 57 (2012). In upholding the denial of attorney's fees, it rejected Octane's argument that the District Court had "applied an overly restrictive standard in refusing to find the case exceptional under § 285." Id., at 65. The Federal Circuit declined to "revisit the settled standard for exceptionality." *Ibid.*

We granted certiorari, *570 U.S. 948, 134 S. Ct. 49, 186 L. Ed. 2d 962 (2013)*, and now reverse.

II

HN4[] **LEdHN[4]**[] [4] The framework established by **[***825]** the Federal Circuit in *Brooks Furniture* is unduly rigid, and it impermissibly encumbers the statutory grant of discretion **[****14]** to district courts.

A

Our analysis begins and ends with **HN5**[] **LEdHN[5]**[] [5] the text of § 285: "The court in exceptional cases may award reasonable attorney fees to the prevailing party." This text is patently clear. It imposes one and only one constraint on district courts' discretion to award attorney's fees in patent litigation: **[**1756]** The power is reserved for "exceptional" cases.

The Patent Act does not define "exceptional," so we construe it "'in accordance with [its] ordinary meaning.'" Sebelius v. Cloer, 569 U.S. 369, 376, 133 S. Ct. 1886, 1889, 185 L. Ed. 2d 1003, 1009 (2013); see also Bilski v. Kappos, 561 U.S. 593, 603, 130 S. Ct. 3218, 3226, 177 L. Ed. 2d 792, 801 (2010) ("In patent law, as in all statutory construction, '[u]nless otherwise defined, "words will be interpreted as taking their ordinary, contemporary, common meaning" '"). In 1952, when Congress used the word in § 285 (and today, for that matter), "[e]xceptional" meant "uncommon," "rare," or "not ordinary." Webster's New International Dictionary 889 (2d ed. 1934); see also 3 Oxford English Dictionary 374 (1933) (defining "exceptional" as "out of the ordinary course," "unusual," or "special"); Merriam-Webster's Collegiate Dictionary 435 (11th ed. 2008) **[*554]** (defining "exceptional" as "rare"); Noxell Corp. v. Firehouse No. 1 Bar-B-Que Restaurant, 771 F.2d 521, 526, 248 U.S. App. D.C. 329 (CADC 1985) (R. B. Ginsburg, J., joined by Scalia, J.) (interpreting the term "exceptional" in the Lanham Act's identical fee-shifting provision, 15 U. S. C. § 1117(a), to mean "uncommon" or **[****15]** "not run-of-the-mill").

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[5] One e-mail, sent from ICON's Vice President of Global Sales to two employees, read: "'We are suing Octane. Not only are we coming out with a greater product to go after them, but throwing a lawsuit on top of that.'" 2011 WL 3900975, *4, 2011 U.S. Dist. LEXIS 100113, *11. One of the recipients then forwarded that e-mail to a third party, along with the **[****13]** accompanying message: "'Just clearing the way and making sure you guys have all your guns loaded!'" *Ibid*. More than a year later, that same employee sent an e-mail to the Vice President of Global Sales with the subject, "'I heard we are suing Octane!'" *Ibid.* The executive responded as follows: "'Yes—old patent we had for a long time that was sitting on the shelf. They are just looking for royalties.'" *Ibid.* The District Court wrote that "in the light most favorable to Octane, these remarks are stray comments by employees with no demonstrated connection to the lawsuit." *Ibid.*

We hold, then, that ***HN6***[] ***LEdHN[6]***[] [6] an "exceptional" case is simply one that stands out from others with respect to the substantive strength of a party's litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated. District courts may determine whether a case is "exceptional" in the case-by-case exercise of their discretion, considering the totality of the circumstances. [6] As in the comparable context of the Copyright Act, "'[t]here is no precise rule or formula for making these determinations,' but instead equitable discretion should be exercised 'in light of the considerations we have identified.'" *Fogerty v. Fantasy, Inc., 510 U.S. 517, 534, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*.

B

1

The Federal Circuit's formulation is overly rigid. Under the standard **[****16]** crafted in **[1342]** *Brooks Furniture*, a case is "exceptional" only if a district court either finds litigation-related misconduct of an independently sanctionable magnitude or determines that the litigation was both "brought in subjective bad faith" and "objectively baseless." **[***826]** *393 F.3d, at [*555] 1381*. This formulation superimposes an inflexible framework onto statutory text that is inherently flexible.

For one thing, the first category of cases in which the Federal Circuit allows fee awards—those involving litigation misconduct or certain other misconduct—appears to extend largely to independently sanctionable conduct. See *ibid.* (defining litigation-related misconduct to include "willful infringement, fraud or inequitable conduct in procuring the patent, misconduct during litigation, vexatious or unjustified litigation, conduct that violates *Fed. R. Civ. P. 11*, or like infractions"). But ***HN8***[] ***LEdHN[8]***[] [8] sanctionable conduct is not the appropriate benchmark. Under the standard announced **[**1757]** today, a district court may award fees in the rare case in which a party's unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so "exceptional" as to justify an award of fees.

The second category of cases in which the Federal Circuit **[****17]** allows fee awards is also too restrictive. In order for a case to fall within this second category, a district court must determine *both* that the litigation is objectively baseless *and* that the plaintiff brought it in subjective bad faith. But ***HN9***[] ***LEdHN[9]***[] [9] a case presenting either subjective bad faith or exceptionally meritless claims may sufficiently set itself apart from mine-run cases to warrant a fee award. Cf. *Noxell, 771 F.2d, at 526* ("[W]e think it fair to assume that Congress did not intend rigidly to limit recovery of fees by a [Lanham Act] defendant to the rare case in which a court finds that the plaintiff 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons' . . . . Something less than 'bad faith,' we believe, suffices to mark a case as 'exceptional'").

ICON argues that the dual requirement of "subjective bad faith" and "objective baselessness" follows from this Court's decision in *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49, 113 S. Ct. 1920, 123 L. Ed. 2d 611 (1993)* (*PRE*), which involved an exception to the *Noerr-Pennington* doctrine of ***antitrust law***. It does not. Under the *Noerr-Pennington* **[*556]** doctrine—established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*, and *Mine Workers v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)* defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government. *PRE, 508 U.S., at 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611*. But under **[****18]** a "sham exception" to this doctrine, "activity 'ostensibly directed toward influencing governmental action' does not qualify for *Noerr* immunity if it 'is a mere sham to cover . . . an attempt to interfere directly with the business relationships of a competitor.'" *Id., at 51, 113 S. Ct. 1920, 123 L. Ed. 2d 611*. In *PRE*, we held that to qualify as a "sham," a "lawsuit must be objectively baseless" and must "concea[l] 'an attempt to interfere directly with the business relationships of

[6] In *Fogerty v. Fantasy, Inc., 510 U.S. 517, 114 S. Ct. 1023, 127 L. Ed. 2d 455 (1994)*, for example, we explained that ***HN7***[] ***LEdHN[7]***[] [7] in determining whether to award fees under a similar provision in the Copyright Act, district courts could consider a "nonexclusive" list of "factors," including "frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Id., at 534, n. 19, 114 S. Ct. 1023, 127 L. Ed. 2d 455* (internal quotation marks omitted).

a competitor . . . .'" *Id., at 60-61, 113 S. Ct. 1920, 123 L. Ed. 2d 611* (emphasis deleted). In other words, the plaintiff must have brought baseless claims in an attempt to thwart competition (*i.e.,* in bad faith).

[*827]** In *Brooks Furniture*, the Federal Circuit imported the *PRE* standard into *§ 285*. See *393 F.3d, at 1381*. But ***HN10***[] ***LEdHN[10]***[] [10] the *PRE* standard finds no roots in the text of *§ 285*, and it makes little sense in the context of determining whether a case is so "exceptional" as to justify an award of attorney's fees in patent litigation. We crafted the *Noerr-Pennington* doctrine—and carved out only a narrow exception for "sham" litigation—to avoid chilling the exercise of the *First Amendment* right to petition the government for the redress of grievances. See *PRE, 508 U.S., at 56, 113 S. Ct. 1920, 123 L. Ed. 2d 611* ("Those who petition government for redress are generally immune from antitrust liability"). But to the **[****19]** extent that patent suits are similarly protected as acts of petitioning, it is not clear why the shifting of fees in an "exceptional" case would diminish that right. The threat of antitrust liability (and the attendant treble damages, *15 U. S. C. § 15*) far more significantly chills the exercise of the right to petition than does the mere shifting of attorney's fees. In the *Noerr*-*Pennington*context, defendants seek immunity from a judicial declaration that their filing **[*557]** of a **[**1758]** lawsuit was actually unlawful; here, they seek immunity from a far less onerous declaration that they should bear the costs of that lawsuit in exceptional cases.

2

We reject *Brooks Furniture* for another reason: ***HN11***[] ***LEdHN[11]***[] [11] It is so demanding that it would appear to render *§ 285* largely superfluous. We have **[1343]** long recognized a common-law exception to the general "American rule" against fee shifting—an exception, "inherent" in the "power [of] the courts" that applies for "'willful disobedience of a court order'" or "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons . . . .'" *Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258-259, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975)*. We have twice declined to construe fee-shifting provisions narrowly on the basis that doing so would render them superfluous, given the background **[****20]** exception to the American rule, see *Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 419, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)*; *Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402, n. 4, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968)* (*per curiam*), and we again decline to do so here.

3

Finally, ***HN12***[] ***LEdHN[12]***[] [12] we reject the Federal Circuit's requirement that patent litigants establish their entitlement to fees under *§ 285* by "clear and convincing evidence," *Brooks Furniture, 393 F.3d, at 1382*. We have not interpreted comparable fee-shifting statutes to require proof of entitlement to fees by clear and convincing evidence. See, *e.g., Fogerty, 510 U.S., at 519, 114 S. Ct. 1023, 127 L. Ed. 2d 455*; *Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)*; *Pierce v. Underwood, 487 U.S. 552, 558, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988)*. And nothing in *§ 285* justifies such a high standard of proof. *Section 285* demands a simple discretionary inquiry; it imposes no specific evidentiary burden, much less such a high one. Indeed, patent-infringement litigation has always been governed by a preponderance of the evidence standard, see, *e.g., Bene v.* ***[*558]*** *Jeantet, 129 U.S. 683, 688, 9 S. Ct. 428, 32 L. Ed. 803, 1889 Dec. Comm'r Pat. 408 (1889)*, and that is the "standard generally applicable in civil actions," because it "allows both parties to 'share the risk **[***828]** of error in roughly equal fashion,'" *Herman & MacLean v. Huddleston, 459 U.S. 375, 390, 103 S. Ct. 683, 74 L. Ed. 2d 548 (1983)*.

* * *

For the foregoing reasons, the judgment of the United States Court of Appeals for the Federal Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

References

35 U.S.C.S. § 285

15 Chisum on Patents § 6331.20 (Matthew Bender)

L Ed Digest, Costs and Fees § 34

L Ed Index, Patents

Patent infringement under *35 U.S.C.S. § 271*--Supreme Court cases. *162 L. Ed. 2d 977*.

Noerr-Pennington **[****21]** doctrine, exempting from federal antitrust laws joint efforts to influence governmental action--Supreme Court cases. *123 L. Ed. 2d 707*.

Supreme Court's views as to requisites for award of attorneys' fees. *77 L. Ed. 2d 1540*.

End of Document

N.C. State Bd. of Dental Exam'rs v. FTC

Supreme Court of the United States

October 14, 2014, Argued; February 25, 2015, Decided

No. 13-534

Reporter

574 U.S. 494 *; 135 S. Ct. 1101 **; 191 L. Ed. 2d 35 ***; 2015 U.S. LEXIS 1502 ****; 83 U.S.L.W. 4110; 2015-1 Trade Cas. (CCH) P79,072; 25 Fla. L. Weekly Fed. S 85

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Petitioner v. FEDERAL TRADE COMMISSION

Notice: The Lexis pagination of this document is subject to change pending release of the final published version.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

N.C. State Bd. of Dental Examiners v. FTC, 717 F.3d 359, 2013 U.S. App. LEXIS 11006 (4th Cir., 2013)

Disposition: *717 F. 3d 359*, affirmed.

Core Terms

immunity, supervision, active market, state agency, regulation, Sherman Act, whitening, dentists, teeth, municipality, sovereign, anti trust law, anticompetitive, state-action, licensing, entity, nondentists, antitrust, anticompetitive conduct, practice of dentistry, nonsovereign, Dental, agencies, state policy, articulated, dentistry, state law, Ethics, profession, delegates

LexisNexis® Headnotes

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Constitutional Law > State Sovereign Immunity > General Overview

HN1[] **Exemptions & Immunities, Parker State Action Doctrine**

Judicial precedent interprets the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. That ruling recognizes Congress's purpose to respect the federal balance and to embody in the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the federalism principle that the States possess a significant measure of sovereignty under the United States Constitution.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN2[] **Exemptions & Immunities, Parker State Action Doctrine**

A non-sovereign actor controlled by active market participants enjoys Parker immunity only if it satisfies two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the State.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN3[] **Exemptions & Immunities, Parker State Action Doctrine**

Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, Parker immunity is not unbounded. Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN4[] **Exemptions & Immunities, Parker State Action Doctrine**

An entity may not invoke Parker immunity unless the actions in question are an exercise of the State's sovereign power. State legislation and decisions of a state supreme court, acting legislatively rather than judicially, will satisfy this standard, and ipso facto are exempt from the operation of the antitrust laws because they are an undoubted exercise of state sovereign authority.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN5[] **Exemptions & Immunities, Parker State Action Doctrine**

While the Sherman Act, *15 U.S.C.S. § 1 et seq.*, confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where a State delegates control over a market to a non-sovereign actor. For purposes of Parker immunity, a non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

Constitutional Law > Supremacy Clause > General Overview

HN6[] **Exemptions & Immunities, Parker State Action Doctrine**

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. So it follows that, under Parker immunity and the *Supremacy Clause*, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act, 15 U.S.C.S. § 1 et seq., through unsupervised delegations to active market participants.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN7[] Exemptions & Immunities, Parker State Action Doctrine

Parker immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. The question is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by non-sovereign actors should be deemed state action and thus shielded from the antitrust laws.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN8[] Exemptions & Immunities, Parker State Action Doctrine

A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN9[] Parker State Action Doctrine, Local Governments & Private Parties

The Midcal clear articulation requirement for state action immunity is satisfied where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. The active supervision requirement demands, inter alia, that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN10[] Parker State Action Doctrine, Local Governments & Private Parties

The two Midcal requirements provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement, clear articulation, rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second Midcal requirement, active supervision, seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN11[] Parker State Action Doctrine, Local Governments & Private Parties

The Midcal supervision rule stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Concern about the private incentives of active market participants animates the Midcal supervision mandate, which demands realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN12[] Parker State Action Doctrine, Local Governments & Private Parties

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from the Midcal active supervision requirement. Municipalities are subject exclusively to the Midcal clear articulation requirement. That rule is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. Municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. Critically, the municipality in judicial precedent exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. That the precedent excuses municipalities from the Midcal supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception precedent identifies.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN13[] Exemptions & Immunities, Parker State Action Doctrine

There is no conspiracy exception to Parker immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN14[] Exemptions & Immunities, Parker State Action Doctrine

Recipients of Parker immunity will not lose it on the basis of ad hoc and ex post questioning of their motives for making particular decisions.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN15[] **Parker State Action Doctrine, Local Governments & Private Parties**

The Midcal limits on delegation must ensure that actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. The Midcal active supervision requirement, in particular, is an essential condition of state-action immunity when a non-sovereign actor has an incentive to pursue its own self-interest under the guise of implementing state policies. The lesson is clear: the Midcal active supervision test is an essential prerequisite of Parker immunity for any non-sovereign entity, public or private, controlled by active market participants.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

HN16[] **Parker State Action Doctrine, Local Governments & Private Parties**

Private trade associations must satisfy the Midcal active supervision standard to be entitled to Parker immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Local Governments & Private Parties

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN17[] **Parker State Action Doctrine, Local Governments & Private Parties**

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. Parker immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. A state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy the Midcal active supervision requirement in order to invoke state-action antitrust immunity.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN18[] **Exemptions & Immunities, Parker State Action Doctrine**

States can ensure Parker immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN19[] **Exemptions & Immunities, Parker State Action Doctrine**

Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision in order to qualify for Parker immunity. Rather, the question is whether the State's review mechanisms provide realistic assurance that a non-sovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN20[] **Exemptions & Immunities, Parker State Action Doctrine**

Judicial precedent identifies only a few constant requirements of active supervision for purposes of Parker immunity: (1) the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and (3) the mere potential for state supervision is not an adequate substitute for a decision by the State. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

Antitrust & Trade Law > Sherman Act > Scope > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

HN21[] **Sherman Act, Scope**

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity is to be invoked.

Lawyers' Edition Display

Decision

[*35]** State dental examiners board created by state law held not allowed to invoke state-action antitrust immunity, as (1) controlling number of board's decisionmakers were active dental-market participants; and (2) board was not subject to active state supervision.

Summary

Overview: HOLDINGS: [1]-The Midcal active supervision test was an essential prerequisite of Parker immunity for any non-sovereign entity, public or private, controlled by active market participants; [2]-A state board on which a controlling number of decisionmakers were active market participants in the occupation the board regulated had to satisfy the Midcal active supervision requirement in order to invoke state-action antitrust immunity; [3]-The North Carolina State Board of Dental Examiners was not entitled to state-action antitrust immunity where, even assuming that the clear articulation standard was satisfied, the Board did not receive active supervision by the State when it interpreted the Dental Practice Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to non-dentist teeth whiteners.

Outcome: Judgment affirmed. 6-3 decision, 1 dissent.

Headnotes

[*36]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- SOVEREIGN CAPACITY > Headnote:
LEdHN[1][] [1]

Judicial precedent interprets the antitrust laws to confer immunity on anticompetitive conduct by the states when acting in their sovereign capacity. That ruling recognizes Congress's purpose to respect the federal balance and to embody in the Sherman Act, *15 U.S.C.S. § 1 et seq.*, the federalism principle that the states possess a significant measure of sovereignty under the United States Constitution. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > NON-SOVEREIGN ACTOR -- STATE-ACTION IMMUNITY > Headnote:
LEdHN[2][] [2]

A non-sovereign actor controlled by active market participants enjoys Parker immunity only if it satisfies two requirements: first that the challenged restraint be one clearly articulated and affirmatively expressed as state policy, and second that the policy be actively supervised by the state. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- LIMITS > Headnote:
LEdHN[3][] [3]

Although state-action immunity exists to avoid conflicts between state sovereignty and the nation's commitment to a policy of robust competition, Parker immunity is not unbounded. Given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY-- SOVEREIGN POWER > Headnote:
LEdHN[4][] [4]

An entity may not invoke Parker immunity unless the actions in question are an exercise of the state's sovereign power. State legislation and decisions of a state supreme court, acting legislatively rather than judicially, will satisfy this standard, and ipso facto are exempt from the operation of the antitrust laws because they are an undoubted exercise of state sovereign authority. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- NON-SOVEREIGN ACTOR > Headnote:
LEdHN[5][] [5]

While the Sherman Act, *15 U.S.C.S. § 1 et seq.*, confers immunity on the states' own anticompetitive policies out of respect for federalism, it does not always confer immunity where a state delegates control over a market to a non-sovereign actor. For purposes of Parker immunity, a non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign state itself. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of Parker's rationale to ensure the states accept political accountability for anticompetitive conduct they permit and control. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*37]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MARKET PARTICIPANTS > Headnote:
LEdHN[6][] [6]

Limits on state-action immunity are most essential when the state seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. So it follows that, under Parker immunity and the *supremacy clause*, the states' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act, *15 U.S.C.S. § 1 et seq.*, through unsupervised delegations to active market participants. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- NON-SOVEREIGN ACTORS > Headnote:
LEdHN[7][] [7]

Parker immunity requires that the anticompetitive conduct of non-sovereign actors, especially those authorized by the state to regulate their own profession, result from procedures that suffice to make it the state's own. The question is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by non-sovereign actors should be deemed state action and thus shielded from the antitrust laws. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > ANTITRUST IMMUNITY -- STATE LAW > Headnote:
LEdHN[8][] [8]

A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the state has articulated a clear policy to allow the anticompetitive conduct, and second, the state provides active supervision of the anticompetitive conduct. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- DELEGATION OF AUTHORITY > Headnote:
LEdHN[9][] [9]

The Midcal clear articulation requirement for state action immunity is satisfied where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the state must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. The active supervision requirement demands, inter alia, that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*38]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- POLICY -- SUPERVISION > Headnote:
LEdHN[10][] [10]

The two Midcal requirements provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a state. The first requirement, clear articulation, rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. Entities purporting to act under state authority might diverge from the state's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second Midcal requirement, active supervision, seeks to avoid this harm by requiring the state to review and approve interstitial policies made by the entity claiming immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION EXEMPTION -- PRIVATE PARTY -- STATE POLICY > Headnote:
LEdHN[11][] [11]

The Midcal supervision rule stems from the recognition that where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the state. Concern about the private incentives of active market participants animates the Midcal supervision mandate, which demands realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*39]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MUNICIPALITIES > Headnote:
LEdHN[12][] [12]

In determining whether anticompetitive policies and conduct are indeed the action of a state in its sovereign capacity, there are instances in which an actor can be excused from the Midcal active supervision requirement. Municipalities are subject exclusively to the Midcal clear articulation requirement. That rule is consistent with the objective of ensuring that the policy at issue be one enacted by the state itself. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. Municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. Critically, the municipality in judicial precedent exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. That the precedent excuses municipalities from the Midcal supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception precedent identifies. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §10 > STATE-ACTION IMMUNITY -- CONSPIRACY > Headnote:
LEdHN[13][] [13]

There is no conspiracy exception to Parker immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MOTIVES > Headnote:
LEdHN[14][] [14]

Recipients of Parker immunity will not lose it on the basis of ad hoc and ex post questioning of their motives for making particular decisions. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- NON-SOVEREIGN ENTITY -- SUPERVISION > Headnote:
LEdHN[15][] [15]

The Midcal limits on delegation must ensure that actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. The Midcal active supervision requirement, in particular, is an essential condition of state-action immunity when a non-sovereign actor has an incentive to pursue its own self-interest under the guise of implementing state policies. The lesson is clear: the Midcal active supervision test is an essential prerequisite of Parker immunity for any non-sovereign entity, public or private, controlled by active market participants. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- TRADE ASSOCIATIONS > Headnote:
LEdHN[16][] [16]

Private trade associations must satisfy the Midcal active supervision standard to be entitled to Parker immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- MARKET PARTICIPANTS > Headnote:
LEdHN[17][] [17]

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the state, vested with a measure of government power, and required to follow some procedural rules. Parker immunity does not derive from nomenclature alone. When a state empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. A state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy the Midcal active supervision requirement in order to invoke state-action antitrust immunity. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[*40]**

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- COMPETITION > Headnote:
LEdHN[18][] [18]

States can ensure Parker immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the states may provide active supervision. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- ACTIVE SUPERVISION > Headnote:
LEdHN[19][] [19]

Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision in order to qualify for Parker immunity. Rather, the question is whether the state's review mechanisms provide realistic assurance that a non-sovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION IMMUNITY -- ACTIVE SUPERVISION > Headnote:
LEdHN[20][] [20]

Judicial precedent identifies only a few constant requirements of active supervision for purposes of Parker immunity: (1) the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and (3) the mere potential for state supervision is not an adequate substitute for a decision by the state. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §9.5 > STATE-ACTION EXEMPTION -- MARKET PARTICIPANTS -- SUPERVISION > Headnote:
LEdHN[21][] [21]

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, protects competition while also respecting federalism. It does not authorize the states to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a state wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity is to be invoked. (Kennedy, J., joined by Roberts, Ch. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Syllabus

[*494] **[**1104]** **[***41]** North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive **[****2]** and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the mer- **[***42]** its, the ALJ determined that the Board had unreasonably restrained trade in violation of ***antitrust law***. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. *Pp. 502-516, 191 L. Ed. 2d, at 47-55, 135 S. Ct. 1101*.

(a) Federal ***antitrust law*** is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates **[*495]** of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' **[****3]** power to regulate. Therefore, beginning with *Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315*, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. *Pp. 502-503, 191 L. Ed. 2d, at 47*.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants--such as the Board--enjoys *Parker* immunity only if " 'the challenged restraint . . . [is] clearly articulated and **[**1105]** affirmatively expressed as state policy,' and . . . 'the policy . . . [is] actively supervised by the State.' " *FTC v. Phoebe Putney Health System, Inc., 568 U. S. 216, 225, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53* (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233)*. Here, the Board did not receive active supervision of its anticompetitive conduct. *Pp. 503-514, 191 L. Ed. 2d, at 47-54*.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc., 499 U. S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. Thus, where a State delegates control over a market to a nonsovereign actor, the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive **[****4]** self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement--clear articulation--rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement--active supervision--seeks to avoid this harm by requiring the State to review and approve interstitial policies made by **[***43]** the entity claiming immunity. *Pp. 504-507, 191 L. Ed. 2d, at 48-50*.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation **[****5]** requirement. See *Hallie v. Eau Claire, 471 U. S. 34, 35, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, **[*496]** however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, *499 U. S., at 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382*, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co., 504 U. S. 621, 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410*, and *Phoebe Putney, supra, at 226, 133 S. Ct. 1003, 185 L. Ed. 2d 43*. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity--public or private--controlled by active market participants. *Pp. 507-510, 191 L. Ed. 2d, at 50-52*.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision **[****6]** **[**1106]** requirement was created to address. See *Goldfarb v. Virginia State Bar, 421 U. S. 773, 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572*. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, *471 U. S., at 46, n. 10, 105 S. Ct. 1713, 85 L. Ed. 2d 24*, the entity there was more like prototypical state

agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. *445 U. S., at 105-106, 100 S. Ct. 937, 63 L. Ed. 2d 233*. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra, at 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus, the Court holds today that a state board on which a controlling number of decisionmakers are active market **[****7]** participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action anti- **[***44]** trust immunity. *Pp. 510-512, 191 L. Ed. 2d, at 52-53*.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards **[*497]** that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget, 486 U. S. 94, 105-106, 108 S. Ct. 1658, 100 L. Ed. 2d 83*, particularly in light of the risks licensing boards dominated by market participants **[****8]** may pose to the free market. *Pp. 512-514, 191 L. Ed. 2d, at 53-54*.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. *P. 514, 191 L. Ed. 2d, at 54*.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context dependent. The question is whether the State's review mechanisms provide “realistic assurance” that a nonsovereign actor's **[**1107]** anticompetitive conduct “promotes state policy, rather than merely the party's individual interests.” *Patrick, 486 U. S., 100-101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*. The Court has identified only a few **[****9]** constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id., at 102-103, 108 S. Ct. 1658, 100 L. Ed. 2d 83*; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor, supra, at 638, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. *Pp. 515, 191 L. Ed. 2d, at 55*.

717 F. 3d 359, affirmed.

Counsel: Hashim M. Mooppan argued the cause for petitioner.

Malcolm L. Stewart argued the cause for respondent.

Judges: Kennedy, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. **[*498]** Alito, J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined, *post*, p. 516.

Opinion by: Kennedy

Opinion

[*499] **[***45]** Justice **Kennedy** delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in **[****10]** this Court's decisions beginning with *Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*.

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. *N. C. Gen. Stat. Ann. §90-22(a)* (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." *§90-22(b)*.

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See *§§90-29 to 90-41*. To perform that function it has broad authority over licensees. See *§90-41*. The Board's authority with respect to unlicensed persons, however, is more restricted: Like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." *§90-40.1*.

[1108]** The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. *§90-22*. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must **[*500]** be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed **[****11]** by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, *§138A-22(a)*, and the Board must comply with the State's Administrative Procedure Act, *§150B-1 et seq.*, Public Records Act, *§132-1 et seq.*, and open-meetings law, *§143-318.9 et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See *§§90-48*, *143B-30.1*, *150B-21.9(a)*.

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed **[***46]** a principal concern with the low prices charged **[****12]** by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern **[*501]** did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against **[****13]** providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging the Board with violating §5 of **[**1109]** the Federal Trade Commission Act, 38 Stat. 719, as amended, *15 U. S. C. §45*. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. **[*502]** The FTC further concluded the Board could not make that showing. **[****14]**

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of ***antitrust law***. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.,* at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere **[***47]** of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. *717 F. 3d 359, 370 (2013)*. This Court granted certiorari. *571 U. S. 1236, 134 S. Ct. 1491, 188 L. Ed. 2d 375 (2014)*.

II

Federal ***antitrust law*** is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system **[****15]** as the *Bill of Rights* is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc., 405 U. S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*. The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, *15 U. S. C. §1 et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See **[*503]** *FTC v. Ticor Title Ins. Co., 504 U. S. 621, 632, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992)*. The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id., at 635-636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal ***antitrust law*** would impose an impermissible burden on the States' power to regulate. See *Exxon Corp. v. Governor of Maryland, 437 U. S. 117,* 133, 98 S. Ct. 2207, 57 L. Ed. 2d 91 (1978); see also Easterbrook, **[**1110]** Antitrust and **[****16]** the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, **HN1**[] **LEdHN[1]**[] [1] the Court in *Parker* v. *Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350-351, 63 S. Ct. 307, 87 L. Ed. 315 . That ruling recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." Community Communications Co. v. Boulder, 455 U. S. 40, 53, 102 S. Ct. 835, 70 L. Ed. 2d 810 (1982). Since 1943, the Court has reaffirmed the importance of *Parker*'s central holding. See, *e.g.,* Ticor, supra, at 632-637, 112 S. Ct. 2169, 119 L. Ed. 2d 410; Hoover v. Ronwin, 466 U. S. 558, 568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984); Lafayette v. Louisiana Power & Light Co., 435 U. S. 389, 394-400, 98 S. Ct. 1123, 55 L. Ed. 2d 364 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's **[***48]** actions are cloaked with Parker immunity. This argument fails, however. **HN2**[] **LEdHN[2]**[] [2] A nonsovereign actor controlled by active market participants — such as the **[*504]** Board — enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" FTC v. Phoebe Putney Health System, Inc., 568 U. S. 216, 225, 568 U.S. 216, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53 (2013) (quoting California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 105, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. **[****17]** While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

HN3[] **LEdHN[3]**[] [3] Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" Phoebe Putney, supra, at 225, 133 S. Ct. 1003, 1010, 185 L. Ed. 2d 43, 53) (quoting Ticor, supra, at 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410).

HN4[] **LEdHN[4]**[] [4] An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See Columbia v. Omni Outdoor Advertising, Inc., 499 U. S. 365, 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. Hoover, supra, at 567-568, 104 S. Ct. 1989, 80 L. Ed. 2d 590.

But **HN5**[] **LEdHN[5]**[] [5] while the **[****18]** Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, **[*505]** it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. See Parker, supra, at 351, 63 S. Ct. 307, 87 L. Ed. 315 **[**1111]** ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See Hoover, supra, at 567-568, 104 S. Ct. 1989, 80 L. Ed. 2d 590 . State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See Goldfarb v. Virginia State Bar, 421 U. S. 773, 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure

[*49]** the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor, supra, at 636, 112 S. Ct. 2169, 119 L. Ed. 2d 410*.

HN6[🡅] ***LEdHN[6]***[🡅] [6] Limits on state-action immunity are most essential when the State seeks to delegate **[****19]** its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra, at 106, 100 S. Ct. 937, 63 L. Ed. 2d 233* ("The national policy in favor of competition cannot be thwarted by casting . . . gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U. S. 492, 501, 108 S. Ct. 1931, 100 L. Ed. 2d 497 (1988)*; *Hoover, supra, at 584, 104 S. Ct. 1989, 80 L. Ed. 2d 590* (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be **[*506]** designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, *104 Harv. L. Rev. 667, 672 (1991)*. So it follows that, under *Parker*and the *Supremacy Clause*, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment **[****20]** embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, *96 Yale L. J. 486, 500 (1986)*.

HN7[🡅] ***LEdHN[7]***[🡅] [7] *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. See *Goldfarb, supra, at 790, 95 S. Ct. 2004, 44 L. Ed. 2d 572*; see also 1A P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶226, p. 180 (4th ed. 2013) (Areeda & Hovenkamp). The question is not whether the challenged conduct is efficient, well functioning, or wise. See *Ticor, 504 U. S., at 634-635, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Rather, it is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burget, 486 U. S. 94, 100, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988)*.

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233*, a case arising from California's delegation of price-fixing authority **[**1112]** to wine merchants. Under *Midcal*, ***HN8***[🡅] ***LEdHN[8]***[🡅] [8] "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear . . . policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] **[****21]** anticompetitive conduct." *Ticor, supra, at 631, 112 S. Ct. 2169, 119 L. Ed. 2d 410* (citing *Midcal, supra, at 105, 100 S. Ct. 937, 63 L. Ed. 2d 233*.

[*50]** ***HN9***[🡅] ***LEdHN[9]***[🡅] [9] *Midcal*'s clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the **[*507]** state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney, 568 U. S., at 229, 133 S. Ct. 1003, 185 L. Ed. 2d 43, 56*). The active supervision requirement demands, *inter alia*, "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick, supra, at 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*.

HN10[🡅] ***LEdHN[10]***[🡅] [10] The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement — clear articulation — rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor, supra, at 636-637, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Entities purporting to act under state authority might diverge from the State's considered definition **[****22]** of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement —

active supervision — seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

HN11[] **LEdHN[11]**[] [11] *Midcal*'s supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick, supra, at 100, 108 S. Ct. 1658, 100 L. Ed. 2d 83*. Concern about the private incentives of active market participants animates *Midcal*'s supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick, supra, at 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*.

B

HN12[] **LEdHN[12]**[] [12] In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, **[*508]** there are instances in which an actor can be excused from *Midcal*'s active supervision requirement. In *Hallie v. Eau Claire, 471 U. S. 34, 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*, the Court held municipalities are subject exclusively to *Midcal*'s "'clear articulation'" requirement. That rule, the Court observed, is **[****23]** consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals." *471 U. S., at 47, 105 S. Ct. 1713, 85 L. Ed. 2d 24* (emphasis deleted).*Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id., at 45, n. 9, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. Critically, the municipality in *Hallie* exercised a wide range of governmental **[**1113]** powers **[***51]** across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See *471 U. S., at 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24*.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign **[****24]** actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc., 499 U. S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382*, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. *499 U. S., at 367-368, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. The **[*509]** Court disagreed, holding **HN13**[] **LEdHN[13]**[] [13] there is no "conspiracy exception" to Parker. *Omni, supra, at 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382*.

Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *499 U. S., at 378, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some segments of the society and harms others" and may in that sense be seen as "'corrupt.'" *499 U. S., at 377, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official **[****25]** 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that **HN14**[] **LEdHN[14]**[] [14] recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor,* the Court affirmed that **HN15**[] **LEdHN[15]**[] [15] *Midcal*'s limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *504 U. S., at 633, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. And in *Phoebe Putney,* the Court observed that *Midcal*'s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." **[*510]** *568 U. S., at 226, 133 S. Ct. 1003, 1011, 185 L. Ed. 2d 43, 54*) (quoting *Hallie, supra, at 46-47, 105* ***[***52]*** *S. Ct. 1713, 85 L. Ed. 2d 24*). The lesson is clear: *Midcal*'s active supervision **[****26]** test is an essential prerequisite of *Parker* immunity for any nonsovereign entity — public or private — controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal*'s second requirement. **[**1114]** That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See Areeda & Hovenkamp ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick, 486 U. S., at 100-101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially **[****27]** a private anticompetitive activity" for "the benefit of its members." *421 U. S., at 791, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572*. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See *421 U. S., at 791, 95 S. Ct. 2004, 44 L. Ed. 2d 572*; see also *Hoover, 466 U. S., at 569, 104 S. Ct. 1989, 80 L. Ed. 2d 590* (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz., 433 U. S. 350, 361-362, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977)* (granting the Arizona Bar state-action immunity partly because **[*511]** its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, *471 U. S., at 46, n. 10, 105 S. Ct. 1713, 85 L. Ed. 2d 24*, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie*considered. And as the Court observed three years after *Hallie*, "[t]here is no doubt that the members of such associations **[****28]** often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube, 486 U. S., at 500, 108 S. Ct. 1931, 100 L. Ed. 2d 497* . For that reason, ***HN16***[] ***LEdHN[16]***[] [16] those associations must satisfy *Midcal*'s active supervision standard. See *Midcal, 445 U. S., at 105-106, 100 S. Ct. 937, 63 L. Ed. 2d 233*.

HN17[] ***LEdHN[17]***[] [17] The similarities between agencies controlled by active market participants and private trade associations **[***53]** are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra, at 39, 105 S. Ct. 1713, 85 L. Ed. 2d 24* (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovenkamp ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active **[*512]** supervision requirement in order to invoke state-action antitrust immunity.

[1115]** D

The State argues that allowing this FTC order to stand will discourage dedicated **[****29]** citizens from serving on state agencies that regulate their own occupation. If this were so — and, for reasons to be noted, it need not be so — there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft, 501 U. S. 452, 460, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991)*, and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U. S. 48, 64, 105 S. Ct. 1721, 85 L. Ed. 2d 36 (1985)*. There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics **[****30]** Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3-4 (2012). **[*513]** State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia, 566 U. S. 377, 390, 566 U.S. 377, 132 S. Ct. 1657, 1666, 182 L. Ed. 2d 662, 672 (2012)*) (warning in the context of civil rights suits that "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not present a claim for money damages, does not offer occasion **[***54]** to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb, 421 U. S., at 792, n. 22, 95 S. Ct. 2004, 44 L. Ed. 2d 572*; see also Brief for Respondent **[****31]** 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

HN18[] ***LEdHN[18]***[] [18] States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and **[**1116]** actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress **[*514]** has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively **[****32]** has made this conduct its own." *Patrick, 486 U. S., at 105-106, 108 S. Ct. 1658, 100 L. Ed. 2d 83* (footnote omitted).

The reasoning of *Patrick v. Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? *162 U. Pa. L. Rev. 1093 (2014)*.

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members — some of whom offered whitening services — acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well **[****33]** have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni, 499 U. S., at 371-372, 111 S. Ct. 1344, 113 L. Ed. 2d 382*, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

[*515] **[***55]** IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context dependent. ***HN19***[] ***LEdHN[19]***[] [19] Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick, supra, at 100-101, 108 S. Ct. 1658, 100 L. Ed. 2d 83*; see also *Ticor, 504 U. S., at 639-640, 112 S. Ct. 2169, 119 L. Ed. 2d 410*.

HN20[] ***LEdHN[20]***[] [20] The Court has identified only a few constant requirements of active supervision: The supervisor must **[****34]** review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick, 486 U. S., at 102-103, 108 S. Ct. 1658, 100 L. Ed. 2d 83*; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra, at 638, 112 S. Ct. 2169, 119 L. Ed. 2d 410*. Further, **[**1117]** the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

HN21[] ***LEdHN[21]***[] [21] The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

[*516] The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Dissent by: Alito

Dissent

Justice **Alito**, with whom Justice **Scalia** and Justice **Thomas** join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action **[****35]** antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1943)*. In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id., at 352, 63 S. Ct. 307, 87 L. Ed. 315*. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina State Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is **[***56]** not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff them in this way.[1] Nor is there anything new about the suspicion that the North Carolina Board — in attempting to prevent **[****36]** persons other than dentists from performing teeth whitening procedures — was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been **[*517]** used in such a way. [2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the Federal Trade Commission Act, see **[**1118]** *FTC v. Ticor Title Ins. Co., 504 U. S. 621, 635, 112 S. Ct. 2169, 119 L. Ed. 2d 410 (1992))* do not apply to state agencies; the Board **[****37]** is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy v. Hardin, 135 U. S. 100, 122, 10 S. Ct. 681, 34 L. Ed. 128, 12 Ky. L. Rptr. 123 (1890)*. In exercising their police power in this area, the States had long **[*518]** enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade. [3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, **[****38]** and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States v. South-Eastern Underwriters Assn., 322 U. S. 533, 558, 64 S. Ct. 1162, 88 L. Ed. 1440 (1944)*. **[***57]** But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g., Kidd v. Pearson, 128 U. S. 1, 17-18, 9 S. Ct. 6, 32 L. Ed. 346 (1888)*. As a result, the Act did not pose a threat to traditional state regulatory activity.

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[1] S. White, History of Oral and Dental Science in America 197-214 (1876) (detailing earliest American regulations of the practice of dentistry.)

[2] See, e.g., R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deteriorations of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

[3] See Handler, The Current Attack on the Parker v. Brown State Action Doctrine, 76 Colum. L., Rev. 1, 4-6 (1976) (collecting cases).

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn, 317 U. S. 111, 125, 63 S. Ct. 82, 87 L. Ed. 122 (1942)*. This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *HospitalBuilding Co. v. Trustees of Rex Hospital, 425 U. S. 738, 743, n. 2, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976)* ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question **[****39]** in *Parker.*

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to **[*519]** establish marketing plans for certain agricultural commodities within the State. *317 U. S., at 346-347, 63 S. Ct. 307, 87 L. Ed. 315*. Raisins were among the regulated commodities, and so the Commission **[**1119]** established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id., at 347-348, 63 S. Ct. 307, 87 L. Ed. 315*. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id., at 350, 63 S. Ct. 307, 87 L. Ed. 315*. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id., at 351, 63 S. Ct. 307, 87 L. Ed. 315*.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history **[****40]** affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Ibid.*. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the **[***58]** *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical **[*520]** and dental boards, often staffed by doctors or dentists, [4] and had given those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws **[****41]** were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia, 129 U. S. 114, 128, 9 S. Ct. 231, 32 L. Ed. 623 (1889)*, this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker v. New York, 170 U. S. 189, 192, 18 S. Ct. 573, 42 L. Ed. 1002 (1898)*, the Court reiterated that a lawspecifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

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[4] Shrylock 54-55: D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23-24 92012).

[5] In *Hawker v. New York, 170 U.S. 189, 18 S. Ct. 573, 42 L. Ed. 1002 (1989)*, the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id., at 191-193, n. 1, 18 S. Ct. 573, 42 L. Ed. 1002*. See also *Douglas v. Noble, 261 U.S. 165, 166, 43 S. Ct. 303, 67 L. Ed. 590 (1923)* ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

II

As noted above, the only question in this case is whether **[****42]** the Board **[**1120]** is really a state agency, and the answer to that question is clearly yes.

•The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that **[*521]** only qualified persons be permitted to practice dentistry in the State." *N. C. Gen. Stat. Ann. §90-22(a)* (2013).

•To further that end, the legislature created the Board "as the agency of the State for the regulation of the practice of dentistry in th[e] State." *§90-22(b)*.

•The legislature specified the membership of the Board. *§90-22(c)*. It defined the "practice of dentistry," *§90-29(b)*, and it set out standards for licensing practitioners, *§90-30*. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. *§90-41(a)*.

[*59]** •The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry." *§90-40.1(a)*. It authorized the Board to conduct investigations and **[****43]** to hire legal counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. *§§ 90-41(d)-(g)*.

•The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. *§90-48*. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. *§93B-2*. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid*.

As this regulatory regime demonstrates, North Carolina's Board is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

[*522] The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not "'give immunity to those who violate the Sherman Act by authorizing them to **[****44]** violate it, or by declaring that their action is lawful.'" *Ante, at 505, 135 S. Ct. 1101, 191 L. Ed. 2d, at 48* (quoting *Parker, 317 U. S., at 351, 63 S. Ct. 307, 87 L. Ed. 315*). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States, 193 U. S. 197, 24 S. Ct. 436, 48 L. Ed. 679 (1904)*, to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal ***antitrust law***. *Id., at 344-345, 63 S. Ct. 307, 87 L. Ed. 315*. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active **[**1121]** market participants," *ante, at 510, 135 S. Ct. 1101, 191 L. Ed. 2d, at 52*, must demonstrate active state supervision in order to be immune from federal ***antitrust law***. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California **[****45]** conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker, 317 U. S., at 346, 63 S. Ct. 307, 87 L. Ed. 315*. If the Commission then agreed that a marketing plan was **[***60]** warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers*." **[*523]** *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id., at 347, 63 S. Ct. 307, 87 L. Ed. 315*. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id., at 352, 63 S. Ct. 307, 87 L. Ed. 315*. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the*Parker* doctrine and is misdirected by subsequent cases that extended that doctrine **[****46]** (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U. S. 97, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980)*, but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both "'clearly articulated'" and "'actively supervised, by the State itself." *445 U. S., at 105, 100 S. Ct. 937, 63 L. Ed. 2d 233*. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. **[*524]** And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina. **[****47]**

Our decision in *Hallie v. Eau Claire, 471 U. S. 34, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*, which involved Sherman Act claims against a municipality, not a state agency, is similarly inapplicable. In *Hallie,* the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." *471 U. S., at 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. But recognizing that a municipality is "an arm of the State," *id., at 45, 105 S. Ct. 1713, 85 L. Ed. 2d 24*, the Court held that a municipality **[**1122]** should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), *471 U. S., at 46, 105 S. Ct. 1713, 85 L. Ed. 2d 24*. That municipalities are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

[*61]** Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N. Y. v. Chatham County, 547 U. S. 189, 193, 126 S. Ct. 1689, 164 L. Ed. 2d 367 (2006)*, and California's sovereignty provided the foundation for the decision in *Parker, supra, at 352, 63 S. Ct. 307, 87 L. Ed. 315*. Municipalities are not sovereign. *Jinks v. Richland County, 538 U. S. 456, 466, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003)*. And for this reason, federal law often treats municipalities differently from States. Compare *Will v. Michigan Dept. of State Police, 491 U. S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)* ("[N]either a State nor its officials acting in their official capacities are 'persons' **[****48]** under [*42 U. S. C.] §1983*"), with *Monell v. New York City Dept. of Social Servs., 436 U. S. 658, 694, 8 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)* (municipalities liable under *§1983* where "execution of a government's policy or custom . . . inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the Board, a full-fledged state agency, **[*525]** is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v.*

Omni Outdoor Advertising, Inc., 499 U. S. 365, 111 S. Ct. 1344, 113 L. Ed. 2d 382 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *499 U.S., at 374, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. The Sherman Act, we said, is not an anticorruption or good-government statute. *Id., at 398, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive **[****49]** behavior of city officials. *499 at 374-379, 111 S. Ct. 1344, 113 L. Ed. 2d 382*. But that is essentially what the Court has done here.

IV

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

[*62]** As a result of today's decision, States may find it necessary to change the composition **[**1123]** of medical, dental, and other **[*526]** boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure **[****50]** of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante, at 511, 135 S. Ct. 1101, 191 L. Ed. 2d, at 53*, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, **[****51]** did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the **[*527]** Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether the members of a board are active market participants? The answer may be that determining when regulatory

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[6] See, e.g., R. Noll, Reforming Regulation 40-43, 46 (1971); J. Wilson, The Politics of Regulation 357-394 (1980). Indeed, it has even been charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "the Nader Report" on the Federal Trade Commission vii-xiv (1969); Posner, Federal Trade Commission, Chi, L. Rev. 47, 82-84 (1969).

capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt **[****52]** the rather crude test for capture that constitutes the holding of today's decision.

V

The Court has created a new standard for distinguishing between private and state actors for purposes of **[***63]** federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

References

15 U.S.C.S. § 1 et seq.

3 Antitrust Laws and Trade Regulations §§49.01-49.03 (Matthew Bender)

10 Federal Antitrust Laws §§76.5, 76.7-76.9 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 9.5

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices

What constitutes vertical price fixing in violation of *§ 1* of Sherman Act (*15 U.S.C.S. § 1*)--Supreme Court cases. *168 L. Ed. 2d 847*.

Applicability of "state action" doctrine granting **[****53]** immunity from federal antitrust laws for activities of, or directed by, state governments--Supreme Court cases. *119 L. Ed. 2d 641*.

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (*15 U.S.C.S. § 1 et seq.*). *64 L. Ed. 2d 997*.

Applicability of federal antitrust laws as affected by other federal statutes or by Federal Constitution--Supreme Court cases. *45 L. Ed. 2d 841*.

End of Document

[Oneok, Inc. v. Learjet, Inc.](#)

Supreme Court of the United States

January 12, 2015, Argued; April 21, 2015, Decided

No. 13-271

Reporter

575 U.S. 373 *; 135 S. Ct. 1591 **; 191 L. Ed. 2d 511 ***; 2015 U.S. LEXIS 2808 ****; 83 U.S.L.W. 4249; 2015-1 Trade Cas. (CCH) P79,135; 183 Oil & Gas Rep. 678; 25 Fla. L. Weekly Fed. S 197; 2015 WL 1780926

ONEOK, INC., et al. Petitioners v. LEARJET, INC., et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: **[****1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Learjet, Inc. v. Oneok, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 715 F.3d 716, 2013 U.S. App. LEXIS 7234 (9th Cir. Nev., 2013)

Disposition: Affirmed.

Core Terms

regulation, pipelines, natural gas, wholesale, pre-emption, rates, pre-empted, natural-gas, interstate, state law, sales, retail, manipulation, state regulation, transportation, prices, antitrust, practices, aimed, wholesale sale, producers, state ***antitrust law***, indices, sellers, trades, cases, purchasers, effects, resale, conditions

LexisNexis® Headnotes

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN1[] **Supremacy Clause, Federal Preemption**

The United States Supreme Court has said that, in passing the Natural Gas Act, 52 Stat. 821, Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce.

Constitutional Law > Supremacy Clause > Federal Preemption

Constitutional Law > Supremacy Clause > Supreme Law of the Land

HN2[] **Supremacy Clause, Federal Preemption**

The *Supremacy Clause* provides that the laws of the United States (as well as treaties and the Constitution itself) shall be the supreme law of the land, anything in the Constitution or laws of any State to the contrary notwithstanding. *U.S. Const. art. VI, cl. 2*. Congress may consequently preempt, i.e., invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to preemption, Congress may implicitly preempt a state law, rule, or other state action. It may do so either through "field" preemption or "conflict" preemption. As to the former, Congress may have intended to foreclose any state regulation in an area, irrespective of whether state law is consistent or inconsistent with federal standards. In such situations, Congress has forbidden the States to take action in the field that the federal statute preempts. By contrast, conflict preemption exists where compliance with both state and federal law is impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In either situation, federal law must prevail.

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN3[] **Natural Gas Industry, Distribution & Sale**

In the early 20th century, the United States Supreme Court held that the *Commerce Clause* forbids the States to regulate the interstate shipment and sale of gas to local distributors for resale. Those holdings left a regulatory gap. Congress enacted the Natural Gas Act, 52 Stat. 821, to fill it. The Act, in § 5(a), *15 U.S.C.S. § 717d(a)*, gives rate-setting authority to the Federal Energy Regulatory Commission (FERC). That authority allows FERC to determine whether any rate, charge, or classification collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of FERC, or any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential. Section 5(a) limits the scope of FERC's authority to activities in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission. And the Act, in § 1(b), *15 U.S.C.S. § 717(b)*, limits FERC's jurisdiction to (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale, and (3) natural-gas companies engaged in such transportation or sale. The Act leaves regulation of other portions of the industry, such as production, local distribution facilities, and direct sales, to the States.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN4[] **Supremacy Clause, Federal Preemption**

As the United States Supreme Court has repeatedly stressed, the Natural Gas Act, 52 Stat. 821, was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. Accordingly, where a state law can be applied to nonjurisdictional as well as jurisdictional sales, courts must proceed cautiously, finding preemption only where detailed examination convinces a court that a matter falls within the preempted field as defined by Supreme Court precedents.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN5[] **Supremacy Clause, Federal Preemption**

United States Supreme Court precedents emphasize the importance of considering the target at which a state law aims in determining whether that law is preempted under the Natural Gas Act, 52 Stat. 821. The Court consistently recognized that the significant distinction for purposes of preemption in the natural-gas context is the distinction between measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at subjects left to the States to regulate. The Natural Gas Act does not preempt a state regulation concerning the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, i.e., jurisdictional sales. In reaching this conclusion, the Court explained that the state regulation aimed primarily at protecting producers' rights—a matter firmly on the States' side of that dividing line. The Court contrasted this state regulation with the state orders at issue in Northern Natural, which invalidly invaded the federal agency's exclusive domain precisely because they were unmistakably and unambiguously directed at purchasers.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN6[] **Supremacy Clause, Federal Preemption**

The target to which United States Supreme Court cases that interpret the Natural Gas Act, 52 Stat. 821, refer must mean more than just the physical activity that a State regulates. After all, a single physical action, such as reporting a price to a specialized journal, could be the subject of many different laws—including tax laws, disclosure laws, and others. No one can claim that the Federal Energy Regulatory Commission's regulation of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates.

Antitrust & Trade Law > Regulated Industries > Energy & Utilities > State Regulation

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN7[] **Energy & Utilities, State Regulation**

Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

HN8[] **Supremacy Clause, Federal Preemption**

To find field preemption of state regulation under the Natural Gas Act, 52 Stat. 821, merely because purchasers' costs and hence rates might be affected would be largely to nullify § 1(b), *15 U.S.C.S. § 717(b)*, of the Act.

Constitutional Law > Supremacy Clause > Federal Preemption

Energy & Utilities Law > Natural Gas Industry > Distribution & Sale

Energy & Utilities Law > Natural Gas Industry > Marketing & Transportation > General Overview

Energy & Utilities Law > Natural Gas Industry > Natural Gas Act > General Overview

HN9[] **Supremacy Clause, Federal Preemption**

The enumeration of the Federal Energy Regulatory Commission's powers in § 5(a), *15 U.S.C.S. § 717d(a)*, of the Natural Gas Act, 52 Stat. 821, is circumscribed by a reference back to the limitations in § 1(b), *15 U.S.C.S. § 717(b)*. Those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. States have a long history of providing common-law and statutory remedies against monopolies and unfair business practices.

Constitutional Law > Supremacy Clause > Federal Preemption

HN10[] **Supremacy Clause, Federal Preemption**

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U. S. 354 (1988), is best read as a conflict preemption case, not a field preemption case.

Lawyers' Edition Display

Decision

[*511]** Natural Gas Act (*15 U.S.C.S. § 717 et seq.*) held not to pre-empt state-law claims challenging industry practices that directly affected wholesale natural gas market, when claims were asserted by litigants who purchased gas in retail transactions.

Summary

Overview: HOLDINGS: [1]-Manufacturers, hospitals, and other institutions that bought natural gas directly from interstate pipelines were not pre-empted under the Natural Gas Act, *52 Stat. 821*, from suing the pipelines under state antitrust statutes, claiming that they violated state law when they engaged in behavior that affected both wholesale and retail prices of natural gas; [2]-The Act was drawn with meticulous regard for the continued exercise of state power, it did not pre-empt the States from regulating issues involving the retail sale of natural gas, and no one could claim that the FERC's regulation of natural gas transmission for purposes of wholesale rates foreclosed every form of state regulation that affected those rates; [3]-To the extent conflicts arose between state ***antitrust law*** and the federal rate-setting process, the doctrine of conflict pre-emption was available to address them.

Outcome: Judgment affirmed. 7-2 decision; 1 concurrence; 1 dissent.

Headnotes

COMMERCE §138 > NATURAL GAS ACT -- FEDERAL PRE-EMPTION > Headnote:
LEdHN[1][] [1]

The United States Supreme Court has said that, in passing the Natural Gas Act, *52 Stat. 821*, Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

[*512]**

STATES, TERRITORIES, AND POSSESSIONS §18 STATES, TERRITORIES, AND POSSESSIONS §19 > SUPREMACY CLAUSE -- STATE LAW -- FEDERAL PRE-EMPTION > Headnote:
LEdHN[2][] [2]

The *supremacy clause* provides that the laws of the United States (as well as treaties and the Constitution itself) shall be the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding. *U.S. Const. Art. VI, cl. 2*. Congress may consequently preempt, i.e., invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action. It may do so either through “field” pre-emption or “conflict” pre-emption. As to the former, Congress may have intended to foreclose any state regulation in an area, irrespective of whether state law is consistent or inconsistent with federal standards. In such situations, Congress has forbidden the states to take action in the field that the federal statute pre-empts. By contrast, conflict pre-emption exists where compliance with both state and federal law is impossible, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. In either situation, federal law must prevail. (Breyer, J., joined by Kennedy, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

[*513]**

COMMERCE §138 > NATURAL GAS -- SHIPMENT AND SALE -- FEDERAL AND STATE REGULATION > Headnote:
LEdHN[3][] [3]

In the early 20th century, the United States Supreme Court held that the *commerce clause* forbids the states to regulate the interstate shipment and sale of gas to local distributors for resale. Those holdings left a regulatory gap.

Congress enacted the Natural Gas Act, *52 Stat. 821*, to fill it. The Act, in § 5(a), *15 U.S.C.S. § 717d(a)*, gives rate-setting authority to the Federal Energy Regulatory Commission (FERC). That authority allows FERC to determine whether any rate, charge, or classification collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of FERC, or any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential. *Section 5(a)* limits the scope of FERC's authority to activities in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission. And the Act, in § 1(b), *15 U.S.C.S. § 717(b)*, limits FERC's jurisdiction to (1) the transportation of natural gas in interstate commerce, (2) the sale in interstate commerce of natural gas for resale, and (3) natural-gas companies engaged in such transportation or sale. The Act leaves regulation of other portions of the industry, such as production, local distribution facilities, and direct sales, to the states. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE AND FEDERAL POWERS > Headnote:

LEdHN[4][] [4]

As the United States Supreme Court has repeatedly stressed, the Natural Gas Act, *52 Stat. 821*, was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. Accordingly, where a state law can be applied to nonjurisdictional as well as jurisdictional sales, courts must proceed cautiously, finding pre-emption only where detailed examination convinces a court that a matter falls within the pre-empted field as defined by Supreme Court precedents. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE LAW -- FEDERAL PRE-EMPTION > Headnote:

LEdHN[5][] [5]

United States Supreme Court precedents emphasize the importance of considering the target at which a state law aims in determining whether that law is pre-empted under the Natural Gas Act, *52 Stat. 821*. The court consistently recognized that the significant distinction for purposes of pre-emption in the natural-gas context is the distinction between measures aimed directly at interstate purchasers and wholesales for resale, and those aimed at subjects left to the states to regulate. The Natural Gas Act does not pre-empt a state regulation concerning the timing of gas production from a gas field within the state, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, i.e., jurisdictional sales. In reaching this conclusion, the Court explained that the state regulation aimed primarily at protecting producers' rights--a matter firmly on the states' side of that dividing line. The court contrasted this state regulation with the state orders at issue in Northern Natural, which invalidly invaded the federal agency's exclusive domain precisely because they were unmistakably and unambiguously directed at purchasers. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §38.7 STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE LAW -- FEDERAL PRE-EMPTION > Headnote:

LEdHN[6][] [6]

The target to which United States Supreme Court cases that interpret the Natural Gas Act, *52 Stat. 821*, refer must mean more than just the physical activity that a state regulates. After all, a single physical action, such as reporting a price to a specialized journal, could be the subject of many different laws--including tax laws, disclosure laws, and others. No one can claim that the Federal Energy Regulatory Commission's regulation of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §36 > NATURAL GAS -- STATE AND FEDERAL REGULATION > Headnote:
LEdHN[7][] [7]

Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- FIELD PRE-EMPTION > Headnote:
LEdHN[8][] [8]

To find field pre-emption of state regulation under the Natural Gas Act, *52 Stat. 821*, merely because purchasers' costs and hence rates might be affected would be largely to nullify § 1(b), *15 U.S.C.S. § 717(b)*, of the Act. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

[*514]**

STATES, TERRITORIES, AND POSSESSIONS §45.8 > NATURAL GAS ACT -- STATE POWER > Headnote:
LEdHN[9][] [9]

The enumeration of the Federal Energy Regulatory Commission's powers in § 5(a), *15 U.S.C.S. § 717d(a)*, of the Natural Gas Act, *52 Stat. 821*, is circumscribed by a reference back to the limitations in § 1(b), *15 U.S.C.S. § 717(b)*. Those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way. States have a long history of providing common-law and statutory remedies against monopolies and unfair business practices. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

STATES, TERRITORIES, AND POSSESSIONS §45.8 > PUBLIC UTILITY -- STATE LAW -- PRE-EMPTION > Headnote:
LEdHN[10][] [10]

Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U.S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988), is best read as a conflict pre-emption case, not a field pre-emption case. (Breyer, J., joined by Kennedy, Thomas, Ginsburg, Alito, Sotomayor, and Kagan, JJ.)

Syllabus

[*373] [1592] [***515]** Respondents, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines, sued petitioner interstate pipelines, claiming that the pipelines had engaged in behavior that violated state antitrust laws. In particular, respondents alleged that petitioners reported false information to the natural-gas indices on which respondents' natural-gas contracts were based. The indices affected not only retail natural-gas prices, but also wholesale natural-gas prices.

After removing the cases to federal court, the petitioner pipelines sought summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law claims. That Act gives the Federal Energy Regulatory Commission (FERC) the authority to determine whether rates charged by natural-gas companies or practices affecting such rates are unreasonable. 15 U. S. C. §717d(a). But it also limits FERC's jurisdiction to the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural-gas companies engaged in such transportation or sale. §717(b). The **[****2]** Act leaves regulation of other portions of the industry--such as retail sales--to the States. *Ibid.*

The District Court granted petitioners' motion for summary judgment, reasoning that because petitioners' challenged practices directly affected wholesale as well as retail prices, they were pre-empted by the Act. The Ninth Circuit reversed. While acknowledging that the pipelines' index manipulation increased wholesale prices as well as retail prices, it held that the state-law claims were not pre-empted because they were aimed at obtaining damages only for excessively high retail prices.

Held: Respondents' state-law antitrust claims are not within the field of matters pre-empted by the Natural Gas Act. Pp. 384-391, 191 L. Ed. 2d, at 521-525.

(a) The Act "was drawn with meticulous regard for the continued exercise of state power." Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U. S. 507, 517-518, 68 S. Ct. 190, 92 L. Ed. 128. Where, as here, a practice affects nonjurisdictional as well as jurisdictional sales, pre-emption **[*374]** can be found only where a detailed examination convincingly demonstrates that a matter falls within the pre-empted field as defined by this Court's precedents. Those precedents emphasize the importance of considering the target at which **[****3]** the state-law claims aim. See, *e.g.,* Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 83 S. Ct. 646, 9 L. Ed. 2d 601; Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan., 489 U. S. 493, 109 S. Ct. 1262; 103 L. Ed. 2d 509. Here, respondents' claims are aimed at practices affecting retail prices, a matter "firmly on the States' side of [the] dividing line." Id., at 514, 109 S. Ct. 1262; 103 L. Ed. 2d 509.

Schneidewind v. ANR Pipeline Co., 485 U. S. 293, 108 S. Ct. 1145, 99 L. Ed. 2d 316, is not to the contrary. That opinion explains that the Act does not pre-empt "traditional" state regulation, such as blue sky laws. Id., at 308, n. 11, 108 S. Ct. 1145, 99 L. Ed. 2d 316. Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, **[**1593]** but rather **[***516]** all businesses in the marketplace. The broad applicability of state antitrust laws supports a finding of no pre-emption here.

So, too, does the fact that States have long provided "common-law and statutory remedies against monopolies and unfair business practices," California v. ARC America Corp., 490 U. S. 93, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86. As noted earlier, the Act circumscribes FERC's powers and preserves traditional areas of state authority. §717(b). Pp. 384-388, 191 L. Ed. 2d, at 521-524.

(b) Neither Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U. S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322, nor FPC v. Louisiana Power & Light Co., 406 U. S. 621, 92 S. Ct. 1827, 32 L. Ed. 2d 369, supports petitioners' position. *Mississippi Power* is best read as a conflict pre-emption case, not a field pre-emption case. In any event, the state inquiry in *MississippiPower* was pre-empted because it was directed at jurisdictional sales in a way that **[****4]** respondents' state antitrust suits are not. *Louisiana Power* is also a conflict pre-emption case, and thus does not significantly help petitioners' field pre-emption argument. Pp. 388-390, 191 L. Ed. 2d, at 524-525.

(c) Because the parties have not argued conflict pre-emption, questions involving conflicts between state antitrust proceedings and the federal ratesetting process are left for the lower courts to resolve in the first instance. Pp. 390, 191 L. Ed. 2d, at 525.

(d) While petitioners and the Government argue that this Court should defer to FERC's determination that field pre-emption bars respondents' claims, they fail to point to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Thus, this Court need not consider what legal effect such a determination might have. *P. 390, 191 L. Ed. 2d, at 525*.

715 F. 3d 716, affirmed.

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Judges: Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Alito, Sotomayor, And Kagan, JJ., joined, and in which Thomas, J., joined as to all but Part I-A. Thomas, J., filed an opinion concurring in part and concurring in the judgment, *post*, p. 391. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., joined, *post*, p.392.

Opinion by: BREYER

Opinion

[1594]**

[*376] Justice **Breyer** delivered the opinion of the Court.

In this **[****5]** case, a group of manufacturers, hospitals, and other institutions that buy natural gas directly from interstate pipelines sued the pipelines, claiming that they engaged in behavior that violated state antitrust laws. The pipelines' behavior affected *both* federally regulated *wholesale* natural-gas prices *and* nonfederally regulated *retail* natural-gas prices. The question is whether the federal Natural Gas Act pre-empts these lawsuits. ***HN1***[] ***LEdHN[1]***[] [1] We have said that, in passing the Act, "Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce." *Schneidewind v. ANR Pipeline Co., 485 U. S. 293, 305, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988)*. Nevertheless, for the reasons given below, we conclude that the Act does not pre-empt the state-law antitrust suits at issue here.

[*517]** I

A

HN2[] ***LEdHN[2]***[] [2] The *Supremacy Clause* provides that "the Laws of the United States" (as well as treaties and the Constitution itself) "shall be the supreme Law of the Land . . . any **[**1595]** Thing in the Constitution or Laws of any state to the Contrary notwithstanding." *Art. VI, cl. 2*. Congress may consequently pre-empt, *i.e.*, invalidate, a state law through federal legislation. It may do so through express language in a statute. But even where, as here, a statute does not refer expressly to pre-emption, **[****6]** Congress may implicitly pre-empt **[*377]** a state law, rule, or other state action. See *Sprietsma v. Mercury Marine, 537 U. S. 51, 64, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002)*.

It may do so either through "field" pre-emption or "conflict" pre-emption. As to the former, Congress may have intended "to foreclose any state regulation in the *area*," irrespective of whether state law is consistent or inconsistent with "federal standards." *Arizona v. United States, 567 U. S. 387, 401, 132 S. Ct. 2492, 2502, 183 L. Ed. 2d 351, 370 (2012)* (emphasis added). In such situations, Congress has forbidden the State to take action in the *field* that the federal statute pre-empts.

By contrast, conflict pre-emption exists where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *California v. ARC America Corp., 490 U. S. 93, 100, 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86 (1989)*. In either situation, federal law must prevail.

No one here claims that any relevant federal statute expressly pre-empts state antitrust lawsuits. Nor have the parties argued at any length that these state suits conflict with federal law. Rather, the interstate pipeline companies (petitioners here) argue that Congress implicitly "'occupied *the field of matters* relating to wholesale sales and transportation of natural gas in interstate commerce.'" Brief for Petitioners 18 (quoting **[****7]** *Schneidewind, supra, at 305, 108 S. Ct. 1145, 99 L. Ed. 2d 316* (emphasis added)). And they contend that the state antitrust claims advanced by their direct-sales customers (respondents here) fall within that field. The United States, supporting the pipelines, argues similarly. See Brief for United States as *Amicus Curiae* 15. Since the parties have argued this case almost exclusively in terms of field pre-emption, we consider only the field pre-emption question.

B

1

Federal regulation of the natural-gas industry began at a time when the industry was divided into three segments. **[*378]** See 1 Regulation of the Natural Gas Industry §1.01 (W. Mogel ed. 2008) (hereinafter Mogel); *General Motors Corp. v. Tracy, 519 U. S. 278, 283, 117 S. Ct. 811, 136 L. Ed. 2d 761 (1997)*. First, natural-gas producers sunk wells in large oil and gas fields (such as the Permian Basin in Texas and New Mexico). They gathered the gas, brought it to transportation points, and left it to interstate gas pipelines to transport the gas to distant markets.

Second, interstate pipelines shipped the gas from the field to cities and towns across the Nation. Third, local gas distributors bought the gas from the interstate pipelines and resold it to business and residential customers within their localities.

[*518]** Originally, the States regulated all three segments of the industry. **[****8]** See 1 Mogel §1.03. But ***HN3***[] ***LEdHN[3]***[] [3] in the early 20th century, this Court held that the Commerce Clause forbids the States to regulate the second part of the business—*i.e.*, the interstate shipment and sale of gas to local distributors for resale. See, *e.g.*, *R. I. v. Public Util. Comm'n of Attleboro Steam & Elec. Co., 273 U. S. 83, 89-90, 47 S. Ct. 294, 71 L. Ed. 549 (1927)*; **[**1596]** *Missouri ex rel. Barrett v. Kansas Natural Gas Co., 265 U. S. 298, 307-308, 44 S. Ct. 544, 68 L. Ed. 1027 (1924)*. These holdings left a regulatory gap. Congress enacted the Natural Gas Act, *52 Stat. 821*, to fill it. See *Phillips Petroleum Co. v. Wisconsin, 347 U. S. 672, 682-684, and n. 13, 74 S. Ct. 794, 98 L. Ed. 1035 (1954)* (citing H. R. Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937); S. Rep. No. 1162, 75th Cong., 1st Sess., 1-2 (1937)).

The Act, in *§5(a)*, gives ratesetting authority to the Federal Energy Regulatory Commission (FERC, formerly the Federal Power Commission (FPC)). That authority allows FERC to determine whether "any rate, charge, or classification . . . collected by any natural-gas company in connection with any transportation or sale of natural gas, *subject to the jurisdiction of* [*FERC*]," or "any rule, regulation, practice, or contract affecting *such* rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential." *15 U. S. C. §717d(a)* (emphasis added). As the italicized words make clear, *§5(a)* limits the scope of FERC's authority **[*379]** to activities "in connection with any transportation or sale of natural gas, *subject to the jurisdiction of the Commission* ***[****9]*** ." *Ibid.* (emphasis added). And the Act, in *§1(b)*, limits FERC's "jurisdiction" to (1) "the transportation of natural gas in interstate commerce," (2) "the sale in interstate commerce of natural gas for resale," and (3) "natural-gas companies engaged in such transportation or sale." *§717(b)*. The Act leaves regulation of other portions of the industry—such as production, local distribution facilities, and direct sales—to the States. See *Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan., 489 U. S. 493, 507, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989)* (*Section 1(b)* of the Act "expressly" provides that "States retain jurisdiction over *intrastate* transportation, local distribution, and distribution facilities, and over 'the production or gathering of natural gas'").

To simplify our discussion, we shall describe the firms that engage in interstate transportation as "jurisdictional sellers" or "interstate pipelines" (though various brokers and others may also fall within the Act's jurisdictional scope). Similarly, we shall refer to the sales over which FERC has jurisdiction as "jurisdictional sales" or "wholesale sales."

2

Until the 1970's, natural-gas regulation roughly tracked the industry model we described above. Interstate pipelines would typically buy gas from **[****10]** field producers and resell it to local distribution companies for resale. See *Tracy, supra, at 283, 117 S. Ct. 811, 136 L. Ed. 2d 761*. FERC (or FPC), acting under the authority of the Natural Gas Act, would set interstate pipeline wholesale rates using classical "cost-of-service" ratemaking methods. See *Public Serv. Comm'n of N. Y. v. Mid-Louisiana Gas Co., 463 U. S. 319, 328, 103 S. Ct. 3024, 77 L. Ed. 2d 668 (1983)*. That is, FERC would determine a pipeline's revenue **[***519]** requirement by calculating the costs of providing its services, including operating and maintenance expenses, depreciation expenses, taxes, and a reasonable profit. See FERC, Cost-of-Service Rates Manual **[*380]** 6 (June 1999). FERC would then set wholesale rates at a level designed to meet the pipeline's revenue requirement.

Deregulation of the natural-gas industry, however, brought about changes in FERC's approach. In the 1950's, this Court had held that the Natural Gas Act required regulation of prices at the interstate pipelines' *buying* end—*i.e.*, the prices at which field producers sold natural gas to interstate pipelines. *Phillips Petroleum Co., supra, at 682, 685, 74 S. Ct. 794, 98 L. Ed. 1035*. By the 1970's, many in Congress thought that such efforts to regulate field prices **[**1597]** had jeopardized natural-gas supplies in an industry already dependent "on the caprice of nature." *FPC v. Hope Natural Gas Co., 320 U. S. 591, 630, 64 S. Ct. 281, 88 L. Ed. 333 (1944)* (opinion of Jackson, J.); see *id., at 629, 64 S. Ct. 281, 88 L. Ed. 333* (recognizing that "the **[****11]** wealth of Midas and the wit of man cannot produce . . . a natural gas field"). Hoping to avoid future shortages, Congress enacted forms of field price deregulation designed to rely upon competition, rather than regulation, to keep field prices low. See, *e.g.*, Natural

Gas Policy Act of 1978, 92 Stat. 3409, codified in part at *15 U. S. C. §3301 et seq.* (phasing out regulation of wellhead prices charged by producers of natural gas); Natural Gas Wellhead Decontrol Act of 1989, *103 Stat. 157* (removing price controls on wellhead sales as of January 1993).

FERC promulgated new regulations designed to further this process of deregulation. See, *e.g.*, Regulation of Natural Gas Pipelines After *Partial Wellhead Decontrol, 50 Fed. Reg. 42408 (1985)* (allowing "open access" to pipelines so that consumers could pay to ship their own gas). Most important here, FERC adopted an approach that relied on the competitive marketplace, rather than classical regulatory ratesetting, as the main mechanism for keeping *wholesale* natural-gas rates at a reasonable level. Order No. 636, issued in 1992, allowed FERC to issue blanket certificates that permitted jurisdictional sellers (typically interstate pipelines) to charge market-based rates for gas, provided that FERC had first determined that the sellers lacked **[****12]** market **[*381]** power. See *57 Fed. Reg. 57957-57958* (1992); *id.*, at 13270.

After the issuance of this order, FERC's oversight of the natural-gas market largely consisted of (1) ex ante examinations of jurisdictional sellers' market power, and (2) the availability of a complaint process under *§717d(a)*. See Brief for United States as *Amicus Curiae* 4. The new system also led many large gas consumers—such as industrial and commercial users—to buy their own gas directly from gas producers, and to arrange (and often pay separately) for transportation from the field to the place of consumption. See *Tracy, 519 U. S., at 284, 117 S. Ct. 811, 136 L. Ed. 2d 761*. Insofar as interstate pipelines sold gas to such consumers, they sold it for direct consumption rather than resale.

3

The free-market system for setting interstate pipeline rates turned out to be less than perfect. Interstate pipelines, distributing companies, and many of the customers who bought directly from the pipelines found that **[***520]** they had to rely on privately published price indices to determine appropriate prices for their natural-gas contracts. These indices listed the prices at which natural gas was being sold in different (presumably competitive) markets across the country. The information on which these indices were based was voluntarily **[****13]** reported by natural-gas traders.

In 2003, FERC found that the indices were inaccurate, in part because much of the information that natural-gas traders reported had been false. See FERC, Final Report on Price Manipulation in Western Markets (Mar. 2003), App. 88-89. FERC found that false reporting had involved "inflating the volume of trades, omitting trades, and adjusting the price of trades." *Id.*, at 88. That is, sometimes those who reported information simply fabricated it. Other times, the information reported reflected "wash trades," *i.e.*, "*prearranged* pair[s] of trades of the same good between the same parties, involving no economic risk and no net change in beneficial **[*382]** ownership." *Id.*, at 215. FERC concluded that these "efforts to manipulate **[**1598]** price indices compiled by trade publications" had helped raise "to extraordinary levels" the prices of both jurisdictional sales (that is, interstate pipeline sales for resale) and nonjurisdictional direct sales to ultimate consumers. *Id.*, at 86, 85.

After issuing its final report on price manipulation in western markets, FERC issued a Code of Conduct. That code amended all blanket certificates to prohibit jurisdictional sellers "from engaging in actions without a legitimate business **[****14]** purpose that manipulate or attempt to manipulate market conditions, including wash trades and collusion." *68 Fed. Reg. 66324 (2003)*. The code also required jurisdictional companies, when they provided information to natural-gas index publishers, to "provide accurate and factual information, and not knowingly submit false or misleading information or omit material information to any such publisher." *Id., at 66337*. At the same time, FERC issued a policy statement setting forth "minimum standards for creation and publication of any energy price index" and "for reporting transaction data to index developers." *Price Discovery in Natural Gas and Elec. Markets, 104 FERC ¶61,121*, pp. 61,407, 61,408 (2003). Finally, FERC, after finding that certain jurisdictional sellers had "engaged in wash trading . . . that resulted in the manipulation of [natural-gas] prices," terminated those sellers' blanket marketing certificates. *Enron Power Marketing, Inc., 103 FERC ¶61,343*, p. 62,303 (2003).

Congress also took steps to address these problems. In particular, it passed the Energy Policy Act of 2005, *119 Stat. 594*, which gives FERC the authority to issue rules and regulations to prevent "any manipulative or deceptive device or contrivance" by "any entity . . . in connection with the purchase or sale of natural gas or the purchase or sale of transportation **[****15]** services subject to the jurisdiction of" FERC, *15 U. S. C. §717c-1*.

[*383] C

We now turn to the cases before us. Respondents, as we have said, bought large quantities of natural gas directly from interstate pipelines for their own consumption. They believe that they overpaid in these transactions due to the interstate pipelines' manipulation of the natural-gas indices. Based on this belief, they filed state-law antitrust suits against petitioners **[***521]** in state and federal courts. See App. 244-246 (alleging violations of *Wis. Stat. §§133.03*, *133.14*, *133.18*); see also App. 430-433 (same); *id.*, at 519-521 (same); *id.*, at 362-364 (alleging violations of Kansas Restraint of Trade Act, *Kan. Stat. Ann. §50-101 et seq.*); App. 417-419 (alleging violations of Missouri ***Antitrust Law***, *Mo. Rev. Stat. §§416.011-416.161*). The pipelines removed all the state cases to federal court, where they were consolidated and sent for pretrial proceedings to the Federal District Court for the District of Nevada. See *28 U. S. C. §1407*.

The pipelines then moved for summary judgment on the ground that the Natural Gas Act pre-empted respondents' state-law antitrust claims. The District Court granted their motion. It concluded that the pipelines were "jurisdictional sellers," *i.e.*, "natural gas companies engaged in" the "transportation of natural gas in interstate commerce." **[****16]** Order in No. 03-cv-1431, (D Nev., July 18, 2011), pp. 4, 11. And it held that respondents' claims, which were "aimed at" these sellers' "alleged practices of false price reporting, wash trades, and anticompetitive collusive behavior" were pre-empted because "such practices" not only affected nonjurisdictional direct-sale prices but also "directly affect[ed]" jurisdictional (*i.e.*, wholesale) rates. *Id.*, at 36-37.

[1599]** The Ninth Circuit reversed. It emphasized that the price-manipulation of which respondents complained affected not only jurisdictional (*i.e.*, wholesale) sales but also nonjurisdictional (*i.e.*, retail) sales. The court construed the Natural Gas Act's pre-emptive scope narrowly in light of Congress' intent—manifested in *§1(b)* of the Act—to preserve **[*384]** for the States the authority to regulate nonjurisdictional sales. And it held that the Act did not pre-empt state-law claims aimed at obtaining damages for excessively high *retail* natural-gas prices stemming from interstate pipelines' price manipulation, even if the manipulation raised *wholesale* rates as well. See *In re Western States Wholesale Natural Gas Antitrust Litigation, 715 F. 3d 716, 729-736 (2013)*.

The pipelines sought certiorari. They asked us to resolve confusion in the lower courts as to whether the Natural Gas Act pre-empts retail customers' **[****17]** state ***antitrust law*** challenges to practices that also affect wholesale rates. Compare *id., at 729-736*, with *Leggett v. Duke Energy Corp., 308 S. W. 3d 843 (Tenn. 2010)*. We granted the petition.

II

Petitioners, supported by the United States, argue that their customers' state antitrust lawsuits are within the field that the Natural Gas Act pre-empts. See Brief for Petitioners 18 (citing *Schneidewind, 485 U. S., at 305, 108 S. Ct. 1145, 99 L. Ed. 2d 316*); Brief for United States as *Amicus Curiae* 13 (same). They point out that respondents' antitrust claims target anticompetitive activities that affected wholesale (as well as retail) rates. See Brief for Petitioners 2. They add that the Natural Gas Act expressly grants FERC authority to keep wholesale rates at reasonable levels. See *ibid.* (citing *15 U. S. C. §§717(b)*, *717d(a)*). In exercising this authority, FERC has prohibited the very kind of anticompetitive conduct that the state actions attack. See Part I-B-3, *supra*. And, petitioners contend, letting these actions proceed will permit state antitrust courts to reach conclusions about that conduct that differ from those that FERC **[***522]** might reach or has already reached. Accordingly, petitioners argue, respondents' state-law antitrust suits fall within the pre-empted field.

A

Petitioners' arguments are forceful, but we cannot accept their conclusion. ***HN4***[] ***LEdHN[4]***[] [4] As we **[****18]** have repeatedly stressed, the Natural **[*385]** Gas Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n of Ind., 332 U. S. 507, 517-518, 68 S. Ct. 190, 92 L. Ed. 128 (1947); see also Northwest Central, 489 U. S., at 511, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (the "legislative history of the [Act] is replete with assurances that the Act 'takes nothing from the State [regulatory] commissions'" (quoting 81 Cong. Rec. 6721 (1937))). Accordingly, where (as here) a state law can be applied to nonjurisdictional as well as jurisdictional sales, we must proceed cautiously, finding pre-emption only where detailed examination convinces us that a matter falls within the pre-empted field as defined by our precedents. See Panhandle Eastern, supra, at 516-518, 68 S. Ct. 190, 92 L. Ed. 128; Interstate Natural Gas Co. v. FPC, 331 U. S. 682, 689-693, 67 S. Ct. 1482, 91 L. Ed. 1742 (1947).

HN5[] ***LEdHN[5]***[] [5] Those precedents emphasize the importance of considering the *target* at which the state law *aims* in determining whether that law is pre-empted. For example, in Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963), the Court said that it had "consistently recognized" **[**1600]** that the "significant distinction" for purposes of pre-emption in the natural-gas context is the distinction between "measures *aimed directly at* interstate purchasers and wholesales for resale, and those aimed at" subjects left to the **[****19]** States to regulate. Id., at 94, 83 S. Ct. 646, 9 L. Ed. 2d 601 (emphasis added). And, in *Northwest Central*, the Court found that the Natural Gas Act did not pre-empt a state regulation concerning the timing of gas production from a gas field within the State, even though the regulation might have affected the costs of and the prices of interstate wholesale sales, *i.e.*, jurisdictional sales. 489 U. S., at 514, 109 S. Ct. 1262, 103 L. Ed. 2d 509. In reaching this conclusion, the Court explained that the state regulation aimed primarily at "protect[ing] producers' . . . rights—a matter firmly on the States' side of that dividing line." *Ibid.* The Court contrasted this state regulation with the state orders at issue in *Northern Natural*, which "'invalidly invade[d] the federal **[*386]** agency's exclusive domain' precisely because" they were "'unmistakably and unambiguously *directed at purchasers*.'" Id., at 513, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (quoting Northern Natural, supra, at 92, 83 S. Ct. 646, 9 L. Ed. 2d 601; emphasis added). Here, too, the lawsuits are directed at practices affecting *retail* rates—which are "firmly on the States' side of that dividing line."

Petitioners argue that *Schneidewind* constitutes contrary authority. In that case, the Court found pre-empted a state law that required public utilities, such as interstate pipelines crossing the State, to obtain state approval before issuing long-term **[****20]** securities. 485 U. S., at 306-309, 108 S. Ct. 1145, 99 L. Ed. 2d 316. But the Court there thought that the State's securities regulation was aimed directly at interstate pipelines. **[***523]** It wrote that the state law was designed to keep "a natural gas company from raising its equity levels above a certain point" in order to keep the company's revenue requirement low, thereby ensuring lower *wholesale* rates. Id., at 307-308, 108 S. Ct. 1145, 99 L. Ed. 2d 316. Indeed, the Court expressly said that the state law was pre-empted because it was "*directed at* . . . the control of rates and facilities of natural gas companies," "precisely the things over which FERC has comprehensive authority." Id., at 308, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (emphasis added).

The dissent rejects the notion that the proper test for purposes of pre-emption in the natural-gas context is whether the challenged measures are "aimed directly at interstate purchasers and wholesales for resale" or not. Northern Natural, supra, at 94, 83 S. Ct. 646; 9 L. Ed. 2d 601. It argues that this approach is "unprecedented," and that the Court's focus should be on "*what* the State seeks to regulate . . ., not *why* the State seeks to regulate it." Post, at 397, 191 L. Ed. 2d, at 529 (opinion of Scalia, J.). But ***HN6***[] ***LEdHN[6]***[] [6] the "target" to which our cases refer must mean more than just the physical activity that a State regulates. After all, a single physical action, such as reporting a price **[****21]** to a specialized journal, could be the subject of many different laws—including tax laws, disclosure laws, and others. To repeat the point we made above, no one could claim that FERC's regulation **[*387]** of this physical activity for purposes of wholesale rates forecloses every other form of state regulation that affects those rates.

Indeed, although the dissent argues that *Schneidewind* created a definitive test for pre-emption in the natural-gas context that turns on whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act," post, at 394, 191 L. Ed. 2d, 527 (quoting 485 U. S., at 310, n. 13, 108 S. Ct. 1145, 99 L. Ed. 2d 316), *Schneidewind* could not mean this statement as an absolute test. It goes on to explain that the Natural Gas Act does not pre-empt "traditional" state regulation, such as state blue sky laws (which, of course, raise wholesale—as well as retail—investment **[**1601]** costs). Id., at 308, n. 11, 108 S. Ct. 1145, 99 L. Ed. 2d 316.

HN7[] LEdHN[7][] [7] Antitrust laws, like blue sky laws, are not aimed at natural-gas companies in particular, but rather all businesses in the marketplace. See *ibid.* They are far broader in their application than, for example, the regulations at issue in *Northern Natural*, which applied only to entities buying gas from fields within the State. See 372 U. S., at 85-86, n. 1, 83 S. Ct. 646, 9 L. Ed. 2d 601; contra, **[****22]** post, at 396, 191 L. Ed. 2d, at 529 (stating that *Northern Natural* concerned "background market conditions"). This broad applicability of state ***antitrust law*** supports a finding of no pre-emption here.

Petitioners and the dissent argue that there is, or should be, a clear division between areas of state and federal authority in natural-gas regulation. See Brief for Petitioners 18; post, at 397-398, 191 L. Ed. 2d, 530. But that Platonic ideal does not describe the natural-gas regulatory world. Suppose FERC, when setting wholesale rates in the former cost-of-service ratemaking days, had denied cost recovery for pipelines' failure to recycle. Would that fact deny States the power to enact and apply recycling laws? These state laws might well raise pipelines' operating costs, **[***524]** and thus the costs of wholesale natural gas transportation. But in *Northwest Central* we said that HN8[] LEdHN[8][] [8] "[t]o find field pre-emption of [state] regulation merely because purchasers' costs and hence rates might be **[*388]** affected would be largely to nullify . . . §1(b)." 489 U. S., at 514, 109 S. Ct. 1262, 103 L. Ed. 2d 509.

The dissent barely mentions the limitations on FERC's powers in §1(b), but HN9[] LEdHN[9][] [9] the enumeration of FERC's powers in §5(a) is circumscribed by a reference back to the limitations in §1(b). See post, at 392-394, 191 L. Ed. 2d, at 526-528. As we explained above, see Part **[****23]** I-B-1, *supra*, those limits are key to understanding the careful balance between federal and state regulation that Congress struck when it passed the Natural Gas Act. That Act "was drawn with meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." Panhandle Eastern, 332 U. S., at 517-518, 68 S. Ct. 190, 92 L. Ed. 128. Contra, post, at 399, 191 L. Ed. 2d, at 531. States have a "long history of" providing "common-law and statutory remedies against monopolies and unfair business practices." ARC America, 490 U. S., at 101, 109 S. Ct. 1661, 104 L. Ed. 2d 86; see also Watson v. Buck, 313 U. S. 387, 404, 61 S. Ct. 962, 85 L. Ed. 1416 (1941) (noting the States' "long-recognized power to regulate combinations in restraint of trade"). Respondents' state-law antitrust suits relied on this well-established state power.

B

Petitioners point to two other cases that they believe support their position. The first is Mississippi Power & Light Co. v. Mississippi ex rel. Moore, 487 U. S. 354, 108 S. Ct. 2428, 101 L. Ed. 2d 322 (1988). There, the Court held that the Federal Power Act—which gives FERC the authority to determine whether rates charged by public utilities in electric energy sales are "just and reasonable," 16 U. S. C. §824d(a)—pre-empted a state inquiry into the reasonableness of FERC-approved prices for the sale of nuclear power to wholesalers of electricity (which led to higher retail electricity rates). 487 U. S., at 373-377, 108 S. Ct. 2428, 101 L. Ed. 2d 322. Petitioners argue that this case shows that state regulation of similar sales here—*i.e.*, by a pipeline **[****24]** to a direct consumer—must also be pre-empted. See Reply Brief 11-12. HN10[] LEdHN[10][] [10] *Mississippi Power*, however, is best read as a conflict pre-emption case, not a field pre-emption case. See 487 U. S., at 377, 108 S. Ct. 2428, 101 L. Ed. 2d 322 ("[A] **[*389]** state agency's 'efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity'" (quoting **[**1602]** Chicago & North Western Transp. Co. v. Kalo Brick & Tile Co., 450 U. S. 311, 318-319, 101 S. Ct. 1124, 67 L. Ed. 2d 258 (1981))).

Regardless, the state inquiry in *Mississippi Power* was pre-empted because it was directed at jurisdictional sales in a way that respondents' state antitrust lawsuits are not. Mississippi's inquiry into the reasonableness of FERC-approved purchases was effectively an attempt to "regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates." 487 U. S., at 374, 108 S. Ct. 2428, 101 L. Ed. 2d 322. By contrast, respondents' state antitrust lawsuits do not seek to challenge the reasonableness of any rates expressly approved by FERC. Rather, they seek to challenge the background **[***525]** marketplace conditions that affected both jurisdictional and nonjurisdictional rates.

Petitioners additionally point to FPC v. Louisiana Power & Light Co., 406 U. S. 621, 92 S. Ct. 1827, 32 L. Ed. 2d 369 (1972). In that case, the Court held that federal law gave FPC the authority to allocate natural gas during shortages by ordering interstate pipelines to curtail gas deliveries **[****25]** to all customers, *including retail customers.* This latter fact, the pipelines argue, shows that FERC has authority to regulate index manipulation insofar as that manipulation affects *retail* (as well as wholesale) sales. Brief for Petitioners 26. Accordingly, they contend that state laws that aim at this same subject are pre-empted.

This argument, however, makes too much of too little. The Court's finding of pre-emption in *Louisiana Power* rested on its belief that the state laws in question *conflicted* with federal law. The Court concluded that "FPC has authority to effect orderly curtailment plans involving both direct sales and sales for resale," *406 U. S., at 631, 92 S. Ct. 1827, 32 L. Ed. 2d 369*, because otherwise there would be "unavoidable conflict between" state regulation of direct sales and the "uniform federal **[*390]** regulation" that the Natural Gas Act foresees, *id., at 633-635, 92 S. Ct. 1827, 32 L. Ed. 2d 369*. Conflict pre-emption may, of course, invalidate a state law even though field pre-emption does not. Because petitioners have not argued this case as a conflict pre-emption case, *Louisiana Power* does not offer them significant help.

C

To the extent any conflicts arise between state ***antitrust law*** proceedings and the federal rate-setting process, the doctrine of conflict pre-emption **[****26]** should prove sufficient to address them. But as we have noted, see Part I-A, *supra*, the parties have not argued conflict pre-emption. See also, *e.g.*, Tr. of Oral Arg. 24 (Solicitor General agrees that he has not "analyzed this [case] under a conflict preemption regime"). We consequently leave conflict pre-emption questions for the lower courts to resolve in the first instance.

D

We note that petitioners and the Solicitor General have argued that we should defer to FERC's determination that field pre-emption bars the respondents' claims. See Brief for Petitioners 22 (citing *Arlington v. FCC, 569 U. S. 290, 301-305, 133 S. Ct. 1863, 185 L. Ed. 2d 941, 963-968 (2013)*); Brief for United States as *Amicus Curiae* 32 (same). But they have not pointed to a specific FERC determination that state antitrust claims fall within the field pre-empted by the Natural Gas Act. Rather, they point only to the fact that FERC has promulgated detailed rules governing manipulation of price indices. Because there is no determination by FERC that its regulation pre-empts the field into which respondents' state-law antitrust **[**1603]** suits fall, we need not consider what legal effect such a determination might have. And we conclude that the detailed federal regulations here do not offset the other considerations that weigh against **[****27]** a finding of pre-emption in this context.

[*391] ***

For these reasons, the judgment of the Court of Appeals for the Ninth Circuit is affirmed.

It is so ordered.

Concur by: THOMAS

Concur

[*526]** Justice **Thomas**, concurring in part and concurring in the judgment.

I agree with much of the majority's application of our precedents governing pre-emption under the Natural Gas Act. I write separately to reiterate my view that "implied pre-emption doctrines that wander far from the statutory text are inconsistent with the Constitution." *Wyeth v. Levine, 555 U. S. 555, 583, 129 S. Ct. 1187, 173 L. Ed. 2d 51 (2009)* (Thomas, J., concurring in judgment). The *Supremacy Clause* of our Constitution "gives 'supreme' status only to those [federal laws] that are 'made in Pursuance'" of it. *555 U.S., at 585, 129 S. Ct. 1187, 173 L. Ed. 2d 51* (quoting *Art. VI, cl. 2*). And to be "made in Pursuance" of the Constitution, a law must fall within one of Congress' enumerated powers and be promulgated in accordance with the lawmaking procedures set forth in that document. *Id., at 585-586, 129 S. Ct. 1187, 173 L. Ed. 2d 51*. "The Supremacy Clause thus requires that pre-emptive effect be given only to those federal standards and policies that are set forth in, or necessarily follow from, the statutory text that was produced through the constitutionally required bicameral and presentment procedures." *Id., at 586, 129 S. Ct. 1187, 173 L. Ed. 2d 51*.

In light of this constitutional requirement, I have **[****28]** doubts about the legitimacy of this Court's precedents concerning the pre-emptive scope of the Natural Gas Act, see, *e.g.*, *Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 91-92, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963)* (defining the pre-empted field in light of the "objective[s]" of the Act). Neither party, however, has asked us to overrule these longstanding precedents or "to overcome the presumption of *stare decisis* that attaches to" them. *Kurns v. Railroad Friction Products Corp., 565 U. S. 625, 633, 132 S. Ct. 1261, 1267, 182 L. Ed. 2d 116, 125 (2012)*. And even under these precedents, the challenged state antitrust laws fall outside the **[*392]** pre-empted field. Because the Court today avoids extending its earlier questionable precedents, I concur in its judgment and join all but Part I-A of its opinion.

Dissent by: SCALIA

Dissent

Justice **Scalia**, With Whom The Chief Justice joins, dissenting.

The Natural Gas Act divides responsibility over trade in natural gas between federal and state regulators. The Act and our cases interpreting it draw a firm line between national and local authority over this trade: If the Federal Government may regulate a subject, the States may not. Today the Court smudges this line. It holds that States may use their antitrust laws to regulate practices already regulated by the Federal Energy Regulatory Commission whenever "other considerations **[****29]** . . . weigh against a finding of pre-emption." *Ante, at 390, 191 L. Ed. 2d, at 525*. The Court's make-it-up-as-you-go-along approach to preemption has no basis in the Act, contradicts our cases, and will prove unworkable in practice.

I

Trade in natural gas consists of three parts. A drilling company collects gas from the earth; a pipeline company then carries the gas to its destination and sells **[**1604]** it at wholesale to a local distributor; and the local distributor sells the gas at retail to industries and households. See *ante, at 377-378, 191 L. Ed. 2d, at 517*. **[***527]** The Natural Gas Act empowers the Commission to regulate the middle of this three-leg journey—interstate transportation and wholesale sales. *15 U. S. C. §717 et seq.* But it does not empower the Commission to regulate the opening and closing phases—production at one end, retail sales at the other—thus leaving those matters to the States. *§717(b)*. (Like the Court, I will for simplicity's sake call the sales controlled by the Commission wholesale sales, and the companies controlled by the Commission pipelines. See *ante, at 379, 191 L. Ed. 2d, at 518*.)

Over 70 years ago, the Court concluded that the Act confers "exclusive jurisdiction upon the federal regulatory **[*393]** agency." *Public Util. Comm'n of Ohio v. United Fuel Gas Co., 317 U. S. 456, 469, 63 S. Ct. 369, 87 L. Ed. 396 (1943)*. The Court thought it "clear" that the Act contemplates **[****30]** "a harmonious, dual system of regulation of the natural gas industry—federal and state regulatory bodies operating side by side, each active in its own sphere," "without any confusion of functions." *Id., at 467, 63 S. Ct. 369, 87 L. Ed. 396*. The Court drew this inference from the law's purpose and legislative history, though it could just as easily have relied on the law's terms and structure. The Act grants the Commission a wide range of powers over wholesale sales and transportation, but qualifies only some of these powers with reservations of state authority over the same subject. See *§717g(a)* (concurrent authority over recordkeeping); *§717h(a)* (concurrent authority over depreciation and amortization rates). Congress's decision to include express reservations of state power alongside these grants of authority, but to omit them alongside other grants of authority, suggests that the other grants are exclusive. Right or wrong, in any event, our inference of exclusivity is now settled beyond debate.

United Fuel rejected a State's regulation of wholesale rates. *Id., at 468, 63 S. Ct. 369, 87 L. Ed. 396*. But our later holdings establish that the Act makes exclusive the Commission's powers in general, not just its rate-setting power in particular. We have again and again set aside **[****31]** state laws—even those that do not purport to fix wholesale rates—for regulating a matter already subject to regulation by the Commission. See, *e.g.*, *Northern Natural Gas Co. v. State Corporation Comm'n of Kan., 372 U. S. 84, 89, 83 S. Ct. 646, 9 L. Ed. 2d 601 (1963)* (state regulation of pipelines' gas purchases preempted because it "invade[s] the exclusive jurisdiction which the Natural Gas Act has conferred upon the [Commission]"); *Exxon Corp. v. Eagerton, 462 U. S. 176, 185, 103 S. Ct. 2296, 76 L. Ed. 2d 497 (1983)* (state law prohibiting producers from passing on production taxes preempted because it "trespasse[s] upon FERC's authority"); *Schneidewind v. ANR Pipeline Co., 485 U. S. 293, 309, 108 S. Ct. 1145, 99 L. Ed. 2d 316 (1988)* (state securities regulation directly affecting **[*394]** wholesale rates and gas transportation facilities preempted because it regulates "matters that Congress intended FERC to regulate"). The test for preemption in this setting, the Court has confirmed, "'is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act.'" *Id., at 310, n. 13, 108 S. Ct. 1145, 99 L. Ed. 2d 316*.

Straightforward application of these precedents would make short work of the case at hand. The Natural **[***528]** Gas Act empowers the Commission to regulate "practice[s] . . . affecting [wholesale] rate[s]." *§717d*. Nothing in the Act suggests that the States share power to regulate these practices. The Commission has reasonably determined that this power allows it **[**1605]** to regulate the behavior **[****32]** involved in this case, pipelines' use of sham trades and false reports to manipulate gas price indices. Because the Commission's exclusive authority extends to the conduct challenged here, state antitrust regulation of that conduct is preempted.

II

The Court agrees that the Commission may regulate index manipulation, but upholds state antitrust regulation of this practice anyway on account of "other considerations that weigh against a finding of pre-emption in this context." *Ante, at 390, 191 L. Ed. 2d, at 525*. That is an unprecedented decision. The Court does not identify a single case—not one—in which we have sustained state regulation of behavior already regulated by the Commission. The Court's justifications for its novel approach do not persuade.

A

The Court begins by considering "the *target* at which the state law *aims*." *Ante, at 385, 191 L. Ed. 2d, at 522*. It reasons that because this case involves a practice that affects both wholesale and retail rates, the Act tolerates state regulation that takes aim at the practice's retail-stage effects. *Ante, at 386*.

This analysis misunderstands how the Natural Gas Act divides responsibilities between national and local regulators. The Act does not give the Commission the power to aim at **[*395]** particular **[****33]** effects; it gives it the power to regulate particular activities. When the Commission regulates those activities, it may consider their effects on *all* parts of the gas trade, not just on wholesale sales. It may, for example, set wholesale rates with the aim of encouraging producers to conserve gas supplies—even though production is a state-regulated activity. See *Colorado Interstate Gas Co. v. FPC, 324 U. S. 581, 602-603, 65 S. Ct. 829, 89 L. Ed. 1206 (1945)*; *id., at 609-610, 65 S. Ct. 829, 89 L. Ed. 1206* (Jackson, J., concurring). Or it may regulate wholesale sales with an eye toward blunting the sales' anticompetitive effects in the retail market—even though retail prices are controlled by the States. See *FPC v. Conway Corp., 426 U. S. 271, 276-280, 96 S. Ct. 1999, 48 L. Ed. 2d 626 (1976)*. The Court's ad hoc partition of authority over index manipulation—leaving it to the Commission to control the practice's consequences for wholesale sales, but allowing the States to target its consequences for retail sales—thus clashes with the design of the Act.

To justify its fixation on aims, the Court stresses that this case involves regulation of "background marketplace conditions" rather than regulation of wholesale rates or sales themselves. *Ante, at 389, 191 L. Ed. 2d, at 524*. But the Natural Gas Act empowers the Commission to regulate wholesale rates *and* "background" practices affecting such rates. It grants both powers in the same **[****34]** clause: "Whenever the Commission . . . find[s] that a [wholesale] rate, charge, or classification . . . [or] any rule, regulation, *practice*, or contract affecting such rate, charge, or classification is unjust [or] unreasonable, . . . the Commission shall determine **[***529]** the just and reasonable rate, charge, classification, rule, regulation, *practice*, or contract to be thereafter observed." §717d(a) (emphasis added). Nothing in this provision, and for that matter nothing in the Act, suggests that federal authority over practices is a second-class power, somehow less exclusive than the authority over rates.

The Court persists that the background conditions in this case affect *both* wholesale and retail sales. Ante, at 389, 191 L. Ed. 2d, at 525. This observation adds atmosphere, but nothing more. The **[*396]** Court concedes that index manipulation's dual effect does not weaken the Commission's power to regulate it. **[**1606]** Ante, at 384-385, 191 L. Ed. 2d, at 521. So too should the Court have seen that this simultaneous effect does not strengthen the claims of the States. It is not at all unusual for an activity controlled by the Commission to have effects in the States' field; production, wholesale, and retail are after all interdependent stages of a single trade. We have **[****35]** never suggested that the rules of field preemption change in such situations. For example, producers' ability to pass production taxes on to pipelines no doubt affects both producers and pipelines. Yet we had no trouble concluding that a state law restricting producers' ability to pass these taxes impermissibly attempted to manage "a matter within the sphere of FERC's regulatory authority." Exxon, supra, at 185-186, 103 S. Ct. 2296, 76 L. Ed. 2d 497.

The Court's approach makes a snarl of our precedents. In *Northern Natural*, the Court held that the Act preempts state regulations requiring pipelines to buy gas ratably from gas wells. 372 U. S., at 90, 83 S. Ct. 646, 9 L. Ed. 2d 601. The regulations in that case shared each of the principal features emphasized by the Court today. They governed background market conditions, not wholesale prices. Id., at 90-91, 83 S. Ct. 646, 9 L. Ed. 2d 601. The background conditions in question, pipelines' purchases from gas wells, affected both the federal field of wholesale sales and the state field of gas production. Id., at 92-93, 83 S. Ct. 646, 9 L. Ed. 2d 601. And the regulations took aim at the purchases' effects on production; they sought to promote conservation of natural resources by limiting how much gas pipelines could take from each well. Id., at 93, 83 S. Ct. 646, 9 L. Ed. 2d 601. No matter; the Court still concluded that the regulations "invade[d] the federal agency's **[****36]** exclusive domain." Id., at 92, 83 S. Ct. 646, 9 L. Ed. 2d 601. The factors that made no difference in *Northern Natural* should make no difference today.

Contrast *Northern Natural* with Northwest Central Pipeline Corp. v. State Corporation Comm'n of Kan., 489 U. S. 493, 109 S. Ct. 1262, 103 L. Ed. 2d 509 (1989), which involved state regulations that restricted the times when producers could take gas from wells. On **[*397]** this occasion the Court upheld the regulations—not because the law aimed at the objective of gas conservation, but because the State pursued this end by regulating "'the physical ac[t] of drawing gas from the earth.'" Id., at 510, 109 S. Ct. 1262, 103 L. Ed. 2d 509. Our precedents demand, in other words, that the Court focus in the present case upon *what* the State seeks to regulate (a pipeline practice that is subject to regulation by the Commission), not *why* the State seeks to regulate it (to curb the practice's effects on retail rates).

[*530]** Trying to turn liabilities into assets, the Court brandishes statements from *Northern Natural* and *Northwest Central* that (in its view) discuss where state law was "aimed" or "directed." Ante, at 385, 386, 191 L. Ed. 2d, at 522. But read in context, these statements refer to the entity or activity that the state law regulates, not to which of the activity's effects the law seeks to control by regulating it. See, *e.g.,* ***[****37]*** Northern Natural, supra, at 94, 83 S. Ct. 646; 9 L. Ed. 2d 601 ("[O]ur cases have consistently recognized a significant distinction . . . between conservation measures aimed directly at interstate purchasers and wholesales . . ., and those aimed at producers and production"); Northwest Central, supra, at 512, 109 S. Ct. 1262, 103 L. Ed. 2d 509 ("[This regulation] is directed to the behavior of gas producers"). The lawsuits at hand target pipelines (entities regulated by the Commission) for their manipulation of indices (behavior regulated by the Commission). That should have sufficed to establish preemption.

B

The Court also tallies several features of state ***antitrust law*** that, it believes, weigh **[**1607]** against preemption. Ante, at 387-388, 191 L. Ed. 2d, at 523-524. Once again the Court seems to have forgotten its precedents. We have said before that "'Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction'" over the gas trade. Nantahala Power & Light Co. v. Thornburg, 476 U. S. 953, 966, 106 S. Ct. 2349, 90 L. Ed. 2d 943 (1986) (quoting FPC v. Southern Cal. Edison Co., 376 U. S. 205, 215-216, 84 S. Ct. 644, 11 L. Ed. 2d 638 (1964)). Our decisions have therefore "'squarely rejected'" **[*398]** the theory, endorsed by the Court today, that the boundary between national and local authority turns on "'a case-by-case analysis of the impact of state regulation upon the national interest.'" *Ibid.*

State ***antitrust law***, the Court begins, applies to "all businesses in the marketplace" rather than just "natural-gas companies **[****38]** in particular." *Ante, at 387, 191 L. Ed. 2d, at 523*. So what? No principle of our natural-gas preemption jurisprudence distinguishes particularized state laws from state laws of general applicability. We have never suggested, for example, that a State may use general price-gouging laws to fix wholesale rates, or general laws about unfair trade practices to control wholesale contracts, or general common-carrier laws to administer interstate pipelines. The Court in any event could not have chosen a worse setting in which to attempt a distinction between general and particular laws. Like their federal counterpart, state antitrust laws tend to use the rule of reason to judge the lawfulness of challenged practices. Legal Aspects of Buying and Selling §10:12 (P. Zeidman ed. 2014-2015). This amorphous standard requires the reviewing court to consider "a variety of factors, including specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect." *State Oil Co. v. Khan, 522 U. S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Far from authorizing across-the-board application of a uniform requirement, therefore, the Court's decision will invite state antitrust courts to engage in targeted regulation of the **[****39]** natural-gas industry.

The Court also stresses the "'long history'" of state antitrust regulation. *Ante, at 388, 191 L. Ed. 2d, at 524*. **[***531]** Again, quite beside the point. States have long regulated public utilities, yet the Natural Gas Act precludes them from using that established power to fix gas wholesale prices. *United Fuel, 317 U. S., at 468, 63 S. Ct. 369, 87 L. Ed. 396*. States also have long enacted laws to conserve natural resources, yet the Act precludes them from deploying that power to control purchases made by gas pipelines. *Northern **[*399]** Natural, 372 U. S., at 93-94, 83 S. Ct. 646, 9 L. Ed. 2d 601*. The Court's invocation of the pedigree of state ***antitrust law*** rests on air.

One need not launch this unbounded inquiry into the features of state law in order to preserve the States' authority to apply "tax laws," "disclosure laws," and "blue sky laws" to natural-gas companies, *ante, at 386, 387, 191 L. Ed. 2d, at 523*. One need only stand by the principle that if the Commission has authority over a subject, the States lack authority over that subject. The Commission's authority to regulate gas pipelines "in the public interest," *§717a*, is a power to address matters that are traditionally the concern of utility regulators, not "a broad license to promote the general public welfare," *NAACP v. FPC, 425 U. S. 662, 669, 96 S. Ct. 1806, 48 L. Ed. 2d 284 (1976)*. We have explained that the Commission does not, for example, have power to superintend **[****40]** "employment discrimination" or "unfair labor practices." *Id., at 670-671, 96 S. Ct. 1806, 48 L. Ed. 2d 284*. So the Act does not preempt state employment discrimination or labor laws. But the Commission does have power to consider, say, "conservation, **[**1608]** environmental, and *antitrust* questions." *Id., at 670, n. 6, 96 S. Ct. 1806, 48 L. Ed. 2d 284* (emphasis added). So the Act does preempt state antitrust laws.

C

At bottom, the Court's decision turns on its perception that the Natural Gas Act "'was drawn with meticulous regard for the continued exercise of state power.'" *Ante, at 385, 191 L. Ed. 2d, at 522* No doubt the Act protects state authority in a variety of ways. It gives the Commission authority over only some parts of the gas trade. *§717(b)*. It establishes procedures under which the Commission may consult, collaborate, or share information with States. *§717p*. It even provides that the Commission may regulate practices affecting wholesale rates "upon its own motion *or upon complaint of any State*." *§717d(a)* (emphasis added). It should have gone without saying, however, that no law pursues its purposes at all costs. Nothing in the Act and nothing in our cases suggests that Congress protected state power in the way imagined **[*400]** by today's decision: by licensing state sorties into the Commission's domain whenever judges conclude **[****41]** that an incursion would not be too disruptive.

The Court's preoccupation with the purpose of preserving state authority is all the more inexpiable because that is not the Act's only purpose. The Act also has competing purposes, the most important of which is promoting "uniformity of regulation." *Northern Natural, supra, at 91-92, 83 S. Ct. 646;9 L. Ed. 2d 601*. The Court's decision impairs *that* objective. Before today, interstate pipelines knew that their practices relating to price indices had to comply with one set of regulations **[***532]** promulgated by the Commission. From now on, however, pipelines will have to ensure that their behavior conforms to the discordant regulations of 50 States—or more accurately, to the discordant verdicts of untold state antitrust juries. The Court's reassurance that pipelines may still invoke conflict preemption, see *ante, at 390, 191 L. Ed. 2d, at 525*, provides little comfort on this front. Conflict preemption will resolve only discrepancies between state and federal regulations, not the discrepancies among differing state regulations to which today's opinion subjects the industry.

***

"The Natural Gas Act was designed . . . to produce a harmonious and comprehensive regulation of the industry. Neither state nor federal regulatory body was to **[****42]** encroach upon the jurisdiction of the other." *FPC v. Panhandle Eastern Pipe Line Co., 337 U. S. 498, 513, 69 S. Ct. 1251, 93 L. Ed. 1499 (1949)* (footnote omitted). Today, however, the Court allows the States to encroach. Worse still, it leaves pipelines guessing about when States will be allowed to encroach again. May States aim at retail rates under laws that share none of the features of ***antitrust law*** advertised today? Under laws that share only some of those features? May States apply their antitrust laws to pipelines *without* aiming at retail rates? But that is just the start. Who knows what other "considerations that weigh against a finding of pre-emption" remain **[*401]** to be unearthed in future cases? The Court's all-things-considered test does not make for a stable background against which to carry on the natural-gas trade.

I would stand by the more principled and more workable line traced by our precedents. The Commission may regulate the practices alleged in this case; the States therefore may not. I respectfully dissent.

References

15 U.S.C.S. § 717 et seq.

1 Antieau on Local Government Law § 12.02 (Matthew Bender 2d ed.)

L Ed Digest, States, Territories, and Possessions § 45.8

L Ed Index, Natural Gas Acts

State tax as inconsistent with federal law so as to violate *supremacy clause* *(Art. VI, cl. 2)* of Federal Constitution--Supreme Court cases. *93 L. Ed. 2d 1056*.

Validity, under *commerce clause of Federal Constitution*, of state statutes regulating **[****43]** securities transactions--federal cases. *73 L. Ed. 2d 1454*.

Validity, under *commerce clause of Federal Constitution*, of state restrictions on interstate movement of goods, products, and natural resources originating from within state--Supreme Court cases. *71 L. Ed. 2d 890*.

Kimble v. Marvel Entm't, LLC

Supreme Court of the United States

March 31, 2015, Argued; June 22, 2015, Decided

No. 13-720

Reporter

576 U.S. 446 *; 135 S. Ct. 2401 **; 192 L. Ed. 2d 463 ***; 2015 U.S. LEXIS 4067 ****; 114 U.S.P.Q.2D (BNA) 1941; 83 U.S.L.W. 4531; 25 Fla. L. Weekly Fed. S 405

STEPHEN KIMBLE, et al., Petitioners v. MARVEL ENTERTAINMENT, LLC, SUCCESSOR TO MARVEL ENTERPRISES, INC.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Kimble v. Marvel Enters., 727 F.3d 856, 2013 U.S. App. LEXIS 14354 (9th Cir. Ariz., 2013)

Disposition: *727 F. 3d 856*, affirmed.

Core Terms

patent, royalties, stare decisis, parties, post-expiration, expires, invention, decisions, antitrust, licensee, licensing, license agreement, patent law, innovation, overrule, courts, monopoly, reasons, patent holder, anticompetitive, expectations, post-patent, royalty payment, contracts, patentee, effects, cases, terms, statutory interpretation, per se rule

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Ownership > Conveyances > Royalties

HN1[] **Conveyances, Royalties**

A patent holder cannot charge royalties for the use of his invention after its patent term has expired.

Patent Law > Infringement Actions > Exclusive Rights > General Overview

Patent Law > Infringement Actions > Exclusive Rights > Limitations

HN2[] **Infringement Actions, Exclusive Rights**

Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. *35 U.S.C.S. §154(a)(1)*. But a patent typically expires 20 years from the day the application for it was filed. *§ 154(a)(2)*. And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public.

Governments > Courts > Judicial Precedent

HN3[] **Courts, Judicial Precedent**

Overruling precedent is never a small matter. Stare decisis—in English, the idea that today's court should stand by yesterday's decisions—is a foundation stone of the rule of law. Application of that doctrine, although not an inexorable command, is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

Governments > Courts > Judicial Precedent

HN4[] **Courts, Judicial Precedent**

Respecting stare decisis means sticking to some wrong decisions. The doctrine rests on the idea that it is usually more important that the applicable rule of law be settled than that it be settled right. Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that the U.S. Supreme Court got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that the Court would decide a case differently now than the Court did then. To reverse course, the Court requires as well what the Court has termed a special justification—over and above the belief that the precedent was wrongly decided.

Governments > Courts > Judicial Precedent

HN5[] **Courts, Judicial Precedent**

Stare decisis carries enhanced force when a decision interprets a statute. Then, unlike in a constitutional case, critics of a U.S. Supreme Court ruling can take their objections across the street, and Congress can correct any mistake it sees. That is true regardless whether the Court's decision focused only on statutory text or also relied on the policies and purposes animating the law. Indeed, the Court applies statutory stare decisis even when a decision has announced a judicially created doctrine designed to implement a federal statute. All of the Court's interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

Governments > Courts > Judicial Precedent

HN6[] **Courts, Judicial Precedent**

In the contexts of cases involving property and contract rights, considerations favoring stare decisis are at their acme. That is because parties are especially likely to rely on such precedents when ordering their affairs.

Governments > Courts > Judicial Precedent

HN7[] **Courts, Judicial Precedent**

When the U.S. Supreme Court reverses its statutory interpretations, the Court most often points to subsequent legal developments—either the growth of judicial doctrine or further action taken by Congress—that have removed the basis for a decision.

Governments > Courts > Judicial Precedent

HN8[] **Courts, Judicial Precedent**

What the U.S. Supreme Court can decide, the Court can undecide. But stare decisis teaches that the Court should exercise that authority sparingly.

Lawyers' Edition Display

Decision

[*463]** Patentee receiving royalties for sales made after patent expired held not warranted since policy favored unrestricted use of expired patents and stare decisis favored settled law.

Summary

Overview: HOLDINGS: [1]-Overruling a long-standing precedential decision which held that a patentee could not continue to receive royalties after expiration of the patent was not warranted since the doctrine of stare decisis favored settled law, the precedent did not preclude business arrangements other than royalties, there was a broad policy favoring unrestricted use of patents after their expiration, overruling the precedent could threaten other precedents, and the precedent was simple and workable; [2]-Whether the precedent relied on an economic misjudgment concerning the competitive effects of post-expiration royalties and tended to suppress technological innovation were matters within the realm of Congress to provide any required remedy.

Outcome: Judgment affirmed. 6-3 Decision; 1 Dissent.

Headnotes

PATENTS §239 > ROYALTIES -- EXPIRATION OF PATENT > Headnote:
LEdHN[1][] [1]

A patent holder cannot charge royalties for the use of his invention after its patent term has expired. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[*464]**

PATENTS §15 PATENTS §232 > EXPIRATION OF PATENT -- RIGHT TO MAKE OR USE > Headnote:
LEdHN[2][] [2]

Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article--rights he may sell or license for royalty payments if he so chooses. *35 U.S.C.S. § 154(a)(1)*. But a patent typically expires 20 years from the day the application for it was filed. *§ 154(a)(2)*. And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §766 > STARE DECISIS -- ADHERENCE TO FORMER DECISION > Headnote:
LEdHN[3][] [3]

Overruling precedent is never a small matter. Stare decisis--in English, the idea that today's court should stand by yesterday's decisions--is a foundation stone of the rule of law. Application of that doctrine, although not an inexorable command, is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §775 > STARE DECISIS -- DEPARTURE > Headnote:
LEdHN[4][] [4]

Respecting stare decisis means sticking to some wrong decisions. The doctrine rests on the idea that it is usually more important that the applicable rule of law be settled than that it be settled right. Indeed, stare decisis has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that the U.S. Supreme Court got something wrong--even a good argument to that effect--cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that the Court would decide a case differently now than the Court did then. To reverse course, the Court requires as well what the Court has termed a special justification--over and above the belief that the precedent was wrongly decided. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §775.5 > STARE DECISIS -- INTERPRETATION -- STATUTE > Headnote:
LEdHN[5][] [5]

Stare decisis carries enhanced force when a decision interprets a statute. Then, unlike in a constitutional case, critics of a U.S. Supreme Court ruling can take their objections across the street, and Congress can correct any mistake it sees. That is true regardless whether the Court's decision focused only on statutory text or also relied on the policies and purposes animating the law. Indeed, the Court applies statutory stare decisis even when a decision has announced a judicially created doctrine designed to implement a federal statute. All of the Court's interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

[*465]**

COURTS §779 COURTS §780 > STARE DECISIS -- PROPERTY AND CONTRACT RIGHTS > Headnote:
LEdHN[6][] [6]

In the contexts of cases involving property and contract rights, considerations favoring stare decisis are at their acme. That is because parties are especially likely to rely on such precedents when ordering their affairs. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §775.5 > STATUTORY INTERPRETATION -- REVERSAL > Headnote:
LEdHN[7][] [7]

When the U.S. Supreme Court reverses its statutory interpretations, the Court most often points to subsequent legal developments--either the growth of judicial doctrine or further action taken by Congress--that have removed the basis for a decision. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

COURTS §766 > STARE DECISIS > Headnote:
LEdHN[8][] [8]

What the U.S. Supreme Court can decide, the Court can undecide. But stare decisis teaches that the Court should exercise that authority sparingly. (Kagan, J., joined by Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ.)

Syllabus

[2403]** **[*446]** **[1942]** Respondent Marvel Entertainment's corporate predecessor agreed to purchase petitioner Stephen Kimble's patent for a Spider-Man toy in exchange for a lump sum plus a 3% royalty on future sales. The agreement set no end date for royalties. As the patent neared the end of its statutory 20-year term, Marvel discovered *Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99*, in which this Court held that a patentee cannot continue to receive royalties for sales made after his patent expires. Marvel **[***466]** then sought a declaratory judgment in federal district court confirming that it could stop paying Kimble royalties. The district court granted relief, and the Ninth Circuit affirmed. Kimble now asks this Court to overrule *Brulotte*.

Held: Stare decisis requires this Court to adhere to *Brulotte*. *Pp. ___ - ___, 192 L. Ed. 2d, at 469-478*.

(a) A patent typically expires 20 years from its application date. *35 U.S. C. §154(a)(2)*. At that point, the unrestricted right to make or use the article passes to the public. See *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*. This Court has carefully guarded the significance of that expiration date, declining to enforce laws and contracts that restrict free public access to formerly patented, as well as unpatentable, inventions. See, **[****2]** *e.g., id., at 230-233, 84 S. Ct. 784, 11 L. Ed. 2d 661*; *Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 255-256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*

[2404]** *Brulotte* applied that principle to a patent licensing agreement that provided for the payment of royalties accruing after the patent's expiration. 379 U.S., at 30, 85 S. Ct. 176, 13 L. Ed. 2d 99. The Court held that the post-patent royalty provision was "unlawful *per se*," id., at 30, 32, 85 S. Ct. 176, 13 L. Ed. 2d 99, because it continued "the patent monopoly beyond the [patent] period," id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99, and, in so doing, conflicted with patent law's policy of establishing a "post-expiration . . . public domain," *ibid.*

The *Brulotte* rule may prevent some parties from entering into deals they desire, but parties can often find ways to achieve similar outcomes. For example, *Brulotte* leaves parties free to defer payments for pre-expiration use of a patent, tie royalties to non-patent rights, or make non-royalty-based business arrangements. Contending that such alternatives are not enough, Kimble asks this Court to abandon *Brulotte*'s **[*447]** bright-line rule in favor of a case-by-case approach based on ***antitrust law***'s "rule of reason." Pp. ___ - ___, 192 L. Ed. 2d, at 469-471.

(b) The doctrine of *stare decisis* provides that today's Court should stand by yesterday's decisions. Application of that doctrine, though "not an inexorable command," is the "preferred course." Payne v. Tennessee, 501 U.S. 808, 828, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720. Overruling a case always requires "special justification"--over **[****3]** and above the belief "that the precedent was wrongly decided." Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339 at 349. Where, as here, the precedent interprets a statute, *stare decisis* carries enhanced force, since critics are free to take their objections to Congress. See *e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132. Congress, moreover, has spurned multiple opportunities to reverse *Brulotte*, see Watson v. United States, 552 U.S. 74, 82-83, 128 S. Ct. 579, 169 L. Ed. 2d 472, and has even rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the standard Kimble urges. In addition, *Brulotte* implicates property and contract law, two contexts in which considerations favoring *stare decisis* are "at their acme," Payne, 501 U.S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720, because parties are especially likely to rely on such precedents when ordering their affairs.

[*467]** Given those good reasons for adhering to *stare decisis* in this case, this Court would need a very strong justification for overruling *Brulotte*. But traditional justifications for abandoning *stare decisis* do not help Kimble here. First, *Brulotte's* doctrinal underpinnings have not eroded over time. The patent statute at issue in *Brulotte* is essentially unchanged. And the precedent on which the *Brulotte* Court primarily relied, like other decisions enforcing a patent's cut-off date, remains good law. Indeed, *Brulotte*'s close relation **[****4]** to a whole web of precedents means that overruling it could threaten others. Second, nothing about *Brulotte* has proved unworkable. See Patterson, 491 U.S., at 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132. To the contrary, the decision itself is simple to apply- **[1943]** -particularly as compared to Kimble's proposed alternative, which can produce high litigation costs and unpredictable results. Pp. ___ - ___, 192 L. Ed. 2d, at 471-474.

(c) Neither of the justifications Kimble offers gives cause to overrule *Brulotte.* Pp. ___ - ___, 192 L. Ed. 2d, at 474-478.

(1) Kimble first argues that *Brulotte* hinged on an economic error--*i.e.,* an assumption that post-expiration royalties are always anticompetitive. This Court sees no error in Kimble's economic analysis. But even assuming Kimble is right that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. The patent laws are not like the Sherman **[**2405]** Act, which gives courts exceptional authority to shape the law and reconsider precedent based on better economic analysis. Moreover, Kimble's argument is based not on evolving economic **[*448]** theory but rather on a claim that the *Brulotte* Court simply made the wrong call. That claim fails to clear *stare decisis*'s high bar. In any event, *Brulotte* did not even turn on the notion that post-patent royalties harm competition. **[****5]** Instead, the *Brulotte* Court simply applied the categorical principle that all patent-related benefits must end when the patent term expires. Kimble's real complaint may go to the merits of that principle as a policy matter. But Congress, not this Court, gets to make patent policy. Pp. ___ - ___, 192 L. Ed. 2d, at 474-477.

(2) Kimble also argues that *Brulotte* suppresses technological innovation and harms the national economy by preventing parties from reaching agreements to commercialize patents. This Court cannot tell whether that is true. *Brulotte* leaves parties free to enter alternative arrangements that may suffice to accomplish parties' payment deferral and risk-spreading goals. And neither Kimble nor his *amici* offer any empirical evidence connecting *Brulotte*

to decreased innovation. In any event, claims about a statutory precedent's consequences for innovation are "more appropriately addressed to Congress." *Halliburton, 573 U.S., at 277, 134 S. Ct. 2398, 189 L. Ed. 2d at 356*. *Pp. ___ - ___, 192 L. Ed. 2d, at 477-478*.

727 F. 3d 856, affirmed.

Counsel: Roman Melnik argued the cause for petitioners.

Malcolm L. Stewart argued the cause for the United States, as amicus curiae, by special leave of court.

Thomas G. Saunders argued the cause for respondent.

Judges: Kagan, J., delivered the opinion of the Court, in which Scalia, Kennedy, Ginsburg, Breyer, and Sotomayor, JJ., joined. Alito, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas, J., joined, *post*, ___.

Opinion by: KAGAN

Opinion

[*468]** **[*449]** Justice **Kagan** delivered the opinion of the Court.

In *Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964)*, this Court held that **[****6]** ***HN1***[] ***LEdHN[1]***[] [1] a patent holder cannot charge royalties for the use of his invention after its patent term has expired. The sole question presented here is whether we should overrule *Brulotte*. Adhering to principles of *stare decisis*, we decline to do so. Critics of the *Brulotte* rule must seek relief not from this Court but from Congress.

I

In 1990, petitioner Stephen Kimble obtained a patent on a toy that allows children (and young-at-heart adults) to role-play as "a spider person" by shooting webs—really, pressurized foam string—"from the palm of [the] hand." U.S. Patent No. 5,072,856, Abstract (filed May 25, **[**2406]** 1990). [1] Respondent Marvel Entertainment, LLC (Marvel) makes and markets products featuring Spider-Man, among other comic-book characters. Seeking to sell or license his patent, Kimble **[*450]** met with the president of Marvel's corporate predecessor to discuss his idea for web-slinging fun. Soon afterward, but without remunerating Kimble, that company began marketing the "Web Blaster"—a toy that, like Kimble's patented invention, enables would-be action heroes to mimic Spider-Man through the use of a polyester glove and a canister of foam.

Kimble sued Marvel in 1997 alleging, among other things, patent infringement. The parties ultimately settled that litigation. Their agreement provided that Marvel would purchase Kimble's patent in exchange for a lump sum (of about a half-million dollars) and a 3% royalty on Marvel's future sales of the Web Blaster and similar products. The parties set no end date for royalties, apparently contemplating that they would continue for as long as kids want to imitate Spider-Man (by doing whatever a spider can).

And then Marvel stumbled across *Brulotte*, the case at the heart of this dispute. In negotiating the settlement, neither side was aware of *Brulotte*. But Marvel must have been pleased to learn of it. *Brulotte* had read the patent laws to prevent a patentee from receiving royalties for sales made after his patent's expiration. See *379 U.S., at 32, 85 S. Ct. 176, 13 L. Ed. 2d 99*. So the decision's effect **[1944]** was to sunset the settlement's royalty clause. [2] On

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[1] Petitioner Robert Grabb later acquired an interest in the patent. For simplicity, we **[****7]** refer only to Kimble.

making that discovery, Marvel sought a declaratory judgment in federal district court confirming that the company could cease paying royalties come 2010—the end of Kimble's patent term. The court approved that relief, holding that *Brulotte* made "the royalty provision **[****8]** . . . unenforceable after the expiration of the Kimble patent." *692 F. Supp. 2d 1156, 1161 (Ariz. 2010)*. The Court of Appeals for the Ninth Circuit affirmed, though making clear that it **[*451]** was none too happy about doing so. "[T]he *Brulotte* rule," the court complained, **[***469]** "is counterintuitive and its rationale is arguably unconvincing." *727 F. 3d 856, 857 (2013)*.

We granted certiorari, *574 U.S. 1058, 135 S. Ct. 781, 190 L. Ed. 2d 649 (2014)*, to decide whether, as some courts and commentators have suggested, we should overrule *Brulotte*. [3] For reasons of *stare decisis*, we demur.

II

HN2[] ***LEdHN[2]***[] [2] Patents endow their holders with certain superpowers, but only for a limited time. In crafting the patent laws, Congress struck a balance between fostering innovation and ensuring public access to **[**2407]** discoveries. While a patent lasts, the patentee possesses exclusive rights to the patented article—rights he may sell or license for royalty payments if he so chooses. See *35 U.S.C. §154(a)(1)*. But a patent typically expires 20 years from the day the application for it was filed. See *§154(a)(2)*. And when the patent expires, the patentee's prerogatives expire too, and the right to make or use the article, free from all restriction, passes to the public. See *Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225, 230, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425 (1964)*.

This Court has carefully guarded that cut-off date, just as it has the patent laws' subject-matter limits: In case after case, the Court has construed those laws to preclude measures that restrict free access to formerly patented, as well as unpatentable, inventions. In one line of cases, we have **[*452]** struck down state statutes with that consequence. See, *e.g., id., at 230-233, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*; *Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152, 167-168, 109 S. Ct. 971, 103 L. Ed. 2d 118 (1989)*; *Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234, 237-238, 84 S. Ct. 779, 11 L. Ed. 2d 669, 1964 Dec. Comm'r Pat. 421 (1964)*. By virtue of federal law, we reasoned, "an article on which the patent has expired," **[****10]** like an unpatentable article, "is in the public domain and may be made and sold by whoever chooses to do so." *Sears, 376 U.S., at 231, 84 S. Ct. 784, 11 L. Ed. 2d 661, 1964 Dec. Comm'r Pat. 425*. In a related line of decisions, we have deemed unenforceable private contract provisions limiting free use of such inventions. In *Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616 (1945)*, for example, we determined that a manufacturer could not agree to refrain from challenging a patent's validity. Allowing even a single company to restrict its use of an expired or invalid patent, we explained, "would deprive . . . the consuming public of the advantage to be derived" from free exploitation of the discovery. *Id., at 256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*. And to permit such a result, whether or not authorized "by express contract," would impermissibly undermine the patent laws. *Id., at 255-256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*; see also, *e.g., Edward Katzinger Co. v. Chicago Metallic Mfg. Co., 329 U.S. 394, 400-401, 67 S. Ct. 416, 91 L. Ed. 374 (1947)* (ruling that *Scott Paper* applies to licensees); *Lear, Inc. v. Adkins, 395 U.S. 653, 668-675, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)* **[***470]** (refusing to enforce a contract requiring a licensee to pay royalties while contesting a patent's validity).

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[2] In *Brulotte,* the patent holder retained ownership of the patent while licensing customers to use the patented article in exchange for royalty payments. See *379 U.S., at 29-30, 85 S. Ct. 176, 13 L. Ed. 2d 99*. By contrast, Kimble sold his whole patent to obtain royalties. But no one here disputes that *Brulotte* covers a transaction structured in that alternative way.

[3] See, *e.g., Scheiber v. Dolby Labs., Inc., 293 F. 3d 1014, 1017-1018 (CA7 2002)* (Posner, J.) (*Brulotte* has been "severely, and as it seems to us, with all due respect, justly criticized . . . . However, we have no authority to overrule a Supreme Court decision no matter how dubious its reasoning strikes us, or even how out of touch with the Supreme Court's current thinking the decision seems"); Ayres & Klemperer, Limiting Patentees' Market Power Without Reducing Innovation Incentives: The Perverse **[****9]** Benefits of Uncertainty and Non-Injunctive Remedies, *97 Mich. L. Rev. 985, 1027 (1999)* ("Our analysis . . . suggests that *Brulotte* should be overruled").

Brulotte was brewed in the same barrel. There, an inventor licensed his patented hop-picking machine to farmers in exchange for royalties from hop crops harvested both before and after his patents' expiration dates. The Court (by an 8-1 vote) held the agreement unenforceable—"unlawful *per se*"—to the extent it provided **[****11]** for the payment of royalties "accru[ing] after the last of the patents incorporated into the machines had expired." *379 U.S., at 30, 32, 85 S. Ct. 176, 13 L. Ed. 2d 99*. To arrive at that conclusion, the Court began with the statutory provision **[1945]** setting the length of a patent term. See *id., at 30, 85 S. Ct. 176, 13 L. Ed. 2d 99* (quoting the then-current version of *§154*). Emphasizing that a **[*453]** patented invention "become[s] public property once [that term] expires," the Court then quoted from *Scott Paper*: Any attempt to limit a licensee's post-expiration use of the invention, "whatever the legal device employed, runs counter to the policy and purpose of the patent laws." *379 U.S., at 31, 85 S. Ct. 176, 13 L. Ed. 2d 99* (quoting *326 U.S., at 256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616*). In the *Brulotte* Court's view, contracts to pay royalties for such use continue "the patent monopoly beyond the [patent] period," even though only as to the licensee affected. *379 U.S., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99*. And in so doing, those agreements conflict with patent law's policy of establishing a **[**2408]** "post-expiration . . . public domain" in which every person can make free use of a formerly patented product. *Ibid.*

The *Brulotte* rule, like others making contract provisions unenforceable, prevents some parties from entering into deals they desire. As compared to lump-sum fees, royalty plans both draw out payments over time and tie those payments, in each month **[****12]** or year covered, to a product's commercial success. And sometimes, for some parties, the longer the arrangement lasts, the better—not just up to but beyond a patent term's end. A more extended payment period, coupled (as it presumably would be) with a lower rate, may bring the price the patent holder seeks within the range of a cash-strapped licensee. (Anyone who has bought a product on installment can relate.) See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 17. Or such an extended term may better allocate the risks and rewards associated with commercializing inventions—most notably, when years of development work stand between licensing a patent and bringing a product to market. See, *e.g.,* 3 R. Milgrim & E. Bensen, Milgrim on Licensing §18.05, p. 18-9 (2013). As to either goal, *Brulotte* may pose an obstacle.

Yet parties can often find ways around *Brulotte*, enabling them to achieve those same ends. To start, *Brulotte* allows a licensee to defer payments for pre-expiration use of a patent into the post-expiration period; all the decision bars are **[*454]** royalties for using an invention after it has moved into the public domain. See *379 U.S., at 31, 85 S. Ct. 176, 13 L. Ed. 2d 99*; *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 136, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969)*. A licensee could agree, for example, to pay the licensor **[****13]** a sum equal to 10% of sales during the 20-year patent term, but to amortize that amount over 40 years. That arrangement would at least bring down early outlays, even if it would not do everything the parties might want to allocate risk over a long **[***471]** timeframe. And parties have still more options when a licensing agreement covers either multiple patents or additional non-patent rights. Under *Brulotte*, royalties may run until the latest-running patent covered in the parties' agreement expires. See *379 U.S., at 30, 85 S. Ct. 176, 13 L. Ed. 2d 99*. Too, post-expiration royalties are allowable so long as tied to a non-patent right—even when closely related to a patent. See, *e.g.,* 3 Milgrim on Licensing §18.07, at 18-16 to 18-17. That means, for example, that a license involving both a patent and a trade secret can set a 5% royalty during the patent period (as compensation for the two combined) and a 4% royalty afterward (as payment for the trade secret alone). Finally and most broadly, *Brulotte* poses no bar to business arrangements other than royalties—all kinds of joint ventures, for example—that enable parties to share the risks and rewards of commercializing an invention.

Contending that such alternatives are not enough, Kimble asks us to abandon *Brulotte* in **[****14]** favor of "flexible, case-by-case analysis" of post-expiration royalty clauses "under the rule of reason." Brief for Petitioners 45. Used in ***antitrust law***, the rule of reason requires courts to evaluate a practice's effect on competition by "taking into account a variety of factors, including specific information about the relevant business, its condition before and after the [practice] was imposed, and the [practice's] history, nature, and effect." *State Oil Co. v. Khan, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*. Of primary importance in this context, Kimble posits, is whether a patent holder has power in the relevant market and so might be **[*455]** able to curtail competition. See Brief for Petitioners **[**2409]** 47-48; *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 44, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* ("[A] patent does not necessarily confer market power"). Resolving that issue, Kimble notes, entails "a full-fledged economic inquiry into the definition of the market, barriers to entry, and the like." Brief for

Petitioners 48 (quoting 1 H. Hovenkamp, M. Janis, M. Lemley, & C. Leslie, IP and Antitrust §3.2e, p. 3-12.1 (2d ed., Supp. 2014) (Hovenkamp)).

[1946] III

HN3[] *LEdHN[3]*[] [3] Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law." *Michigan v. Bay Mills Indian Community, 572 U.S. 782, 798, 134 S. Ct. 2024, 188 L. Ed. 2d 1071, 1089 (2014)*. Application of **[****15]** that doctrine, although "not an inexorable command," is the "preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee, 501 U.S. 808, 827-828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*. It also reduces incentives for challenging settled precedents, saving parties and courts the expense of endless relitigation.

HN4[] *LEdHN[4]*[] [4] Respecting *stare decisis* means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right." *Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406, 52 S. Ct. 443, 76 L. Ed. 815, 1932 C.B. 265, 1932-1 C.B. 265 (1932)* (dissenting opinion). Indeed, **[***472]** *stare decisis* has consequence only to the extent it sustains incorrect decisions; correct judgments have no need for that principle to prop them up. Accordingly, an argument that we got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent. Or otherwise said, it is not alone sufficient that we would decide a case differently now than we did then. To reverse course, we require as well **[*456]** what we have termed a "special justification"—over and above the belief **[****16]** "that the precedent was wrongly decided." *Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266, 134 S. Ct. 2398, 189 L. Ed. 2d 339, 349 (2014)*.

HN5[] *LEdHN[5]*[] [5] What is more, *stare decisis* carries enhanced force when a decision, like *Brulotte*, interprets a statute. Then, unlike in a constitutional case, critics of our ruling can take their objections across the street, and Congress can correct any mistake it sees. See, *e.g., Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)*. That is true, contrary to the dissent's view, see *post, at ___ - ___, 192 L. Ed. 2d, at 481-482* (opinion of Alito, J.), regardless whether our decision focused only on statutory text or also relied, as *Brulotte* did, on the policies and purposes animating the law. See, *e.g., Bilski v. Kappos, 561 U.S. 593, 601-602, 130 S. Ct. 3218, 177 L. Ed. 2d 792 (2010)*. Indeed, we apply statutory *stare decisis* even when a decision has announced a "judicially created doctrine" designed to implement a federal statute. *Halliburton, 573 U.S., at 274, 134 S. Ct. 2398, 189 L. Ed. 2d at 354*). All our interpretive decisions, in whatever way reasoned, effectively become part of the statutory scheme, subject (just like the rest) to congressional change. Absent special justification, they are balls tossed into Congress's court, for acceptance or not as that branch elects.

And Congress has spurned multiple opportunities to reverse *Brulotte*—openings as frequent and clear as this Court ever sees. **[**2410]** *Brulotte* has governed licensing agreements for more than half a century. See *Watson v. United States, 552 U.S. 74, 82-83, 128 S. Ct. 579, 169 L. Ed. 2d 472 (2007)* (stating **[****17]** that "long congressional acquiescence," there totaling just 14 years, "enhance[s] even the usual precedential force we accord to our interpretations of statutes" (internal quotation marks omitted)). During that time, Congress has repeatedly amended the patent laws, including the specific provision (*35 U.S.C. §154*) on which *Brulotte* rested. See, *e.g.*, Uruguay Round Agreements Act, §532(a), 108 Stat. 4983 (1994) (increasing the length of the patent term); Act of Nov. 19, 1988, §201, 102 Stat. 4676 **[*457]** (limiting patent-misuse claims). *Brulotte* survived every such change. Indeed, Congress has rebuffed bills that would have replaced *Brulotte*'s *per se* rule with the same antitrust-style analysis Kimble now urges. See, *e.g.,* S. 1200, 100th Cong., 1st Sess., Tit. II (1987) (providing that no patent owner would be guilty of "illegal extension of the patent right by reason of his or her licensing practices . . . unless such practices . . . violate the antitrust laws"); S. 438, 100th Cong., 2d Sess., §201(3) (1988) (same). Congress's continual reworking of the patent laws—but never of the *Brulotte* rule—further supports leaving the decision in place.

Nor yet are we done, for the subject matter of *Brulotte* adds to the case for adhering to precedent. *Brulotte* lies at **[***473]** the intersection **[****18]** of two areas of law: property (patents) and contracts (licensing agreements). ***HN6***[] ***LEdHN[6]***[] [6] And we have often recognized that in just those contexts—"cases involving property and contract rights"—considerations favoring *stare decisis* are "at their acme." *E.g., Payne, 501 U.S., at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720*; *Khan, 522 U.S., at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199*. That is because parties are especially likely to rely on such precedents when ordering their affairs. To be sure, Marvel and Kimble disagree about **[1947]** whether *Brulotte* has actually generated reliance. Marvel says yes: Some parties, it claims, do not specify an end date for royalties in their licensing agreements, instead relying on *Brulotte* as a default rule. Brief for Respondent 32-33; see 1 D. Epstein, Eckstrom's Licensing in Foreign and Domestic Operations §3.13, p. 3-13, and n. 2 (2014) (noting that it is not "necessary to specify the term . . . of the license" when a decision like *Brulotte* limits it "by law"). Overturning *Brulotte* would thus upset expectations, most so when long-dormant licenses for long-expired patents spring back to life. Not true, says Kimble: Unfair surprise is unlikely, because no "meaningful number of [such] license agreements . . . actually exist." Reply Brief 18. To be honest, we do not know (nor, we suspect, do Marvel **[****19]** and Kimble). But even uncertainty on this score cuts in Marvel's direction. So long as we see a reasonable **[*458]** possibility that parties have structured their business transactions in light of *Brulotte*, we have one more reason to let it stand.

As against this superpowered form of *stare decisis*, we would need a superspecial justification to warrant reversing *Brulotte*. But the kinds of reasons we have most often held sufficient in the past do not help Kimble here. If anything, they reinforce our unwillingness to do what he asks.

First, *Brulotte*'s statutory and doctrinal underpinnings have not eroded over time. ***HN7***[] ***LEdHN[7]***[] [7] When we reverse our statutory interpretations, we most often point to subsequent legal developments—"either the growth of judicial doctrine or further action taken by Congress"—that have removed the basis for a decision. *Patterson, 491 U.S., at 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132* (calling this "the primary reason" for overruling statutory precedent). But the core feature of the patent laws on which *Brulotte* relied remains just the same: *Section 154* now, as then, draws **[**2411]** a sharp line cutting off patent rights after a set number of years. And this Court has continued to draw from that legislative choice a broad policy favoring unrestricted use of an invention **[****20]** after its patent's expiration. See *supra, at ___ - ___, 192 L. Ed. 2d, at 469-470*. *Scott Paper*—the decision on which *Brulotte* primarily relied—remains good law. So too do this Court's other decisions refusing to enforce either state laws or private contracts constraining individuals' free use of formerly patented (or unpatentable) discoveries. See *supra, at ___ - ___, 192 L. Ed. 2d, at 469-470*. *Brulotte*, then, is not the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*. Cf., *e.g., Alleyne v. United States, 570 U.S. 99, 119-121, 133 S. Ct. 2151, 186 L. Ed. 2d 314, 330 (2013)* (Sotomayor, J., concurring). To the contrary, the decision's close relation to a whole web of precedents means that reversing it could threaten others. If *Brulotte* is outdated, **[***474]** then (for example) is *Scott Paper* too? We would prefer not to unsettle stable law. [4]

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[4] The only legal erosion to which Kimble gestures is a change in the treatment of patent tying agreements—*i.e.,* contracts conditioning a licensee's right to use a patent on the purchase of an unpatented product. See Brief for Petitioners 43. When *Brulotte* was decided, those agreements counted as *per se* antitrust violations and patent misuse; now, they are unlawful only if the patent holder wields power in the relevant market. See Act of Nov. 19, 1988, §201, 102 Stat. 4676 (adding the market **[****21]** power requirement in the patent-misuse context); *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 41-43, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)* (relying on that legislative change to overrule antitrust decisions about tying and to adopt the same standard). But it is far from clear that the old rule of tying was among *Brulotte*'s legal underpinnings. *Brulotte* briefly analogized post-expiration royalty agreements to tying arrangements, but only after relating the statutory and caselaw basis for its holding and "conclud[ing]" that post-patent royalties are "unlawful *per se*." *379 U.S., at 32, 85 S. Ct. 176, 13 L. Ed. 2d 99*. And even if that analogy played some real role in *Brulotte*, the development of tying law would not undercut the decision—rather the opposite. Congress took the lead in changing the treatment of tying agreements and, in doing so, conspicuously left *Brulotte* in place. Indeed, Congress declined to enact bills that would have modified not only tying doctrine but also *Brulotte*. See *supra, at ___, 192 L. Ed. 2d, at 472* (citing S. 1200, 100th Cong., 1st Sess. (1987), and S. 438, 100th Cong., 2d Sess. (1988)). That choice suggests congressional acquiescence in *Brulotte*, and so further supports adhering to *stare decisis*.

[*459] And second, nothing about *Brulotte* has proved unworkable. See, *e.g., Patterson, 491 U.S., at 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132* (identifying unworkability as another "traditional justification" **[****22]** for overruling precedent). The decision is simplicity itself to apply. A court need only ask whether a licensing agreement provides royalties for post-expiration use of a patent. If not, no problem; if so, no dice. *Brulotte*'s ease of use appears in still sharper relief when compared to Kimble's proposed alternative. Recall that he wants courts to employ ***antitrust law***'s rule of reason to identify and invalidate those post-expiration royalty clauses with anti-competitive consequences. See *supra, at ___ - ___, 192 L. Ed. 2d, at 471*. But whatever its merits may be for deciding antitrust claims, that "elaborate inquiry" produces **[1948]** notoriously high litigation costs and unpredictable results. *Arizona v. Maricopa County Medical Soc., 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*. For that reason, trading in *Brulotte* for the rule of reason would make the law less, not more, workable than it is now. Once again, then, the case for sticking with long-settled precedent grows stronger: Even the most **[*460]** usual reasons for abandoning *stare decisis* cut the other way here.

IV

Lacking recourse to those traditional justifications for overruling a prior decision, **[**2412]** Kimble offers two different ones. He claims first that *Brulotte* rests on a mistaken view of the competitive effects of post-expiration royalties. He contends next that **[****23]** *Brulotte* suppresses technological innovation and so harms the nation's economy. (The dissent offers versions of those same arguments. See *post, at ___ - ___, 192 L. Ed. 2d, at 478-480*.) We consider the two claims in turn, but our answers to both are much the same: Kimble's reasoning may give Congress cause to upset *Brulotte*, but does not warrant this Court's doing so.

A

According to Kimble, we should overrule *Brulotte* because it hinged on an error about economics: It assumed that post-patent royalty "arrangements **[***475]** are invariably anticompetitive." Brief for Petitioners 37. That is not true, Kimble notes; indeed, such agreements more often increase than inhibit competition, both before and after the patent expires. See *id., at 36-40, 85 S. Ct. 176, 13 L. Ed. 2d 99*. As noted earlier, a longer payment period will typically go hand-in-hand with a lower royalty rate. See *supra, at ___, n. 3, 192 L. Ed. 2d, at 470*. During the patent term, those reduced rates may lead to lower consumer prices, making the patented technology more competitive with alternatives; too, the lesser rates may enable more companies to afford a license, fostering competition among the patent's own users. See Brief for Petitioners 38. And after the patent's expiration, Kimble continues, further benefits follow: Absent high barriers **[****24]** to entry (a material caveat, as even he would agree, see Tr. of Oral Arg. 12-13, 23), the licensee's continuing obligation to pay royalties encourages new companies to begin making the product, figuring that they can quickly attract customers by undercutting the licensee on price. See Brief for Petitioners 38-39. In light of those realities, Kimble **[*461]** concludes, "the *Brulotte per se* rule makes little sense." *Id.,* at 11.

We do not join issue with Kimble's economics—only with what follows from it. A broad scholarly consensus supports Kimble's view of the competitive effects of post-expiration royalties, and we see no error in that shared analysis. See *id.,* at 13-18 (citing numerous treatises and articles critiquing *Brulotte*). Still, we must decide what that means for *Brulotte*. Kimble, of course, says it means the decision must go. Positing that *Brulotte* turned on the belief that post-expiration royalties are always anticompetitive, he invokes decisions in which this Court abandoned antitrust precedents premised on similarly shaky economic reasoning. See Brief for Petitioners 55-56 (citing, *e.g.*, *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; *Illinois Tool Works, 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26*). But to agree with Kimble's conclusion, we must resolve two questions in his favor. First, even assuming **[****25]** Kimble accurately characterizes *Brulotte*'s basis, does the decision's economic mistake suffice to overcome *stare decisis*? Second and more fundamentally, was *Brulotte* actually founded, as Kimble contends, on an analysis of competitive effects?

If *Brulotte* were an antitrust rather than a patent case, we might answer both questions as Kimble would like. This Court has viewed *stare decisis* as having less-than-usual force in cases involving the Sherman Act. See, *e.g., Khan, 522 U.S., at 20-21, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Congress, we have explained, intended that law's reference to "restraint of trade" to have "changing content," and authorized courts to oversee the term's "dynamic potential." Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717, 731-732, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). We have therefore felt relatively free to revise our **[**2413]** legal analysis as economic understanding evolves and (just as Kimble notes) to reverse antitrust precedents that misperceived a practice's competitive consequences. See Leegin, 551 U.S., at 899-900, 127 S. Ct. 2705, 168 L. Ed. 2d 623. Moreover, because the question in those cases was **[*462]** whether the challenged activity restrained trade, the Court's rulings necessarily turned on its understanding of economics. See Business Electronics **[***476]** Corp., 485 U.S., at 731, 108 S. Ct. 1515, 99 L. Ed. 2d 808. Accordingly, to overturn the decisions in light of sounder economic reasoning was to take them "on [their] own terms." Halliburton, 573 U.S., at 271, 134 S. Ct. 2398, 189 L. Ed. 2d at 352.

[1949] But *Brulotte* is a patent rather **[****26]** than an antitrust case, and our answers to both questions instead go against Kimble. To begin, even assuming that *Brulotte* relied on an economic misjudgment, Congress is the right entity to fix it. By contrast with the Sherman Act, the patent laws do not turn over exceptional law-shaping authority to the courts. Accordingly, statutory *stare decisis*—in which this Court interprets and Congress decides whether to amend—retains its usual strong force. See supra, at ___, 192 L. Ed. 2d, at 472. And as we have shown, that doctrine does not ordinarily bend to "wrong on the merits"-type arguments; it instead assumes Congress will correct whatever mistakes we commit. See supra, at ___ - ___, 192 L. Ed. 2d, at 471-472. Nor does Kimble offer any reason to think his own "the Court erred" claim is special. Indeed, he does not even point to anything that has changed since *Brulotte*—no new empirical studies or advances in economic theory. Cf., *e.g.,* Halliburton, 573 U.S., at 270-274, 134 S. Ct. 2398, 189 L. Ed. 2d at 352 (considering, though finding insufficient, recent economic research). On his argument, the *Brulotte* Court knew all it needed to know to determine that post-patent royalties are not usually anticompetitive; it just made the wrong call. See Brief for Petitioners 36-40. That claim, even if itself dead-right, fails to **[****27]** clear *stare decisis*'s high bar.

And in any event, *Brulotte* did not hinge on the mistake Kimble identifies. Although some of its language invoked economic concepts, see n. 4, *supra*, the Court did not rely on the notion that post-patent royalties harm competition. Nor is that surprising. The patent laws—unlike the Sherman Act—do not aim to maximize competition (to a large extent, the opposite). And the patent term—unlike the "restraint **[*463]** of trade" standard—provides an all-encompassing bright-line rule, rather than calling for practice-specific analysis. So in deciding whether post-expiration royalties comport with patent law, *Brulotte* did not undertake to assess that practice's likely competitive effects. Instead, it applied a categorical principle that all patents, and all benefits from them, must end when their terms expire. See Brulotte, 379 U.S., at 30-32, 85 S. Ct. 176, 13 L. Ed. 2d 99; supra, at ___ - ___, 192 L. Ed. 2d, at 469-470. Or more specifically put, the Court held, as it had in *Scott Paper*, that Congress had made a judgment: that the day after a patent lapses, the formerly protected invention must be available to all for free. And further: that post-expiration restraints on even a single licensee's access to the invention clash with that principle. See Brulotte, 379 U.S., at 31-32, 85 S. Ct. 176, 13 L. Ed. 2d 99 (a licensee's **[****28]** obligation to pay post-patent royalties conflicts with the "free market visualized for the post-expiration period" and so "runs counter to the policy and purpose of the patent laws" (quoting Scott Paper, 326 U.S., at 256, 66 S. Ct. 101, 90 L. Ed. 47, 1946 Dec. Comm'r Pat. 616)). That patent (not antitrust) policy gave rise to the Court's conclusion that post-patent royalty contracts are unenforceable—utterly "regardless of a demonstrable effect on competition." 1 Hovenkamp §3.2d, at 3-10.

[*477] [**2414]** Kimble's real complaint may go to the merits of such a patent policy—what he terms its "formalis[m]," its "rigid[ity]", and its detachment from "economic reality." Brief for Petitioners 27-28. But that is just a different version of the argument that *Brulotte* is wrong. And it is, if anything, a version less capable than the last of trumping statutory *stare decisis*. For the choice of what patent policy should be lies first and foremost with Congress. So if Kimble thinks patent law's insistence on unrestricted access to formerly patented inventions leaves too little room for pro-competitive post-expiration royalties, then Congress, not this Court, is his proper audience.

B

Kimble also seeks support from the wellspring of all patent policy: the goal of promoting innovation. *Brulotte*, he **[*464]** contends, "discourages **[****29]** technological innovation and does significant damage to the American economy." Brief for Petitioners 29. Recall that would-be licensors and licensees may benefit from post-patent royalty arrangements because they allow for a longer payment period and a more precise allocation of risk. See supra, at ___, 192 L. Ed. 2d, at 470. If the parties' ideal licensing agreement is barred, Kimble reasons, they may reach no agreement at all. See Brief for Petitioners 32. And that possibility may discourage invention in the first instance. The bottom line, Kimble concludes, is that some "breakthrough technologies will never see the light of day." Id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99.

Maybe. Or, then again, maybe not. While we recognize that post-patent royalties are sometimes not anticompetitive, we just cannot say whether barring them imposes any meaningful drag on innovation. As we have explained, *Brulotte* leaves open various ways—involving both licensing and other business arrangements—to accomplish payment deferral **[1950]** and risk-spreading alike. See supra, at ___, 192 L. Ed. 2d, at 471. Those alternatives may not offer the parties the precise set of benefits and obligations they would prefer. But they might still suffice to bring patent holders and product developers together and ensure **[****30]** that inventions get to the public. Neither Kimble nor his *amici* have offered any empirical evidence connecting *Brulotte* to decreased innovation; they essentially ask us to take their word for the problem. And the United States, which acts as both a licensor and a licensee of patented inventions while also implementing patent policy, vigorously disputes that *Brulotte* has caused any "significant real-world economic harm." Brief for United States as *Amicus Curiae* 30. Truth be told, if forced to decide that issue, we would not know where or how to start.

Which is one good reason why that is not our job. Claims that a statutory precedent has "serious and harmful consequences" for innovation are (to repeat this opinion's refrain) "more appropriately addressed to Congress." Halliburton, **[*465]** 573 U.S., at 277, 134 S. Ct. 2398, 189 L. Ed. 2d at 356. That branch, far more than this one, has the capacity to assess Kimble's charge that *Brulotte* suppresses technological progress. And if it concludes that *Brulotte* works such harm, Congress has the prerogative to determine the exact right response—choosing the policy fix, among many conceivable ones, that will optimally serve the public interest. As we have noted, Congress legislates actively with respect to patents, **[****31]** considering concerns **[***478]** of just the kind Kimble raises. See supra, at ___, 192 L. Ed. 2d, at 472. In adhering to our precedent as against such complaints, we promote the rule-of-law values to which courts must attend while leaving matters of public policy to Congress.

[2415]** V

HN8[] **LEdHN[8]**[] [8]What we can decide, we can undecide. But *stare decisis* teaches that we should exercise that authority sparingly. Cf. S. Lee & S. Ditko, Amazing Fantasy No. 15: Spider-Man!, p. 13 (1962) ("[I]n this world, with great power there must also come—great responsibility"). Finding many reasons for staying the *stare decisis* course and no "special justification" for departing from it, we decline Kimble's invitation to overrule *Brulotte*.

For the reasons stated, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Dissent by: ALITO

Dissent

Justice **Alito**, with whom The Chief Justice and Justice **Thomas** join, dissenting.

The Court employs *stare decisis*, normally a tool of restraint, to reaffirm a clear case of judicial overreach. Our decision in Brulotte v. Thys Co., 379 U.S. 29, 85 S. Ct. 176, 13 L. Ed. 2d 99 (1964), held that parties cannot enter into a patent licensing agreement that provides for royalty payments to continue after the term of the patent expires. That decision was not based on anything that can plausibly be regarded as an interpretation **[****32]** of the terms of the Patent Act. It was based instead on an **[*466]** economic theory—and one that has been debunked. The decision interferes with the ability of parties to negotiate licensing agreements that reflect the true value of a patent, and it disrupts contractual expectations. *Stare decisis* does not require us to retain this baseless and damaging precedent.

I

A

The Patent Act provides that a patent grants certain exclusive rights to the patentee and "his heirs or assigns" for a term of 20 years. *35 U.S.C. §§154(a)(1)* and *(2)*. The Act says nothing whatsoever about post-expiration royalties. In *Brulotte*, however, the Court held that such royalties are *per se* unlawful. The Court made little pretense of finding support for this holding in the language of the Act. Instead, the Court reasoned that allowing post-expiration royalties would subject "the free market visualized for the post-expiration period . . . to monopoly influences that have no proper place there." *379 U.S., at 32-33, 85 S. Ct. 176, 13 L. Ed. 2d 99*. Invoking antitrust concepts, the decision suggested that such arrangements are "an effort to enlarge the monopoly of the patent by t[y]ing the sale or use of the patented article to the purchase or use of unpatented ones." *Id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99*.

Whatever the merits of this economic **[****33]** argument, it does not represent a serious attempt to interpret the Patent Act. A licensing agreement that provides for the payment of royalties after a patent's term expires does not enlarge the patentee's monopoly or extend the term of the patent. It simply gives the licensor a **[***479]** contractual right. Thus, nothing in the text of the Act **[1951]** even arguably forbids licensing agreements that provide for post-expiration royalties.

Brulotte was thus a bald act of policymaking. It was not simply a case of incorrect statutory interpretation. It was not really statutory interpretation at all.

B

[*467] Not only was *Brulotte* based on policymaking, it was based on a policy that is difficult to defend. Indeed, in the intervening 50 years, its reasoning has been soundly refuted. See, *e.g.,* 10 P. Areeda & H. Hovenkamp, ***Antitrust Law***: An Analysis of Antitrust Principles and Their Application ¶1782c.3, pp. 554-556 (3d ed. 2011); See & Caprio, The Trouble with *Brulotte*: **[**2416]** The Patent Royalty Term and Patent Monopoly Extension, 1990 Utah L. Rev. 813, 846-851; *Scheiber v. Dolby Labs., Inc., 293 F. 3d 1014, 1017 (CA7 2002)*; Brief for Petitioners 23-25, and n. 11 (collecting sources); *ante, at ___, n. 3, 192 L. Ed. 2d, at 469*.

Brulotte misperceived the purpose and effect of post-expiration royalties. The decision rested on the view that **[****34]** post-expiration royalties extend the patent term by means of an anticompetitive tying arrangement. As the Court understood such an arrangement, the patent holder leverages its monopoly power during the patent term to require payments after the term ends, when the invention would otherwise be available for free public use. But agreements to pay licensing fees after a patent expires do not "enlarge the monopoly of the patent." *379 U.S., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99*. Instead, "[o]nce the patent term expires, the power to exclude is gone," and all that is left "is a problem about optimal contract design." Easterbrook, Contract and Copyright, *42 Hous. L. Rev. 953, 955 (2005)*.

The economics are simple: Extending a royalty term allows the parties to spread the licensing fees over a longer period of time, which naturally has the effect of reducing the fees during the patent term. See *ante, at ___, 192 L. Ed. 2d, at 470*. Restricting royalty payments to the patent term, as *Brulotte* requires, compresses payment into a shorter period of higher fees. The Patent Act does not prefer one approach over the other.

There are, however, good reasons why parties sometimes prefer post-expiration royalties over upfront fees, and why **[*468]** such arrangements have pro-competitive effects. Patent holders and licensees **[****35]** are often unsure whether a patented idea will yield significant economic value, and it often takes years to monetize an innovation. In those circumstances, deferred royalty agreements are economically efficient. They encourage innovators, like universities, hospitals, and other institutions, to invest in research that might not yield marketable products until decades down the line. See Brief for Memorial Sloan Kettering Cancer Center et al. as *Amici Curiae* 8-12. And they allow producers to hedge their bets and develop more products by spreading licensing fees over longer periods. See *ibid*. By prohibiting these arrangements, *Brulotte* erects an obstacle to efficient patent use. In patent law and other areas, we have abandoned *per se* rules with similarly disruptive effects. See, *e.g.,* *Illinois Tool Works Inc. v. Independent Ink, Inc., 547 U.S. 28, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*; *Leegin Creative Leather Products,* **[***480]** *Inc. v. PSKS, Inc., 551 U.S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*.

The majority downplays this harm by insisting that "parties can often find ways around *Brulotte*." *Ante, at ___, 192 L. Ed. 2d, at 470*. But the need to avoid *Brulotte* is an economic inefficiency in itself. Parties are not always aware of the prohibition—as this case amply demonstrates. And the suggested alternatives do not provide the same benefits as post-expiration royalty agreements. For instance, although an agreement to amortize **[****36]** payments for sales during the patent term would "bring down early outlays," the Court admits that such an agreement might not reflect the parties' risk preferences. *Ante, at ___, 192 L. Ed. 2d, at 470*. Moreover, such an arrangement would not necessarily yield the same amount of total royalties, particularly for an invention or a medical breakthrough that takes decades to develop into a marketable product. The sort of agreements that *Brulotte* prohibits would allow licensees to spread their costs, while *also* allowing patent holders to capitalize on slow-developing inventions.

[2417]** C

[*469] On top of that, *Brulotte* most often functions to upset the parties' expectations.

This case illustrates the point. No one disputes that, when "negotiating the settlement, neither side was aware of *Brulotte*." *Ante, at ___, 192 L. Ed. 2d, at 468*. Without knowledge of our *per se* rule, the parties agreed that Marvel would pay 3% in royalties on all of its future sales involving the Web Blaster and similar products. If the parties had been aware of *Brulotte*, they might have agreed to higher payments during the patent term. Instead, both sides expected the **[1952]** royalty payments to continue until Marvel stopped selling toys that fit the terms of the agreement. But that is **[****37]** not what happened. When Marvel discovered *Brulotte*, it used that decision to nullify a key part of the agreement. The parties' contractual expectations were shattered, and petitioners' rights were extinguished.

The Court's suggestion that some parties have come to rely on *Brulotte* is fanciful. The Court believes that there is a "reasonable possibility that parties have structured their business transactions in light of *Brulotte*." *Ante, at ___, 192 L. Ed. 2d, at 473*. Its only support for this conclusion is Marvel's self-serving and unsupported assertion that some contracts might not specify an end date for royalties because the parties expect *Brulotte* to supply the default rule. To its credit, the Court stops short of endorsing this unlikely prediction, saying only that "uncertainty on this score cuts in Marvel's direction." *Ante, at ___, 192 L. Ed. 2d, at 473*.

But there is no real uncertainty. "[W]e do not know" if Marvel's assertion is correct because Marvel has provided no evidence to support it. *Ibid.* And there are reasons to believe that, if parties actually relied on *Brulotte* to supply a default rule, courts would enforce the contracts as the parties expected. See, *e.g.,* 27 R. Lord, Williston on Contracts §70:124 (4th ed. 2003). What we **[****38]** know for sure, however, is **[*470]** that *Brulotte* has upended the parties' expectations here and in many other cases. See, *e.g.,* *Scheiber, 293 F. 3d, at 1016*; *Boggild v. Kenner Products, 853 F. 2d 465, 466-467 (CA6 1988)*; *Pitney Bowes, Inc. v. Mestre, 701 F. 2d 1365, 1367, 1373 (CA11 1983)*. **[***481]** These confirmed problems with retaining *Brulotte* clearly outweigh Marvel's hypothetical fears.

II

In the end, *Brulotte*'s only virtue is that we decided it. But that does not render it invincible. *Stare decisis* is important to the rule of law, but so are correct judicial decisions. Adherence to prior decisions "'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" *Pearson v. Callahan, 555 U.S. 223, 233, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009)* (quoting *Payne v. Tennessee, 501 U.S. 808, 827, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991)*). But *stare decisis* is not an "inexorable command." *Id.*; *Washington v. W. C. Dawson & Co., 264 U.S. 219, 238, 44 S. Ct. 302, 68 L. Ed. 646 (1924)* (Brandeis, J., dissenting). "Revisiting precedent is particularly appropriate where, as here, a departure would not upset expectations, the precedent consists of a judge-made rule

. . ., and experience has pointed up the precedent's shortcomings." Pearson, supra, at 233, 129 S. Ct. 808, 172 L. Ed. 2d 565.

Our traditional approach to *stare decisis* does not require us to retain *Brulotte*'s *per se* rule. *Brulotte*'s holding had no basis in the law. Its reasoning has been thoroughly disproved. It poses economic barriers that stifle **[****39]** innovation. And it unsettles contractual expectations.

[2418]** It is not decisive that Congress could have altered *Brulotte*'s rule. In general, we are especially reluctant to overturn decisions interpreting statutes because those decisions can be undone by Congress. See, *e.g.,* John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139, 128 S. Ct. 750, 169 L. Ed. 2d 591 (2008); Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989). The Court calls this a "superpowered form of *stare decisis*" **[*471]** that renders statutory interpretation decisions nearly impervious to challenge. Ante, at ___, n. 3, 192 L. Ed. 2d, at 473. I think this goes a bit too far.

As an initial matter, we do not give super-duper protection to decisions that do not actually interpret a statute. When a precedent is based on a judge-made rule and is not grounded in anything that Congress has enacted, we cannot "properly place on the shoulders of Congress" the entire burden of correcting "the Court's own error." Girouard v. United States, 328 U.S. 61, 69-70, 66 S. Ct. 826, 90 L. Ed. 1084 (1946). On the contrary, we have recognized that it is appropriate for us to correct rules of this sort. See, *e.g.,* Leegin, supra, at 899-900, 127 S. Ct. 2705, 168 L. Ed. 2d 623; State Oil Co. v. Khan, 522 U.S. 3, 20-21, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997).

The Court says that it might agree if *Brulotte* were an antitrust precedent because *stare decisis* has "less-than-usual force in cases involving the Sherman Act." Ante, at ___, 192 L. Ed. 2d, at 475. But this distinction is unwarranted. We have been more willing to reexamine antitrust precedents because they have attributes **[****40]** of common-law decisions. I see no reason why the same approach should not apply where the precedent at issue, while purporting to apply a statute, is actually based on policy concerns. Indeed, we should be even more willing to reconsider such a precedent **[***482]** because the role implicitly assigned to the federal courts under the Sherman Act has no parallel in Patent Act cases.

[1953] Even taking the Court on its own terms, *Brulotte* was an antitrust decision masquerading as a patent case. The Court was principally concerned with patentees improperly leveraging their monopoly power. See 379 U.S., at 32-33, 85 S. Ct. 176, 13 L. Ed. 2d 99. And it expressly characterized post-expiration royalties as anti-competitive tying arrangements. See id., at 33, 85 S. Ct. 176, 13 L. Ed. 2d 99. It makes no sense to afford greater *stare decisis* protection to *Brulotte*'s thinly veiled antitrust reasoning than to our Sherman Act decisions.

The Court also places too much weight on Congress' failure to overturn *Brulotte*. We have long cautioned that "[i]t **[*472]** is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." Girouard, supra, at 69, 66 S. Ct. 826, 90 L. Ed. 1084. Even where Congress has considered, but not adopted, legislation that would abrogate a judicial ruling, it cannot be inferred that Congress' **[****41]** failure to act shows that it approves the ruling. See Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A., 511 U.S. 164, 187, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994). "'[S]everal equally tenable inferences may be drawn from such inaction.'" *Ibid*. (quoting Pension Benefit Guaranty Corporation v. LTV Corp., 496 U.S. 633, 650, 110 S. Ct. 2668, 110 L. Ed. 2d 579 (1990)).

Passing legislation is no easy task. A federal statute must withstand the "finely wrought" procedure of bicameralism and presentment. INS v. Chadha, 462 U.S. 919, 951, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983); Clinton v. City of New York, 524 U.S. 417, 440, 118 S. Ct. 2091, 141 L. Ed. 2d 393 (1998); see U. S. Const., Art. I, §7. Within that onerous process, there are additional practical hurdles. A law must be taken up for discussion and not passed over in favor of more pressing matters, **[**2419]** and Senate rules require 60 votes to end debate on most legislation. And even if the House and Senate agree on a general policy, the details of the measure usually must be hammered out in a conference committee and repassed by both Houses.

* * *

A proper understanding of our doctrine of *stare decisis* does not prevent us from reexamining *Brulotte.* Even the Court does not defend the decision on the merits. I would reconsider and overrule our obvious mistake. For these reasons, I respectfully dissent.

References

35 U.S.C.S. § 154(a)

3 Milgrim on Licensing §§18.05, 18.07 (Matthew Bender)

L Ed Digest, Patents § 239

L Ed Index, Royalties

Supreme Court's views as to precedential weight of Supreme Court memorandum decision affirming lower federal court judgment on appeal or summarily dismissing appeal from state court. *139 L. Ed. 2d 979*.

RJR Nabisco, Inc. v. European Cmty.

Supreme Court of the United States

March 21, 2016, Argued; June 20, 2016, Decided

No. 15-138

Reporter

579 U.S. 325 *; 136 S. Ct. 2090 **; 195 L. Ed. 2d 476 ***; 2016 U.S. LEXIS 3925 ****; 84 U.S.L.W. 4450; 26 Fla. L. Weekly Fed. S 263

RJR NABISCO, INC., et al., Petitioners v . EUROPEAN COMMUNITY, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [**1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

European Cmty. v. RJR Nabisco, Inc., 764 F.3d 129, 2014 U.S. App. LEXIS 7593 (2d Cir., 2014)

Disposition: *764 F. 3d 129*, reversed and remanded.

Core Terms

extraterritorial, predicates, domestic, enterprise, racketeering, abroad, injuries, pattern of racketeering activity, private right of action, prohibitions, violations, foreign country, extraterritorial effect, courts, cause of action, Clayton Act, racketeering activity, clear indication, occurring, offenses, anti trust law, injured person, organizations, suits, private plaintiff, district court, suffer injury, limitations, cigarette, sovereign

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

Governments > Legislation > Statutory Remedies & Rights

HN1[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, created four new criminal offenses involving the activities of organized criminal groups in relation to an enterprise. *18 U.S.C.S. § 1962(a)-(d)*. RICO also created a new civil cause of action for any person injured in his business or property by reason of a violation of those prohibitions. *18 U.S.C.S. § 1964(c)*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN2[] Racketeer Influenced & Corrupt Organizations Act, Elements

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, is founded on the concept of racketeering activity. The statute defines "racketeering activity" to encompass dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act "indictable" under specified federal statutes, 18 U.S.C.S. § 1961(1)(B)-(C), (E)-(G), as well as certain crimes "chargeable" under state law, § 1961(1)(A), and any offense involving bankruptcy or securities fraud or drug-related activity that is "punishable" under federal law, § 1961(1)(D). A predicate offense implicates RICO when it is part of a "pattern of racketeering activity"—a series of related predicates that together demonstrate the existence or threat of continued criminal activity. Section 1961(5) specifies that a "pattern of racketeering activity" requires at least two predicates committed within 10 years of each other.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN3[] Racketeer Influenced & Corrupt Organizations Act, Elements

18 U.S.C.S. § 1962 of the Racketeer Influenced and Corrupt Organizations Act sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. These prohibitions can be summarized as follows. Section 1962(a) makes it unlawful to invest income derived from a pattern of racketeering activity in an enterprise. Section 1962(b) makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. Section 1962(c) makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Finally, § 1962(d) makes it unlawful to conspire to violate any of the other three prohibitions.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN4[] Racketeer Influenced & Corrupt Organizations Act, Elements

See 18 U.S.C.S. § 1962.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Penalties

Governments > Legislation > Statutory Remedies & Rights

HN5[] Racketeer Influenced & Corrupt Organizations Act, Penalties

Violations of 18 U.S.C.S. § 1962 are subject to criminal penalties, 18 U.S.C.S. § 1963(a), and civil proceedings to enforce those prohibitions may be brought by the Attorney General, 18 U.S.C.S. § 1964(a)-(b). Separately, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C.S. §§ 1961-1968, creates a private civil cause of action that allows any person injured in his business or property by reason of a violation of § 1962 to sue in federal district court and recover treble damages, costs, and attorney's fees. § 1964(c).

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

Governments > Legislation > Statutory Remedies & Rights

HN6[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

See *18 U.S.C.S. § 1964(c)*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN7[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

18 U.S.C.S. § 1961(4) defines an enterprise to include any union or group of individuals associated in fact although not a legal entity.

Governments > Legislation > Interpretation

International Law > Authority to Regulate

HN8[] **Legislation, Interpretation**

It is a basic premise of the United States' legal system that, in general, United States law governs domestically but does not rule the world. This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. The question is not whether a court thinks Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court, but whether Congress has affirmatively and unmistakably instructed that the statute will do so. When a statute gives no clear indication of an extraterritorial application, it has none. There are several reasons for this presumption. Most notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries. But it also reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind. A court therefore applies the presumption across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law.

Governments > Legislation > Interpretation

International Law > Authority to Regulate

HN9[] **Legislation, Interpretation**

There is a two-step framework for analyzing extraterritoriality issues. At the first step, a court asks whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. The court must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step the court determines whether the case involves a domestic application of the statute, and the court does this by looking to the statute's "focus." If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

Governments > Legislation > Interpretation

International Law > Authority to Regulate

HN10[] Legislation, Interpretation

The scope of an extraterritorial statute turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's "focus." Because a finding of extraterritoriality at step one will obviate step two's "focus" inquiry, it will usually be preferable for courts to proceed in that sequence. But the U.S. Supreme Court does not mean to preclude courts from starting at step two in appropriate cases.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

International Law > Authority to Regulate

HN11[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Regarding whether the Racketeer Influenced and Corrupt Organizations Act's, *18 U.S.C.S. §§ 1961-1968*, substantive prohibitions in *18 U.S.C.S. § 1962* may apply to foreign conduct, the presumption against extraterritoriality has been rebutted—but only with respect to certain applications of the statute.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN12[] Racketeer Influenced & Corrupt Organizations Act, Elements

The Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*, defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct. These predicates include the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when the defendant is a United States person, to offenses that take place outside the United States. *18 U.S.C.S. § 1957(d)(2)*. Other examples include the prohibitions against the assassination of Government officials, *18 U.S.C.S. § 351(i)* (there is extraterritorial jurisdiction over the conduct prohibited by this section); *18 U.S.C.S. § 1751(k)* (same), and the prohibition against hostage taking, which applies to conduct that occurred outside the United States if either the hostage or the offender is a U.S. national, if the offender is found in the United States, or if the hostage taking is done to compel action by the U.S. Government, *18 U.S.C.S. § 1203(b)*. At least one predicate—the prohibition against killing a national of the United States, while such national is outside the United States—applies only to conduct occurring outside the United States. *18 U.S.C.S. § 2332(a)*.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN13[] Racketeer Influenced & Corrupt Organizations Act, Elements

Congress's incorporation of extraterritorial predicates into the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, gives a clear, affirmative indication that *18 U.S.C.S. § 1962* applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. Put another way, a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome. To give a simple (albeit grim) example, a violation of *§ 1962* could be premised on a pattern of killings of Americans abroad in violation of *18 U.S.C.S. § 2332(a)*—a predicate that applies extraterritorially—whether or not any domestic predicates are also alleged. The foreign killings would, of course, still have to satisfy the relatedness and continuity requirements of RICO's pattern element.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN14[] Racketeer Influenced & Corrupt Organizations Act, Elements

In order for the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, to apply extraterritorially, foreign conduct must violate a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially. Although a number of RICO predicates have extraterritorial effect, many do not. The inclusion of some extraterritorial predicates does not mean that all RICO predicates extend to foreign conduct. This is apparent for two reasons. First, when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms. Second, RICO defines as racketeering activity only acts that are "indictable" (or, what amounts to the same thing, "chargeable" or "punishable") under one of the statutes identified in 18 U.S.C.S. § 1961(1). If a particular statute does not apply extraterritorially, then conduct committed abroad is not "indictable" under that statute and so cannot qualify as a predicate under RICO's plain terms.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN15[] Racketeer Influenced & Corrupt Organizations Act, Elements

While the presumption against extraterritoriality can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. Assuredly context can be consulted as well. Context is dispositive with regard to the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968. Congress has not expressly said that 18 U.S.C.S. § 1962(c) applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity"—and by extension a "pattern of racketeering activity"—to encompass violations of predicate statutes that do expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN16[] Racketeer Influenced & Corrupt Organizations Act, Elements

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.S. §§ 1961-1968, applies to some foreign racketeering activity. A violation of 18 U.S.C.S. § 1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. This fact is determinative as to § 1962(b) and § 1962(c), both of which prohibit the employment of a pattern of racketeering. Although they differ as to the end for which the pattern is employed—to acquire or maintain control of an enterprise under § 1962(b), or to conduct an enterprise's affairs under § 1962(c)—this difference is immaterial for extraterritoriality purposes.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN17[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Unlike *18 U.S.C.S. § 1962(b)* and *(c)*, *§ 1962(a)* targets certain uses of income derived from a pattern of racketeering, not the use of the pattern itself. While this prohibition applies to income derived from foreign patterns of racketeering (within limits), arguably *§ 1962(a)* extends only to domestic uses of the income.

Governments > Legislation > Interpretation

International Law > Authority to Regulate

HN18[] **Legislation, Interpretation**

Only at the second step of the extraterritoriality inquiry does a court consider a statute's "focus." However, if is a clear indication at step one that the statute applies extraterritorially, the court does not proceed to the "focus" step.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN19[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*—or at least *18 U.S.C.S. § 1962(b)* and *(c)*—applies abroad, and so a court does not need to determine which transnational (or wholly foreign) patterns of racketeering it applies to; it applies to all of them, regardless of whether they are connected to a "foreign" or "domestic" enterprise. This rule is, of course, subject to the important limitation that RICO covers foreign predicate offenses only to the extent that the underlying predicate statutes are extraterritorial. But within those bounds, the location of the affected enterprise does not impose an independent constraint.

Governments > Legislation > Interpretation

International Law > Authority to Regulate

HN20[] **Legislation, Interpretation**

Congress does not usually exempt foreigners acting in the United States from U.S. legal requirements. Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

HN21[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

The nerve center test, developed with ordinary corporate command structures in mind, is ill suited to govern Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*, association-in-fact enterprises, which need not have a hierarchical structure or a "chain of command."

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

International Law > Authority to Regulate

HN22[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

Congress intended the prohibitions in *18 U.S.C.S. § 1962(b)* and *(c)* to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise.

Criminal Law & Procedure > ... > Racketeering > Racketeer Influenced & Corrupt Organizations Act > Elements

International Law > Authority to Regulate

HN23[] **Racketeer Influenced & Corrupt Organizations Act, Elements**

Although the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§ 1961-1968*, imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO's substantive prohibitions requires proof of an enterprise that is engaged in, or the activities of which affect, interstate or foreign commerce. *18 U.S.C.S. § 1962(a)*, *(b)*, *(c)*. This reference to "foreign commerce" is not taken to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—e.g., commerce between the United States and a foreign country. Enterprises whose activities lack that anchor to U.S. commerce cannot sustain a RICO violation.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

Governments > Legislation > Statutory Remedies & Rights

International Law > Authority to Regulate

HN24[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

18 U.S.C.S. § 1964(c) allows any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962* to sue for treble damages, costs, and attorney's fees. Irrespective of any extraterritorial application of *§ 1962*, *§ 1964(c)* does not overcome the presumption against extraterritoriality. A private Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*, plaintiff therefore must allege and prove a domestic injury to its business or property.

Governments > Legislation > Statutory Remedies & Rights

International Law > Authority to Regulate

HN25[] **Legislation, Statutory Remedies & Rights**

For extraterritoriality purposes, the creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Thus, providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct.

Governments > Legislation > Interpretation

International Law > Authority to Regulate

HN26[] Legislation, Interpretation

Although a risk of conflict between an American statute and a foreign law is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex.

Governments > Legislation > Interpretation

International Law > Authority to Regulate

HN27[] Legislation, Interpretation

The U.S. Supreme Court rejects the notion that it should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign. Rather than guess anew in each case, the Court applies the presumption in all cases.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

Governments > Legislation > Interpretation

International Law > Authority to Regulate

Governments > Legislation > Statutory Remedies & Rights

HN28[] Racketeering, Racketeer Influenced & Corrupt Organizations Act

Nothing in *18 U.S.C.S. § 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States. The statute provides a cause of action to any person injured in his business or property by a violation of *18 U.S.C.S. § 1962*. *§ 1964(c)*. The word “any” ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality. The statute’s reference to injury to “business or property” also does not indicate extraterritorial application. If anything, by cabining Racketeer Influenced and Corrupt Organizations Act's (RICO’s), *18 U.S.C.S. §§ 1961-1968*, private cause of action to particular kinds of injury—excluding, for example, personal injuries—Congress signaled that the civil remedy is not coextensive with *§ 1962*’s substantive prohibitions. The rest of *§ 1964(c)* places a limit on RICO plaintiffs’ ability to rely on securities fraud to make out a claim. This too suggests that *§ 1964(c)* is narrower in its application than *§ 1962*, and in any event does not support extraterritoriality.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

Governments > Legislation > Interpretation

International Law > Authority to Regulate

Governments > Legislation > Statutory Remedies & Rights

HN29[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

The presumption against extraterritoriality must be applied separately to both the Racketeer Influenced and Corrupt Organizations Act's (RICO's), *18 U.S.C.S. §§ 1961-1968*, substantive prohibitions and its private right of action. It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and under RICO it is absent.

Antitrust & Trade Law > Clayton Act > Scope

International Law > Authority to Regulate > Anticompetitive Activities

Governments > Legislation > Statutory Remedies & Rights

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

HN30[] **Antitrust & Trade Law, Clayton Act**

The Racketeer Influenced and Corrupt Organizations Act's (RICO's), *18 U.S.C.S. §§ 1961-1968*, private right of action was modeled after § 4 of the Clayton Act, *15 U.S.C.S. § 15*, which allows recovery for injuries suffered abroad as a result of antitrust violations. Although the U.S. Supreme Court has often looked to the Clayton Act for guidance in construing *18 U.S.C.S. § 1964(c)*, the Court has not treated the two statutes as interchangeable. The Court has declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate.

Criminal Law & Procedure > Criminal Offenses > Racketeering > Racketeer Influenced & Corrupt Organizations Act

Governments > Legislation > Statutory Remedies & Rights

International Law > Authority to Regulate

HN31[] **Racketeering, Racketeer Influenced & Corrupt Organizations Act**

18 U.S.C.S. § 1964(c) requires a civil Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§ 1961-1968*, plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries.

Lawyers' Edition Display

Decision

[*476]** Civil action under Racketeer Influenced and Corrupt Organizations Act (RICO) provision (*18 U.S.C.S. § 1964(c)*) by plaintiffs who waived claims for domestic injuries was not maintainable, because RICO did not apply extraterritorially under *§ 1964(c)*.

Summary

Overview: HOLDINGS: [1]-RICO applies to some foreign racketeering activity. A violation of *18 U.S.C.S. § 1962* may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial; [2]-RICO imposes no domestic enterprise requirement, although the enterprise must engage in or affect commerce involving the U.S.; [3]-The European Community's allegations that a cigarette company engaged in a global money-laundering scheme did not involve an impermissibly extraterritorial application of *§ 1962*; [4]-RICO's private right of action under *18 U.S.C.S. § 1964(c)* did not overcome the presumption against extraterritoriality. It was therefore necessary to allege and prove a domestic injury to business or property, and claims for domestic injuries had been waived in the instant case.

Outcome: Judgment reversed; case remanded. 4-3 Decision; 2 Opinions Concurring in Part, Dissenting in Part, and Dissenting from the Judgment.

Headnotes

[*477]**

EXTORTION, BLACKMAIL, AND RACKETEERING §5 EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- CRIMES -- CIVIL ACTION > Headnote:
LEdHN[1][] [1]

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*, created four new criminal offenses involving the activities of organized criminal groups in relation to an enterprise. *18 U.S.C.S. § 1962(a)-(d)*. RICO also created a new civil cause of action for any person injured in his business or property by reason of a violation of those prohibitions. *18 U.S.C.S. § 1964(c)*.

EXTORTION, BLACKMAIL, AND RACKETEERING §4 > RICO -- RACKETEERING ACTIVITY > Headnote:
LEdHN[2][] [2]

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*, is founded on the concept of racketeering activity. The statute defines “racketeering activity” to encompass dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act “indictable” under specified federal statutes, *18 U.S.C.S. § 1961(1)(B)-(C)*, *(E)-(G)*, as well as certain crimes “chargeable” under state law, *§ 1961(1)(A)*, and any offense involving bankruptcy or securities fraud or drug-related activity that is “punishable” under federal law, *§ 1961(1)(D)*. A predicate offense implicates RICO when it is part of a “pattern of racketeering activity”--a series of related predicates that together demonstrate the existence or threat of continued criminal activity. *Section 1961(5)* specifies that a “pattern of racketeering activity” requires at least two predicates committed within 10 years of each other.

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- PROHIBITIONS > Headnote:
LEdHN[3][] [3]

18 U.S.C.S. § 1962 of the Racketeer Influenced and Corrupt Organizations Act sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. These prohibitions can be summarized as follows. *Section 1962(a)* makes it unlawful to invest income derived from a pattern of racketeering activity in an enterprise. *Section 1962(b)* makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. *Section 1962(c)* makes it unlawful for a person employed by or associated with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Finally, *§ 1962(d)* makes it unlawful to conspire to violate any of the other three prohibitions.

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- PROHIBITIONS > Headnote:
LEdHN[4][] [4]

See *18 U.S.C.S. § 1962*, which prohibits various racketeering-related activities.

[*478]**

EXTORTION, BLACKMAIL, AND RACKETEERING §4 EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- CRIMINAL PENALTIES -- CIVIL ACTION > Headnote:
LEdHN[5][] [5]

Violations of *18 U.S.C.S. § 1962* are subject to criminal penalties, *18 U.S.C.S. § 1963(a)*, and civil proceedings to enforce those prohibitions may be brought by the Attorney General, *18 U.S.C.S. § 1964(a)-(b)*. Separately, the Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§1961-1968*, creates a private civil cause of action that allows any person injured in his business or property by reason of a violation of *§ 1962* to sue in Federal District Court and recover treble damages, costs, and attorney's fees. *§ 1964(c)*.

EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- CIVIL ACTION > Headnote:
LEdHN[6][] [6]

See *18 U.S.C.S. § 1964(c)*, which creates a private civil cause of action that allows any person injured in his business or property by reason of a violation of *§ 1962* to sue in Federal District Court and recover treble damages, costs, and attorney's fees.

EXTORTION, BLACKMAIL, AND RACKETEERING §4 > RICO -- ENTERPRISE > Headnote:
LEdHN[7][] [7]

18 U.S.C.S. § 1961(4) defines an enterprise to include any union or group of individuals associated in fact although not a legal entity.

STATUTES §84 > PRESUMPTION AGAINST EXTRATERRITORIALITY > Headnote:
LEdHN[8][] [8]

It is a basic premise of the United States' legal system that, in general, United States law governs domestically but does not rule the world. This principle finds expression in a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. The question is not whether a court thinks Congress would have wanted a statute to apply to foreign conduct if it had thought of the situation before the court, but whether Congress has affirmatively and unmistakably instructed that the statute will do so. When a statute gives no clear indication of an extraterritorial application, it has none. There are several reasons for this presumption. Most notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries. But it also reflects the more prosaic commonsense notion that Congress generally legislates with domestic concerns in mind. A court therefore applies the presumption across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law.

[*479]**

STATUTES §84 > EXTRATERRITORIALITY -- ANALYSIS > Headnote:
LEdHN[9][] [9]

There is a two-step framework for analyzing extraterritoriality issues. At the first step, a court asks whether the presumption against extraterritoriality has been rebutted--that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. The court must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step the court determines whether the case involves a domestic application of the statute, and the court does this by looking to the statute's “focus.” If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

STATUTES §84 > EXTRATERRITORIALITY -- INQUIRY > Headnote:
LEdHN[10][] [10]

The scope of an extraterritorial statute turns on the limits Congress has (or has not) imposed on the statute's foreign application, and not on the statute's “focus.” Because a finding of extraterritoriality at step one will obviate step two's “focus” inquiry, it will usually be preferable for courts to proceed in that sequence. But the U.S. Supreme Court does not mean to preclude courts from starting at step two in appropriate cases.

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- FOREIGN CONDUCT > Headnote:
LEdHN[11][] [11]

Regarding whether the Racketeer Influenced and Corrupt Organizations Act's, *18 U.S.C.S. §§1961-1968*, substantive prohibitions in *18 U.S.C.S. § 1962* may apply to foreign conduct, the presumption against extraterritoriality has been rebutted--but only with respect to certain applications of the statute.

EXTORTION, BLACKMAIL, AND RACKETEERING §4 > RICO -- PREDICATE OFFENSES -- FOREIGN CONDUCT > Headnote:
LEdHN[12][] [12]

The Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§1961-1968*, defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct. These predicates include the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when the defendant is a United States person, to offenses that take place outside the United States. *18 U.S.C.S. § 1957(d)(2)*. Other examples include the prohibitions against the assassination of government officials, *18 U.S.C.S. § 351(i)* (there is extraterritorial jurisdiction over the conduct prohibited by this section); *18 U.S.C.S. § 1751(k)* (same), and the prohibition against hostage taking, which applies to conduct that occurred outside the United States if either the hostage or the offender is a U.S. national, if the offender is found in the United States, or if the hostage taking is done to compel action by the U.S. Government, *18 U.S.C.S. § 1203(b)*. At least one predicate--the prohibition against killing a national of the United States, while such national is outside the United States--applies only to conduct occurring outside the United States. *18 U.S.C.S. § 2332(a)*.

[*480]**

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- FOREIGN ACTIVITY > Headnote:
LEdHN[13][] [13]

Congress's incorporation of extraterritorial predicates into the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*, gives a clear, affirmative indication that *18 U.S.C.S. § 1962* applies to foreign racketeering activity--but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. Put another way, a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome. To give a simple (albeit grim) example, a violation of *§ 1962* could be premised on a pattern of killings of Americans abroad in violation of *18 U.S.C.S. § 2332(a)*--a predicate that applies extraterritorially--whether or not any domestic predicates are also alleged. The foreign killings would, of course, still have to satisfy the relatedness and continuity requirements of RICO's pattern element.

EXTORTION, BLACKMAIL, AND RACKETEERING §4STATUTES §84 > RICO -- PRESUMPTION AGAINST EXTRATERRITORIALITY > Headnote:
LEdHN[14][] [14]

In order for the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*, to apply extraterritorially, foreign conduct must violate a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially. Although a number of RICO predicates have extraterritorial effect, many do not. The inclusion of some extraterritorial predicates does not mean that all RICO predicates extend to foreign conduct. This is apparent for two reasons. First, when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms. Second, RICO defines as racketeering activity only acts that are “indictable” (or, what amounts to the same thing, “chargeable” or “punishable”) under one of the statutes identified in *18 U.S.C.S. § 1961(1)*. If a particular statute does not apply extraterritorially, then conduct committed abroad is not "indictable" under that statute and so cannot qualify as a predicate under RICO's plain terms.

EXTORTION, BLACKMAIL, AND RACKETEERING §5STATUTES §84 > RICO -- PRESUMPTION AGAINST EXTRATERRITORIALITY > Headnote:
LEdHN[15][] [15]

While the presumption against extraterritoriality can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. Assuredly context can be consulted as well. Context is dispositive with regard to the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*. Congress has not expressly said that *18 U.S.C.S. § 1962(c)* applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity"--and by extension a "pattern of racketeering activity"--to encompass violations of predicate statutes that do expressly apply extraterritorially. Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality.

[*481]**

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- FOREIGN ACTIVITY > Headnote:
LEdHN[16][] [16]

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*, applies to some foreign racketeering activity. A violation of *18 U.S.C.S. § 1962* may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. This fact is determinative as to *§ 1962(b)* and *§ 1962(c)*, both of which prohibit the employment of a pattern of racketeering. Although they differ as to the end for which the pattern is employed--to acquire or maintain control of an enterprise under *§ 1962(b)*, or to conduct an enterprise's affairs under *§ 1962(c)*--this difference is immaterial for extraterritoriality purposes.

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- FOREIGN AND DOMESTIC ACTIVITIES > Headnote:
LEdHN[17][] [17]

Unlike *18 U.S.C.S. § 1962(b)* and *(c)*, *§ 1962(a)* targets certain uses of income derived from a pattern of racketeering, not the use of the pattern itself. While this prohibition applies to income derived from foreign patterns of racketeering (within limits), arguably *§ 1962(a)* extends only to domestic uses of the income.

STATUTES §84 > EXTRATERRITORIALITY -- INQUIRY > Headnote:
LEdHN[18][] [18]

Only at the second step of the extraterritoriality inquiry does a court consider a statute's "focus." However, if is a clear indication at step one that the statute applies extraterritorially, the court does not proceed to the "focus" step.

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- EXTRATERRITORIALITY > Headnote:
LEdHN[19][] [19]

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*--or at least *18 U.S.C.S. § 1962(b)* and *(c)*--applies abroad, and so a court does not need to determine which transnational (or wholly foreign) patterns of racketeering it applies to; it applies to all of them, regardless of whether they are connected to a “foreign” or “domestic” enterprise. This rule is, of course, subject to the important limitation that RICO covers foreign predicate offenses only to the extent that the underlying predicate statutes are extraterritorial. But within those bounds, the location of the affected enterprise does not impose an independent constraint.

STATUTES §84 > EXTRATERRITORIALITY -- FOREIGNER IN UNITED STATES > Headnote:
LEdHN[20][] [20]

Congress does not usually exempt foreigners acting in the United States from U.S. legal requirements. Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States.

EXTORTION, BLACKMAIL, AND RACKETEERING §4 > ASSOCIATION-IN-FACT ENTERPRISES > Headnote:
LEdHN[21][] [21]

The nerve center test, developed with ordinary corporate command structures in mind, is ill suited to govern Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§1961-1968*, association-in-fact enterprises, which need not have a hierarchical structure or a “chain of command.” (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- EXTRATERRITORIALITY > Headnote:
LEdHN[22][] [22]

Congress intended the prohibitions in *18 U.S.C.S. § 1962(b)* and *(c)* to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

[*482]**

EXTORTION, BLACKMAIL, AND RACKETEERING §5 > RICO -- FOREIGN ENTERPRISE > Headnote:
LEdHN[23][] [23]

Although the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. §§1961-1968*, imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO's substantive prohibitions requires proof of an enterprise that is engaged in, or the activities of which affect, interstate or foreign commerce. *18 U.S.C.S. § 1962(a)*, *(b)*, *(c)*. This reference to "foreign commerce" is not taken to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States--e.g., commerce between the United States and a foreign country. Enterprises whose activities lack that anchor to U.S. commerce cannot sustain a RICO violation.

EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- CIVIL SUIT -- EXTRATERRITORIALITY > Headnote:
LEdHN[24][] [24]

18 U.S.C.S. § 1964(c) allows any person injured in his business or property by reason of a violation of *18 U.S.C.S. § 1962* to sue for treble damages, costs, and attorney's fees. Irrespective of any extraterritorial application of *§ 1962*, *§ 1964(c)* does not overcome the presumption against extraterritoriality. A private Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§1961-1968*, plaintiff therefore must allege and prove a domestic injury to its business or property. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

ACTIONS §2 > CIVIL REMEDY -- FOREIGN CONDUCT > Headnote:
LEdHN[25][] [25]

For extraterritoriality purposes, the creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion. Thus, providing a private civil remedy for foreign conduct creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

STATUTES §84 > PRESUMPTION AGAINST EXTRATERRITORIALITY > Headnote:
LEdHN[26][] [26]

Although a risk of conflict between an American statute and a foreign law is not a prerequisite for applying the presumption against extraterritoriality, where such a risk is evident, the need to enforce the presumption is at its apex. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

STATUTES §84 > PRESUMPTION AGAINST EXTRATERRITORIALITY > Headnote:
LEdHN[27][] [27]

The U.S. Supreme Court rejects the notion that it should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign. Rather than guess anew in each case, the court applies the presumption in all cases. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

[*483]**

EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- CIVIL -- EXTRATERRITORIALITY > Headnote:
LEdHN[28][] [28]

Nothing in *18 U.S.C.S. § 1964(c)* provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States. The statute provides a cause of action to any person injured in his business or property by a violation of *18 U.S.C.S. § 1962*. *§ 1964(c)*. The word "any" ordinarily connotes breadth, but it is insufficient to displace the presumption against extraterritoriality. The statute's reference to injury to "business or property" also does not indicate extraterritorial application. If anything, by cabining Racketeer Influenced and Corrupt Organizations Act's (RICO's), *18 U.S.C.S. §§1961-1968*, private cause of action to particular kinds of injury--excluding, for example, personal injuries--Congress signaled that the civil remedy is not coextensive with *§ 1962*'s substantive prohibitions. The rest of *§ 1964(c)* places a limit on RICO plaintiffs' ability to rely on securities fraud to make out a claim. This too suggests that *§ 1964(c)* is narrower in its application than *§ 1962*, and in any event does not support extraterritoriality. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

EXTORTION, BLACKMAIL, AND RACKETEERING §4 EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- EXTRATERRITORIALITY -- PROHIBITIONS -- CIVIL SUIT > Headnote:
LEdHN[29][] [29]

The presumption against extraterritoriality must be applied separately to both the Racketeer Influenced and Corrupt Organizations Act's (RICO's), *18 U.S.C.S. §§1961-1968*, substantive prohibitions and its private right of action. It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and under RICO it is absent. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

EXTORTION, BLACKMAIL, AND RACKETEERING §6RESTRAINTS OF TRADE, MONOPOLIES, AND UNFAIR TRADE PRACTICES §63 > CLAYTON ACT -- RICO -- EXTRATERRITORIALITY > Headnote:
LEdHN[30][] [30]

The Racketeer Influenced and Corrupt Organizations Act's (RICO's), *18 U.S.C.S. §§1961-1968*, private right of action was modeled after § 4 of the Clayton Act, *15 U.S.C.S. § 15*, which allows recovery for injuries suffered abroad as a result of antitrust violations. Although the U.S. Supreme Court has often looked to the Clayton Act for guidance in construing *18 U.S.C.S. § 1964(c)*, the court has not treated the two statutes as interchangeable. The court has declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

EXTORTION, BLACKMAIL, AND RACKETEERING §6 > RICO -- CIVIL SUIT -- FOREIGN INJURIES > Headnote:
LEdHN[31][] [31]

18 U.S.C.S. § 1964(c) requires a civil Racketeer Influenced and Corrupt Organizations Act, *18 U.S.C.S. §§161-1968*, plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. (Alito, J., joined by Roberts, Ch. J., and Kennedy and Thomas, JJ.)

Syllabus

[*325] [*484] [**2093]** The Racketeer Influenced and Corrupt Organizations Act (RICO) prohibits certain activities of organized crime groups in relation to an enterprise. RICO makes it a crime to invest income derived from a pattern of racketeering activity in an enterprise "which is engaged in, or the activities of which affect, interstate or foreign commerce," *18 U.S.C. §1962(a)*; to acquire or maintain an interest in an enterprise through a pattern of racketeering activity, *§1962(b)*; to conduct an enterprise's affairs through a pattern of racketeering activity, *§1962(c)*; and to conspire to violate any of the other three prohibitions, *§1962(d)*. RICO also provides a civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of those prohibitions. *§1964(c)*.

Respondents (the European Community and 26 of its member states) filed suit under RICO, alleging that petitioners (RJR Nabisco and related entities (collectively RJR)) participated in a global money-laundering **[***485]** scheme in association with various organized crime groups. Under the alleged scheme, drug traffickers smuggled narcotics into Europe and sold them for euros **[****2]** that--through transactions involving black-market money brokers, cigarette importers, and wholesalers--were used to pay for large shipments of RJR cigarettes into Europe. The complaint alleged that RJR violated *§§1962(a)-(d)* by engaging in a pattern of racketeering activity that included numerous predicate acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act. The District Court granted RJR's motion to dismiss on the ground that RICO does not apply to racketeering activity occurring outside U.S. territory or to foreign enterprises. The Second Circuit reinstated the claims, however, concluding that RICO applies extraterritorially to the same extent as the predicate acts of racketeering that underlie the alleged RICO violation, and that certain predicates alleged in this case expressly apply extraterritorially. In denying rehearing, the court held further that RICO's civil action does not require a domestic injury, but permits recovery for a foreign injury caused by the violation of a predicate statute that applies extraterritorially.

Held:

1. The law of extraterritoriality provides guidance in determining RICO's reach **[****3]** to events outside the United States. The Court applies **[*326]** a canon of statutory construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535*. *Morrison* and *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671*, reflect a two-step framework for analyzing extraterritoriality issues. First, the Court asks whether the presumption against extraterritoriality has been rebutted--*i.e.*, whether the statute **[**2094]** gives a clear, affirmative indication that it applies extraterritorially. This question is asked regardless of whether the particular statute regulates conduct, affords relief, or merely confers jurisdiction. If, and only if, the statute is not found extraterritorial at step one, the Court moves to step two, where it examines the statute's "focus" to determine whether the case involves a domestic application of the statute. If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the relevant conduct occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless **[****4]** of whether other conduct occurred in U.S. territory. In the event the statute is found to have clear extraterritorial effect at step one, then the statute's scope turns on the limits Congress has or has not imposed on the statute's foreign application, and not on the statute's "focus." *Pp. 7 - 10, 195 L. Ed. 2d, at 491-493*.

2. The presumption against extraterritoriality has been rebutted with respect to certain applications of RICO's substantive prohibitions in *§1962*. *Pp. 10 - 18, 195 L. Ed. 2d, at 493-498*.

(a) RICO defines racketeering activity to include a number of predicates **[***486]** that plainly apply to at least some foreign conduct, such as the prohibition against engaging in monetary transactions in criminally derived property, *§1957(d)(2)*, the prohibitions against the assassination of Government officials, *§§351(i)*, *1751(k)*, and the prohibition against hostage taking, *§1203(b)*. Congress has thus given a clear, affirmative indication that *§1962* applies to foreign racketeering activity--but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. This fact is determinative as to §§1962(b) and (c), which both prohibit the employment of a pattern of racketeering. But §1962(a), which targets certain uses of income derived from a pattern of racketeering, arguably **[****5]** extends only to domestic uses of that income. Because the parties have not focused on this issue, and because its resolution does not affect this case, it is assumed that respondents have pleaded a domestic investment of racketeering income in violation of §1962(a). It is also assumed that the extraterritoriality of a violation of RICO's conspiracy provision, §1962(d), tracks that of the RICO provision underlying the alleged conspiracy. *Pp. 10 - 14, 195 L. Ed. 2d, at 493-496*.

[*327] (b) RJR contends that RICO's "focus" is its enterprise element, which gives no clear indication of extraterritorial effect. But focus is considered only when it is necessary to proceed to the inquiry's second step. See *Morrison, supra, at 267, n. 9, 130 S. Ct. 2869, 177 L. Ed. 2d 535*. Here, however, there is a clear indication at step one that at least §§1962(b) and (c) apply to all transnational patterns of racketeering, subject to the stated limitation. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results, such as excluding from RICO's reach foreign enterprises that operate within the United States. Such troubling consequences reinforce the conclusion that Congress intended the §§1962(b) and (c) prohibitions to apply extraterritorially in tandem with the underlying predicates, **[****6]** without regard to the locus of the enterprise. Of course, foreign enterprises will qualify only if they engage in, or significantly affect, commerce directly involving the United States. *Pp. 14 - 17, 195 L. Ed. 2d, at 496-498*.

(c) Applying these principles here, respondents' allegations that RJR violated §§1962(b) and (c) do not involve an impermissibly extraterritorial application of RICO. The Court assumes that the alleged pattern of racketeering activity consists entirely of predicate offenses that were **[**2095]** either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. The alleged enterprise also has a sufficient tie to U.S. commerce, as its members include U.S. companies and its activities depend on sales of RJR's cigarettes conducted through "the U.S. mails and wires," among other things. *Pp. 17 - 18, 195 L. Ed. 2d, at 498*.

3. Irrespective of any extraterritoriality of §1962s substantive provisions, §1964(c)'s private right of action does not overcome the presumption against extraterritoriality, and thus a private RICO plaintiff must allege and prove a domestic injury. *Pp. 18 - 27, 195 L. Ed. 2d, at 498-504*.

(a) The Second Circuit reasoned **[***487]** that the presumption against extraterritoriality did not apply to §1964(c) independently **[****7]** of its application to §1962s substantive provisions because §1964(c) does not regulate conduct. But this view was rejected in *Kiobel, 569 U.S., at 116, 133 S. Ct. 1659, 185 L. Ed. 2d 671* , and the logic of that decision requires that the presumption be applied separately to RICO's cause of action even though it has been overcome with respect to RICO's substantive prohibitions. As in other contexts, allowing recovery for foreign injuries in a civil RICO action creates a danger of international friction that militates against recognizing foreign-injury claims without clear direction from Congress. Respondents, in arguing that such concerns are inapplicable here because the plaintiffs are not foreign citizens seeking to bypass their home countries' less generous remedies but are foreign countries themselves, forget that this Court's interpretation of §1964(c)'s injury requirement will necessarily govern suits by nongovernmental plaintiffs. The Court will not **[*328]** forgo the presumption against extraterritoriality to permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the affected sovereign's consent. Nor will the Court adopt a double standard that would treat suits by foreign sovereigns more favorably than other suits. *Pp. 18 - 22, 195 L. Ed. 2d, at 498-501*.

(b) *Section 1964(c)* **[****8]** does not provide a clear indication that Congress intended to provide a private right of action for injuries suffered outside of the United States. It provides a cause of action to "[a]ny person injured in his business or property" by a violation of §1962, but neither the word "any" nor the reference to injury to "business or property" indicates extraterritorial application. Respondents' arguments to the contrary are unpersuasive. In particular, while they are correct that RICO's private right of action was modeled after §4 of the Clayton Act, which allows recovery for injuries suffered abroad as a result of antitrust violations, see *Pfizer Inc. v. Government of India, 434 U.S. 308, 314-315, 98 S. Ct. 584, 54 L. Ed. 2d 563*, this Court has declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate. Cf. *Sedima, S. P. R. L. v. Imrex*

Co., 473 U.S. 479, 485, 495, 105 S. Ct. 3275, 87 L. Ed. 2d 346. There is good reason not to do so here. Most importantly, RICO lacks the very language that the Court found critical to its decision in *Pfizer*, namely, the Clayton Act's definition of a "person" who may sue, which "explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country,' " 434 U.S., at 313, 98 S. Ct. 584, 54 L. Ed. 2d 563. Congress's more recent decision to exclude from the antitrust laws' reach most conduct that "causes only foreign injury," F. Hoffmann-La Roche Ltd v. Empagran S. A., 542 U.S. 155, 158, 124 S. Ct. 2359, 159 L. Ed. 2d 226, also counsels against importing into RICO those Clayton Act principles that are at odds with the **[**2096]** Court's current extraterritoriality doctrine. Pp. 22 - 27, 195 L. Ed. 2d, at 501-504.

(c) Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. Respondents waived their domestic injury damages claims, **[***488]** so the District Court dismissed them with prejudice. Their remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed. P. 27, 195 L. Ed. 2d, at 504.

764 F. 3d 129, reversed and remanded.

Counsel: Gregory G. Katsas argued the cause for petitioner.

Elaine J. Goldenberg argued the cause for the United States, as *amicus curiae*, by special leave of court, supporting vacatur.

David C. Frederick argued the cause for respondent.

Judges: Alito, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy and Thomas, JJ., joined, and in which Ginsburg, Breyer, and Kagan, JJ., joined as to Parts I, II, and III. Ginsburg, J., filed an opinion concurring in part, dissenting in part, and dissenting from the judgment, in which Breyer and Kagan, JJ., joined. Breyer, J., filed an opinion concurring in part, dissenting in part, and dissenting from the judgment. Sotomayor, J., took **[****9]** no part in the consideration or decision of the case.

Opinion by: Alito; Breyer

Opinion

[*329] Justice **Alito** delivered the opinion of the Court.

HN1[] ***LEdHN[1]***[] [1] The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1961-1968, created four new criminal offenses involving the activities of organized criminal groups in relation to an enterprise. §§1962(a)-(d). RICO also created a new civil cause of action for "[a]ny person injured in his business or property by reason of a violation" of those prohibitions. §1964(c). We are asked to decide whether RICO applies extraterritorially—that is, to events occurring and injuries suffered outside the United States.

I

A

HN2[] ***LEdHN[2]***[] [2] RICO is founded on the concept of racketeering activity. The statute defines "racketeering activity" to encompass **[*330]** dozens of state and federal offenses, known in RICO parlance as predicates. These predicates include any act "indictable" under specified federal statutes, §§1961(1)(B)-(C), (E)-(G), as well as certain crimes "chargeable" under state law, §1961(1)(A), and any offense involving bankruptcy or securities fraud or drug-related activity that is "punishable" under federal law, §1961(1)(D). A predicate offense implicates RICO when it is part of a "pattern of racketeering activity"—a series **[**2097]** of related predicates that together demonstrate the existence **[****10]** or threat of continued criminal activity. *H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*; see *§1961(5)* (specifying that a "pattern of racketeering activity" requires at least two predicates committed within 10 years of each other).

HN3[] ***LEdHN[3]***[] [3] RICO's *§1962* sets forth four specific prohibitions aimed at different ways in which a pattern of racketeering activity may be used to infiltrate, control, or operate "a[n] enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce." These prohibitions can be summarized as follows. *Section 1962(a)* makes it unlawful to invest income derived from a pattern of racketeering activity in an enterprise. *Section 1962(b)* makes it unlawful to acquire or maintain an interest in an enterprise through a pattern of racketeering activity. *Section 1962(c)* makes it unlawful for a person employed by or associated **[***489]** with an enterprise to conduct the enterprise's affairs through a pattern of racketeering activity. Finally, *§1962(d)* makes it unlawful to conspire to violate any of the other three prohibitions. [1]

[*331] ***HN5***[] ***LEdHN[5]***[] [5] Violations of *§1962* are subject to criminal penalties, *§1963(a)*, and civil proceedings to enforce those prohibitions may be brought by the Attorney General, *§§1964(a)-(b)*. Separately, RICO creates a private civil cause of action that allows "[a]ny person injured in his business or property by reason of a violation of *section 1962*" to sue in federal district court and recover treble damages, costs, and attorney's fees. *§1964(c)*. [2]

[*332] **[**2098]** B

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[1] In full, *18 U.S.C. §1962* provides:

HN4[] ***LEdHN[4]***[] [4] "(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal **[****11]** within the meaning of *section 2, title 18, United States Code*, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities **[****12]** of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

The attentive reader will notice that these prohibitions concern not only patterns of racketeering activity but also the collection of unlawful debt. As is typical in our RICO cases, we have no occasion here to address this aspect of the statute.

[2] In full, *§1964(c)* provides:

HN6[] ***LEdHN[6]***[] [6] "Any person injured in his business or property by reason **[****13]** of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of *section 1962*. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final."

This case arises from allegations that petitioners—RJR Nabisco and numerous related entities (collectively RJR)—participated in a global money-laundering scheme in association with various organized crime groups. Respondents—the European Community and 26 of its member states—first sued RJR in the Eastern District of New York in 2000, alleging that RJR had violated RICO. Over the past 16 years, the resulting litigation (spread over at least three separate **[***490]** actions, with this case the lone survivor) has seen multiple complaints and multiple trips up and down **[****14]** the federal court system. See *2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, *1-*2 (EDNY, Mar. 8, 2011)* (tracing the procedural history through the District Court's dismissal of the present complaint). In the interest of brevity, we confine our discussion to the operative complaint and its journey to this Court.

Greatly simplified, the complaint alleges a scheme in which Colombian and Russian drug traffickers smuggled narcotics into Europe and sold the drugs for euros that—through a series of transactions involving black-market money brokers, cigarette importers, and wholesalers—were used to pay for large shipments of RJR cigarettes into Europe. In other variations of this scheme, RJR allegedly dealt directly with drug traffickers and money launderers in South America and sold cigarettes to Iraq in violation of international sanctions. RJR is also said to have acquired Brown & Williamson Tobacco Corporation for the purpose of expanding these illegal activities.

The complaint alleges that RJR engaged in a pattern of racketeering activity consisting of numerous acts of money laundering, material support to foreign terrorist organizations, mail fraud, wire fraud, and violations of the Travel Act. **[*333]** RJR, in concert with the other participants in the scheme, allegedly **[****15]** formed an association in fact that was engaged in interstate and foreign commerce, and therefore constituted a RICO enterprise that the complaint dubs the "RJR Money-Laundering Enterprise." App. to Pet. for Cert. 238a, Complaint ¶158; see ***HN7***[] ***LEdHN[7]***[] [7]*§1961(4)* (defining an enterprise to include "any union or group of individuals associated in fact although not a legal entity").

Putting these pieces together, the complaint alleges that RJR violated each of RICO's prohibitions. RJR allegedly used income derived from the pattern of racketeering to invest in, acquire an interest in, and operate the RJR Money-Laundering Enterprise in violation of *§1962(a)*; acquired and maintained control of the enterprise through the pattern of racketeering in violation of *§1962(b)*; operated the enterprise through the pattern of racketeering in violation of *§1962(c)*; and conspired with other participants in the scheme in violation of *§1962(d)*. [3] These violations allegedly harmed respondents in various ways, including through competitive harm to their state-owned cigarette businesses, lost tax revenue from black-market cigarette sales, harm to European financial institutions, currency instability, and increased law enforcement costs. [4]

[2099]** RJR moved to dismiss the complaint, arguing that RICO does not apply to racketeering activity occurring outside U.S. territory or to foreign **[***491]** enterprises. The District Court **[*334]** agreed and dismissed the RICO claims as impermissibly extraterritorial. *2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *7*.

The Second Circuit reinstated the RICO claims. It concluded that, "with respect to a number of offenses that constitute predicates for RICO liability and are alleged in this case, Congress has clearly manifested an intent that they apply extraterritorially." *764 F. 3d 129, 133 (2014)*. "By incorporating these statutes into RICO as predicate racketeering acts," the court reasoned, "Congress has **[****17]** clearly communicated its intention that RICO apply to extraterritorial conduct to the extent that extraterritorial violations of these statutes serve as the basis for RICO liability." *Id., at 137*. Turning to the predicates alleged in the complaint, the Second Circuit found that they passed muster. The court concluded that the money laundering and material support of terrorism statutes expressly apply

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[3] The complaint also alleges **[****16]** that RJR committed a variety of state-law torts. Those claims are not before us.

[4] At an earlier stage of respondents' litigation against RJR, the Second Circuit "held that the revenue rule barred the foreign sovereigns' civil claims for recovery of lost tax revenue and law enforcement costs." *European Community v. RJR Nabisco, Inc., 424 F. 3d 175, 178 (2005)* (Sotomayor, J.), cert. denied, ***546 U.S. 1092 (2006), 126 S. Ct. 1045, 163 L. Ed. 2d 858***. It is unclear why respondents subsequently included these alleged injuries in their present complaint; they do not ask us to disturb or distinguish the Second Circuit's holding that such injuries are not cognizable. We express no opinion on the matter. Cf. *Pasquantino v. United States, 544 U.S. 349, 355, n. 1, 125 S. Ct. 1766, 161 L. Ed. 2d 619 (2005)*.

extraterritorially in the circumstances alleged in the complaint. *Id., at 139-140*. The court held that the mail fraud, wire fraud, and Travel Act statutes do *not* apply extraterritorially. *Id., at 141*. But it concluded that the complaint states *domestic* violations of those predicates because it "allege[s] conduct in the United States that satisfies every essential element" of those offenses. *Id., at 142*.

RJR sought rehearing, arguing (among other things) that RICO's civil cause of action requires a plaintiff to allege a domestic *injury*, even if a domestic pattern of racketeering or a domestic enterprise is not necessary to make out a violation of RICO's substantive prohibitions. The panel denied rehearing and issued a supplemental opinion holding that RICO does not require a domestic injury. *764 F. 3d 149 (CA2 2014)* (*per curiam*). If a foreign injury was **[****18]** caused by the violation of a predicate statute that applies extraterritorially, the court concluded, then the plaintiff may seek recovery for that injury under RICO. *Id., at 151*. The Second Circuit later denied rehearing en banc, with five judges dissenting. *783 F. 3d 123 (2015)*.

[*335] The lower courts have come to different conclusions regarding RICO's extraterritorial application. Compare *764 F. 3d 129* (case below) (holding that RICO may apply extraterritorially) with *United States v. Chao Fan Xu, 706 F. 3d 965, 974-975 (CA9 2013)* (holding that RICO does not apply extraterritorially; collecting cases). Because of this conflict and the importance of the issue, we granted certiorari. *576 U.S. 1095, 136 S. Ct. 28, 192 L. Ed. 2d 998 (2015)*.

II

The question of RICO's extraterritorial application really involves two questions. First, do RICO's substantive prohibitions, contained in *§1962*, apply to conduct that occurs in foreign countries? Second, does RICO's private right of action, contained in *§1964(c)*, apply to injuries that are suffered in foreign countries? We consider **[**2100]** each of these questions in turn. To guide our inquiry, we begin by reviewing the law of extraterritoriality.

HN8[] ***LEdHN[8]***[] [8] It is a basic premise of our legal system that, in general, "United **[***492]** States law governs domestically but does not rule the world." *Microsoft Corp. v. AT&T Corp., 550 U.S. 437, 454, 127 S. Ct. 1746, 167 L. Ed. 2d 737 (2007)*. This principle finds expression in a canon of statutory **[****19]** construction known as the presumption against extraterritoriality: Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application. *Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)*. The question is not whether we think "Congress would have wanted" a statute to apply to foreign conduct "if it had thought of the situation before the court," but whether Congress has affirmatively and unmistakably instructed that the statute will do so. *Id., at 261, 130 S. Ct. 2869, 177 L. Ed. 2d 535*. "When a statute gives no clear indication of an extraterritorial application, it has none." *Id., at 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535*.

There are several reasons for this presumption. Most notably, it serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries. See, *e.g.*, *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 115-116,* ***[*336]*** *133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013)*; *EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)* (*Aramco*); *Benz v. Compania Naviera Hidalgo, S. A., 353 U.S. 138, 147, 77 S. Ct. 699, 1 L. Ed. 2d 709 (1957)*. But it also reflects the more prosaic "commonsense notion that Congress generally legislates with domestic concerns in mind." *Smith v. United States, 507 U.S. 197, 204, n. 5, 113 S. Ct. 1178, 122 L. Ed. 2d 548 (1993)*. We therefore apply the presumption across the board, "regardless of whether there is a risk of conflict between the American statute and a foreign law." *Morrison, supra, at 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535*.

Twice in the past six years we have considered whether a federal statute applies extraterritorially. In *Morrison*, we addressed the question whether **[****20]** *§10(b)* of the Securities Exchange Act of 1934 applies to misrepresentations made in connection with the purchase or sale of securities traded only on foreign exchanges. We first examined whether *§10(b)* gives any clear indication of extraterritorial effect, and found that it does not. *561 U.S., at 262-265, 130 S. Ct. 2869, 177 L. Ed. 2d 535*. We then engaged in a separate inquiry to determine whether the complaint before us involved a permissible *domestic* application of *§10(b)* because it alleged that some of the relevant misrepresentations were made in the United States. At this second step, we considered the "'focus' of congressional concern," asking whether §10(b)'s focus is "the place where the deception originated" or rather "purchases and sale of securities in the United States." Id., at 266, 130 S. Ct. 2869, 177 L. Ed. 2d 535. We concluded that the statute's focus is on domestic securities transactions, and we therefore held that the statute does not apply to frauds in connection with foreign securities transactions, even if those frauds involve domestic misrepresentations.

In *Kiobel,* we considered whether the Alien Tort Statute (ATS) confers federal-court jurisdiction over causes of action alleging international-law violations committed overseas. We acknowledged that the presumption against extraterritoriality **[****21]** is "typically" **[***493]** applied to statutes "regulating conduct," but we concluded that the principles supporting the presumption **[*337]** should "similarly constrain courts considering causes of action that may be brought under the ATS." 569 U.S., at 116, 133 S. Ct. 1659, 185 L. Ed. 2d 671. **[**2101]** We applied the presumption and held that the ATS lacks any clear indication that it extended to the foreign violations alleged in that case. Id., at 117-124, 133 S. Ct. 1659, 185 L. Ed. 2d 671. Because "all the relevant conduct" regarding those violations "took place outside the United States," id., at 124, 133 S. Ct. 1659, 185 L. Ed. 2d 671, we did not need to determine, as we did in *Morrison*, the statute's "focus."

HN9[] **LEdHN[9]**[] [9] Morrisonand Kiobelreflect a two-step framework for analyzing extraterritoriality issues. At the first step, we ask whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially. We must ask this question regardless of whether the statute in question regulates conduct, affords relief, or merely confers jurisdiction. If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's "focus." If the conduct relevant **[****22]** to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad; but if the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory.

What if we find at step one that a statute clearly *does* have extraterritorial effect? Neither *Morrison* nor *Kiobel* involved such a finding. But we addressed this issue in *Morrison*, explaining that it was necessary to consider §10(b)'s "focus" only because we found that the statute does not apply extraterritorially: "If §10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply to all of them (barring some other limitation)." 561 U.S., at 267, n. 9, 130 S. Ct. 2869, 177 L. Ed. 2d 535. **HN10**[] **LEdHN[10]**[] [10] The scope of an extraterritorial statute thus turns on the limits Congress has (or **[*338]** has not) imposed on the statute's foreign application, and not on the statute's "focus." [5]

III

With these guiding principles in mind, we first consider **HN11**[] **LEdHN[11]**[] [11] whether RICO's substantive prohibitions in §1962 may apply to foreign conduct. Unlike in Morrisonand Kiobel, we find that the presumption against extraterritoriality has been rebutted—but only with respect to certain applications of the statute.

A

The most obvious textual clue is that **HN12**[] **LEdHN[12]**[] [12] RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct. These predicates **[***494]** include the prohibition against engaging in monetary transactions in criminally derived property, which expressly applies, when "the defendant is a United States person," to offenses that "tak[e] place outside the United States." 18 U.S.C. §1957(d)(2). Other examples include the prohibitions against the assassination of Government officials, §351(i) ("There is extraterritorial jurisdiction over the conduct prohibited by this section"); §1751(k) (same), and the prohibition against hostage taking, which applies to conduct that "occurred outside the United States" if either the hostage or the offender is a U.S. national, if the offender is **[**2102]** found in the United States, or if the

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[5] Because a finding of extraterritoriality at step one will obviate step two's "focus" inquiry, it will usually be preferable for courts to proceed in the sequence that we have set forth. But we do not **[****23]** mean to preclude courts from starting at step two in appropriate cases. Cf. Pearson v. Callahan, 555 U.S. 223, 236-243, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009).

hostage **[****24]** taking is done to compel action by the U.S. Government, *§1203(b)*. At least one predicate—the prohibition against "kill[ing] a national of the United States, while such national is outside the United States"—applies *only* to conduct occurring outside the United States. *§2332(a)*.

[*339] We agree with the Second Circuit that ***HN13***[] ***LEdHN[13]***[] [13] Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that *§1962* applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially. Put another way, a pattern of racketeering activity may include or consist of offenses committed abroad in violation of a predicate statute for which the presumption against extraterritoriality has been overcome. To give a simple (albeit grim) example, a violation of *§1962* could be premised on a pattern of killings of Americans abroad in violation of *§2332(a)*—a predicate that all agree applies extraterritorially—whether or not any domestic predicates are also alleged. [6]

We emphasize the important limitation **[****25]** that ***HN14***[] ***LEdHN[14]***[] [14] foreign conduct must violate "a predicate statute that manifests an unmistakable congressional intent to apply extraterritorially." *764 F. 3d, at 136*. Although a number of RICO predicates have extraterritorial effect, many do not. The inclusion of *some* extraterritorial predicates does not mean that *all* RICO predicates extend to foreign conduct. This is apparent for two reasons. First, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison, 561 U.S., at 265, 130 S. Ct. 2869, 177 L. Ed. 2d 535*. Second, RICO defines as racketeering activity only acts that are "indictable" (or, what amounts to the same thing, "chargeable" or "punishable") under one of the statutes identified in *§1961(1)*. If a particular statute does not apply extraterritorially, then conduct committed abroad is not "indictable" under that statute and so cannot qualify as a predicate under RICO's plain terms.

[*340] RJR resists the conclusion that RICO's incorporation of extraterritorial predicates gives RICO commensurate extraterritorial effect. It points out that "RICO itself" does not refer to extraterritorial application; only the underlying predicate statutes do. Brief for Petitioners 42. RJR thus **[****26]** argues that Congress could have intended **[***495]** to capture only *domestic* applications of extraterritorial predicates, and that any predicates that apply only abroad could have been "incorporated . . . solely for when such offenses are part of a broader pattern whose overall locus is domestic." *Id.*, at 43.

The presumption against extraterritoriality does not require us to adopt such a constricted interpretation. ***HN15***[] ***LEdHN[15]***[] [15] While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. "Assuredly context can be consulted as well." *Morrison, supra, at 265, 130 S. Ct. 2869, 177 L. Ed. 2d 535*. Context is dispositive here. Congress has not expressly said that *§1962(c)* applies to patterns of racketeering activity in foreign countries, but it has defined "racketeering activity"—and by extension a "pattern of racketeering activity"—to encompass violations of predicate statutes that *do* expressly apply extraterritorially. Short of an explicit declaration, **[**2103]** it is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect. This unique structure makes RICO the rare statute that clearly evidences extraterritorial effect despite **[****27]** lacking an express statement of extraterritoriality.

We therefore conclude that ***HN16***[] ***LEdHN[16]***[] [16] RICO applies to some foreign racketeering activity. A violation of *§1962* may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. This fact is determinative as to *§1962(b)* and *§1962(c)*, both of which prohibit the employment of a pattern of racketeering. Although they differ as to the end for which the pattern is employed—to acquire or maintain control of an enterprise under *subsection (b)*, or to conduct an enterprise's affairs **[*341]** under *subsection (c)*—this difference is immaterial for extraterritoriality purposes.

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[6] The foreign killings would, of course, still have to satisfy the relatedness and continuity requirements of RICO's pattern element. See *H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)*.

Section 1962(a) presents a thornier question. HN17[] LEdHN[17][] [17] Unlike subsections (b) and (c), subsection (a) targets certain uses of *income* derived from a pattern of racketeering, not the use of the pattern itself. Cf. Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461-462, 126 S. Ct. 1991, 164 L. Ed. 2d 720 (2006). While we have no difficulty concluding that this prohibition applies to income derived from foreign patterns of racketeering (within the limits we have discussed), arguably §1962(a) extends only to domestic uses of the income. The Second Circuit did not decide this question because it found that respondents have alleged "a domestic investment of racketeering proceeds **[****28]** in the form of RJR's merger in the United States with Brown & Williamson and investments in other U.S. operations." 764 F. 3d, at 138, n. 5. RJR does not dispute the basic soundness of the Second Circuit's reasoning, but it does contest the court's reading of the complaint. See Brief for Petitioners 57-58. Because the parties have not focused on this issue, and because it makes no difference to our resolution of this case, see infra, at 27, 195 L. Ed. 2d, at 504, we assume without deciding that respondents have pleaded a domestic investment of racketeering income in violation of §1962(a).

Finally, although respondents' complaint alleges a violation of RICO's conspiracy provision, §1962(d), the parties' briefs do not address whether this provision should be treated differently **[***496]** from the provision (§1962(a), (b), or (c)) that a defendant allegedly conspired to violate. We therefore decline to reach this issue, and assume without deciding that §1962(d)'s extraterritoriality tracks that of the provision underlying the alleged conspiracy.

B

RJR contends that, even if RICO may apply to foreign patterns of racketeering, the statute does not apply to foreign *enterprises*. Invoking *Morrison*'s discussion of the Exchange Act's "focus," RJR says that the "focus" of RICO **[*342]** is the enterprise being **[****29]** corrupted—not the pattern of racketeering—and that RICO's enterprise element gives no clear indication of extraterritorial effect. Accordingly, RJR reasons, RICO requires a domestic enterprise.

This argument misunderstands Morrison. As explained above, supra, at 9 - 10, 195 L. Ed. 2d, at 493, HN18[] LEdHN[18][] [18] only at the second step of the inquiry do we consider a statute's "focus." Here, however, there is a clear indication at step one that RICO applies extraterritorially. We therefore do not proceed to the "focus" step. The *Morrison* Court's discussion of the statutory "focus" made this clear, stating that "[i]f §10(b) did apply abroad, we would not need to determine which transnational frauds it applied to; it would apply **[**2104]** to all of them (barring some other limitation)." 561 U.S., at 267, n. 9, 130 S. Ct. 2869, 177 L. Ed. 2d 535. The same is true here.HN19[] LEdHN[19][] [19] RICO—or at least §§1962(b) and (c)—applies abroad, and so we do not need to determine which transnational (or wholly foreign) patterns of racketeering it applies to; it applies to all of them, regardless of whether they are connected to a "foreign" or "domestic" enterprise. This rule is, of course, subject to the important limitation that RICO covers foreign predicate offenses only to the extent that the underlying predicate statutes are extraterritorial. But within **[****30]** those bounds, the location of the affected enterprise does not impose an independent constraint.

It is easy to see why Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results. It would exclude from RICO's reach foreign enterprises—whether corporations, crime rings, other associations, or individuals—that operate within the United States. Imagine, for example, that a foreign corporation has operations in the United States and that one of the corporation's managers in the United States conducts its U.S. affairs through a pattern of extortion and mail fraud. Such domestic conduct would seem to fall well within what Congress meant to capture in enacting RICO. HN20[] LEdHN[20][] [20] Congress, after all, does not usually exempt foreigners acting in the United **[*343]** States from U.S. legal requirements. See 764 F. 3d, at 138 ("Surely the presumption against extraterritorial application of United States laws does not command giving foreigners carte blanche to violate the laws of the United States in the United States"). Yet RJR's theory would insulate this scheme from RICO liability—both civil and criminal—because the enterprise at **[****31]** issue is a foreign, not domestic, corporation.

Seeking to avoid this result, RJR offers that any "'emissaries'" a foreign enterprise sends to the United States—such as our hypothetical U. **[***497]** S.-based corporate manager—could be carved off and considered a "distinct domestic enterprise" under an association-in-fact theory. Brief for Petitioners 40. RJR's willingness to gerrymander the enterprise to get around its proposed domestic enterprise requirement is telling. It suggests that RJR is not really concerned about whether an enterprise is foreign or domestic, but whether the relevant conduct occurred here or abroad. And if that is the concern, then it is the pattern of racketeering activity that matters, not the enterprise. Even spotting RJR its "domestic emissary" theory, this approach would lead to strange gaps in RICO's coverage. If a foreign enterprise sent only a single "emissary" to engage in racketeering in the United States, there could be no RICO liability because a single person cannot be both the RICO enterprise and the RICO defendant. *Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 162, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001)*.

RJR also offers no satisfactory way of determining whether an enterprise is foreign or domestic. Like the District Court, RJR maintains that **[****32]** courts can apply the "nerve center" test that we use to determine a corporation's principal place of business for purposes of federal diversity jurisdiction. See *Hertz Corp. v. Friend, 559 U.S. 77, 130 S. Ct. 1181, 175 L. Ed. 2d 1029 (2010)*; *28 U.S.C. §1332(c)(1)*; *2011 U.S. Dist. LEXIS 23538, 2011 WL 843957, at *5-*6*. But this test quickly becomes meaningless if, as RJR suggests, a corporation with a foreign nerve center can, if necessary, be pruned into an association-in-fact enterprise with a domestic nerve **[*344]** center. ***HN21***[] ***LEdHN[21]***[] [21] The nerve center test, developed with ordinary corporate command structures in mind, is also ill **[**2105]** suited to govern RICO association-in-fact enterprises, which "need not have a hierarchical structure or a 'chain of command.'" *Boyle v. United States, 556 U.S. 938, 948, 129 S. Ct. 2237, 173 L. Ed. 2d 1265 (2009)*. These difficulties are largely avoided if, as we conclude today, RICO's extraterritorial effect is pegged to the extraterritoriality judgments Congress has made in the predicate statutes, often by providing precise instructions as to when those statutes apply to foreign conduct.

The practical problems we have identified with RJR's proposed domestic enterprise requirement are not, by themselves, cause to reject it. Our point in reciting these troubling consequences of RJR's theory is simply to reinforce our conclusion, based on RICO's text and context, that ***HN22***[] ***LEdHN[22]***[] [22] Congress intended the prohibitions in *18 U.S.C. §§1962(b)* and **[****33]** *(c)* to apply extraterritorially in tandem with the underlying predicates, without regard to the locus of the enterprise.

HN23[] ***LEdHN[23]***[] [23] Although we find that RICO imposes no domestic enterprise requirement, this does not mean that every foreign enterprise will qualify. Each of RICO's substantive prohibitions requires proof of an enterprise that is "engaged in, or the activities of which affect, interstate or foreign commerce." *§§1962(a)*, *(b)*, *(c)*. We do not take this reference to "foreign commerce" to mean literally all commerce occurring abroad. Rather, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States—*e.g.*, commerce between the United States and a foreign country. **[***498]** Enterprises whose activities lack that anchor to U.S. commerce cannot sustain a RICO violation.

C

Applying these principles, we agree with the Second Circuit that the complaint does not allege impermissibly extraterritorial violations of *§§1962(b)* and *(c)*. [7]

[*345] The alleged pattern of racketeering activity consists of five basic predicates: (1) money laundering, (2) material support of foreign terrorist organizations, (3) mail fraud, (4) wire fraud, and (5) violations of the Travel Act. The **[****34]** Second Circuit observed that the relevant provisions of the money laundering and material support of terrorism statutes expressly provide for extraterritorial application in certain circumstances, and it concluded that those circumstances are alleged to be present here. *764 F. 3d, at 139-140*. The court found that the fraud statutes and the Travel Act do not contain the clear indication needed to overcome the presumption against extraterritoriality. But it held that the complaint alleges *domestic* violations of those statutes because it "allege[s] conduct in the United States that satisfies every essential element of the mail fraud, wire fraud, and Travel Act claims." *Id., at 142*.

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[7] As to *§§1962(a)* and *(d)*, see *supra, at 13 - 14, 195 L. Ed. 2d, at 495-496*.

RJR does not dispute these characterizations of the alleged predicates. We therefore assume without deciding that the alleged pattern of racketeering activity consists entirely of predicate offenses that were either committed in the United States or committed in a foreign country in violation of a predicate statute that applies extraterritorially. The alleged enterprise also has a sufficient tie to U.S. commerce, as its members include U.S. companies, and its activities depend on sales of RJR's cigarettes conducted through "the U.S. mails and **[****35]** wires," among other things. App. to Pet. for Cert. 186a, Complaint **[**2106]** ¶96. On these premises, respondents' allegations that RJR violated *§§1962(b)* and *(c)* do not involve an impermissibly extraterritorial application of RICO. [8]

[*346] IV

We now turn to RICO's private right of action, on which respondents' lawsuit rests. ***HN24***[] ***LEdHN[24]***[] [24] *Section 1964(c)* allows "[a]ny person injured in his business or property by reason of a violation of *section 1962*" to sue for treble damages, costs, and attorney's fees. Irrespective of any extraterritorial application of *§1962*, we conclude that *§1964(c)* does not overcome the presumption against extraterritoriality. A private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property.

A

The Second Circuit thought that the presumption against extraterritoriality did not apply to *§1964(c)* independently of its application to *§1962*, reasoning that the presumption "is primarily concerned with the question of what *conduct* falls within a statute's **[****36]** purview." *764 F. 3d, at 151*. **[***499]** We rejected that view in *Kiobel*, holding that the presumption "constrain[s] courts considering causes of action" under the ATS, a "'strictly jurisdictional'" statute that "does not directly regulate conduct or afford relief." *569 U.S., at 116, 133 S. Ct. 1659, 185 L. Ed. 2d 671, 680*. We reached this conclusion even though the underlying substantive law consisted of well-established norms of international law, which by definition apply beyond this country's borders. See *id., at 116-118, 133 S. Ct. 1659, 185 L. Ed. 2d 671, 680* .

The same logic requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions. ***HN25***[] ***LEdHN[25]***[] [25] "The creation of a private right of action raises issues beyond the mere consideration whether underlying primary conduct should be allowed or not, entailing, for example, a decision to permit enforcement without the check imposed by prosecutorial discretion." *Sosa v. Alvarez-Machain, 542 U.S. 692, 727, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004)*. Thus, as we have observed in other contexts, providing a private civil remedy for foreign conduct **[*347]** creates a potential for international friction beyond that presented by merely applying U.S. substantive law to that foreign conduct. See, *e.g., Kiobel, supra, at 117, 133 S. Ct. 1659, 185 L. Ed. 2d 671, 681* ("Each of th[e] decisions" involved **[****37]** in defining a cause of action based on "conduct within the territory of another sovereign" "carries with it significant foreign policy implications").

Consider antitrust. In that context, we have observed that "[t]he application . . . of American private treble-damages remedies to anticompetitive conduct taking place abroad has generated considerable controversy" in other nations, even when those nations agree with U.S. substantive law on such things as banning price fixing. *F. Hoffmann-La Roche Ltd v. Empagran S. A., 542 U.S. 155, 167, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*. Numerous foreign countries—including some respondents in this case—advised us in *Empagran* that "to apply [U. S.] remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing **[**2107]** considerations that their own domestic antitrust laws embody." *Ibid.* [9]

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[8] We stress that we are addressing only the extraterritoriality question. We have not been asked to decide, and therefore do not decide, whether the complaint satisfies any other requirements of RICO, or whether the complaint in fact makes out violations of the relevant predicate statutes.

[9] See Brief for Governments of Federal Republic of Germany et al. as *Amici Curiae*, O. T. 2003, No. 03-724, p. 11 (identifying "controversial features of the U.S. legal system," including treble damages, extensive discovery, jury trials, class actions, contingency fees, and punitive damages); *id.*, at 15 ("Private plaintiffs rarely exercise the type of self-restraint or demonstrate the

[*348] We received similar warnings in *Morrison*, where France, a respondent **[***500]** here, informed us that "most foreign countries proscribe securities fraud" but "have made very different choices with respect to the best way to implement that proscription," such as "prefer[ring] 'state actions, not private ones' for the enforcement of law." Brief for Republic of France as *Amicus Curiae*, O. T. 2009, No. 08-1191, p. 20; see *id.*, at 23 ("Even when foreign countries permit private rights of action for securities fraud, they often have different schemes" for litigating them and "may approve of different measures of damages"). Allowing foreign investors to pursue private suits in the United States, we were told, "would upset that delicate balance and offend the sovereign interests of foreign nations." *Id.*, at 26.

Allowing recovery for foreign injuries in a civil RICO action, including treble damages, presents the **[****40]** same danger of international friction. See Brief for United States as *Amicus Curiae* 31-34. This is not to say that friction would necessarily result in every case, or that Congress would violate international law by permitting such suits. It is to say only that there is a potential for international controversy that militates against recognizing foreign-injury claims without clear direction from Congress. ***HN26***[] ***LEdHN[26]***[] [26] Although "a risk of conflict between the American statute and a foreign law" is not a prerequisite for applying the presumption against extraterritoriality, *Morrison, 561 U.S., at 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535*, where such a risk is evident, the need to enforce the presumption is at its apex.

[*349] Respondents urge that concerns about international friction are inapplicable in this case because here the plaintiffs are not foreign citizens seeking to bypass their home countries' less generous remedies but rather the foreign countries themselves. Brief for Respondents 52-53. Respondents assure us that they "are satisfied that the[ir] complaint . . . comports **[**2108]** with limitations on prescriptive jurisdiction under international law and respects the dignity of foreign sovereigns." *Ibid.* Even assuming that this is true, however, our interpretation of *§1964(c)*'s injury **[****41]** requirement will necessarily govern suits by nongovernmental plaintiffs that are not so sensitive to foreign sovereigns' dignity. ***HN27***[] ***LEdHN[27]***[] [27] We reject the notion that we should forgo the presumption against extraterritoriality and instead permit extraterritorial suits based on a case-by-case inquiry that turns on or looks to the consent of the affected sovereign. See *Morrison, supra, at 261, 130 S. Ct. 2869, 177 L. Ed. 2d 535* ("Rather than guess anew in each case, we apply the presumption in all cases"); cf. *Empagran, 542 U.S., at 168, 124 S. Ct. 2359, 159 L. Ed. 2d 226*. Respondents suggest that we should be reluctant to permit a foreign corporation to be sued in the courts of this country for events occurring **[***501]** abroad if the nation of incorporation objects, but that we should discard those reservations when a foreign state sues a U.S. entity in this country under U.S. law—instead of in its own courts and under its own laws—for conduct committed on its own soil. We refuse to adopt this double standard. "After all, in the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson, 578 U.S. 266, 272, 136 S. Ct. 1412 194 L. Ed. 2d 508, 514 (2016)*.

B

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requisite sensitivity **[****38]** to the concerns of foreign governments that mark actions brought by the United States government"); Brief for United Kingdom et al. as *Amici Curiae*, O. T. 2003, No. 03-724, p. 13 ("No other country has adopted the United States' unique 'bounty hunter' approach that permits a private plaintiff to 'recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.' . . . Expanding the jurisdiction of this generous United States private claim system could skew enforcement and increase international business risks. It makes United States courts the forum of choice without regard to whose laws are applied, where the injuries occurred or even if there is any connection to the court except the ability to get *in personam* jurisdiction over the defendants"); see also Brief for Government of Canada as *Amicus Curiae*, O. T. 2003, No. 03-724, p. 14 ("[T]he attractiveness of the [U. S.] treble damages remedy would supersede the national policy decision by Canada that civil recovery by Canadian citizens for injuries resulting from anti-competitive behavior in Canada should be limited to actual damages"). *Empagran* concerned not the presumption against extraterritoriality **[****39]** *per se*, but the related rule that we construe statutes to avoid unreasonable interference with other nations' sovereign authority where possible. See *F. Hoffmann-La Roche Ltd v. Empagran S. A., 542 U.S. 155, 164, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (2004)*; see also *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 814-815, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993)* (Scalia, J., dissenting) (discussing the two canons). As the foregoing discussion makes clear, considerations relevant to one rule are often relevant to the other.

HN28[] **LEdHN[28]**[] [28] Nothing in §1964(c) provides a clear indication that Congress intended to create a private right of action for injuries suffered outside of the United States. The statute provides a cause of action to "[a]ny person injured in **[****42]** his business or property" by a violation of §1962. §1964(c). The word "any" ordinarily connotes breadth, but it is insufficient to **[*350]** displace the presumption against extraterritoriality. See Kiobel, 569 U.S., at 118, 133 S. Ct. 1659, 185 L. Ed. 2d 671, 681. The statute's reference to injury to "business or property" also does not indicate extraterritorial application. If anything, by cabining RICO's private cause of action to particular kinds of injury—excluding, for example, personal injuries—Congress signaled that the civil remedy is not coextensive with §1962's substantive prohibitions. The rest of §1964(c) places a limit on RICO plaintiffs' ability to rely on securities fraud to make out a claim. This too suggests that §1964(c) is narrower in its application than §1962, and in any event does not support extraterritoriality.

The Second Circuit did not identify anything in §1964(c) that shows that the statute reaches foreign injuries. Instead, the court reasoned that §1964(c)'s extraterritorial effect flows directly from that of §1962. Citing our holding in Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985), that the "compensable injury" addressed by §1964(c) "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern," id., at 497, 105 S. Ct. 3275, 87 L. Ed. 2d 346, the Court of Appeals held that a RICO plaintiff may sue for foreign injury that was caused by the violation **[****43]** of a predicate statute that applies extraterritorially, just as a substantive RICO violation may be based on extraterritorial predicates. 764 F. 3d, at 151. Justice Ginsburg advances the same theory. See post, at 4 - 5, 195 L. Ed. 2d, at 506-507 (opinion concurring in part and dissenting in part). This reasoning has surface appeal, but it fails to appreciate that **HN29**[] **LEdHN[29]**[] [29] the presumption against extraterritoriality must be applied separately to both RICO's substantive prohibitions and its private right of action. See supra, at 18 - 22, 195 L. Ed. 2d, at 498-501. It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and here it is absent. [10]

[*351] **[**2109]** Respondents contend that background legal principles allow them to sue for foreign injuries, invoking what **[***502]** they call the "'traditional rule' that 'a plaintiff injured in a foreign country' could bring suit 'in American courts.'" Brief for Respondents 41 (quoting Sosa, 542 U.S., at 706-707, 124 S. Ct. 2739, 159 L. Ed. 2d 718). But **[****44]** the rule respondents invoke actually provides that a court will ordinarily "apply *foreign* law to determine the tortfeasor's liability" to "a plaintiff injured in a foreign country." Id., at 706, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (emphasis added). Respondents' argument might have force if they sought to sue RJR for violations of *their own laws* and to invoke federal diversity jurisdiction as a basis for proceeding in U.S. courts. See U. S. Const., Art. III, §2, cl. 1 ("The judicial Power [of the United States] shall extend . . . to Controversies . . . between a State, or the Citizens thereof, and foreign States"); 28 U.S.C. §1332(a)(4) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . a foreign state . . . as plaintiff and citizens of a State or of different States"). The question here, however, is not "whether a federal court has jurisdiction to entertain a cause of action provided by foreign or even international law. The question is instead whether the court has authority to recognize a cause of action *under U.S. law*" for injury suffered overseas. Kiobel, supra, at 119, 133 S. Ct. 1659, 185 L. Ed. 2d 671, 682 (emphasis added). As to that question, the relevant background principle is the presumption against extraterritoriality, **[****45]** not the "traditional rule" respondents cite.

Respondents and Justice Ginsburg point out that **HN30**[] **LEdHN[30]**[] [30] RICO's private right of action was modeled after §4 of the Clayton Act, 15 U.S.C. §15; see Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 267-268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992), which we have held allows recovery for injuries suffered abroad as a result of antitrust violations, see Pfizer Inc. v. **[*352]** Government of India, 434 U.S. 308, 314-315, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978). It follows, respondents and Justice Ginsburg contend, that §1964(c) likewise allows plaintiffs to sue for injuries suffered in foreign countries. We disagree. Although we have often

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[10] Respondents note that *Sedima* itself involved an injury suffered by a Belgian corporation in Belgium. Brief for Respondents 45-46; see Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 483-484, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985). Respondents correctly do not contend that this fact is controlling here, as the *Sedima* Court did not address the foreign-injury issue.

looked to the Clayton Act for guidance in construing §1964(c), we have not treated the two statutes as interchangeable. We have declined to transplant features of the Clayton Act's cause of action into the RICO context where doing so would be inappropriate. For example, in *Sedima* we held that a RICO plaintiff need not allege a special "racketeering injury," rejecting a requirement that some lower courts had adopted by "[a]nalog[y]" to the "antitrust injury" required under the Clayton Act. 473 U.S., at 485, 495, 105 S. Ct. 3275, 87 L. Ed. 2d 346.

There is good reason not to interpret §1964(c) to cover foreign injuries just because the Clayton Act does so. When we held in *Pfizer* that the Clayton Act allows recovery for foreign injuries, we relied first and foremost on the fact that the Clayton Act's definition of "person"—which in turn **[****46]** defines who may sue under that Act—"explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country.'" **[**2110]** 434 U.S., at 313, 98 S. Ct. ***[***503]*** 584, 54 L. Ed. 2d 563; see 15 U.S.C. §12. [11] RICO lacks the language that the *Pfizer* **[*353]** Court found critical. See 18 U.S.C. §1961(3). [12] To the extent that the *Pfizer* Court cited other factors that might apply to §1964(c), they were not sufficient in themselves to show that the provision has extraterritorial effect. For example, the *Pfizer* Court, writing before we honed our extraterritoriality jurisprudence in *Morrison* and *Kiobel*, reasoned that Congress "[c]learly . . . did not intend to make the [Clayton Act's] treble-damages remedy available only to consumers in our own country" because "the antitrust laws extend to trade 'with foreign nations' as well as among the several States of the Union." 434 U.S., at 313-314, 98 S. Ct. 584, 54 L. Ed. 2d 563. But we have emphatically rejected reliance on such language, holding that "'even statutes . . . that expressly refer to "*foreign* commerce" do not apply abroad.'" Morrison, 561 U.S., at 262-263, 130 S. Ct. 2869, 177 L. Ed. 2d 535. This reasoning also fails to distinguish between extending *substantive* ***antitrust law*** to foreign conduct and extending a *private right of action* to foreign injuries, two separate issues that, as we have explained, raise distinct extraterritoriality **[****47]** problems. See supra, at 18 - 22, 195 L. Ed. 2d, at 498-501. Finally, the *Pfizer* Court expressed concern that it would "defeat th[e] purposes" of the antitrust laws if a defendant could "escape full liability for his illegal actions." 434 U.S., at 314, 98 S. Ct. 584, 54 L. Ed. 2d 563. But this justification was merely an attempt to "divin[e] what Congress would have wanted" had it considered the question of extraterritoriality—an approach we eschewed in Morrison. 561 U.S., at 261, 130 S. Ct. 2869, 177 L. Ed. 2d 535. Given all this, and in particular the fact that RICO lacks the language that *Pfizer*found integral to its decision, we decline to extend this aspect of our Clayton Act jurisprudence to RICO's cause of action.

Underscoring our reluctance to read §1964(c) as broadly as we have read the Clayton Act is Congress's more recent **[*354]** decision to define precisely the antitrust laws' extraterritorial effect and to exclude from their reach most conduct that "causes only foreign injury." Empagran, 542 U.S., at 158, 124 S. Ct. 2359, 159 L. Ed. 2d 226 (describing Foreign Trade Antitrust Improvements Act of 1982); see also id., at 169-171, 173-174, 124 S. ***[***504]*** Ct. 2359, 159 L. Ed. 2d 226 (discussing how the applicability of the antitrust laws to foreign injuries may depend on whether suit is brought by the Government or by private plaintiffs). Although this later enactment obviously does not limit §1964(c)'s scope by its own force, it does counsel against **[**2111]** importing into RICO those Clayton Act principles **[****49]** that are at odds with our current extraterritoriality doctrine.

C

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[11] *Pfizer* most directly concerned whether a foreign government is a "person" that may be a Clayton Act plaintiff. But it is clear that the Court's decision more broadly concerned recovery for foreign injuries, see 434 U.S., at 315, 98 S. Ct. 584, 54 L. Ed. 2d 563 (expressing concern that "persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home"), as respondents themselves contend, see Brief for Respondents 44 ("[T]his Court clearly recognized in *Pfizer* that Section 4 extends to foreign **[****48]** injuries"). The Court also permitted an antitrust plaintiff to sue for foreign injuries in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962), but the Court's discussion in that case focused on the extraterritoriality of the underlying antitrust prohibitions, not the Clayton Act's private right of action, see id., at 704-705, 82 S. Ct. 1404, 8 L. Ed. 2d 777, and so sheds little light on the interpretive question now before us.

[12] This does not mean that foreign plaintiffs may not sue under RICO. The point is that RICO does not include the explicit foreign-oriented language that the *Pfizer* Court found to support foreign-injury suits under the Clayton Act.

HN31[] LEdHN[31][] [31] Section 1964(c) requires a civil RICO plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries. The application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is "foreign" or "domestic." But we need not concern ourselves with that question in this case. As this case was being briefed before this Court, respondents filed a stipulation in the District Court waiving their damages claims for domestic injuries. The District Court accepted this waiver and dismissed those claims with prejudice. Respondents' remaining RICO damages claims therefore rest entirely on injury suffered abroad and must be dismissed. [13]

[*355] ***

The judgment of the United States Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Justice Sotomayor took no part in the consideration **[****51]** or decision of this case.

Concur by: Ginsburg(In Part)

Dissent by: Ginsburg(In Part)

Dissent

Justice **Ginsburg**, with whom Justice **Breyer** and Justice **Kagan** join, concurring in Parts I, II, and III, and dissenting from Part IV and from the judgment.

In enacting the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq., Congress sought to provide a new tool to combat "organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26, 104 S. Ct. 296, 78 L. Ed. 2d 17 (1983). RICO accordingly proscribes various ways in **[***505]** which an "enterprise," §1961(4), might be controlled, operated, or funded by a "pattern of racketeering activity," §1961(1), (5). See §1962. [1] RICO builds on predicate statutes, many of them applicable extraterritorially. App. to **[*356]** Brief for United States **[**2112]** as *Amicus Curiae* 27a-33a. Congress not only armed the United States with authority to initiate criminal and civil proceedings to enforce RICO, §§1963, 1964(b), Congress also created in §1964(c) a

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[13] In respondents' letter notifying this Court of the waiver of their domestic-injury damages claims, respondents state that "[n]othing in the stipulation will affect respondents' claims for equitable relief, including claims for equitable relief under state common law that are not at issue in this case before this Court." Letter from David C. Frederick, Counsel for Respondents, to Scott S. Harris, Clerk of **[****50]** Court (Feb. 29, 2016). Although the letter mentions only state-law claims for equitable relief, count 5 of respondents' complaint seeks equitable relief under RICO. App. to Pet. for Cert. 260a-262a, Complaint ¶¶181-188. This Court has never decided whether equitable relief is available to private RICO plaintiffs, the parties have not litigated that question here, and we express no opinion on the issue today. We note, however, that any claim for equitable relief under RICO based on foreign injuries is necessarily foreclosed by our holding that §1964(c)'s cause of action requires a domestic injury to business or property. It is unclear whether respondents intend to seek equitable relief under RICO based on domestic injuries, and it may prove unnecessary to decide whether §1964(c) (or respondents' stipulation) permits such relief in light of respondents' state-law claims. We leave it to the lower courts to determine, if necessary, the status and availability of any such claims.

[1] The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1961 et seq., makes it unlawful "to . . . invest" in an enterprise income derived from a pattern of racketeering activity, §1962(a), "to acquire or maintain" an interest in an enterprise **[****52]** through a pattern of racketeering activity, §1962(b), "to conduct or participate . . . in the conduct" of an enterprise through a pattern of racketeering activity, §1962(c), or "to conspire" to violate any of those provisions, §1962(d).

private right of action for "[a]ny person injured in his business or property by reason of a violation of [RICO's substantive provision]."

Invoking this right, respondents, the European Community and 26 member states, filed suit against petitioners, RJR Nabisco, Inc., and related entities. Alleging that petitioners orchestrated from their U.S. headquarters a complex money-laundering scheme in violation of RICO, respondents sought to recover for various injuries, including losses sustained by financial institutions and lost opportunities to collect duties. See *ante, at 4 - 7, 195 L. Ed. 2d, at 489-491*. Denying respondents a remedy under RICO, the Court today reads into *§1964(c)* a domestic-injury requirement for suits by private plaintiffs nowhere indicated in the statute's text. Correctly, the Court imposes no such restriction on the United States when it initiates a civil suit under *§1964(b)*. Unsupported by RICO's text, inconsistent with its purposes, and unnecessary to protect the comity interests the Court emphasizes, the domestic-injury requirement for private suits replaces Congress' prescription with one of the Court's own invention. Because the Court **[****53]** has no authority so to amend RICO, I dissent.

I

As the Court recounts, *ante, at 7, 195 L. Ed. 2d, at 491*, "Congress ordinarily legislates with respect to domestic, not foreign, matters." *Morrison v. Nat'l Austl. Bank Ltd., 561 U.S. 247, 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)*. So recognizing, the Court employs a presumption that "'legislation . . . is meant to apply only within the territorial jurisdiction of the United States.'" *Ibid.* (quoting *EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274 (1991)* (*Aramco*)). But when a statute demonstrates Congress' "affirmative inten[t]" that the law should apply beyond **[*357]** the borders of the United States, as numerous RICO predicate statutes do, the presumption is rebutted, and the law applies extraterritorially to the extent Congress prescribed. See *Morrison, 561 U.S., at 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535* (quoting *Aramco, 499 U.S., at 248, 111 S. Ct. 1227, 113 L. Ed. 2d 274*). The presumption, in short, aims to distinguish instances in which Congress consciously designed a statute to reach beyond U.S. borders, from those in which nothing plainly signals that Congress directed extraterritorial application.

[*506]** In this case, the Court properly holds that Congress signaled its "affirmative inten[t]," *Morrison, 561 U.S., at 255, 130 S. Ct. 2869, 177 L. Ed. 2d 535*, that RICO, in many instances, should apply extraterritorially. See *ante, at 10 - 18, 195 L. Ed. 2d, at 493-498*; App. to Brief for United States as *Amicus Curiae* 27a-33a. As the Court relates, see *ante, at 10 - 14, 195 L. Ed. 2d, at 493-495*, Congress deliberately included within RICO's compass predicate federal **[****54]** offenses that manifestly reach conduct occurring abroad. See, *e.g.*, *§§1956-1957* (money laundering); *§2339B* (material support to foreign terrorist organizations). Accordingly, the Court concludes, when the predicate crimes underlying invocation of *§1962* thrust extraterritorially, so too does *§1962*. I agree with that conclusion.

I disagree, however, that the private right of action authorized by *§1964(c)* requires a domestic injury to a person's business or property and does not allow recovery for foreign injuries. One cannot extract such a limitation from the text of *§1964(c)*, which affords a right of action to "[a]ny person injured in his business or property by reason of a violation of **[**2113]** *section 1962*." *Section 1962*, at least *subsections (b)* and *(c)*, all agree, encompasses foreign injuries. How can *§1964(c)* exclude them when, by its express terms, *§1964(c)* is triggered by "a violation of *section 1962*"? To the extent RICO reaches injury abroad when the Government is the suitor pursuant to *§1962* (specifying prohibited activities) and *§1963* (criminal penalties) or *§1964(b)* (civil remedies), to that same extent, I would hold, RICO reaches extraterritorial **[*358]** injury when, pursuant to *§1964(c)*, the suitor is a private plaintiff.

II

A

I would not distinguish, as the Court does, between the extraterritorial compass of a private right of action **[****55]** and that of the underlying proscribed conduct. See *ante, at 18 - 22, 195 L. Ed. 2d, at 498-501*. Instead, I would adhere to precedent addressing RICO, linking, not separating, prohibited activities and authorized remedies. See *Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 495, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985)* ("If the defendant engages in a pattern of racketeering activity in a manner forbidden by *[§1962]*, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under *§1964(c)*."); *ibid.* (refusing to require a "distinct 'racketeering injury'" for private RICO actions under *§1964(c)* where *§1962* imposes no such requirement). [2]

To reiterate, a *§1964(c)* right of action may be maintained by "[a]ny person injured in his business or property by reason of a violation of **[***507]** *section 1962*" (emphasis added). "[I]ncorporating one statute . . . into another," the Court has long understood, "serves to bring into the latter all that is fairly covered by the reference." *Panama R. Co. v. Johnson, 264 U.S. 375, 392, 44 S. Ct. 391, 68 L. Ed. 748 (1924)*. RICO's private right of action, it cannot be gainsaid, expressly incorporates *§1962*, **[*359]** whose extraterritoriality, the Court recognizes, is coextensive with the underlying predicate offenses charged. See *ante, at 10 - 18, 195 L. Ed. 2d, at 493-498*. See also *ante, at 12, 195 L. Ed. 2d, at 494* ("[I]t is hard to imagine how Congress could have more clearly indicated that it intended RICO to have (some) extraterritorial effect."). The sole additional condition *§1964(c)* imposes on access to relief is an injury to one's "business or property." Nothing in that condition should change the extraterritoriality assessment. In agreement with the Second Circuit, I would hold that "[i]f an injury abroad was proximately caused by the violation of a statute which Congress intended should apply to injurious conduct performed abroad, [there is] no reason to import a domestic injury requirement simply because the victim sought redress through the RICO statute." *764 F. 3d 149, 151 (2014)*.

What *§1964(c)*'s **[****57]** text conveys is confirmed by its history. As this Court has repeatedly observed, Congress modeled *§1964(c)* on §4 of the Clayton Act, *15 U.S.C. §15*, **[**2114]** the private civil-action provision of the federal antitrust laws, which employs nearly identical language: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor." See *Klehr v. A. O. Smith Corp., 521 U.S. 179, 189-190, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (1997)*; *Holmes v. Securities Investor Protection Corporation, 503 U.S. 258, 267-268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*; *Sedima, 473 U.S., at 485, 489, 105 S. Ct. 3275, 87 L. Ed. 2d 346*. *Clayton Act §4*, the Court has held, provides a remedy for injuries both foreign and domestic. *Pfizer Inc. v. Government of India, 434 U.S. 308, 313-314, 98 S. Ct. 584, 54 L. Ed. 2d 563 (1978)* ("Congress did not intend to make the [Clayton Act's] treble-damages remedy available only to consumers in our own country."); *Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 707-708, 82 S. Ct. 1404, 8 L. Ed. 2d 777 (1962)* (allowing recovery in *Clayton Act §4* suit for injuries in Canada).

"The similarity of language in [the two statutes] is, of course, a strong indication that [they] should be interpreted *pari passu*," *Northcross v. Board of Ed. of Memphis City* ***[*360]*** *Schools, 412 U.S. 427, 428, 93 S. Ct. 2201, 37 L. Ed. 2d 48 (1973)* (*per curiam*), and I see no contradictory indication here. [3] Indeed, when the Court has addressed gaps in *§1964(c)*, it has aligned the RICO private right of action **[***508]** with the private right afforded by *Clayton*

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[2] Insisting that the presumption against extraterritoriality should "apply to *§1964(c)* independently of its application to *§1962*," *ante, at 18 - 19, 195 L. Ed. 2d, at 498-499*, the Court cites *Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 133 S. Ct. 1659, 185 L. Ed. 2d 671 (2013)*. That decision will not bear the weight the Court would place on it. As the Court comprehends, the statute there at issue, the Alien Tort Statute, *28 U.S.C. §1350*, is a spare jurisdictional grant that itself does not "regulate conduct or afford relief." *Kiobel, 569 U.S., at 116, 133 S. Ct. 1659, 185 L. Ed. 2d 671, 680*. With no grounding for extraterritorial application in the statute, *Kiobel* held, courts have no warrant to fashion, on their own initiative, claims for relief that operate extraterritorially. See *ibid.* ("[T]he question is not what Congress has done but instead what **[****56]** courts may do.").

[3] The Court asserts that "[t]here is good reason not to interpret *§1964(c)* to cover foreign injuries just because the Clayton Act does." *Ante, at 25, 195 L. Ed. 2d, at 502*. The Clayton Act's definition of "person," *15 U.S.C. §12*, the Court observes, "explicitly includes 'corporations and associations existing under or authorized by . . . the laws of any foreign country.'" *Ante, at 25, 195 L. Ed. 2d, at 502* (some internal quotation marks omitted). RICO, the Court stresses, lacks this "critical" language. *Ibid.* The Court's point is underwhelming. RICO's definition of "persons" is hardly confining: "any individual or entity capable of holding a legal or beneficial interest in property." *18 U.S.C. §1961(3)*. Moreover, there is little doubt that Congress anticipated *§1964(c)* plaintiffs like the suitors here. See 147 Cong. Rec. 20676, 20710 (2001) (remarks of Sen. Kerry) ("Since some of the money-laundering conducted in the world today also defrauds foreign governments, it would be hostile to the intent **[****59]** of [the USA PATRIOT Act, which added as RICO predicates additional money laundering offenses,] for us to interject into the statute any rule of construction of legislative language which would in any way limit our foreign allies access to our courts to battle against money laundering.").

Act §4. See, *e.g.,* Klehr, 521 U.S., at 188-189, 117 S. Ct. 1984, 138 L. Ed. 2d 373 (adopting for private RICO actions Clayton Act §4's accrual rule—that a claim accrues when a defendant commits an act that injures a plaintiff's business—rather than criminal RICO's "most recent, **[****58]** predicate act" rule); Holmes, 503 U.S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (requiring private plaintiffs under §1964(c), like private plaintiffs under Clayton Act §4, to show proximate cause); Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 155-156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987) (applying to §1964(c) actions Clayton Act §4's shorter statute of limitations instead of "catchall" federal statute of limitations applicable to RICO criminal prosecutions).

This very case illustrates why pinning a domestic-injury requirement onto §1964(c) makes little sense. All defendants are U.S. corporations, headquartered in the United States, charged with a pattern of racketeering activity directed and managed from the United States, involving conduct **[*361]** occurring in the United States. In particular, according to the complaint, defendants received in the United States funds known to them to have been generated by illegal narcotics trafficking and terrorist activity, conduct violative **[**2115]** of §1956(a)(2); traveled using the facilities of interstate commerce in furtherance of unlawful activity, in violation of §1952; provided material support to foreign terrorist organizations "in the United States and elsewhere," in violation of §2339B; and used U.S. mails and wires in furtherance of a "scheme or artifice to defraud," in violation of §§1341 and 1343. App. to Pet. for Cert. 238a-250a. In short, this case has the **[****60]** United States written all over it.

B

The Court nevertheless deems a domestic-injury requirement for private RICO plaintiffs necessary to avoid international friction. See ante, at 20 - 22, 195 L. Ed. 2d, at 499-501. When the United States considers whether to initiate a prosecution or civil suit, the Court observes, it will take foreign-policy considerations into account, but private parties will not. It is far from clear, however, that the Court's blanket rule would ordinarily work to ward off international discord. Invoking the presumption against extraterritoriality as a bar to *any* private suit for injuries to business or property abroad, this case suggests, might spark, rather than quell, international strife. Making such litigation available to domestic but not foreign plaintiffs is hardly solicitous of international comity or respectful of foreign interests. Cf. Pfizer, 434 U.S., at 318-319, 98 S. Ct. 584, 54 L. Ed. 2d 563 ("[A] foreign nation is generally entitled to prosecute any civil claim in the courts of the United States upon the same basis as a domestic corporation or individual might do. To deny him this privilege would manifest a want of **[***509]** comity and friendly feeling." (internal quotation marks omitted)).

RICO's definitional provisions exclude "[e]ntirely foreign activity." **[****61]** 783 F. 3d 123, 143 (Lynch, J., dissenting from denial **[*362]** of rehearing en banc). Thus no suit under RICO would lie for injuries resulting from "[a] pattern of murders of Italian citizens committed by members of an Italian organized crime group in Italy." *Ibid.* That is so because "murder is a RICO predicate only when it is 'chargeable under state law' or indictable under specific federal statutes." *Ibid.* (citing §1961(1)(A), (G)).

To the extent extraterritorial application of RICO could give rise to comity concerns not present in this case, those concerns can be met through doctrines that serve to block litigation in U.S. courts of cases more appropriately brought elsewhere. Where an alternative, more appropriate forum is available, the doctrine of *forum non conveniens* enables U.S. courts to refuse jurisdiction. See Piper Aircraft Co. v. Reyno, 454 U.S. 235, 102 S. Ct. 252, 70 L. Ed. 2d 419 (1981) (dismissing wrongful-death action arising out of air crash in Scotland involving only Scottish victims); Restatement (Second) of Conflict of Laws §84 (1969). Due process constraints on the exercise of general personal jurisdiction shelter foreign corporations from suit in the United States based on conduct abroad unless the corporation's "affiliations with the [forum] in which suit is brought are so constant and pervasive 'as to render it essentially **[****62]** at home [there].'" Daimler AG v. Bauman, 571 U.S. 117, 122, 134 S. Ct. 746, 187 L. Ed. 2d 624, 625 (2014) (quoting Goodyear Dunlop Tires Operations, S. A. v. Brown, 564 U.S. 915, 919, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011); alterations omitted). These controls provide a check against civil RICO litigation with little or no connection to the United States.

***

The Court hems in RICO out of concern about establishing a "double standard." *Ante, at 22, 195 L. Ed. 2d, at 501*. But today's decision does exactly that. U.S. defendants commercially engaged here and abroad would be answerable **[**2116]** civilly to U.S. victims of their criminal activities, but foreign parties similarly injured would have no RICO remedy. "'Sauce for the goose'" should indeed serve the gander as well. See *ibid.* (quoting **[*363]** *Heffernan v. City of Paterson, 578 U.S. 266, 272, 136 S. Ct. 1412 194 L. Ed. 2d 508, 514 (2016)*). I would resist reading into *§1964(c)* a domestic-injury requirement Congress did not prescribe. Instead, I would affirm the Second Circuit's sound judgment:

> "To establish a compensable injury under *§1964(c)*, a private plaintiff must show that (1) the defendant 'engage[d] in a pattern of racketeering activity in a manner forbidden by' *§1962*, and (2) that these 'racketeering activities' were the proximate cause of some injury to the plaintiff's business or property." *764 F. 3d, at 151* (quoting *Sedima, 473 U.S., at 495, 105 S. Ct. 3275, 87 L. Ed. 2d 346*; *Holmes, 503 U.S., at 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532*)).

Because the Court overturns that judgment, I dissent.

Justice Breyer, concurring in part, dissenting in part, and dissenting from the judgment.

I join Parts I through III of **[****63]** the Court's opinion. But I do not join Part **[***510]** IV. The Court there holds that the private right of action provision in the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C. §1964(c)*, has no extraterritorial application. Like Justice Ginsburg, I believe that it does.

In saying this, I note that this case does not involve the kind of purely foreign facts that create what we have sometimes called "foreign-cubed" litigation (*i.e.*, cases where the plaintiffs are foreign, the defendants are foreign, and all the relevant conduct occurred abroad). See, *e.g., Morrison v. National Australia Bank Ltd., 561 U.S. 247, 283, n. 11, 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010)* (Stevens, J., concurring in judgment). Rather, it has been argued that the statute at issue does not extend to such a case. See *18 U.S.C. §1961(1)* (limiting qualifying RICO predicates to those that are, *e.g.*, "chargeable" under state law, or "indictable" or "punishable" under federal law); Tr. of Oral Arg. 32, 33-34 (respondents conceding that all of the **[*364]** relevant RICO predicates require some kind of connection to the United States). And, as Justice Ginsburg points out, "this case has the United States written all over it." *Ante, at 7, 195 L. Ed. 2d, at 508* (opinion concurring in part, dissenting in part, and dissenting from judgment).

Unlike the Court, I cannot accept as controlling **[****64]** the Government's argument as *amicus curiae* that "[a]llowing recovery for foreign injuries in a civil RICO action . . . presents the . . . danger of international friction." *Ante, at 21, 195 L. Ed. 2d, at 500*. The Government does not provide examples, nor apparently has it consulted with foreign governments on the matter. See Tr. of Oral Arg. 26 ("[T]o my knowledge, [the Government] didn't have those consultations" with foreign states concerning this case). By way of contrast, the European Community and 26 of its member states tell us "that the complaint in this case, which alleges that American corporations engaged in a pattern of racketeering activity that caused injury to respondents' businesses and property, comports with limitations on prescriptive jurisdiction under international law and respects the dignity of foreign sovereigns." Brief for Respondents 52-53; see also Tr. of Oral Arg. 31 (calling the European Union's "vett[ing] exercise" concerning this case "comprehensiv[e]"). In these circumstances, and for the reasons given by Justice Ginsburg, see *ante, at 7 - 8, 195 L. Ed. 2d, at 508-509*, I would not place controlling weight on the Government's contrary view.

[2117]** Consequently, I join Justice Ginsburg's opinion.

References

18 U.S.C.S. § 1964(c)

Civil RICO P 6.03 (Matthew Bender)

L Ed Digest, Extortion, Blackmail, and Racketeering

L Ed Index, Racketeering

[**65]** Validity, construction, and application of Racketeer Influenced and Corrupt Organizations Act (RICO) (*18 U.S.C.S. § 1961 et seq.*)--Supreme Court cases. *139 L. Ed. 2d 945*.

Standing to sue, under *§ 4* of the Clayton Act (*15 U.S.C.S. § 15*) and predecessor statute, to recover treble damages for antitrust violation--Supreme Court cases. *73 L. Ed. 2d 1427*.

Supreme Court's views as to right of foreign nation or its representative to sue in courts of United States. *54 L. Ed. 2d 854*.

End of Document

Animal Sci. Prods. v. Hebei Welcome Pharm. Co.

Supreme Court of the United States

April 24, 2018, Argued; June 14, 2018, Decided

No. 16-1220.

Reporter

138 S. Ct. 1865 *; 201 L. Ed. 2d 225 **; 2018 U.S. LEXIS 3684 ***; 86 U.S.L.W. 4411; 2018-1 Trade Cas. (CCH) P80,408; 100 Fed. R. Serv. 3d (Callaghan) 1269; 27 Fla. L. Weekly Fed. S 345; 2018 WL 2973745

ANIMAL SCIENCE PRODUCTS, INC., et al., Petitioners v. HEBEI WELCOME PHARMACEUTICAL CO. LTD., et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Animal Sci. Prods. v. Hebei Welcome Pharm. Co. (In re Vitamin C Antitrust Litig.), 837 F.3d 175, 2016 U.S. App. LEXIS 17135 (2d Cir. N.Y., Sept. 20, 2016)

Disposition: Vacated and remanded.

Core Terms

sellers, court of appeals, foreign law, purchasers, federal court, exports, vitamin, foreign government, price fixing, own law, declaration, relevant material, characterization, circumstances, quantity, decree, defer, views

LexisNexis® Headnotes

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

HN1[] **Legislative Facts, Laws of Foreign States**

A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, Fed. R. Civ. P. 44.1 instructs that, in determining foreign law, the court may consider any relevant material or source whether or not submitted by a party. As the court's determination must be treated as a ruling on a question of law, Fed. R. Civ. P. 44.1, the court may engage in its own research and consider any relevant material thus found.

Civil Procedure > Appeals > Standards of Review > De Novo Review

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

HN2[] **Standards of Review, De Novo Review**

Fed. R. Civ. P. 44.1, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The rule specifies that a court's determination of foreign law must be treated as a ruling on a question of law, rather than as a finding of fact. Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they may consider any relevant material or source, whether or not admissible under the Federal Rules of Evidence. Appellate review, as is true of domestic law determinations, is de novo. *Rule 44.1* frees courts to reexamine and amplify material presented by counsel in partisan fashion or in insufficient detail. The obvious purpose of the changes *Rule 44.1* ordered was to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.

Evidence > Judicial Notice > Legislative Facts > Laws of Foreign States

International Law > Dispute Resolution > Comity Doctrine

HN3[] **Legislative Facts, Laws of Foreign States**

Federal courts deciding questions of foreign law under *Fed. R. Civ. P. 44.1* are sometimes provided with the views of the relevant foreign government. *Rule 44.1* does not address the weight a federal court determining foreign law should give to the views presented by a foreign government. Nor does any other rule or statute. In the spirit of international comity, a federal court should carefully consider a foreign state's views about the meaning of its own laws. But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt a foreign government's characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements, or offers an account in the context of litigation, there may be cause for caution in evaluating the government's submission. Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Erie Doctrine

HN4[] **Federal & State Interrelationships, Erie Doctrine**

If relevant state law is established by a decision of the State's highest court, that decision is binding on the federal courts. But views of the State's attorney general, while attracting respectful consideration, do not garner controlling weight.

Lawyers' Edition Display

Decision

[225]** Federal court determining foreign law under *Federal Rules of Civil Procedure Rule 44.1* (1) should accord respectful consideration to foreign government's submission; but (2) is not bound to accord conclusive effect to foreign government's statements.

Summary

Overview: ISSUE: Whether a federal court determining foreign law under *Fed. R. Civ. P. 44.1* was required to treat as conclusive a submission from the foreign government describing its own law. HOLDINGS: [1]-A federal court should accord respectful consideration to a foreign government's submission, but was not bound to accord conclusive effect to the foreign government's statements. Instead, *Rule 44.1* instructed that, in determining foreign law, the court could consider any relevant material **[**226]** or source whether or not submitted by a party; [2]-The court of appeals erred in deeming the foreign government's submission binding, so long as facially reasonable, because that unyielding rule was inconsistent with *Rule 44.1* and with the Supreme Court's treatment of analogous submissions from States of the United States. The court of appeals did not address other evidence.

Outcome: Judgment vacated and case remanded. Unanimous decision.

Headnotes

Conflict of Laws 4Evidence 461 > FOREIGN NATION -- CONSTRUCTION OF FOREIGN LAW > Headnote:
LEdHN1[] 1

A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, *Fed. R. Civ. P. 44.1* instructs that, in determining foreign law, the court may consider any relevant ma-terial or source whether or not submitted by a party. As the court's determination must be treated as a ruling on a question of law, *Fed. R. Civ. P. 44.1*, the court may engage in its own research and consider any relevant material thus found.

Evidence 461 > DETERMINATION OF FOREIGN LAW > Headnote:
LEdHN2[] 2

Fed. R. Civ. P. 44.1, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The rule specifies that a court's determination of foreign law must be treated as a ruling on a question of law, rather than as a finding of fact. Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they may consider any relevant material or source, whether or not admissible under the Federal Rules of Evidence. Appellate review, as is true of domestic law determinations, is de novo. *Rule 44.1* frees courts to reexamine and amplify material presented by counsel in partisan fashion or in insufficient detail. The obvious purpose of the changes *Rule 44.1* ordered was to make the process of determining alien law identical with the method of ascertaining domestic law to the extent that it is possible to do so.

Conflict of Laws 4Evidence 461 > FOREIGN LAW -- CONSTRUCTION BY FEDERAL COURT -- COMITY > Headnote:
LEdHN3[] 3

Federal courts deciding questions of foreign law under *Fed. R. Civ. P. 44.1* are sometimes provided with the views of the relevant foreign government. *Rule 44.1* does not address the weight a federal court determining foreign law should give to the views presented by a foreign government. Nor does any other rule or statute. In the spirit of international comity, a federal court should carefully consider a foreign state's views about the meaning of its own laws. But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt a foreign government's characterization nor required to ignore other relevant materials. When a foreign government makes conflicting statements, or offers an account in the context of litigation, there may be cause for caution in evaluating the government's submission. Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Courts 787.5Courts 793.5 > STATE LAW -- STATE'S CONSTRUCTION -- AUTHORITY > Headnote:
LEdHN4[] 4

If relevant state law is established by a decision of the state's highest court, that decision is binding on the federal courts. But views of the state's attorney general, while attracting respectful consideration, do not garner controlling weight.

Syllabus

[227]** **[*1867]** Petitioners, U. S.-based purchasers of vitamin C (U. S. purchasers), filed a class-action suit, alleging that four Chinese corporations that manufacture and export the nutrient (Chinese sellers), including the two respondents here, had agreed to fix the price and quantity of vitamin C exported to the United States, in violation of *§1 of the Sherman Act*. The Chinese sellers moved to dismiss the complaint on the ground that Chinese law required them to fix the price and quantity of vitamin C exports, thus shielding them from liability under U. S. ***antitrust law***. The Ministry of Commerce of the People's Republic of China (Ministry) filed an *amicus* brief in support of the motion, explaining that it is the administrative authority authorized to regulate foreign trade, and stating that the alleged conspiracy in restraint of trade was actually a pricing regime mandated by the Chinese Government. The U. S. purchasers countered that the Ministry had identified no law or regulation ordering the Chinese sellers' price agreement, highlighted a publication announcing that the Chinese sellers had **[***2]** agreed to control the quantity and rate of exports without government intervention, and presented supporting expert testimony.

[228]** The District Court denied the Chinese sellers' motion in relevant part, concluding that it did not regard the Ministry's statements as "conclusive," particularly in light of the U. S. purchasers' evidence. When the Chinese sellers subsequently moved for summary judgment, the Ministry submitted **[*1868]** another statement, reiterating its stance, and the U. S. purchasers pointed to China's statement to the World Trade Organization that it ended its export administration of vitamin C in 2002. The court denied this motion as well. The case was then tried to a jury, which returned a verdict for the U. S. purchasers.

The Second Circuit reversed, holding that the District Court erred by denying the Chinese sellers' motion to dismiss the complaint. When a foreign government whose law is in contention submits an official statement on the meaning and interpretation of its domestic law, the court concluded, federal courts are "bound to defer" to the foreign government's construction of its own law, whenever that construction is "reasonable." Inspecting only the Ministry's brief **[***3]** and the sources cited therein, the court found the Ministry's account of Chinese law "reasonable."

Held:

A federal court determining foreign law under *Federal Rule of Civil Procedure 44.1* should accord respectful consideration to a foreign government's submission, but the court is not bound to accord conclusive effect to the foreign government's statements.

Rule 44.1 fundamentally changed the mode of determining foreign law in federal courts. Before adoption of the rule in 1966, a foreign nation's laws had to be "proved as facts." Talbot v. Seeman, 5 U.S. 1, 1 Cranch 1, 38, 2 L. Ed. 15. Rule 44.1, in contrast, specifies that a court's determination of foreign law "must be treated as a ruling on a question of law." And in ascertaining foreign law, courts are not limited to materials submitted by the parties, but "may consider any relevant material or source." Appellate review, as is true of domestic law determinations, is *de novo*. The purpose of these changes was to align, to the extent possible, the process for determining alien law and the process for determining domestic law.

Neither Rule 44.1 nor any other rule or statute addresses the weight a federal court determining foreign law should give to the views presented by a foreign government. In the spirit of "international comity," Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U. S. 522, 543, 107 S. Ct. 2542, 96 L. Ed. 2d 461, a federal **[***4]** court should carefully consider a foreign state's views about the meaning of its own laws. The appropriate weight in each case, however, will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore other relevant materials. No single formula or rule will fit all cases, but relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency with the foreign government's past positions.

Judged in this light, the Second Circuit's unyielding rule is inconsistent with Rule 44.1 and, tellingly, with this Court's treatment of analo- **[**229]** gous submissions from States of the United States. If the relevant state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts," Wainwright v. Goode, 464 U. S. 78, 84, 104 S. Ct. 378, 78 L. Ed. 2d 187, but views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight, Arizonans for Official English v. Arizona, 520 U. S. 43, 76-77, n. 30, 117 S. Ct. 1055, 137 L. Ed. 2d 170. Furthermore, because the Second Circuit riveted its attention on the Ministry's submission, **[***5]** it did not address evidence submitted by the U. S. purchasers. The court also **[*1869]** misperceived the pre-Rule 44.1 decision of United States v. Pink, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796. Under the particular circumstances of that case, this Court found conclusive a declaration from the government of the Russian Socialist Federal Soviet Republic on the extraterritorial effect of a decree nationalizing assets: The declaration was *obtained by the United States* through official "diplomatic channels," id., at 218, 62 S. Ct. 552, 86 L. Ed. 796; there was no indication that the declaration was inconsistent with the Russian Government's past statements; and the declaration was consistent with expert evidence in point.

The Second Circuit expressed concern about reciprocity, but the United States has not historically argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources. International practice is also inconsistent with the Second Circuit's rigid rule. Pp. ___ - ___, 201 L. Ed. 2d, at 232-236.

837 F. 3d 175, vacated and remanded.

Counsel: Michael J. Gottlieb argued the cause for petitioners.

Brian H. Fletcher argued the cause for petitioner as amicus curiae, by special leave of court.

Carter G. Phillips argued the cause for respondents.

Judges: Ginsburg, J., delivered the opinion for a unanimous Court.

Opinion by: GINSBURG

Opinion

Justice **Ginsburg** delivered the opinion of the Court.

When foreign law is relevant to a case instituted in a federal court, and the foreign government whose law is in contention submits an official **[***6]** statement on the meaning and interpretation of its domestic law, may the federal court look beyond that official statement? The Court of Appeals for the Second Circuit answered generally "no," ruling that federal courts are "bound to defer" to a foreign government's construction of its own law, whenever that construction is "reasonable." *In re Vitamin C Antitrust Litigation, 837 F. 3d 175, 189 (2016)*.

We hold otherwise. ***HN1***[] ***LEdHN[1]***[] [1] A federal court should accord respectful consideration to a foreign government's submission, but is not bound to accord conclusive effect to the foreign government's statements. Instead, *Federal Rule of Civil Procedure 44.1* instructs that, in determining foreign law, "the court may consider any relevant material or source . . . whether or not submitted by a party." As "[t]he court's determination must be treated as a ruling on a question of law," *Fed. Rule Civ. Proc. 44.1*, the court "may engage in **[*1870]** its own research and consider any relevant material thus found," Advisory Committee's 1966 Note on *Fed. Rule Civ. Proc. 44.1*, 28 U. S. C. App., p. 892 (hereinafter Advisory Committee's Note). Because the Second Circuit ordered dismissal of this case on the ground that the foreign government's statements could **[**230]** not be gainsaid, we vacate that court's judgment and remand the case for further consideration.

I

Petitioners, U. **[***7]** S.-based purchasers of vitamin C (hereinafter U. S. purchasers), filed a class-action suit against four Chinese corporations that manufacture and export the nutrient (hereinafter Chinese sellers). The U. S. purchasers alleged that the Chinese sellers, two of whom are respondents here, had agreed to fix the price and quantity of vitamin C exported to the United States from China, in violation of *§1 of the Sherman Act, 15 U. S. C. §1*. More particularly, the U. S. purchasers stated that the Chinese sellers had formed a cartel "facilitated by the efforts of their trade association," the Chamber of Commerce of Medicines and Health Products Importers and Exporters (Chamber). Complaint in No. 1:05-CV-453, Docket No. 1, ¶43. The Judicial Panel on Multidistrict Litigation consolidated the instant case and related suits for pretrial proceedings in the United States District Court for the Eastern District of New York.

The Chinese sellers moved to dismiss the U. S. purchasers' complaint on the ground that Chinese law required them to fix the price and quantity of vitamin C exports. Therefore, the Chinese sellers urged, they are shielded from liability under U. S. ***antitrust law*** by the act of state doctrine, the **[***8]** foreign sovereign compulsion doctrine, and principles of international comity. The Ministry of Commerce of the People's Republic of China (Ministry) filed a brief as *amicus curiae* in support of the Chinese sellers' motion. The Ministry's brief stated that the Ministry is "the highest administrative authority in China authorized to regulate foreign trade," App. to Pet. for Cert. 190a; that the Chamber is "an entity under the Ministry's direct and active supervision" and is authorized to regulate vitamin C exports, *id.,* at 196a; and that the conspiracy in restraint of trade alleged by the U. S. purchasers was in fact "a regulatory pricing regime mandated by the government of China," *id.,* at 197a. [1]

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[1] The Ministry told the District Court: For much of the 20th century, China allowed only state-owned entities to export products. App. to Pet. for Cert. 198a. When China started to allow private enterprises to obtain export licenses, the Ministry established the Chamber to regulate exports under the Ministry's authority and direction. *Ibid.*

In 1997, the Ministry authorized the establishment of the Chamber's Vitamin C Subcommittee. *Id.,* at 202a. That year, the Ministry promulgated a regulation authorizing and requiring the subcommittee to limit the production of vitamin C for export and to set export prices. *Id.,* at 202a-204a. Under the regulation delineating this "Export Licensing System," the Ministry issued export licenses only to manufacturers whose export volume and price complied with the output quota and price coordinated by the Vitamin C Subcommittee. *Id.,* at 204a.

In 2002, the Ministry replaced the Export Licensing System with a "Verification and Chop System." *Id.,* at 208a. As set forth in a 2002 Ministry Notice, the Chamber itself—instead of the Ministry—would inspect each export contract and certify its compliance with the coordinated quotas and price by affixing a special seal, known as a "chop." *Id.,* at 208a-209a. China's Customs would allow export only if the exporter presented its contract bearing the Chamber's "chop." *Id.,* at 209a. According to the Ministry, it

[*1871] In response, the U. S. purchasers disputed that Chinese law required the Chinese sellers to engage in price **[**231]** fixing. Among other things, the U. S. purchasers noted that the Ministry had not identified any written law or regulation expressly ordering the Chinese sellers' price agreement. [2] They also highlighted a Chamber announcement that the manufacturers "were able to reach a self-regulated agreement . . . whereby they would voluntarily control the quantity and pace of exports . . . without any government intervention." **[***9]** App. 109. In addition, the U. S. purchasers presented expert testimony that the Chinese Government's authorization of a Vitamin C Subcommittee within the Chamber did not necessarily mean that the subcommittee's price fixing was mandated by law.

The District Court denied the Chinese sellers' motion to dismiss the complaint in relevant part. *In re Vitamin C Antitrust Litigation, 584 F. Supp. 2d 546, 559 (EDNY 2008)*. That court acknowledged that the Ministry's *amicus* brief was "entitled to substantial deference." *Id., at 557*. The court, however, did not regard the Ministry's statements as "conclusive," emphasizing particularly that the U. S. purchasers had submitted evidence suggesting that the price fixing was voluntary. *Ibid.* The record, the District Court determined, was "too ambiguous to foreclose further inquiry into the voluntariness of [the Chinese sellers'] actions." *Id., at 559*.

After further discovery, focused on whether Chinese law compelled the Chinese sellers to enter into a price-fixing agreement, the Chinese sellers moved for summary judgment. See *In re Vitamin C Antitrust Litigation, 810 F. Supp. 2d 522, 525-526 (EDNY 2011)*. The Ministry submitted an additional statement, reiterating that "the Ministry specifically charged the Chamber . . . with the authority and responsibility . . . for regulating, through consultation, the price of vitamin **[***10]** C manufactured for export." App. 133. The Chinese sellers tendered expert testimony in accord with the Ministry's account, which stressed that the Ministry's "interpretation of its own regulations and policies carries decisive weight under Chinese law." *Id.,* at 142. The U. S. purchasers, in response, cited further materials supporting their opposing view, including China's statement to the World Trade Organization (WTO) that it "gave up export administration of . . . vitamin C" in 2002. *810 F. Supp. 2d, at 532* (internal quotation marks omitted). Denying the Chinese sellers' motion for summary judgment, the District Court held that Chinese law did not require the sellers to fix the price or quantity of vitamin C exports. *Id., at 525*.

The case was then tried to a jury, which returned a verdict for the U. S. purchasers. The jury found that the Chinese sellers had agreed to fix the prices and quantities of vitamin C exports, see App. to Pet. for Cert. 276a-279a, and further found that the Chinese sellers were not "actually compelled" by China to enter into **[**232]** those agreements, *id.,* at 278a. In accord with the jury's verdict, the District Court entered judgment for the U. S. purchasers, awarding some $147 million in treble damages and enjoining **[***11]** the Chinese sellers **[*1872]** from further violations of the *Sherman Act*.

The Court of Appeals for the Second Circuit reversed, holding that the District Court erred in denying the Chinese sellers' motion to dismiss the complaint. *In re Vitamin C Antitrust Litigation, 837 F. 3d 175, 178, 195-196 (2016)*. The Court of Appeals determined that the propriety of dismissal hinged on whether the Chinese sellers could adhere to both Chinese law and U. S. ***antitrust law***. See *id., at 186*. That question, in turn, depended on "the amount of deference" owed to the Ministry's characterization of Chinese law. *Ibid*. Cognizant of "competing authority" on this question, *ibid.,* the Court of Appeals settled on a highly deferential rule: "[W]hen a foreign

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was implicit in this arrangement that vitamin C exporters would remain under an obligation to fix prices and volumes. *Id.,* at 208a.

The effect of China's regime on the Chinese sellers' liability under the *Sherman Act*, we note, is not an issue before the Court today.

[2] The complaint, the U. S. purchasers emphasized, was directed only at conduct occurring after December 2001. As they understood the Ministry's 2002 Notice, see *supra,* at 3, n. 1, vitamin C exporters could have lawfully opted out of price fixing. Beyond that, the Vitamin C Subcommittee had replaced its 1997 Charter with a new 2002 Charter, App. 182-197, which eliminated the 1997 Charter's requirement that subcommittee members "[s]trictly execute" the "coordinated price" set by the Chamber, compare *id.*, at 85, with *id.,* at 185, and granted members an express "[r]igh[t]" to "freely resign from the Subcommittee," *id.,* at 186.

government, acting through counsel or otherwise, directly participates in U. S. court proceedings by providing a [statement] regarding the construction and effect of [the foreign government's] laws and regulations, which is reasonable under the circumstances presented, a U. S. court is bound to defer to those statements," *id., at 189*. The appeals court "note[d] that[,] if the Chinese Government had not appeared in this litigation, the [D]istrict [C]ourt's careful and thorough treatment of the evidence before it in analyzing what Chinese law required at both **[***12]** the motion to dismiss and summary judgment stages would have been entirely appropriate." *Id., at 191, n. 10*.

Applying its highly deferential rule, the Court of Appeals concluded that the Ministry's account of Chinese law was "reasonable." In so concluding, the Court of Appeals inspected only the Ministry's brief and sources cited therein. *Id., at 189-190*. Because it thought that "a U. S. court [must] not embark on a challenge to a foreign government's official representation," *id., at 189*, the Court of Appeals disregarded the submissions made by the U. S. purchasers casting doubt on the Ministry's account of Chinese law, *id., at 189-190*. Based solely on the Ministry's statements, the Court of Appeals held that "Chinese law required [the Chinese sellers] to engage in activities in China that constituted antitrust violations here in the United States." *Ibid.*

We granted certiorari to resolve a Circuit conflict over this question: Is a federal court determining foreign law under *Rule 44.1* required to treat as conclusive a submission from the foreign government describing its own law? *583 U. S. ___, 138 S. Ct. 734, 199 L. Ed. 2d 601 (2018)*. [3]

II

At common law, the content of foreign **[**233]** law relevant to a dispute was treated "as a question of fact." Miller, Federal *Rule 44.1* and the "Fact" Approach to Determining Foreign Law: **[***13]** Death Knell for a Die-Hard Doctrine, 65 Mich. L. Rev. 613, 617-619 (1967) (Miller). In 1801, this Court endorsed the common-law rule, instructing that "the laws of a foreign nation" must be "proved as facts." *Talbot v. Seeman, 5 U.S. 1, 1 Cranch 1, 38, 2 L. Ed. 15 (1801)*; **[*1873]** see, *e.g., Church v. Hubbart, 6 U.S. 187, 2 Cranch 187, 236, 2 L. Ed. 249 (1804)* ("Foreign laws are well understood to be facts."). Ranking questions of foreign law as questions of fact, however, "had a number of undesirable practical consequences." 9A C. Wright & A. Miller, Federal Practice and Procedure §2441, p. 324 (3d ed. 2008) (Wright & Miller). Foreign law "had to be raised in the pleadings" and proved "in accordance with the rules of evidence." *Ibid.* Appellate review was deferential and limited to the record made in the trial court. *Ibid.*; see also Miller 623.

HN2[] ***LEdHN[2]***[] [2] *Federal Rule of Civil Procedure 44.1*, adopted in 1966, fundamentally changed the mode of determining foreign law in federal courts. The Rule specifies that a court's determination of foreign law "must be treated as a ruling on a question of law," rather than as a finding of fact. [4] Correspondingly, in ascertaining foreign law, courts are not limited to materials submitted by the parties; instead, they "may consider any relevant material or source . . ., whether or not . . . admissible under the Federal Rules of Evidence." *Ibid.* Appellate review, as is true **[***14]** of domestic law determinations, is *de novo*. Advisory Committee's Note, at 892. *Rule 44.1* frees courts "to reexamine and amplify material . . . presented by counsel in partisan fashion or in insufficient detail." *Ibid.* The "obvious" purpose of the changes *Rule 44.1* ordered was "to make the process of determining alien law identical

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[3] Compare *In re Vitamin C Antitrust Litigation, 837 F. 3d 175 (CA2 2016)* (case below), with *In re Oil Spill by Amoco Cadiz, 954 F. 2d 1279, 1311-1313 (CA7 1992)* (adopting French Government's interpretation of French law, but only after considering all of the circumstances, including the French Government's statements in other contexts); *United States v. McNab, 331 F. 3d 1228, 1239-1242 (CA11 2003)* (noting Honduran Government's shift in position on the question of Honduran law and determining that the original position stated the proper interpretation); *McKesson HBOC, Inc. v. Islamic Republic of Iran, 271 F. 3d 1101, 1108-1109, 348 U.S. App. D.C. 160 (CADC 2001)*, vacated in part on other grounds, ***320 F. 3d 280 (CADC 2003)*** (declining to adopt the view of Iranian law advanced by Iranian Government because it was not supported by the affidavits submitted by Iran's experts).

[4] *Federal Rule of Criminal Procedure 26.1* establishes "substantially the same" rule for criminal cases. Advisory Committee's 1966 Note on *Fed. Rule Crim. Proc. 26.1*, 18 U. S. C. App., p. 709.

with the method of ascertaining domestic law to the extent that it is possible to do so." Wright & Miller §2444, at 338-342.

HN3[] **LEdHN[3]**[] [3] Federal courts deciding questions of foreign law under Rule 44.1 are sometimes provided with the views of the relevant foreign government, as they were in this case through the *amicus* brief of the Ministry. See *supra,* at 2-3. As the Court of Appeals correctly observed, Rule 44.1 does not address the weight a federal court determining foreign law should give to the views presented by the foreign government. See 837 F. 3d, at 187. Nor does any other rule or statute. In the spirit of "international comity," Société Nationale Industrielle Aérospatiale v. United States Dist. Court for Southern Dist. of Iowa, 482 U. S. 522, 543, 107 S. Ct. 2542, 96 L. Ed. 2d 461, and n. 27 (1987), a federal court should carefully consider a foreign state's views about the meaning of its own laws. See United States v. McNab, 331 F. 3d 1228, 1241 (CA11 2003); cf. Bodum USA, Inc. v. La Cafetière, Inc., 621 F. 3d 624, 638-639 (CA7 2010) (Wood, J., concurring). But the appropriate weight in each case will depend upon the circumstances; a federal court is neither bound to adopt the foreign government's characterization nor required to ignore **[***15]** other relevant materials. **[**234]** When a foreign government makes conflicting statements, see *supra,* at 5, or, as here, offers an account in the context of litigation, there may be cause for caution in evaluating the foreign government's submission.

Given the world's many and diverse legal systems, and the range of circumstances in which a foreign government's views may be presented, no single formula or rule will fit all cases in which a foreign government describes its own law. Relevant considerations include the statement's clarity, thoroughness, and support; its context and purpose; the transparency of the foreign legal system; the role and authority of the entity or official offering the statement; and the statement's consistency **[*1874]** with the foreign government's past positions.

Judged in this light, the Court of Appeals erred in deeming the Ministry's submission binding, so long as facially reasonable. That unyielding rule is inconsistent with Rule 44.1 (determination of an issue of foreign law "must be treated as a ruling on a question of law"; court may consider "any relevant material or source") and, tellingly, with this Court's treatment of analogous submissions from States of the United States. **HN4**[] **LEdHN[4]**[] [4] If the relevant **[***16]** state law is established by a decision of "the State's highest court," that decision is "binding on the federal courts." Wainwright v. Goode, 464 U. S. 78, 84, 104 S. Ct. 378, 78 L. Ed. 2d 187 (1983) (*per curiam*); see Mullaney v. Wilbur, 421 U. S. 684, 691, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975). But views of the State's attorney general, while attracting "respectful consideration," do not garner controlling weight. Arizonans for Official English v. Arizona, 520 U. S. 43, 76-77, n. 30, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997); see, *e.g.,* Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393-396, 108 S. Ct. 636, 98 L. Ed. 2d 782 (1988). Furthermore, because the Court of Appeals riveted its attention on the Ministry's submission, it did not address other evidence, including, for example, China's statement to the WTO that China had "g[i]ve[n] up export administration . . . of vitamin C" at the end of 2001. 810 F. Supp. 2d, at 532 (internal quotation marks omitted). [5]

The Court of Appeals also misperceived this Court's decision in United States v. Pink, 315 U. S. 203, 62 S. Ct. 552, 86 L. Ed. 796 (1942). See 837 F. 3d, at 186-187, 189. *Pink*, properly comprehended, is not compelling authority for the attribution of controlling weight to the Ministry's brief. We note, first, that *Pink* was a pre-Rule 44.1 decision. Second, *Pink* arose in unusual circumstances. *Pink* was an action brought by the United States to recover assets of the U. S. branch of a Russian insurance company that had been nationalized in 1918, after the Russian revolution. 315 U. S., at 210-211, 62 S. Ct. 552, 86 L. Ed. 796. In 1933, the Soviet Government assigned the nationalized assets located in this country to the United States. Id., at 211-212, 62 S. Ct. 552, 86 L. Ed. 796. The disposition of the case **[***17]** turned on the extraterritorial effect of **[**235]** the nationalization decree—specifically, whether the decree reached assets of the Russian insurance company located in the United States, or was instead limited to property in Russia. Id., at 213-215, 217, 62 S. Ct. 552, 86 L. Ed. 796. To support the position that the decree reached all of the company's assets, the United States obtained an "official declaration of the Commissariat for

[5] The Court of Appeals additionally mischaracterized the Ministry's brief as a "sworn evidentiary proffer." 837 F. 3d, at 189. In so describing the Ministry's submission, the Court of Appeals overlooked that a court's resolution of an issue of foreign law "must be treated as a ruling on a question of law." Fed. Rule Civ. Proc. 44.1. The Ministry's brief, while a probative source for resolving the legal question at hand, was not an attestation to facts.

Justice" of the Russian Socialist Federal Soviet Republic. *Id., at 218, 62 S. Ct. 552, 86 L. Ed. 796*. The declaration certified that the nationalization decree reached "the funds and property of former insurance companies . . . irrespective of whether [they were] situated within the territorial limits of [Russia] or abroad." *Id., at 220, 62 S. Ct. 552, 86 L. Ed. 796* (internal quotation marks omitted). This Court determined that "the evidence supported [a] finding" that "the Commissariat for Justice ha[d] power to interpret existing Russian law." *Ibid*. "That being true," the Court concluded, the "official declaration [wa]s conclusive so far as the intended **[*1875]** extraterritorial effect of the Russian decree [wa]s concerned." *Ibid.*

This Court's treatment of the Commissariat's submission as conclusive rested on a document *obtained by the United States*, through official "diplomatic channels." *Id., at 218, 62 S. Ct. 552, 86 L. Ed. 796*. There **[***18]** was no indication that the declaration was inconsistent with the Soviet Union's past statements. Indeed, the Court emphasized that the declaration was consistent with expert evidence in point. See *ibid.* That the Commissariat's declaration was deemed "conclusive" in the circumstances *Pink* presented scarcely suggests that all submissions by a foreign government are entitled to the same weight.

The Court of Appeals also reasoned that a foreign government's characterization of its own laws should be afforded "the same respect and treatment that we would expect our government to receive in comparable matters." *837 F. 3d, at 189*. The concern for reciprocity is sound, but it does not warrant the Court of Appeals' judgment. Indeed, the United States, historically, has not argued that foreign courts are *bound* to accept its characterizations or precluded from considering other relevant sources. [6]

The understanding that a government's expressed view of its own law is ordinarily entitled to substantial but not conclusive weight is also consistent with two international treaties that establish formal mechanisms by which one government may obtain from another **[***19]** an official statement characterizing its laws. Those treaties specify that "[t]he information given in the reply shall not bind the judicial authority from which the request emanated." European Convention on Information on Foreign Law, Art. 8, June 7, 1968, 720 U. N. T. S. 154; see Inter-American Convention on Proof of and Information on Foreign Law, Art. 6, May 8, 1979, O. A. S. T. S. 1439 U. N. T. S. 111 (similar). **[**236]** Although the United States is not a party to those treaties, they reflect an international practice inconsistent with the Court of Appeals' "binding, if reasonable" resolution.

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Because the Court of Appeals concluded that the District Court was bound to defer to the Ministry's brief, the court did not consider the shortcomings the District Court identified in the Ministry's position or other aspects of "the [D]istrict [C]ourt's careful and thorough treatment of the evidence before it." *837 F. 3d, at 191, n. 10*. The correct interpretation of Chinese law is not before this Court, and we take no position on it. But the materials identified by the District Court were at least relevant to the weight the Ministry's submissions should receive and to the question whether Chinese law required the Chinese **[***20]** sellers' conduct. We therefore vacate the judgment of the Court of Appeals and remand the case for renewed consideration consistent with this opinion.

It is so ordered.

References

U.S.C.S. Court Rules, *Federal Rules of Civil Procedure, Rule 44.1*

9 *Moore's Federal Practice §§44.1.04*, *44.1.05* (Matthew Bender 3d ed.)

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[6] The Chinese sellers assert, see Supp. Brief for Respondents 7-8, that the United States sought a greater degree of deference in a 2002 submission to a World Trade Organization panel. In fact, the submission acknowledged that "the Panel is not bound to accept the interpretation [of U. S. law] presented by the United States." Brief for United States as *Amicus Curiae* 29, n. 6 (quoting Second Written Submission of the United States of America, *United States—Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221 ¶11 (Mar. 8, 2002)).

L Ed Digest, Conflict of Laws *§ 4*; Evidence *§ 461*

L Ed Index, Foreign State or Country

Supreme Court's views as to constitutionality, construction, and application of Foreign Sovereign Immunities Act of 1976 (*28 U.S.C.S. §§1330*, *1332(a)(2)-(4)*, *1391(f)*, *1441(d)*, *1602-1611*). *102 L. Ed. 2d 1093*.

End of Document

Ohio v. Am. Express Co.

Supreme Court of the United States

February 26, 2018, Argued; June 25, 2018, Decided

No. 16-1454.

Reporter
138 S. Ct. 2274 *; 201 L. Ed. 2d 678 **; 2018 U.S. LEXIS 3845 ***; 86 U.S.L.W. 4561; 2018-1 Trade Cas. (CCH) P80,427; 27 Fla. L. Weekly Fed. S 471; 2018 WL 3096305

OHIO, et al., Petitioners v. AMERICAN EXPRESS COMPANY, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: As revised June 25, 2018.

Prior History: **[***1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

United States v. Am. Express Co., 838 F.3d 179, 2016 U.S. App. LEXIS 17502 (2d Cir. N.Y., Sept. 26, 2016)

Disposition: Affirmed.

Core Terms

merchants, card, cardholders, platform, credit-card, provisions, two-sided, network, effects, prices, anticompetitive, customers, shoppers, antisteering, transactions, nondiscrimination, merchant-related, steering, markets, credit card, competitors, rewards, shopper-related, increased price, relevant market, anti trust law, substitutes, market power, output, rule of reason

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

Antitrust & Trade Law > Sherman Act > Scope

HN1[] **Regulated Practices, Price Fixing & Restraints of Trade**

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. In view of the common law and the law in the United States when the *Sherman Act* was passed, the phrase restraint of trade is best read to mean undue restraint. The United States Supreme Court's precedents have thus understood *§ 1* to outlaw only unreasonable restraints.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] Per Se Rule & Rule of Reason, Practices Governed by Per Se Rule

For purposes of *15 U.S.C.S. § 1*, restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output. Typically only horizontal restraints, restraints imposed by agreement between competitors, qualify as unreasonable per se. Restraints that are not unreasonable per se are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. The goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN3[] Per Se Rule & Rule of Reason, Sherman Act

For purposes of *15 U.S.C.S. § 1*, vertical restraints are restraints imposed by agreement between firms at different levels of distribution. Nearly every vertical restraint should be assessed under the rule of reason.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Evidence > Burdens of Proof > Burden Shifting

HN4[] Per Se Rule & Rule of Reason, Sherman Act

For purposes of *15 U.S.C.S. § 1*, to determine whether a restraint violates the rule of reason, a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a pro-competitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the pro-competitive efficiencies could be reasonably achieved through less anticompetitive means.

Antitrust & Trade Law > Sherman Act > Claims

Evidence > Burdens of Proof > Initial Burden of Persuasion

HN5[] Sherman Act, Claims

Plaintiffs under *15 U.S.C.S. § 1* can carry their initial burden of proving that the defendant's action has an anticompetitive effect by making this showing directly or indirectly. Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN6[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Because legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition. Thus, the relevant market is defined as the area of effective competition. Typically this is the arena within which significant substitution in consumption or production occurs. But courts should combine different products or services into a single market when that combination reflects commercial realities. The definition of the relevant market must correspond to the commercial realities of the industry.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN7[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the court first defines the relevant market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN8[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Industries > Financial Institutions

HN9[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as supplying only one product, i.e., transactions. In the credit-card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Industries > Financial Institutions

HN10[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, credit-card companies are best understood as supplying only one product, transactions, which is jointly consumed by a cardholder and a merchant. Merchant services and cardholder services are both inputs to this single product.

Antitrust & Trade Law > Sherman Act > Claims

HN11[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, evaluating both sides of a two-sided transaction platform is necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

HN12[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, in two-sided transaction markets, only one market should be defined. Any other analysis would lead to mistaken inferences of the kind that could chill the very conduct the antitrust laws are designed to protect. A court must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. Courts should avoid increasing the total cost of the antitrust system by prohibiting pro-competitive conduct the antitrust laws should encourage.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Market Definition > Relevant Market > Product Market Definition

Antitrust & Trade Law > Regulated Industries > Financial Institutions

HN13[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, plaintiffs must prove that a credit-card company's action increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade

HN14[] **Sherman Act, Claims**

For purposes of *15 U.S.C.S. § 1*, market power is the ability to raise price profitably by restricting output. Competitive injury from price and output data will not be inferred absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Where output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand.

Antitrust & Trade Law > Sherman Act > Scope

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > Vertical Restraints

HN15[] **Antitrust & Trade Law, Sherman Act**

For purposes of *15 U.S.C.S. § 1*, vertical restraints can prevent retailers from free riding and thus increase the availability of tangible or intangible services or promotional efforts that enhance competition and consumer welfare.

Antitrust & Trade Law > Regulated Practices

HN16[] **Antitrust & Trade Law, Regulated Practices**

It is the promotion of interbrand competition that is the primary purpose of the antitrust laws.

Lawyers' Edition Display

Decision

Credit card company's antisteering provisions to prevent merchants from encouraging customers to use different credit card did not violate Sherman Act in that evidence of price increase on one side of two-sided transaction platform did not demonstrate anticompetitive exercise of market power.

Summary

Overview: HOLDINGS: [1]-In determining whether the antisteering provisions of a credit-card company's contracts that restricted merchants from discouraging use of the company's cards violated *15 U.S.C.S. § 1* of the Sherman Act, the two-sided market for credit-card transactions had to be analyzed as a whole to determine whether the antisteering provisions had been shown to have anticompetitive effects; [2]-The federal government and states failed to show that the antisteering provisions had anticompetitive effects. The company's increased merchant fees reflected increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price, and it was not shown that the antisteering provisions stifled interbrand competition.

Outcome: Judgment affirmed. 5-4 decision; 1 dissent.

Headnotes

Restraints of Trade, Monopolies, and Unfair Trade Practices 5 > SHERMAN ACT -- UNDUE RESTRAINT > Headnote:
LEdHN1.[] 1.

15 U.S.C.S. § 1 prohibits every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states. In view of the common law and the law in the United States when the Sherman Act was passed, the phrase restraint of trade is best read to mean undue restraint. The United States Supreme Court's precedents have thus understood *§ 1* to outlaw only unreasonable restraints. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 16 > RESTRAINT -- REASONABLENESS > Headnote:
LEdHN2.[] 2.

For purposes of *15 U.S.C.S. § 1*, restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable per se because they always or almost always tend to restrict competition and decrease output. Typically only horizontal restraints, restraints imposed by agreement between competitors, qualify as unreasonable per se. Restraints that are not unreasonable per se are judged under the rule of reason. The rule of reason requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition. The goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 16 > VERTICAL RESTRAINTS -- REASON > Headnote:
LEdHN3.[] 3.

For purposes of *15 U.S.C.S. § 1*, vertical restraints are restraints imposed by agreement between firms at different levels of distribution. Nearly every vertical restraint should be assessed under the rule of reason. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5 > RESTRAINT -- BURDEN > Headnote:
LEdHN4.[] 4.

For purposes of *15 U.S.C.S. § 1*, to determine whether a restraint violates the rule of reason, a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market. If the plaintiff carries its burden, then the burden shifts to the defendant to show a pro-competitive rationale for the restraint. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the pro-competitive efficiencies could be reasonably achieved through less anticompetitive means. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5 > RESTRAINT -- CARRYING BURDEN > Headnote:
LEdHN5.[] 5.

Plaintiffs under *15 U.S.C.S. § 1* can carry their initial burden of proving that the defendant's action has an anticompetitive effect by making this showing directly or indirectly. Direct evidence of anticompetitive effects would be proof of actual detrimental effects on competition, such as reduced output, increased prices, or decreased quality in the relevant market. Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > RESTRAINTS -- RELEVANT MARKET > Headnote:
LEdHN6.[] 6.

Because legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. Without a definition of the market there is no way to measure the defendant's ability to lessen or destroy competition. Thus, the relevant market is defined as the area of effective competition. Typically this is the arena within which significant substitution in consumption or production occurs. But courts should combine different products or services into a single market when that combination reflects commercial realities. The definition of the relevant market must correspond to the commercial realities of the industry. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > RESTRAINTS -- RELEVANT MARKET > Headnote:
LEdHN7.[] 7.

For purposes of *15 U.S.C.S. § 1*, vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the court first defines the relevant market. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- TWO-SIDED PLATFORM > Headnote:
LEdHN8.[] 8.

For purposes of *15 U.S.C.S. § 1*, due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. And the fact that two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- TRANSACTION PLATFORMS > Headnote:
LEdHN9.[] 9.

For purposes of *15 U.S.C.S. § 1*, because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as supplying only one product, i.e., transactions. In the credit card market, these transactions are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- CREDIT CARD COMPANIES > Headnote:
LEdHN10.[] 10.

For purposes of *15 U.S.C.S. § 1*, credit card companies are best under-stood as supplying only one product, transactions, which is jointly consumed by a cardholder and a merchant. Merchant services and cardholder services are both inputs to this single product. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 14 > TRANSACTION PLATFORMS -- BOTH SIDES > Headnote:
LEdHN11.[] 11.

For purposes of *15 U.S.C.S. § 1*, evaluating both sides of a two-sided transaction platform is necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > MARKET -- TWO-SIDED TRANSACTIONS > Headnote:
LEdHN12.[] 12.

For purposes of *15 U.S.C.S. § 1*, in two-sided transaction markets, only one market should be defined. Any other analysis would lead to mistaken inferences of the kind that could chill the very conduct the antitrust laws are designed to protect. A court must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. Courts should avoid increasing the total cost of the antitrust system by prohibiting pro-competitive conduct the antitrust laws should encourage. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5Restraints of Trade, Monopolies, and Unfair Trade Practices 19 > CREDIT CARD MARKET -- PROOF REQUIRED > Headnote:
LEdHN13.[] 13.

For purposes of *15 U.S.C.S. § 1*, the credit card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit card market as a whole, plaintiffs must prove that a credit card company's action increased the cost of credit card transactions above a competitive level, reduced the number of credit card transactions, or otherwise stifled competition in the credit card market. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Evidence 343.5 > MARKET POWER -- INFERENCES > Headnote:
LEdHN14.[] 14.

For purposes of *15 U.S.C.S. § 1*, market power is the ability to raise price profitably by restricting output. Competitive injury from price and output data will not be inferred absent some evidence that tends to prove that output was restricted or prices were above a competitive level. Where output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 14 > RESTRAINTS -- COMPETITION > Headnote:
LEdHN15.[] 15.

For purposes of *15 U.S.C.S. § 1*, vertical restraints can prevent retailers from free riding and thus increase the availability of tangible or intangible services or promotional efforts that enhance competition and consumer welfare. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices 6 > ***ANTITRUST LAW*** -- PURPOSE > Headnote:
LEdHN16.[] 16.

It is the promotion of interbrand competition that is the primary purpose of the antitrust laws. (Thomas, J., joined by Roberts, Ch. J., and Kennedy, Alito, and Gorsuch, JJ.)

Syllabus

[*2276] Respondent credit-card companies American Express Company and American Express Travel Related Services Company (collectively, Amex) operate what economists call a "two-sided platform," **[*2277]** providing services to two **[**683]** different groups (cardholders and merchants) who depend on the platform to intermediate between them. Because the interaction between the two groups is a transaction, credit-card networks are a special type of two-sided platform known as a "transaction" platform. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. Unlike traditional markets, two-sided platforms exhibit "indirect network effects," which exist where the value of the platform to one group depends on how many members of another group participate. Two-sided platforms must take these effects into account before making a change in price on either side, or they risk creating a feedback loop of declining demand. Thus, striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms **[***2]** to maximize the value of their services and to compete with their rivals.

Visa and MasterCard--two of the major players in the credit-card market--have significant structural advantages over Amex. Amex competes with them by using a different business model, which focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than the other credit-card companies. Amex must continually invest in its cardholder rewards program to maintain its cardholders' loyalty. But to fund those investments, it must charge merchants higher fees than its rivals. Although this business model has stimulated competitive innovations in the credit-card market, it sometimes causes friction with merchants. To avoid higher fees, merchants sometimes attempt to dissuade cardholders from using Amex cards at the point of sale--a practice known as "steering." Amex places antisteering provisions in its contracts with merchants to combat this.

In this case, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate *§1 of the Sherman Antitrust Act*. The District Court agreed, finding that the credit-card **[***3]** market should be treated as two separate markets--one for merchants and one for cardholders--and that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. The Second Circuit reversed. It determined that the credit-card market is one market, not two. And it concluded that Amex's antisteering provisions did not violate *§1*.

Held:

Amex's antisteering provisions do not violate federal ***antitrust law***. *Pp. ___ - ___, 201 L. Ed. 2d, at 689-697*.

(a) *Section 1 of the Sherman Act* prohibits "unreasonable restraints" of trade. *State Oil Co. v. Khan, 522 U. S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199*. Restraints may be unreasonable in one of two ways--unreasonable *per se* or unreasonable as judged under the "rule of reason." *Business Electronics Corp. v. Sharp Electronics Corp., 485 U. S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808*. The parties agree that Amex's antisteering provisions should be judged under the rule of reason using a three-step burden-shifting framework. They ask this Court to decide whether the plaintiffs have satisfied the first step in that framework--*i.e.*, whether they have **[**684]** proved that Amex's antisteering provisions have a substantial anticompetitive effect that harms consumers in the relevant market. *Pp. ___ - ___, 201 L. Ed. 2d, at 689-691*.

(b) Applying the rule of reason generally requires an accurate definition of the relevant market. In this case, both sides of the two-sided credit-card **[***4]** market--cardholders and merchants--must be considered. Only a company with both cardholders **[*2278]** and merchants willing to use its network could sell transactions and compete in the credit-card market. And because credit-card networks cannot make a sale unless both sides of the platform simultaneously agree to use their services, they exhibit more pronounced indirect network effects and interconnected pricing and demand. Indeed, credit-card networks are best understood as supplying only one product--the transaction--that is jointly consumed by a cardholder and a merchant. Accordingly, the two-sided market for credit-card transactions should be analyzed as a whole. *Pp. ___ - ___, 201 L. Ed. 2d, at 691-693*.

(c) The plaintiffs have not carried their burden to show anticompetitive effects. Their argument--that Amex's antisteering provisions increase merchant fees--wrongly focuses on just one side of the market. Evidence of a price increase on one side of a two-sided transaction platform cannot, by itself, demonstrate an anticompetitive exercise of market power. Instead, plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card **[***5]** transactions, or otherwise stifled competition in the two-sided credit-card market. They failed to do so. *Pp. ___ - ___, 201 L. Ed. 2d, at 693-697*.

(1) The plaintiffs offered no evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. It uses higher merchant fees to offer its cardholders a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes it valuable to merchants. In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees: Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted. *Pp. ___ - ___, 201 L. Ed. 2d, at 694*.

(2) The plaintiffs' evidence that Amex's merchant-fee increases between 2005 and 2010 were not entirely spent on cardholder rewards does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. This Court will "not infer competitive **[***6]** injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U. S. 209, 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168*. There is no such evidence here. Output of credit-card transactions increased during the relevant period, and the plaintiffs did not show **[**685]** that Amex charged more than its competitors. *P. ___, 201 L. Ed. 2d, at 695*.

(3) The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while they have been in place, the market experienced expanding output and improved quality. Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Amex's competitors have exploited its higher merchant fees to their advantage. Lastly, there is nothing inherently anticompetitive about the provisions. They actually stem negative externalities in the credit-card market and promote interbrand competition. And they do not prevent competing credit-card networks from offering lower merchant fees or promoting their broader merchant acceptance. *Pp. ___ - ___, 201 L. Ed. 2d, at 695-696*.

838 F. 3d 179, affirmed.

Counsel: Eric E. Murphy argued the cause for petitioners and state respondents.

Malcolm L. Stewart argued the cause for respondent United States in support of petitioners.

Evan R. Chesler argued the cause for respondents.

Judges: Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Alito, **[***7]** and Gorsuch, JJ., joined. Breyer, J., filed a dissenting opinion, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

Opinion by: THOMAS

Opinion

[*2279] Justice **Thomas** delivered the opinion of the Court.

American Express Company and American Express Travel Related Services Company (collectively, Amex) provide credit-card **[*2280]** services to both merchants and cardholders. When a cardholder buys something from a merchant who accepts Amex credit cards, Amex processes the transaction through its network, promptly pays the merchant, and subtracts a fee. If a merchant wants to accept Amex credit cards—and attract Amex cardholders to its business—Amex requires the merchant to agree to an antisteering contractual provision. The antisteering provision prohibits merchants from discouraging customers from using their Amex card after they have already entered the store and are about to buy something, thereby avoiding Amex's fee. In this case, we must decide whether Amex's antisteering provisions violate federal ***antitrust law***. We conclude they do not.

I

A

Credit cards have become a primary way that consumers in the United States purchase goods and services. When a cardholder uses a credit card to buy something from a merchant, the **[***8]** transaction is facilitated by a credit-card network. The network provides separate but interrelated services to both cardholders and merchants. For cardholders, the network extends them credit, which allows them to make purchases without cash and to defer payment until later. Cardholders also can receive rewards based on the amount of money they spend, such as airline miles, points for travel, or cash back. For merchants, the network allows them to avoid the cost of processing transactions and offers them quick, guaranteed payment. This saves merchants the trouble and risk of extending credit to customers, and it increases the number and value of sales that they can make.

[686]** By providing these services to cardholders and merchants, credit-card companies bring these parties together, and therefore operate what economists call a "two-sided platform." As the name implies, a two-sided platform offers different products or services to two different groups who both depend on the platform to intermediate between them. See Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667 (2008) (Evans & Schmalensee); Evans & Noel, Defining Antitrust Markets When Firms **[***9]** Operate Two-Sided Platforms, *2005 Colum. Bus. L. Rev. 667, 668* (Evans & Noel); Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 296 (2014) (Filistrucchi). For credit cards, that interaction is a transaction. Thus, credit-card networks are a special type of two-sided platform known as a "transaction" platform. See *id*., at 301, 304, 307; Evans & Noel 676-678. The key feature of transaction platforms is that they cannot make a sale to one side of the platform without simultaneously making a sale to the other. See Klein, Lerner, Murphy, & Plache, Competition in Two-Sided Markets: The Antitrust Economics of Payment Card Interchange Fees, 73 Antitrust L. J. 571, 580, 583 (2006) (Klein). For example, no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use the same credit-card network. See Filistrucchi 301.

Two-sided platforms differ from traditional markets in important ways. Most relevant here, two-sided platforms often exhibit what economists call "indirect network effects." Evans & Schmalensee 667. Indirect network effects exist where the value of the two-sided platform to one group of participants depends on how many members of a different **[***10]** group participate. D. Evans & R. Schmalensee, Matchmakers: The New Economics of **[*2281]** Multisided Platforms 25 (2016). In other words, the value of the services that a two-sided platform provides increases as the number of participants on both sides of the platform increases. A credit card, for example, is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it. See Evans & Noel 686-687; Klein 580, 584. To ensure sufficient participation, two-sided platforms must be sensitive to the prices that they charge each side. See Evans & Schmalensee 675; Evans & Noel 680; Muris, Payment Card Regulation and the (Mis)Application of the Economics of Two-Sided Markets, *2005 Colum. Bus. L. Rev. 515, 532-533* (Muris); Rochet & Tirole, Platform Competition in Two-Sided Markets, 1 J. Eur. Econ. Assn. 990, 1013 (2003). Raising the price on side A risks losing participation on that side, which decreases the value of the platform to side B. If participants on side B leave due to this loss in value, then the platform has even less value to side A—risking a feedback loop of declining demand. See Evans & Schmalensee 675; Evans & Noel 680-681. Two-sided platforms therefore must take **[***11]** these indirect network effects into account before making a **[**687]** change in price on either side. See Evans & Schmalensee 675; Evans & Noel 680-681. [1]

Sometimes indirect network effects require two-sided platforms to charge one side much more than the other. See Evans & Schmalensee 667, 675, 681, 690-691; Evans & Noel 668, 691; Klein 585; Filistrucchi 300. For two-sided platforms, "'the [relative] price structure matters, and platforms must design it so as to bring both sides on board.'" Evans & Schmalensee 669 (quoting Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006)). The optimal price might require charging the side with more elastic demand a below-cost (or even negative) price. See Muris 519, 550; Klein 579; Evans & Schmalensee 675; Evans & Noel 681. With credit cards, for example, networks often charge cardholders a lower fee than merchants because cardholders are more price sensitive. [2] See Muris 522; Klein 573-574, 585, 595. In fact, the network might well *lose* money on the cardholder side by offering rewards such as cash back, airline miles, or gift cards. See Klein 587; Evans & Schmalensee 672. The network can do this because increasing the number **[***12]** of cardholders increases the value of accepting the card to merchants and, thus, increases the number of merchants who accept it. Muris 522; Evans & Schmalensee 692. Networks can then charge those merchants a fee for every transaction (typically a percentage of the purchase price). Striking the optimal balance of the prices charged on each side of the platform is essential for two-sided platforms to maximize the value of their services and to compete with their rivals.

[*2282] B

Amex, Visa, MasterCard, and Discover are the four dominant participants in the credit-card market. Visa, which is by far the largest, has 45% of the market as measured by transaction volume. [3] Amex and MasterCard trail with 26.4% and 23.3%, respectively, while Discover has just 5.3% of the market.

Visa and MasterCard have significant structural advantages over Amex. Visa and MasterCard began as bank cooperatives and thus almost every bank that offers credit cards is in the Visa or MasterCard network. This makes it very likely that the average consumer carries, and the average merchant accepts, Visa or MasterCard. As a result, the vast majority of Amex cardholders have a Visa or MasterCard, but only a small number of Visa **[***13]** and Master-Card cardholders have an Amex. Indeed, Visa and MasterCard account for **[**688]** more than 432 million cards in circulation in the United States, while Amex has only 53 million. And while 3.4 million merchants at 6.4 million locations accept Amex, nearly three million more locations accept Visa, MasterCard, and Discover. [4]

Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior

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[1] In a competitive market, indirect network effects also encourage companies to take increased profits from a price increase on side A and spend them on side B to ensure more robust participation on that side and to stem the impact of indirect network effects. See Evans & Schmalensee 688; Evans & Noel 670-671, 695. Indirect network effects thus limit the platform's ability to raise overall prices and impose a check on its market power. See Evans & Schmalensee 688; Evans & Noel 695.

[2] "Cardholders are more price-sensitive because many consumers have multiple payment methods, including alternative payment cards. Most merchants, by contrast, cannot accept just one major card because they are likely to lose profitable incremental sales if they do not take [all] the major payment cards. Because most consumers do not carry all of the major payment cards, refusing to accept a major card may cost the merchant substantial sales." Muris 522.

[3] All figures are accurate as of 2013.

[4] Discover entered the credit-card market several years after Amex, Visa, and MasterCard. It nonetheless managed to gain a foothold because Sears marketed Discover to its already significant base of private-label cardholders. Discover's business model shares certain features with Amex, Visa, and MasterCard. Like Amex, Discover interacts directly with its cardholders. But like Visa and MasterCard, Discover uses banks that cooperate with its network to interact with merchants.

rewards, Amex tends to attract cardholders who are wealthier and spend more money. Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants.

Amex's business model has significantly influenced the credit-card market. To compete for the valuable cardholders that Amex attracts, both Visa and MasterCard have introduced premium cards that, like Amex, charge merchants higher fees and offer **[***14]** cardholders better rewards. To maintain their lower merchant fees, Visa and MasterCard have created a sliding scale for their various cards—charging merchants less for low-reward cards and more for high-reward cards. This differs from Amex's strategy, which is to charge merchants the same fee no matter the rewards that its card offers. Another way that Amex has influenced the credit-card market is by making banking and card-payment services available to low-income individuals, who otherwise could not qualify for a credit card and could not afford the fees that traditional banks charge. See 2 Record 3835-3837, 4527-4529. In sum, Amex's business model has stimulated competitive innovations in the credit-card market, increasing the volume of transactions and improving the quality of the services.

Despite these improvements, Amex's business model sometimes causes friction with merchants. To maintain the loyalty of its cardholders, Amex must continually invest in its rewards program. But, to fund those investments, Amex must charge merchants higher fees than its rivals. **[*2283]** Even though Amex's investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees. **[***15]** One way that merchants try to avoid them, while still enticing Amex's cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale. This practice is known as "steering."

Amex has prohibited steering since the 1950s by placing antisteering provisions in its contracts with merchants. These antisteering provisions prohibit merchants from implying a preference for non-Amex cards; dissuading customers from using Amex cards; persuading customers to use other cards; imposing any special restrictions, conditions, disadvantages, **[**689]** or fees on Amex cards; or promoting other cards more than Amex. The antisteering provisions do not, however, prevent merchants from steering customers toward debit cards, checks, or cash.

C

In October 2010, the United States and several States (collectively, plaintiffs) sued Amex, claiming that its antisteering provisions violate *§1 of the Sherman Act, 26 Stat. 209*, as amended, *15 U. S. C. §1*. [5] After a 7-week trial, the District Court agreed that Amex's antisteering provisions violate *§1*. *United States v. American Express Co., 88 F. Supp. 3d 143, 151-152 (EDNY 2015)*. It found that the credit-card market should be treated as two separate markets—one for merchants and one for cardholders. See *id., at 171-175*. Evaluating the effects on the merchant side **[***16]** of the market, the District Court found that Amex's antisteering provisions are anticompetitive because they result in higher merchant fees. See *id., at 195-224*.

The Court of Appeals for the Second Circuit reversed. *United States v. American Express Co., 838 F. 3d 179, 184 (2016)*. It concluded that the credit-card market is one market, not two. *Id., at 196-200*. Evaluating the credit-card market as a whole, the Second Circuit concluded that Amex's antisteering provisions were not anticompetitive and did not violate *§1*. See *id., at 200-206*.

We granted certiorari, *583 U. S. ___, 138 S. Ct. 355, 199 L. Ed. 2d 261 (2017)*, and now affirm.

II

HN1[] ***LEdHN[1]***[] [1] *Section 1 of the Sherman Act* prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." *15 U. S. C. §1*. This Court has long recognized that, "[i]n view of the common law and the law in this country" when the *Sherman Act* was passed, the phrase "restraint of trade" is best read to mean "undue restraint." *Standard Oil Co. of N. J. v. United*

[5] Plaintiffs also sued Visa and MasterCard, claiming that their anti-steering provisions violated *§1*. But Visa and MasterCard voluntarily revoked their antisteering provisions and are no longer parties to this case.

States, 221 U. S. 1, 59-60, 31 S. Ct. 502, 55 L. Ed. 619 (1911). This Court's precedents have thus understood §1 "to outlaw only *unreasonable* restraints." State Oil Co. v. Khan, 522 U. S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) (emphasis added).

HN2[] **LEdHN[2]**[] [2] Restraints can be unreasonable in one of two ways. A small group of restraints are unreasonable *per se* because they "' "always or almost always tend to restrict competition and decrease output." '" Business Electronics Corp. v. Sharp Electronics Corp., 485 U. S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988). Typically only "horizontal" restraints—restraints **[***17]** "imposed by agreement between **[*2284]** competitors"—qualify as unreasonable *per se*. Id., at 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808. Restraints that are not unreasonable *per se* are judged under the "rule of reason." Id., at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808. The rule of reason requires courts to conduct a fact-specific assessment of "market power and market structure . . . to assess the [restraint]'s actual effect" on competition. Copperweld Corp. v. Independence **[**690]** Tube Corp., 467 U. S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). The goal is to "distinguis[h] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 886, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007).

In this case, both sides correctly acknowledge that Amex's antisteering provisions are **HN3**[] **LEdHN[3]**[] [3] vertical restraints—*i.e.,* restraints "imposed by agreement between firms at different levels of distribution." Business Electronics, supra, at 730, 108 S. Ct. 1515, 99 L. Ed. 2d 808. The parties also correctly acknowledge that, like nearly every other vertical restraint, the antisteering provisions should be assessed under the rule of reason. See Leegin, supra, at 882, 127 S. Ct. 2705, 168 L. Ed. 2d 623; State Oil, supra, at 19, 118 S. Ct. 275, 139 L. Ed. 2d 199; Business Electronics, supra, at 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808; Continental T. V., Inc. v. GTE Sylvania Inc., 433 U. S. 36, 57, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977).

HN4[] **LEdHN[4]**[] [4] To determine whether a restraint violates the rule of reason, the parties agree that a three-step, burden-shifting framework applies. Under this framework, the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers **[***18]** in the relevant market. See 1 J. Kalinowski, Antitrust Laws and Trade Regulation §12.02[1] (2d ed. 2017) (Kalinowski); P. Areeda & H. Hovenkamp, Fundamentals of ***Antitrust Law*** §15.02[B] (4th ed. 2017) (Areeda & Hovenkamp); Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs., 996 F.2d 537, 543 (CA2 1993). If the plaintiff carries its burden, then the burden shifts to the defendant to show a procompetitive rationale for the restraint. See 1 Kalinowski §12.02[1]; Areeda & Hovenkamp §15.02[B]; Capital Imaging Assocs., supra, at 543. If the defendant makes this showing, then the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. See 1 Kalinowski §12.02[1]; Capital Imaging Assocs., supra, at 543.

Here, the parties ask us to decide whether the **HN5**[] **LEdHN[5]**[] [5] plaintiffs have carried their initial burden of proving that Amex's antisteering provisions have an anticompetitive effect. The plaintiffs can make this showing directly or indirectly. Direct evidence of anticompetitive effects would be "'proof of actual detrimental effects [on competition],'" FTC v. Indiana Federation of Dentists, 476 U. S. 447, 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986), such as reduced output, increased prices, or decreased quality in the relevant market, see 1 Kalinowski §12.02[2]; Craftsmen Limousine, Inc. v. Ford Motor Co., 491 F.3d 380, 390 (CA8 2007); Virginia Atlantic Airways Ltd. v. British Airways PLC, 257 F. 3d 256, 264 (CA2 2001). Indirect evidence would be proof of market power plus some evidence that the challenged restraint harms competition. See 1 Kalinowski §12.02[2]; Tops Mkts., Inc. v. Quality Mkts., Inc., 142 F.3d 90, 97 (CA2 1998); Spanish Broadcasting System of Fla. v. Clear Channel Communications, Inc., 376 F. 3d 1065, 1073 (CA11 2004).

Here, the plaintiffs rely exclusively on direct evidence to prove that Amex's **[**691]** antisteering **[***19]** provisions have caused anticompetitive **[*2285]** effects in the credit-card market. [6] To assess this evidence, we must first

[6] Although the plaintiffs relied on indirect evidence below, they have abandoned that argument in this Court. See Brief for United States 23, n. 4 (citing Pet. for Cert. i, 18-25).

define the relevant market. Once defined, it becomes clear that the plaintiffs' evidence is insufficient to carry their burden.

A

HN6[] *LEdHN[6]*[] [6] Because "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in ***antitrust law***," *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U. S. 451, 466-467, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*, courts usually cannot properly apply the rule of reason without an accurate definition of the relevant market. [7] "Without a definition of [the] market there is no way to measure [the defendant's] ability to lessen or destroy competition." *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U. S. 172, 177, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*; accord, 2 Kalinowski §24.01[4][a]. Thus, the relevant market is defined as "the area of effective competition." *Ibid.* Typically this is the "arena within which significant substitution in consumption or production occurs." Areeda & Hovenkamp §5.02; accord, 2 Kalinowski §24.02[1]; *United States v. Grinnell Corp., 384 U. S. 563, 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966)*. But courts should "combin[e]" different products or services into "a single market" when "that combination reflects commercial realities." *Id., at 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778*; see also *Brown Shoe Co. v. United States, 370 U. S. 294, 336-337, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)* (pointing out that "the definition of the relevant market" must "'correspond to the commercial realities' of the industry").

As explained, credit-card networks **[**692]** are two-sided **[***20]** platforms. *HN8*[] *LEdHN[8]*[] [8] Due to indirect network effects, two-sided platforms cannot raise prices on one side without risking a feedback loop of declining demand. See Evans & Schmalensee 674-675; Evans & Noel 680-681. And the fact that two-sided platforms charge one side a **[*2286]** price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing. See Klein 574, 595, 598, 626. Price increases on one side of the platform likewise do not suggest anticompetitive effects without some evidence that they have increased the overall cost of the platform's services. See *id.,* at 575, 594, 626. Thus, courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market.

To be sure, it is not always necessary to consider both sides of a two-sided platform. A market should be treated as one sided when the impacts of indirect network effects and relative pricing in that market are minor. See Filistrucchi 321-322. Newspapers that sell advertisements, for example, arguably operate a two-sided platform because the value of an advertisement increases as more people read the newspaper. *Id*., at 297, 315; Klein 579. But in the newspaper-advertisement market, **[***21]** the indirect networks effects operate in only one direction; newspaper readers are largely indifferent to the amount of advertising that a newspaper contains. See Filistrucchi 321, 323, and n. 99; Klein 583. Because of these weak indirect network effects, the market for newspaper advertising

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[7] The plaintiffs argue that we need not define the relevant market in this case because they have offered actual evidence of adverse effects on competition—namely, increased merchant fees. See Brief for United States 40-41 (citing *FTC v. Indiana Federation of Dentists, 476 U. S. 447, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*, and *Catalano, Inc. v. Target Sales, Inc., 446 U. S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980)* (*per curiam*)). We disagree. The cases that the plaintiffs cite for this proposition evaluated whether horizontal restraints had an adverse effect on competition. See *Indiana Federation of Dentists, supra, at 450-451, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445* (agreement between competing dentists not to share X rays with insurance companies); *Catalano, supra, at 644-645, 650, 100 S. Ct. 1925, 64 L. Ed. 2d 580* (agreement among competing wholesalers not to compete on extending credit to retailers). Given that horizontal restraints involve agreements between competitors not to compete in some way, this Court concluded that it did not need to precisely define the relevant market to conclude that these agreements were anticompetitive. See *Indiana Federation of Dentists, supra, at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445*; *Catalano, supra, at 648-649, 100 S. Ct. 1925, 64 L. Ed. 2d 580*. But vertical restraints are different. See *Arizona v. Maricopa County Medical Soc., 457 U. S. 332, 348, n. 18, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)*; *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 888, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. *HN7*[] *LEdHN[7]*[] [7] Vertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first defines the relevant market. See *id., at 898, 127 S. Ct. 2705, 168 L. Ed. 2d 623* (noting that a vertical restraint "may not be a serious concern unless the relevant entity has market power"); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L. J. 135, 160 (1984) ("[T]he possibly anticompetitive manifestations of vertical arrangements can occur only if there is market power").

behaves much like a one-sided market and should be analyzed as such. See Filistrucchi 321; *Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 610, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*.

But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card-payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually. See Klein 583 ("Because cardholders and merchants jointly consume a single product, payment card transactions, their consumption of payment card transactions must be directly proportional"). To optimize sales, the network must find the balance **[***22]** of pricing that encourages the greatest number of matches between cardholders and merchants.

HN9[] ***LEdHN[9]***[] [9] Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as "suppl[ying] only one product"—transactions. Klein 580. In the credit-card market, these transactions "are jointly consumed by a cardholder, who uses the payment card to make a transaction, and a merchant, who accepts the payment card as a method of payment." *Ibid.* Tellingly, credit cards **[**693]** determine their market share by measuring the volume of transactions they have sold. [8]

[*2287] ***HN11***[] ***LEdHN[11]***[] [11] Evaluating both sides of a two-sided transaction platform is also necessary to accurately assess competition. Only other two-sided platforms can compete with a two-sided platform for transactions. See Filistrucchi 301. A credit-card company that processed transactions for merchants, but that had no cardholders willing to use its card, could not compete with Amex. See *ibid.* Only a company that had both cardholders and merchants willing to **[***23]** use its network could sell transactions and compete in the credit-card market. Similarly, if a merchant accepts the four major credit cards, but a cardholder only uses Visa or Amex, only those two cards can compete for the particular transaction. Thus, competition cannot be accurately assessed by looking at only one side of the platform in isolation. [9]

For all these reasons, ***HN12***[] ***LEdHN[12]***[] [12] "[i]n two-sided transaction markets, only one market should be defined." *Id*., at 302; see also Evans & Noel 671 ("[F]ocusing on one dimension of . . . competition tends to distort the competition that actually exists among [two-sided platforms]"). Any other analysis would lead to "' "mistaken inferences" '" of the kind that could "' "chill the very conduct the antitrust laws are designed to protect." '" *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U. S. 209, 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993)*; see also *Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U. S. 574, 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* ("'[W]e must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition'"); *Leegin, 551 U. S., at 895, 127 S. Ct. 2705, 168 L. Ed. 2d 623* (noting that courts should avoid "increas[ing] the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage"). Accordingly, we will analyze the two-sided market for credit-card **[***24]** transactions as a whole to determine whether the plaintiffs have shown that Amex's antisteering provisions have anticompetitive effects.

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[8] Contrary to the dissent's assertion, *post, at ___ - ___, 201 L. Ed. 2d, at 703*, merchant services and cardholder services are not complements. See Filistrucchi 297 ("[A] two-sided market [is] different from markets for complementary products, in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices"). As already explained,***HN10***[] ***LEdHN[10]***[] [10] credit-card companies are best understood as supplying only one product—transactions—which is jointly consumed by a cardholder and a merchant. See Klein 580. Merchant services and cardholder services are both inputs to this single product. See *ibid.*

[9] Nontransaction platforms, by contrast, often do compete with companies that do not operate on both sides of their platform. A newspaper that sells advertising, for example, might have to compete with a television network, even though the two do not meaningfully compete for viewers. See Filistrucchi 301.

B

The plaintiffs have not carried their burden to prove anticompetitive effects in the relevant market. The plaintiffs stake their entire case on proving that Amex's agreements increase merchant fees. We find this argument unpersuasive.

As an initial matter, the plaintiffs' argument about merchant fees wrongly **[**694]** focuses on only one side of the two-sided credit-card market. As explained, ***HN13***[] ***LEdHN[13]***[] [13] the credit-card market must be defined to include both merchants and cardholders. Focusing on merchant fees alone misses the mark because the product that credit-card companies sell is transactions, not services to merchants, and the competitive effects of a restraint on transactions cannot be judged by looking at merchants alone. Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power. To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions **[***25]** above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market. See 1 Kalinowski §12.02[2]; **[*2288]** *Craftsman Limousine, Inc., 491 F. 3d, at 390*; *Virginia Atlantic Airways Ltd., 257 F. 3d, at 264*. They failed to do so.

1

The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market. As the District Court found, the plaintiffs failed to offer any reliable measure of Amex's transaction price or profit margins. *88 F. Supp. 3d, at 198, 215*. And the evidence about whether Amex charges more than its competitors was ultimately inconclusive. *Id., at 199, 202, 215*.

Amex's increased merchant fees reflect increases in the value of its services and the cost of its transactions, not an ability to charge above a competitive price. Amex began raising its merchant fees in 2005 after Visa and MasterCard raised their fees in the early 2000s. *Id., at 195, 199-200*. As explained, Amex has historically charged higher merchant fees than these competitors because it delivers wealthier cardholders who spend more money. *Id., at 200-201*. Amex's higher merchant fees are based on a careful study of how much additional value its cardholders offer merchants. See *id., at 192-193*. On the other side of the market, Amex uses its higher merchant fees to offer its cardholders **[***26]** a more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants. *Id., at 160, 191-195*. That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anticompetitive ends. See Evans & Noel 670-671; Klein 574-575, 594-595, 598, 626.

In addition, the evidence that does exist cuts against the plaintiffs' view that Amex's antisteering provisions are the cause of any increases in merchant fees. Visa and MasterCard's merchant fees have continued to increase, even at merchant locations where Amex is not accepted and, thus, Amex's antisteering provisions do not apply. See *88 F. Supp. 3d, at 222*. This suggests that the cause of increased merchant fees is not Amex's antisteering provisions, but rather increased competition for cardholders and a corresponding marketwide adjustment in the relative price charged to merchants. See Klein 575, 609.

2

The plaintiffs did offer evidence **[**695]** that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on **[***27]** cardholder rewards. See *88 F. Supp. 3d, at 195-197, 215*. The plaintiffs believe that this evidence shows that the price of Amex's transactions increased.

Even assuming the plaintiffs are correct, this evidence does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices. ***HN14***[] ***LEdHN[14]***[] [14] "Market power is the ability to raise price profitably *by restricting output*." Areeda & Hovenkamp §5.01 (emphasis added); accord, *Kodak, 504 U. S., at 464,* 112 S. Ct. 2072, 119 L. Ed. 2d 265; Business Electronics, 485 U. S., at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808. This Court will "not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." Brooke Group Ltd., 509 U. S., at 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168. There is no such evidence in this case. The output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%. See 838 F. 3d, at 206. "Where . . . output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand." **[*2289]** Brooke Group Ltd., supra, at 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168. And, as previously explained, the plaintiffs did not show that Amex charged more than its competitors.

3

The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. To the contrary, while these agreements have been in place, the credit-card market experienced **[***28]** expanding output and improved quality. Amex's business model spurred Visa and MasterCard to offer new premium card categories with higher rewards. And it has increased the availability of card services, including free banking and card-payment services for low-income customers who otherwise would not be served. Indeed, between 1970 and 2001, the percentage of households with credit cards more than quadrupled, and the proportion of households in the bottom-income quintile with credit cards grew from just 2% to over 38%. See D. Evans & R. Schmalensee, Paying With Plastic: The Digital Revolution in Buying and Borrowing 88-89 (2d ed. 2005) (Paying With Plastic).

Nor have Amex's antisteering provisions ended competition between credit-card networks with respect to merchant fees. Instead, fierce competition between networks has constrained Amex's ability to raise these fees and has, at times, forced Amex to lower them. For instance, when Amex raised its merchant prices between 2005 and 2010, some merchants chose to leave its network. 88 F. Supp. 3d, at 197. And when its remaining merchants complained, Amex stopped raising its merchant prices. Id., at 198. In another instance in the late 1980s and early 1990s, competition **[***29]** forced Amex to offer lower merchant fees to "everyday spend" merchants—supermarkets, gas stations, pharmacies, and the like—to persuade them to accept Amex. See id., at 160-161, 202.

In addition, Amex's competitors have exploited its higher merchant **[**696]** fees to their advantage. By charging lower merchant fees, Visa, MasterCard, and Discover have achieved broader merchant acceptance—approximately 3 million more locations than Amex. Id., at 204. This broader merchant acceptance is a major advantage for these networks and a significant challenge for Amex, since consumers prefer cards that will be accepted everywhere. *Ibid.* And to compete even further with Amex, Visa and MasterCard charge different merchant fees for different types of cards to maintain their comparatively lower merchant fees and broader acceptance. Over the long run, this competition has created a trend of declining merchant fees in the credit-card market. In fact, since the first credit card was introduced in the 1950s, merchant fees—including Amex's merchant fees—have decreased by more than half. See id., at 202-203; Paying With Plastic 54, 126, 152.

Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. These agreements actually stem **[***30]** negative externalities in the credit-card market and promote interbrand competition. When merchants steer cardholders away from Amex at the point of sale, it undermines the cardholder's expectation of "welcome acceptance"—the promise of a frictionless transaction. 88 F. Supp. 3d, at 156. A lack of welcome acceptance at one merchant makes a cardholder less likely to use Amex at all other merchants. This externality endangers the viability of the entire Amex network. And it undermines the investments that Amex has made to encourage increased cardholder spending, which discourages investments in rewards and ultimately harms both cardholders and merchants. Cf. **[*2290]** Leegin, 551 U. S., at 890-891, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (recognizing that ***HN15***[] ***LEdHN[15]***[] [15] vertical restraints can prevent retailers from free riding and thus increase the availability of "tangible or intangible services or promotional efforts" that enhance competition and consumer welfare). Perhaps most importantly, antisteering provisions do not prevent Visa, MasterCard, or Discover from competing against Amex by offering lower merchant fees or promoting their broader merchant acceptance. [10]

In sum, the plaintiffs have not satisfied the first step of the rule of reason. They have not carried their burden of **[***31]** proving that Amex's antisteering provisions have anticompetitive effects. Amex's business model has spurred robust interbrand competition and has increased the quality and quantity of credit-card transactions. And ***HN16***[] ***LEdHN[16]***[] [16] it is "[t]he promotion of interbrand competition," after all, that "is . . . 'the primary purpose of the antitrust laws.'" *Id., at 890, 127 S. Ct. 2705, 168 L. Ed. 2d 623*.

[697]** ***

Because Amex's antisteering provisions do not unreasonably restrain trade, we affirm the judgment of the Court of Appeals.

It is so ordered.

Dissent by: BREYER; GINSBURG; SOTOMAYOR; KAGAN

Dissent

Justice **Breyer**, with whom Justice **Ginsburg**, Justice **Sotomayor**, and Justice **Kagan** join, dissenting.

For more than 120 years, the American economy has prospered by charting a middle path between pure *laissez-faire* and state capitalism, governed by an ***antitrust law*** "dedicated to the principle that *markets*, not individual firms and certainly not political power, produce the optimal mixture of goods and services." 1 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶100b, p. 4 (4th ed. 2013) (Areeda & Hovenkamp). By means of a strong ***antitrust law***, the United States has sought to avoid the danger of monopoly capitalism. Long gone, we hope, are the days when the great trusts presided unfettered **[***32]** by competition over the American economy.

This lawsuit is emblematic of the American approach. Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. See GAO, Credit and Debit Cards: Federal Entities Are Taking Actions to Limit Their Interchange Fees, but Additional Revenue Collection Cost Savings May Exist 31-35 (GAO-08-558, 2008). The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contract-ual barrier with anticompetitive effects. The majority rejects that effort. But because the challenged contractual term clearly has serious anticompetitive effects, I dissent.

I

I agree with the majority and the parties that this case is properly evaluated under the three-step "rule of reason" that governs many antitrust lawsuits. **[*2291]** *Ante, at ___ - ___, 201 L. Ed. 2d, at 690-691*. Under that approach, a court looks first at the agreement or restraint at issue to assess whether it has had, or is likely to have,

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[10] The plaintiffs argue that *United States v. Topco Associates, Inc., 405 U. S. 596, 610, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*, forbids any restraint that would restrict competition in part of the market—here, for example, merchant steering. See Brief for Petitioners and Respondents Nebraska, Tennessee, and Texas 30, 42. *Topco* does not stand for such a broad proposition. *Topco* concluded that a horizontal agreement between competitors was unreasonable *per se*, even though the agreement did not extend to every competitor in the market. See *405 U. S., at 599, 608, 92 S. Ct. 1126, 31 L. Ed. 2d 515*. A horizontal agreement between competitors is markedly different from a vertical agreement that incidentally affects one particular method of competition. See *Leegin, 551 U. S., at 888, 127 S. Ct. 2705, 168 L. Ed. 2d 623*; *Maricopa County Medical Soc., 457 U. S., at 348, n. 18, 102 S. Ct. 2466, 73 L. Ed. 2d 48*.

anticompetitive effects. *FTC v. Indiana Federation of Dentists, 476 U. S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)*. In doing so, the court normally asks whether the restraint **[***33]** may tend to impede competition and, if so, whether those who have entered into that restraint have sufficient economic or commercial power for the agreement to make a negative difference. See *id., at 459-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445.* Sometimes, but not always, a court will try to determine the appropriate market (the market that the agreement affects) and determine whether those entering into that agreement have the power to raise prices above the competitive level in that market. See *ibid.*

It is important here to understand that in cases under *§1 of the Sherman Act* (unlike in cases challenging **[**698]** a merger under *§7 of the Clayton Act , 15 U. S. C. §18*), it may well be unnecessary to undertake a sometimes complex, market power inquiry:

> "Since the purpose [in a *Sherman Act §1* case] of the inquiries into . . . market power is [simply] to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction in output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" *Indiana Federation of Dentists, supra, at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445* (quoting 7 P. Areeda, ***Antitrust Law*** ¶1511, p. 429 (3d ed. 1986)).

Second (as treatise writers summarize the case law), if an antitrust plaintiff meets **[***34]** the initial burden of showing that an agreement will likely have anticompetitive effects, normally the "burden shifts to the defendant to show that the restraint in fact serves a legitimate objective." 7 Areeda & Hovenkamp ¶1504b, at 415; see *California Dental Ass'n v. FTC, 526 U.S. 756, 771, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*; *id., at 788, 119 S. Ct. 1604, 143 L. Ed. 2d 935* (Breyer, J., dissenting).

Third, if the defendant successfully bears this burden, the antitrust plaintiff may still carry the day by showing that it is possible to meet the legitimate objective in less restrictive ways, or, perhaps by showing that the legitimate objective does not outweigh the harm that competition will suffer, *i.e.*, that the agreement "on balance" remains unreasonable. 7 Areeda & Hovenkamp ¶1507a, at 442.

Like the Court of Appeals and the parties, the majority addresses only the first step of that three-step framework. *Ante, at ___, 201 L. Ed. 2d, at 691*.

II

A

This case concerns the credit-card business. As the majority explains, *ante, ___, 201 L. Ed. 2d, at 686*, that business involves the selling of two different but related card services. First, when a shopper uses a credit card to buy something from a participating merchant, the credit-card company pays the merchant the amount of money that the merchant's customer has charged to his card and charges the merchant a fee, **[***35]** say 5%, for that speedy-payment service. I shall refer to that kind of transaction as a merchant-related card service. Second, the credit-card company then sends a bill to the merchant's customer, the shopper who holds the card; and the shopper pays the card company the sum that merchant charged the shopper for the goods or services he or she bought. The cardholder also often pays the card company a fee, such as an annual fee for the card or an interest charge for delayed payment. I **[*2292]** shall call that kind of transaction a shopper-related card service. The credit-card company can earn revenue from the sale (directly or indirectly) of each of these services: (1) speedy payment for merchants, and (2) credit for shoppers. (I say "indirectly" to reflect the fact that card companies often create or use networks of banks as part of the process—but I have found nothing here suggesting that that fact makes a significant difference to my analysis.)

Sales of the two basic card services are related. A shopper can pay for a **[**699]** purchase with a particular credit card only if the merchant has signed up for merchant-related card services with the company that issued the credit card that the shopper wishes **[***36]** to use. A firm in the credit-card business is therefore unlikely to make money unless quite a few merchants agree to accept that firm's card and quite a few shoppers agree to carry and use it. In general, the more merchants that sign up with a particular card company, the more useful that card is likely to prove to shoppers and so the more shoppers will sign up; so too, the more shoppers that carry a particular card, the more useful that card is likely to prove to merchants (as it obviously helps them obtain the shoppers' business) and so the more merchants will sign up. Moreover, as a rough rule of thumb (and assuming constant charges), the larger the networks of paying merchants and paying shoppers that a card firm maintains, the larger the revenues that the firm will likely receive, since more payments will be processed using its cards. Thus, it is not surprising that a card company may offer shoppers incentives (say, points redeemable for merchandise or travel) for using its card or that a firm might want merchants to accept its card exclusively.

B

This case focuses upon a practice called "steering." American Express has historically charged higher merchant fees than its competitors. **[***37]** App. to Pet. for Cert. 173a-176a. Hence, fewer merchants accept American Express' cards than its competitors'. *Id.,* at 184a-187a. But, perhaps because American Express cardholders are, on average, wealthier, higher-spending, or more loyal to American Express than other cardholders, vast numbers of merchants still accept American Express cards. See *id.*, at 156a, 176a-177a, 184a-187a. Those who do, however, would (in order to avoid the higher American Express fee) often prefer that their customers use a different card to charge a purchase. Thus, the merchant has a monetary incentive to "steer" the customer towards the use of a different card. A merchant might tell the customer, for example, "American Express costs us more," or "please use Visa if you can," or "free shipping if you use Discover." See *id.,* at 100a-102a.

Steering makes a difference, because without it, the shopper does not care whether the merchant pays more to American Express than it would pay to a different card company—the shopper pays the same price either way. But if steering works, then American Express will find it more difficult to charge more than its competitors for merchant-related services, because merchants will respond by steering their customers, **[***38]** encouraging them to use other cards. Thus, American Express dislikes steering; the merchants like it; and the shoppers may benefit from it, whether because merchants will offer them incentives to use less expensive cards or in the form of lower retail prices overall. See *id.,* at 92a, 97a-104a.

In response to its competitors' efforts to convince merchants to steer shoppers to use less expensive cards, American Express **[*2293]** tried to stop, or at least to limit, steering by placing antisteering provisions in most of its contracts with merchants. It called those provisions "nondiscrimination provisions." They prohibited steering of the forms I have described above (and others as well). See *id.,* at 95a-96a, 100a-101a. After placing them in **[**700]** its agreements, American Express found it could maintain, or even raise, its higher merchant prices without losing too many transactions to other firms. *Id.,* at 195a-198a. These agreements—the "nondiscrimination provisions"—led to this lawsuit.

C

In 2010 the United States and 17 States brought this antitrust case against American Express. They claimed that the "nondiscrimination provisions" in its contracts with merchants created an unreasonable restraint of trade. (Initially Visa and MasterCard **[***39]** were also defendants, but they entered into consent judgments, dropping similar provisions from their contracts with merchants). After a 7-week bench trial, the District Court entered judgment for the Government, setting forth its findings of fact and conclusions of law in a 97-page opinion. *88 F. Supp. 3d 143 (EDNY 2015)*.

Because the majority devotes little attention to the District Court's detailed factual findings, I will summarize some of the more significant ones here. Among other things, the District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. See *id., at 195-196*. In doing so, American Express did not take account of the possibility that large merchants would respond to the price increases by encouraging shoppers to use a different credit card because the nondiscrimination provisions prohibited any such steering. *Id., at 215*. The District Court pointed to merchants' testimony stating that, had it not been for those provisions, the large merchants would have responded to the price increases by encouraging customers to use other, less-expensive cards. *Ibid.*

The District Court also found that even though American Express raised its **[***40]** merchant prices 20 times in this 5-year period, it did not lose the business of any large merchant. *Id., at 197*. Nor did American Express increase benefits (or cut credit-card prices) to American Express cardholders in tandem with the merchant price increases. *Id., at 196*. Even had there been no direct evidence of injury to competition, American Express' ability to raise merchant prices without losing any meaningful market share, in the District Court's view, showed that American Express possessed power in the relevant market. See *id., at 195*.

The District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. *Ibid.* It wrote that in the late 1990's, Discover, one of American Express' competitors, had tried to develop a business model that involved charging lower prices to merchants than the other companies charged. *Id., at 213*. Discover then invited each "merchant to save money by shifting volume to Discover," while simultaneously offering merchants additional discounts "if they would steer customers to Discover." *Ibid.* The court determined that these efforts failed because of American Express' (and the other card companies') "nondiscrimination provisions." These provisions, **[***41]** the court found, "denied merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *Id., at 214*. Because the provisions eliminated any advantage that lower **[**701]** prices might produce, Discover **[*2294]** "abandoned its low-price business model" and raised its merchant fees to match those of its competitors. *Ibid.* This series of events, the court concluded was "emblematic of the harm done to the competitive process" by the "nondiscrimination provisions." *Ibid.*

The District Court added that it found no offsetting pro-competitive benefit to shoppers. *Id., at 225-238*. Indeed, it found no offsetting benefit of any kind. See *ibid.*

American Express appealed, and the U. S. Court of Appeals for the Second Circuit held in its favor. *838 F. 3d 179 (2016)*. The Court of Appeals did not reject any fact found by the District Court as "clearly erroneous." See *Fed. Rule Civ. Proc. 52(a)(6)*. Rather, it concluded that the District Court had erred in step 1 of its rule-of-reason analysis by failing to account for what the Second Circuit called the credit-card business's "two-sided market" (or "two-sided platform"). *838 F. 3d, at 185-186, 196-200*.

III

The majority, like the Court of Appeals, reaches only step 1 in its "rule of reason" **[***42]** analysis. *Ante, at ___, 201 L. Ed. 2d, at 690*. To repeat, that step consists of determining whether the challenged "nondiscrimination provisions" have had, or are likely to have, anticompetitive effects. See *Indiana Federation of Dentists, 476 U. S., at 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445*. Do those provisions tend to impede competition? And if so, does American Express, which imposed that restraint as a condition of doing business with its merchant customers, have sufficient economic or commercial power for the provision to make a negative difference? See *id., at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445*.

A

Here the District Court found that the challenged provisions have had significant anticompetitive effects. In particular, it found that the provisions have limited or prevented price competition among credit-card firms for the business of merchants. *88 F. Supp. 3d, at 209*. That conclusion makes sense: In the provisions, American Express required the merchants to agree not to encourage customers to use American Express' competitors' credit cards, even cards from those competitors, such as Discover, that intended to charge the merchants lower prices. See *id., at 214*. By doing so, American Express has "disrupt[ed] the normal price-setting mechanism" in the market. *Id., at 209*. As a result of the provisions, the District Court found, American Express was able to raise merchant prices **[***43]** repeatedly without any significant loss of business, because merchants were unable to respond to such price increases by encouraging shoppers to pay with other cards. *Id., at 215*. The provisions also meant that competitors like Discover had little incentive to lower their merchant prices, because doing so did not lead to any additional market share. *Id., at 214*. The provisions thereby "suppress[ed] [American Express'] . . . competitors' incentives to offer lower prices . . . resulting in higher profit-maximizing prices across the network services market." *Id., at 209.* Consumers throughout the economy paid higher retail prices as a result, and they were denied the opportunity to accept incentives that merchants might otherwise have offered to use less-expensive cards. *Id., at 216, 220*. **[**702]** I should think that, considering step 1 alone, there is little more that need be said.

The majority, like the Court of Appeals, says that the District Court should have looked not only at the market for the card companies' merchant-related services but also at the market for the card companies' shopper-related services, and that it should **[*2295]** have combined them, treating them as a single market. *Ante, at ___ - ___, 201 L. Ed. 2d, at 693*; *838 F. 3d, at 197*. But I am not aware of any support for that **[***44]** view in ***antitrust law***. Indeed, this Court has held to the contrary.

In *Times-Picayune Publishing Co. v. United States, 345 U. S. 594, 610, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*, the Court held that an antitrust court should begin its definition of a relevant market by focusing narrowly on the good or service directly affected by a challenged restraint. The Government in that case claimed that a newspaper's advertising policy violated the *Sherman Act's* "rule of reason." See *ibid.* In support of that argument, the Government pointed out, and the District Court had held, that the newspaper dominated the market for the sales of newspapers to readers in New Orleans, where it was the sole morning daily newspaper. *Ibid.* But this Court reversed. We explained that "every newspaper is a dual trader in separate though interdependent markets; it sells the paper's news and advertising content to its readers; in effect that readership is in turn sold to the buyers of advertising space." *Ibid.* We then added:

> "This case concerns solely one of those markets. The Publishing Company stands accused not of tying sales to its readers but only to buyers of general and classified space in its papers. For this reason, dominance in the advertising market, not in readership, must be decisive in gauging the legality **[***45]** of the Company's unit plan." *Ibid.*

Here, American Express stands accused not of limiting or harming competition for shopper-related card services, but only of merchant-related card services, because the challenged contract provisions appear only in American Express' contracts with merchants. That is why the District Court was correct in considering, at step 1, simply whether the agreement had diminished competition in merchant-related services.

B

The District Court did refer to market definition, and the majority does the same. *Ante, at ___ - ___, 201 L. Ed. 2d, at 691-693*. And I recognize that properly defining a market is often a complex business. Once a court has identified the good or service directly restrained, as *Times-Picayune Publishing Co.* requires, it will sometimes add to the relevant market what economists call "substitutes": other goods or services that are reasonably substitutable for that good or service. See, *e.g., United States v. E. I. du Pont de Nemours & Co., 351 U. S. 377, 395-396, 76 S. Ct. 994, 100 L. Ed. 1264 (1956)* (explaining that cellophane market includes other, substitutable flexible wrapping materials as well). The reason that substitutes are included in the relevant market is that they restrain a firm's ability to profitably raise prices, because customers will switch to the substitutes rather **[***46]** than pay the higher prices. See 2B Areeda & Hovenkamp ¶561, at 378.

[703]** But while the market includes substitutes, it does not include what economists call complements: goods or services that are used together with the restrained product, but that cannot be substituted for that product. See *id.,* ¶565a, at 429; *Eastman Kodak Co. v. Image Technical Services, Inc., 504 U. S. 451, 463, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992)*. An example of complements is gasoline and tires. A driver needs both gasoline and tires to drive, but they are not substitutes for each other, and so the sale price of tires does not check the ability of a gasoline firm (say a gasoline monopolist) to raise the price of gasoline above competitive levels. As a treatise on the subject states: "Grouping complementary goods into the same market" is "economic nonsense," and would "undermin[e] the rationale for the policy **[*2296]** against monopolization or collusion in the first place." 2B Areeda & Hovenkamp ¶565a, at 431.

Here, the relationship between merchant-related card services and shopper-related card services is primarily that of complements, not substitutes. Like gasoline and tires, both must be purchased for either to have value. Merchants upset about a price increase for merchant-related services cannot avoid that price increase by becoming **[***47]** cardholders, in the way that, say, a buyer of newspaper advertising can switch to television advertising or direct mail in response to a newspaper's advertising price increase. The two categories of services serve fundamentally different purposes. And so, also like gasoline and tires, it is difficult to see any way in which the price of shopper-related services could act as a check on the card firm's sale price of merchant-related services. If anything, a lower price of shopper-related card services is likely to cause more shoppers to use the card, and increased shopper popularity should make it *easier* for a card firm to raise prices to merchants, not *harder*, as would be the case if the services were substitutes*.* Thus, unless there is something unusual about this case—a possibility I discuss below, see *infra, at ___ - ___, 201 L. Ed. 2d, at 704-708*—there is no justification for treating shopper-related services and merchant-related services as if they were part of a single market, at least not at step 1 of the "rule of reason."

C

Regardless, a discussion of market definition was legally unnecessary at step 1. That is because the District Court found strong *direct* evidence of anticompetitive effects flowing from the challenged restraint. **[***48]** *88 F. Supp. 3d, at 207-224*. As I said, *supra, at ___, 201 L. Ed. 2d, at 700,* this evidence included Discover's efforts to break into the credit-card business by charging lower prices for merchant-related services, only to find that the "nondiscrimination provisions," by preventing merchants from encouraging shoppers to use Discover cards, meant that lower merchant prices did not result in any additional transactions using Discover credit cards. *88 F. Supp. 3d, at 213-214*. The direct evidence also included the fact that American Express raised its merchant prices 20 times in five years without losing any appreciable market share. *Id., at 195-198, 208-212*. It also included the testimony of numerous merchants that they would have steered shoppers away from American Express cards in response to merchant price increases (thereby checking **[**704]** the ability of American Express to raise prices) had it not been for the nondiscrimination provisions. See *id., at 221-222*. It included the factual finding that American Express "did not even account for the possibility that [large] merchants would respond to its price increases by attempting to shift share to a competitor's network" because the nondiscrimination provisions prohibited steering. *Id., at 215*. It included the District Court's ultimate finding of fact, not overturned by the Court **[***49]** of Appeals, that the challenged provisions "were integral to" American Express' "[price] increases and thereby caused merchants to pay higher prices." *Ibid.*

As I explained above, this Court has stated that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects . . . can obviate the need for" those inquiries. *Indiana Federation of Dentists, 476 U. S., at 460-461, 106 S. Ct. 2009, 90 L. Ed. 2d 445* (internal quotation marks omitted). That statement is fully applicable here. Doubts about the District Court's market-definition analysis are beside **[*2297]** the point in the face of the District Court's findings of actual anticompetitive harm.

The majority disagrees that market definition is irrelevant. See *ante, at ___ - ___, 201 L. Ed. 2d, at 691-692, and n. 7*. The majority explains that market definition is necessary because the nondiscrimination provisions are "vertical restraints" and "[v]ertical restraints often pose no risk to competition unless the entity imposing them has market power, which cannot be evaluated unless the Court first determines the relevant market." *Ante, at ___, n. 7, 201 L. Ed. 2d, at 691*. The majority thus, in a footnote, seems categorically to exempt vertical **[***50]** restraints from the ordinary "rule of reason" analysis that has applied to them since the *Sherman Act's* enactment in 1890. The majority's only support for this novel exemption is *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*. But *Leegin* held that the "rule of reason" *applied* to the vertical restraint at issue in that case. See *id., at 898-899, 127 S. Ct. 2705, 168 L. Ed. 2d 623*. It said nothing to suggest that vertical restraints are not subject to the usual "rule of reason" analysis. See also *infra, at ___, 201 L. Ed. 2d, at 711*.

One critical point that the majority's argument ignores is that proof of actual adverse effects on competition *is*, *a fortiori*, proof of market power. Without such power, the restraints could not have brought about the anticompetitive effects that the plaintiff proved. See *Indiana Federation of Dentists, supra, at 460, 106 S. Ct. 2009, 90 L. Ed. 2d 445* ("[T]he purpose of the inquiries into market definition and market power is to determine *whether an arrangement has the potential for* genuine adverse effects on competition" (emphasis added)). The District Court's findings of actual anticompetitive harm from the nondiscrimination provisions thus showed that, whatever the relevant market might be, American Express had enough power in that market to cause that harm. There is no reason to require a separate showing of market definition and market power under such circumstances. **[***51]** And so the majority's **[**705]** extensive discussion of market definition is legally unnecessary.

D

The majority's discussion of market definition is also wrong. Without raising any objection in general with the longstanding approach I describe above, *supra, at ___ - ___, 201 L. Ed. 2d, at 702-703*, the majority agrees with the Court of Appeals that the market for American Express' card services is special because it is a "two-sided transaction platform." *Ante, at ___ - ___, ___ - ___, 201 L. Ed. 2d, at 686-687, 691-693*. The majority explains that credit-card firms connect two distinct groups of customers: First, merchants who accept credit cards, and second, shoppers who use the cards. *Ante, at ___, 201 L. Ed. 2d, at 686*; accord, *838 F. 3d, at 186*. The majority adds that "no credit-card transaction can occur unless both the merchant and the cardholder simultaneously agree to use to the same credit-card network." *Ante, at ___, 201 L. Ed. 2d, at 686*. And it explains that the credit-card market involves "indirect network effects," by which it means that shoppers want a card that many merchants will accept and merchants want to accept those cards that many customers have and use. *Ibid.* From this, the majority concludes that "courts must include both sides of the platform—merchants and cardholders—when defining the credit-card market." *Ante, at ___, 201 L. Ed. 2d, at 692*; accord, **[***52]** *838 F. 3d, at 197*.

1

Missing from the majority's analysis is any explanation as to *why*, given the purposes that market definition serves in ***antitrust law***, the fact that a credit-card firm can be said to operate a "two-sided transaction platform" means that its merchant-related **[*2298]** and shopper-related services should be combined into a single market. The phrase "two-sided transaction platform" is not one of antitrust art—I can find no case from this Court using those words. The majority defines the phrase as covering a business that "offers different products or services to two different groups who both depend on the platform to intermediate between them," where the business "cannot make a sale to one side of the platform without simultaneously making a sale to the other" side of the platform. *Ante, at ___, 201 L Ed. 2d, at 686*. I take from that definition that there are four relevant features of such businesses on the majority's account: they (1) offer different products or services, (2) to different groups of customers, (3) whom the "platform" connects, (4) in simultaneous transactions. See *ibid.*

What is it about businesses with those four features that the majority thinks justifies a special market-definition approach for them? **[***53]** It cannot be the first two features—that the company sells different products to different groups of customers. Companies that sell multiple products to multiple types of customers are commonplace. A firm might mine for gold, which it refines and sells both to dentists in the form of fillings and to investors in the form of ingots. Or, a firm might drill for both oil and natural gas. Or a firm might make both ignition switches inserted into auto bodies and tires used for cars. I have already explained that, ordinarily, ***antitrust law*** will not group the two nonsubstitutable products together **[**706]** for step 1 purposes. *Supra, at ___ - ___, 201 L. Ed. 2d, at 702-703*.

Neither should it normally matter whether a company sells related, or complementary, products, *i.e.*, products which must both be purchased to have any function, such as ignition switches and tires, or cameras and film. It is well established that an antitrust court in such cases looks at the product where the attacked restraint has an anticompetitive effect. *Supra, at ___, 201 L. Ed. 2d, at 701*; see *Eastman Kodak, 504 U. S., at 463, 112 S. Ct. 2072, 119 L. Ed. 2d 265*. The court does not combine the customers for the separate, nonsubstitutable goods and see if "overall" the restraint has a negative effect. See *ibid.*; 2B Areeda & Hovenkamp ¶565a. That is because, as I have explained, **[***54]** the complementary relationship between the products is irrelevant to the purposes of market-definition. See *supra, at ___ - ___, 201 L. Ed. 2d, at 702-703*.

The majority disputes my characterization of merchant-related and shopper-related services as "complements." See *ante, at ___, n. 8, 201 L. Ed. 2d, at 70114, n. 693*. The majority relies on an academic article which devotes one sentence to the question, saying that "a two-sided market [is] different from markets for complementary products [*e.g.,* tires and gas], in which both products are bought by the same buyers, who, in their buying decisions, can therefore be expected to take into account both prices." Filistrucchi, Geradin, Van Damme, & Affeldt, Market Definition in Two-Sided Markets: Theory and Practice, 10 J. Competition L. & Econ. 293, 297 (2014) (Filistrucchi). I agree that two-sided platforms—at least as some academics define them, but see infra, at ___ - ___, 201 L. Ed. 2d, at 708—may be distinct from some types of complements in the respect the majority mentions (even though the services resemble complements because they must be used together for either to have value). But the distinction the majority mentions has nothing to do with the relevant question. The relevant question is whether merchant-related and shopper-related services **[***55]** are *substitutes*, one for the other, so that customers can respond to a price increase for one service by switching to the other service. As I have explained, the two types of services are not substitutes in this way. Supra, at ___ - ___, 201 L. Ed. 2d, at 702-703. And so the question remains, just as before: **[*2299]** What is it about the economic relationship between merchant-related and shopper-related services that would justify the majority's novel approach to market definition?

What about the last two features—that the company connects the two groups of customers to each other, in simultaneous transactions? That, too, is commonplace. Consider a farmers' market. It brings local farmers and local shoppers together, and transactions will occur only if a farmer and a shopper simultaneously agree to engage in one. Should courts abandon their ordinary step 1 inquiry if several competing farmers' markets in a city agree that only certain kinds of farmers can participate, or if a farmers' market charges a higher fee than its competitors do and prohibits participating farmers from raising their prices to cover it? Why? If farmers' markets are special, what about travel agents that connect airlines and passengers? What about internet retailers, **[***56]** who, in addition to selling their own goods, allow (for a fee) other **[**707]** goods-producers to sell over their networks? Each of those businesses seems to meet the majority's four-prong definition.

Apparently as its justification for applying a special market-definition rule to "two-sided transaction platforms," the majority explains that such platforms "often exhibit" what it calls "indirect network effects." Ante, at ___, 201 L. Ed. 2d, at 686. By this, the majority means that sales of merchant-related card services and (different) shopper-related card services are interconnected, in that increased merchant-buyers mean increased shopper-buyers (the more stores in the card's network, the more customers likely to use the card), and vice versa. See *ibid.* But this, too, is commonplace. Consider, again, a farmers' market. The more farmers that participate (within physical and esthetic limits), the more customers the market will likely attract, and vice versa. So too with travel agents: the more airlines whose tickets a travel agent sells, the more potential passengers will likely use that travel agent, and the more potential passengers that use the travel agent, the easier it will likely be to convince airlines to sell **[***57]** through the travel agent. And so forth. Nothing in ***antitrust law***, to my knowledge, suggests that a court, when presented with an agreement that restricts competition in any one of the markets my examples suggest, should abandon traditional market-definition approaches and include in the relevant market services that are complements, not substitutes, of the restrained good. See supra, at ___ - ___, 201 L. Ed. 2d, at 702-703.

2

To justify special treatment for "two-sided transaction platforms," the majority relies on the Court's decision in United States v. Grinnell Corp., 384 U. S. 563, 571-572, 86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966). In *Grinnell*, the Court treated as a single market several different "central station services," including burglar alarm services and fire alarm services. Id., at 571, 86 S. Ct. 1698, 16 L. Ed. 2d 778. It did so even though, for *consumers*, "burglar alarm services are not interchangeable with fire alarm services." Id., at 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778. But that is because, for *producers*, the services were indeed interchangeable: A company that offered one could easily offer the other, because they all involve "a single basic service—the protection of property through use of a central service station." *Ibid.* Thus, the "commercial realit[y]" that the *Grinnell* Court relied on, *ibid.*, was that the services being grouped were what economists call "producer substitutes." See 2B Areeda **[***58]** & Hovenkamp ¶561, at 378. And the law is clear that "two products produced interchangeably from the same production facilities are presumptively **[*2300]** in the same market," even if they are not "close substitutes for each other on the demand side." *Ibid.* That is because a firm that produces one such product can, in response to a price increase in the other, easily shift its production and thereby limit its competitor's power to impose the higher price. See *id.*, ¶561a, at 379.

Unlike the various types of central station services at issue in *Grinnell Corp.*, however, the shopper-related and merchant-related services that American Express provides are not "producer substitutes" any more than they are traditional substitutes. For producers as for consumers, the services **[**708]** are instead complements. Credit card companies must sell them together for them to be useful. As a result, the credit-card companies cannot respond to, say, merchant-related price increases by shifting production away from shopper-related services to merchant-related services. The relevant "commercial realities" in this case are thus completely different from those in *Grinnell Corp.* (The majority also cites *Brown Shoe Co. v. United States, 370 U. S. 294, 336-337, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*, for this point, but **[***59]** the "commercial realities" considered in that case were that "shoe stores in the outskirts of cities compete effectively with stores in central downtown areas," and thus are part of the same market. *Id., at 338-339, 82 S. Ct. 1502, 8 L. Ed. 2d 510*. Here, merchant-related services do not, as I have said, compete with shopper-related services, and so *Brown Shoe Co.* does not support the majority's position.) Thus, our precedent provides no support for the majority's special approach to defining markets involving "two-sided transaction platforms."

3

What about the academic articles the majority cites? The first thing to note is that the majority defines "two-sided transaction platforms" much more broadly than the economists do. As the economists who coined the term explain, if a "two-sided market" meant simply that a firm connects two different groups of customers via a platform, then "pretty much any market would be two-sided, since buyers and sellers need to be brought together for markets to exist and gains from trade to be realized." Rochet & Tirole, Two-Sided Markets: A Progress Report, 37 RAND J. Econ. 645, 646 (2006). The defining feature of a "two-sided market," according to these economists, is that "the platform can affect the **[***60]** volume of transactions by charging more to one side of the market and reducing the price paid by the other side by an equal amount." *Id.,* at 664-665; accord, Filistrucchi 299. That requirement appears nowhere in the majority's definition. By failing to limit its definition to platforms that economists would recognize as "two sided" in the relevant respect, the majority carves out a much broader exception to the ordinary antitrust rules than the academic articles it relies on could possibly support.

Even as limited to the narrower definition that economists use, however, the academic articles the majority cites do not support the majority's flat rule that firms operating "two-sided transaction platforms" should always be treated as part of a single market for all antitrust purposes. *Ante, at ___ - ___, 201 L. Ed. 2d, at 692-693*. Rather, the academics explain that for market-definition purposes, "[i]n some cases, the fact that a business can be thought of as two-sided may be irrelevant," including because "nothing in the analysis of the practices [at issue] really hinges on the linkages between the demands of participating groups." Evans & Schmalensee, Markets With Two-Sided Platforms, 1 Issues in Competition L. & Pol'y 667, 689 **[***61]** (2008). "In other cases, the fact that a business is two-sided will prove important both by **[*2301]** identifying the real dimensions of competition and focusing on sources of constraints." *Ibid.* That flexible approach, however, is precisely the one the District Court followed in this case, by considering the effects of "[t]he **[**709]** two-sided nature of the . . . card industry" throughout its analysis. *88 F. Supp. 3d, at 155*.

Neither the majority nor the academic articles it cites offer any explanation for why the features of a "two-sided transaction platform" justify always treating it as a single antitrust market, rather than accounting for its economic features in other ways, as the District Court did. The article that the majority repeatedly quotes as saying that "'[i]n two-sided transaction markets, only one market should be defined,'" *ante, at ___ - ___, 201 L. Ed. 2d, at 693* (quoting Filistrucchi 302), justifies that conclusion only for purposes of assessing the effects of a merger. In such a case, the article explains, "[e]veryone would probably agree that a payment card company such as American Express is either in the relevant market on both sides or on neither side . . . . The analysis of a merger between two payment card platforms should **[***62]** thus consider . . . both sides of the market." *Id.,* at 301. In a merger case this makes sense, but is also meaningless, because, whether there is one market or two, a reviewing court will consider both sides, because it must examine the effects of the merger in each affected market and submarket. See *Brown Shoe Co., 370 U. S., at 325, 82 S. Ct. 1502, 8 L. Ed. 2d 510*. As for a nonmerger case, the article offers only *United States* v. *Grinnell* as a justification, see Filistrucchi 303, and as I have already explained, *supra, at ___ - ___, 201 L. Ed. 2d, at 706-707*, *Grinnell* does not support this proposition.

E

Put all of those substantial problems with the majority's reasoning aside, though. Even if the majority were right to say that market definition was relevant, and even if the majority were right to further say that the District Court should have defined the market in this case to include shopper-related services as well as merchant-related services, that *still* would not justify the majority in affirming the Court of Appeals. That is because, as the majority is forced to admit, the plaintiffs *made* the factual showing that the majority thinks is required. See *ante, at ___, 201 L. Ed. 2d, at 694*.

Recall why it is that the majority says that market definition matters: because if the relevant market includes both merchant-related services **[***63]** and card-related services, then the plaintiffs had the burden to show that as a result of the nondiscrimination provisions, "the price of credit-card transactions"—considering both fees charged to merchants and rewards paid to cardholders—"was higher than the price one would expect to find in a competitive market." *Ante, at ___, 201 L. Ed. 2d, at 694*. This mirrors the Court of Appeals' holding that the Government had to show that the "nondiscrimination provisions" had "made *all* [American Express] customers on both sides of the platform—*i.e.*, both merchants and cardholders—worse off overall." *838 F. 3d, at 205*.

The problem with this reasoning, aside from it being wrong, is that the majority admits that the plaintiffs *did* show this: they "offer[ed] evidence" that American Express "increased the percentage of the purchase price that it charges merchants . . . and that this increase was not entirely spent on cardholder rewards." *Ante, ___, 201 L. Ed. 2d, at 695* (citing *88 F. Supp. 3d, **[**710]** at 195-197, 215)*. Indeed, the plaintiffs did not merely "offer evidence" of this—they persuaded the District Court, which made an unchallenged factual finding that the merchant price increases that resulted from the nondiscrimination provisions "were not wholly offset **[*2302]** by additional rewards expenditures **[***64]** or otherwise passed through to cardholders, and *resulted in a higher net price.*" *Id., at 215* (emphasis added).

In the face of this problem, the majority retreats to saying that even net price increases do not matter after all, absent a showing of lower output, because if output is increasing, "'rising prices are equally consistent with growing product demand.'" *Ante, at ___, 201 L. Ed. 2d, at 695* (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U. S. 209, 237, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993))*. This argument, unlike the price argument, has nothing to do with the credit-card market being a "two-sided transaction platform," so if this is the basis for the majority's holding, then nearly all of the opinion is dicta. The argument is also wrong. It is true as an economic matter that a firm exercises market power by restricting output in order to raise prices. But the relevant restriction of output is as compared with a hypothetical world in which the restraint was not present and prices were lower. The fact that credit-card use in general has grown over the last decade, as the majority says, see *ante, at ___ - ___, 201 L. Ed. 2d, at 694-695*, says nothing about whether such use would have grown more or less without the nondiscrimination provisions. And because the relevant question is a comparison between reality and a hypothetical state of **[***65]** affairs, to require actual proof of reduced output is often to require the impossible—tantamount to saying that the *Sherman Act* does not apply at all.

In any event, there are features of the credit-card market that may tend to limit the usual relationship between price and output. In particular, merchants generally spread the costs of credit-card acceptance across all their customers (whatever payment method they may use), while the benefits of card use go only to the cardholders. See, *e.g., 88 F. Supp. 3d, at 216*; Brief for John M. Connor et al. as *Amici Curiae* 34-35. Thus, higher credit-card merchant fees may have only a limited effect on credit-card transaction volume, even as they disrupt the marketplace by extracting anticompetitive profits.

IV

A

For the reasons I have stated, the Second Circuit was wrong to lump together the two different services sold, *at step 1.* But I recognize that the Court of Appeals has not yet considered whether the relationship between the two services might make a difference at steps 2 and 3. That is to say, American Express might wish to argue that the nondiscrimination provisions, while anticompetitive in respect to merchant-related services, nonetheless have an adequate offsetting **[***66]** procompetitive benefit in respect to its shopper-related services. I believe that American Express should have an opportunity to ask the Court of Appeals to consider that matter.

American Express might face an uphill battle. A Sherman Act §1 defendant can rarely, if ever, show that a pro-competitive benefit in the market **[**711]** for one product offsets an anticompetitive harm in the market for another. In United States v. Topco Associates, Inc., 405 U. S. 596, 611, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972), this Court wrote:

> "If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this . . . is a decision that 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 decisionmaking."

[*2303] American Express, pointing to vertical price-fixing cases like our decision in *Leegin*, argues that comparing competition-related pros and cons is more common than I have just suggested. See 551 U. S., at 889-892, 127 S. Ct. 2705, 168 L. Ed. 2d 623. But *Leegin* held only that vertical price fixing is subject to the "rule of reason" instead of being *per se* unlawful; the "rule of reason" still applies to vertical agreements just as it applies to horizontal agreements. **[***67]** See id., at 898-899, 127 S. Ct. 2705, 168 L. Ed. 2d 623.

Moreover, the procompetitive justifications for vertical price-fixing agreements are not apparently applicable to the distinct types of restraints at issue in this case. A vertically imposed price-fixing agreement typically involves a manufacturer controlling the terms of sale for its own product. A television-set manufacturer, for example, will insist that its dealers not cut prices for the manufacturer's own televisions below a particular level. Why might a manufacturer want its dealers to refrain from price competition in the manufacturer's own products? Perhaps because, for example, the manufacturer wants to encourage the dealers to develop the market for the manufacturer's brand, thereby increasing *interbrand* competition for the same ultimate product, namely a television set. This type of reasoning does not appear to apply to American Express' nondiscrimination provisions, which seek to control the terms on which merchants accept *other brands'* cards, not merely American Express' own.

Regardless, I would not now hold that an agreement such as the one before us can never be justified by procompetitive benefits of some kind. But the Court of Appeals would properly consider procompetitive **[***68]** justifications not at step 1, but at steps 2 and 3 of the "rule of reason" inquiry. American Express would need to show just how this particular anticompetitive merchant-related agreement has procompetitive benefits in the shopper-related market. In doing so, American Express would need to overcome the District Court's factual findings that the agreement had no such effects. See 88 F. Supp. 3d, at 224-238.

B

The majority charts a different path. Notwithstanding its purported acceptance of the three-step, burden-shifting framework I have described, ante, at ___ - ___, 201 L. Ed. 2d, at 690-691, the majority addresses American Express' procompetitive justifications now, at step 1 of the analysis, see ante, at ___ - ___, 201 L. Ed. 2d, at 695-696. And in doing so, the majority inexplicably ignores the District Court's factual findings on the subject.

[712]** The majority reasons that the challenged nondiscrimination provisions "stem negative externalities in the credit-card market and promote interbrand competition." Ante, at ___, 201 L. Ed. 2d, at 696. The "negative externality" the majority has in mind is this: If one merchant persuades a shopper not to use his American Express card at that merchant's store, that shopper becomes less likely to use his American Express card at other merchants' stores. *Ibid* ***[***69]*** . The majority worries that this "endangers the viability of the entire [American Express] network," *ibid.*, but if so that is simply a consequence of American Express' merchant fees being higher than a competitive market will support. "The antitrust laws were enacted for 'the protection of *competition,* not *competitors.*'" Atlantic Richfield Co. v. USA Petroleum Co., 495 U. S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990). If American Express' merchant fees are so high that merchants successfully induce their customers to use other cards, American Express can remedy that problem by lowering those fees or by spending more on cardholder rewards so **[*2304]** that cardholders decline such requests. What it may not do is demand contractual protection from price competition.

In any event, the majority ignores the fact that the District Court, in addition to saying what I have just said, also rejected this argument on independent factual grounds. It explained that American Express "presented no expert testimony, financial analysis, or other direct evidence establishing that without its [nondiscrimination provisions] it will, in fact, be unable to adapt its business to a more competitive market." *88 F. Supp. 3d, at 231*. It further explained that the testimony that was provided on the topic "was notably inconsistent," with **[***70]** some of American Express' witnesses saying only that invalidation of the provisions "would require American Express to adapt its current business model." *Ibid.* After an extensive discussion of the record, the District Court found that "American Express possesses the flexibility and expertise necessary to adapt its business model to suit a market in which it is required to compete on both the cardholder and merchant sides of the [credit-card] platform." *Id., at 231-232*. The majority evidently rejects these factual findings, even though no one has challenged them as clearly erroneous.

Similarly, the majority refers to the nondiscrimination provisions as preventing "free riding" on American Express' "investments in rewards" for cardholders. *Ante, at ___ - ___, 201 L. Ed. 2d, at 696*; see also *ante, at ___, 201 L. Ed. 2d, at 688* (describing steering in terms suggestive of free riding). But as the District Court explained, "[p]lainly . . . investments tied to card use (such as Membership Rewards points, purchase protection, and the like) are not subject to free-riding, since the network does not incur any cost if the cardholder is successfully steered away from using his or her American Express card." *88 F. Supp. 3d, at 237*. This, I should think, is an unassailable conclusion: **[***71]** American Express pays rewards to cardholders only for transactions in which cardholders use their American Express cards, so if a steering effort succeeds, no rewards are paid. As for concerns about free riding on American Express' fixed expenses, including its investments in its brand, the District **[**713]** Court acknowledged that free-riding was in theory possible, but explained that American Express "ma[de] no effort to identify the fixed expenses to which its experts referred or to explain how they are subject to free riding." *Ibid.*; see also *id., at 238* (American Express' own data showed "that the network's ability to confer a credentialing benefit trails that of its competitors, casting doubt on whether there is in fact any particular benefit associated with accepting [American Express] that is subject to free riding"). The majority does not even acknowledge, much less reject, these factual findings, despite coming to the contrary conclusion.

Finally, the majority reasons that the nondiscrimination provisions "do not prevent Visa, MasterCard, or Discover from competing against [American Express] by offering lower merchant fees or promoting their broader merchant acceptance." *Ante, at ___, 201 L. Ed. 2d, at 696*. But again, **[***72]** the District Court's factual findings were to the contrary. As I laid out above, the District Court found that the nondiscrimination provisions *in fact did prevent* Discover from pursuing a low-merchant-fee business model, by "den[ying] merchants the ability to express a preference for Discover or to employ any other tool by which they might steer share to Discover's lower-priced network." *88 F. Supp. 3d, at 214*; see *supra, at ___, 201 L. Ed. 2d, at 700*. The majority's statements that the nondiscrimination provisions are procompetitive are directly contradicted by this and other factual findings.

***

[*2305] For the reasons I have explained, the majority's decision in this case is contrary to basic principles of ***antitrust law***, and it ignores and contradicts the District Court's detailed factual findings, which were based on an extensive trial record. I respectfully dissent.

References

15 U.S.C.S. § 1

1 Antitrust Laws and Trade Regulation §§1.02, 2.02 (Matthew Bender 2d ed.)

L Ed Digest, Evidence § 343.5; Restraints of Trade, Monopolies, and Unfair Trade Practices §§14, 19

L Ed Index, Letters of Credit and Credit Cards; Sherman Act

What constitutes vertical price fixing in violation of *§ 1* of Sherman Act (*15 U.S.C.S. § 1*)--Supreme Court cases. *168 L. Ed. 2d 847*.

Supreme Court's views as to what constitutes per se illegal "price fixing" under the Sherman Act (**[***73]** *15 U.S.C.S. §§1 et seq.*). *64 L. Ed. 2d 997*.

Apple Inc. v. Pepper

Supreme Court of the United States

November 26, 2018, Argued; May 13, 2019, Decided

No. 17-204.

Reporter

139 S. Ct. 1514 *; 203 L. Ed. 2d 802 **; 2019 U.S. LEXIS 3397 ***; 2019-1 Trade Cas. (CCH) P80,762; 27 Fla. L. Weekly Fed. S 796; 2019 WL 2078087

APPLE INC., Petitioner v. ROBERT PEPPER, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Subsequent History: Remanded by, Motion denied by *Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litig.), 2019 U.S. App. LEXIS 21057 (9th Cir. Cal., July 16, 2019)*

Prior History: [*1]** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Pepper v. Apple Inc. (In re Apple iPhone Antitrust Litig.), 846 F.3d 313, 2017 U.S. App. LEXIS 577 (9th Cir. Cal., Jan. 12, 2017)

Disposition: Affirmed.

Core Terms

retailer, consumers, antitrust, monopolistic, developers, iPhone, manufacturer, overcharge, purchasers, prices, damages, violator, supplier, chain, monopoly, pass-on, anti trust law, higher-than-competitive, suits, proximate cause, markup, complicated, customers, upstream, Shoe, buy, statutory text, intermediary, contractors, monopolize

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

HN1[] **Scope, Monopolization Offenses**

Section 2 of the Sherman Act, *15 U.S.C.S. § 2*, makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations. *15 U.S.C.S. § 2*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

HN2[] Clayton Act, Claims

Section 4 of the Clayton Act, 15 U.S.C.S. § 15, provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue the defendant and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C.S. § 15(a). The broad text of § 4—any person who has been injured by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN3[] Clayton Act, Claims

Applying § 4 of the Clayton Act, 15 U.S.C.S. § 15, the U.S. Supreme Court has consistently stated that the immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators. At the same time, incorporating principles of proximate cause into § 4, the U.S. Supreme Court has ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. The U.S. Supreme Court's decision in Illinois Brick established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers.

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

HN4[] Purchasers, Direct Purchasers

The bright-line rule of the U.S. Supreme Court's decision in Illinois Brick means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are the immediate buyers from the alleged antitrust violators—may sue. For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of Illinois Brick.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > ... > Private Actions > Purchasers > Direct Purchasers

Antitrust & Trade Law > ... > Private Actions > Purchasers > Indirect Purchasers

Antitrust & Trade Law > Clayton Act > Scope

HN5[] Clayton Act, Claims

The U.S. Supreme Court's precedent in Illinois Brick established a bright-line rule where direct purchasers may sue antitrust violators from whom they purchased a good or service. Illinois Brick was not based on an economic theory about who set the price. Rather, Illinois Brick sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The Illinois Brick bright-line rule is grounded on the belief that simplified administration improves antitrust enforcement. To the extent that Illinois Brick leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, the court should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Lawyers' Edition Display

Decision

[802]** Where only place at which owners of particular brand of cell phone lawfully could buy apps for their phones was at brand manufacturer's retail app store, owners were direct apps purchasers who were allowed to sue manufacturer for alleged monopolization.

Summary

Overview: HOLDINGS: [1]-The cellphone owners were proper plaintiffs for an antitrust suit, which alleged that the corporation exercised monopoly power in the retail market for the sale of applications (hereinafter, apps) and had unlawfully used its monopoly power to force cellphone owners to pay the corporation higher-than-competitive prices for the apps, because, under *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, the owners were direct purchasers who might have sued the corporation for alleged monopolization since the owners bought the apps directly from the corporation.

Outcome: Judgment affirmed. 5-4 Decision; 1 Dissent.

Headnotes

[803]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 5 > MONOPOLIZATION -- SHERMAN ACT > Headnote:
LEdHN1.[] 1.

Section 2 of the Sherman Act (*15 U.S.C.S. § 2*) makes it unlawful for any person to monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations. *15 U.S.C.S. § 2*. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > MONOPOLISTIC RETAILER -- SUITS BY CONSUMERS -- CLAYTON ACT > Headnote:
LEdHN2.[] 2.

Section 4 of the Clayton Act (*15 U.S.C.S. § 15*) provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue the defendant and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. *15 U.S.C.S. § 15(a)*. The broad text of *§ 4*--any person who has been injured by an antitrust violator may sue--readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > SUITS -- IMMEDIATE AND INDIRECT BUYERS -- CLAYTON ACT > Headnote:
LEdHN3.[] 3.

Applying *§ 4* of the Clayton Act (*15 U.S.C.S. § 15*), the U.S. Supreme Court has consistently stated that the immediate buyers from the alleged antitrust violators may maintain a suit against the antitrust violators. At the same time, incorporating principles of proximate cause into *§ 4*, the U.S. Supreme Court has ruled that indirect purchasers who are two or more steps removed from the violator in a distribution chain may not sue. The U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, established a bright-line rule that authorizes suits by direct purchasers but bars suits by indirect purchasers. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > SUITS -- DIRECT AND INDIRECT PURCHASERS > Headnote:
LEdHN4.[] 4.

The bright-line rule of the U.S. Supreme Court's decision in *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers--that is, those who are the immediate buyers from the alleged antitrust violators--may sue. For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of Illinois Brick. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

[804]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6 > SUITS -- DIRECT AND INDIRECT PURCHASERS > Headnote:
LEdHN5.[] 5.

The U.S. Supreme Court's precedent in *Illinois Brick Co. v. Illinois (1977) 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707, 1977 U.S. LEXIS 105*, established a bright-line rule where direct purchasers may sue antitrust violators from whom they purchased a good or service. Illinois Brick was not based on an economic theory about who set the price. Rather, Illinois Brick sought to insure an effective and efficient litigation scheme in antitrust cases. To do so, the court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The Illinois Brick bright-line rule is grounded on the belief that simplified administration improves antitrust enforcement. To the extent that Illinois Brick leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, the court should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers. (Kavanaugh, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.)

Syllabus

[*1517] Apple Inc. sells iPhone applications, or apps, directly to iPhone owners through its App Store--the only place where iPhone owners may lawfully buy apps. Most of those apps are created by independent developers under contracts with Apple. Apple charges the developers a $99 annual membership fee, allows them to set the retail price of the apps, and **[**805]** charges a 30% commission on every app sale. Respondents, four iPhone owners, sued Apple, alleging that the company has unlawfully monopolized the aftermarket for iPhone apps. Apple moved to dismiss, arguing that the iPhone owners could not sue because they were not direct purchasers from Apple under *Illinois Brick Co. v. Illinois, 431 U. S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. The District Court agreed, but the Ninth Circuit reversed, concluding that the iPhone owners were direct purchasers because they purchased apps directly from Apple.

Held: Under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization. *Pp. ___ - ___, 203 L. Ed. 2d, at 808-814*.

(a) This straightforward conclusion follows from the text of the antitrust laws and from this Court's precedent. *Section 4* of the Clayton Act provides that “any person who shall **[***2]** be injured in his business or property by reason of anything forbidden in the antitrust laws may sue.” *15 U. S. C. §15(a)*. That broad text readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer. Applying *§4*, this Court has consistently stated that “the immediate buyers from the alleged antitrust violators” may maintain a suit against the antitrust violators, *Kansas v. UtiliCorp United Inc., 497 U. S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169*, but has ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Unlike the consumer in *Illinois Brick*, the iPhone owners here are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. The absence of an intermediary in the distribution chain between Apple and the consumer is dispositive. *Pp. ___ - ___, 203 L. Ed. 2d, at 808-809*.

(b) Apple argues that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not the party sells the good or service directly to the complaining party. But that theory suffers from three main problems. First, it contradicts statutory text and precedent by requiring the Court to rewrite the rationale of *Illinois* ***[***3]*** *Brick* and to gut its longstanding bright-line rule. Any ambiguity in *Illinois Brick* should be resolved in the direction of the statutory text, which states that “any person” injured by an antitrust violation may sue to recover damages. Second, Apple's theory is not persuasive economically or legally. It would draw an arbitrary and unprincipled line among retailers based on their financial arrangements with their manufacturers or suppliers. And it would permit a consumer to sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service but not when the manufacturer or supplier set the retail price and the retailer took a commission on each sale. Third, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust **[*1518]** claims by consumers and thereby thwart effective antitrust enforcement. *Pp. ___ - ___, 203 L. Ed. 2d, at 809-812*.

(c) Contrary to Apple's argument, the three *Illinois Brick* rationales for adopting the direct-purchaser rule cut **[**806]** strongly in respondents' favor. First, Apple posits that allowing only the upstream app developers--and not **[***4]** the downstream consumers--to sue Apple would mean more effective antitrust enforcement. But that makes little sense, and it would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases. Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. But *Illinois Brick* is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. Third, Apple claims that allowing consumers to sue will result in “conflicting claims to a common fund--the amount of the alleged overcharge.” *Illinois Brick, 431 U. S., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. But this is not a case where multiple parties at different levels of a distribution chain are trying to recover the same passed-through overcharge initially levied by the manufacturer at the top of the chain, cf. *id., at 726-727, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. *Pp. ___ - ___, 203 L. Ed. 2d, at 812-814*.

846 F.3d 313, affirmed.

Counsel: Daniel M. Wall argued the cause for petitioner.

Noel J. Francisco argued the cause for the United States, as amicus curiae, by special leave of court.

David C. Frederick argued the cause for respondents.

Judges: Roberts, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh. **[***5]**

Opinion by: KAVANAUGH

Opinion

Justice **Kavanaugh** delivered the opinion of the Court.

In 2007, Apple started selling iPhones. The next year, Apple launched the retail App Store, an electronic store where iPhone owners can purchase iPhone applications from Apple. Those "apps" enable iPhone owners to send messages, take photos, watch videos, buy clothes, order food, arrange transportation, purchase concert tickets, donate to charities, and the list goes on. "There's an app for that" has become part of the 21st-century American lexicon.

In this case, however, several consumers contend that Apple charges too much for apps. The consumers argue, in particular, that Apple has monopolized the retail market for the sale of apps and has unlawfully used its monopolistic power to charge consumers higher-than-competitive prices.

[*1519] A claim that a monopolistic retailer (here, Apple) has used its monopoly to overcharge consumers is a classic antitrust claim. But Apple asserts that the consumer-plaintiffs in this case may not sue Apple because they supposedly were not "direct purchasers" from Apple under our decision in *Illinois Brick Co. v. Illinois, 431 U. S. 720, 745-746, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*. We disagree. The plaintiffs purchased apps directly from Apple and therefore are direct purchasers under ***[***6]*** *Illinois Brick*. At this early pleadings stage of the litigation, we do not assess the merits of the plaintiffs' antitrust claims against Apple, nor do we consider any other defenses Apple might have. We merely hold that the *Illinois Brick* direct-purchaser rule does not bar these plaintiffs from suing Apple under the antitrust laws. We affirm the **[**807]** judgment of the U. S. Court of Appeals for the Ninth Circuit.

I

In 2007, Apple began selling iPhones. In July 2008, Apple started the App Store. The App Store now contains about 2 million apps that iPhone owners can download. By contract and through technological limitations, the App Store is the only place where iPhone owners may lawfully buy apps.

For the most part, Apple does not itself create apps. Rather, independent app developers create apps. Those independent app developers then contract with Apple to make the apps available to iPhone owners in the App Store.

Through the App Store, Apple sells the apps directly to iPhone owners. To sell an app in the App Store, app developers must pay Apple a $99 annual membership fee. Apple requires that the retail sales price end in $0.99, but otherwise allows the app developers to set the retail price. **[***7]** Apple keeps 30 percent of the sales price, no matter what the sales price might be. In other words, Apple pockets a 30 percent commission on every app sale.

In 2011, four iPhone owners sued Apple. They allege that Apple has unlawfully monopolized “the iPhone apps aftermarket.” App. to Pet. for Cert. 53a. The plaintiffs allege that, via the App Store, Apple locks iPhone owners “into buying apps only from Apple and paying Apple’s 30% fee, even if” the iPhone owners wish “to buy apps elsewhere or pay less.” *Id.,* at 45a. According to the complaint, that 30 percent commission is “pure profit” for Apple and, in a competitive environment with other retailers, “Apple would be under considerable pressure to substantially lower its 30% profit margin.” *Id.,* at 54a-55a. The plaintiffs allege that in a competitive market, they would be able to “choose between Apple’s high-priced App Store and less costly alternatives.” *Id.,* at 55a. And they allege that they have “paid more for their iPhone apps than they would have paid in a competitive market.” *Id.,* at 53a.

Apple moved to dismiss the complaint, arguing that the iPhone owners were not direct purchasers from Apple and therefore may not sue. In *Illinois Brick*, this Court held that direct **[***8]** purchasers may sue antitrust violators, but also ruled that indirect purchasers may not sue. The District Court agreed with Apple and dismissed the complaint. According to the District Court, the iPhone owners were not direct purchasers from Apple because the app developers, not Apple, set the consumers’ purchase price.

The Ninth Circuit reversed. The Ninth Circuit concluded that the iPhone owners were direct purchasers under *Illinois Brick* because the iPhone owners purchased apps directly from Apple. According to the Ninth Circuit, *Illinois Brick* means that a consumer may not sue an alleged monopolist who is two or more **[*1520]** steps removed from the consumer in a vertical distribution chain. See *In re Apple iPhone Antitrust Litig., 846 F. 3d 313, 323 (2017)*. Here, however, the consumers purchased directly from Apple, the alleged monopolist. Therefore, the Ninth Circuit held that the iPhone owners could sue Apple for allegedly monopolizing the sale of iPhone apps and charging higher-than-competitive **[**808]** prices. *Id., at 324*. We granted certiorari. *585 U. S. ___, 138 S. Ct. 2647, 201 L. Ed. 2d 1049 (2018)*.

II

A

The plaintiffs’ allegations boil down to one straightforward claim: that Apple exercises monopoly power in the retail market for the sale of apps and has unlawfully used its monopoly power to force iPhone **[***9]** owners to pay Apple higher-than-competitive prices for apps. According to the plaintiffs, when iPhone owners want to purchase an app, they have only two options: (1) buy the app from Apple’s App Store at a higher-than-competitive price or (2) do not buy the app at all. Any iPhone owners who are dissatisfied with the selection of apps available in the App Store or with the price of the apps available in the App Store are out of luck, or so the plaintiffs allege.

The sole question presented at this early stage of the case is whether these consumers are proper plaintiffs for this kind of antitrust suit—in particular, our precedents ask, whether the consumers were “direct purchasers” from Apple. *Illinois Brick, 431 U. S., at 745-746, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. It is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization.

That straightforward conclusion follows from the text of the antitrust laws and from our precedents.

First is text: ***HN1***[] ***LEdHN[1]***[] [1] *Section 2 of the Sherman Act* makes it unlawful for any person to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade **[***10]** or commerce among the several States, or with foreign nations.” *26 Stat. 209*, *15 U. S. C. §2*. ***HN2***[] ***LEdHN[2]***[] [2] *Section 4 of the Clayton Act* in turn provides that “*any person* who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue . . . the defendant . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 38 Stat. 731, *15 U. S. C. §15(a)* (emphasis added). The broad text of *§4*—“any person” who has been “injured” by an antitrust violator may sue—readily covers consumers who purchase goods or services at higher-than-competitive prices from an allegedly monopolistic retailer.

Second is precedent: **HN3**[] **LEdHN[3]**[] [3] Applying §4, we have consistently stated that "the immediate buyers from the alleged antitrust violators" may maintain a suit against the antitrust violators. *Kansas v. UtiliCorp United Inc., 497 U. S. 199, 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169 (1990)*; see also *Illinois Brick, 431 U. S., at 745-746, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. At the same time, incorporating principles of proximate cause into §4, we have ruled that *indirect* purchasers who are two or more steps removed from the violator in a distribution chain may not sue. Our decision in *Illinois Brick* established a bright-line rule that authorizes suits by *direct* **[**809]** purchasers but bars suits by *indirect* purchasers. *Id., at 746, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. [1]

[*1521] The facts of *Illinois* ***[***11]*** *Brick* illustrate the rule. Illinois Brick Company manufactured and distributed concrete blocks. Illinois Brick sold the blocks primarily to masonry contractors, and those contractors in turn sold masonry structures to general contractors. Those general contractors in turn sold their services for larger construction projects to the State of Illinois, the ultimate consumer of the blocks.

The consumer State of Illinois sued the manufacturer Illinois Brick. The State alleged that Illinois Brick had engaged in a conspiracy to fix the price of concrete blocks. According to the complaint, the State paid more for the concrete blocks than it would have paid absent the price-fixing conspiracy. The monopoly overcharge allegedly flowed all the way down the distribution chain to the ultimate consumer, who was the State of Illinois.

This Court ruled that the State could not bring an antitrust action against Illinois Brick, the alleged violator, because the State had not purchased concrete blocks directly from Illinois Brick. The proper plaintiff to bring that claim against Illinois Brick, the Court stated, would be an entity that had purchased directly from Illinois Brick. *Ibid*.

HN4[] **LEdHN[4]**[] [4] The bright-line rule **[***12]** of *Illinois Brick*, as articulated in that case and as we reiterated in *UtiliCorp*, means that indirect purchasers who are two or more steps removed from the antitrust violator in a distribution chain may not sue. By contrast, direct purchasers—that is, those who are "the immediate buyers from the alleged antitrust violators"—may sue. *UtiliCorp, 497 U. S., at 207, 110 S. Ct. 2807, 111 L. Ed. 2d 169*.

For example, if manufacturer A sells to retailer B, and retailer B sells to consumer C, then C may not sue A. But B may sue A if A is an antitrust violator. And C may sue B if B is an antitrust violator. That is the straightforward rule of *Illinois Brick*. See *Loeb Industries, Inc. v. Sumitomo Corp., 306 F. 3d 469, 481-482 (CA7 2002)* (Wood, J.). [2]

In this case, unlike in *Illinois Brick*, the iPhone owners are not consumers at the bottom of a vertical distribution chain who are attempting to sue manufacturers at the top of the chain. There is no intermediary in the distribution chain between Apple and the consumer. The iPhone owners purchase apps directly from the retailer Apple, who is the alleged antitrust violator. The iPhone owners pay the alleged overcharge directly to Apple. The absence of an intermediary is dispositive. Under *Illinois Brick*, the iPhone owners are direct purchasers from Apple **[***13]** and are proper plaintiffs to maintain this antitrust suit.

B

All of that seems simple enough. **[**810]** But Apple argues strenuously against that seemingly simple conclusion, and we address its arguments carefully. For this kind of retailer case, Apple's theory is that *Illinois Brick* allows consumers to sue only the party who sets the retail price, whether or not that party sells the good or service directly to the complaining party. Apple says that its theory accords with the economics of the transaction. Here, Apple argues that the app developers, not Apple, set the retail price charged to consumers, **[*1522]** which according to Apple means that the consumers may not sue Apple.

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[1] *Illinois Brick* held that the direct-purchaser requirement applies to claims for damages. *Illinois Brick* did not address injunctive relief, and we likewise do not address injunctive relief in this case.

[2] Thirty States and the District of Columbia filed an *amicus* brief supporting the plaintiffs, and they argue that C should be able to sue A in that hypothetical. They ask us to overrule *Illinois Brick* to allow such suits. In light of our ruling in favor of the plaintiffs in this case, we have no occasion to consider that argument for overruling *Illinois Brick*.

We see three main problems with Apple's "who sets the price" theory.

First, Apple's theory contradicts statutory text and precedent. As we explained above, the text of *§4* broadly affords injured parties a right to sue under the antitrust laws. And ***HN5***[] ***LEdHN[5]***[] [5] our precedent in *Illinois Brick* established a bright-line rule where direct purchasers such as the consumers here may sue antitrust violators from whom they purchased a good or service. *Illinois Brick*, as we read the opinion, was not based on an economic theory about who set the price. Rather, **[***14]** *Illinois Brick* sought to ensure an effective and efficient litigation scheme in antitrust cases. To do so, the Court drew a bright line that allowed direct purchasers to sue but barred indirect purchasers from suing. When there is no intermediary between the purchaser and the antitrust violator, the purchaser may sue. The *Illinois Brick* bright-line rule is grounded on the "belief that simplified administration improves antitrust enforcement." 2A P. Areeda, H. Hovenkamp, R. Blair, & C. Durrance, ***Antitrust Law*** ¶346e, p. 194 (4th ed. 2014) (Areeda & Hovenkamp). Apple's theory would require us to rewrite the rationale of *Illinois Brick* and to gut the longstanding bright-line rule.

To the extent that *Illinois Brick* leaves any ambiguity about whether a direct purchaser may sue an antitrust violator, we should resolve that ambiguity in the direction of the statutory text. And under the text, direct purchasers from monopolistic retailers are proper plaintiffs to sue those retailers.

Second, in addition to deviating from statutory text and precedent, Apple's proposed rule is not persuasive economically or legally. Apple's effort to transform *Illinois Brick* from a direct-purchaser rule to a "who **[***15]** sets the price" rule would draw an arbitrary and unprincipled line among retailers based on retailers' financial arrangements with their manufacturers or suppliers.

In the retail context, the price charged by a retailer to a consumer is often a result (at least in part) of the price charged by the manufacturer or supplier to the retailer, or of negotiations between the manufacturer or supplier and the retailer. Those agreements between manufacturer or supplier and retailer may take myriad forms, including for example a markup pricing model or a commission pricing model. In a traditional markup pricing model, a hypothetical monopolistic retailer might pay $6 to the manufacturer and then sell the product for $10, keeping $4 for itself. In a commission pricing model, the retailer might pay nothing to the manufacturer; agree with the manufacturer that the retailer will sell the product for $10 and keep 40 percent of the sales price; and then sell the product for $10, send $6 back to the manufacturer, **[**811]** and keep $4. In those two different pricing scenarios, everything turns out to be economically the same for the manufacturer, retailer, and consumer.

Yet Apple's proposed rule would allow a **[***16]** consumer to sue the monopolistic retailer in the former situation but not the latter. In other words, under Apple's rule a consumer could sue a monopolistic retailer when the retailer set the retail price by marking up the price it had paid the manufacturer or supplier for the good or service. But a consumer could not sue a monopolistic retailer when the manufacturer or supplier set the retail price and the retailer took a commission on each sale.

Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar **[*1523]** lawsuits. In particular, we fail to see why the form of the upstream arrangement between the manufacturer or supplier and the retailer should determine whether a monopolistic retailer can be sued by a downstream consumer who has purchased a good or service directly from the retailer and has paid a higher-than-competitive price because of the retailer's unlawful monopolistic conduct. As the Court of Appeals aptly stated, "the distinction between a markup and a commission is immaterial." *846 F. 3d, at 324*. A leading antitrust treatise likewise states: "Denying standing because 'title' never passes to a broker is an overly lawyered approach that **[***17]** ignores the reality that a distribution system that relies on brokerage is economically indistinguishable from one that relies on purchaser-resellers." 2A Areeda & Hovenkamp ¶345, at 183. If a retailer has engaged in unlawful monopolistic conduct that has caused consumers to pay higher-than-competitive prices, it does not matter how the retailer structured its relationship with an upstream manufacturer or supplier—whether, for example, the retailer employed a markup or kept a commission.

To be sure, if the monopolistic retailer's conduct has not caused the consumer to pay a higher-than-competitive price, then the plaintiff's damages will be zero. Here, for example, if the competitive commission rate were 10 percent rather than 30 percent but Apple could prove that app developers in a 10 percent commission system would always set a higher price such that consumers would pay the same retail price regardless of whether Apple's commission was 10 percent or 30 percent, then the consumers' damages would presumably be zero. But we cannot assume in all cases—as Apple would necessarily have us do—that a monopolistic retailer who keeps a commission does not ever cause the consumer to pay a higher-than-competitive **[***18]** price. We find no persuasive legal or economic basis for such a blanket assertion.

In short, we do not understand the relevance of the upstream market structure in deciding whether a downstream consumer may sue a monopolistic retailer. Apple's rule would elevate form (what is the precise arrangement between manufacturers or suppliers and retailers?) over substance (is the consumer paying a higher price because of the monopolistic retailer's actions?). If the retailer's unlawful monopolistic conduct caused a consumer to pay the retailer a higher-than-competitive price, the **[**812]** consumer is entitled to sue the retailer under the antitrust laws.

Third, if accepted, Apple's theory would provide a roadmap for monopolistic retailers to structure transactions with manufacturers or suppliers so as to evade antitrust claims by consumers and thereby thwart effective antitrust enforcement.

Consider a traditional supplier-retailer relationship, in which the retailer purchases a product from the supplier and sells the product with a markup to consumers. Under Apple's proposed rule, a retailer, instead of buying the product from the supplier, could arrange to sell the product for the supplier without purchasing **[***19]** it from the supplier. In other words, rather than paying the supplier a certain price for the product and then marking up the price to sell the product to consumers, the retailer could collect the price of the product from consumers and remit only a fraction of that price to the supplier.

That restructuring would allow a monopolistic retailer to insulate itself from antitrust suits by consumers, even in situations where a monopolistic retailer is using its monopoly to charge higher-than-competitive prices to consumers. We decline to green-light monopolistic retailers to exploit their market position in that way. We refuse to rubber-stamp such a blatant evasion **[*1524]** of statutory text and judicial precedent.

In sum, Apple's theory would disregard statutory text and precedent, create an unprincipled and economically senseless distinction among monopolistic retailers, and furnish monopolistic retailers with a how-to guide for evasion of the antitrust laws.

C

In arguing that the Court should transform the direct-purchaser rule into a "who sets the price" rule, Apple insists that the three reasons that the Court identified in *Illinois Brick* for adopting the direct-purchaser rule apply to this case—even **[***20]** though the consumers here (unlike in *Illinois Brick*) were direct purchasers from the alleged monopolist. The *Illinois Brick* Court listed three reasons for barring indirect-purchaser suits: (1) facilitating more effective enforcement of antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.

As we said in *UtiliCorp*, however, the bright-line rule of *Illinois Brick* means that there is no reason to ask whether the rationales of *Illinois Brick* "apply with equal force" in every individual case. *497 U. S., at 216, 110 S. Ct. 2807, 111 L. Ed. 2d 169*. We should not engage in "an unwarranted and counterproductive exercise to litigate a series of exceptions." *Id., at 217, 110 S. Ct. 2807, 111 L. Ed. 2d 169*.

But even if we engage with this argument, we conclude that the three *Illinois Brick* rationales—whether considered individually or together—cut strongly in the plaintiffs' favor here, not Apple's.

First, Apple argues that barring the iPhone owners from suing Apple will better promote effective enforcement of the antitrust laws. Apple posits that allowing only the upstream app developers—and not the downstream consumers—to sue Apple would mean more effective enforcement of the antitrust laws. We do not agree. Leaving **[**813]** **[***21]** consumers at the mercy of monopolistic retailers simply because upstream suppliers could *also* sue the retailers makes little sense and would directly contradict the longstanding goal of effective private enforcement and consumer protection in antitrust cases.

Second, Apple warns that calculating the damages in successful consumer antitrust suits against monopolistic retailers might be complicated. It is true that it may be hard to determine what the retailer would have charged in a competitive market. Expert testimony will often be necessary. But that is hardly unusual in antitrust cases. *Illinois Brick*is not a get-out-of-court-free card for monopolistic retailers to play any time that a damages calculation might be complicated. *Illinois Brick* surely did not wipe out consumer antitrust suits against monopolistic retailers from whom the consumers purchased goods or services at higher-than-competitive prices. Moreover, the damages calculation may be just as complicated in a retailer markup case as it is in a retailer commission case. Yet Apple apparently accepts consumers suing monopolistic retailers in a retailer markup case. If Apple accepts that kind of suit, then Apple should also **[***22]** accept consumers suing monopolistic retailers in a retailer commission case.

Third, Apple claims that allowing consumers to sue will result in "conflicting claims to a common fund—the amount of the alleged overcharge." *Illinois Brick, 431 U. S., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. Apple is incorrect. This is not a case where multiple parties at different levels of a distribution chain are trying to all recover the same passed-through overcharge initially levied by the manufacturer at the top of the **[*1525]** chain. Cf. *id., at 726-727, 97 S. Ct. 2061, 52 L. Ed. 2d 707*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U. S. 481, 483-484, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. If the iPhone owners prevail, they will be entitled to the *full amount* of the unlawful overcharge that they paid to Apple. The overcharge has not been passed on by anyone to anyone. Unlike in *Illinois Brick*, there will be no need to "trace the effect of the overcharge through each step in the distribution chain." *431 U. S., at 741, 97 S. Ct. 2061, 52 L. Ed. 2d 707*.

It is true that Apple's alleged anticompetitive conduct may leave Apple subject to multiple suits by different plaintiffs. But *Illinois Brick* did not purport to bar multiple liability that is unrelated to passing an overcharge down a chain of distribution. Basic ***antitrust law*** tells us that the "mere fact that an antitrust violation produces two different classes of victims hardly entails that their injuries are duplicative **[***23]** of one another." 2A Areeda & Hovenkamp ¶339d, at 136. Multiple suits are not atypical when the intermediary in a distribution chain is a bottleneck monopolist or monopsonist (or both) between the manufacturer on the one end and the consumer on the other end. A retailer who is both a monopolist and a monopsonist may be liable to different classes of plaintiffs—both to downstream consumers and to upstream suppliers—when the retailer's unlawful conduct affects both the downstream and upstream markets.

Here, some downstream iPhone consumers have sued Apple on a monopoly theory. And it could be that **[**814]** some upstream app developers will also sue Apple on a monopsony theory. In this instance, the two suits would rely on fundamentally different theories of harm and would not assert dueling claims to a "common fund," as that term was used in *Illinois Brick*. The consumers seek damages based on the difference between the price they paid and the competitive price. The app developers would seek lost profits that they could have earned in a competitive retail market. *Illinois Brick* does not bar either category of suit.

In short, the three *Illinois Brick* rationales do not persuade us to remake *Illinois* ***[***24]*** *Brick* and to bar direct-purchaser suits against monopolistic retailers who employ commissions rather than markups. The plaintiffs seek to hold retailers to account if the retailers engage in unlawful anticompetitive conduct that harms consumers who purchase from those retailers. That is why we have ***antitrust law***.

***

Ever since Congress overwhelmingly passed and President Benjamin Harrison signed the *Sherman Act* in 1890, "protecting consumers from monopoly prices" has been "the central concern of antitrust." 2A Areeda & Hovenkamp ¶345, at 179. The consumers here purchased apps directly from Apple, and they allege that Apple used its monopoly power over the retail apps market to charge higher-than-competitive prices. Our decision in *Illinois Brick* does not bar the consumers from suing Apple for Apple's allegedly monopolistic conduct. We affirm the judgment of the U. S. Court of Appeals for the Ninth Circuit.

It is so ordered.

Dissent by: GORSUCH

Dissent

Justice **Gorsuch**, with whom The Chief Justice, Justice **Thomas**, and Justice **Alito** join, dissenting.

More than 40 years ago, in *Illinois Brick Co. v. Illinois, 431 U. S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*, this Court held that an antitrust plaintiff can't sue a defendant for overcharging *someone else* who might (or might not) have passed **[***25]** on all (or some) of the overcharge to him. *Illinois Brick* held that these convoluted **[*1526]** "pass on" theories of damages violate traditional principles of proximate causation and that the right plaintiff to bring suit is the one on whom the overcharge immediately and surely fell. Yet today the Court lets a pass-on case proceed. It does so by recasting *Illinois Brick* as a rule forbidding only suits where the plaintiff does not contract directly with the defendant. This replaces a rule of proximate cause and economic reality with an easily manipulated and formalistic rule of contractual privity. That's not how ***antitrust law*** is supposed to work, and it's an uncharitable way of treating a precedent which—whatever its flaws—is far more sensible than the rule the Court installs in its place.

I

To understand *Illinois Brick*, it helps to start with the case that paved the way for that decision: *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U. S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. Hanover sued **[**815]** United, a company that supplied machinery Hanover used to make shoes. Hanover alleged that United's illegal monopoly in the shoe-making-machinery market had allowed it to charge supracompetitive prices. As damages, Hanover sought to recover the amount it had overpaid United for machinery. United **[***26]** replied that Hanover hadn't been damaged at all because, United asserted, Hanover had not absorbed the supposedly "illegal overcharge" but had "passed the cost on to its customers" by raising the prices it charged for shoes. *Id., at 487-488, and n. 6, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. This Court called United's argument a "'passing-on' defense" because it suggested that a court should consider whether an antitrust plaintiff had "passed on" the defendant's overcharge to its own customers when assessing if and to what degree the plaintiff was injured by the defendant's anticompetitive conduct. *Id., at 488, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*.

This Court rejected that defense. While *§4 of the Clayton Act* allows private suits for those injured by antitrust violations, we have long interpreted this language against the backdrop of the common law. See, *e.g.*, *Associated Gen. Contractors of Cal., Inc. v. Carpenters, 459 U. S. 519, 529-531, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. And under ancient rules of proximate causation, the "'general tendency of the law, in regard to damages at least, is not to go beyond the first step.'" *Hanover Shoe, 392 U. S., at 490, n. 8, 88 S. Ct. 2224, 20 L. Ed. 2d 1231* (quoting *Southern Pacific Co. v. Darnell-Taenzer Lumber Co., 245 U. S. 531, 533, 38 S. Ct. 186, 62 L. Ed. 451 (1918))*. In *Hanover Shoe*, the first step was United's overcharging of Hanover. To proceed beyond that and inquire whether Hanover had passed on the overcharge to its customers, the Court held, would risk the sort of problems traditional principles of proximate cause were designed **[***27]** to avoid. "[N]early insuperable" questions would follow about whether Hanover had the capacity and incentive to pass on to its customers in the shoe-making market United's alleged monopoly rent from the separate shoe-making-machinery market. *392 U. S., at 493, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. Resolving those questions would, in turn, necessitate a trial within a trial about Hanover's power and conduct in its own market, with the attendant risk that proceedings would become "long and complicated" and would "involv[e] massive evidence and complicated theories." *Ibid.*

Illinois Brick was just the other side of the coin. With *Hanover Shoe* having held that an antitrust *defendant* could not rely on a pass-on theory to avoid damages, *Illinois Brick* addressed whether an antitrust *plaintiff* could rely on a pass-on theory to recover damages. The State of Illinois had sued several manufacturers of concrete blocks, alleging that the defendants' **[*1527]** price-fixing conspiracy had enabled them to overcharge building contractors, who in turn had passed on those charges to their customers, including the State. Recognizing that *Hanover Shoe* had already prohibited antitrust violators from using a "pass-on theory" defensively, the Court declined to "permit offensive **[***28]** use of a pass-on theory against an alleged violator that could not use the same theory as a defense." *431 U. S., at 735, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. "Permitting the use of pass-on theories under *§4*," the Court **[**816]** reasoned, would require determining how much of the manufacturer's monopoly rent was absorbed by intermediary building contractors and how much they were able and chose to pass on to their customers like the State. *Id., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707*. Allowing pass-on theories would, as well, allow "plaintiffs at each level in the distribution chain" to "assert conflicting claims to a common fund," which would require "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." *Ibid.* Better again, the Court decided, to adhere to traditional rules of proximate causation and allow only the first affected customers—the building contractors—to sue for the monopoly rents they had directly paid.

There is nothing surprising in any of this. Unless Congress provides otherwise, this Court generally reads statutory causes of action as "limited to plaintiffs whose injuries are proximately caused by violations of the statute." *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U. S. 118, 132, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)*. That proximate **[***29]** cause requirement typically bars suits for injuries that are "derivative of misfortunes visited upon a third person by the defendant's acts." *Id., at 133, 134 S. Ct. 1377, 188 L. Ed. 2d 392* (internal quotation marks omitted). So, for example, if a defendant's false advertising causes harm to one of its competitors, the competitor can sue the false advertiser under the *Lanham Act*. But if the competitor is unable to pay its rent as a result, the competitor's landlord can't sue the false advertiser, because the landlord's harm derives from the harm to the competitor. *Id., at 134, 134 S. Ct. 1377, 188 L. Ed. 2d 392*; see also, *e.g.*, *Bank of America Corp. v. Miami, 581 U. S. ___, ___-___, 137 S. Ct. 1296, 197 L. Ed. 2d 678, 693-694 (2017)*; *Dura Pharmaceuticals, Inc. v. Broudo, 544 U. S. 336, 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005)*; *Holmes v. Securities Investor Protection Corporation, 503 U. S. 258, 268-270, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992)*. This Court has long understood *Illinois Brick* as simply applying these traditional proximate cause principles in the antitrust context. See *Associated Gen. Contractors, 459 U. S., at 532-535, 544-545, 103 S. Ct. 897, 74 L. Ed. 2d 723*. [1]

II

The lawsuit before us depends on just the sort of pass-on theory that *Illinois Brick* forbids. The plaintiffs bought apps from third-party app developers (or manufacturers) in Apple's retail Internet App Store, at prices set by the developers. The lawsuit alleges that Apple is a monopolist retailer and that the 30% commission it **[*1528]** charges developers for the right to sell through its platform represents an anticompetitive price. The problem is that the 30% commission falls **[***30]** initially on the developers. So if the **[**817]** commission is in fact a monopolistic overcharge, the *developers* are the parties who are directly injured by it. Plaintiffs can be injured *only* if the developers are able and choose to pass on the overcharge to them in the form of higher app prices that the developers alone control. Plaintiffs admitted as much in the district court, where they described their theory of injury this way: "[I]f Apple tells the developer . . . we're going to take this 30 percent commission . . . what's the developer going to do? The developer is going to increase its price to cover Apple's . . . demanded profit." App. 143.

Because this is *exactly* the kind of "pass-on theory" *Illinois Brick* rejected, it should come as no surprise that the concerns animating that decision are also implicated. Like other pass-on theories, plaintiffs' theory will necessitate a complex inquiry into how Apple's conduct affected third-party pricing decisions. And it will raise difficult questions about apportionment of damages between app developers and their customers, along with the risk of duplicative damages awards. If anything, plaintiffs' claims present these difficulties even more starkly **[***31]** than did the claims at issue in *Illinois Brick*.

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[1] For this reason, it's hard to make sense of the suggestion that *Illinois Brick* may not apply to claims for injunctive relief, *ante, at ___, n. 1, 203 L. Ed. 2d, at 809*. Under our normal rule of construction, a plaintiff who's not proximately harmed by a defendant's unlawful conduct has no cause of action to sue the defendant for any type of relief. *Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U. S. 118, 135, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014)* (although a plaintiff that "cannot quantify its losses with sufficient certainty to recover damages . . . may still be entitled to injunctive relief," the requirement of proximate causation "must be met in every case").

Consider first the question of causation. To determine if Apple's conduct damaged plaintiffs at all (and if so, the magnitude of their damages), a court will first have to explore whether and to what extent each individual app developer was able—and then opted—to pass on the 30% commission to its consumers in the form of higher app prices. Sorting this out, if it can be done at all, will entail wrestling with "'complicated theories'" about "how the relevant market variables would have behaved had there been no overcharge." Illinois Brick, 431 U. S., at 741-743, 97 S. Ct. 2061, 52 L. Ed. 2d 707. Will the court hear testimony to determine the market power of each app developer, how each set its prices, and what it might have charged consumers for apps if Apple's commission had been lower? Will the court also consider expert testimony analyzing how market factors might have influenced developers' capacity and willingness to pass on Apple's alleged monopoly overcharge? And will the court then somehow extrapolate its findings to all of the tens of thousands of developers who sold apps through the App Store at different prices and times over the course of years?

This causation inquiry will be complicated further **[***32]** by Apple's requirement that all app prices end in $0.99. As plaintiffs acknowledge, this rule has caused prices for the "vast majority" of apps to "cluster" at exactly $0.99. Brief for Respondents 44. And a developer charging $0.99 for its app can't raise its price by just enough to recover the 30-cent commission. Instead, if the developer wants to pass on the commission to consumers, it has to more than double its price to $1.99 (doubling the commission in the process), which could significantly affect its sales. In short, because Apple's 99-cent rule creates a strong disincentive for developers to raise their prices, it makes plaintiffs' pass-on theory of injury even harder to prove. Yet the court will have to consider all **[**818]** of this when determining what damages, if any, plaintiffs suffered as a result of Apple's allegedly excessive 30% commission. [2]

[*1529] Plaintiffs' claims will also necessitate "massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge," including both consumers and app developers. Illinois Brick, 431 U. S., at 737, 97 S. Ct. 2061, 52 L. Ed. 2d 707. If, as plaintiffs contend, Apple's 30% commission is a monopolistic overcharge, then the app developers have a claim against **[***33]** Apple to recover whatever portion of the commission they did not pass on to consumers. Before today, *Hanover Shoe* would have prevented Apple from reducing its liability to the developers by arguing that they had passed on the overcharge to consumers. But the Court's holding that *Illinois Brick* doesn't govern this situation surely must mean *Hanover Shoe* doesn't either. So courts will have to divvy up the commissions Apple collected between the developers and the consumers. To do that, they'll have to figure out which party bore what portion of the overcharge in every purchase. And if the developers bring suit separately from the consumers, Apple might be at risk of duplicative damages awards totaling more than the full amount it collected in commissions. To avoid that possibility, it may turn out that the developers are necessary parties who will have to be joined in the plaintiffs' lawsuit. See Fed. Rule Civ. Proc. 19(a)(1)(B); Illinois Brick, 431 U. S., at 739, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (explaining that "[t]hese absent potential claimants would seem to fit the classic definition of 'necessary parties,' for purposes of compulsory joinder"). [3]

III

The United States and its antitrust regulators agree with all of this, so how does the Court reach **[***34]** such a different conclusion? Seizing on *Illinois Brick*'s use of the shorthand phrase "direct purchasers" to describe the parties immediately injured by the monopoly overcharge in that case, the Court (re)characterizes *Illinois Brick* as a

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[2] Plaintiffs haven't argued (and so have forfeited in this Court any argument) that Apple's imposition of the 99-cent rule was *itself* an antitrust violation that injured consumers by raising the price of apps above competitive levels. They didn't mention the 99-cent rule in their complaint in district court or in their briefs to the court of appeals. And, as I've noted, they concede that they are seeking damages "based solely on" the 30% commission. Brief in Opposition 5.

[3] The Court denies that allowing both consumers and developers to sue over the same allegedly unlawful commission will "result in 'conflicting claims to a common fund'" as *Illinois Brick* feared. Ante, at ___, 203 L. Ed. 2d, at 813. But Apple charged only one commission on each sale. So even assuming for argument's sake that the 30% commission was entirely illegal, Apple can only be required to pay out in damages, at most, the full amount it received in commissions. To their credit, even plaintiffs have conceded as much, acknowledging that because "there is only *one 30% markup*," any claim by the developers against Apple would necessarily be seeking "a piece of the same 30% pie." Brief in Opposition 12. It's a mystery why the Court refuses to accept that sensible concession.

rule that anyone who purchases goods directly from an alleged antitrust violator can sue, while anyone who doesn't, can't. Under this revisionist version of *Illinois Brick*, the dispositive question becomes whether an "intermediary in the distribution chain" stands between the plaintiff and the defendant. *Ante, at ___, 203 L. Ed. 2d, at 809*. And because the plaintiff app purchasers in this case **[**819]** happen to have purchased apps directly from Apple, the Court reasons, they may sue.

This exalts form over substance. Instead of focusing on the traditional proximate cause question where the alleged overcharge is first (and thus surely) felt, the Court's test turns on who happens to be in privity of contract with whom. But we've long recognized that ***antitrust law*** should look at "the economic reality of the relevant transactions" rather than "formal conceptions of contract law." **[*1530]** *United States v. Concentrated Phosphate Export Assn., Inc., 393 U. S. 199, 208, 89 S. Ct. 361, 21 L. Ed. 2d 344 (1968)*. And this case illustrates why. To evade the Court's test, all Apple must do is amend its contracts. Instead **[***35]** of collecting payments for apps sold in the App Store and remitting the balance (less its commission) to developers, Apple can simply specify that consumers' payments will flow the other way: directly to the developers, who will then remit commissions to Apple. No antitrust reason exists to treat these contractual arrangements differently, and doing so will only induce firms to abandon their preferred—and presumably more efficient—distribution arrangements in favor of less efficient ones, all so they might avoid an arbitrary legal rule. See *Copperweld Corp. v. Independence Tube Corp., 467 U. S. 752, 763, 772-774, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (rejecting an "'artificial distinction'" that "serves no valid antitrust goals but merely deprives consumers and producers of the benefits" of a particular business model).

Nor does *Illinois Brick* come close to endorsing such a blind formalism. Yes, as the Court notes, the plaintiff in *Illinois Brick* did contract directly with an intermediary rather than with the putative antitrust violator. But *Illinois Brick*'s rejection of pass-on claims, and its explanation of the difficulties those claims present, had nothing to do with privity of contract. Instead and as we have seen, its rule and reasoning grew from the "general tendency of the law . . . not **[***36]** to go beyond" the party that first felt the sting of the alleged overcharge, and from the complications that can arise when courts attempt to discern whether and to what degree damages were passed on to others. *Supra, at ___ - ___, 203 L. Ed. 2d, at 815-816*. The Court today risks replacing a cogent rule about proximate cause with a pointless and easily evaded imposter. We do not usually read our own precedents so uncharitably.

Maybe the Court proceeds as it does today because it just disagrees with *Illinois Brick*. After all, the Court not only displaces a sensible rule in favor of a senseless one; it also proceeds to question each of *Illinois Brick*'s rationales—doubting that those directly injured are always the best plaintiffs to bring suit, that calculating damages for pass-on plaintiffs will often be unduly complicated, and that conflicting claims to a common fund justify limiting who may sue. *Ante, at ___ - ___, 203 L. Ed. 2d, at 812-814*. The Court even tells us that any "ambiguity" about the permissibility of pass-on damages should be resolved "in the direction of the statutory text," *ante, at ___, 203 L. Ed. 2d, at 810*—ignoring that *Illinois Brick* followed the well-trodden path of construing the statutory text in light of background common law principles of **[**820]** proximate cause. Last **[***37]** but not least, the Court suggests that the traditional understanding of *Illinois Brick* leads to "arbitrary and unprincipled" results. *Ante, at ___, 203 L. Ed. 2d, at 810*. It asks us to consider two hypothetical scenarios that, it says, prove the point. The first is a "markup" scenario in which a monopolistic retailer buys a product from a manufacturer for $6 and then decides to sell the product to a consumer for $10, applying a supracompetitive $4 markup. The second is a "commission" scenario in which a manufacturer directs a monopolistic retailer to sell the manufacturer's product to a consumer for $10 and the retailer keeps a supracompetitive 40% commission, sending $6 back to the manufacturer. The two scenarios are economically the same, the Court asserts, and forbidding recovery in the second for lack of proximate cause makes no sense.

But there is nothing arbitrary or unprincipled about *Illinois Brick*'s rule or results. The notion that the causal chain must stop somewhere is an ancient and venerable one. As with most any rule of proximate cause, reasonable people can debate **[*1531]** whether *Illinois Brick* drew exactly the right line in cutting off claims where it did. But the line it drew is intelligible, principled, **[***38]** administrable, and far more reasonable than the Court's artificial rule of contractual privity. Nor do the Court's hypotheticals come close to proving otherwise. In the first scenario, the markup falls initially on the consumer, so there's no doubt that the retailer's anticompetitive conduct proximately caused the consumer's injury. Meanwhile, in the second scenario the commission falls initially on the manufacturer, and the consumer won't feel the pain unless the manufacturer can and does recoup some or all of the elevated commission by raising its own prices. In *that* situation, the manufacturer is the directly injured party, and the difficulty of disaggregating damages between those directly and indirectly harmed means that the consumer can't establish proximate cause under traditional principles.

Some *amici* share the Court's skepticism of *Illinois Brick*. They even urge us to overrule *Illinois Brick*, assuring us that "modern economic techniques" can now mitigate any problems that arise in allocating damages between those who suffer them directly and those who suffer them indirectly. Brief for State of Texas et al. as *Amici Curiae* 25. Maybe there is something to these arguments; maybe **[***39]** not. But there's plenty of reason to decline any invitation to take even a small step away from *Illinois Brick* today. The plaintiffs have not asked us to overrule our precedent—in fact, they've disavowed any such request. Tr. of Oral Arg. 40. So we lack the benefit of the adversarial process in a complex area involving a 40-year-old precedent and many hard questions. For example, if we are really inclined to overrule *Illinois Brick*, doesn't that mean we must do the same to *Hanover Shoe*? If the proximate cause line is no longer to be drawn at the first injured party, how far down the causal chain can a plaintiff be and still recoup damages? Must all potential claimants to the single monopoly rent be gathered in a single lawsuit as necessary parties (and if not, why **[**821]** not)? Without any invitation or reason to revisit our precedent, and with so many grounds for caution, I would have thought the proper course today would have been to afford *Illinois Brick* full effect, not to begin whittling it away to a bare formalism. I respectfully dissent.

References

15 U.S.C.S. §§2, *15*

8 Antitrust Laws and Trade Regulation § 161.02 (Matthew Bender 2d ed.)

11 Federal ***Antitrust Law*** § 78.7 (Matthew Bender)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 67.6

L Ed Index, Restraints of **[***40]** Trade, Monopolies, and Unfair Trade Practices

Standing to sue, under § 4 of the Clayton Act (*15 U.S.C.S. § 15*) and predecessor statute, to recover treble damages for antitrust violation--Supreme Court cases. *73 L. Ed. 2d 1427*.

NFL v. Ninth Inning, Inc.

Supreme Court of the United States

November 2, 2020, Decided

No. 19-1098.

Reporter

141 S. Ct. 56 *; 208 L. Ed. 2d 291 **; 2020 U.S. LEXIS 5194 ***; 89 U.S.L.W. 3147; 28 Fla. L. Weekly Fed. S 602; 2020 WL 6385695

National Football League, et al., Petitioners v. Ninth Inning, Inc., et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nat'l Football League's Sunday Ticket Antitrust Litig. v. DirecTV, LLC, 933 F.3d 1136, 2019 U.S. App. LEXIS 24041, 2019 WL 3788253 (9th Cir. Cal., Aug. 13, 2019)

Core Terms

teams, television, antitrust, games, anti trust law, rights, out-of-market, purchasers, suits

Counsel: Gregg H. Levy argued for the cause for petitioners.

Arun Srinivas Subramanian argued for the cause for respondents.

Judges: Roberts, Thomas, Breyer, Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh, Barrett*.

Opinion

[*56] [291]** Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Statement of Justice Kavanaugh respecting the denial of certiorari.

Concur by: KAVANAUGH

Concur

Statement of Justice Kavanaugh respecting the denial of certiorari.

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* Justice Barrett took no part in the consideration or decision of the motions or petitions appearing on this Order List.

In this antitrust case, the plaintiffs challenged the National Football League's contract with DirecTV for the television rights to out-of-market games. That contract has been in place for 26 years. The District Court dismissed the plaintiffs' suit. But the Court of Appeals reversed, holding that the plaintiffs' complaint sufficiently alleged that the contract may be illegal under the antitrust laws. Ordinarily, a decision of such legal and economic significance might warrant this Court's review. But the case **[*57]** comes to us at the motion-to-dismiss stage, and the interlocutory posture is a factor counseling against this Court's review at this time. See *Abbott v. Veasey, 580 U. S. ___, ___, 137 S. Ct. 612, 197 L. Ed. 2d 78, 79 (2017)* (Roberts, C. J., statement respecting denial of certiorari) (slip op., at 2).

I write separately simply to explain that the denial of certiorari should not **[**292]** necessarily be viewed as agreement **[***2]** with the legal analysis of the Court of Appeals.

Under the existing contract, the 32 NFL teams have authorized the NFL to sell the television rights for out-of-market games to a single buyer, DirecTV. The plaintiffs argue, and the Court of Appeals agreed, that ***antitrust law*** may require each team to negotiate an individualized contract for televising only its own games. But that conclusion appears to be in substantial tension with antitrust principles and precedents. The NFL and its member teams operate as a joint venture. See *Smith v. Pro Football, Inc., 593 F. 2d 1173, 1179, 193 U.S. App. D.C. 19 (CADC 1978)*. And ***antitrust law*** likely does not require that the NFL and its member teams compete against each other with respect to television rights. Cf. *American Needle, Inc. v. National Football League, 560 U. S. 183, 202, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)* ("NFL teams . . . must cooperate in the production and scheduling of games"); R. Bork, The Antitrust Paradox 278 (1978).

Moreover, the plaintiffs may not have antitrust standing to sue the NFL and the individual teams. This Court's case law "authorizes suits by *direct* purchasers but bars suits by *indirect* purchasers." *Apple Inc. v. Pepper, 587 U. S. ___, ___, 139 S. Ct. 1514, 203 L. Ed. 2d 802, 809 (2019)*. The plaintiffs here did not purchase a product from the NFL or any team, and may therefore be barred from bringing suit against the NFL and its teams under *Illinois Brick Co. v. Illinois, 431 U. S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977)*.

In sum, the defendants—the NFL, its teams, and **[***3]** DirecTV—have substantial arguments on the law. If the defendants do not prevail at summary judgment or at trial, they may raise those legal arguments again in a new petition for certiorari, as appropriate.

NCAA v. Alston

Supreme Court of the United States

March 31, 2021, Argued; June 21, 2021, Decided*

Nos. 20-512 and 20-520.

Reporter

141 S. Ct. 2141 *; 210 L. Ed. 2d 314 **; 2021 U.S. LEXIS 3123 ***; 28 Fla. L. Weekly Fed. S 915; 2021 WL 2519036

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner (No. 20-512) v. SHAWNE ALSTON, et al. AMERICAN ATHLETIC CONFERENCE, et al., Petitioners (No. 20-520) v. SHAWNE ALSTON, et al.

Notice: The LEXIS pagination of this document is subject to change pending release of the final published version.

Prior History: [*1]** ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Alston v. NCAA (In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig.), 958 F.3d 1239, 2020 U.S. App. LEXIS 15789, 2020 WL 2519475 (9th Cir. Cal., May 18, 2020)

Disposition: *958 F. 3d 1239*, affirmed.

Core Terms

student-athletes, athletic, district court, benefits, schools, sports, procompetitive, restrictions, student athlete, antitrust, football, limits, conferences, consumer demand, anti trust law, consumer, awards, education-related, rule of reason, amateurism, injunction, Sherman Act, anticompetitive, courts, questions, league, achievement, basketball, salaries, internships

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN1[] **Per Se Rule & Rule of Reason, Sherman Act**

In view of the common law and the law in this country when the Sherman Act was passed, the phrase "restraint of trade" is best read to mean undue restraint. Determining whether a restraint is undue for purposes of the Sherman Act presumptively calls for what the United States Supreme Court has described as a rule of reason analysis. That manner of analysis generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition. Always, the goal is to distinguish between

* Together with No. 20-520, *American Athletic Conference et al.* v. *Alston et al.*, also on certiorari to the same court.

restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN2[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which the United States Supreme Court has described as a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition—especially its capacity to reduce output and increase price.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN3[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

For purposes of the Sherman Act, the United States Supreme Court has suggested that sometimes it can determine the competitive effects of a challenged restraint in the twinkling of an eye. That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Per Se Violations

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN4[] **Per Se Rule & Rule of Reason, Per Se Violations**

For purposes of the Sherman Act, at one end of the competitive spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. If the exercise of market power is not plausible, the challenged practice is legal. Unless firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial. At the other end of the competitive spectrum, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look. Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—the United States Supreme Court takes special care not to deploy these condemnatory tools until the Court has amassed considerable experience with the type of restraint at issue and can predict with confidence that it would be invalidated in all or almost all instances.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN5[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

For purposes of the Sherman Act, that some restraints are necessary to create or maintain a league sport does not mean all aspects of elaborate interleague cooperation are. While a quick look will often be enough to approve the restraints necessary to produce a game, a fuller review may be appropriate for others.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN6[] **Per Se Rule & Rule of Reason, Sherman Act**

Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis.

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN7[] **Private Actions, Sherman Act**

The statutory policy of the Sherman Act is one of competition and it precludes inquiry into the question whether competition is good or bad.

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN8[] **Scope, Exemptions**

The orderly way to temper the Sherman Act's policy of competition is by legislation and not by court decision. A party is free to argue that, because of the special characteristics of its particular industry, it should be exempt from the usual operation of the antitrust laws—but that appeal is properly addressed to Congress. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. But until Congress says otherwise, the only law it has asked courts to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Evidence > Burdens of Proof > Allocation

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

Evidence > Burdens of Proof > Burden Shifting

HN9[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

When describing the rule of reason, the United States Supreme Court has sometimes spoken of a three-step, burden-shifting framework as a means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. What is required to assess whether a challenged restraint harms competition can vary depending on the circumstances.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN10[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

The whole point of the rule of reason is to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful. The factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN11[] **Per Se Rule & Rule of Reason, Sherman Act**

Antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Regulated Practices > Private Actions > Sherman Act

HN12[] **Sherman Act, Claims**

Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. After all, even under the best of circumstances, applying the antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect. Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. To know that the Sherman Act prohibits only unreasonable restraints of trade is thus to know that attempts to meter small deviations is not an appropriate antitrust function.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN13[] **Per Se Rule Tests, Manifestly Anticompetitive Effects**

However framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. To be sure, the two questions can be collapsed into one, since a legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN14[] **Sherman Act, Claims**

Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. But none of that means a party can relabel a restraint as a product feature and declare it immune from Sherman Act §1, 15 U.S.C.S. § 1, scrutiny. In any suit, the district court has to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by substantially less restrictive alternative means.

Antitrust & Trade Law > Sherman Act > Scope

Civil Procedure > Judgments > Relief From Judgments > Altering & Amending Judgments

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

HN15[] **Antitrust & Trade Law, Sherman Act**

Antitrust courts must give wide berth to business judgments before finding liability. Judges must be sensitive to the possibility that the continuing supervision of a highly detailed decree could wind up impairing rather than enhancing competition. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. Judges must be wary, too, of the temptation to specify the proper price, quantity, and other terms of dealing—cognizant that they are neither economic nor industry experts. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for what they see may vary over time. And throughout courts must have a healthy respect for the practical limits of judicial administration: An antitrust court is unlikely to be an effective day-to-day enforcer of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. Nor should any court impose a duty that it cannot explain or adequately and reasonably supervise. In short, judges make for poor central planners and should never aspire to the role.

Antitrust & Trade Law > Sherman Act > Remedies

Governments > Courts > Authority to Adjudicate

HN16[] **Sherman Act, Remedies**

When it comes to fashioning an antitrust remedy, caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to set sail on a sea of doubt.

Lawyers' Edition Display

Decision

[314]** District court properly applied rule of reason analysis in finding that National Collegiate Athletic Association violated Sherman Act, 15 U.S.C.S. § 1, by limiting education-related benefits schools could offer student-athletes; restraints were found to be stricter than necessary to achieve demonstrated procompetitive benefits.

Summary

Overview: HOLDINGS: [1]-The district court did not err in finding that the National Collegiate Athletic Association (NCAA) violated the Sherman Act, 15 U.S.C.S. § 1, by limiting the education-related benefits schools could offer student-athletes, such as rules limiting scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. The district court properly applied a rule of reason analysis and nowhere required the NCAA to show that its compensation rules constituted the least restrictive means of preserving consumer demand, and it was only after finding that the restraints were stricter than necessary to achieve demonstrated procompetitive benefits that the district court declared a violation of the Sherman Act.

Outcome: Judgment affirmed. Unanimous decision; 1 concurrence.

Headnotes

[315]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- UNDUE RESTRAINT -- RULE OF REASON > Headnote:
LEdHN1.[] 1.

In view of the common law and the law in this country when the Sherman Act was passed, the phrase “restraint of trade” is best read to mean undue restraint. Determining whether a restraint is undue for purposes of the Sherman Act presumptively calls for what the United States Supreme Court has described as a rule of reason analysis. That manner of analysis generally requires a court to conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition. Always, the goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- RULE OF REASON > Headnote:
LEdHN2.[] 2.

Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which the United States Supreme Court has described as a fact-specific assessment of market power and market structure aimed at assessing the challenged restraint's actual effect on competition—especially its capacity to reduce output and increase price.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- COMPETITIVE EFFECTS > Headnote:
LEdHN3.[] 3.

For purposes of the Sherman Act, the United States Supreme Court has suggested that sometimes it can determine the competitive effects of a challenged restraint in the twinkling of an eye. That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

[316]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- QUICK LOOK > Headnote:
LEdHN4.[] 4.

For purposes of the Sherman Act, at one end of the competitive spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. If the exercise of market power is not plausible, the challenged practice is legal. Unless firms have the power to raise price by curtailing output, their agreement is unlikely to harm consumers, and it makes sense to understand their cooperation as benign or beneficial. At the other end of the competitive spectrum, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful per se or rejected after only a quick look. Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—the United States Supreme Court takes special care not to deploy these condemnatory tools until the Court has amassed considerable experience with the type of restraint at issue and can predict with confidence that it would be invalidated in all or almost all instances.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- SPORTS LEAGUES > Headnote:
LEdHN5.[] 5.

For purposes of the Sherman Act, that some restraints are necessary to create or maintain a league sport does not mean all aspects of elaborate interleague cooperation are. While a quick look will often be enough to approve the restraints necessary to produce a game, a fuller review may be appropriate for others.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 19 > ANTITRUST ANALYSIS -- MARKET REALITIES > Headnote:
LEdHN6.[] 6.

Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. If those market realities change, so may the legal analysis.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 6 > SHERMAN ACT -- STATUTORY POLICY > Headnote:
LEdHN7.[] 7.

The statutory policy of the Sherman Act is one of competition and it precludes inquiry into the question whether competition is good or bad.

Courts § 141 > ANTITRUST EXEMPTIONS -- LEGISLATIVE REMEDY > Headnote:
LEdHN8.[] 8.

The orderly way to temper the Sherman Act's policy of competition is by legislation and not by court decision. A party is free to argue that, because of the special characteristics of its particular industry, it should be exempt from the usual operation of the antitrust laws—but that appeal is properly addressed to Congress. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. But until Congress says otherwise, the only law it has asked courts to enforce is the Sherman Act, and that law is predicated on one assumption alone—competition is the best method of allocating resources in the Nation's economy.

[317]**

Evidence § 343.5 > RULE OF REASON -- BURDEN SHIFTING > Headnote:
LEdHN9.[] 9.

When describing the rule of reason, the United States Supreme Court has sometimes spoken of a three-step, burden-shifting framework as a means for distinguishing between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest. The plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect. Should the plaintiff carry that burden, the burden then shifts to the defendant to show a procompetitive rationale for the restraint. If the defendant can make that showing, the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means. These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. What is required to assess whether a challenged restraint harms competition can vary depending on the circumstances.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > RULE OF REASON -- CIRCUMSTANCES OF CASE > Headnote:
LEdHN10.[] 10.

The whole point of the rule of reason is to furnish an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint to ensure that it unduly harms competition before a court declares it unlawful. The factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > ***ANTITRUST LAW*** -- LEGITIMATE BUSINESS PURPOSES > Headnote:
LEdHN11.[] 11.

Antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > ***ANTITRUST LAW*** -- APPROPRIATE FUNCTION > Headnote:
LEdHN12.[] 12.

Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. After all, even under the best of circumstances, applying the antitrust laws can be difficult—and mistaken condemnations of legitimate business arrangements are especially costly, because they chill the very procompetitive conduct the antitrust laws are designed to protect. Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. To know that the Sherman Act prohibits only unreasonable restraints of trade is thus to know that attempts to meter small deviations is not an appropriate antitrust function.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > RULE OF REASON -- SUBSTANTIALLY LESS RESTRICTIVE MEANS > Headnote:
LEdHN13.[] 13.

However framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. To be sure, the two questions can be collapsed into one, since a legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative.

[318]**

Restraints of Trade, Monopolies, and Unfair Trade Practices § 16 > SHERMAN ACT -- SUBSTANTIALLY LESS RESTRICTIVE MEANS > Headnote:
LEdHN14.[] 14.

Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. But none of that means a party can relabel a restraint as a product feature and declare it immune from Sherman Act §1, 15 U.S.C.S. § 1, scrutiny. In any suit, the district court has to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by substantially less restrictive alternative means.

Courts § 141 > ***ANTITRUST LAW*** -- ROLE OF COURT > Headnote:
LEdHN15.[] 15.

Antitrust courts must give wide berth to business judgments before finding liability. Judges must be sensitive to the possibility that the continuing supervision of a highly detailed decree could wind up impairing rather than enhancing competition. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. Judges must be wary, too, of the temptation to specify the proper price, quantity, and other terms of dealing—cognizant that they are neither economic nor industry experts. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for what they see may vary over time. And throughout courts must have a healthy respect for the practical limits of judicial administration: An antitrust court is unlikely to be an effective day-to-day enforcer of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. Nor should any court impose a duty that it cannot explain or adequately and reasonably supervise. In short, judges make for poor central planners and should never aspire to the role.

Restraints of Trade, Monopolies, and Unfair Trade Practices § 74 > ANTITRUST REMEDY -- LIMITS > Headnote:
LEdHN16.[] 16.

When it comes to fashioning an antitrust remedy, caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to set sail on a sea of doubt.

Syllabus

[319]** Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on “amateur” student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.

Against this backdrop, current and former student-athletes brought this antitrust lawsuit challenging the NCAA's restrictions on compensation. Specifically, they alleged that the NCAA's rules violate *§ 1 of the Sherman Act*, which prohibits “contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce.” *15 U. S. C. § 1*. Key facts were undisputed: The NCAA and its members have agreed to compensation limits for student-athletes; the NCAA enforces these limits on its member-schools; and these compensation limits affect interstate commerce. **[***2]** Following a bench trial, the district court issued a 50-page opinion that refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court found unlawful and thus enjoined certain NCAA rules limiting the education-related benefits schools may make available to student-athletes. Both sides appealed. The Ninth Circuit affirmed in full, holding that the district court “struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.” *958 F. 3d 1239, 1263*. Unsatisfied with that result, the NCAA asks the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny. The student-athletes have not renewed their across-the-board challenge and the Court thus does not consider the **[**320]** rules that remain in place. The Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined. The Court does so based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that **[***3]** it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.

Held: The district court's injunction is consistent with established antitrust principles. Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___.

(a) The courts below properly subjected the NCAA's compensation restrictions to antitrust scrutiny under a “rule of reason” analysis. In the Sherman Act, Congress tasked courts with enforcing an antitrust policy of competition on the theory that market forces “yield the best allocation” of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U. S. 85, 104, n. 27, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. The Sherman Act's prohibition on restraints of trade has long been understood to prohibit only restraints that are “undue.” *Ohio v. American Express Co., 585 U. S. ___, ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. Whether a particular restraint is undue “presumptively” turns on an application of a “rule of reason analysis.” *Texaco, Inc. v. Dagher, 547 U. S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1*. That manner of analysis generally requires a court to “conduct a fact-specific assessment of market power and market structure” to assess a challenged restraint's “actual effect on competition.” *American Express, 585 U. S., at ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(1) The NCAA maintains the courts below should have analyzed its compensation restrictions under an extremely deferential standard because it is a joint venture among members who must collaborate **[***4]** to offer consumers the unique product of intercollegiate athletic competition. Even assuming the NCAA is a joint venture, though, it is a joint venture with monopoly power in the relevant market. Its restraints are appropriately subject to the ordinary rule of reason's fact-specific assessment of their effect on competition. *American Express, 585 U. S., at ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*. Circumstances sometimes allow a court to determine the anticompetitive effects of a challenged restraint (or lack thereof) under an abbreviated or “quick look.” See *Dagher, 547 U. S., at 7, n. 3, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *Board of Regents, 468 U. S., at 109, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. But not here. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(2) The NCAA next contends that the Court's decision in *Board of Regents* expressly approved the NCAA's limits on student-athlete compensation. That is incorrect. The Court in *Board of Regents* did not analyze the lawfulness of the NCAA's restrictions on student-athlete compensation. Rather, that case involved an antitrust challenge to the NCAA's restraints on televising games—an antitrust challenge the Court sustained. Along the way, the Court commented on the NCAA's critical role in maintaining the revered tradition of amateurism in college sports as one “entirely **[**321]** consistent with the goals of the Sherman Act.” *Id., at 120, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. But that sort of passing comment on an issue not **[***5]** presented is not binding, nor is it dispositive here. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(3) The NCAA also submits that a rule of reason analysis is inappropriate because its member schools are not “commercial enterprises” but rather institutions that exist to further the societally important noncommercial objective of undergraduate education. This submission also fails. The Court has regularly refused these sorts of special dispensations from the Sherman Act. See *FTC v. Superior Court Trial Lawyers Assn., 493 U. S. 411, 424, 110 S. Ct. 768, 107 L. Ed. 2d 851*. The Court has also previously subjected the NCAA to the Sherman Act, and any argument that “the special characteristics of [the NCAA's] particular industry” should exempt it from the usual operation of the antitrust laws is “properly addressed to Congress.” *National Soc. of Professional Engineers v. United States, 435 U. S. 679, 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(b) The NCAA's remaining attacks on the district court's decision lack merit. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(1) The NCAA contends that the district court erroneously required it to prove that its rules are the least restrictive means of achieving the procompetitive purpose of preserving consumer demand for college sports. True, a least restrictive means test would be erroneous and overly intrusive. But the district court nowhere expressly or effectively required the NCAA to show that its rules met that standard. **[***6]** Rather, only after finding the NCAA's restraints "patently and inexplicably stricter than is necessary" did the district court find the restraints unlawful. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(2) The NCAA contends the district court should have deferred to its conception of amateurism instead of "impermissibly redefin[ing]" its "product." But a party cannot declare a restraint "immune from *§ 1* scrutiny" by relabeling it a product feature. *American Needle, Inc. v. National Football League, 560 U. S. 183, 199, n. 7, 130 S. Ct. 2201, 176 L. Ed. 2d 947*. Moreover, the district court found the NCAA had not even maintained a consistent definition of amateurism. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

(3) The NCAA disagrees that it can achieve the same pro-competitive benefits using substantially less restrictive alternatives and claims the district court's injunction will "micromanage" its business. Judges must indeed be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U. S. 398, 415, 124 S. Ct. 872, 157 L. Ed. 2d 823*. The district court's injunction honored these principles, though. The court enjoined only certain restraints—and only after finding both that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand, and further that this **[***7]** course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive **[**322]** benefits as the NCAA's current rules. Finally, the court's injunction preserves considerable leeway for the NCAA, while individual conferences remain free to impose whatever rules they choose. To the extent the NCAA believes meaningful ambiguity exists about the scope of its authority, it may seek clarification from the district court. *Pp. ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

958 F. 3d 1239, affirmed.

Counsel: Seth P. Waxman argued the cause for petitioners.

Jeffrey L. Kessler argued the cause for respondents.

Elizabeth B. Prelogar argued the cause for the United States, as amicus curiae, by special leave of court.

Judges: Gorsuch, J., delivered the opinion for a unanimous Court. Kavanaugh, J., filed a concurring opinion.

Opinion by: GORSUCH

Opinion

[*2147] JUSTICE **GORSUCH** delivered the opinion of the Court.

In the Sherman Act, Congress tasked courts with enforcing a policy of competition on the belief that market forces "yield the best allocation" of the Nation's resources. *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U. S. 85, 104, n. 27, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*. The plaintiffs before us brought this lawsuit alleging that the National Collegiate Athletic Association (NCAA) and certain of its member institutions violated this policy by agreeing to restrict the compensation colleges and universities may offer the student-athletes who play for their teams. After amassing a vast record and conducting an exhaustive trial, the district court issued a 50-page opinion **[***8]** that cut both ways. The court refused to disturb the NCAA's rules limiting undergraduate athletic scholarships and other compensation related to athletic performance. At the same time, the court struck down NCAA rules limiting the education-related benefits schools may offer student-athletes—such as rules that prohibit schools from offering graduate or vocational school scholarships. Before us, the student-athletes do not challenge the district court's judgment. But the NCAA does. In essence, it seeks immunity from the normal operation of the antitrust laws and argues, in any event, that the district court should have approved all of its existing restraints. We took this case to consider those objections.

[*2148] I

A

From the start, American colleges and universities have had a complicated relationship with sports and money. In 1852, students from Harvard and Yale participated in what many regard as the Nation's first intercollegiate competition—a boat race at Lake Winnipesaukee, New Hampshire. But this was no pickup match. A railroad executive sponsored the event to promote train travel to the picturesque lake. T. Mendenhall, The Harvard-Yale Boat Race 1852-1924, pp. 15-16 (1993). He offered **[***9]** the competitors an all-expenses-paid vacation with lavish prizes—along with unlimited alcohol. See A. Zimbalist, Unpaid Professionals 6-7 (1999) (Zimbalist); Rushin, Inside the Moat, Sports Illustrated, Mar. 3, 1997. The event filled the resort with "life and excitement," N. Y. Herald, Aug. 10, 1852, p. 2, col. 2, and one student-athlete described the " 'junket' " as an experience " 'as unique and irreproducible as the Rhodian colossus,' " Mendenhall, Harvard-Yale Boat Race, at 20.

Life might be no "less than a boat race," Holmes, On Receiving the Degree **[**323]** of Doctor of Laws, Yale University Commencement, June 30, 1886, in Speeches by Oliver Wendell Holmes, p. 27 (1918), but it was football that really caused college sports to take off. "By the late 1880s the traditional rivalry between Princeton and Yale was attracting 40,000 spectators and generating in excess of $25,000 . . . in gate revenues." Zimbalist 7. Schools regularly had "graduate students and paid ringers" on their teams. *Ibid.*

Colleges offered all manner of compensation to talented athletes. Yale reportedly lured a tackle named James Hogan with free meals and tuition, a trip to Cuba, the exclusive right to sell scorecards from **[***10]** his games—and a job as a cigarette agent for the American Tobacco Company. *Ibid.*; see also Needham, The College Athlete, McClure's Magazine, June 1905, p. 124. The absence of academic residency requirements gave rise to " 'tramp athletes' " who "roamed the country making cameo athletic appearances, moving on whenever and wherever the money was better." F. Dealy, Win at Any Cost 71 (1990). One famous example was a law student at West Virginia University—Fielding H. Yost—"who, in 1896, transferred to Lafayette as a freshman just in time to lead his new teammates to victory against its arch-rival, Penn." *Ibid.* The next week, he "was back at West Virginia's law school." *Ibid.* College sports became such a big business that Woodrow Wilson, then President of Princeton University, quipped to alumni in 1890 that " 'Princeton is noted in this wide world for three things: football, baseball, and collegiate instruction.' " Zimbalist 7.

By 1905, though, a crisis emerged. While college football was hugely popular, it was extremely violent. Plays like the flying wedge and the players' light protective gear led to 7 football fatalities in 1893, 12 deaths the next year, and 18 in 1905. *Id*., at 8. President **[***11]** Theodore Roosevelt responded by convening a meeting between Harvard, Princeton, and Yale to review the rules of the game, a gathering that ultimately led to the creation of what we now know as the NCAA. *Ibid.* Organized primarily as a standard-setting body, the association also expressed a view at its founding about compensating college athletes—admonishing that "[n]o student shall represent a College or University in any intercollegiate game or contest who is paid or receives, directly or indirectly, any money, or financial concession." Intercollegiate Athletic Association of the United States Constitution By-Laws, Art. VII, §3 (1906); see also Proceedings of the Eleventh Annual Convention of the National **[*2149]** Collegiate Athletic Association, Dec. 28, 1916, p. 34.

Reality did not always match aspiration. More than two decades later, the Carnegie Foundation produced a report on college athletics that found them still "sodden with the commercial and the material and the vested interests that these forces have created." H. Savage, The Carnegie Foundation for the Advancement of Teaching, American College Athletics Bull. 23, p. 310 (1929). Schools across the country sought to leverage sports **[***12]** to bring in revenue, attract attention, boost enrollment, and raise money from alumni. The University of California's athletic revenue was over $480,000, while Harvard's football revenue alone came in at $429,000. *Id*., at 87. College football was "not a student's game"; it was an "organized **[**324]** commercial enterprise" featuring athletes with "years of training," "professional coaches," and competitions that were "highly profitable." *Id*., at viii.

The commercialism extended to the market for student-athletes. Seeking the best players, many schools actively participated in a system "under which boys are offered pecuniary and other inducements to enter a particular college." *Id*., at xiv-xv. One coach estimated that a rival team "spent over $200,000 a year on players." Zimbalist 9. In 1939, freshmen at the University of Pittsburgh went on strike because upperclassmen were reportedly earning more money. Crabb, The Amateurism Myth: A Case for a New Tradition, *28 Stan. L. & Pol'y Rev. 181, 190 (2017)*. In the 1940s, Hugh McElhenny, a halfback at the University of Washington, "became known as the first college player 'ever to take a cut in salary to play pro football.' " Zimbalist 22-23. He reportedly said: " '[A] wealthy guy puts big bucks **[***13]** under my pillow every time I score a touchdown. Hell, I can't afford to graduate.' " *Id*., at 211, n. 17. In 1946, a commentator offered this view: "[W]hen it comes to chicanery, double-dealing, and general undercover work behind the scenes, big-time college football is in a class by itself." Woodward, Is College Football on the Level?, Sport, Nov. 1946, Vol. 1, No. 3, p. 35.

In 1948, the NCAA sought to do more than admonish. It adopted the "Sanity Code." Colleges Adopt the 'Sanity Code' To Govern Sports, N. Y. Times, Jan. 11, 1948, p. 1, col. 1. The code reiterated the NCAA's opposition to "promised pay in any form." Hearings before the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, 95th Congress, 2d Sess., pt. 2, p. 1094 (1978). But for the first time the code also authorized colleges and universities to pay athletes' tuition. *Ibid.* And it created a new enforcement mechanism—providing for the "suspension or expulsion" of "proven offenders." Colleges Adopt 'Sanity Code,' N. Y. Times, p. 1, col. 1. To some, these changes sought to substitute a consistent, above-board compensation system for the varying under-the-table schemes that **[***14]** had long proliferated. To others, the code marked "the beginning of the NCAA behaving as an effective cartel," by enabling its member schools to set and enforce "rules that limit the price they have to pay for their inputs (mainly the 'student-athletes')." Zimbalist 10.

The rules regarding student-athlete compensation have evolved ever since. In 1956, the NCAA expanded the scope of allowable payments to include room, board, books, fees, and "cash for incidental expenses such as laundry." *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063 (ND Cal. 2019)* (hereinafter D. Ct. Op.). In 1974, the NCAA began permitting paid professionals in one sport to compete on an amateur basis in another. Brief for Historians as *Amici Curiae* 10. In **[*2150]** 2014, the NCAA "announced it would allow athletic conferences to authorize their member schools to increase scholarships up to the full cost of attendance." *O'Bannon v. National Collegiate Athletic Assn., 802 F. 3d 1049, 1054-1055 (CA9 2015)*. The 80 member schools of the "Power Five" athletic conferences—the conferences with the highest revenue in Division I—promptly voted to raise their scholarship **[**325]** limits to an amount that is generally several thousand dollars higher than previous limits. *D. Ct. Op., at 1064*.

In recent years, changes have continued. The NCAA has created the "Student Assistance Fund" and **[***15]** the "Academic Enhancement Fund" to "assist student-athletes in meeting financial needs," "improve their welfare or academic support," or "recognize academic achievement." *Id., at 1072*. These funds have supplied money to student-athletes for "postgraduate scholarships" and "school supplies," as well as "benefits that are not related to education," such as "loss-of-value insurance premiums," "travel expenses," "clothing," and "magazine subscriptions." *Id., at 1072, n. 15*. In 2018, the NCAA made more than $84 million available through the Student Activities Fund and more than $48 million available through the Academic Enhancement Fund. *Id., at 1072*. Assistance may be provided in cash or in kind, and there is no limit to the amount any particular student-athlete may receive. *Id., at 1073*. Since 2015, disbursements to individual students have sometimes been tens of thousands of dollars above the full cost of attendance. *Ibid.*

The NCAA has also allowed payments " 'incidental to athletics participation,' " including awards for "participation or achievement in athletics" (like "qualifying for a bowl game") and certain "payments from outside entities" (such as for "performance in the Olympics"). *Id., at 1064, 1071, 1074*. **[***16]** The NCAA permits its member schools to award up to (but no more than) two annual "Senior Scholar Awards" of $10,000 for students to attend graduate school after their athletic eligibility expires. *Id., at 1074*. Finally, the NCAA allows schools to fund travel for student-athletes' family members to attend "certain events." *Id., at 1069*.

Over the decades, the NCAA has become a sprawling enterprise. Its membership comprises about 1,100 colleges and universities, organized into three divisions. *Id., at 1063*. Division I teams are often the most popular and attract the most money and the most talented athletes. Currently, Division I includes roughly 350 schools divided across 32 conferences. See *ibid.* Within Division I, the most popular sports are basketball and football. The NCAA divides Division I football into the Football Bowl Subdivision (FBS) and the Football Championship Subdivision, with the FBS generally featuring the best teams. *Ibid.* The 32 conferences in Division I function similarly to the NCAA itself, but on a smaller scale. They "can and do enact their own rules." *Id., at 1090*.

At the center of this thicket of associations and rules sits a massive business. The NCAA's **[***17]** current broadcast contract for the March Madness basketball tournament is worth $1.1 billion annually. See *id., at 1077, n. 20*. Its television deal for the FBS conference's College Football Playoff is worth approximately $470 million per year. See *id., at 1063*; Bachman, ESPN Strikes Deal for College Football Playoff, Wall Street Journal, Nov. 21, 2012. Beyond these sums, the Division I conferences earn substantial revenue from regular-season games. For example, the Southeastern Conference (SEC) "made more than $409 million in revenues from television contracts alone in 2017, with its total conference revenues exceeding $650 million that **[*2151]** year." *D. Ct. Op., at 1063*. **[**326]** All these amounts have "increased consistently over the years." *Ibid.*

Those who run this enterprise profit in a different way than the student-athletes whose activities they oversee. The president of the NCAA earns nearly $4 million per year. Brief for Players Association of the National Football League et al. as *Amici Curiae* 17. Commissioners of the top conferences take home between $2 to $5 million. *Ibid.* College athletic directors average more than $1 million annually. *Ibid.* And annual salaries for top Division I college **[***18]** football coaches approach $11 million, with some of their assistants making more than $2.5 million. *Id*., at 17-18.

B

The plaintiffs are current and former student-athletes in men's Division I FBS football and men's and women's Division I basketball. They filed a class action against the NCAA and 11 Division I conferences (for simplicity's sake, we refer to the defendants collectively as the NCAA). The student-athletes challenged the "current, interconnected set of NCAA rules that limit the compensation they may receive in exchange for their athletic services." *D. Ct. Op., at 1062, 1065, n. 5*. Specifically, they alleged that the NCAA's rules violate *§ 1 of the Sherman Act*, which prohibits "contract[s], combination[s], or conspirac[ies] in restraint of trade or commerce." *15 U. S. C. § 1*.

After pretrial proceedings stretching years, the district court conducted a 10-day bench trial. It heard experts and lay witnesses from both sides, and received volumes of evidence and briefing, all before issuing an exhaustive decision. In the end, the court found the evidence undisputed on certain points. The NCAA did not "contest evidence showing" that it and its members have agreed to compensation limits on student-athletes; the NCAA **[***19]** and its conferences enforce these limits by punishing violations; and these limits "affect interstate commerce." *D. Ct. Op., at 1066*.

Based on these premises, the district court proceeded to assess the lawfulness of the NCAA's challenged restraints. ***HN1***[] ***LEdHN[1]***[] [1] This Court has "long recognized that in view of the common law and the law in this country when the *Sherman Act* was passed, the phrase 'restraint of trade' is best read to mean 'undue restraint.' " *Ohio v. American Express Co., 585 U. S. ___, ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 689 (2018)* (brackets and some internal quotation marks omitted). Determining whether a restraint is undue for purposes of the Sherman Act "presumptively" calls for what we have described as a "rule of reason analysis." *Texaco Inc. v. Dagher, 547 U. S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*; *Standard Oil Co. of N. J. v. United States, 221 U. S. 1, 60-62, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. That manner of analysis generally requires a court to "conduct a fact-specific assessment of market power and market structure" to assess a challenged restraint's "actual effect on competition." *American Express, 585 U. S., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678* (internal quotation marks omitted). Always, "[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Ibid.*(brackets and internal quotation marks omitted).

[327]** In applying the rule of reason, the district **[***20]** court began by observing that the NCAA enjoys "near complete dominance of, and exercise[s] monopsony power in, the relevant market"—which it defined as the market for "athletic services in men's and women's Division I basketball and **[*2152]** FBS football, wherein each class member participates in his or her sport-specific market." *D. Ct. Op., at 1097*. The "most talented athletes are concentrated" in the "markets for Division I basketball and FBS football." *Id., at 1067*. There are no "viable substitutes," as the "NCAA's Division I essentially *is* the relevant market for elite college football and basketball." *Id., at 1067, 1070*. In short, the NCAA and its member schools have the "power to restrain student-athlete compensation in any way and at any time they wish, without any meaningful risk of diminishing their market dominance." *Id., at 1070*.

The district court then proceeded to find that the NCAA's compensation limits "produce significant anticompetitive effects in the relevant market." *Id., at 1067*. Though member schools compete fiercely in recruiting student-athletes, the NCAA uses its monopsony power to "cap artificially the compensation offered to recruits." *Id., at 1097*. In a market without the challenged restraints, **[***21]** the district court found, "competition among schools would increase in terms of the compensation they would offer to recruits, and student-athlete compensation would be higher as a result." *Id., at 1068*. "Student-athletes would receive offers that would more closely match the value of their athletic services." *Ibid.* And notably, the court observed, the NCAA "did not meaningfully dispute" any of this evidence. *Id., at 1067*; see also Tr. of Oral Arg. 31 ("[T]here's no dispute that the—the no-pay-for-play rule imposes a significant restraint on a relevant antitrust market").

The district court next considered the NCAA's procompetitive justifications for its restraints. The NCAA suggested that its restrictions help increase output in college sports and maintain a competitive balance among teams. But the district court rejected those justifications, *D. Ct. Op., at 1070, n. 12*, and the NCAA does not pursue them here. The NCAA 's only remaining defense was that its rules preserve amateurism, which in turn widens consumer choice by providing a unique product—amateur college sports as distinct from professional sports. Admittedly, this asserted benefit accrues to consumers in the NCAA 's seller-side consumer market rather **[***22]** than to student-athletes whose compensation the NCAA fixes in its buyer-side labor market. But, the NCAA argued, the district court needed to assess its restraints in the labor market in light of their procompetitive benefits in the consumer market—and the district court agreed to do so. *Id., at 1098*.

Turning to that task, the court observed that the NCAA's conception of amateurism has changed steadily over the years. See *id., at 1063-1064, 1072-1073*; see also *supra*, at ___ - ___, 210 L. Ed. 2d, at ___ - ___. The court noted that the NCAA "nowhere define[s] the nature of the amateurism they claim consumers insist upon." *D. Ct. Op., at 1070*. And, given all this, the court struggled to ascertain for itself "any coherent definition" of the term, *id., at 1074*, noting the testimony of a former SEC commissioner that he's **[**328]** " 'never been clear on . . . what is really meant by amateurism.' " *Id., at 1070-1071*.

Nor did the district court find much evidence to support the NCAA's contention that its compensation restrictions play a role in consumer demand. As the court put it, the evidence failed "to establish that the challenged compensation rules, in and of themselves, have any direct connection to consumer demand." *Id., at 1070*. The court observed, for example, that the NCAA's "only **[***23]** economics expert on the issue of consumer demand" did not "study any standard measures of consumer demand" but instead simply "interviewed people connected with the NCAA and its schools, who were chosen for him by defense **[*2153]** counsel." *Id., at 1075*. Meanwhile, the student-athletes presented expert testimony and other evidence showing that consumer demand has increased markedly despite the new types of compensation the NCAA has allowed in recent decades. *Id., at 1074, 1076*. The plaintiffs presented economic and other evidence suggesting as well that further increases in student-athlete compensation would "not negatively affect consumer demand." *Id., at 1076*. At the same time, however, the district court did find that one particular aspect of the NCAA's compensation limits "may have some effect in preserving consumer demand." *Id., at 1082*. Specifically, the court found that rules aimed at ensuring "student-athletes do not receive unlimited payments unrelated to education" could play some role in product differentiation with professional sports and thus help sustain consumer demand for college athletics. *Id., at 1083*.

The court next required the student-athletes to show that "substantially less restrictive alternative rules" existed that "would achieve the **[***24]** same procompetitive effect as the challenged set of rules." *Id., at 1104*. The district court emphasized that the NCAA must have "ample latitude" to run its enterprise and that courts "may not use antitrust laws to make marginal adjustments to broadly reasonable market restraints." *Ibid.* (internal quotation marks omitted). In light of these standards, the court found the student-athletes had met their burden in some respects but not others. The court rejected the student-athletes' challenge to NCAA rules that limit athletic scholarships to the full cost of attendance and that restrict compensation and benefits unrelated to education. These may be price-fixing agreements, but the court found them to be reasonable in light of the possibility that "professional-level cash payments . . . could blur the distinction between college sports and professional sports and thereby negatively affect consumer demand." *Ibid.*

The court reached a different conclusion for caps on education-related benefits—such as rules that limit scholarships for graduate or vocational school, payments for academic tutoring, or paid posteligibility internships. *Id., at 1088*. On no account, the court found, could such education-related benefits **[***25]** be "confused with a professional athlete's salary." *Id., at 1083*. If anything, they "emphasize that the recipients are students." *Ibid.* Enjoining the NCAA's restrictions on these forms of compensation alone, the court concluded, would be substantially less restrictive than the NCAA's current rules and yet fully capable of preserving consumer demand for college sports. *Id., at 1088*.

[329]** The court then entered an injunction reflecting its findings and conclusions. Nothing in the order precluded the NCAA from continuing to fix compensation and benefits unrelated to education; limits on athletic scholarships, for example, remained untouched. The court enjoined the NCAA only from limiting education-related compensation or benefits that conferences and schools may provide to student-athletes playing Division I football and basketball. App. to Pet. for Cert. in No. 20-512, p. 167a, ¶1. The court's injunction further specified that the NCAA could continue to limit cash awards for academic achievement—but only so long as those limits are no lower than the cash awards allowed for athletic achievement (currently $5,980 annually). *Id*., at 168a-169a, ¶5; Order Granting Motion for Clarification of Injunction in No. 4:14-md-02541, **[***26]** ECF Doc. 1329, pp. 5-6 (ND Cal., Dec. 30, 2020). The court added that the NCAA and its members were free to propose a definition of compensation or benefits " 'related to education.' " App. to Pet. for Cert. in No. 20-512, at 168a, ¶4. And the court **[*2154]** explained that the NCAA was free to regulate how conferences and schools provide education-related compensation and benefits. *Ibid.* The court further emphasized that its injunction applied only to the NCAA and multi-conference agreements—thus allowing individual conferences (and the schools that constitute them) to impose tighter restrictions if they wish. *Id*., at 169a, ¶6. The district court's injunction issued in March 2019, and took effect in August 2020.

Both sides appealed. The student-athletes said the district court did not go far enough; it should have enjoined all of the NCAA's challenged compensation limits, including those "untethered to education," like its restrictions on the size of athletic scholarships and cash awards. *In re National Collegiate Athletic Assn. Athletic Grant-in-Aid Cap Antitrust Litig., 958 F. 3d 1239, 1263 (CA9 2020)*. The NCAA, meanwhile, argued that the district court went too far by weakening its restraints on education-related compensation and benefits. In the end, the court of appeals affirmed in full, explaining its **[***27]** view that "the district court struck the right balance in crafting a remedy that both prevents anticompetitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports." *Ibid.*

C

Unsatisfied with this result, the NCAA asks us to reverse to the extent the lower courts sided with the student-athletes. For their part, the student-athletes do not renew their across-the-board challenge to the NCAA 's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the district court's judgment upholding them. Our review is confined to those restrictions now enjoined.

Before us, as through much of the litigation below, some of the issues most frequently debated in antitrust litigation are uncontested. The parties do not challenge the district court's definition of the relevant market. They do not contest that the NCAA enjoys monopoly (or, as it's called on the buyer side, monopsony) control in that labor market—such that it is capable of depressing wages below competitive levels and restricting the quantity of student-athlete **[**330]** labor. Nor does the NCAA dispute that its member schools compete fiercely for student-athletes **[***28]** but remain subject to NCAA-issued-and-enforced limits on what compensation they can offer. Put simply, this suit involves admitted horizontal price fixing in a market where the defendants exercise monopoly control.

Other significant matters are taken as given here too. No one disputes that the NCAA's restrictions *in fact* decrease the compensation that student-athletes receive compared to what a competitive market would yield. No one questions either that decreases in compensation also depress participation by student-athletes in the relevant labor market—so that price and quantity are both suppressed. See 12 P. Areeda & H. Hovenkamp, ***Antitrust Law*** ¶2011b, p. 134 (4th ed. 2019) (Areeda & Hovenkamp). Nor does the NCAA suggest that, to prevail, the plaintiff student-athletes must show that its restraints harm competition in the seller-side (or consumer facing) market as well as in its buyer-side (or labor) market. See, *e.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U. S. 219, 235, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*; *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U. S. 312, 321, 127 S. Ct. 1069, 166 L. Ed. 2d 911 (2007)*; 2A Areeda & Hovenkamp ¶352c, pp. 288-289 (2014); 12 *id*., ¶2011a, at 132-134.

[*2155] Meanwhile, the student-athletes do not question that the NCAA may permissibly seek to justify its restraints in the labor market by pointing to procompetitive effects they produce in the **[***29]** consumer market. Some *amici* argue that "competition in input markets is incommensurable with competition in output markets," and that a court should not "trade off " sacrificing a legally cognizable interest in competition in one market to better promote competition in a different one; review should instead be limited to the particular market in which antitrust plaintiffs have asserted their injury. Brief for American Antitrust Institute as *Amicus Curiae* 3, 11-12. But the parties before us do not pursue this line.

II

A

With all these matters taken as given, we express no views on them. Instead, we focus only on the objections the NCAA *does* raise. Principally, it suggests that the lower courts erred by subjecting its compensation restrictions to a rule of reason analysis. In the NCAA's view, the courts should have given its restrictions at most an "abbreviated deferential review," Brief for Petitioner in No. 20-512, p. 14, or a " 'quick look,' " Brief for Petitioners in No. 20-520, p. 18, before approving them.

The NCAA offers a few reasons why. Perhaps dominantly, it argues that it is a joint venture and that collaboration among its members is necessary if they are to offer consumers the **[***30]** benefit of intercollegiate athletic competition. We doubt little of this. There's no question, for example, that many "joint ventures are calculated to enable firms to do something more cheaply or better than they did it before." 13 Areeda & Hovenkamp ¶2100c, at 7. And the fact that joint ventures can have such procompetitive benefits surely stands as a caution against condemning their arrangements too reflexively. See **[**331]** *Dagher, 547 U. S., at 7, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U. S. 1, 22-23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979)*.

But even assuming (without deciding) that the NCAA is a joint venture, that does not guarantee the foreshortened review it seeks. ***HN2***[] ***LEdHN[2]***[] [2] Most restraints challenged under the Sherman Act—including most joint venture restrictions—are subject to the rule of reason, which (again) we have described as "a fact-specific assessment of market power and market structure" aimed at assessing the challenged restraint's "actual effect on competition"—especially its capacity to reduce output and increase price. *American Express, 585 U. S., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678* (internal quotation marks omitted).

Admittedly, the amount of work needed to conduct a fair assessment of these questions can vary. As the NCAA observes, ***HN3***[] ***LEdHN[3]***[] [3] this Court has suggested that sometimes we can determine the competitive effects of a challenged restraint in the " 'twinkling **[***31]** of an eye.' " *Board of Regents, 468 U. S., at 110, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981)); *American Needle, Inc. v. National Football League, 560 U. S. 183, 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947 (2010)*. That is true, though, only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than restraints in the great in-between—a quick look is sufficient for approval or condemnation.

HN4[] ***LEdHN[4]***[] [4] At one end of the spectrum, some restraints may be so obviously incapable of harming competition that they require little scrutiny. In **[*2156]** *Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F. 2d 210, 253 U.S. App. D.C. 142 (CADC 1986)*, for example, Judge Bork explained that the analysis could begin and end with the observation that the joint venture under review "command[ed] between 5.1 and 6% of the relevant market." *Id., at 217*. Usually, joint ventures enjoying such small market share are incapable of impairing competition. Should they reduce their output, "there would be no effect upon market price because firms making up the other 94% of the market would simply take over the abandoned business." *Ibid.*; see also 7 Areeda & Hovenkamp ¶1507a, p. 444 (2017) (If "the exercise of market power is not plausible, the challenged practice is legal"); *Polk Bros., Inc. v. Forest City Enterprises, Inc., 776 F. 2d 185, 191 (CA7 1985)* ("Unless the firms have the power to raise price by curtailing output, their agreement is unlikely **[***32]** to harm consumers, and it makes sense to understand their cooperation as benign or beneficial").

At the other end, some agreements among competitors so obviously threaten to reduce output and raise prices that they might be condemned as unlawful *per se* or rejected after only a quick look. See *Dagher, 547 U. S., at 7, n. 3, 126 S. Ct. 1276, 164 L. Ed. 2d 1*; *California Dental Assn. v. FTC, 526 U. S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999)*. Recognizing the inherent limits on a court's ability to master an entire industry—and aware that there are often hard-to-see efficiencies attendant to complex business arrangements—we take special care not to **[**332]** deploy these condemnatory tools until we have amassed "considerable experience with the type of restraint at issue" and "can predict with confidence that it would be invalidated in all or almost all instances." *Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U. S. 877, 886-887, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (2007)*; Easterbrook, On Identifying Exclusionary Conduct, *61 Notre Dame L. Rev. 972, 975 (1986)* (noting that it can take "economists years, sometimes decades, to understand why certain business practices work [and] determine whether they work because of increased efficiency or exclusion"); see also *infra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___* (further reasons for caution).

None of this helps the NCAA. The NCAA. *accepts* that its members collectively enjoy monopsony power in the market for student-athlete services, such that its restraints can (and in fact **[***33]** do) harm competition. See *D. Ct. Op., at 1067*. Unlike customers who would look elsewhere when a small van company raises its prices above market levels, the district court found (and the NCAA does not here contest) that student-athletes have nowhere else to sell their labor. Even if the NCAA is a joint venture, then, it is hardly of the sort that would warrant quick-look approval for all its myriad rules and restrictions.

Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review. We do not doubt that some degree of coordination between competitors within sports leagues can be procompetitive. Without some agreement among rivals—on things like how many players may be on the field or the time allotted for play—the very competitions that consumers value would not be possible. See *Board of Regents, 468 U. S., at 101, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (quoting R. Bork, The Antitrust Paradox 278 (1978)). Accordingly, even a sports league with market power might see some agreements among its members win antitrust approval in the " 'twinkling of an eye.' " *American Needle, 560 U. S., at 203, 130 S. Ct. 2201, 176 L. Ed. 2d 947*.

But this insight does not always apply. ***HN5***[] ***LEdHN[5]***[] [5] That *some* restraints are necessary to create or maintain a league sport does not mean *all* "aspects **[***34]** of elaborate interleague cooperation are." *Id., at 199, n. 7,* ***[*2157]*** *130 S. Ct. 2201, 176 L. Ed. 2d 947*. While a quick look will often be enough to approve the restraints "necessary to produce a game," *ibid.*, a fuller review may be appropriate for others. See, *e.g.*, *Chicago Professional*

Sports Ltd. Partnership v. National Basketball Assn., 95 F. 3d 593, 600 (CA7 1996) ("Just as the ability of McDonald's franchises to coordinate the release of a new hamburger does not imply their ability to agree on wages for counter workers, so the ability of sports teams to agree on a TV contract need not imply an ability to set wages for players").

The NCAA's rules fixing wages for student-athletes fall on the far side of this line. Nobody questions that Division I basketball and FBS football can proceed (and have proceeded) without the education-related compensation restrictions the district court enjoined; the games go on. Instead, the parties dispute whether and to what extent those restrictions in the NCAA's labor market yield benefits in its consumer market that can be attained using substantially less restrictive **[**333]** means. That dispute presents complex questions requiring more than a blink to answer.

B

Even if background antitrust principles counsel in favor of the rule of reason, the NCAA replies that a particular precedent ties our hands. The NCAA directs **[***35]** our attention to *Board of Regents*, where this Court considered the league's rules restricting the ability of its member schools to televise football games. *468 U. S., at 94, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. On the NCAA's reading, that decision expressly approved its limits on student-athlete compensation—and this approval forecloses any meaningful review of those limits today.

We see things differently. *Board of Regents* explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as " 'illegal *per se*.' " *Id., at 100, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. The Court declined to declare the NCAA's restraints *per se* unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." *Id., at 101-102, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. Our analysis today is fully consistent with all of this. Indeed, if any daylight exists it is only in the NCAA's favor. While *Board of Regents* did not condemn the NCAA's broadcasting restraints as *per se* unlawful, it invoked abbreviated antitrust review as a path to condemnation, not salvation. *Id., at 109, n. 39, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. If a quick look was thought sufficient before rejecting the NCAA's procompetitive rationales in that case, it is hard **[***36]** to see how the NCAA might object to a court providing a more cautious form of review before reaching a similar judgment here.

To be sure, the NCAA isn't without a reply. It notes that, in the course of reaching its judgment about television marketing restrictions, the *Board of Regents* Court commented on student-athlete compensation restrictions. Most particularly, the NCAA highlights this passage:

> "The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." *Id., at 120, 104 S. Ct. 2948, 82 L. Ed. 2d 70*.

See also *id., at 101, 102, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (the NCAA "seeks to market a particular brand of football" in which "athletes must not be paid, must be required to attend class, and the like"). On the NCAA 's telling, **[*2158]** these observations foreclose any rule of reason review in this suit.

Once more, we cannot agree. *Board of Regents* may suggest that courts should take care when assessing the NCAA's restraints on student-athlete compensation, **[***37]** sensitive to their procompetitive possibilities. But these remarks do not suggest that courts must reflexively reject *all* challenges to the NCAA's compensation restrictions. Student-athlete compensation rules were not even at issue in *Board of Regents*. And the Court made clear it was only assuming the reasonableness **[**334]** of the NCAA's restrictions: "It is reasonable to *assume* that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and are therefore procompetitive . . . ." *Id., at 117, 104 S. Ct. 2948, 82 L. Ed. 2d 70* (emphasis added). Accordingly, the Court simply did not have occasion to declare—nor did it declare—the NCAA's compensation restrictions procompetitive both in 1984 and forevermore.

Our confidence on this score is fortified by still another factor. ***HN6***[] ***LEdHN[6]***[] [6] Whether an antitrust violation exists necessarily depends on a careful analysis of market realities. See, *e.g.*, *American Express Co., 585 U. S., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678*; 2B Areeda & Hovenkamp ¶500, p. 107 (2014). If those market realities change, so may the legal analysis.

When it comes to college sports, there can be little doubt that the market realities have changed significantly since 1984. Since then, the NCAA has dramatically increased the amounts **[***38]** and kinds of benefits schools may provide to student-athletes. For example, it has allowed the conferences flexibility to set new and higher limits on athletic scholarships. *D. Ct. Op., at 1064*. It has increased the size of permissible benefits “incidental to athletics participation.” *Id., at 1066*. And it has developed the Student Assistance Fund and the Academic Enhancement Fund, which in 2018 alone provided over $100 million to student-athletes. *Id., at 1072*. Nor is that all that has changed. In 1985, Division I football and basketball raised approximately $922 million and $41 million respectively. Brief for Former NCAA Executives as *Amici Curiae* 7. By 2016, NCAA Division I schools raised more than $13.5 billion. *Ibid.* From 1982 to 1984, CBS paid $16 million per year to televise the March Madness Division I men’s basketball tournament. *Ibid.* In 2016, those annual television rights brought in closer to $1.1 billion. *D. Ct. Op., at 1077, n. 20*.

Given the sensitivity of antitrust analysis to market realities—and how much has changed in this market—we think it would be particularly unwise to treat an aside in *Board of Regents* as more than that. This Court may be “infallible only because **[***39]** we are final,” *Brown v. Allen, 344 U. S. 443, 540, 73 S. Ct. 397, 97 L. Ed. 469 (1953)* (Jackson, J., concurring in result), but those sorts of stray comments are neither.

C

The NCAA submits that a rule of reason analysis is inappropriate for still another reason—because the NCAA and its member schools are not “commercial enterprises” and instead oversee intercollegiate athletics “as an integral part of the undergraduate experience.” Brief for Petitioner in No. 20-512, at 31. The NCAA represents that it seeks to “maintain amateurism in college sports as part of serving [the] societally important non-commercial objective” of “higher education.” *Id*., at 3.

Here again, however, there may be less of a dispute than meets the eye. The NCAA does not contest that its restraints affect interstate trade and commerce and are thus subject to the Sherman Act. See **[*2159]** *D. Ct. Op., at 1066*. The NCAA acknowledges that this Court already analyzed (and struck down) some of its restraints as anticompetitive **[**335]** in *Board of Regents*. And it admits, as it must, that the Court did all this only after observing that the Sherman Act had already been applied to other nonprofit organizations—and that “the economic significance of the NCAA’s nonprofit character is questionable at best” given **[***40]** that “the NCAA and its member institutions are in fact organized to maximize revenues.” *468 U. S., at 100-101, n. 22, 104 S. Ct. 2948, 82 L. Ed. 2d 70*. Nor, on the other side of the equation, does anyone contest that the status of the NCAA’s members as schools and the status of student-athletes as students may be relevant in assessing consumer demand as part of a rule of reason review.

With this much agreed it is unclear exactly what the NCAA seeks. To the extent it means to propose a sort of judicially ordained immunity from the terms of the Sherman Act for its restraints of trade—that we should overlook its restrictions because they happen to fall at the intersection of higher education, sports, and money—we cannot agree. This Court has regularly refused materially identical requests from litigants seeking special dispensation from the Sherman Act on the ground that their restraints of trade serve uniquely important social objectives beyond enhancing competition.

Take two examples. In *National Soc. of Professional Engineers v. United States, 435 U. S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*, a trade association argued that price competition between engineers competing for building projects had to be restrained to ensure quality work and protect public safety. *Id., at 679-680, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. This Court rejected that appeal as “nothing less than a frontal assault on the basic policy **[***41]** of the Sherman Act.” *Id., at 695, 98 S. Ct. 1355, 55 L. Ed. 2d 637*. ***HN7***[] ***LEdHN[7]***[] [7] The “statutory policy” of the Act is one of competition and it “precludes inquiry into the question whether competition is good or bad.” *Ibid.* In

FTC v. Superior Court Trial Lawyers Assn., 493 U. S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851 (1990), criminal defense lawyers agreed among themselves to refuse court appointments until the government increased their compensation. Id., at 414, 110 S. Ct. 768, 107 L. Ed. 2d 851. And once more the Court refused to consider whether this restraint of trade served some social good more important than competition: "The social justifications proffered for respondents' restraint of trade . . . do not make it any less unlawful." Id., at 424, 110 S. Ct. 768, 107 L. Ed. 2d 851.

To be sure, this Court once dallied with something that looks a bit like an antitrust exemption for professional baseball. In Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs, 259 U. S. 200, 42 S. Ct. 465, 66 L. Ed. 898, 20 Ohio L. Rep. 211 (1922), the Court reasoned that "exhibitions" of "base ball" did not implicate the Sherman Act because they did not involve interstate trade or commerce—even though teams regularly crossed state lines (as they do today) to make money and enhance their commercial success. Id., at 208-209, 42 S. Ct. 465, 66 L. Ed. 898. But this Court has refused to extend Federal Baseball's reasoning to other sports leagues—and has even acknowledged criticisms of the decision as " 'unrealistic' " and " 'inconsistent' " and "aberration[al]." Flood v. Kuhn, 407 U. S. 258, 282, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972) (quoting **[**336]** Radovich v. National Football League, 352 U. S. 445, 452, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)); see also Brief for Advocates for Minor **[***42]** Leaguers as *Amicus Curiae* 5, n. 3 (gathering criticisms). Indeed, as we have seen, this Court has already recognized that the NCAA itself *is* subject to the Sherman Act.

[*2160] ***HN8***[] ***LEdHN[8]***[] [8] The "orderly way" to temper that Act's policy of competition is "by legislation and not by court decision." Flood, 407 U. S., at 279, 92 S. Ct. 2099, 32 L. Ed. 2d 728. The NCAA is free to argue that, "because of the special characteristics of [its] particular industry," it should be exempt from the usual operation of the antitrust laws—but that appeal is "properly addressed to Congress." National Soc. of Professional Engineers, 435 U. S., at 689, 98 S. Ct. 1355, 55 L. Ed. 2d 637. Nor has Congress been insensitive to such requests. It has modified the antitrust laws for certain industries in the past, and it may do so again in the future. See, *e.g.*, 7 U. S. C. §§ 291-292 (agricultural cooperatives); 15 U. S. C. §§ 1011-1013 (insurance); 15 U. S. C. §§ 1801-1804 (newspaper joint operating agreements). But until Congress says otherwise, the only law it has asked us to enforce is the Sherman Act, and that law is predicated on one assumption alone—"competition is the best method of allocating resources" in the Nation's economy. National Soc. of Professional Engineers, 435 U. S., at 695, 98 S. Ct. 1355, 55 L. Ed. 2d 637.

III

A

While the NCAA devotes most of its energy to resisting the rule of reason in its usual form, the league lodges some objections to the district court's application of it as well.

HN9[] ***LEdHN[9]***[] [9] When describing the rule of reason, **[***43]** this Court has sometimes spoken of "a three-step, burden-shifting framework" as a means for " 'distinguish[ing] between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.' " American Express Co., 585 U. S., at ___, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 690. As we have described it, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect." *Ibid.* Should the plaintiff carry that burden, the burden then "shifts to the defendant to show a procompetitive rationale for the restraint." *Ibid.* If the defendant can make that showing, "the burden shifts back to the plaintiff to demonstrate that the procompetitive efficiencies could be reasonably achieved through less anticompetitive means." Id., at ___-___, 138 S. Ct. 2274, 201 L. Ed. 2d 678, 690.

These three steps do not represent a rote checklist, nor may they be employed as an inflexible substitute for careful analysis. As we have seen, what is required to assess whether a challenged restraint harms competition can vary depending on the circumstances. See supra, at ___-___, 210 L. Ed. 2d, at ___-___. ***HN10***[] ***LEdHN[10]***[] [10] The whole point of the rule of reason is to furnish "an enquiry meet for the case, looking to the circumstances, **[***44]** details, and logic of a restraint" to ensure that it unduly harms competition before a court declares it unlawful. California Dental, 526 U. S., at 781, 119 S. Ct. 1604, 143 L. Ed. 2d 935; see also, *e.g.*, Leegin

Creative, 551 U. S., at 885, 127 S. Ct. 2705, 168 L. Ed. 2d 623 (" '[T]he **[**337]** factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition' "); *Copperweld Corp. v. Independence Tube Corp., 467 U. S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)*; 7 Areeda & Hovenkamp ¶1507a, at 442-444 (slightly different "decisional model" using sequential questions).

In the proceedings below, the district court followed circuit precedent to apply a multistep framework closely akin to *American Express*'s. As its first step, the district court required the student-athletes to show that "the challenged restraints produce significant anticompetitive effects in the relevant market." *D. Ct. Op., at 1067*. This was no slight burden. According to **[*2161]** one *amicus*, courts have disposed of nearly all rule of reason cases in the last 45 years on the ground that the plaintiff failed to show a substantial anticompetitive effect. Brief for 65 Professors of Law, Business, Economics, and Sports Management as *Amici Curiae* 21, n. 9 ("Since 1977, courts decided 90% (809 of 897) on this ground"). This suit proved different. As we have seen, based on a voluminous **[***45]** record, the district court held that the student-athletes had shown the NCAA enjoys the power to set wages in the market for student-athletes' labor—and that the NCAA has exercised that power in ways that have produced significant anticompetitive effects. See *D. Ct. Op., at 1067*. Perhaps even more notably, the NCAA "did not meaningfully dispute" this conclusion. *Ibid.*

Unlike so many cases, then, the district court proceeded to the second step, asking whether the NCAA could muster a procompetitive rationale for its restraints. *Id., at 1070*. This is where the NCAA claims error first crept in. On its account, the district court examined the challenged rules at different levels of generality. At the first step of its inquiry, the court asked whether the NCAA 's entire package of compensation restrictions has substantial anticompetitive effects *collectively*. Yet, at the second step, the NCAA says the district court required it to show that each of its distinct rules limiting student-athlete compensation has procompetitive benefits *individually*. The NCAA says this mismatch had the result of effectively—and erroneously—requiring it to prove that each rule is the least restrictive means of achieving the **[***46]** procompetitive purpose of differentiating college sports and preserving demand for them.

We agree with the NCAA's premise that ***HN11***[] ***LEdHN[11]***[] [11] ***antitrust law*** does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess "degrees of reasonable necessity" so that "the lawfulness of conduct turn[s] upon judgments of degrees of efficiency." *Rothery Storage, 792 F. 2d, at 227*; *Continental T. V., Inc. v. GTE Sylvania Inc., 433 U. S. 36, 58, n. 29, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. That would be a recipe for disaster, for a "skilled lawyer" will "have little difficulty imagining possible less restrictive alternatives to most joint arrangements." 11 Areeda & Hovenkamp ¶1913b, p. 398 (2018). And judicial acceptance of such imaginings would risk interfering "with the legitimate objectives at issue" without "adding that much to competition." 7 *id*., ¶1505b, at 435-436.

HN12[] ***LEdHN[12]***[] [12] Even worse, "[r]ules that seek **[**338]** to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright Corp. v. ITT Grinnell Corp., 724 F. 2d 227, 234 (CA1 1983)* (BREYER, J.). After all, even "[u]nder the best of circumstances," applying the antitrust laws " 'can be difficult' "—and mistaken condemnations of legitimate business **[***47]** arrangements " 'are especially costly, because they chill the very' " procompetitive conduct " 'the antitrust laws are designed to protect.' " *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U. S. 398, 414, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*. Indeed, static judicial decrees in ever-evolving markets may themselves facilitate collusion or frustrate entry and competition. *Ibid.* To know that the Sherman Act prohibits only *unreasonable* restraints of trade is thus to know that attempts to " '[m]ete[r]' small deviations is not an appropriate antitrust function." Hovenkamp, Antitrust Balancing, *12 N. Y. U. J. L. & Bus. 369, 377 (2016)*.

[*2162] While we agree with the NCAA's legal premise, we cannot say the same for its factual one. Yes, at the first step of its inquiry, the district court held that the student-athletes had met their burden of showing the NCAA's restraints collectively bear an anticompetitive effect. And, given that, yes, at step two the NCAA had to show only that those same rules collectively yield a procompetitive benefit. The trouble for the NCAA, though, is not the level of generality. It is the fact that the district court found unpersuasive much of its proffered evidence. See *D. Ct. Op., at 1070-1076, 1080-1083*. Recall that the court found the NCAA failed "to establish that the challenged compensation rules . . . have **[***48]** any direct connection to consumer demand." *Id., at 1070*.

To be sure, there is a wrinkle here. While finding the NCAA had failed to establish that its rules collectively sustain consumer demand, the court did find that "some" of those rules "may" have procompetitive effects "to the extent" they prohibit compensation "unrelated to education, akin to salaries seen in professional sports leagues." *Id., at 1082-1083*. The court then proceeded to what corresponds to the third step of the *American Express* framework, where it required the student-athletes "to show that there are substantially less restrictive alternative rules that would achieve the same procompetitive effect as the challenged set of rules." *D. Ct. Op., at 1104*. And there, of course, the district court held that the student-athletes partially succeeded—they were able to show that the NCAA could achieve the procompetitive benefits it had established with substantially less restrictive restraints on education-related benefits.

Even acknowledging this wrinkle, we see nothing about the district court's analysis that offends the legal principles the NCAA invokes. The court's judgment ultimately turned on the key question at the third step: whether the student-athletes **[***49]** could prove that "substantially less restrictive alternative rules" existed to achieve the same procompetitive benefits the NCAA had proven at the second step. *Ibid.* Of course, deficiencies in the NCAA's proof of procompetitive benefits at the second step influenced the analysis at the third. But that is only because, ***HN13***[] ***LEdHN[13]***[] [13] however **[**339]** framed and at whichever step, anticompetitive restraints of trade may wind up flunking the rule of reason to the extent the evidence shows that substantially less restrictive means exist to achieve any proven procompetitive benefits. See, *e.g.*, 7 Areeda & Hovenkamp ¶1505, p. 428 ("To be sure, these two questions can be collapsed into one," since a "legitimate objective that is not promoted by the challenged restraint can be equally served by simply abandoning the restraint, which is surely a less restrictive alternative").

Simply put, the district court nowhere—expressly or effectively—required the NCAA to show that its rules constituted the *least* restrictive means of preserving consumer demand. Rather, it was only after finding the NCAA's restraints " 'patently and inexplicably stricter than is necessary' " to achieve the procompetitive benefits the league had demonstrated **[***50]** that the district court proceeded to declare a violation of the Sherman Act. *D. Ct. Op., at 1104*. That demanding standard hardly presages a future filled with judicial micromanagement of legitimate business decisions.

B

In a related critique, the NCAA contends the district court "impermissibly redefined" its "product" by rejecting its views about what amateurism requires and replacing them with its preferred conception. **[*2163]** Brief for Petitioner in No. 20-512, at 35-36.

This argument, however, misapprehends the way a defendant's procompetitive business justification relates to the antitrust laws. ***HN14***[] ***LEdHN[14]***[] [14] Firms deserve substantial latitude to fashion agreements that serve legitimate business interests—agreements that may include efforts aimed at introducing a new product into the marketplace. *Supra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*. But none of that means a party can relabel a restraint as a product feature and declare it "immune from *§ 1* scrutiny." *American Needle, 560 U. S., at 199, n. 7, 130 S. Ct. 2201, 176 L. Ed. 2d 947*. In this suit, as in any, the district court had to determine whether the defendants' agreements harmed competition and whether any procompetitive benefits associated with their restraints could be achieved by "substantially less restrictive alternative" means. *D. Ct. Op., at 1104*. **[***51]**

The NCAA's argument not only misapprehends the inquiry, it would require us to overturn the district court's factual findings. While the NCAA asks us to defer to its conception of amateurism, the district court found that the NCAA had not adopted any consistent definition. *Id., at 1070*. Instead, the court found, the NCAA's rules and restrictions on compensation have shifted markedly over time. *Id., at 1071-1074*. The court found, too, that the NCAA adopted these restrictions without any reference to "considerations of consumer demand," *id., at 1100*, and that some were "not necessary to preserve consumer demand," *id., at 1075, 1080, 1104*. None of this is product redesign; it is a straightforward application of the rule of reason.

C

Finally, the NCAA attacks as "indefensible" the lower courts' holding that substantially less restrictive alternatives exist capable of delivering the same procompetitive benefits as its current rules. Brief for Petitioner **[**340]** in No. 20-512, at 46. The NCAA claims, too, that the district court's injunction threatens to "micromanage" its business. *Id*., at 50.

Once more, we broadly agree with the legal principles the NCAA invokes. As we have discussed,***HN15***[] ***LEdHN[15]***[] [15] antitrust courts must give wide berth to business judgments before finding liability. **[***52]** See *supra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*. Similar considerations apply when it comes to the remedy. Judges must be sensitive to the possibility that the "continuing supervision of a highly detailed decree" could wind up impairing rather than enhancing competition. *Trinko, 540 U. S., at 415, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Costs associated with ensuring compliance with judicial decrees may exceed efficiencies gained; the decrees themselves may unintentionally suppress procompetitive innovation and even facilitate collusion. See *supra, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*. Judges must be wary, too, of the temptation to specify "the proper price, quantity, and other terms of dealing"—cognizant that they are neither economic nor industry experts. *Trinko, 540 U. S., at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Judges must be open to reconsideration and modification of decrees in light of changing market realities, for "what we see may vary over time." *California Dental, 526 U. S., at 781, 119 S. Ct. 1604, 143 L. Ed. 2d 935*. And throughout courts must have a healthy respect for the practical limits of judicial administration: "An antitrust court is unlikely to be an effective day-to-day enforcer" of a detailed decree, able to keep pace with changing market dynamics alongside a busy docket. *Trinko, 540 U. S., at 415, 124 S. Ct. 872, 157 L. Ed. 2d 823*. Nor should any court " 'impose a duty . . . that it cannot explain or adequately and reasonably supervise.' " *Ibid.* In short, judges make **[***53]** for poor "central planners" and **[*2164]** should never aspire to the role. *Id., at 408, 124 S. Ct. 872, 157 L. Ed. 2d 823*.

Once again, though, we think the district court honored these principles. The court enjoined only restraints on education-related benefits—such as those limiting scholarships for graduate school, payments for tutoring, and the like. The court did so, moreover, only after finding that relaxing these restrictions would not blur the distinction between college and professional sports and thus impair demand—and only after finding that this course represented a significantly (not marginally) less restrictive means of achieving the same procompetitive benefits as the NCAA's current rules. *D. Ct. Op., at 1104-1105*.

Even with respect to education-related benefits, the district court extended the NCAA considerable leeway. As we have seen, the court provided that the NCAA could develop its own definition of benefits that relate to education and seek modification of the court's injunction to reflect that definition. App. to Pet. for Cert. in No. 20-512, at 168a, ¶4. The court explained that the NCAA and its members could agree on rules regulating how conferences and schools go about providing these education-related benefits. ***[***54]*** *Ibid.* The court said that the NCAA and its members could continue fixing education-related cash awards, too—so long as those "limits are never lower than the limit" on awards for athletic performance. *D. Ct. Op., at 1104*; App. to Pet. for Cert. in No. **[**341]** 20-512, at 168a-169a, ¶5. And the court emphasized that its injunction applies only to the NCAA and multi-conference agreements; individual conferences remain free to reimpose every single enjoined restraint tomorrow—or more restrictive ones still. *Id*., at 169a-170a, ¶¶6-7.

In the end, it turns out that the NCAA's complaints really boil down to three principal objections.

First, the NCAA worries about the district court's inclusion of paid posteligibility internships among the education-related benefits it approved. The NCAA fears that schools will use internships as a way of circumventing limits on payments that student-athletes may receive for athletic performance. The NCAA even imagines that boosters might promise posteligibility internships "at a sneaker company or auto dealership" with extravagant salaries as a "thinly disguised vehicle" for paying professional-level salaries. Brief for Petitioner in No. 20-512, at 37-38.

This argument **[***55]** rests on an overly broad reading of the injunction. The district court enjoined only restrictions on education-related compensation or benefits "that may be made available *from conferences or schools*." App. to Pet. for Cert. in No. 20-512, at 167a, ¶1 (emphasis added). Accordingly, as the student-athletes concede, the injunction "does not stop the NCAA from continuing to prohibit compensation from" sneaker companies, auto dealerships, boosters, "or anyone else." Brief for Respondents 47-48; see also Brief for United States as *Amicus Curiae* 33. The NCAA itself seems to understand this much. Following the district court's injunction, the organization adopted new regulations specifying that only "a conference or institution" may fund post-eligibility internships. See Decl. of M. Boyer in No. 4:14-md-02541, ECF Doc. 1302-2, p. 6 (ND Cal., Sept. 22, 2020) (NCAA Bylaw 16.3.4(d)).

Even when it comes to internships offered by conferences and schools, the district court left the NCAA considerable flexibility. The court refused to enjoin NCAA rules prohibiting its members from providing compensation or benefits unrelated to legitimate educational activities—thus leaving the league room to police **[***56]** phony internships. As we've observed, the **[*2165]** district court also allowed the NCAA to propose (and enforce) rules defining what benefits do and do not relate to education. App. to Pet. for Cert. in No. 20-512, at 168a, ¶4. Accordingly, the NCAA may seek whatever limits on paid internships it thinks appropriate. And, again, the court stressed that individual conferences may restrict internships however they wish. *Id*., at 169a, ¶6. All these features underscore the modesty of the current decree.

Second, the NCAA attacks the district court's ruling that it may fix the aggregate limit on awards schools may give for "academic or graduation" achievement no lower than its aggregate limit on parallel athletic awards (currently $5,980 per year). *Id*., at 168a-169a, ¶5; *D. Ct. Op., at 1104*. This, the NCAA asserts, "is the very definition of a professional salary." Brief for Petitioner in No. 20-512, at 48. The NCAA also represents that "[m]ost" of its currently permissible athletic awards are "for genuine individual or team *achievement*" and that "[m]ost . . . are received by only a few student-athletes each year." *Ibid.* Meanwhile, the NCAA says, the district **[**342]** court's decree would allow a school to **[***57]** pay players thousands of dollars each year for minimal achievements like maintaining a passing GPA. *Ibid.*

The basis for this critique is unclear. The NCAA does not believe that the athletic awards it presently allows are tantamount to a professional salary. And this portion of the injunction sprang directly from the district court's finding that the cap on athletic participation awards "is an amount that has been shown not to decrease consumer demand." *D. Ct. Op., at 1088*. Indeed, there was no evidence before the district court suggesting that corresponding academic awards would impair consumer interest in any way. Again, too, the district court's injunction affords the NCAA leeway. It leaves the NCAA free to reduce its athletic awards. And it does not ordain what criteria schools must use for their academic and graduation awards. So, once more, if the NCAA believes certain criteria are needed to ensure that academic awards are legitimately related to education, it is presently free to propose such rules—and individual conferences may adopt even stricter ones.

Third, the NCAA contends that allowing schools to provide in-kind educational benefits will pose a problem. This relief focuses **[***58]** on allowing schools to offer scholarships for "graduate degrees" or "vocational school" and to pay for things like "computers" and "tutoring." App. to Pet. for Cert. in No. 20-512, at 167a-168a, ¶2. But the NCAA fears schools might exploit this authority to give student-athletes " 'luxury cars' " "to get to class" and "other unnecessary or inordinately valuable items" only "nominally" related to education. Brief for Petitioner in No. 20-512, at 48-49.

Again, however, this over-reads the injunction in ways we have seen and need not belabor. Under the current decree, the NCAA is free to forbid in-kind benefits unrelated to a student's actual education; nothing stops it from enforcing a "no Lamborghini" rule. And, again, the district court invited the NCAA to specify and later enforce rules delineating which benefits it considers legitimately related to education. To the extent the NCAA believes meaningful ambiguity really exists about the scope of its authority—regarding internships, academic awards, in-kind benefits, or anything else—it has been free to seek clarification from the district court since the court issued its injunction three years ago. The NCAA remains free to do so today. **[***59]** To date, the NCAA has sought clarification only once—about the precise amount at which it can cap academic awards—and the question was quickly resolved. Before conjuring hypothetical concerns **[*2166]** in this Court, we believe it best for the NCAA to present any practically important question it has in district court first.

HN16[] ***LEdHN[16]***[] [16] When it comes to fashioning an antitrust remedy, we acknowledge that caution is key. Judges must resist the temptation to require that enterprises employ the least restrictive means of achieving their legitimate business objectives. Judges must be mindful, too, of their limitations—as generalists, as lawyers, and as outsiders trying to understand intricate business relationships. Judges must remain aware that markets are often more effective than the heavy hand of judicial power when it comes to enhancing consumer welfare. And judges must be open to clarifying and **[**343]** reconsidering their decrees in light of changing market realities. Courts reviewing complex business arrangements should, in other words, be wary about invitations to "set sail on a sea of doubt." *United States v. Addyston Pipe & Steel Co., 85 F. 271, 284 (CA6 1898)* (Taft, J.). But we do not believe the district court fell prey to that temptation. Its judgment does not float on a **[***60]** sea of doubt but stands on firm ground—an exhaustive factual record, a thoughtful legal analysis consistent with established antitrust principles, and a healthy dose of judicial humility.

*

Some will think the district court did not go far enough. By permitting colleges and universities to offer enhanced education-related benefits, its decision may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools. Still, some will see this as a poor substitute for fuller relief. At the same time, others will think the district court went too far by undervaluing the social benefits associated with amateur athletics. For our part, though, we can only agree with the Ninth Circuit: " 'The national debate about amateurism in college sports is important. But our task as appellate judges is not to resolve it. Nor could we. Our task is simply to review the district court judgment through the appropriate lens of ***antitrust law***.' " *958 F. 3d, at 1265*. That review persuades us the district court acted within the law's bounds.

The judgment is

Affirmed.

Concur by: KAVANAUGH

Concur

JUSTICE **KAVANAUGH**, concurring.

The NCAA has long restricted the compensation and benefits **[***61]** that student athletes may receive. And with surprising success, the NCAA has long shielded its compensation rules from ordinary antitrust scrutiny. Today, however, the Court holds that the NCAA has violated the antitrust laws. The Court's decision marks an important and overdue course correction, and I join the Court's excellent opinion in full.

But this case involves only a narrow subset of the NCAA's compensation rules—namely, the rules restricting the *education-related* benefits that student athletes may receive, such as post-eligibility scholarships at graduate or vocational schools. The rest of the NCAA's compensation rules are not at issue here and therefore remain on the books. Those remaining compensation rules generally restrict student athletes from receiving compensation or benefits from their colleges for playing sports. And those rules have also historically restricted student athletes from receiving money from endorsement deals and the like.

I add this concurring opinion to underscore that the NCAA's remaining compensation rules also raise serious questions **[*2167]** under the antitrust laws. Three points warrant emphasis.

First, the Court does not address the legality of the NCAA's **[***62]** remaining compensation rules. As the Court says, "the student-athletes do not renew their across-the-board challenge to the NCAA's compensation restrictions. Accordingly, we do not pass on the rules that remain in place or the **[**344]** district court's judgment upholding them. Our review is confined to those restrictions now enjoined." *Ante, at ___, 210 L. Ed. 2d, at ___*.

Second, although the Court does not weigh in on the ultimate legality of the NCAA's remaining compensation rules, the Court's decision establishes how any such rules should be analyzed going forward. After today's decision, the

NCAA's remaining compensation rules should receive ordinary "rule of reason" scrutiny under the antitrust laws. The Court makes clear that the decades-old "stray comments" about college sports and amateurism made in *National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla., 468 U. S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984)*, were dicta and have no bearing on whether the NCAA's current compensation rules are lawful. *Ante, at ___, 210 L. Ed. 2d, at ___*. And the Court stresses that the NCAA is not otherwise entitled to an exemption from the antitrust laws. *Ante, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*; see also *Radovich v. National Football League, 352 U. S. 445, 449-452, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957)*. As a result, absent legislation or a negotiated agreement between the NCAA and the student athletes, the NCAA 's remaining compensation rules should be subject to ordinary rule of **[***63]** reason scrutiny. See *ante, at ___ - ___, 210 L. Ed. 2d, at ___ - ___*.

Third, there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAAmust supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAAmay lack such a justification.

The NCAA acknowledges that it controls the market for college athletes. The NCAA concedes that its compensation rules set the price of student athlete labor at a below-market rate. And the NCAA recognizes that student athletes currently have no meaningful ability to negotiate with the NCAA over the compensation rules.

The NCAA nonetheless asserts that its compensation rules are procompetitive because those rules help define the product of college sports. Specifically, the NCAA says that colleges may decline to pay student athletes because the defining feature of college sports, according to the NCAA , is that the student athletes are not paid.

In my view, that argument is circular and unpersuasive. The NCAA couches its arguments for not paying student athletes in innocuous labels. But the labels cannot disguise the reality: The **[***64]** NCAA's business model would be flatly illegal in almost any other industry in America. All of the restaurants in a region cannot come together to cut cooks' wages on the theory that "customers prefer" to eat food from low-paid cooks. Law firms cannot conspire to cabin lawyers' salaries in the name of providing legal services out of a "love of the law." Hospitals cannot agree to cap nurses' income in order to create a "purer" form of helping the sick. News organizations cannot join forces to curtail pay to reporters to preserve a "tradition" of public-minded journalism. Movie studios cannot collude to slash benefits to camera crews to kindle a "spirit of amateurism" in Hollywood.

[345]** Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook **[*2168]** antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work. See, *e.g.*, *Texaco Inc. v. Dagher, 547 U. S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Businesses like the NCAA cannot avoid the consequences of price-fixing labor by incorporating price-fixed labor into the definition of the product. Or to put it in more doctrinal terms, a monopsony cannot launder its price-fixing of labor by calling it product definition.

The **[***65]** bottom line is that the NCAA and its member colleges are suppressing the pay of student athletes who collectively generate *billions* of dollars in revenues for colleges every year. Those enormous sums of money flow to seemingly everyone except the student athletes. College presidents, athletic directors, coaches, conference commissioners, and NCAA executives take in six- and seven-figure salaries. Colleges build lavish new facilities. But the student athletes who generate the revenues, many of whom are African American and from lower-income backgrounds, end up with little or nothing. See Brief for African American Antitrust Lawyers as *Amici Curiae* 13-17.

Everyone agrees that the NCAA can require student athletes to be enrolled students in good standing. But the NCAA 's business model of using unpaid student athletes to generate billions of dollars in revenue for the colleges raises serious questions under the antitrust laws. In particular, it is highly questionable whether the NCAA and its member colleges can justify not paying student athletes a fair share of the revenues on the circular theory that the defining characteristic of college sports is that the colleges do not pay student **[***66]** athletes. And if that asserted justification is unavailing, it is not clear how the NCAA can legally defend its remaining compensation rules.

If it turns out that some or all of the NCAA's remaining compensation rules violate the antitrust laws, some difficult policy and practical questions would undoubtedly ensue. Among them: How would paying greater compensation to student athletes affect non-revenue-raising sports? Could student athletes in some sports but not others receive compensation? How would any compensation regime comply with Title IX? If paying student athletes requires something like a salary cap in some sports in order to preserve competitive balance, how would that cap be administered? And given that there are now about 180,000 Division I student athletes, what is a financially sustainable way of fairly compensating some or all of those student athletes?

Of course, those difficult questions could be resolved in ways other than litigation. Legislation would be one option. Or colleges and student athletes could potentially engage in collective bargaining (or seek some other negotiated agreement) to provide student athletes a fairer share of the revenues that they generate **[***67]** for their colleges, akin to how professional football and basketball players have negotiated for a share of league revenues. Cf. *Brown v. Pro Football, Inc., 518 U. S. 231, 235-237, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996)*; *Wood v. National Basketball Assn., 809 F. 2d 954, 958-963 (CA2 1987)* (R. Winter, J.). Regardless of how those issues ultimately would be resolved, however, **[**346]** the NCAA's current compensation regime raises serious questions under the antitrust laws.

To be sure, the NCAA and its member colleges maintain important traditions that have become part of the fabric of America—game days in Tuscaloosa and South Bend; the packed gyms in Storrs and Durham; the women's and men's lacrosse championships on Memorial Day weekend; track and field meets in Eugene; the spring softball and baseball World Series **[*2169]** in Oklahoma City and Omaha; the list goes on. But those traditions alone cannot justify the NCAA 's decision to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of ***antitrust law***, it is not evident why college sports should be any different. The NCAA is not above **[***68]** the law.

References

15 U.S.C.S. § 1

1 Antitrust Laws and Trade Regulation §§ 2.02, 12.01[3], 12.02 (Matthew Bender 2d ed.)

L Ed Digest, Restraints of Trade, Monopolies, and Unfair Trade Practices § 16

L Ed Index, Restraints of Trade, Monopolies, and Unfair Trade Practices

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