Antitrust Outline – Fox Spring 2012 (received an A)

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	2. Exclusionary Restraints: Clayton Act Section 3
		1. Intro: Section 3 “effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce,” steps of analysis
		2. Tying – historical: explanations, IBM, International Salt, Northern Pacific Railway (per se), Loew’s (since-overruled IP presumption of mrkt power), Fortner Enterprises (no mrkt power)
		3. Tying – Modern Analysis: Qualified per se rule, Jefferson Parish (separable products test), Kodak, Microsoft (carve-out for platform software), Illinois Tool (overrules Loews presumption of IP mrkt power)
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6. Standing

Cartels and Closely Related Agreements---------------------------------------

1. Introduction-----------------------------------------------------------------------------

Necessary elements of a cartel:

* + Includes all significant producers (or buyers) so cartel price is not undercut.
	+ **Barriers to entry**/expansion so insurgents don’t increase output and undercut.
	+ Effective means **of administration**:
		- Ability to determine and disseminate the profit-maximizing price: often accomplished via **information-sharing**, which may itself attract attn. of authorities.
		- Ability to detect “**cheating**” via unauthorized price cuts.
		- Ability to **punish** cheaters: such as “squeeze-out” in which remaining members of cartel temporarily decrease prices beneath those at which the cheater can afford to stay in business.
	+ Fewer market actors greatly facilitates cartelization by easing administration of coordination.
	+ Interchangeability of products facilitates cartelization in that the profit-maximizing price is easier to determine.
	+ These conditions arise prominently in the merger context in that the government will take preemptive action to prevent the creation of conditions conducive to the development of cartels, even without evidence of actual agreement (“shadow cartel”).

**Forms of Cartels**: “any combination which directly interferes with the free play of market forces.” (Socony)

* + Price-fixing: agree on single price
	+ Market division: especially popular in the EU after trade barriers fell, divide up the market geographically and agree not to enter territory of co-conspirators.
	+ Quota allocation: co-conspirators agree to limit output.
	+ Customer allocation: divvy up monopoly over specific groups of customers.
	+ Boycott: entrenched powers organize a boycott of newcomers, having potentially more harmful effects than price-fixing in that it completely excludes potential innovators, rather than merely raising prices (Foga).
	+ Standard-setting: trade organization sets a standard of practice in a way designed to exclude a newcomer. Courts have to determine whether there is legitimate basis for standard, or whether it’s intended to serve anticompetitive ends (Allied Tube).
	+ Patent pools: competitors grant one another exclusive licenses to their patents in order to exclude market entrants.

**Ruinous Competition is no defense**: as we saw in Trans-Missouri and Addyston Pipe.

**Naked vs**. **Ancillary Restraints**:

* + if the objective is to restrain trade and there are no procompetitive benefits, then the restraint is naked and per se illegal (even if justified on public interest grounds).
	+ If the restraint is merely ancillary to, a byproduct of, a legitimate business relationship, then you get to rule of reason analysis.
1. Rehabilitating Trans-Missouri: Naked Restraints vs. Reasonable Agreements

Board of Trade of the City of Chicago v. U.S. (1918):

* + Dealers were exploiting farmers by purchasing grain to arrive after the close of Chicago’s famous grain trade for the day, drastically decreasing the price.
	+ **Call Rule**: to remedy, Board of Trade created requirement that all grain traded after-hours be priced as if it had arrived at closing.
	+ Per se illegality:
		- District court did not allow evidence of purpose or effect of trade restraint.
		- Court holds that restraint of trade, absent evidence of intent, effect…, is insufficient, since all agreements concerning trade ultimately restrain it in some way (think non-compete agreements)
			* “**Mere regulation**” of trade, potentially having procompetitive effect, not sufficient.
			* “**True test**:” Restraints are violative if they “suppress or destroy competition.”
	+ Restraint was “reasonable regulation of business.”

Appalachian Coals v. US (1933): Case is worthless.

* + Facts: Coal market in Appalachia was hamstrung by disorganized speculation on coal prices, other problems. The producers in the area agree to go through a single sales agent, stream-lining the process and stabilizing prices.
		- Note: They submit this plan to the government before acting on it, and this is the hearing on its legality, so **government involvement/approval does not immunize an otherwise anticompetitive act**.
	+ Court finds that agreement **is not illegal per se**.
	+ Rule of reason analysis:
		- Defense argues that it’s an efficient joint venture which actually facilitates fair competition by removing abuses. Though at the end of the day, they are still attempting to fix prices by removing distressed coal.
		- Court notes **that ruinous competition is not a defense**, but appears to allow it to inform their view of the reasonableness of the plan.
		- Court says there is sufficient ambiguity to the effect of the plan that they need to see it in action before they can decide whether or not it is anticompetitive.
	+ This **appears to embrace an effects requirement, which was explicitly rejected in subsequently in Socony**, so this case stands on its own, never having been explicitly overturned, but **without much lasting influence.**

Socony-Vacuum (1940): No FX requirement for per se illegality of naked restraints

* + Great depression slows oil demand and smaller oil produces do not have the infrastructure to store it excess supply, so they flood the market with “**distress oil**,” lowering prices to unsustainable levels for all producers.
	+ This apparent **industry crisis** led industry leaders, **in conjunction with the government**, to develop a system by which larger oil companies would store “distress oil” for smaller companies in order to avoid supply flood by purchasing it at market price and holding on to it until demand increased.
	+ **Rule: Per se illegality**: cartel agreements that affect the market through **naked restraints such as price-fixing are per se illegal,** ie “any agreement with the purpose [or effect] of raising, depressing, fixing, pegging, or stabilizing price is illegal per se.” – don’t have to define the market, do power analysis, etc.
		- * **rejects “reasonableness” as an inquiry in application of per se rule**. govt doesn’t have to prove market power, effect, or that the conspiracy was carried out – per se rule is a clear one in order to boost its deterrent effect
			* **FN 59: effect not necessary** to prove violation as long as there was intent to fix prices (not intended anticompetitive harm, which is definitely not necessary); **the agreement itself is the illegal conduct**.
			* and once you have an agreement among competitors to fix prices, that’s all you need – no Δ justifications will be heard or have to be rebutted
			* Beginning in the 70s, characterization case law began to limit the broad strokes of Socony.
	+ Intent:
		- D argues that they did not intend to fix prices because they organized purchase at spot market price.
		- Court rejects because fixing a price floor still constitutes fixing a price, and they clearly intended a price floor.
	+ Crisis defense/Ruinous competition
		- Court rejects crisis defense because defendants will always argue ruinous competition.
		- Policy: to the extent there are industry crises, the industry should not be left to its own devices to react to this (but in this case, the government did intervene to determine appropriate response to crisis).
	+ Government involvement: is no defense even if it might inform rule of reason analysis, because the intention was still to fix prices and the government officials had no authority to confer immunity (in fact, there was a route to immunity at the time, but they failed to pursue it for unknown reasons).

Fashion Originators’ Guild of America (1941):

* + To address “style pirates,” who would make cheap copies of high fashion, members of FOGA at every part of the chain of design agreed not to deal with any style pirates.
	+ **Naked boycott is violative**: Although the FTC had made no showing of price increase, output limitation or deteriorating quality, the Court held this was a “naked boycott” which violated the “policy of the Sherman act” in that its “**necessary tendency** and its **purpose and effect** to **directly suppress competition**,” expanding the reach of the Sherman act beyond the traditional harms of price increase, output limitation and deteriorating quality.
	+ **Extra-governmental agency:** the Court also found that the organization “trenches upon the power of the national legislature and violates the statute,” in that it provides rules for the regulation and restraint of interstate commerce, and enforces them at its discretion.
1. Characterization Cases (Is this a Cartel?)-------------------------------------------
* Characterization cases blur the line between per se illegality and rule of reason: if qualify for the latter, you enter “continuum of reasonableness” by which cases are adjudged according to their similarity to per se cartels plus their countervailing procompetitive consideration. Here, we’re litigating whether or not we even get to that question by characterizing the facts to suggest cartelization (which is per se illegal) vel non.

Goldfarb:

* + atty negotiated purchase of his own home and drafted documents, but couldn’t get any outside atty to agree to finish the closing beneath a percentage of the price of the house specified by the bar association’s ethics rules.
	+ Court determined this was, in fact, price fixing and a Sherman act violation.
	+ However, they left FN stating that the professions may present fact patterns that would justify certain anticompetitive acts.

Nat’l Society of Professional Engineers (US 1978) – quick look to get to per se rule

* + - NSPE has bylaws, all members have to agree to the bylaws – so no question about existence of agreement; question of *characterization* of agreement
			1. bylaws set rules for fees schedules – ethics rules prohibiting competitive bidding by members (prohibited price competition among members)
			2. Clearly prevents prices from decreasing to a competitive level because direct price competition for projects was outright banned.
		- **Quick look to get to per se violation:** this isn’t price-fixing on its face (how?) – ct gives a **quick look** at Δ’s justifications to determine what rule to apply
			1. *ct will apply* ***quick look analysis*** *in cases where per se condemnation is inappropriate (e.g., not clearly price-fixing), but where no elaborate industry analysis is required to demonstrate the anticompetitive character of an* ***inherently suspect restraint***
		- D’s Characterization: incentive to prevent poor quality work
			1. safety and ethics problems – if engineers have to compete against each other on price, would cut corners in order to meet the costs
			2. D doesn’t attempt to characterize the agreement as “not anticompetitive” – but that anticompetitive nature is necessary and reasonable.
		- No public interest defense: can’t make arg under Rule of Reason that *competition itself* is unreasonable – so even under Rule of Reason analysis, this would be illegal
			1. only possible Δ justifications for anticompetitive behavior are pro-competitive ones – here, possible increase in public good doesn’t enhance competition
			2. Policy: there is no public interest defense because this is so **vulnerable to abuse** and **Congress made the cost/benefit analysis** and determined that competition is so often in the public interest that they didn’t even allow exemption for the extenuating circumstances when this might not be the case.
		- Quick look yields per se violation: absent articulated pro-competitive benefits, there is no justification for restraint of trade.
		- Rule: if there is hard core price fixing, then that is the end of the case; if not, you may get to a quick look.

BMI (1979):

* Facts:
	+ Copyright pools (ASCAP and BMI) license compositions to television studios for background music and monitors TV to ensure there’s no infringing use.
	+ CBS didn’t want to purchase license for access to entire libraries because price was calculated as percentage of revenue and they had more revenue than other studios.
* Per se violation?
	+ CBS argued that composers should be competing against one another to lower prices and this coordination of prices should be a per se violation of the Sherman act as a form of price fixing.
	+ Court **rejected this argument**, finding that the infringement monitoring needs and centralization of sales was reasonably necessary as coordinated enterprise.
	+ The Court admits that literally speaking, this is price fixing, but so are the practices of joint ventures and (effectively) mergers between competitors, yet none are per se violations because they are not accurately characterized as “plainly anticompetitive” and “without redeeming virtue.”
	+ Test: Instead, the court looks to whether the “purpose” and “effect” (though as we know, effect is not required) of the conduct is to threaten the proper operation of a free-market economy, whether it “**facially appears to be one that would always or almost always tend to restrict competition and decrease output**,” rather than tend toward procompetitive merits.
	+ Here, because of the transaction costs associated with separately negotiating every license with each composer, and of each composer to monitor for infringement, would drastically increase the costs of doing business, and perhaps eliminate the market entirely. “The whole [of the copyright pool] is truly greater than the sum of its parts” in that it makes possible the functioning of the industry, offering a product quite separate from the licenses in their own right (meaning ASCAP and BMI provide a service in the facilitation of licensing above and beyond merely the licensing itself).
		- The **restraint of trade is merely ancillary** to otherwise legitimate and procompetitive business arrangement, which is to say the procompetitive benefits outweigh the anticompetitive restraints.
		- In Fox’s words, the Ds “**create the market**” according them some special consideration, which we see further developed in NCAA. But how is this different from a ruinous competition argument?
* Court denies per se violation and remands for rule of reason analysis.
* Distinguishing factors? Although the holding is of general applicability, other facts that informed the Court’s decision here, however, include
	+ The copyright legislation, passed after the Sherman act, implies that copyright holders should be able to make market arrangements “reasonably necessary” to effectuate the rights granted.” And
	+ A few years prior, ASCAP and BMI, in their former manifestations, were determined to violate the Sherman act and were reorganized by consent decree to provide licensees a “genuine economic choice” of how to license compositions by, inter ali, prohibiting exclusive licensing to the agencies.

Catalano (1980): quick look to get to per se violation

* Beer distributors agree to end practice of extending interest free credit to retailers for purchase of beer.
* Price fixing?
	+ Court determined that the extent to which buyers may capture the time value of money on interest-free credit lines is an **effective component of price**, so distributors had colluded to eliminate a discount on the price, affixing a higher price in effect.
	+ D argued that the entire price of beer is not set, so if they had eliminated a discount then in theory, the price of the beer itself should adjust to account for this effective increase. And decreased credit will ease entry for competing distributors who don’t have the overhead to delay payment.
	+ But the reverse is true for the buyers (less credit requires more overhead), and moreover, anytime you increase price you ease entry for competitors, so if that were an allowable justification, then all horizontal agreements would be valid.
* Rule: fixing a component of price constitutes price fixing and a per se violation.

Maricopa (1982):

* Non-profit association to which 70% of doctors in market belong, **determines maximum prices** that member doctors will charge for certain services under certain insurance plans.
	+ Remember from Socony that **maximum price fixing is per se illegal** as well as minimum price fixing, since a nominally maximum price functions as both the ceiling and the floor in that it signals the cartel price to the competitors.
* Notice: patients can go to 30% of non-member doctors and even member doctors can charge more for patients off the specified insurance plans, both facts undermining market power, but **market power is simply not relevant to per se violations.**
* Today:
	+ The dissent points out that the reasoning for illegalizing maximum prices per se from Socony does not apply with equal force in this context because the insurance industry negotiates with the organization on these prices, so they can determine what premiums to pass on to consumers, who can easily compare premium prices to those of competing HMOs. In turn, the upward pressure on the price would be the need of the organization to attract sufficient doctors to join up. But viewed this way, these look like legitimate market forces, and this case may turn out differently today.
	+ But as the court notes, letting the competitors get together and set the fee, which is inherently suspect, was simply not necessary to establishing a maximum price, even if that is a socially desirable outcome, since the insurer could simply do the same on its own. And procompetitive benefits only justify anticompetitive acts to the extent they cannot be achieved through alternative, less anticompetitive means.
	+ And in any event, even if this is one of those rare cases in which bald price fixing is ultimately pro-competitive or otherwise beneficial to consumers, the Sherman act compels a bright line prohibition on these types of schemes.

NCAA (1984):

* NCAA limited the number of games which any given school was allowed to televise in an effort to preserve actual ticket sales, an effort which clearly **overrides consumer preference** for televising of Oklahoma and Georgia games, so it appears to be a clear cartel.
	+ Horizontal restraint, limitation on output, prevents price negotiation
* **Market creation exception** (my term):
	+ The Court declines to find a per se violation because **unique nature of the college sports industry requires certain horizontal restraints** on competition (preserving the academic character of the product requires mutual agreement for example).
	+ One can escape per se violation if **industry’s very existence depends on certain horizontal restraints**.
		- “Our decision not to apply a per se rule in 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.” Also quoted in American Needle (distinguishing).
* So the court takes a “quick look,” without a full rule of reason analysis (conflicts with outline, which says they go to full rule of reason).
* They nevertheless conclude that this is a violation of the act because the purpose of this particular restraint (on the proliferation of television contracts) was not to preserve the unique nature of college football, but to preserve the ticket sales of certain members of the cartel, overriding consumer choice without justification.
	+ Appears that any horizontal restraints justified via market creation must be those necessary to the existence of the industry.
* This exception has rarely proven successful.

FTC v. Superior Court Trial Lawyers Association (1990):

* At the DC council’s urging, the indigent defense attys in DC agreed to boycott taking new cases until fees were raised, attracting political will, resulting in fee raise. Reagan administration decided to sue them.
* Boycotts should be thought of as integral with price fixing as evidence here since the purpose and effect was to raise prices.
* Court determined this was **illegal per se** rejecting two defenses:
	+ **social justifications** proffered for naked restraint of trade does not make it less unlawful (ie no public interest defense) and
	+ **market power** doesn’t need to approach monopoly for restraint of trade to be harmful, so it’s not a defense to per se violation (why would you do it if you didn’t have market power?).

Cal Dental (1999):

* California Dental Association had certain rules prohibiting/regulating advertisement of across-the-board discounts (10% off for students!), general price levels, quality of service.
* FTC and lower court found per se violations for prohibition on price advertisements, and quick look violation on others.
* **Continuum of analyses**: Court describes the distinctions between per se, quick look and rule of reason analyses as gradated, placing them on a continuum and noting that significant market inquiry may be required even to arrive, ultimately, at a per se violation.
* Court remand for full rule of reason analysis:
	+ The restraints could be justified as **procompetitive ban on puffery** meant to address **special danger of coercive advertisement in professional services given informational disadvantage of consumers** (unable to gauge quality of product due to specialized knowledge).
* **After Cal Dental**, there is a much narrower view of the per se rule, allowing defendants to bring in arguments about countervailing benefits to consumers to get past per se violation.

Polygram Holdings (ie the Three Tenors)(DC Cir. 2005):

* Tenors had three famous concerts, the first sponsored by Polygram, the second by Warner and the third as a joint venture.
	+ Formed, allegedly, so that neither had to subsidize the **free-riding** (in the form of enhanced sales of the previous concerts) of the other on the advertising for the third concert.
	+ Joint venture decided to place moratorium on advertising previous recordings for fear that it would encourage consumers to forego purchasing the third, weaker concert and hold out for a box set.
* Historical Discussion of continuum:
	+ Here has been a § 1 transition that began around 1978 w/ Justice Stevens’ “two categories” (*per se* and R/R)k
	+ But notes the **trade-offs** à “for the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable”
	+ P*er se* analysis “dispenses w/ costly proof reqs, such as proof of **market power**, but consequently produces a certain number of “**false positives**”
	+ But à ct has **moved away** from dichotomous approach (*per se* or full-blown R/R) toward one in which the extent of the inquiry is **tailored** to the suspect conduct in each case
	+ e.g., *NCAA* and *IFD* à ct did *not* insist on showing D market power and anticompetitive effect but instead took a “quick look” (intermediate inquiry) to evaluate the horizontal restraint
	+ We now have a **continuum**.
* Court explains framework for AT litigation:
	1. P/Govt present evidence showing that it is obvious from the basic nature of the conduct that it tends towards anticompetitive effect by comparison to like structures previously condemned (“**close family resemblance” rather than “inherently anticompetitive,” which is something of a misnomer**),
		1. If completely naked restraint, per se illegal (more extreme than above).
		2. If “obviously anticompetitive” (as above) move to step 2 for “quick look,” though courts don’t like that terminology.
		3. If “not so obviously competitive but maybe,” (Fox quote p. 52) move directly to full rule of reason/step 3.
	2. Burden moves to D to either:
		1. Show why restraint is unlikely to cause harm to consumers OR
		2. Identify countervailing pro-competitive effects
			1. If D fails to do either, agreement is per se illegal (quick look to per se illegality such as that in National Society of Professional Engineers and Catalano).
			2. If successful, move to step three for “full rule of reason analysis”
	3. Burden moves to P to either:
		1. Explain, “**without adducing evidence**,” (presumably meaning no market definition or market power inquiries) why, in view of D’s articulated mitigating factors, the nature of the conduct is nonetheless inherently likely to restrain competition OR
			1. This presumably gets you back to quick look condemnation since you don’t make market power inquiry.
		2. Present evidence showing that anticompetitive effect is in fact likely in this particular manifestation of the conduct.
			1. The “in fact” inquiry presumably requires market definition/power as full rule of reason analysis.
	4. Burden moves to D to either:
		1. Show that restraint will not in fact hurt consumers OR
		2. That it has procompetitive benefits which “outweigh” its harms.
* Quick Look finding of illegality:
	+ Court conducts what it terms a “quick look,” applying the above framework:
1. Agreement between competitors not to advertise is an agreement to restrain trade of sufficient fundamental obviousness that it satisfies step 1.
2. D presents procompetitive justification of increasing output via increased profitability resulting from mitigation of free rider effects (perhaps neither would have, on their own, sufficient financial incentive to release third record)
	1. Court finds this sufficiently troubling to justify going beyond per se to quick look analysis
	2. But ultimately finds that the agreement with respect to the old albums is merely one between competitors, and if the release of the new album depends on a restraint of healthy competition, one wonders whether consumers really benefit from its release at all.

Dagher (2006):

* Texaco and Shell merged in particular geographic area but maintained the separate brands
	+ That they bore residual risk collectively is key, under Maricopa, to being treated as a single joint venture entity, competing in the market.
* In a literal sense, they fix the prices of their brands, but it is within the discretion of any business entity to set the prices for all its products.
1. Can the Parties Conspire?-------------------------------------------------------------

American Needle v. NFLP (2010):

* Teams had licensed their IP non-exclusively through joint venture NFLP for years, but decided to grant exclusive license to Reebok and decline to renew with American Needle.
* Should NFLP be considered a **single legal entity or a collection of competitive entities**?
	+ Court went with the latter because there was **not the same “unitary” decision-making as there was in Dahger**, since the NFL is made up of 32 teams that, while dependent on the existence of one another for their collective success (gotta have someone to play), are separate competitive companies with separate management, etc.
	+ **Risk-bearing**: Profits from the licensing were shared equally amongst teams, suggesting collective risk-sharing at least with respect to that particular activity. But the court finds this unpersuasive because it **anticompetitive behavior cannot be masked simply through facilitation via a joint venture** or other third party intermediary.
	+ Court recognizes that some collective decision-making may be justified by the nature of the market (ie rules to maintain a competitive balance between teams “legitimate and important”) but this ain’t one of em: reverse and remand.
		- Case was settled before remand for rule of reason analysis conducted, but opinion suggests it may have been illegal as a competitor collaboration.
	+ Copper Weld: Parent and sub corps are treated as single entity for AT purposes, incapable of conspiring with one another.
1. Pleading and Proving Cartel----------------------------------------------------------
	1. Proving a Cartel
* Three major questions on proof of agreement (and in the civil context, proof of agreement that causes antitrust harm to the plaintiff for standing):
1. What level and form of commitment is necessary? What meeting of the minds?
	1. Explicit agreement or circumstantial evidence implying the existence of an explicit agreement (the latter apparently being termed “implied agreement”).
	2. Tacit agreement: two different meanings among judges:
		1. A quid pro quo understanding that they could rely on one another to follow through on agreement
		2. flimsier, competitors suspected and hoped the others would follow through on cooperative behavior, but they had no firm basis for trusting that they would (like a gratuity).
	3. Interdependence/conscious parallelism (NOT SUFFICIENT): Parallel conduct, all firms, generally in an oligopical market, act interdependently in that they act in accordance with expectations that competitors will carry out joint common interest, without ever explicitly or implicitly agreeing to anything (no communication of any kind).
2. What evidence is sufficient to infer agreement, either express or tacit?
	1. What is the legal standard for sufficiency of evidence to get to trial?
	2. To get summary dismissal?
3. How to get the necessary evidence when much of it is abroad (generally done through agreements with foreign gov’ts)
* Direct evidence of explicit agreement is ideal, and this has been available with increasing frequency since 1978 thanks to leniency programs for the first to report on the cartel.

Interstate Circuit (1939):

* Facts:
	+ Exhibitor defendants were two theater companies who had monopoly control of a number of movie markets in Texas.
	+ Woman representing Exhibitor defendants sent letter to all the distributor defendants, with all recipients listed on each individual letter (signaling), demanding certain price increases and limitations on runs which constituted extreme deviation from past business practices.
	+ Ultimately, all distributors carried out what amounted to a joint common interest.
* Conspiracy Theory:
	+ There was no direct evidence of agreement amongst exhibitors, but the jury found conspiracy nonetheless.
	+ **Rimless hub and spoke conspiracy theory**: the exhibitors were the hub, the distributors were each a separate spoke, but you need to prove the rim to find a conspiracy between the competing distributors themselves.
* “**Plus factor” requirement**:
	+ Parallel action is not enough to get past summary judgment on implicit agreement claim. Instead, there must be some **“plus” factor** to suggest that there was agreement between competitors, **showing that actual agreement was more likely than alternative explanations**.
		- Even today a hub and spoke conspiracy would be illegal because an agreement is an agreement, whether or not it’s facilitated through the hub or directly between competitors.
	+ Here, that factor was that the proposed rules were an **extreme deviation from past business practices, making the likelihood of independent action very low**.
	+ This **moves the burden of proof to the defendant to show that the exculpatory interpretation of the evidence was the correct one**. Here, defendant did not sustain this burden because key testimony from distributor executive who would have been in a position to affirm or deny the existence of an explicit agreement was conspicuously absent.
* **Deliberate parallelism:** In addition, the court explains that even if there were not an explicit agreement, this kind of deliberate parallelism would be sufficient to establish a conspiracy in violation of the Sherman act. **This last holding has been largely overruled** (the circumstantial evidence has to point to an agreement today), but the **remainder of the case is modern.**

Theatre Enterprises, Inc. v. Paramount Film Distributing (1954):

* P owned theater in suburb and alleged that distributors were restricting movie sales to urban movie theaters pursuant to urban movie theaters’ requirements that they receive exclusive first run license.
* Court found that this was independent parallelism, made all the more plausible by the facts that this was **long-time industry practice** (in contrast to plus factor from Interstate) and **in their independent business interests**.

Matsushita Electric v. Zenith radio (1986): Summary Judgment Standard

* Facts:
	+ American electronics companies were being undercut by Japanese companies. **Alleged that Japanese were reaping above-cost profits via cartelization in Japanese markets and using them to subsidize predatory pricing in American markets** (undercutting prices of American companies beneath cost for temporary period of time to boot out Americans and then agree to artificially raise prices).
	+ Probably, the Japanese were just better. But Americans were paranoid about Japanese takeover, so the plaintiffs probably would have found a very sympathetic jury.
	+ And at this time, motions for summary judgment and motions to dismiss were relatively unheard of in the antitrust area.
* Evidence of agreement:
	+ The Japanese companies were selling above cost in Japan, arguably providing sufficient profits to cross-subsidize below-cost prices in American markets.
		- Evidence was controversial on this point.
	+ **Five company rule**: each Japanese company could only sell to five American distributors, theoretically allowing supracompetitive pricing via market division.
		- This would have been illegal if true, but in any event it was **not a legally cognizable consideration for these private plaintiffs because it bears no causal relationship to an antitrust harm suffered by the plaintiffs because it doesn’t support the low-price conspiracy alleged, but rather a high price conspiracy.**
		- This would be more closely analogous to the Japanese companies (with a production cost of $90) agreeing to sell at $98, while American companies’ cost of production is $100. Any collusion doesn’t harm plaintiffs or play into their theory of a low-price scheme.
	+ Minimum price for Japanese imports was set by government in order to avoid freaking out Americans via crazy low prices (this would seem to suggest even greater efficiency for Japanese companies and they didn’t follow it anyways, but the plaintiffs still characterized it as a point of coordination).
* **Inferences from ambiguous evidence**:
	+ When circumstantial evidence can be interpreted in multiple ways, one of which is consistent with legal competition, **the plaintiff has to demonstrate why the inference of conspiracy is more reasonable than competing inferences of legal behavior**.
	+ Here, such a long-term and speculative predatory pricing scheme **just doesn’t make economic sense for the Japanese companies** since recouping the losses would require such long-term and disciplined price coordination after squeezing out the Americans (and somehow avoiding antitrust liability all the while) that there was **no realistic prospect of recouping losses**.
		- As a general matter, **low price conspiracies require more compelling plus factor** because the incentives for the defendants are not as immediate and definite as with high price conspiracies (they’re just less likely to be in the interests of competitors).
* “evidence must tend to exclude the possibility” that free competition explained the behavior for there to be a legitimate question of fact. Prof. Fox says that Mutsishida standard for summary judgment is **that if the competing stories are in equipoise, then dismissal at summary judgment.**

JCT Petroleum (7th Cir. 1999): also at summary judgment.

* Oligopoly of applicators (defendants) bid on municipal road repair contracts (govt required to accept lowest bid) allegedly coercing independently oligopical producers of asphalt emulsifier to discipline maverick applicator plaintiff breaking from the cartel.
* Applicator cartel: Local market of few competitors with fungible product and requirement that govt take lowest bid (easy cheater detection) make marke “ripe” for administration of cartel.
	+ Yet this is no cognizable antitrust harm to the P in itself since the P would presumably benefit from his competitors raising price by winning all the Ks.
* Producer cartel: transportation limitations constrain market to oligopoly, product is fungible (no product differentiation opportunities), demand is inelastic (dependent on city contracts), so market is also ripe for cartelization.
	+ Although a coordinated price increase may have harmed P, all the producers have settled out of the suit, so how is this relevant?
* “**Cat’s Paw**” Theory:
	+ First, court notes that **under Matsushita, we assess the “economic sense” of the agreement** in determining whether to dismiss on summary judgment.
		- And remember, we resolve the validity of all evidence in favor of the P.
	+ The **applicators coerced the producers to discipline the Maverick P applicator from breaking from cartel pricing** by refusing to sell emulsifier to P.
		- But producers have no economic interest in furthering the applicator cartel since higher prices may decrease municipal Ks, decreasing emulsifier demand.
		- Perhaps the applicators could coerce the producers on the threat of boycott, but the applicators need them just as badly.
	+ **More plausibly,** the applicators are paying the producers for this service.
		- There’s evidence that certain producers obtained above-market price for fungible emulsifier from applicators.
		- There’s evidence that the producers’ alleged reason for refusal to deal with P (that P is a credit risk) was proven pretextual by their continued refusal to deal when P offered cash.
	+ This concerted boycott administered via the producers as instrumentality for applicator cartel’s disciplinary needs forms a cognizable antitrust harm.
	+ The ripeness of the markets for cartelization, paired with the economic sense of the cat’s paw arrangement, corroborated by the evidence of such an arrangement, is sufficient to form the basis of a plausible inference of conspiracy (and that is apparently compelling enough to get past summary judgment).
	1. Pleading Facts Sufficient for Plausible Inference of Agreement

For this class: if there is a “significant chance” that discovery wil lead to smoking gun, you give it to em.

Twombly (2007):

* On several continuous localities in which post-breakup babybells are monopolists, the bells never cross into one another’s territory.
	+ No additional evidence of collusion; mere parallel action.
* 12(b)(6) motion to dismiss at pleading granted:
	+ Inference of conspiracy must be “**plausible**,” ie **at least as compelling as competing inferences of lawful behavior**.
		- Greater than merely “possible,” but “not a probability requirement.”
	+ Here, the more likely inference was legal interdependence, defeating plausibility and justifying dismissal.

Text Messaging (7th Cir. 2010):

* Circumstantial Evidence:
	+ Small group of cell phone companies control vast majority of text messaging services. These circumstances (highly concentrated market, high barriers to entry) would facilitate anticompetitive collusion, increasing the temptation and thus, the suspicion.
	+ Most suspicious fact was that they all **raised prices almost simultaneously** (a degree of coordination that **suggests collusion rather than price leadership**), as their costs decreased.
	+ Two of the companies met with each other at “leadership council” with the stated mission of replacing competition with “co-opetition.”
* **Plus factor**: At the least, this is conscious parallelism. But parallelism alone is not sufficient.
	+ Posner finds “parallel plus” in that on the facts, it strains belief that the behavior would have manifested in this way in the absence of agreement.
* **Plausible interdependence story**:
	+ The circumstances of oligopoly lead to interdependence as plausibly as they lead to collusion, presenting a pretty compelling alternative explanation of “plausible interdependence.”
	+ But posner allows it to discovery because there is a non-negligible chance (“**mere chance**”) that there WAS collusion, establishing plausibility.
* Post-Twombly disarray:
	+ Conceivable – possible – **plausible** – probable: Iqbal court does not require “probability,” by which they likely meant “more likely than not,” but posner seems to view “probability” in the mathematical sense, ranging from 0.1 to 1.0. Nevertheless he decides that probable is a lower standard than preponderance of the evidence, and plausible is beneath that.
	+ Remember, the summary judgment standard requires that the plaintiff’s explanation be stronger than that of the defense as in Matsushida, and presumably pleading standard is less stringent, so an anticompetitive explanation of facts that is not as likely as a competing explanation of free competition would nonetheless get to discovery as long as it’s plausible
		- or perhaps they need only be in equipoise, but this is unclear at this point.
	+ None of this is settled in the law but applying the Text Messaging “mere chance” to facts of Twombly and you would probably get discovery. Seems like posner misconstrued Twombly.
* **For this class**, if there is a “**significant chance**” that discovery will uncover smoking gun, then you give it to em.
1. State Action, Political Action---------------------------------------------------------
	1. The State Action Doctrine

Parker v. Brown (1943):

* Raisin crisis compelled state of California to implement raisin marketing program “so as to restrict competition” and “maintain prices,” whereby they required growers, under penalty of fines, to submit all raisins to them for inspection a partial confiscation, increasing prices from $45-55/ton. Farmer sued to enjoin state for price fixing violation.
* State action exempt: Court defines “person” in the Sherman act to **exclude state officials carrying out state policy**.

Contours of the doctrine:

* **State action**: Only “state action” is immune, which is limited to **acts of the state acting as sovereign**, not merely as a “commercial participant in a given market.” Parker.
	+ Action must be articulated with sufficient clarity that the anticompetitive act can be said to be a deliberate policy of the state, rather than merely “prompted by state action” such as the after-the-fact judicial approval of the minimum fee schedules in Goldfarb, which were excluded from Parker immunity.
	+ **Midcal test:** to qualify as state action
		- 1. State must have clearly articulated and affirmatively expressed policy to replace competition with regulation and
			2. There must be active supervision by the state.
				1. Must play substantial role in determining specifics of conduct (mere right to disapprove anticompetitive filings insufficient in FTC v. Ticor Title).
* Limitations to state action immunity (ie even if state action, not immune if…):
	+ Cannot “impose undue burden on interstate commerce.”
	+ Cannot authorize or even order private parties to do an act that is a federal offense (price-fixing). Schwegmann.
		- Preempted as a conflict of state law with federal law because remember, states are not “immunized” technically, but merely exempted by virtue of exclusion from definition of “person."
		- Municipal rent control not illegal because although it mandated price fixing, it did not order to landlords to themselves fix prices, but simply to conform to state action.
* Municipalities:
	+ Only exempt under state action if state authorized municipality to act as it did or “contemplated the kind of action complained of.” Lafayette.
	+ In Boulder, despite “home rule” law in which municipal law is supreme to state law, specific authorization by the state still necessary to grant Parker immunity.
	+ Local gov’t Antitrust act relieved individual municipal officials of personal liability, but towns still subject to injunctive relief.
	+ Active state supervision not required for municipal activity, providing Midcal 1 is satisfied (clear articulation of state policy to replace competition with regulation), which can be satisfied state delegation of “express authority to take action that will foreseeably result in anticompetitive effects.”
	1. Political Action

Noerr (1961):

* RR got together and launched publicity campaign to prevent political action that would have expanded shipping by trucks, since trucks are their competition.
	+ Truckers claimed this was an antitrust violation because there’s a clear anticompetitive intent.
* Court found that this behavior was exempt because people, including rr, have a constitutional **right to petition the gov’t** to obtain political result, and to interpret the Sherman act to encroach on this “raises Constitutional questions.”

Pennington (1965):

* Small coal miners sued large coal miners and union officials for conspiring to convince the secretary of labor to raise the minimum wage, disadvantaging the more labor-intensive methods of the small producers.
* Court rejected, **extending the Noerr doctrine to attempts to influence the executive branch**.

Sham Political Action:

Cal Transport Co. (1972):

* Every time competitor filed with administrative body for a license, D would automatically oppose the license without regard to the outcome of the challenge, using the administrative delays as a means to frustrate competition.
* Court ruled that abuse of the governmental proceedings constituted “**sham political action**” which is not protected by Noerr immunity.

Professional Real Estate (1993):

* Columbia Pcitures lost copyright infringement claim intended to prevent hotel company from selling movie rental machines to other hotels.
* **Sham Political Action**: exception to political action defense when political activism is
1. objectively baseless (such as a suit in which no plaintiff could possibly expect a favorable outcome) AND
2. the intent is to interfere with competition through direct misuse of government process (NOT the *outcome* of the process, but the process itself, similar to the grounds on which the court distinguishes Superior Court Trial Lawyers).
	* “objectively baseless” has proved very difficult standard to meet.
* Here, the Court found “probable cause” for bringing the suit, so there was no violation.

Allied Tube & Conduit (1988):

* Firms lobbied **non-governmental standard-setting body** to promulgate regulations with anticompetitive effect, anticipating that the government will adopt these standards and give them the force of law, as they have previously done.
* Court admits that while these efforts may be part of a genuine attempt to change the law, they **cannot extend Noerr immunity to indirect political action** for this would open the door to all sorts of anticompetitive behavior merely construed as “political” to secure immunity.

Fraud/Bribery as means of influencing governmental body:

* Legislature: because first amendment interest is strongest in the legislative context, Noerr immunity is available even if effectuated via bribery/misrepresentation. (City of Columbia).
* Judicial and administrative adjudicative proceedings: 1) knowingly misleads a court or other adjudicative body and (2) thereby actually influences its decision forfeits immunity.

NAACP v. Clairborne (1982):

* Facts:
	+ NAACP organized economic boycott of white stores to achieve political goals.
	+ Threatened adherence to the boycott on the threat of violence, which was consummated in a few incidents.
	+ White store-owners sued for boycott-related losses.
* Court afforded Noerr immunity for all losses related to non-violent boycott as first amendment protection.
	+ Violence not within the scope of 1st Amend.

Role of Noerr doctrine in Superior Court trial lawyers

* Holding seems inconsistent with case since a boycott is a form of political petition as well, and perhaps even one more accessible to those without the financial resources for other forms of lobbying.
* **Ends v. Means**: The Court distinguished on the grounds that in Noerr, the action was not itself anti-competitive (lobbying) but only an anticompepetive goal, whereas the superior court trial lawyers were hurting the market as an instrument to pursue political action. That makes all the difference to the court.
	+ But then how does NAACP survive since their means were anticompetitive…
* **“Direct Commercial Line”**: The Court further distinguishes NAACP on the grounds that the attys in Superior Court **stood to personally benefit financially from the success of the boycott** (direct commercial line).
1. The International Dimension---------------------------------------------------------
	1. Extraterritorial Reach and Enforcement

U.S. v. Aluminum Co. of America (ALCOA): established “**effects principle,”** which extends antitrust liability to acts committed abroad when the actors intend to and do affect US commerce.

* The “Wood Pulp Cartel” case established effects doctrine in Europe.

Foreign Trade Antitrust Improvement Act (FTAIA)(codifies effects test):

* Except for import commerce, the Sherman act does not apply to off-shore behavior UNLESS:
1. off-shore acts entail sufficiently direct, substantial and foreseeable effect on domestic or certain export commerce AND
2. such effect gives rise to a claim under the Sherman act other than this section

Empagran (2004):

* Global vitamin cartel; can Ecuadorian and Panamanian who bought price-fixed vitamins abroad sue in the US under the Sherman Act for treble damages?
* Policy: The Court determines that the statute is ambiguous so they go to policy reasons.
	+ Treble damages serve a punitive/deterrent purpose, so the identity of the plaintiff is not entirely relevant the punitive/deterrent goals.
	+ In addition, we might fall short of optimal deterrence in view of insufficient antitrust regimes abroad.
	+ But why are we concerned about antitrust harms abroad if we are optimally deterring American harms through American plaintiffs?
	+ The answer is that the US market can’t be carved out of globalized cartels, so deterrence arising from suits involving US plaintiffs wouldn’t be sufficient to deter the international scheme, in which the US is unavoidably included.
	+ But we don’t want to provide forum for all these foreigners; shit is expensive at the least.
	+ Legal/economic imperialism is a concern one supposes.
* **No standing**.
	+ If **actual effects on US commerce resulting from global conspiracy conducted off shore, proximately caused the specific plaintiff’s injury, then there is standing.**
	+ That was not the case here because prices in Europe are not dependent on the US effects of the conspiracy.
1. Monopoly and Dominance-----------------------------------------------

A. Introduction---------------------------------------------------------------------------

Sherman Act Section 2: no person may…

* Monopolize
* Attempt to monopolize
	+ Specific intent to gain monopoly
	+ Challenged conduct must threaten to produce a “dangerous probability of achieving monopoly”
	+ Although technically a separate offense, conduct that constitutes attempt will generally constitute monopolization as well, causing the two to merger to a large degree.
* Conspire to monopolize (also run afoul of section 1)

B. The Alcoa Case----------------------------------------------------------------------------

Alcoa (2d Cir. 1945): Hand opinion embraced by SCOTUS but **subsequently abandoned** to large degree.

* Market definition:
	+ Hand wrote that he could consider only the percentage of the market in "virgin aluminum" for which Alcoa accounted.
	+ Alcoa had argued that it was in the position of having to compete with scrap: Even if the scrap was aluminum that Alcoa had manufactured in the first instance, it no longer controlled its marketing.
	+ But Hand defined the relevant market narrowly in accord with the prosecution's theory.
* Questions: did D have monopoly power and did D monopolize in violation of Sherman act?
1. Monopoly power? Yes; 90% of virgin ingot market.
2. Monopolization?
	1. No evidence of unfair price
	2. But court says there are **inherent evils in monopoly structure**.
	3. **Exception for “thrust-upon” monopoly** resulting from chance or mere “**skill and foresigh**t” not applicable here because whether or not monopolized, they have acted badly in the maintenance of their monopoly.
	4. **Intent not relevant.**
	5. **YES SECTION 2 VIOLATION**
* **Courts have departed from the “structural” offense of monopoly.**
* Also, “price squeeze:”
	+ The only “conduct offense” of which Alcoa is convicted
	+ They were the only seller of an essential input to a product they also manufactured.
	+ They inflated the price of that input artificially so as to push up the costs of their competitors and reap supracompetitive profits themselves.
	+ This part of the holding was good law until Linkline.

C. Market Definition and Monopoly Power--------------------------------------------

1. The Dupont Cellophane case

Dupont Cellophane (1956):

* Monopoly power in cellophane market, but is that how market should be defined? Perhaps more properly as “flexible packaging materials?”
* Two indicators of market definition:
1. Reasonable interchangeability:
	1. Cellophane does combine the desired attributes of transparency, strength and cheapness more definitively than any of the other flexible packaging materials.
	2. But cellophane faces significant, albeit diverse, competition in submarkets of the food product market for flexible packaging material, leaving evidence ambiguous.
2. Cross-elasticity of demand
	1. There is apparently cross-elasticity of demand. Fuck this incompetent casebook editing.
* So they define market as “flexible packaging materials” rather than cellophane, of which Dupont has only 30%, which is insufficient for monopoly power, defeating monopoly offense.

**Cellophane fallacy**:

* if a firm has monopoly power, they are presumably already pricing at point reflecting that power, the upper bound of the monopolist’s power to increase prices without consumer defection. So cross-elasticity which shows changes to consumer behavior doesn’t indicate true interchangeability/competitive pricing any more than monopolist’s equilibrium, because we’re measuring deviation from the wrong baseline.
* The monopolist prices in the elastic portion of its demand curve.
* Notably, **you don’t face this problem in the merger context** because merger analysis takes place before the monopoly is in place, so we have the right baseline for calculating elasticity as it bespeaks actual competition, rather than just pricing at the elastic point of a monopolist’s demand curve.

2. Modern U.S. Market Definition and Assessment of Power

Kodak (1992):

* Facts:
	+ Kodak entered high-volume photocopying and micrographic equipment market, originally taking affirmative steps to develop a healthy aftermarket (service market for repairs and such) of competing independent firms.
	+ Subsequently, Kodak decided it wanted to monopolize Kodak brand aftermarket by depriving former aftermarket firms of necessary parts and in some cases decreasing the quality of aftermarket services to consumers, and increasing the price.
* Court **defines market as “Kodak aftermarket,”** and finds complete market dominance.
	+ Dissent
		- argues that a given brand’s aftermarket is not a discrete market unto its own. Instead, the quality of the aftermarket of a given brand is part of the product sold in the foremarket, which was competitive.
		- If consumers have sufficient information about quality of aftermarket, they will discount the value of a product on that basis.
		- And to find a separate aftermarket specific to a given brand inhibits their ability to control their brand quality in the aftermarket.
		- They would dismiss by defining the market as the foremarket for the machines, and finding sufficient competition in such market.
		- Comes back to Scalia’s basic assumption that consumers are sophisticated, rational actors, a perspective that differentiates the majority, but that becomes increasingly prevalent on the Court.
	+ **But here**, consumers did not have full information about quality of aftermarket, and because the initial overhead costs of purchasing such expensive machines are so high, consumers experience a **“lock-in effect,”** which prevents them from changing brands once they have made the initial investment (and initial investment was not sufficiently informed as to aftermarket).
	+ In addition, **prices rose after a competitive force was removed**, suggesting abuse of dominance to reap supracompetitive profits.
* Economists don’t like this case because it appears to hinge on the sense of inequity in Kodak’s revocation of the independent aftermarket, upon which consumers may have relied in purchasing the machines.
	+ Arguably, such equities should not come into play in the antitrust context since contract should cover this, and there’s no breach of contract.
	+ And there is no case which holds that a company cannot choose to be the exclusive aftertmarket provider for your own brand *from the start*.

Microsoft (2001):

* Market definition:
	+ **Always begin market power analysis by evaluating the smallest conceivable market**: in this case, that meant “intel-compatible personal computer operating systems,” a definition which puts Microsoft at overwhelming market domination.
	+ Microsoft argues this definition is too narrow because interchangeable alternatives beyond intel-compatible personal computer operating systems put legitimate competitive pressure on them:
		- **Lock-in effect/network effects**: Court determines Apple is excluded due to lock-in effect of investment in pc-compatible shit, hindering elasticity.
		- Hand-held devices excluded because they did not provide nearly all the functions of PCs.
		- **Long-term competition not considered**: Middleware: it is conceivable that the middleware market could develop to present competition to Microsoft, but this was not in the “**reasonably foreseeable future**,” and was thus, excluded.
* Market Power (circumstantial evidence):
	+ **Market share**: Microsoft has about 95% of market share (market share is circumstantial evidence), but Court admits that dominant market share does not alone ineluctably indicate monopoly power if the threat of competition looms large enough to mimic competitive pressure
	+ Here, we didn’t know whether or not pricing was monopolistic, but the real concern was ensuring technological innovation.
	+ **Barriers to entry**:
		- Importantly, in addition to high market share, high barriers to entry (also circumstantial evidence) are necessary to find monopoly power (the legal inference of monopoly power, shifting burden of proof to defendant to disprove market power).
		- Here, the barriers to entry are 1) consumers prefer computers with a diversity of applications available and 2) developers prefer to write applications for computers with a substantial consumer base, create “chicken and egg” problem, perpetuating dominance of Microsoft.
* This, taken together, shifts burden to Microsoft to disprove monopoly.
* Market Power (Direct evidence):
	+ Unique dynamism argument:
		- Microsoft argues that because this high tech industry is uniquely dynamic, even the behemoths have to stay on their toes to avoid being overtaken by competition, so these industry contingencies decrease the likelihood of monopoly power following high market share such that direct evidence of monopoly power should be required to shift burden of proof to defendants.
		- **Court rejects** this argument on the grounds that structural (market share) analyses **focus on short-term competition, rather than any long-term idiosyncracies of a market**.
	+ So burdened with the burden of proof, Microsoft goes on to attempt to refute the circumstantial evidence…
		- Proof of innovation? Microsoft argued that its high reinvestment in R&D proves that they pursue innovation with the vigor of a company under efficient competitive pressure.
		- But court concludes that this is unpersuasive because the R&D could have gone to their other products, and moreover, monopolists can have incentives to invest in R&D to further stave off competition.
		- Moreover, **pricing your products without considering the prices of competitors is a luxury only monopolists have**. This, in addition to a pattern of exclusionary conduct that could only be rational for a monopolist, provides **evidence of behavior inconsistent with effective competition** and thus, indicative of monopoly power.

Note: US caselaw tends to presume monopoly power at 70% where barriers are significant.

D. The Conduct Offense------------------------------------------------------------------

1. The Paradigm

* Post-Alcoa, courts have required in addition to monopoly power, “**wrongful/bad conduct**” in the achievement/maintenance of that power.
	+ Even in Alcoa, that Hand provides exception for seemingly “unwitting” “thrust-upon” monopolies (including, at least nominally in Alcoa and substantively in subsequent caselaw, those monopolies arrived at via competitive merits, ie “skill and foresight”) foretells development of wrongful conduct requirement.
	+ In monopoly, as opposed to cartel, the existence of monopoly power is not an inherent evil, though some are more cynical about the frequency with which monopoly power tempts the monopolist into abuse of monopoly power.
	+ But nevertheless, anticompetitive harm is not inferred in monopoly cases, but must be proved, generally with regard to consumer welfare these days (antitrust law protects consumers, not competitors!).
* Intent: Although specific intent is **technically required**, there is very rarely legitimate business reason for anticompetitive behavior, so **intent is usually inferred**.
* Attempted monopoly requires a “**dangerous probability of achieving monopoly**.”

Grinnel Rule: **monopoly offense requires**

1) possession of monopoly power **and**

2) **the willful acquisition and maintenance of that power**, as distinguished from growth/development as a consequence of superior product, business acumen or historical accident.

* 2 later qualified to limit to monopoly acquisition or maintenance achieved through “**acts not on competitive merits**,” or those which do not have procompetitive benefits for consumers (again, notice increasing consumer welfare focus). Indeed the Trinko Court explicitly allowed the charging of monopoly prices in the absence of bad acts in the acquisition of maintenance of monopoly power.

Lorain Journal Co. (1951):

* Facts:
	+ Local newspaper was only source of local news and advertising (the more important/lucrative monopoly) in small town (the relevant market).
	+ New radio station popped up, threatening competition for ad budgets of local businesses, which the newspaper preempted by refusing to sell any ad space to companies that also bought ad space with the radio station.
* This **came up as an attempted monopoly case, though today it would probably be a monopoly maintenance case/exclusionary conduct** (being that the newspaper sought to defend an existing monopoly from the radio station’s intrusion, rather than to establish monopoly power by squeezing out an established competitor), but the outcome is the same either way.
* **Right to refuse to deal**: there is a general principle in US law that firms have the right to choose who they do and do not deal with. This was asserted here as a defense, but the Court took exception…
* Purpose of the conduct:
	+ the decision not to deal at issue had **no rational business purpose** (**intent inferred**) other than to quash the competitor.
	+ In fact, the firm incurred costs to customer good will, which it calculated were justified for the maintenance of its monopoly, but were counterproductive to its business interests in the absence of an overriding desire to injure radio station.
	+ This harm to consumers is key evidence here because competition can get brutal as long as the ultimate goal is to benefit consumers (or so the recent evolution of the antitrust paradigm, towards consumer protection, demands).
		- Notice: this ain’t like predatory pricing which, although arguably self-mutilating, benefits consumers with the low prices, so courts air on the side of allowing.
	+ Because the purpose of the refusal was anti-competitive, the right to refuse defense is rendered unavailable.
* Focus on effect: There was a **substantial likelihood** that the newspaper would be successful in running the radio station out of business, reinforcing the **focus on effect** (in this case “prospective effect” since it’s a preemptive injunction being upheld) and the requirement for attempt to monopolize that there be a “dangerous probability of achieving (or maintaining) monopoly.”

2. Essential Facilities and Duty to Deal

* Usually this means that a market actor **monopolizes some supply-side input that is essential to the delivery of the product** in the market.

MCI v. ATT (7th Cir. 1983)(Classic Ess. Fac. Case):

Elements:

1. Control of essential facility by a monopolist
	1. Note: still have to show monopoly, requiring market def. and power.
2. A competitor’s inability practically or reasonably to duplicate the essential facility
3. The denial of use of the facility to a competitor and
4. The feasibility of providing the facility
	1. Would seem to get at intent, inferred from lack of rational business purpose.

Terminal Railroad Ass. Of St. Louis (1912):

* Facts:
	+ Terminal railroad acquires a total of 3 RR lines necessary to serving the St. Louis market due to topography of area.
	+ It costs Terminal nothing to provide access to additional competitors, but constructing additional lines to compete with those of terminal would have been prohibitively expensive.
* **Duty to deal found due to essential facility**:
	+ Topographical and financial limitations rendered this RR system the only one available to the St. Louis market, making it essential to the delivery of the RR product.
* Remedy:
	+ The Court issued decree requiring **equal and non-discriminatory access** to the RR lines in question (still had to pay a fee, but everyone had to pay the same fee).

Otter Tail Power (1973):

* Municipalities started building their own electricity transmission systems and demanding wholesale prices to the municipality. Otter refused, so they got a gov’t agency to do so, but Otter refused to even allow this to run through their lines, which was necessary for delivery and had no cost to Otter.
* Court found **duty to deal** based on **essential nature of the facilities** and **anticompetitive purpose** in refusing to do so.
	+ Was the fact that allowing use of electricity lines would impose no additional cost on D relevant? Perhaps in that it undercut any defense of a rational business purpose, which the anticompetitive intent served to inform as well.
* Notably, there was a gov’t agency that could have forced Otter’s hand, so this fact may cause the holding to conflict somewhat with dicta in Trinko.

The essential facilities doctrine is eroded over time, as we shall see…

Official Airline Guides (2d Cir. 1980): No vertical essential facilities

* Facts:
	+ Guidebook to airlines refused to put small airline flights with big airline flights on the alleged ground that they are less reliable and therefore, of less consumer interest.
	+ Little airlines sued on the grounds that the guide is an essential facility and a monopolist, and they are being squeezed out without a rational basis.
* No duty to deal:
	+ Court rules that however unfairly/unreasonably the little airlines are being treated, the guidebook is not in the airline business, so **they are not competing** with little airlines and thus, **they have no incentive to exclude them** for the maintenance of their monopoly.
	+ To allow the FTC to enforce a duty to deal absent an anticompetitive incentive would **substitute the business judgment of the FTC for that of the Defendant**, which simply oversteps the bounds of the government’s expertise and discretion.
	+ Every decision a monopolist makes is an essential facilities harm according to the plaintiff’s standard!

Aspen Skiing (1985 Stevens):

* Facts:
	+ Four ski slopes in Aspen. 3 owned by defendants who, prior to their merger and for some time thereafter, maintained an interslope pass deal with the fourth slope.
	+ They then decide to cease this contract with the competitor 4th slope, allegedly on the grounds that calculating proportional payments is **administratively costly** and ultimately, that they want to **dissociate themselves from the allegedly lower quality of the fourth slop**e.
	+ 4th slope agrees to take cuts to their percentage and **even to purchase the other slopes’ lift tickets at retail price** in order to package them with their own, but Aspen Skiing remained intransigent. 4th slope sues for antitrust violation.
* Aspen asserts right of refusal to deal.
* Plaintiff makes out **prima facie case**:
	+ Market definition: skiing in Aspen.
	+ Essential facility: Opening other slopes is infeasible due to topographical and regulatory obstacles, creating high barriers to entry.
	+ **Intent/no rational business purpose**:
		- Departure from previously volitional (and therefore, presumptively profitable) dealings **signals absence of rational business purpose**.
		- Aspen not even willing to accept retail value for their tickets, suggesting that they are willing to lose money to squash competitor, undermining their claim to a rational business purpose.
		- **Rebuttal failed**: Branding justification that the inferior quality of 4th slope would dilute defendant’s brand rejected because it lacked evidentiary support (from my perspective, this subjective determination would seem to be within the scope of business judgment, but perhaps the allowance of such arbitrary discretion would cause defendants to assert it insincerely in every single case).
	+ **Consumer harm**: consumers were outraged about this break from past practices, undermining the best defense to exclusionary conduct, proconsumer benefits.
* Affirms judgment in of monopolization violation.
* **Today** Aspen Skiing might say:
	+ I didn’t refuse to deal, but just offered a price that plaintiff clearly should have accepted, being that their alternative was to go out of business, as they now have. I’ve no duty to deal as a joint venture, no duty to help my competitors, and I decided not to do so. I’m not affirmatively putting any obstacles in their way, only refraining from helping them. “I have no sharing duties.” These arguments will see increasing success over time.
	+ Aspen skiing needs freedom to brand itself in the way it feels is in its best business interests, which may include dissociating itself from perceivedly inferior slope.

Olympia Equipment Leasing v. Western Union Telegraph (7th Cir. 1986):

* Facts:
	+ D created Telex service and, wanting to sell its Telex machines quickly, set up sales service to assist 3rd party Telex machine lessors in finding lease customers.
	+ It then changed course and decided to end sales service, leaving Olympia on its own to make its own sales. Olympia then tried to poach customers and D exhibited some intent to prevent this from happening by hurting Olympia (“let’s flush those turkies”).
* Essential facilities?
	+ This was kind of an attempted essential facilities case, but Posner rules that Olympia should have set up its own sales team as new market entrants are expected to make their own way.
		- Defendant has no duty to help its competitor set up its own sales force.
	+ Very different from building a new mountain (or overcoming significant regulatory hurdles), as would have been required in Aspen, to the extent aspen could be construed as an essential facilities case.
* Intent:
	+ Posner takes opportunity to note that the **clearly hostile attitude** of D towards P (“let’s flush those turkies” email) was **not evidence of anticompetitive behavior anymore than zealous competition**, which is precisely what we hope to incentivize with antitrust law.
	+ Departure from past practices relevant?
		- Similar to Aspen and Eastman Kodak, there was a departure from past business practices that could be construed to suggest that former profitability indicates the absence of a rational business purpose in deviating.
		- But Posner notes that the former practice did not turn out to be profitable for Western Union, and that companies should not be barred from such business judgments on antitrust grounds absent other evidence.
		- Any equitable significance such changes in course may hold should be litigated in the contract/tort contexts.

Trinko (2004 Scalia): Modern state of the law

* Facts:
	+ Telecom act of 1996 required local telephone service to provide local loop access to outside telephone companies, and national telephone companies must provide access to enable competitors to provide long-distance service, all on non-discriminatory terms.
	+ Verizon (appellant/defendant) failed to fulfill its obligations (makes noises in phone lines of competitors, etc.), harming AT&T. AT&T complained to FCC and Commission handled with fines and damages as part of consent decree in which ATT agreed to give up any remaining claims arising out of transactions.
	+ Trinko, an attorney, claims he lost business because his business’s ATT phone service was diluted by Verizon’s violations.
* Standing?
	+ Plaintiff clearly did not have standing because harm was merely derivative of ATT’s, which had already been compensated for AT harm, making the **risk of duplicative recovery extremely high**.
	+ the concurrence would have dismissed on those grounds alone, but the majority wanted to take the opportunity to restate the law here.
* **Regulatory preemption**: Does the telecom act preempt antitrust act?
	+ No because of savings clause for antitrust suits, but we will see that the existence of the act informs the court’s analysis.
* Court starts from the basic proposition that there is **no duty to deal,** and examines possible reasons to take exception:
	+ Requiring competitors to deal with one another discourages investment in essential facilities because the prospect of profits (even monopoly profits) is mitigated by the threat of “**forced sharing**” once success is had.
		- Indeed, Scalia explicitly embraces the charging of monopoly profits as an important incentive to invest is developing essential facilities.
	+ In addition, requiring and therefore endorsing such cooperation facilitates/encourages price collusion, which is a much greater harm than monopoly.
	+ **But is this even a duty to deal case**? Arguably not, since the Telecom act creates duty to provide access, independent of any antitrust concerns, and in addition, D does not outright refuse to deal with ATT, but simply does so on deliberately unfair terms.
* But the plaintiff argues both Aspen and essential facilities:
* Aspen:
	+ The supreme court characterizes Aspen as an exception to the rule, rather than the rule itself.
	+ **The Court distinguishes** on the grounds that
		- the voluntary nature of the previously existing Aspen contracts suggests that it was profitable, and that,
		- in addition to the unwillingness of Aspen to allow 4th slope to purchase and bundle even at retail price,
		- combines to form the basis of sufficient evidence that Aspen intended to incur the costs of disadvantaging consumers today on the prospect of monopoly prices in the future.
	+ Here, there was no voluntary dealing so there’s no presumption that to do otherwise goes against the firm’s legitimate business interests in a way that would suggest anticompetitive attempts to ultimately secure monopoly prices.
* Essential Facilities:
	+ Supreme Court refuses to ‘either recognize or repudiate” the existence of an essential services doctrine.
	+ But if there is, then it is **not at issue in this case because it is premised on the unavailability of access to the facilities, whereas here that access is legally ensured by the telecom act**, through the oversight of the FCC.
	+ **Regulatory oversight**:
		- “essential facility claims should be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.”
			* This is particularly so when the regulatory scheme addresses anticompetitive harms, diminishing the value of additional AT enforcement.
		- Does this conflict with holding in Otter Tail Power, in which a gov’t agency could have forced Otter to provide access? Perhaps not if you interpret this not to mean that an agency merely *could* step in to regulate, but that they did/do intervene.
		- Does this conflict with the savings clause in the telecom act? Again, perhaps not if savings clause limited to AT actions when the regulator merely could, but didn’t step in.
* Carve out a new exception? (since court rejected the two above)
	+ Scalia declines to create new exception because **cost/benefit analysis** comes out against it:
	+ Potential **benefits are mitigated by presence of regulatory regime** already working towards these ends.
		- Another savings clause problem? Perhaps not because any *new* exception would not have existed to be “saved” by the savings clause at the time of enactment.
	+ Costs are high (essentially a “**cost of error**” argument):
		- Complexity of fact patterns will confuse courts in a way that produces “**false positive**” findings of antitrust violations (“cost of error”)
		- This will in turn encourage **frivolous litigation**
		- Also **duplicative litigation** in that already being handled by the agency
		- And the other costs of any exception to no duty to deal (**risk of facilitating collusion**, inefficient allocation of capital due to threat of forced sharing diluting prospect of monopoly profits).
		- Notice that none of these apply to the fact pattern at issue here, but they wanted to make a general statement of law, and you’re not denying this specific plaintiff anything here anyways since they shouldn’t have standing to begin with.
* Trinko is the modern law of the land.
* To prof. Fox, degrading the quality of the product you’re delivering to a competitor is so plainly anticompetitive that it strains the imagination to understand how the court could find otherwise. So the challenge is to determine how much of this holding is related to the regulatory intervention aspect.

Intent:

* “let’s flush those turkies” totally allowed in Olympia.
* Obviously there was intent to marginalize competitors in Trinko, and clearly it didn’t win the day there
	+ And unlike Olympia this is the type of harm that would normally concern us in that it hurts consumers, but was not persuasive in trinko obviously
* Intent not to help your competitor? That’s basically Olympia. It is arguably Aspen as well, but aspen has subsequently been significantly cabined.
* At the end of the day, **evidence of intent to hurt competitors is admissible, but it is persuasive only to the extent it bespeaks an illegally anticompetitive (ie anticonsumer) effect/intent**.

3. Strategic Low Pricing – Predatory pricing and Price Discrimination

* **Robinson-Patman Act:** prohibits price discrimination between different buyers of comparable goods that would tend to create a monopoly or otherwise “**substantially lessen competition**.”
	+ Originally enacted to assist smaller firms competing in the buyer’s market (mom and pop shouldn’t pay increased price above supermarkets in excess of what economies of scale would demand).
	+ **Doesn’t require monopoly power** as in Ligett.
* Also come up under section 2.

Utah Pie (1967):

* Price war between ice cream pie companies that resulted in lower prices but rarely below cost, and that the lower prices alone (plus some evidence of predatory intent) could have (according to a rational jury) worked to substantially lessen competition.
* Case is widely maligned and largely overruled.

Predatory Pricing Bright Line/Efficient competitor rule:

* (now justice) Breyer’s standard from Barry Wright Corp. (1st Cir. 1983) has been adopted by SCOTUS.
* **Prices that exceed both incremental AND average total costs per se lawful.**
* **Average total cost**: total cost (**including fixed costs**) divided by output.
* **Marginal/incremental cost**: cost of producing last additional unit (often very similar to average variable cost).
* But in between?
	+ Pricing below variable cost is arguably not the best measure because it is an equally unsustainable price in that fails to recoup capital investment in fixed costs (industries with extreme fixed costs, but negligible marginal cost free to engage in predatory pricing with impunity?).
	+ Supreme Court has not been explicit about what measure of cost, but **courts generally are only willing to find price predation at below marginal/average variable** cost because intuition about appropriate, though arbitrary, bright line measure for **prophylactic rule** has been informed by skepticism about the value of antitrust actions.
* Policy debate:
	+ Above-cost pricing can still stamp out competition in a way that threatens recoupment of supracompetitive profits forgone via pricing beneath competitor’s cost, by subsequent monopoly prices (presenting a misallocation).
	+ But they are more efficient and the prospect of monopoly pricing is necessary to incentivize investment in gaining maximal (sometimes dominant) efficiency.
	+ But if the greater efficiency is really just the result of economies of scale resulting from arbitrarily allocated market share then is this really more efficient?
	+ Europe embraces a “potentially efficient competitor” rule to address this issue.
	+ But the US does not, treating below-cost pricing as a prophylactic rule given complexity/nuance of antitrust claims where pricing is above cost, especially in view of benefit to consumers of low pricing.
	+ This is especially necessary to avoid nuisance suits.

Brooke Group (1993):

* Facts:
	+ Robinson-Patman prohibits price discrimination, even when there is no monopoly power (in contrast to sherman act predatory pricing violations), as was the case here.
	+ Ligett put out a cheap, cigarette option with no branding whatsoever, so it could price without respect to advertising costs and capture the market of purchasers who didn’t care about branding.
	+ D initiated aggressive price war to force Ligget to raise their prices in which it sacrificed “war chest” of capital they were willing to lose by pricing below average variable cost (ignores fixed costs, so you actually lose money on every additional sale).
* Robert Bork was representing Defendant.
* Violation requires plaintiff to prove:
1. **PREDATION** (below-cost price, though court did not specify by what measure of cost) **AND**
2. **“reasonable prospect” of (or “dangerous probability” under Sherman act) of RECOUPMENT**
	* Justification for burden of proof on plaintiff is that even below-cost pricing is not inherently anti-consumer; the **harm to consumers manifests at recoupment**.
	* Intent to recoup?
		+ If the D has no chance at recoupment and entered predatory pricing on an unreasonable (or since shown to be unreasonable) belief that they would recoup losses, the court doesn’t feel the need to intervene because there’s no harm to consumers.
	* **Here, recoupment is unrealistic** because, as was the case in Matsushida, the defendant is not a monopolist, but at best an oligopolist, and the presence of competition even in the absence of the plaintiff firm hamstrings the defendant’s functional prospects for recouping losses at monopolistic prices.
	* So the court rejects for failure to prove “substantial possibility” of recoupment.
	* Would be even more difficult under Sherman act due to heightened “dangerous probability” standard
	* The court states that price predation almost never happens, so these allegations should be approached with great skepticism. Prof. Fox disagrees with this as an empirical matter.
* Even on a broader scale, the court acknowledges that the pricing below cost misallocates resources to those consumers who bought during the price war, since the post-war consumers will effectively subsidize their purchases. Seem ok with it though.
* Note: **another narrative of this story**
	+ Is that the existing oligopoly was disciplining ligget for deviating from the collusive oligopolistic pricing, and they would be happy to return to previous price-levels, which as history proves, is perfectly feasible under the oligopolistic market conditions.
	+ Fox thinks this threat should be sufficient to show threat of recoupment! But the court is more cynical (doesn’t want to risk discouraging low prices, especially since if give plaintiffs an inch, take a mile via nuisance suits, discouraging low pricing beyond the Court’s ability to control).
	+ You also wonder why defendant would be willing to take on the losses associated with discipline for all the oligopoly members.

4. Predatory Buying:

Company purchases inputs at rate/price in excess of their true needs in an effort to push up the price to competitors such that it runs them out of business, leaving the predator to recoup its losses by exercising monopsony power to push input purchase price down to distortionary low levels (or in theory, charge monopoly prices to downstream consumers if they’ve eliminated competition in selling market as well).

Weyerhaeuser (2007): predatory buying subject to Brook Group standard.

* Predatory buying theory: large buyer bid up price of key input to their industry allegedly in order to starve competitor and run them out of business.
* Court ruled you had to apply Brook Group standard in buying context as well.
* Probably what was really happening here was that the defendant genuinely wanted to ensure they had sufficient supply, because the prospect of recoupment was not good (very competitive market on the sell side and D had small market share there).
* Downstream consumer welfare?
	+ At first glance it appears as though the compelling pro-consumer interest in low prices that informed the court’s Brook Group decision is absent when the **predatory pricing takes the form of artificially high prices**.
	+ **But** the court finds a **pro-consumer benefit** in that upward bidding usually results in greater acquisitions of these inputs, which in turn results in greater output of the downstream product, moving the supply point down the demand curve, **ultimately decreasing the price for** consumers.
	+ And to the extent this collateral consumer benefit is more speculative/attenuated than that in the predatory selling context, the harm of recoupment is equally removed from the consumer in that it manifests in the intermediate good market, so on balance perhaps the policy considerations work out similarly.
	+ Also, recoupment is more difficult in predatory buying if you intend to recoup on the buying side because you can’t push your suppliers below cost because they’ll go out of business and you need the input. However, if you intend you recoup on the selling side then it may be a different story depending on the nature of the market.

5. Price Squeezes:

Monopolist wholesaler charges supracompetitive prices for inputs to all competing retailers, exempting itself, pushing up the downstream prices for all competitor-retailers. At this point the monopolist chooses between

1. Pricing at competitive levels and reaping monopoly profits by virtue of their exemption from the inflated input cost (lower costs, same price, higher profits) or
2. Price beneath competitive levels, which they can afford by virtue of their exemption from the inflated input cost, subjecting competitor-retailers to “price squeeze,” which may run competition out of business, leading to a downstream monopoly.

Linkline (2009):

* Facts:
	+ DSL market deregulated with FCC consent decree providing “mandatory interconnection” requirement that AT&T provide wholesale “DSL transport” access to its phone lines for ISP competitors at no greater than retail cost.
	+ Competing ISPs complained that AT&T was subjecting them to a price squeeze by setting high wholesale prices and low retail prices, monopoly maintenance.
* *Antitrust* duty to deal?
	+ Essential facilities doctrine, to the extent it exists, creates an *antitrust* duty to deal.
	+ After Trinko, you don’t have an essential facilities duty to deal if a **regulator is actively regulating** (query whether this extends to the right to regulate).
	+ Here, there was a ***regulatory* duty to deal under FCC, so no *antitrust* duty to deal** (even if you could argue it fit into Aspen exception, must have antitrust-specific duty to deal).
* “Two wrong claims don’t make a right:”
	+ **No antitrust duty to deal under Trinko** because any antitrust duty to deal preempted by regulatory duty to deal.
	+ **No predatory pricing claim under Brookline** because they are not pricing below cost.
	+ If neither of these duties, then no price squeeze case.
* But doesn’t this beg the question? If there’s an exploitative wholesale price and only the monopolist can forego the wholesale price, to use the fact that the retail price is not “below” their artificially depressed cost as evidence of the absence of a price squeeze is circular.
	+ Court rejects “transfer price test” which would calculate below-cost pricing for price squeeze purposes by determining whether the monopolist could make a profit if it purchased inputs at its own wholesale price (ie, if AT&T purchased DSL transfer at the same rate as it charged its competitors) on the grounds that upstream monopolists with no duty to deal are perfectly welcome to charge monopoly prices at the wholesale level.
* But the Court is very effect-focused: at the end of the day, they simply don’t want to create a policy that would lead to an increase in prices for consumers, even though that may not have been the result of a judgment in favor of the plaintiff in this case.
* Recall in addition, that there may be an alternative remedy under the consent decree itself, which one hopes since the Court relies on that additional policing in denying an essential facilities claim on the wholesale price.

6. Loyalty Rebates, Bundled Rebates

Bundled rebate: Wholesaler provides rebates to retailers dependent on the purchase of more than one of the wholesaler’s products in order to incentivize the purchase of a competitive product (the subsidized product) which would not normally be the economically rational choice absent the bundling with the monopoly product (wait this sounds like monopoly leveraging/tying, but Scotch appeared to have market power). Insofar as this causes retailers to replace products their customers would otherwise demand, it overrides consumer preference.

Le Page v. 3M (3rd Cir):

* Facts:
	+ Scotch tape was undercut by Le page, so it introduced a “fighting brand,” which it priced beneath Le page and offered rebates for sales of both products tied to threshold sales levels for both products.
	+ They were attempting to push their bargain brand by tying it to their high-end brand in a way that required retailers to choose between purchasing both or none, the bargain brand naturally tending to exclude Le Page.
	+ Scotch tape never priced below cost.
* This is more akin to an exclusionary conduct standard.
* To make an argument under this standard, you have to make the argument that the their dominance in the bargain brand area will wane in the absence of this conduct, or increase in the presence of this conduct; meaning you must allege that leveraging the high-end tape causes a distortion in the low-end tape market.
* Court ruled that because this **overrides consumer choice to purchase le page as their bargain tape of choice, there’s abuse of dominance**.
	+ Generally, loss of choice can be relevant, but it’s dangerous to depend on it because courts find that a decidedly more speculative consumer benefit than low prices.

Brook-Group Scrutiny?

* Other circuits have been more hesitant to find bundled rebates illegal, instead applying a predatory pricing standard: once the discounts are distributed entirely to the competitive product (the non-monopoly product), if they’re not pricing below cost then they’re not violation the Sherman act. PeaceHealth (9th Cir.).
* As we saw in Brook-Group, this standard will only protect an **equally efficient competitor** who would not be undercut without below-cost pricing.

Loyalty rebates:

* Wholesaler provides retailer rebate on price of product if they meet a certain sales threshold over a certain period of time (rebate period).
	+ Assuming the wholesaler intends to reap a profit, this usually means the up-front cost is adjusted upward to reflect the anticipated rebate (discounted for savings associated with bulk purchases and the likelihood that any given retailer will fail to meet the rebate threshold and indirectly subsidize those who do).
* Lock-in effect: This generates “switching costs” for retailers that may discourage them from changing wholesalers midway through the rebate period because they would lose sunk costs of paying the higher price for the product thus far, without collecting the rebate discount.
	+ While this perhaps erects barriers to entry during the lock-in period, it does not necessarily lessen competition to transform it from ongoing sales competition to an annual competition to secure sales for the entire rebate period.
* Exclusionary leverage: However, in the presence of a monopolist, it is exactly this all-or-nothing decision-making that disadvantages market entrants. A retailer cannot afford to experiment with the new guy if such experimentation may threaten the price feasibility of the monopolist’s product by undermining their ability to meet the sales threshold.
	+ Ex: If it is only economically feasible to sell apples providing that the grocer meets the sales threshold and attains the rebate discount, then he would be foolish to experiment selling grapples, even if some downstream customers would be willing to purchase them at a profitable rate, because they naturally cut into his apple sales, the profitability of which is more essential to his store than that of grapples. And the grapple producer doesn’t have the market leverage to compete in the bid to win the year-long sales because the grocer risks losing too many customers willing to buy apples but not grapples.
	+ **Price increase**: This leverage can liberate the monopolist from price constraints they would normally face under competition for marginal sales because they no longer fear losing any portion of sales to the market entrant, as they’ve locked in the retailers’ entire budgets for the market.
* Procompetitive benefits:
	+ Bulk shipping more efficient
	+ Can lead to a price reduction for downstream consumers: insofar as rebate actually pushes the wholesale price beneath cost, and this loss pricing is subsidized by those who fail to meet the sales threshold, then retailers may feel forced to pass the savings on to customers by lowering prices to increase demand to meet the threshold.

ICN Litigation notes:

Cerveja is leveling punitive price hikes against those small retailers that continue to purchase our local beer.

* In 2009, Cerveja raised their wholesale price to within $1 of the “recommended” wholesale price, which is enforced by the threat revoking all marketing and promotional, a crushing blow to the small retailers that dare to challenge the heart of Cerveja’s stranglehold on the market, their ubiquitous national advertising.
* This profit squeeze on small retailers forces them, out of a desperate need to continue turning a profit on the “must carry” cerveja, to attempt to meet the hoppy program’s guidelines for exemption to the price increase. Indeed, the Cerveja vice president for marketing explicitly aims to “take advantage” of a known delay in price elasticity sufficient to leave small retailers “with no choice but to promote our leading beer,” in an effort to “kill brand development” of microbreweries. If intent is relevant to the extent it bespeaks an anti-consumer objective, Cerveja’s desire to “take advantage” of their own customers speaks rather loudly to this effect.
* Under the hoppy program, to qualify for a rebate sufficient to bring prices down to the pre-hike levels, small retailers must achieve quarterly growth of at least one percent over the previous year (getting them halfway there), and must do so every quarter of the year to qualify for the remaining half.
* In a stagnant economy in which “demand is declining due to depressed local conditions,” this increase in cerveja sales can only come from a decrease the sales of competing beer, so retailers are forced to devote the entirety of their sales efforts to cerveja, to the detriment of consumer choice on the merits of available beers.
* These facts mirror those of lorrain Journal, in which the monopolist newspaper enforced customer loyalty in the ad sales market under the threat of punitive measures against those customers that dealt with their competitor radio station, in that case in the form of an outright boycott.
* Here, as in Lorrain Journal, no given consumer can afford to defect to the competitor at the risk of losing the opportunity to purchase from the monopolist, in this case by failing meet Cerveja’s stringent requirements for exemption from the price hike, necessary to make continued operation economically feasible.
* Key to the court’s judgment in that case was that the act hurt consumers by forcing loyalty through the threat of punishment, rather than incentivizing it through low prices.
* Subsequent judicial developments in the Grinell doctrine have further emphasized this focus on consumer welfare in requiring both 1) monopoly power and 2) the willful acquisition or maintenance of that power through other than proconsumer means, in order to find a conduct offense.
* Distinguished from the predatory pricing cases in which consumers benefitted from the low prices resulting from the price wars, consumers here are forced into compliance by the threat of price margins that cause them to “struggle to stay alive.” This is the stick and not the carrot, and antitrust law does not protect the right of monopolists to punish their customers in an effort to stifle consumer choice of beers.
* Two distinguishing factors make this case even more compelling for relief than that of lorrain journal:
	+ Here, in addition to the consumer harm at the small retailer level, there’s an aftershock harm passed on to customers of the small retailers themselves in that the forced homogeneity of available beer deprives them of alternative choices that their preferences would otherwise demand, as detailed in attachment 907. This market distortion robs consumers of the opportunity to purchase craft beer even to the extent they are willing to pay more for the quality that close care and attention yields in the microbrew context, which unavoidably requires such brewers to forego certain efficiencies of the economies of scale.
	+ In Lorrain Journal and the subsequent essential facilities cases, the plaintiffs had to overcome a defense of no duty to deal. Here, the defendant is already dealing with the plaintiffs, the discipline merely taking the form of punitive price hikes rather than boycotts, eliminating any perceived threat to the defendants ability to “freely exercise their own independent discretion as to parties with whom he will deal,” to quote the Trinko majority. And obviously that court’s and the LInkeline court’s overriding concern that an obligation to deal will facilitate price collusion between competitors is not at issue in this case because we seek not to do business with Cerveja, but only to conduct our own business, free from the anticompetitive attacks of the reigning monopolist.
* Our case is further supported by Le Page, in which the court found and exclusionary conduct offense when the defendant offered discounts on bundled products in an effort to, in like terms to that of Cerveja’s VP, “kill” the competition in the transparent tape area.
	+ The court held illegal such an intention to “preserve its market position” by “discouraging widespread acceptance” of a legitimate competitor by leveraging its monopoly position to force its customers into a position in which they would suffer economically unless they bought exclusively from them. This describes the Cerveja strategy to a tee.
	+ Notably, the court found liability despite the fact that the defendant never priced below cost, distinguishing the rebate scenario from that of predatory pricing.
	+ And to the extent the Commission feels compelled to reject the 3rd cir analysis, in spite of some level of Supreme Court approval implicit in cert denial, and instead embrace the “equally efficient competitor” test developed by renegade circuits in other discount cases, our case is still distinguishable on the grounds that no price discount appears in this case, but a price increase, so the countervailing interest in preserving pro-consumer price competition works against Cerveja, rendering the conduct baldly anticompetitive.

Dominance: There is persuasive structural evidence of monopoly power, which corroborates telling direct evidence..

* Structural:
	+ Cerveja has consistently maintained greater than 70% market share for the past 20 years. And even in the face of their greatest competitive challenge in recent memory, the entrance of Hollander into the supermarket sales market, they maintain 73%.
	+ No new brand has entered the supermarket channel in over five years, and very few new brands have entered the industry at all. This is explainable by the significant barriers to entry for new and smaller brands including the prohibitively high overhead capital required to pursue national advertising and large-scale distribution.
	+ The extinction of my clients, the small but beloved breweries, would exacerbate these barriers to entry in that any young upstart would lack the social capital necessary to get its foot in the door: as attachment 908 explains, “our marketing surveys indicate that only brands that have gained a critical acceptance level through small local retail sales are likely to do well in the long term.”
* Direct:
	+ In addition, cerveja explicitly relies on a known delay in price elasticity in order to impose their hoppy together regime with impunity to consumer backlash in the “short term.” Whether or not such market discipline might manifest in the long term, the Microsoft court rejected the relevance of Microsoft’s evidence of long term market discipline in limiting the analysis to competition the monopolist may face in the “short term.”
	+ In further analogy to the Microsoft case, Cerveja has enjoyed privileges of the monopolist inconsistent with effective competition. According to the appendix, cerveja “has not made a major investment in its beer production facilities since 1990,” an attitude which the independent industry study says leaves Cerveja “not a particularly efficient overall operator given that it has been in such a comfortable position for so long.” The absence of affirmative efforts to innovate indicates a lack of competitive pressure, and such listless conduct compelled the Microsoft court to find market dominance.

7. Intellectual Property: Duty to License

* IP rights confer monopoly-like exclusivity for a period of time in order to spur innovation. To this end, IP rights and antitrust law are in accord.
* But to the extent IP rights threaten effective competition, the regimes conflict.

Kodak (9th cir. 1997): CSU/Xerox is prevailing view.

* Kodak asserted refusal to license its patents (no duty to deal) in a few of the parts in their product as a complete defense to anticompetitive conduct.
* **Presumption of Procompetitive purpose**:
	+ Court accepts that the assertion of IP rights establishes a presumption of pro-competitiveness.
	+ “desire to exclude others from its protected work is a **presumptively valid business justification** **for any immediate harm to consumers**.”
* Rebuttal: P can rebut by showing either
	+ illegal acquisition of ip right or
	+ **Pretext:** assertion is a pretext for anticompetitive goal.
		- This includes sham litigation under Professional Real Estate.
		- Pretext can be problematic because this necessarily involves an inquiry into the state of mind of defendants.
* But in this case, the argument of pretext was more compelling because
	+ they didn’t introduce the IP argument until the case had already been to the Supreme Court once, and
	+ they had been voluntarily distributing their patented parts prior to their change in conduct, suggesting this was merely a **post facto rationalization** for their behavior.

CSU/Xerox (Fed. Cir. 2000): Prevailing view.

* explicitly departs from Kodak in holding that absent evidence of **fraud in the USPTO, sham litigation or illegal tying**, assertion of patent does not violate antitrust law.

Rambus

* “Patent ambush” cases becoming increasingly problematic: patent holders will wait and see whether a standard develops which requires the use of their patent, at which point they charge everyone a monopoly hold-out price for licensing.
	+ Exactly what happened here when Rambus, a member of the standard-setting organization, failed to disclose its IP rights during the standard-setting process.
* Federal Trade Commission Act:
	+ FTC enforces FTCA, section 5 of which prohibits unfair methods of competition and unfair or deceptive acts or practices.
	+ FTC found that rambus had engaged in antocompetitive conduct by material misrepresentations/omissions during standard-setting process which caused the standard-setting committee to select Rambus instead of a substitute.
* DC circuit through case out on the grounds that
	+ there wasn’t sufficient evidence of deception,
	+ no duty to provide information to competitors and
	+ no evidence that alternative would have been adopted had rambus fully disclosed.
* FTC was pissed about this result.
* Case was successfully brought against rambus in EU.

8. Complex Strategies to Maintain Monopoly, including product change, exclusive dealing, tying and bundling, especially in high tech markets

Product Change:

* Product change predation occurs when a monopolist alters its product to create incompatibilities with competing products, to function as a **moving target** and deprive consumers of potential cross-product synergies or otherwise harm consumers.
* IBM allegedly slowed down the speed of their processors to a speed just beneath that necessary for the integration of competing technologies.
* Courts split on how much deference to give to the monopolists on product changes so as to balance anticompetitive risks with ensuring proper incentives to innovate (don’t want AT suits arising every time you make a change).
* Then we have Microsoft cases… which bear out certain requirements in line with Trinko Court’s reasoning (not law, but **likely states the law):**
	+ **Integration: tying not illegal if products have genuine integration, meaning the combination adds value to the overall consumer experience beyond that of the merely the sum of the parts.**
		- **If disagreement between experts, resolve in favor of defendant so as not to chill innovation.**
	+ **Anticompetitive harm necessary: DC circuit states that leveraging only violates Section 2 when it actually monopolizes of dangerously threatens to do so.**

Microsoft I (DC 1998) (go back and sort this section out from pages 226-28):

* Product change: will be characterized by the D as a meritorious innovation, but by P as an anticompetitive tool.
* Tie-in/”mere leveraging”/monopoly leveraging:” use of monopoly power in one market to gain market share in another market.
	+ Microsoft was charging its licensees on the basis of the licensee’s total output, making it more financially sensible to use windows in all computers it produces since you effectively have to pay for it anyways.
	+ Court found this was illegal and Microsoft agreed to consent decree promising not to do this, but allowing for so-called “integrated products.”
	+ ON facts of Microsoft 2, DOJ had brought criminal contempt charge for violation of consent decree for bundling browser with windows, which is dropped, but states continued to pursue this claim monopoly leveraging claim,
	+ but was rejected on the grounds that the decree allowed for **integrated products**.
	+ Court reasons that integration is genuine when it adds value to overall product, and when there is disagreement between experts as to the genuineness of integration, the defendant gets the benefit of the doubt (case should be dismissed at establishment of sufficient ambiguity) so as not to chill innovation.
	+ **Attempted monopolization of tied market; Subsequently, the DC circuit states that mere leveraging is not violative under section 2 even if anticompetitive unless it actually threatens monopolization.**
	+ The above reasoning is likely in line with that of the supreme court, as implied in Trinko dicta.

Microsoft II (DC 2001):

* Market definition: the primary market at issue here is PC operating system.
* Microsoft feared that netscape browser plus sun microsystems JAVA would become attractive enough that people would start developing applications for them, without respect to microsoft-specific compatibility, which would be compatible across operating systems, breaking microsoft’s monopoly stranglehold.
* Court found 5 section 2 violations:
	+ Licenses to OEMs
	+ Integration of IE:
		- You couldn’t get rid of it without screwing up the operating system, so computer manufacturers would be forced to include two browsers if they wanted to provide an alternative option, which was less than maximally efficient (especially for duplicative technical support costs)
		- Part of the defense was that if consumers really want netscape then they can download it.
		- But court ultimately rules that because Microsoft barred OEMs from the “most cost-efficient means of distribution” of netscape, they found a violation, probably because there was no credible procompetitive reason for doing, leaving it, on balance, anticompetitive.
	+ IAPs – AOL
	+ ICPs, Apple:
		- Threatened to end apple-compatible Microsoft office suite unless apple stopped providing netscape as default browser.
		- Microsoft’s argument would be that they have no duty to deal with a competitor like apple, and indeed, that it would be inefficient to do so unless the venture helps perpetuate internet explorer market share (procompetitive justification). This might have been more persuasive post-linkline/trinko.
	+ Java: incompatibility, exclusive deals, deception, Intel
		- Fits with the main story of the case in that Microsoft acted to undermine cross-OS compatibility.
* Monopoly broth:
	+ DOJ had also alleged “monopoly broth” claim that the above violations combine into synergistic section 2 violation unto its own (court found it unnecessary to address since they found five violations anyways).
* One overarching defense of microsoft’s was that I have no essential facility, but only a proprietary product which I have no duty to wield to the advantage of competitors. Perhaps this would have been received with more enthusiasm post-trinko/linkline.
* **Causation**:
	+ Microsoft argues that netscape and JAVA would never have truly threatened Microsoft even if not for microsoft’s anticompetitive behavior (Microsoft probably was acting on paranoia).
	+ Court rejected because they **infer causation** when anticompetitive acts are aimed at and capable of harming 1) substitutes or 2) nascent technologies, because to do otherwise would leave the law at an “edentulous” (toothless) fate.
	+ Harm, of course, will be relevant for relief, and in the private action context, to standing to sue.
* Court lays out **framework** for Section 2 violation (p. 229-30):
	+ - 1. Monopolist’s act must have anticompetitive effect.
			2. Plaintiff must prove anticompetitive effect (prima facie)
				1. And in the case of a private plaintiff, a cognizable antitrust harm suffered by them.
			3. Defendant may present non-pretextual procompetitive justifications.
			4. Plaintiff may either rebut procompetitive justifications or argue that anticompetitive effects outweigh procompetitive benefits.
			5. Court must balance effects and in doing so, use evidence of intent relevant only to the extent it informs us of the likely effect of the conduct.

FTC Act:

* FTC does not have authority to enforce Section 2 of the Sherman Act, but largely incorporates Section 2 jurisprudence under its FTCA Section 5 authority.
	+ “Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.”
* **Arguably broader authority** than Section 2, but courts have been hesitant to embrace such a view and it remains untested.
* Policy: to the extent Section 2 claims have been limited out of fear of vexatious litigation, Section 5 claims should not be so limited because there’s no private right of action.
	+ Commissioner Rosch argues that this justifies “monopoly broth” claims.
1. Mergers--------------------------------------------------------------------------

A. Historical perspective----------------------------------------------------------------------

1. Introduction – The Early Merger Case Law

Clayton act:

* “reasonable probability” that effect of merger will be to “substantially lessen” competition.
* Supreme Court found congressional intent to oppose concentration in its own right, and to promote diversity of business, even if it may result in some costs to consumers.
	+ Later overruled.

Private merger suits:

* Standing requires cognizable antitrust harm to plaintiff.
	+ Sprint could not sue on grounds that prices would rise for downstream consumers because they do not personally suffer that antitrust harm (and may even benefit from price hikes).
	+ However, they could argue that merger creates duopsony power in deals with providers of handsets, like iPhone.

2. Evolution of the Law

Brown Shoe (1962):

1. Famous quote “it is competition, not competitors, that the Act protects.”
	* But subsequent line informs the meaning of “competition” in this context: “But we cannot fail to recognize Congress’ desire to promote competition through the protection of viable, small, locally-owned business.”
	* They go on to anticipate occasional “higher costs and prices” to consumers in the promotion of “competition” as above defined, reflecting the perceived independent social utility to dispersed economic concentration.
	* The Court would go on to disabuse themselves of this notion, due largely to the fall of international barriers to entry, putting pressure on US companies such that they could not withstand economic distortions undermining efficiencies.
2. Market definition
	* Courts maintain that market definition is a **necessary first step to competition analysis**.
	* Market defined by “**reasonable interchangeability**” of products and “**cross-elasticity of** **demand** (ie, how readily will people defect to an existing alternative at a price hike).”
	* **Sub-markets**:
		+ **Practical indicia of the boundaries of submarkets**: Can be helpful (seen in Staples and beyond) but much has changed
			- Public recognition of submarket
			- Product’s peculiar characteristics and uses
			- Unique production facilities
			- Distinct customers
			- Distinct prices
			- Sensitivity to price changes (greater cross-elasticity)
			- Specialized vendors.
		+ Here, Court recognizes sub-markets, in this case defined as “children’s shoes” since they have a discrete group of consumers.
	* **Potential supply-side competition** (other competitors poised to enter the market at a price hike) does not come into the equation yet, but is **reserved for the analysis of the probable effects of the merger**.
3. Indicia of harm to competition from this case can be helpful, but much has changed
	* Court is unwilling to approve Brown would gain 5% market share because it would lead to slippery slope of market concentration. 5% would be absolutely trivial today (anachronistic).

Philadelphia National Bank (1963):

* + Merger between 2d and 3rd biggest banks in Philly, resulting in 58% market share.
	+ Court finds that

1) This level of market concentration as a result of a merger, **and**

2) so significant of an increase in market concentration, establishes the **“Philadelphia National Bank presumption**,” which **shifts burden of proof** to defendant to prove merger will not harm competition.

* + 1. Some courts have required high barriers to entry for the presumption as well.
		2. Every time the merger guidelines are revised, there’s discussion about the renewal of the presumption because the criterion really do not provide enough information to draw a logical inference of probability of harm to competition, especially if barriers to entry are low.
		3. Nevertheless, it might be a good idea to bring those with the informational advantage (the firms) to present evidence rebutting the probability of harm to competition under these circumstances.
	+ The case also **rejects the social policy defense and the countervailing power defense**:
		1. Social policy defense:
			1. Ps argued that bigger bank was needed to bring business into the area and stimulate economic development.
			2. But court says Congress did not entitle it to make such value judgments.
			3. Yet as Fox suggests, this could easily be recharacterized as the need to provide businesses (customers) with something they desire, larger credit limits, and is in that sense independently procompetitive
		2. Countervailing power defense:
			1. Ps argued they needed to be bigger to compete with NY banks
			2. Court rejected on grounds that it’s not relevant what the biggest banks are in other markets.
			3. But as Fox suggests, does the need to compete not go to market definition?

FTC v. Proctor and Gamble (1967):

* + P&G was large producer of soap products, acquired Clorox, which held 48.8% of market share.
	+ Germ of “potential competition” theory:
		1. Proctor’s presence was sufficiently threatening to Clorox, even without actually entering the market, to prevent them from raising prices, due to P&G’s ability to enter market should they so please.
		2. Being that P&G cannot fear itself, the acquisition eliminates the procompetitive benefits of that looming competitor.
	+ Case is anachronistic in other ways.

Citizens Publication (1969):

* + Flailing newspaper in Tuscon acquired by only other newspaper in Tuscon.
	+ Father of “**failing business defense**,” which is extremely narrow.
	+ Must be:
		1. Grave possibility of business failure
		2. Prospects of bankruptcy reorg must be “dim or nonexistent” and
		3. There must be no other prospective purchaser, meaning no less anticompetitive way to salvage company.
	+ This is still the law, though today it is justified on economic grounds, to the exclusion of the social grounds on which the Citizens court relied.

3. The Turning of the Tide

* + 1974 shift from the Warren court the more business-friendly Berger court, along with the fall of international barriers, led to a watershed in merger law. Courts would go on to raise burdens of proof for plaintiffs, and give greater credence to idea that mergers can create pro-competitive efficiencies.

B. Contemporary Law and Enforcement----------------------------------------------------

1. Intro/overview

Two stories of merger harm to competition:

1. Unilateral effects: monopolization and other unilateral harms to competition (will go into further later, but price leadership may blur lines, etc.)
	1. Elimination of “**substantial head-to-head competition**:” (guidelines) Coke acquisition of Pepsi: Unilateral effect: Any sales coke may lose to pepsi as result of price rise pre-merger would be captured by coke post-merger.
	2. **Upward Pricing Pressure**: when a price increase in coke diverts sales to pepsi, the difference between the incremental cost and to pepsi and the additional revenue to pepsi of the additional sales represents the “upward pricing pressure,” which is relieved by coke’s acquisition of pepsi.
		1. Stated more accurately, UPP describes the release of downward pricing pressure. But to the profit-maximizer this amounts to UPP.
		2. The agencies will also consider post-merger incentives to reduce price, such as cost savings, and subtracting these “efficiencies” from the UPP, will calculate “Gross Upward Pricing Pressure,” or GUPPI.
		3. Higher GUPPI = greater likelihood merger is anticompetitive.
	3. Unilateral effects in oligopolistic markets: the merging firms are the major alternatives to one another and no other competitor is well situated to reposition itself if the other two raise price (basically a mini calculation of market definition and power).
		1. If coke and pepsi had serious competition from another firm (sufficient to preclude monopoly power), their merger might still harm competition in spite of and independent of the existence of off-brand cola in the market.
		2. Although the coke-pepsi price increase may divert some sales to alternative brand, the fact that a smaller proportion of consumers would defect from the post-merger entity than would defect from the premerger coke to pepsi and vice versa, pushes the efficient price point upward for the post-merger firm, resulting in a price increase and AT harm.
		3. **Differentiated products**: in markets of greater product differentiation, customers are less responsive to price, so limiting the variety of options can empower the oligopolist to increase prices on two brands with less fear of defection than in homogenous markets because some portion of consumers may prefer one or the other of the products (but not another alternative) for differentiation reasons, and is willing to pay supracompetitive prices.
		4. **Bargaining and auctions**: especially in industries involving **intermediate goods** and services, **auctions and aspects of auctions** play an important role in determining price. Restricting the number of market players inhibits the ability of buyers to play sellers off one another, resulting in increased prices via the failure to push price down through competition.
		5. **Product variety**: if merger involves two of a very small number of firms with capacity to innovate, then the decrease in variety may decrease the efficiency of innovation’s response to customer desires (fewer options, fewer opportunities for consumers to vote with their wallets on preferred innovations).
2. Coordinated effects: threat of cooperation/collusion/coordination between competitors increased as result of merger (closer to oligopolistic market).
	1. Impact of merger on coordinated interaction: depends on changes to and status of market concentration (see HHI below) and Market shows signs of vulnerability.
	2. Signs of Market vulnerability to coordinated conduct:
		1. **History of collusion** (including in comparable but similar markets elseware)
		2. Transparency of market: greater ability to monitor competitors’ behavior, exacerbated by the transparency of homogenous product for ex, creates vulnerability in that it could facilitate cartelization.
	3. Signs of immunity to coordinated conduct:
		1. **Powerful buyers**: with the clout to negotiate favorable term with their suppliers are less likely to be harmed by coordinated price increases.
		2. Low barriers to entry: considers factors such as
			1. “timeliness:” how rapid entry to the market could be considering delays such as permitting, planning designing… and considering how far along specific prospective entrants are in that process.
			2. “likelihood:” likelihood of actual entry, all variables considered.
			3. “sufficiency:” likelihood that entrant would gain sufficient market share to have an impact.
	4. Efficiencies:
		1. Counterveiling procompetitive efficiencies tend to rebut or overwhelm anticompetitive effects.
		2. **Must be “merger-specific**” in that they could not be achieved through less anticompetitive means.
			1. Less anticompetitive means includes only those “practical in the business situation faced by the merging firms,” and **not “merely theoretical” alternativ**es.
			2. “practical alternatives that mitigate competitive concerns” include divestiture.
		3. **Must not themselves be anticompetitve**: efficiencies cannot arise from anticompetitive reductions in output or service (such as Heinz’s attempted use of efficiencies resulting merely from the elimination of competition not cognizable).
		4. Agencies employ a balancing of efficiencies and anticompetitive effects.
	5. Failure and Exiting Assets (ie failing firm defense): only recognized if
		1. Allegedly failing firm would be unable to meet its financial obligations in the near future.
		2. It would not be able to reorganize successfully under Ch. 11 AND
		3. It has made unsuccessful good faith efforts to elicit reasonable alternative offers that would pose less anticompetitive danger and keep assets in market.

2. The Guidelines: Introduction

Overview:

* + Guidelines speak in terms of effects on price, but non-price effects are implicit in this analysis and cognizable AT harms.
	+ Stream of commerce: agencies presume, absent evidence to the contrary, that adverse effects on direct customers cause adverse effects on downstream customers.
	+ Monopsony power: Agencies employ analogous framework in monopsony context.

Evidence of adverse competitive effects:

* + Market shares and concentration in a relevant market: look to specifications but this gets at PNB presumption.
	+ Substantial head-to-head competition: ie coke/pepsi example.
	+ **Disruptive role of a merging party**: there may be additional AT harm in the acquisition of so-called “**maverick” firms**, whose breaks from prevailing industry norms disrupt the market to the benefit of consumers.

Market definition:

* + Still necessary?
		- For the first time in 2010, the merger guidelines admit that market definition may not be an absolute prerequisite to merger analysis.
		- Theoretically, in a unilateral effects case, you can prove anticompetitive effect without determining market definition, such as the obvious unilateral effects of the coke-pepsi merger without examination of market definition necessary (pure cross-elasticity analysis).
		- Market definition “**useful to the extent it illuminates the mergers potential anticompetitive effects**.”
		- **Backing into the market:** the guidelines do go on to admit that market definition will often prove necessary at some point in the analysis, as reasonably interchangeable alternatives for consumers will almost always come up in taking account of price pressures.
	+ Hypothetical monopolist test: Small but Significant and Non-Transitory Increase in Price Test (SSNIP):
		- A **cross-elasticity of demand methodology** for market definition which identifies groups of products that compose a market by determining which firms would need to merge in order to achieve a threshold level of market power (**rule of thumb: ability to raise prices 5**%), which is a **proxy for consumer perceptions of the products’ reasonable interchangeability**.
		- Example: For every dollar increase in the cost of product A, A loses 20 sales units (out of 1200) to products outside the candidate market, and 10 sales units to product B, then a post-merger A-B firm could be expected to their prices by 10%, even though 2/3s of losses are diverted to firms outside the candidate market.
		- **Additional products**: additional products may be added to the candidate market if more sales divert to say, product C, when A increases its price, than go to product B, **suggesting closer substitutability** than B.
		- Notice that cross-elasticity as measured by price reflects generalized competitive pressure, which serves not only to put price pressure on competitors, but also to ensure more qualitative consumer desires are protected as well, such as innovation or terms and conditions, etc. So SSNIP really is a fairly effective proxy for consumer-regarding competition.
		- Guidelines are careful to note that this is just one of several measures of market definition, but it’s the only one we learned so whatev.

Market Concentration: Use the Herfindahl-Hirschman Index

* How to calculate HHI:
	+ Current Market Concentration: sum the squares of the market players’ respective market shares, giving proportionately greater weight to larger market shares to reflect greater market concentration.
		- 30^2 + 30^2 + 20^2 + 20^2 = 2600
		- 40^2 + 30^2 + 30^2 = 3400: Greater market concentration.
	+ Changes to Market Concentration: The difference between HHI calculations, but more easily the market shares of the merging firms factored and multiplied by 2.
		- Merger between 5% firm and 10% firm: delta = 5\*10\*2 = 100.
* Philadelphia National Bank Presumption:
	+ Not explicitly embraced, but reflected in the following:
	+ Market concentration guidelines:
		- Unconcentrated markets: HHI below 1500
		- Moderately Concentrated markets: HHI between 1500 and 2500
		- Highly Concentrated Markets: HHI above 2500
	+ Changes in concentration guidelines:
		- Small change in concentration: Mergers involving an increase in HHI less than 100 points unlikely to have adverse competitive effects and *ordinarily* require no further analysis.
		- Unconcentrated markets: Mergers resulting in unconcentrated markets (HHI below 1500) unlikely to have adverse competitive effects and *ordinarily* require no further analysis.
		- Moderately Concentrated Markets: Mergers resulting in **moderately concentrated markets (1500-2500)** that involve an **increase in HHI more than 100 points** potentially raise significant competitive concerns and often warrant scrutiny.
		- Highly concentrated markets: mergers resulting in highly concentrated markets (HHI above 2500)
			* Increase in HHI 100-200 potentially raise significant concerns and often warrant scrutiny
			* Increase HHI > 200 **presumed to be likely to enhance market power**. Presumption may be rebutted by evidence showing that the merger is unlikely to enhance market power.
	+ Note: As a quantification of the Philadelphia National Bank presumption, these guidelines also fail to account for barriers to entry, which includes the competitive pressure of “potential competition,” ie perceived potential market entrants.

3. The Case Law

a. Market Definition

FTC v. Staples (DDC 1997):

* + Proposed Staples/Office Depot merger.
	+ Superstore Submarket: Court looked to **Brown Shoe** “**practical indicia” of submarkets** to determine that **low cross-elasticity of demand** between office supplies superstores and non-superstore retailers, coupled with **public recognition** of superstores as separate market, **distinctive customer base and business model** of superstores, established a submarket for the purpose of granting a preliminary injunction.
	+ Analyzing the merger in terms of this submarket: post-merger entity would have monopoly in some locals (HHI of 10,000), and average delta would be 2715, **establishing prima facie case of violation** pursuant to merger guidelines.
	+ The court notes that
		1. Staples failed to establish that entry of other firms would mitigate price effects of market concentration (reinforcing the fact that barriers to entry is not an element of a prima facie case, but available only as a defense) and
		2. Staples failed to present evidence of countervailing efficiencies that might have counteracted anticompetitive effects.
	+ Court grants preliminary injunction.

Department Store Merger in South Africa: Court considered the economic status of consumers relevant in defining the market as department store sales to poor consumers, which took on extra significance as the only mechanism by which the poor/disempowered could defend their economic interests was by their ability to exercise a preference for one store over the other.

FTC v. Whole Foods (DC Cir. 2008):

* + Whole foods acquired Wild Oats, a competitor in the “premium natural and organic supermarket” (PNOS) area.
	+ Court notes that in order to secure **preliminary injunction**, FTC need not prove their case but merely “**raise questions going to the merits**” **substantial enough to warrant a “thorough investigation.”**
		1. Sliding scale: And to the extent D presents evidence on the merits and equities (presumably including efficiencies of merger and ease of entry, nuance excluded from the prima facie analysis) to refute the above, the court should apply a “**sliding scale**” in determining whether to grant preliminary injunction.
	+ **Core customers**: Noting that merger law should be applied to protect the “**core customers**” of merger companies, the court found that greater cross-elasticity of demand (citing Brown Shoe and Staples) between PNOSs than between PNOSs and other supermarkets suggested a PNOS-loyal group of core consumers that were vulnerable to a submarket merger.
	+ Analyzing the merits on the basis of a PNOS submarket, the court found a sufficient likelihood of success on the merits to grant preliminary injunction.

US v. H & R Block (DDC 2011):

* + Proposed merger of two of the three do-it-yourself accounting software companies.
		1. Note here that these are the two smaller of the three, but there’s still an antitrust problem.
	+ D argues their market should include accountants and those who do their taxes themselves, which would have presented much more competition, on the grounds that they all share the same consumer base consisting of **all US tax-payers**.
	+ Court refuses to take so broad a view on the grounds that a SSNIP price increase of 5% would be unlikely to cause many do-it-yourself software consumers to switch to either an accountant or becoming their own accountant since that’s a pretty big decision and internal emails show that pricing of do-it-yourself software is in no way connected to that of accountants.
	+ **Is chicken soup in the same market as cold medication**?
		1. Defendant’s expert says yes to the extent there’s cross-elasticity of demand.
		2. Court doubts whether cross-elasticity is really the only relevant concern here because the Brown indicia consider the qualitative substitutability of as well as the economic substitutability.
		3. But in any event, there’s insufficient cross-elasticity of demand.

b. Horizontal Mergers

1) Mergers Likely to Produce Coordinated Effects

Hospital Corporation of America (7th Cir. 1986):

* Classic Posner decision form before most recent guidelines, but still very relevant in its analysis.
* Hospitals in Chattanooga area attempting to acquire competing hospitals, the result of which would limit the number of competing hospitals from 11 to 7.
* Today a court would translate market share into HHI.
	+ But we calculated numbers in class, which show that an HHI of 2201 and a delta of 336 would qualify as “moderately concentrated” under today’s guidelines, establishing prima facie case.
* Posner describes coordinated effects concerns, noting that mergers between competitors are not inherently detrimental, but concerning to the extent they facilitate coordinated price increases (whether tacit or explicit).
* Barriers to entry:
	+ The exigencies of emergency care limit the market to local hospitals.
	+ There are significant **governmental barriers** to building new hospitals in the area.
* **Demand is inelastic** because patients and doctors do not generally make hospital decisions on the basis of price (especially since insurance company usual picks up the bill).
* **History of collusion**:
	+ These hospitals have a history of collaborating to negotiate with the federal government and insurance companies on prices, facilitating future collaboration via preexisting relationships/familiarity and demonstrating its feasibility.
* On the basis of these facts, Posner determines there was sufficient evidence on which the Commission could base its decision, and therefore affirms.
* However, Posner does note several facts that might cut the other way were he on the Commission:
	+ **Complaint from competitor**: Investigation touched off by complaint from competitor, suggesting that the merger might present efficiencies that would allow it to compete even more effectively with the remaining competing hospitals, and undermining the notion that the post-merger hospitals would enjoy supracompetitive pricing as a result of coordinated effects.

Baker Hughes (DC Cir. 1990):

* Proposed merger of manufacturers of hydrolic underground drilling rigs which would result in very high concentration, qualifying it for the Philadelphia Bank presumption which shifted burden of proof to defendant.
* Court rejects antitrust problem because:
	+ Low barriers to entry:
		- **Market Share doesn’t correlate exactly with market power** because the market is so small (only a few of these things sold per year) that there are wild swings in market share with just a few sales, distinguishing the usual entrenchment associated with high market share.
		- Going along with this historical trend, several other firms were poised to enter market.
	+ Demand has historically been very elastic because highly sophisticated buyers do extensive research and solicit/negotiate competing bids, creating a market of greater sensitivity to consumer demands.
		- Perhaps articulated as a “**powerful buyers**” factor under guidelines.

H.J. Heinz Co. (D.C. Cir. 2001):

* Facts:
	+ Three major player in jarred baby food market, the smaller two of which (Heinz and Beechnut) propose to merger, which would create a duopoly.
	+ Gerber is carried in 100% of stores, while generally either Heinz or Beechnut is carried as an alternative to Heinz, but not both, and only where a store carries an alternative.
	+ Notice, for the FTC to secure a preliminary injunction, they must go to federal court.
	+ The district court had rejected the request for preliminary injunction.
* Appeals court overturns.
* **Concentration establishes a prima facie** case, so we focus on D’s rebuttal arguments.
	+ Note here that going to a duopoly presents a very high risk of coordinated effects, which informs the courts great skepticism towards the rebuttal arguments.
* Extent of pre-merger competition:
	+ Heinz and Beechnut argue that because they never share shelf space, consumers are never choosing between the directly, so they don’t really compete as it is, so the elimination of that competition by merger is of no consequence.
	+ **Competition at wholesaler level**: Court rejects, primarily on the grounds that they compete to get placed on the shelves by the wholesaler in the first place.
* Post-merger efficiencies:
	+ District court had justified duopoly largely on the ground of efficiencies.
	+ D had overstated efficiencies.
	+ But moreover, only “**merger-specific” efficiencies**, ie those that can only be achieved through the merger or other means that present an equal level of antitrust risk, as laid out in the guidelines.
	+ **Efficiencies are relevant to the extent they mitigate our concerns of anticompetitive effects in the sense that they lower costs in a way that creates an incentive to decrease price and improve competition. So this is not so much a justification which overrides anticompetitive concerns, but a clarification that speaks directly to the existence and degree of those concerns.**
		- But remember of course, efficiencies that save on the firm’s costs, while maintaining the same level of output, DO tend to decrease price.
	+ Here, some of the efficiencies were through eliminating competition in the market (the costs of competition against one another), which is not a cognizable efficiency because it does not go to show healthier competition, but quite the opposite.
	+ In addition, the parties never showed why these efficiencies could only be achieved through merger.
* Innovation:
	+ Heinz argued that getting their hands on BeechNut’s innovative recipes would allow them to introduce new foods into the market and improve consumer choice.
	+ Court rejected on the grounds that there was no evidence that Heinz couldn’t innovate on their own (this wasn’t a patent pool they were acquiring for chrissake), so there was no reason to think such innovation couldn’t be achieved through less anticompetitive means.
* Structural Barriers to collusion:
	+ D argued that a “time lag” on reactions to competitor’s prices undermines threat of price coordination.
	+ Court rejects on the grounds that they would figure out a way to coordinate once the convenience of duopoly creates a sufficient incentive to do so.

2) Mergers Likely to Produce Unilateral Effects: Monopoly and Dominance

Sirius-XM (2008 statement of the DOJ on decision not to pursue action):

* Sirius and XM were the only satellite radio providers and they proposed to merge.
* DOJ opted to define the market to include regular AM/FM radio and ipods and shit, which was perhaps a bit generous.
* There appears to be an argument analogous to one in HJ Heinz in that they don’t compete at the retail level because their **systems are not interoperable** and there’s a lock-in effect in that the **system is installed at the production of the car**, so **people can’t really switch**.
	+ Heinz court really didn’t buy this since there was **competition at the wholesale level**, which the DOJ here dismisses because **both companies have entered into long-term exclusivity agreements with every major car manufacturer**.
	+ Subsequently the firms did make their systems interoperable pursuant to FCC consent decree, so we’re retroskeptical.
* DOJ finds that efficiencies of scale override any anticompetitive concerns.

Google/Admob (2010):

* Facts:
	+ Google sought to acquire Admob, its direct competitor in the mobile advertising market.
	+ Admob derived a majority of its revenue from iphone ads, and Apple has, since the opening of the investigation, released its own mobile ad technology
* FTC opts to close investigation of merger:
* **Swing in competitive stance**: although Admob was Google’s “head-to-head” competitor, this adversarial relationship sprung out of Google’s Android competition with Apple’s iPhone, from which AdMob did, but no longer, receive revenue, so the real competitor has become Apple itself.
* **Importance of content**: Both Google and Apple had an incentive to ensure the customers of the ad technology, the developers, were happy with it because it encouraged them to continue developing software for their respective phones, making them in turn more attractive to downstream consumers. So there was **insufficient incentive to charge supracompetitive prices because that was overridden by desire to compete in downstream phone market**.

Boeing (FTC 1997):

* Facts:
	+ Boeing had 64% of commercial aircraft market, Airbus had 30%, McDonnell Douglas had 5%
	+ The two American companies (Boeing and MCD) wanted to merge.
	+ Airbus is a consortium of European producers, often criticized for illegal use of government subsidies.
* EU Unilateral Effects Theory: the European unilateral theory was an abuse of dominance theory premised on Boeing’s further entrenchment via increased market share.
* Coordinated effects: reduction of market actors would facilitate collusion.
	+ The FTC **decision not to sue to enjoin the merger** premised on **MCD’s complete inability to continue exerting competitive pressure on the remaining firms** because they have fallen so far behind in technology that they are not developing any new planes and will not be in contention for any new bids.
	+ Their current business model focused exclusively on servicing their existing fleet.
	+ MCD was actually making a lot of money on this, so they **didn’t qualify for “failing” company defense**,
	+ But they were described as a “**flailing company**” because they had no prospects of making a competitive impact in the future market.
* **Less anticompetitive alternative?**
	+ No other companies were interested in acquiring MCD, suggesting there was no less anticompetitive alternative to rescue MCD (in failing/flailing company defense or consideration of merger-specific efficiencies).
	+ In terms of the guidelines, this fulfills the “unsuccessful good faith efforts to elicit reasonable alternative offers.”
	+ **Importance of IP**: the guidelines also suggest that alternative offers should maintain “tangible and intangible assets” of the alleged failing firm in the market, which may have been a particularly significant consideration here because of the military patents involved, developed with federal funding.
* Concede the inevitability of market concentration? Boeing was likely to acquire the market share of MCD whether the merger went forward or not (research showed), but no way would Airbus concede the opportunity to get the share, no matter how small the likelihood.
	+ But would Boeing’s acquisition of MCD make them more likely to gain that market share than they otherwise would be?
* **Short vs. Long Term**: But for the time being, European research showed MCD did put competitive pressure on market, and perhaps this should be less significant in a competition analysis focused on long term effects.
* Fox thinks that ultimately, Boeing was not interested in commercial airliner market share or power being acquired in transaction, but there was no alternative buyer and they wanted MCD’s military patents. This plays into a narrative of no abuse of dominance.
* National champion:
	+ One suspects that EU wanted to protect Airbus as national champion in the industry, and the US Boeing (especially since MCD’s bankruptcy would have put military patents to waste which had been developed with federal funding). Certainly this was the focus of the political dialogue.

3) Mergers Likely to Produce Unilateral Effects in Oligopolistic Markets

* As the guidelines explain, there can be anticompetitive effects even without a monopoly scenario *or* a coordinated effects scenario.

United States v. Oracle (N.D. Cal. 2004):

* Oracle wanted to acquire PeopleSoft (both American). Other big competitor was SAP (German). Gov’t sought injunction.
* Theory of harm:
	+ **DOJ’s theory was unilateral effects** on the grounds that American consumers felt PeopleSoft was the only alternative to Oracle because these American companies are more sensitive to the needs of Americans in some sense, a “preference” which the judge gave little credence for certain reasons.
	+ The court also goes into coordinated effects story a bit (determining that there was no legitimate threat here either).
* **Market definition** question was **two-fold**: product market and geographic market.
	+ Notice, although this is a unilateral effects case, which the DOJ claims is not reliant on market definition, the Court starts with market definition, and essentially ends there as well.
* Product market definition:
	+ DOJ had interviewed many of their customers who expressed a willingness to pay more for oracle/peoplesoft in favor of switching to SAP.
		- Resembles SSNIP test in that it approximates cross-elasticity in post-merger market.
	+ Judge dismissed this testimony as an unreliable measure of “reasonable interchangeability,” the ultimate standard, because there was no empirical or expert evidence, just consumer testimony.
		- But don’t consumers ultimately define “reasonable interchangeability”?
	+ Unrepresentative testimony? To the extent there is any question that the testimony offered for consumer preferences is not representative of the consumers writ large, this begs the question (presupposes the existence of a defined market of consumers while we’re asking the market definition question). Should that group of consumers not count as a discrete market of “core consumers”, distinct from those whose opinions they might not represent?
		- This is surely true to some degree, but as judge Walker points out there will always be some group of consumers with idiosyncratic preferences, who should not always be entitled to deprive the remaining consumers of merger-specific efficiencies.
	+ **Powerful consumers**: the sophistication of the software solutions experts that organize purchases of Oracle/Peoplesoft products suggests that they can find solutions else ware, militating in favor of a more expansive market definition.
* Geographic market definition: court determines market is global.
* Coordinated effects: plaintiffs plead no coordinated effects theory, and it would have failed anyways because:
	+ **Products are not homogenous**, undermining price coordination.
	+ There’s **no price transparency** (negotiations with consumers done independently), presenting administrative hurdle to price coordination.
* **PNB presumption?** Although the merger arguably represents the consolidation of 2/3 market actors, there’s **no market defined**, so Court says they **can’t apply Philadelphia National bank presumption** for prima facie case.
	+ Fox’s criticism: no market defined? Then what was all that ssnip test talk about?!
* Efficiencies: Notice on efficiencies that this is **not an easy defense**, even with a very defense-friendly judge: to be cognizable must be “**substantiated and verifiable**”:
	+ Testimony of oracle executives on personal estimations of efficiencies too speculative.
	+ Efficiencies based on anticipated future innovations not verified by internal documents, with no info on functionality or characteristics of innovations, or date of availability (too long term perhaps).
* **Erroneous use of SSNIP test**: court admits to being persuaded that the post-merger entity does present the risk of “imposing a ssnip,” meaning increasing prices by 10% as a monopolist.
	+ But SSNIP is normally used for market definition rather than assessing likely harms.
	+ And if SSNIP really is compelling then perhaps that suggests a product market, the absence of which compelled the court to reject the PNB presumption!
	+ IN addition, market definition is not necessary for unilateral effects claim.

H&R Block continued…

* Coordinated effects:
	+ PNB presumption: gov’t had established based on high HHI, and **defendant failed to rebut**.
	+ Barriers to entry: one of the prime factors which can serve to rebut PNB presumption worked against D because reputation and strong brand name kept competitors from and entrants from challenging the major players.
		- An unusual significance to reputation makes sense in this market because people are careful about who they trust their taxes with.
	+ Theory of harm: given vulnerability of market to coordinated effects, the court found that the merger decreased the likelihood of a “race to free” software, in which competitors decreased price until they attracted consumers by providing free software. In doing so they gave credence to the facts that:
		- **History of collusion**: H&R and Intuit had previously coordinated lobbying efforts.
		- **Maverick firm**: TaxAct (the target firm) had shaken things up by offering free software, with paid upgrades, a model that competitors subsequently had to match, presenting a greater danger to competition in the elimination of a firm more willing to break from prevailing norms of the oligopoly.
* **Unilateral effects**: court also found unilateral effects likely since this was elimination of “head to head” competitors.
	+ Market definition: D attempted to recharacterize submarkets as premium vs. bargain, with the merging parties in separate ones.
	+ Court found that even if Intuit was H&R’s closest competitor, there was still potential for unilateral effects based in part on diversion rate of 14% from H&R to TaxAct and 12% inverse.

4) Mergers Eliminating Important Potential Competitors

Marine Bancorporation (1974):

* Facts:
	+ Marine Bancorp was #2 bank in Washington, but did not operate in Spokane.
	+ WTB (target bank) was #3 of 3 oligopolists in Spokane market.
* Government proffered two potential competition theories under section 7:
	+ **Actual entry effect**: but for the merger, outside firm would have entered the market.
		- **Two essential preconditions** to claim:
			* Feasible alternative means of entering the market (financial capability, incentive, government permission) AND
			* Those means offer a “**substantial likelihood** of ultimately producing a deconcentration of that market or other significant procompetitive effects.”
		- Here, the state law limits de novo entry of banks to acquisitions of current banks, and none of the alternative target banks present a “substantial likelihood” of procompetitive effects.
		- **Viable theory?** Because the gov’t failed to make out the claim, the Court never reaches the question of whether the Clayton act extends past market harm (since the merger does not increase concentration) to the **preservation of mere opportunities to improve the market.**
	+ **Perceived Potential Entry or “Wings Effect:”** the perception of the outside firm as a potential competitor effectively puts competitive pressure on the market, which is eliminated when perceived competitor merges with the actual competitor.
		- Not sure what’s required (presumably need feasibility and substantial likelihood)
		- Here, the Court rules that because there are regulatory barriers to entry, competitors would surely act with an awareness of those barriers, and would not perceive a threat of entry sufficient to provide meaningful competitive pressure.

c. Non-Horizontal Mergers

1) Vertical Mergers

Vertical mergers: mergers in the buyer-supplier line.

* The DOJ will look at vertical mergers on fear that they will hurt competition by preferring themselves, but they do so reluctantly because efficiencies are likely to be high.
* Harms:
	+ **Dual entry barriers**: Vertical mergers can raise barriers to entry if prospective entrants must now enter both markets (buyer-seller) simultaneously.
	+ **Foreclosure effects**: foreclose access of competitors to scarce inputs or outputs.
		- Avant! FTC investigation closure opinion articulates this fear.
	+ Induce collusion

Avant! (FTC closing statement on investigation of merger 2002):

* Synopsis, a dominant company in the “front end” compute chip design market, acquires Avant!, a company with 40% share of “back end” computer chip design market.
	+ Product change: Fear of foreclosure effects was that synopsis would make it more difficult for competing back end tools to communicate with its own tools.
* FTC did not seek preliminary injunction, but maintained investigation to determine whether post-merger remedy would be needed.
* **Foreclosure effects**: monopolist firm deals with itself on a favored basis, to the exclusion of downstream competitors.
	+ Admits that Chicago analysis has disfavored findings of AT harm in vertical mergers: even if monopolist can extend the reach of its monopoly leverage to intermediate market, the ultimate total price of the downstream product constrains them to a single monopoly profit, whether they reap it through supracompetitive prices at the wholesale or retail level.
		- Any supracompetitive profits they reap at the retail level by virtue of their decreased costs resulting from favorable dealing at the wholesale level, unavoidably comes out of supracompetitive revenue foregone at the wholesale level because in the absence of their retail presence, they would have sold to a 3rd party retailer at the supracompetitive price, rather than the favorable price.
	+ But requiring potential market entrants to enter two markets simultaneously erects barriers to entry.
	+ And if wholesale monopolist’s presence in the retail market so damages retail competitors that they can no longer sustain the increased output that would be necessary to discipline a supracompetitive retail market price increase, then it can fairly be said that the monopolist has harmed retail market competition.
	+ But he admits that procompetitive efficiencies can be great in vertical mergers, and that the analysis is complex, though ultimately concludes it is least disruptive take action at the merger stage, so there’s an imperative to do so.
	+ Here, the fact that the post-merger entity had no incentive or intention to adopt a foreclosure strategy, there was no need to conduct full inquiry.

Ticketmaster – Live Nation (2010):

* Ticketmaster (80% of ticketing at major concert venues) merger with Live Nation (ran 75% of live entertainment venues and a big customer of ticketmaster).
* Although they were not competitors, the merger increased their clout with the concert-goers, the real downstream consumers (and also increased their clout to sign exclusivity contracts with particular artists and monopolize the markets for those artists, further squeezing concertgoers)
* Remedies:
	+ Must license their software to competing promotion company to deliver service of equal quality to consumers.
	+ Must divest of this other ticketing company they own.
	+ Non-retaliation: can’t retaliate against venues that use other services sometimes (hard to police).
	+ Anti-bundling provision.

2) Conglomerate Mergers: mergers between firms that are neither competitors nor buyer-suppliers.

GE/Honeywell:

* US allowed merger, EU blocked out of fear that GE would bundle its products predatorily and push out competitors, subsequently recouping monopoly profits.

V. Collaborations Among Competitors Other than Cartels------------------

A. Introduction---------------------------------------------------------------------------------

Remember, our cartel chapter ended with some cases that were deemed not per se illegal, and thus were sent on for rule of reason analysis.

* Recall NSPE, Maricopa, superior court trial lawyers, for close calls that were nevertheless treated as per se violations.

B. Contemporary Cases, Touchstones for Analysis---------------------------------------

Integration spectrum:

* Fox puts these cases on a spectrum of integration, from loose knit cartels to mergers, with **courts presuming greater efficiencies as integration increases**.
* Cartel - SCTLs, IFD, Cal Dental, Rothery, BMI, Credit Suisse, admob/google – Merger

Indiana Federation of Dentists (1986):

* Facts: Dentists in Indiana (high portions of submarkets) form “union”-type organization in order to collectively boycott insurance companies’ demands for x-rays in order to independently determine whether the advised procedure is necessary, forcing the insurance companies to resort to more expensive methods.
	+ Attempted to justify on the grounds that dentists need **independence of judgment as to patients’ dental needs**, and if insurance companies want to make these determinations they can do so by coming into the office and making a more nuanced attempt at doing so (xrays not sufficient information).
* Not per se: FTC did not claim that behavior was per se anticompetitive because they wanted to fully investigate, though a private plaintiff might have claimed per se illegality on these facts.
* Court goes through only a “**quick look**” analysis, and **declares conduct illegal**.
* IFD arguments:
	+ Restraint not sufficiently naked and FTC did not prove market power
	+ Did not prove price effect
	+ Should have considered non-competitive quality of care
* Harm?
	+ FTC did not prove effect on price or output
	+ But harm is cognizable independently: **depriving consumers of information** they desire, no matter its perceived value, **interferes with consumer sovereignty**; it is not the prerogative of the dentists to supplant the consumer’s perception of the value of the xray information with their own, because competition between insurance companies will punish those who use uninformative information.
* Sufficiently naked in the absence of proof of price effect?
	+ Supreme Court determined that there was **sufficient evidence for FTC to shift burden of justification to defendant**
	+ It’s a **restraint of trade** (jointly deprive consumers of desired information) **without countervailing consideration** that goes to show procompetitive benefits (under Society of professional Engineers, no weight given to paternalistic protections of consumers on “quality of care” argument).
* Notice: it’s a quick look analysis so they don’t completely ignore market definition/power, but they give it only a brief run through.

Cal Dental (1999):

* California Dental Association had certain rules prohibiting/regulating advertisement of across-the-board discounts (10% off for students!), general price levels, quality of service.
* FTC and lower court found per se violations for prohibition on price advertisements, and quick look violation on others.
* **Continuum of analyses**: Court describes the distinctions between per se, quick look and rule of reason analyses as gradated, placing them on a continuum and noting that significant market inquiry may be required even to arrive, ultimately, at a per se violation.
* Court **remand for full rule of reason analysis**:
	+ The restraints could be justified as **procompetitive ban on puffery** meant to address **special danger of coercive advertisement in professional services given informational disadvantage of consumers** (unable to gauge quality of product due to specialized knowledge).
* **After Cal Dental**, there is a much narrower view of the per se rule, allowing defendants to bring in arguments about countervailing benefits to consumers to get past per se violation.

Now for a case with an integration interest…

Rothery (1987)

* Defendant Atlas Moving Company requires its agents not to engage in the moving business while they are acting as agents for Atlas (covenant not to compete).
* Is it so baldly anticompetitive that it warrants no more than a quick look analysis?
	+ There is the countervailing concern of the free rider problem.
* Is this loose knit or not?
* **No market power**: Bork reasons that if this is not an attempt at restricting output, then it must be an attempt to make competition more effective.
	+ This cannot be an attempt to restrict market output because 6% market share in a national market is insufficient clout to effectuate such a consumer squeeze.
	+ Bork states that this lack of market power should alone be sufficient to dismiss the case.
* **Free rider issue**:
	+ Without the ability to restrict the use of the Atlas name, infrastructure and training, Atlas would fail to reap the profits of such investment because independent agents would simply use it for their own business without incurring costs of such investment, so such investments would not be made in the future.
	+ This fully explains behavior in view of lack of market power.
* Note: if there’s a pretty obviously anticompetitive restraint, justified by virtue of a free rider problem, then you may have to ask whether there is **less anti-competitive method for remedying free rider problem** (**though** **you do not get to supplant business judgment** here)

BMI (1979):

* **Majority** had found that behavior was not per se anticompetitive, and remanded for rule of reason analysis.
* **Stevens** agreed with the holding, but thought they should have run rule of reason analysis right then, which he does himself and finds anticompetitive result
	+ The blanket all or nothing license is what Stevens takes issue with.
	+ He is unpersuaded by D’s argument that case-by-case licensings would be cost prohibitively inefficient because to the extent there are extra costs to that format, BMI can adjust the price to reflect them and **let the consumer** choose whether or not it’s worth it.
* **On remand**: found it not an unreasonable restraint of trade because composers reserved right to deal directly with networks in theory, presenting alternative to BMI/ASCAP).
* Other courts basically thought this policy with within the purview of business judgment.
* **Today, this would never be plead as illegal per se because there was significant integration**.

Joint Ventures:

* Can sometimes be so integrative as to resemble mergers, in which case you conduct something like a merger analysis.
* Remember from Dahger, great deference given to efficiencies of joint ventures.

Credit Suisse: 2007 Stevens Concurrence

* Underwriters cooperate in IPO including “laddering” the sales of stock in order to stabilize market by spreading risk of overvaluation.
* Majority found that securities laws preempted antitrust laws.
* Stevens dismissed antitrust complaint on the grounds that it was reasonable under rule of reason to cooperate in order to **increase output** by spreading risk of volatility **without ultimately affecting price** of stock.

Google/admob: supposing it were a joint venture… just for laughs!

* Facts of joint venture:
	+ Share on mobile advertising and agree not to compete in that market only
	+ Indefinite term but cancellable by either party on 6 months notice
* In so called “new market” industries, the FTC notes that they give weight to the likelihood that the market is so dynamic that competitors much more likely to enter.
* Unique questions provoked by agreements between competitors with this level of integration:
	+ Do the terms of the agreement include any unreasonable ancillary covenants?
	+ Does the JV tend to facilitate cartel-like behavior between parents in other markets?
	+ Selective merger: joint ventures can add competition to one market, without eliminating competition in any other markets to a greater degree than across-the-board mergers.
	+ In addition, they are easier to unwind than mergers because they are less permanent.

C. Loose Knit Agreements--------------------------------------------------------------------

1. Concerted Refusals to Deal with Outsiders

* One helpful way to think about agreements in restraint of trade in this context is as **ranging from exploitative to merely exclusionary**, the latter directly affecting only competitors, and violative only to the extent it tends to consequently harm competition/consumers, then becoming exploitative.
* **Per se rule? If it’s a FOGA-style cartel then maybe, but courts have shown significant reluctance to find per se violation.**

The penumbra of FOGA:

* Notable aspects:
	+ That was a **naked boycott** of market participants who sold copied designs.
	+ **Per se illega**l because it’s basically a cartel or in support of a cartel.
	+ You **don’t have to look to effect because the effect is almost always harm to competition**.
* Post-Foga treatment of refusals to deal:
	+ The law has since demonstrated some reluctance to find per se violation by virtue of naked boycott fact pattern, instead opting for a more nuanced rule of reason analysis.

Northwest Wholesale Stationers (1985): Outdated

* Plaintiff “dual distributor” (wholesaler-retailer) cut off from co-op of stationary retailers without notice, which P alleged amounted to a per se illegal naked boycott.
* The court names some traditional characteristics of naked boycotts: defined by their indication of a likelihood of resulting in “**predominantly anticompetitive effects**.”
	+ “Either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.”
	+ **Market power**:
		- Can be manifested in unique access to “**vital element” of competition** **practically necessary** to harm the plaintiff’s ability to compete.
			* Resembles essential facilities, which does not get much sympathy in today’s AT world.
		- Here, the market was very “**fragmented**” in that there were a large number of retailers not involved in the co-op.
	+ **No plausible procompetitive justifications**: The absence of arguments for countervailing procompetitive efficiencies normally required for per se violation as well.
* Suit dismissed: with no plausible showing of market power or unique access to a business element necessary for effective competition, we can dismiss the suit without reaching procompetitive justifications
	+ Without market power, restraints of trade will simply be punished by the market, so we don’t need to worry.
	+ The “unique access to necessary business element” aspect would not be as relevant today.
* This **case would not even have been brought today** because it relied on a **now-defunct precedent**: the “**vital element**” shit.

Visa/Mastercard (2d Cir. 2003):

* Background:
	+ Visa and Mastercard (75% of payment card market) compete to get banks to serve as the “issuers” of their cards.
	+ Both are joint ventures owned by consortiums of the banks who serve as their customers.
	+ Discover and AMEX serve as their own issuers, but want to expand to banks as issuers as well in order to increase market share.
* **Exclusionary conduct**: Discover and AMEX were prevented from expanding into bank-as-issuer area because the banks’ agreements with VISA and Mastercard disallow them from issuing any card that serves as its own issuer (clearly targeted at Discover/Mastercard).
* Market definition: Agreement not illegal per se today, so we must do rule of reason analysis, the first step of which is market definition:
	+ Court determines market is that for “network services” to the banks, rather than downstream consumers.
* Market power:
	+ Joint and separate market power for Visa and Mastercard (whatever that means)
	+ **Undisciplined price increase**: No defection from Visa and Mastercard despite price increases because of consumer preference.
		- Notice: monopoly pricing effectuated through joint venture.
	+ **Inferred from high market share in highly concentrated market**: notice this inference premised on combination of Visa and Mastercard’s market share, since they were party to the agreement in restraint of competition so it wouldn’t make sense to give weight to competition between them.
	+ Also, **evidence of ability to exclude AMEX**: they couldn’t convince a single bank to defect despite multiple attempts.
		- But could this not simply suggest lower quality? Perhaps viewed in light of other evidence it looks more like anticompetitive barriers to entry.
* Harms to competition:
	+ Internationally, AMEX and Visa/Mastercard do have to compete, and the latter have reacted by offering better prices and premium card options.
	+ Accordingly, the court finds no error in concluding that **innovation has been stunted by harm to competition** arising out of exclusionary provisions.
* Defendants’ arguments:
	+ Harm to competition is actually just harm to competitors:
		- **Right of refusal to deal**: They argue that they have **only shut off one network of distribution, the bank-as-issuer system**, and they shouldn’t have to open up their distribution network to competitors because there’s no duty to deal.
		- They analogize to Coke excluding Pepsi from using its trucking network to distribute.
		- Court rejects this argument because it conceives of Visa and Mastercard as a single entity, when in reality both are joint ventures owned by consortiums of banks, effectively imposing a restrictive contract term on themselves, which they determine is in their mutual interest, providing there’s disciplined adherence amongst otherwise competing banks, **amounting to a horizontal restraint between the banks**.
	+ Procompetitive benefits:
		- Necessary to “promote cohesion” in a way that promotes competition.
		- Court rejects citing success of international alternative.

2. Competitors’ Exchanges of Information

**A mere instrument of AT harm**: Exchanges of information between competitors are subject to antitrust scrutiny because they **may indicate a cartel**, may **make a market ripe for cartelization**, or otherwise **facilitate parallel action**, all of which can harm consumers.

* Because the exchange of information is not direct evidence of consumer harm, but requires inference of other circumstances, AT violations based on information exchange is **very fact dependent**.
* This is particularly true because exchange of information also **facilitates healthier competition**, presenting a **strong pro-competitive counter-narrative**.
* **Parallel action**: perfect pricing information in a highly concentrated market with high barriers to entry and relatively inelastic demand can empower those competitors to raises prices, without having to agree in a cartel sense, but with just as much freedom from the competitive forces.

**Rules of thumb** –

* 1. information exchanges are fine as long as:
		1. compiled and distributed through an **independent third party**;
		2. **In aggregate form only**, so competitors cannot deconstruct and identify specific competitor information; and
		3. information should be **past information only**
	2. if your industry is fragmented, and you meet the three prongs, then there’s no problem
		1. **but if your industry is highly concentrated with high barriers**, and there are within that market incentives for firms to act in the same way – info exchange itself has a good chance of causing prices to go up
			1. this is exactly the kind of structure that leads to coordinated effects
			2. transparency under these conditions will likely lead to price increases

American Column and Lumber (1921): Outdated

* “open competition plan” between competing lumber companies involved the weekly reporting of output, rates and other price-cost information.
	+ **Price-cost information is the most sensitive**, especially future price-cost information because it enables coordinated pricing behavior.
* **Transparency**: Stated goal of was to make competition “open and above board:”
	+ Transparency **can be good in a fragmented market** with low barriers to entry in that it facilitates competition
	+ **Can be bad in oligopolistic market** in that it facilitates coordinated pricing
* **Semblance of a cartel**: There is ample evidence that competitors were **using transparency to discourage overproduction** (ie reduce output) and thinly veiled **threats towards those who break from tacit agreement** to restrict output **suggested cartel-like behavior** (discipline of those who broke from cartel).
	+ The focus on the intentions here reflects the DOJ’s interest in conspiratorial cartels, rather than mere interdependence.
* Today: This **would probably not even survive a Twombly motion** today on the evidence presented because the usual factors such as barriers to entry and system of discipline were not presented.
	+ Though it is rather suspicious that they would share this hyper-sensitive information absent an intention to collaborate.

Maple Flooring (1925):

* Only past pricing information was shared.
* In addition they shared freight rates.
* And average, not competitor-specific, cost information.
* Market was very fragmented.
* Court allowed info-sharing.

Container (1969):

* Competitors in container industry had **custom of calling one another to get information on prices in specific sales**, termed an “agreement” by virtue of “**expected reciprocity**” of information-sharing.
	+ Finding an **agreement is essential for** Sherman act **section 1 claims**, and in this context **more nebulous understandings are sufficient**.
* **Qualified Per Se Illegality**: **Demand is inelastic** and **market is oligopolistic** (according to Justice Douglas, but perhaps not by modern standards), creating **a sufficiently large risk that the sharing of price information will result in anticompetitive harm** to find is illegal per se, **even without evidence of effect.**
* **Controlling circumstance exception**: there was one case in which the court allowed otherwise illegal price sharing because it was **necessary to police fraud** by buyers.
	+ This is **not a feasible defense usually** though because there has to be a less anticompetitive way to get this information (like calling the police or something).
* This case also basically eliminates any per se rule in this area (how so?).

Gypsum (1978):

* Facts:
	+ Seller thinks that buyers are lying to them in describing their alternative price options with competitors.
	+ They argued that they needed to call their competitors before agreeing to meet or beat that low price while still complying with the Robinson-Patman act bar against price discrimination between buyers by ensuring they qualify for exception for meeting/beating alternative prices
* **No controlling circumstance exception**: Of course, they could have just lowered their prices to that level for all buyers to comply with the act without potentially anticompetitive information sharing.
	+ **Less anticompetitive solution**.
* **Criminal intent?** There was criminal conviction, which the court overturns because the trial court instructed the jury that intent to anticompetitive effect may be “presumed” from intent to engage in acts the necessary consequences of which are anticompetitive, which is in error in the criminal context because a “presumption” does not imply proof beyond a reasonable doubt, which creates a strict liability regime with respect to the mens rea element of the offense (**remember, intent not required in civil context**).
* **Psychology of information sharing**: Court is skeptical it ever works procompetitively
	+ Does voluntary price sharing ever work for competition-promoting purposes? Probably not since competitors would prefer to lie absent an independent interest in telling the truth.
	+ The **only rational incentive for sharing pricing information is to facilitate price fixing**, so **interseller price verification is generally found unlawful**.

Todd v. Exxon (2d Cir. 2001; Sotomayor opinion):

* Facts: Oil companies got together to share detailed information on what they were paying certain senior technical and marketing employees.
* Market definition:
	+ Market is **oligopsony of buyers in labor market** **for high-level oil industry jobs.**
	+ Market is defined this way because employees’ skills are sufficiently specialized that they **would have to take a significant pay cut** to shift to employers outside the oil industry, so market there is **no reasonable interchangeability with jobs outside of the oil companies**.
* The salary (price) information was **current and future**, allowing companies to negotiate salaries with knowledge of employees’ available alternatives
	+ It’s relevant that the employees were not also given this information, but not dispositive if availability to employees would not have mitigated tendency to squeeze salaries.
	+ **Explicit conspiracy?** The **current/future nature of price info created a likelihood that it would push salaries down**, **whether or not there was an actual conspiracy** (though one suspects there may have been) so it’s a violation.

3. Agreements of Competitors to Restrain their Own Competition-------------------

a. Professional Restraints and By-Laws: did this else ware so it’s really just background here.

b. Brown/MIT

US v. Brown (3d Cir. 1993):

* Facts: The Ivies and MIT agree not to compete via financial aid for students who have been accepted by multiple institutions in an attempt to move to a need-based aid model in order to expand access to higher education.
* Public interest defense? No dice (explicitly anyway), but **not per se illegal**
	+ The court distinguishes from superior court trial lawyers on the grounds that the attys in that case **stood to gain financially** from what could also be construed as a public interest, whereas here there is no financial interest to sully the public interest.
	+ For this reason, they **do not find per se violation**, but go to full rule of reason analysis.
* Competition on price:
	+ It used to be that the most intense price competition was in the fin aid area, especially with regard to minority students.
	+ So is this elimination a harm to competition?
		- Surely to those consumers who would otherwise receive competitive financial aid offers.
		- **Information-sharing harm**: the process of coordinating this agreement required intense information sharing, presenting a danger of cartel-like price increases, as corroborated by the similarity in tuitions and fast-paced increases in tuition.
* D argued for educational immunity from AT laws: Rejected!
	+ We’re non-profit
	+ The cost of education is actually mush higher than tuition, the rest being made up by donors
	+ Going along with this, the agreement was an attempt to reallocate this pool of money (tuition plus donations) in a more accessible/equitable way
	+ For these reasons, it doesn’t make sense to analyze education under normal market assumptions.
	+ **Court rejects immunity argument**.
* Output limitation?
	+ The same number of students will come to these colleges no matter what, so there’s no output limitation, which mitigates the anticompetitive harm and perhaps makes the court more open to the procompetition arguments, weak as they are.
* Procompetitive benefits: Rejected!
	+ Improved quality of product: Quality of education will increase with diversity in student body, resulting from greater accessibility.
	+ Increase consumer choice: Presenting students with relatively equal cost propositions increases consumer choice (rather than selection of the students by the universities by virtue of financial aid decisions), and **encourages competition between schools on non-price variables**.
	+ **You can’t choose your areas of competition**: Court rejected these arguments because **you can’t justify a restraint of one type of competition on the grounds that it will free up capital for other types of competition**.
	+ Fox thinks this shouldn’t have even gotten them to rule of reason because they’re ultimately social justifications, merely masked as procompetitive justifications.
* After the case: consent decree (details in note).
* **Public interest in the back door?** Between this case and Cal Dental, it appears that courts are willing to hear defenses that are not truly pro-competitive, but characterize them as such in order to allow public interest arguments.

c. Real Estate Brokers’ multi-list services and restrictions on web discount listings

 RealComp II, Ltd. V. FTC (6th Cir. 2011):

* Facts:
	+ Policy of real estate listing website maintained by brokers association excludes listings of “limited services” brokers, except under certain conditions, who would otherwise put downward pricing pressure on “full service brokers” who effectively bundle their services through this restraint.
	+ Findings showed that the policy only limited consumer access to limited services listing for 10% of consumers in the market.
* **Per se illegal?** Court refrains from reaching the question of whether the case bore sufficiently close family resemblance to past inherently anticompetitive practices to call it per se illegal, instead affirming on rule of reason grounds.
* **Market definition**: Southeast Michigan Real Estate Brokerage Services
	+ Geographic market: natural geographic limitations of housing market limit it to southeastern Michigan (you won’t commute from Cleveland because housing prices are five percent higher in Michigan).
	+ Product market: brokerage services provide such significant advantages to home sellers that there is no reasonably interchangeable alternative.
* **Market Power**:
	+ **Network effects**: Because the value of real estate listing services increases with the number of participants, the court notes uniquely high barriers to entry.
	+ D has market power in the market for multiple listing services, which is a vital input to the market for brokerage services, establishing market power in both.
* **Potential adverse effects**: ie indirect evidence of anticompetitive effect
	+ Although the services only limited exposure to limited services broker listings to 10% of consumers, this **restraint on the *maximal dissemination* of price-pressuring informatio**n can result in legally cognizable anticompetitive harms.
		- The court analogizes the Indiana Federation of Dentist’s effort to limit information available to consumers.
	+ **Nascent threats**: This is especially compelling in the exclusion of nascent threats, such as those presented by the internet, because they have the potential to emerge as options of much greater competitive significance (Microsoft).
* **Actual adverse effects:** ie direct evidence of anticompetitive effect
	+ There were several studies showing that website policy puts limited services brokers at a competitive disadvantage.
	+ Even if this isn’t conclusive, the indirect evidence is sufficient in its own right.
* Procompetitive Justifications:
	+ Free-rider justification:
		- D argues that without the policy limitations, limited services brokers would free ride off the dues of full service brokers which go to pay for the maintenance of the website.
		- Court rejects this on the grounds that the limited services brokers would still pay a fee for the right to list, contributing their share.
		- D rebuts that they still free ride in that they do not compensate the D for the other services it provides.
		- But the limited services brokers don’t want those services, and it’s exactly this unbundling of services which pushes their price point downward.
	+ Eliminates bidding disadvantage:
		- D argues that excluding the limited services brokers eliminates a bidding disadvantage that results from the higher commissions of the full services brokers in that their customers receive less for a bid of the same price on the selling side, or must pay more to make a bid of the same price on the buying side.
		- Court responds that this is true, and it’s the whole point of price pressure.

4. Intellectual Property

a. Introduction

The tone of antitrust restrictions on IP licensing has shifted dramatically from very restrictive tension between AT and IP, to a view of the two as **complementary doctrines** in that they both seek to incentivize creation/innovation.

* This has led to much more permissive AT treatment of IP licensing.

b. Licensing and Cross-Licensing of Intellectual Property; Pooling of Patents

Grant-back provisions:

* Company licenses IP right with condition that any innovations made on the basis of the licensed technology must be granted back to the licensor.
* **Exclusive grant-back**: only the licensor can use innovations, which drastically mitigates desire to innovate, **violating AT laws**.
* **Non-exclusive grant-back**:
	+ still mitigates incentives to innovate by depriving licensee of IP exclusivity (which itself is intended to spur innovation), though they can at least use it themselves,
	+ and courts have generally found that because the availability of grant-back provisions increase the incentive to license IP in the first instance, there is a sufficiently procompetitive benefit to justify the marginal reduction in innovation incentives. **Generally allowable under AT**.

Pooling/cross-licensing:

* Procompetitive benefits:
	+ Integration of complementary technologies
	+ Facilitation of interoperability
	+ Reducing transaction costs of individual licensing negotiations
	+ Avoiding litigation
		- **Substitute technologies**: All of these benefits less obvious when two substitute technologies are both included in pool because this looks more like the elimination of competition.
* Anticompetitive risks:
	+ Coordinated IP sales may amount to price fixing (NCAA)
	+ Exclusionary effects:
		- May raise barriers to entry by closing off potential entrants to essential IP
		- May serve as disciplinary mechanism for oligopolists to punish maverick firms by denying them, or increasing the cost of, access to essential IP.
		- In the case of exclusion from the pool, courts will look at whether the exclusion is **reasonably related to the efficient development and exploitation of the pooled IP**.
	+ Deter innovation: if competitors know that any technology they develop must be licensed to their competitor at a low cost, then they have effectively eliminated the innovation incentives that IP protections were meant to provide.

c. Standard-Setting and FRAND Obligations: Avoiding Patent Ambush

Standard-setting:

* **Presumptively procompetitive**: Often necessary for industries to operate (interoperability is essential to the efficiencies of markets)
* SSO or SDO (standard-setting organizations): competitors will form these to meet and set standards.
* Anticompetitive risks:
	+ **Price-fixing**: Buyers colluding to depress licensing prices across the market via restraint of competition and
	+ The **information-sharing between competitors** concern looms in all these standard-setting cases.

FRAND (fair, reasonable and non-discrimninatory licensing):

* Frand obligations are voluntarily adopted by market actors in certain industries and require certain non-discriminatory licensing between members, other obligations… designed to address ambush.
* Rambus: Two possibilities:
1. there was an alternative technology that would have been included had they known Rambus would assert its patents and
2. there was no alternative technology, in which case they have the right to charge supracompetitive prices.
	* Is the deception relevant? Perhaps under FTCA bar on “deceptive” practices, but there’s an argument that to the extent there’s a deception problem, litigate it under breach of contract or fraud, rather than AT (though this is cognizable in EU).

Essential facilities?

* Mere refusal to license a patent has yet to be challenged on AT grounds on an essential facilities theory.
* This would be unlikely to succeed.

Hatch-Waxman reverse payment settlements:

* Hatch-waxman act meant to expedite the introduction of generics.
* The fear is that the patent is void or the claim is void, but neither party has an incentive to litigate these issues because the generic is perfectly happy to be paid off from entering the market on legally uncertain and expensive terms.

Cipro:

* Basically, **courts will not second-guess the validity of patents/patent claims if the parties have settled**, in spite of perverse incentives.
	+ Don’t want to encourage unnecessary litigation.
* Other courts have been less deferential.
* FTC has legislation in front of Congress to eliminate this problem.

D. More Integration: Joint Buying, Selling, Marketing, and Researching - Sharing Risks and Savings Costs, or Getting Market Power?-----------------------------------

1. Introduction

Remember, sometimes when assessing antitrust problems of tight-knit agreements, we attack the cooperation itself, while other times we attack only specific ancillary provisions.

2. Health Care-Agency guidance

Med South (FTC advisory opinion 2002):

* Pre-guidelines advisory opinion on proposed Affordable Care organization in south Denver
* Facts:
	+ Significant portion of doctors in market (south Denver) want to integrate under ACO to save administrative costs, provide reliable reference network (clinical integration), share patient data, jointly negotiate with insurers to set prices.
	+ One suspects that they want to jointly negotiate with insurers in order to have the clout to raise prices, rather than lower prices, their purported goal.
* **Joint negotiation of price?** Unclear whether or not they are sharing here, but that **would tend to cut against them** unless it’s really reasonably necessary to integrative efficiencies.
* **Exclusivity**: here, the doctors are **not exclusive to medsouth, which works in their favor**. (this is important to FTC in the guidelines).
	+ But is it realistic that the doctors would go outside the group for a lower price?
	+ Perhaps if prices are so high that they don’t get sufficient customers, but it’s not a perfect market remedy because of the insurance companies’ intervention.
* **Ancillary agreement**: “an agreement is ancillary to a competitor collaboration to the extent that it is **subordinate to and reasonably necessary to accomplish the goals of the integration**, unless the parties could have achieved similar efficiencies by practical, significantly less restrictive means.”
	+ And of course, the procompetitive benefits of the integration must outweigh the restrictive problems of the ancillary agreement.

ACO Guidelines:

* Rule of reason rather than per se illegal for qualifying ACO’s:
* Joint price agreements among competing health care providers are evaluated under the rule of reason, however, if the providers are financially or clinically integrated and the agreement is reasonably necessary to accomplish the procompetitive benefits of the integration.
	+ Financial risk-sharing risk sharing is key because it incentivizes institutional efficiency.
* The Affordable Care Act provides that CMS may approve ACOs that meet certain eligibility criteria, including
1. a formal legal structure that allows the ACO to receive and distribute payments for shared savings;
2. a leadership and management structure that includes clinical and administrative processes;
3. processes to promote evidence- based medicine and patient engagement;
4. reporting on quality and cost measures; and
5. coordinated care for beneficiaries.
* **Safety Zone**: Agencies will not pursue AT action against qualifying ACOs
	+ Combined market share of 30% or less for each market in which the ACO offers services (each specialty will have its own market).
		- Hospitals MUST be non-exclusive to the ACO.
		- Physicians can be exclusive or non-exclusive.
	+ **Rural Exception**: ACOs can avoid counting doctors in their 30% market share calculation if they are in a statutorily defined rural market and belong to the ACO on a non-exclusive basis.
	+ **Dominant participant cure**: for ACO that has > 50% market share in any market in which no other ACO provides that service, that ACO participant MUST be non-exclusive.
* For ACOs outside the safety zone, conduct to avoid:
	+ Improper sharing of competitively sensitive information
	+ Require or incentivize exclusivity.

E. Tighter Alliances and Tight Joint Ventures---------------------------------------------

1. Texaco/Shell Oil

Shell/Texaco Settlement:

* Interesting vertical aspect to merger: shell is also one of two asphalt producers in a market, both of whom buy the heavy crude used to manufacture asphalt from Texaco, leading to the risk that Tecaco would increase its prices to Huntway, increasing the overall asphalt price and allowing shell to reap supracompetitive profits on asphalt and shell to reap supracompeitive profits on crude oil (wasn’t the latter already a risk?).
	+ So Texaco enters commission-approved, ten-year supply agreement with Shell’s asphalt competitor.
	+ This is a **behavioral remedy**.
* Behavioral remedies: they are increasingly common, but there is skepticism that they will ever be effective because strong and ongoing economic incentives to circumvent the remedy increase risk of failure, and such risk should be calculated into the anticompetitive-procompetitive cost/benefit analysis.

2. Microsoft Corporation and Yahoo – DOJ Closing Statement

Microsoft/Yahoo Partnership (DOJ closing statement):

* Concludes that competition will be improved because:
	+ Both currently compete against google, rather than against each other.
	+ Economies of scale are uniquely important in the field because algorithms can build data base with accelerating velocity with as query history compounds, allowing the post-merger entity to more effectively compete with google.

3. Boeing/Lockheed Martin – United Launch Alliance

Boeing/Lockheed Martin – United Launch Alliance:

* The only two competitors in the military launch services market (awesome) permitted to merge under consent decree.
* This is merely a comment on the consent decree, but is not legally binding.
* The FTC gives great deference to the opinion of the department of defense because they are the sole consumer, and presumably have a good sense of their own welfare.
* Two possible justifications:
	+ There is no consumer harm.
	+ Defense is an exception to the ban on public interest justifications.
* Since you’re creating a monopoly, how can you say there are pro competitive benefits? You’re eliminating competition completely.

VI. Vertical Restraints----------------------------------------------------------

1. Formative Law: Resale Price Maintenance-------------------------------------------

a. The Basic Rule for the first century: Dr. Miles

Dr. Miles (1911)(overruled by Leegin):

* Sophisticated resale price maintenance scheme.
* Courts found agreement to be per se illegal.
	+ Producer has limited right to “restrict the alienation of things it no longer owns,” since that would encroach on the rights of the retailer.
	+ It allows retail-competitors to reap supracompatitive profits via the elimination of price competition between one another.

b. The Legislative Response: Fair Trade; The limits of state action protection

Fair trading Laws: ill-fated experiment

* In the wake of Dr. Miles, many states enacted statutes to allow vertical resale price restrictions.
* Some of them included allowance for “nonsigner” provisions, which extends applicability of RPM agreements to, with fair notice, even those retailers who did not sign agreement.
* Question as to federal preemption.
* Congress passed Miller-Tydings act, allowing RPMs but silent as to nonsigner provisions.
* Scwhegmann found nonsigner provision preempted by Sherman act.
* Congress responded with amendment to allow nonsigner provisions.
* Prices went up.
* States started repeal their RPM statutes.
* Then in 1975, Congress repealed both of the above amendments to Sherman act, bringing us back to the law as of Dr. Miles, which left open the question of the state’s power to allow RPM agreements by statute, bringing us to Midcal.

Midcal (1980):

* Facts:
	+ Wine wholesalers required to post price schedule, retailers required to abide under threat of fines for violation.
	+ One wine retailer undercuts, gets taken to court.
* Why is this sort of thing concerning?
	+ Same concern about competitors **sharing price information** from the “agreements among competitors” chapter in that is **facilitates collusion**, in the form of cartelization or otherwise.
	+ Here, the distribution of resale pricing probably facilitated a cartel between producers in that it helped producers to detect cheaters deviating from cartel prices.
		- Indeed, although a retailer is the defendant here, it was probably undercutting pursuant to an attempt of the producer to cheat.
* Parker immunity?
	+ Court sets out two requirements:
1. Clearly articulated and affirmatively expressed policy to replace competition with regulation and
2. State must actively supervise pricing scheme
	* Here, the state had fulfilled 1, but not 2 because the mere sanction of otherwise illegal conduct by private parties does not qualify as state-action.
* 21st amendment issue:
	+ Gives states “virtually complete control” over the distribution of alcohol.
	+ Court recognizes that a state interest in controlling consumption of alcohol, or even protecting small retailers are legitimate, but not strong enough to overcome the national policy in favor of competition.

c. Refusal to Deal and Resale Prices: When is RPM unilateral? When is it undertaken by agreement?

Outer bounds of RPM prohibition:

* Remember, this is under Sherman Act section 1, so it requires a “contract, combination or conspiracy” in order to be violative.
* Case on point is Colgate

Colgate (1919): Unilateral RPM means no “contract, combination or conspiracy”

* Facts:
	+ Colgate announced that it would not sell to retailers who deviated from their listed price, many of whom simply caved.
	+ DOJ sued criminally
* **Court did not find a contract** (despite requests for “assurances and promises” to sell according to listed price, which were given and adhered to) so there was no cognizable section 1 claim.
	+ Many cases turned on just this split hair about when there’s actually a contract.

Park Davis (1960):

* Shifted tone making it much easier to find a contract/combination: “inducing each customer to adhere” to desired price is sufficiently concerted action to constitute a contract/combination.
* After this case, many thought Colgate was dead.

Monsanto (1984):

* Background: at this time, whenever a discounter’s sales agreement with the producer was terminated, they would file suit alleging illegal RPM, many of which were settled as possible nuisance suits, in part because it was so easy to get to the arbitrary justice of a jury.
* 7th cir standard to get to jury required only skeletal allegations to justify jury’s inference of contract/combination:
	+ System of minimum retail prices
	+ Other retailers had complained to producer
	+ Discounter was cut off by producer
* Court overturned for policy reasons:
	+ Free-rider concern: manufacturer might have **legitimate consumer-regarding interest in higher retail price** to subsidize the retailer providing quality service/reputation, which is undermined if low-service/reputation discounters free ride of higher cost retailers’ services.
		- Yet this is philosophically opposed to the Dr. Miles prohibition on RPM in that it recognizes a legitimate interest in exactly that, foreshadowing leegin.
	+ Competitors always complain, so effectively any decision to cut a bitch off could make out a claim, creating a risk that plaintiffs will get to trial without presenting any real evidence to differentiate independent action from illegal coordination.
* “**Something more:”** Court announces that it requires something more to get to jury:
	+ “Evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently.”
	+ “Direct or circumstantial evidence that reasonably tends to prove that the manufacturer and other had ‘a conscious commitment to a common scheme designed to achieve an unlawful objective.”

Leegin Creative Leather Products v. PSKS (2007):

* Many, including the DOJ, wanted to overturn Dr. Miles.
	+ Congress reacted by stating that they intended to maintain Dr. Miles per se illegality in repealing RPM amendments in 1975, and threatened to cut off all DOJ funding if they argued for overturning in Monsanto, so that case was decided on pleading question. But here, Court confronts that question directly.
* Facts: Manufacturer of high quality leather belts cuts off discounter retailers (who had breached agreement to sell at certain price so there was no question of contract/combination), one of whom sues.
	+ One of the false positives of a prophylactic rule: This is an especially good set of facts for overturning Dr. Miles because there does not appear to be any consumer harm because the defendant has no market power, so however exceptional such a case may be, it does make it seem, on the equities, like a per se rule would be draconian in this case.
* **procompetitive justifications**: p. 592-93 (section A):
	+ Primary purpose of AT laws is to protect **interbrand competition**, which is not necessarily threatened by vertical RPM.
	+ Free rider problem: Facilitates the organization of specific services performed by the retailer by guaranteeing a certain profit margin (or protecting it from price competition).
	+ Facilitate market entry for new producers, thereby increasing interbrand competition
		- Prof. Fox admits, this is really just a catalano-type argument, which the court rejected in that case on the logic that the most hardcore cartels could have procompetitive benefits if the Court recognized the attractiveness to potential market entrants of the opportunity to cut into supracompetitive prices.
		- However, the Breyer recognizes in his dissent that to the extent the market entrants themselves need to ensure certain services at the retail level in order to get a foothold, that would be a legit procompetitive benefit of RPM.
	+ Less anticompetitive means? (normative)
		- Fox wonders whether all of the above cannot be accomplished via less anticompetitive means?
		- If true, and if significant risk of anticompetitive effects, then perhaps per se rule is justified.
* **anticompetitive risks**: p. 593-94 (section B):
	+ Risk of facilitating producer cartel
	+ Retailer cartel might bully producer into instituting RPM scheme to exclude their competitors
	+ Dominant producer/retailer, same effects as above.
	+ Fox: what the majority fails to clearly state is that RPM almost always results in price increases. But they do say something in rebuttal, which is that a nominal price increase doesn’t always represent a harm to consumers because it could reflect the delivery of additional services which consumers want.
* Determines that because there’s a balance, vertical RPM cannot be said to “always or almost always tends to restrict competition and decrease output.”
	+ They also feel compelled by the risk of frivolous litigation.
* **Pay attention to where the Court describes rules of thumb for applying the rule of reason here**.
	+ Oligopolistic market conditions, both at the manufacturer level and the retailer level.
	+ Source of restraint: if initiated by retailers, more likely to be an abuse of either a retailer cartel or a dominant retailer.
	+ Market power: with whoever is alleged to be providing impetus for RPM, since otherwise they would be disciplined by the market.

2. Restraints on distributors other than minimal resale pricing – Free Traders to free riders

a. Customer and the territorial restraints and maximum resale price-fixing (earlier law)

b. the turning of the tide

i. Non-price restraints

Schwinn (1967)(overruled by Sylvania):

* Territorial division: Bike manufacturer split up territory between its retailers, disallowing them from treading on one another’s turf and sales to other retailers.
* Court found per se illegal.

Sylvania (1977):

* **Eliminates per se rule against territorial division**.
	+ Here, it they just allowed intraterritorial competition between retailers, but just limited the amount of competition, by limiting the number of retailer franchises in a given market area. Court takes explicit note that this difference is immaterial.
* Policy reasons:
	+ Free rider argument
	+ Promotes investment in building up success of sales in territory
		- Why buy that billboard for Sylvania TVs if your competitor will benefit just as well?
	+ First recognition of the importance of interbrand competition, which is considered very important these days (not inherently undermined by vertical constraints).

ii. Price restraints: Maximum price-fixing

Albrecht: per se illegal to fix maximum prices (overruled by Khan in 1997 (p. 612)):

* Courts had previously worried that maximums would really become minimums, facilitating a cartel.
* But Khan court holds that such intentions are not the dominant reasons for maximum prices, eliminating per se illegality.

Nynex v. Discon (1998): regulatory fraud, cut off competitor

* Facts: Telephone removal services - AT&T came to NYNEX (big incumbent in NY area) – said “I’ll charge you more than DISCON so you can give higher figures to regulator 🡪 allow you to charge higher amt and then we’ll share the extra benefits”
	+ Totally fraudulent deal that basically meant Discon was screwed
* Discon sues: this is conspiracy b/w NYNEX and AT&T to raise price fraudulently
* Issue: Per se illegal price conspiracy (like boycott)?
* Held: SCOTUS said not per se illegal (even though it raised price artificially)
* Reasoning: Invokes *Klor’s* (involved horizontal conspiracy w/ vertical relationships)
	+ Distinguishes from *Klor’s* b/c there’s *no horizontal elements here*
	+ “freedom to switch suppliers” – per se rule would discourage it
* This is really a case of biz impropriety – **treble damages don’t quite fit** (would supplant whatever the appropriate remedy for the harm of regulatory fraud is).

B. Exclusionary Restraints---------------------------------------------------------------

1. Intro

* Clayton act section 3 designed largely to address tying, the perception of which has shifted from hostile to hospitable over time, as we saw in Monopoly.
* Prof. Fox’s terms (of general applicability):
	+ Dynamic concept (old view): market players should not be fenced out of markets; should not be stymied from contesting markets on the merits.
	+ Non-intervention model (new view): Conduct is presumed procompetitive unless it is shown to lessen output, raise prices, and there is no pro-market justification.
* **Section 3: Prohibits practices where the “effect… may be to substantially lessen competition or tend to create a monopoly in any line of commerce.”**
* Analysis (same as in monopoly):
	+ Is there market power?
	+ Why is the restraint imposed? (anticompetitive intent/naked vs. ancillary restraint)
	+ Did the restraint create, enhance or maintain market power?
	+ If so, were there countervailing procompetitive benefits?

2. Tying

* We saw some of this under section 2 of the Sherman act for monopolization, but here it arises under Section 1 and the Clayton act.
* Selling one product (the tying product) on the condition that the buyer buy another product, or providing a discount incentive for doing so (the tied product).
	+ Presumably, the buyer would not purchase the tied product, or do so through the tying seller, in the absence of the tying mechanism, creating a market distortion.
	+ Seller must have market power in the tying product market to leverage with buyer in order to induce the purchase of the tied product.
* Reasons/schemes:
	+ Metering: Monopolist implements price discrimination by charging premium price for tied product, thus charging more for tying product to the largest purchasers.
		- Carvel requiring its franchisees to purchase plastic cups from them at inflated price, effectively collecting a higher franchise fee from those who have the most successful franchises, while allowing those with less successful franchises to pay closer to the initial franchise fee.
		- This way, those most capable of paying high price for franchise subsidize those least capable, actually increasing output.
		- Notice: They’re not collecting on a monopoly on cups, but rather they’re using the cups as a vehicle to reap the supracompetitive profits on their monopoly on franchises.
		- Price discrimination:
			* with direct monopoly pricing, you reach a price point at which some proportion of your consumers simply cannot afford to purchase your product (that triangle on the right).
			* But with price discrimination, you can avoid charging those who would be priced out by the monopolist the preclusive price by targeting increases at those able to pay them, allowing you to reap that whole triangle on the right side of the graph.
	+ Attempt to monopolize tied product market, or expand its sales without having to compete for them.
		- Preempt anticipated tying product competition arising out of “springboard” tied product (Microsoft’s attempts to quash Netscape).
	+ Evade price regulation in tying market by putting premium on tied product.
		- Northern Pacific Railroad.
	+ Protect tying product market monopoly by raising barriers to entry (forcing two-tiered entry into both tying and tied product markets simultaneously)
	+ Compatibility: Tied products work most efficiently and most safely together.

IBM (1936):

* Tabulator machine. IBM tied its tabulator cards to the machines.
* IBM attempted to justify tying on compatibility/quality grounds, but Court found there was insufficient evidence of the necessity that only IBM make the cards because they allowed the government to make their own cards for the tabulator without issue.

International Salt Company (1947):

* Salt-injector machines sold with obligation to buy salt from monopolist, but subject to a **lixator clause**, which allowed buyer to purchase salt from seller at competitive price as long as they present evidence of the competing price to them.
* Possible benefits to International Salt:
	+ Lixator clause may eliminate significant benefits of the tying because it subjects them to market forces on the sale price of the tied product.
	+ But it could allow them to facilitate a cartel by detecting cheating (also interdependence via price information of competitors).
	+ It could just be a way to attract additional business at whatever the competitive price was.
	+ But even this, under an old view at least, might be violative merely in that International Salt gained market share without having to compete for it.

Northern Pacific Railway (1958):

* RR company had been given significant land by the government. After construction of the RR, they sold the land on the condition that goods produced on that land will be shipped with them.
* Harm of tying agreements: They “deny competitors free access to the market for the tied product” not on the merits but “because of power or leverage in another market.”
	+ This appeared to be an attempt to circumvent regulatory barriers to supracompetitive profits on RR monopoly (common carrier price controls on RR shipping) by leveraging land to force additional business.
* Per se illegality:
	+ Market power in tying market
	+ Not insubstantial amount of interstate commerce affected.

Loew’s (1962)(p. 621-22): market power “is presumed when the tying product is patented or copyrighted.”

* Court emphasized the public interest in limiting the IP monopoly to the grant of IP protection itself and nothing more.
* **Overruled in Illinois Tools.**

Fortner Enterprises II (1977):

* US Steel would provide cheap credit with obligation to purchase their pre-fabricated houses.
* Cheap credit was really just a way to incentivize the purchase of their houses (like an effective price decrease to account for lower quality).
* Market power:
	+ No market power in credit
	+ No market power in houses
	+ So nothing to tie to.

3. Tying – Modern Analysis

Qualified per se rule: still exists shakily:

* A not insubstantial dollar amount must be affected
* Must prove market power in tying product market (Illinois Tool)
* Notably, you don’t have to prove anticompetitive effect, which is why the Supreme Court is hostile to it.
* May be able to point to product market exigencies that compel exclusion from per se rule (Microsoft)

Jefferon Parish (1984):

* Facts:
	+ Hospital had exclusive dealing contract with the Roux brothers for all their anesthesiology services.
	+ Dr. Hyde wanted to provide anesthesiologist services at hospital as well, but was excluded via exclusive dealing K.
* Tying claim:
	+ Tying product: hospital services
	+ Tied product: anesthesiologist services
* Exclusive dealing?
	+ This should perhaps be more properly conceived of as an exclusive dealing claim.
	+ But at the time, the per se rule for tying was stronger because you didn’t have to show market harm.
* Elements for tying claim:
	+ Are there two products? Stevens and O’Connor disagreed,
		- Test: whether or not two products are involved “**turns not on the functional relationship between them, but on the character of demand for the two items.**”
		- the fact that anesthesiology services are provided by third parties and even billed independently to the patients distinguishes it from hospital beds, for example.
		- But O’Connor, in her dissent, makes the point that there’s no demand for anesthesiology services independent of hospital services (you don’t go to an anesthesiologist for its own sake), making the product appear more similar to a feature of the hospital services product.
		- But Stevens says the fact that patients do select their anesthesiologists separately suggests it is a separate market.
		- Prof. Fox thinks that O’Connor’s test may gain traction, but the Court is more likely to just overrule the per se rule completely, rendering the point moot.
	+ Market power in tying product:
		- Hospital doesn’t have market power in tying product, hospital services, so the tie is not forced on consumers.

Kodak (1992):

* Facts same as before.
* It was on the record that they were providing inferior service at a higher price.
* Source of exploitation: “switching costs” of overhead investment in alternative machine.
* Remember that we found a second market in the Kodak aftermarket (or rather, that plaintiffs could make this case to a jury).
* Dissent: no market power in aftermarket because aftermarket price abuses would be disciplined by foremarket forces.
* **We don’t learn a lot from this case about the future of the tying per se rule** because the Court basically just let’s the claim stand without commenting on it.

Microsoft: (DC Cir.)(not SCOTUS, but heavily cited):

* Microsoft was not attempting to gain monopoly power over browser market, but attempting to maintain monopoly power over operating system market by erecting additional barrier to entry to browser market (new browsers must find alternative means to get onto computers than packaging with Microsoft OS).
* Separate-products inquiry:
	+ Applies separate demand test from Jefferson Parish, reasoning that consumers will prefer separate choice unless combination presents benefits preferable to choice itself, serving as a prophylactic proxy for consumer harm associated with bundling.
	+ Nascent technologies: But Fox says that the fact that the market is developing so quickly should give us pause to look to the past in determining whether the products are separate, because to hold companies to past distinctions may inhibit innovation given our lack of experience in the market.
		- Court agrees, but is bound by precedent
* Per se analysis innapropriate for this case:
	+ Remanded for rule of reason analysis, which was never tried because administration changed and gov’t dropped case.
	+ Court reasoned that the nascent nature of platform software technologies, and how common integration is in the product market, present a sufficiently great threat of false positives that the per se rule is innapropriate.
	+ A per se rule which, for monopolists, rendered every act of integrative innovation per se illegal, would discourage such firms from such innovation entirely.

Illinois Tool Works (2006):

* Describes transition away from per se rule against tying, explaining that the Jefferson Parish Court established a requirement that plaintiffs show market power in the tying market.
	+ Curiously, Stevens goes out of his way to describe the shift in the Court’s approach to tying, increasingly recognizing procompetitive benefits of tying.
	+ This supererogatory dicta positions the Court to overrule the qualified per se rule for tying.
* Implied market power in patent context:
	+ **Overrules Loews presumption** of market power when tying tool is patented because Congress has since eliminated the presumption in patent misuse cases, from which the presumption was originally derived in the antitrust context.
	+ Rejects proposals for rebuttable presumption of market power, concluding that tying often takes place in competitive markets, even when it involves IP products.
		- There is often no market power in markets that involve patents.

4. Exclusive Dealing and Requirements Contracts

Exclusive dealing and requirements contracts are very similar and usually go hand in hand:

* Buyer will purchase product exclusively from seller.
* Seller will provide all the product that buyer ends up requiring.

Analysis: competitor with mrkt power forecloses plaintiff from significant portion of mrkt

* Where is the market power?
* What is the story that exclusive dealing can increase it?
* Severity of foreclosure (40-50% of mrkt)
* Always consider the procompetitive benefits.

Barry Wright v. ITT Grinell (1st Cir. 1983):

* Facts:
	+ Grinell purchases 50% of “snubbers,” 100% of which are sold by Pacific (regulatory barriers to foreign market entry).
	+ Grinell provides financing to Barry Wright to begin manufacturing snubbers, and enters exclusive dealing agreement.
	+ When Barry fails to meet its production obligations, Grinell exits that K, instead entering requirements-esque K with Pacific for the purchase of a fixed amount of snubbers approximating two years’ worth (though they ended up needing even more) at a 25-30% discount.
	+ Barry sues for violations of Sherman and Clayton Acts
* **Rule of reason analysis for exclusive dealing/requirements Ks**:
	+ Because exclusive and requirements Ks are not different in kind from any given purchase, being that all sales foreclose competitors from at least the amount sold in the transaction, they are treated to rule of reason analysis including consideration to:
		- **Severity/extent of “foreclosure”** and
		- **Strength of the business justifications**.
* Here:
	+ Severity of foreclosure effects:
		- Although Grinell represents 50% of the market, which appears a high proportion to be foreclosed,
		- **Fixed dollar amount**: Grinell did not enter “exclusive” dealing agreement (to purchase all the snubbers it “required” for business from Pacific), but only a fixed amount, leaving open the possibility that Grinell could/would purchase from other sellers should their needs exceed expecations.
		- Advance orders business as usual: Grinnell typically purchasers snubbers well in advance, rather than on a marginal basis, so limiting already periodic purchases to once every two years is not so dramatic a deviation from normal business practices that foreclosure is substantial.
	+ Legitimate business justifications:
		- For Grinnel, the agreements guaranteed a **stable source of supply** and a **favorable price**.
		- For Pacific, agreements allowed use of excess snubber production capacity and enabled **production planning** that saved costs.
		- Powerful consumer: the justifications are lent credence by the fact that Grinell is a sophisticated and powerful buyer, unlikely to be bullied into accepting contractual terms that would lessen competition between snubber producers, since the health of that market is in their interests in that it pushes costs down for them, ultimately pushing costs down for consumers.
			* Indeed **it was Grinell that pursued the agreement**, suggesting that the consumer was not hurt in that it got exactly what it wanted. Surely the consumer should not be handicapped by the law in pursuing contracts in its interest. **Very important**.
			* **Importantly**, **there may not even be a prima facie** case because it doesn’t increase Pacific’s market power because Pacific was already a monopolist.
				+ But Pacific’s sudden willingness to lower its price after Barry’s attempted entry suggests there may have been a wings effect competitive pressure on Pacific, perhaps eliminated by Barry’s foreclosure from the market.

But wouldn’t that then go to rebut pacific’s market power, rebutting a prima facie case in the first element?

Microsoft (DC Cir.)(p. 652):

* Exclusive dealing agreements with internet access providers to be default browser and in some cases, that IAPs would not allow greater than 15% of their customers to use competing browsers.
* Court notes that rule of thumb for cognizable foreclosure effects (“significant foreclosure) is 40-50%
* Court goes on to conclude Microsoft violated section 2.

Dentsply (3d Cir. 2005):

* 75-85% monopolist in artificial teeth market required exclusive dealing Ks with all new retailers (old retailers grandfathered in) on the alleged need to most efficiently market product.
* **Pretextual precompetitive justification**: Court ruled this alleged procompetitive benefit was merely a **pretext** to foreclose the market to competitors because there was insufficient evidence that exclusivity benefited the efficiency of the Dentsply’s marketing.
* What would happen if Jefferson Parish came up under exclusive dealing?
	+ Who is foreclosed and where do you find foreclosure?
	+ Hospital had only represented 30% of anesthesiologist market (at best, because market definition might be broader for anesthisiology than hospital services) so it wouldn’t meet the 40-50% foreclosure threshold articulated in Microsoft (p. 652 version).
	+ Even if this did represent a sufficient portion of the market, do the Roch brothers have the market power necessary to leverage a harmful exclusive dealing contract? Clearly not, because there are other anesthesiologists available.

Standing:

* D cannot claim no AT harm because P passed harm on to downstream consumers.
* Indirect purchasers generally do not have standing for harms passed on to them by direct purchasers.
	+ Unless they had preexisting contract to purchase and can show overcharge was passed on.
* Brunswick balancing test:
	+ Attempts to reflect the principle that only those who suffer an “antitrust harm,” a harm resulting from a harm to competition, have standing, and not those who merely suffer at the hands of legitimate competition.
	+ Elements:
1. The harm should be direct rather than remote.
2. The harm should be of the sort the AT laws were designed to prevent or inextricably intertwined with it.
3. Intent to harm P or those in P’s class weighs in favor of standing.
4. The prospect that standing will lead to duplicative recovery or difficult questions of apportionment weighs against standing.
5. The prospect that no standing would leave significant violations undetected or unremedied weighs in favor of standing.
* Brunswick standing also required for injunction.

Private merger suits:

* Standing requires cognizable antitrust harm to plaintiff.
	+ Sprint could not sue on grounds that prices would rise for downstream consumers because they do not personally suffer that antitrust harm (and may even benefit from price hikes).
	+ However, they could argue that merger creates duopsony power in deals with providers of handsets, like iPhone.