

Professor's Update to Antitrust Analysis: Problems, Text and Cases

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2007 Professor's Update to
ANTITRUST ANALYSIS

Problems, Text, Cases

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Chapter 1

The Setting for Antitrust Analysis

1D. The Reach of the Antitrust Laws

At the end of ¶160, insert the following.

In *Credit Suisse*¹, the Court considered whether the securities laws implicitly precluded plaintiffs from bringing an antitrust action challenging certain practices of underwriting syndicates that were formed to market shares for initial public offerings (IPOs). The challenged practices were subject to the supervision of the Securities and Exchange Commission (SEC). The Court found that even if the antitrust laws were narrowly interpreted only to condemn conduct that the SEC forbade, in application antitrust courts would make such serious mistakes that underwriters would be deterred from conduct permitted by the SEC. Given that the Court considered the role of underwriters vital, the Court concluded that there was a “plain repugnancy” between the antitrust claims and the federal securities laws; consequently the antitrust claims were precluded by the securities laws following *Gordon* and *Silver*.

¹ *Credit Suisse Securities v. Glenn Billing*, 127 S.Ct. 2383 (2007).

Chapter 2

Horizontal Restraints: Collaboration Among Competitors

2B. Modern Applications: Determining Which Restraints Are Reasonable

After ¶223, insert the following.

TEXACO v. DAGHER

547 U.S. 1 (2006)

Justice THOMAS. From 1998 until 2002, petitioners Texaco Inc. and Shell Oil Co. collaborated in a joint venture, Equilon Enterprises, to refine and sell gasoline in the western United States under the original Texaco and Shell Oil brand names. Respondents, a class of Texaco and Shell Oil service station owners, allege that petitioners engaged in unlawful price fixing when Equilon set a single price for both Texaco and Shell Oil brand gasoline. We granted certiorari to determine whether it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a lawful, economically integrated joint venture to set the prices at which the joint venture sells its products. We conclude that it is not, and accordingly we reverse the contrary judgment of the Court of Appeals.

I

Historically, Texaco and Shell Oil have competed with one another in the national and international oil and gasoline markets. Their business activities include refining crude oil into gasoline, as well as marketing gasoline to downstream purchasers, such as the service stations represented in respondents' class action.

In 1998, Texaco and Shell Oil formed a joint venture, Equilon, to consolidate their operations in the western United States, thereby ending competition between the two companies in the domestic refining and marketing of gasoline. Under the joint venture agreement, Texaco and Shell Oil agreed to pool their resources and share the risks of and profits from Equilon's activities. Equilon's board of directors would comprise representatives of Texaco and Shell Oil, and Equilon gasoline would be sold to downstream purchasers under the original Texaco and Shell Oil brand names. The formation of Equilon was approved by consent decree, subject to certain divestments and other modifications, by the Federal Trade Commission, see *In re Shell Oil Co.*, 125 F. T. C. 769 (1998), as well as by the state attorneys general of California, Hawaii, Oregon, and Washington. Notably, the decrees imposed no restrictions on the pricing of Equilon gasoline.

After the joint venture began to operate, respondents brought suit in district court, alleging that, by unifying gasoline prices under the two brands, petitioners had violated the *per se* rule against price fixing that this Court has long recognized under § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580 (1980) (*per curiam*). The District Court awarded summary judgment to Texaco and Shell Oil. It determined that the rule of reason, rather than a *per se* rule or the quick look doctrine, governs respondents' claim, and that, by eschewing rule of reason analysis, respondents had failed to raise a triable issue of fact. The Ninth Circuit reversed, characterizing petitioners' position as a request for an "exception to the *per se* prohibition on price fixing," and rejecting that request. *Dagher v. Saudi Refining, Inc.*, 369 F.3d 1108, 1116 (2004). We consolidated Texaco's and Shell Oil's separate petitions and granted certiorari to determine the extent to which the *per se* rule against price fixing applies to an important and increasingly popular form of business organization, the joint venture. 545 U.S. ___, 125 S. Ct. 2957, 162 L. Ed. 2d 887 (2005).

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. § 1. This Court has not taken a literal approach to this language, however. See, e.g., *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997) ("[T]his Court has long recognized that Congress intended to outlaw only *unreasonable* restraints" (emphasis added)). Instead, this Court presumptively applies rule of reason analysis, under which antitrust plaintiffs must demonstrate that a particular contract or combination is in fact unreasonable and anticompetitive before it will be found unlawful. See, e.g., *id.*, at 10-19, 118 S. Ct. 275, 139 L. Ed. 2d 199 (concluding that vertical price-fixing arrangements are subject to the rule of reason, not *per se* liability). *Per se* liability is reserved for only those agreements that are "so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality." *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). Accordingly, "we have expressed reluctance to adopt *per se* rules . . . 'where the economic impact of certain practices is not immediately obvious.'" *State Oil, supra*, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (quoting *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986)).

Price-fixing agreements between two or more competitors, otherwise known as horizontal price-fixing agreements, fall into the category of arrangements that are *per se* unlawful. See, e.g., *Catalano, supra*, at 647, 100 S. Ct. 1925, 64 L. Ed. 2d 580. These cases do not present such an agreement, however, because Texaco and Shell Oil did not compete with one another in the relevant market--namely, the sale of gasoline to service stations in the western United States--but instead participated in that market jointly through their investments in Equilon.² In other words, the pricing policy challenged here amounts to little more than price setting by a single entity--albeit within the context of a joint venture--and not a pricing agreement between competing entities with respect to their competing products. Throughout Equilon's existence, Texaco and Shell Oil shared in the profits of Equilon's activities in their role as investors, not competitors. When "persons who would otherwise be competitors pool their capital and share the risks of loss

² We presume for purposes of these cases that Equilon is a lawful joint venture. Its formation has been approved by federal and state regulators, and there is no contention here that it is a sham. . .

as well as the opportunities for profit . . . such joint ventures [are] regarded as a single firm competing with other sellers in the market." *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 356, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982). As such, though Equilon's pricing policy may be price fixing in a literal sense, it is not price fixing in the antitrust sense. See *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979) ("When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act").

This conclusion is confirmed by respondents' apparent concession that there would be no *per se* liability had Equilon simply chosen to sell its gasoline under a single brand. See Tr. of Oral Arg. 34. We see no reason to treat Equilon differently just because it chose to sell gasoline under two distinct brands at a single price. As a single entity, a joint venture, like any other firm, must have the discretion to determine the prices of the products that it sells, including the discretion to sell a product under two different brands at a single, unified price. If Equilon's price unification policy is anticompetitive, then respondents should have challenged it pursuant to the rule of reason. But it would be inconsistent with this Court's antitrust precedents to condemn the internal pricing decisions of a legitimate joint venture as *per se* unlawful.³

The court below reached the opposite conclusion by invoking the ancillary restraints doctrine. 369 F.3d at 1118-1124. That doctrine governs the validity of restrictions imposed by a legitimate business collaboration, such as a business association or joint venture, on nonventure activities. See, e.g., *National Collegiate Athletic Assn. v. Board of Regents*, 468 U.S. 85, 113-115, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984); *Citizen Publishing Co. v. United States*, 394 U.S. 131, 135-136, 89 S. Ct. 927, 22 L. Ed. 2d 148 (1969). Under the doctrine, courts must determine whether the nonventure restriction is a naked restraint on trade, and thus invalid, or one that is ancillary to the legitimate and competitive purposes of the business association, and thus valid. We agree with petitioners that the ancillary restraints doctrine has no application here, where the business practice being challenged involves the core activity of the joint venture itself--namely, the pricing of the very goods produced and sold by Equilon. And even if we were to invoke the doctrine in these cases, Equilon's pricing policy is clearly ancillary to the sale of its own products. Judge Fernandez, dissenting from the ruling of the court below, put it well:

"In this case, nothing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products. It decided to price them the same, as any other entity could. What could be more integral to the running of a business than setting a price for its goods and services?" 369 F.3d at 1127.

See also *Broadcast Music*, *supra*, at 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 ("Joint ventures and other cooperative arrangements are . . . not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all").

³ Respondents alternatively contend that petitioners should be held liable under the quick look doctrine. To be sure, we have applied the quick look doctrine to business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability. See *California Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). But for the same reasons that *per se* liability is unwarranted here, we conclude that petitioners cannot be held liable under the quick look doctrine.

Because the pricing decisions of a legitimate joint venture do not fall within the narrow category of activity that is *per se* unlawful under § 1 of the *Sherman Act*, respondents' antitrust claim cannot prevail. Accordingly, the judgment of the Court of Appeals is reversed.

2C. When Does an Agreement Exist?

After ¶241, insert the following.

BELL ATLANTIC CORP. v. TWOMBLY
127 S. Ct. 1955 (2007)

Justice SOUTER. Liability under § 1 of the Sherman Act, *15 U.S.C. § 1*, requires a "contract, combination . . . , or conspiracy, in restraint of trade or commerce." The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT&T) local telephone business was a system of regional service monopolies (variously called "Regional Bell Operating Companies," "Baby Bells," or "Incumbent Local Exchange Carriers" (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, which "fundamentally restructured local telephone markets" and "subjected [ILECs] to a host of duties intended to facilitate market entry." *AT&T Corp. v. Iowa Utilities Bd.*, *525 U.S. 366, 371, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999)*. In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See *47 U.S.C. § 271*.

"Central to the [new] scheme [was each ILEC's] obligation . . . to share its network with competitors," *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, *540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004)*, which came to be known as "competitive local exchange carriers" (CLECs), Pet. for Cert. 6, n. 1 A CLEC could make use of an ILEC's network in any of three ways: by (1) "purchasing local telephone services at wholesale rates for resale to end users," (2) "leasing elements of the [ILEC's] network 'on an unbundled basis,'" or (3) "interconnecting its own facilities with the [ILEC's] network." *Iowa Utilities Bd.*, *supra*, at *371, 119 S. Ct. 721, 142 L. Ed. 2d 834* (quoting *47 U.S.C. § 251 (c)*). Owing to the "considerable expense and effort" required to make unbundled network elements available to rivals at wholesale prices, *Trinko*, *supra*, at *410, 124 S. Ct. 872, 157 L. Ed. 2d 823*, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) three times revised its regulations to narrow the range of network elements to be shared with the CLECs. See *Covad Communs. Co. v. FCC*, *450 F.3d 528, 533-534 (CA DC 2006)* (summarizing the 10-year-long regulatory struggle between the ILECs and CLECs).

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all "subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) P53, App. 28 (hereinafter Complaint). In this action against petitioners, a group of

ILECs,³ plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1, which prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations."

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs "engaged in parallel conduct" in their respective service areas to inhibit the growth of upstart CLECs. Complaint P47, App. 23-26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs'"compelling common motivation" to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; "had any one [ILEC] not sought to prevent CLECs . . . from competing effectively . . . , the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct." *Id.*, P50, App. 26-27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure "meaningfully [to] pursue" "attractive business opportunities" in contiguous markets where they possessed "substantial competitive advantages," *id.*, PP40-41, App. 21-22, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC "'might be a good way to turn a quick dollar but that doesn't make it right,'" *id.*, P42, App. 22.

The complaint couches its ultimate allegations this way:

"In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another." *Id.*, P51, App. 27.4

³ The 1984 divestiture of AT&T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor-in-interest to Bell Atlantic Corporation). Complaint P21, App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.*, P48, App. 26.

⁴ In setting forth the grounds for § 1 relief, the complaint repeats these allegations in substantially similar language:

The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that "plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement," but emphasized that "while 'circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[. . .] 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely.'" 313 F. Supp. 2d 174, 179 (2003) (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954); alterations in original). Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that "tend to exclude independent self-interested conduct as an explanation for defendants' parallel behavior." 313 F. Supp. 2d, at 179. The District Court found plaintiffs' allegations of parallel ILEC actions to discourage competition inadequate because "the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC's own interests in defending its individual territory." *Id.*, at 183. As to the ILECs' supposed agreement against competing with each other, the District Court found that the complaint does not "allege facts . . . suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs'] apparent economic interests, and consequently [does] not raise an inference that [the ILECs'] actions were the result of a conspiracy." *Id.*, at 188.

The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that "plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal." 425 F.3d 99, 114 (2005) (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that "include conspiracy among the realm of 'plausible' possibilities in order to survive a motion to dismiss," it then said that "to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence." *Ibid.*

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, 547 U.S. , 126 S. Ct. 2965, 165 L. Ed. 2d 949 (2006), and now reverse.

II

A

Because § 1 of the Sherman Act "does not prohibit [all] unreasonable restraints of trade . . . but only restraints effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984), "the

"Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of *Section 1* of the Sherman Act." *Id.*, P64, App. 30-31.

crucial question" is whether the challenged anticompetitive conduct "stems from independent decision or from an agreement, tacit or express," *Theatre Enterprises*, 346 U.S., at 540, 74 S. Ct. 257, 98 L. Ed. 273. While a showing of parallel "business behavior is admissible circumstantial evidence from which the fact finder may infer agreement," it falls short of "conclusively establishing agreement or . . . itself constituting a Sherman Act offense." *Id.*, at 540-541, 74 S. Ct. 257, 98 L. Ed. 273. Even "conscious parallelism," a common reaction of "firms in a concentrated market [that] recognize their shared economic interests and their interdependence with respect to price and output decisions" is "not in itself unlawful." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993); see 6 P. Areeda & H. Hovenkamp, *Antitrust Law* P1433a, p. 236 (2d ed. 2003) (hereinafter *Areeda & Hovenkamp*) ("The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1"); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 672 (1962) ("Mere interdependence of basic price decisions is not conspiracy").

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, e.g., AEI-Brookings Joint Center for Regulatory Studies, Epstein, *Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy*, Related Publication 06-08, pp. 3-4 (2006) (discussing problem of "false positives" in § 1 suits). Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises*, *supra*, 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984); and at the summary judgment stage a § 1 plaintiff's offer of conspiracy evidence must tend to rule out

the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).

B

This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the Sherman Act. *Federal Rule of Civil Procedure* 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). While a complaint attacked by a *Rule* 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (CA7 1994), a plaintiff's obligation to provide the "grounds" of his "entitlement to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932, 92 L. Ed. 2d 209 (1986) (on a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation"). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235-236 (3d ed. 2004) (hereinafter *Wright & Miller*)

In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. ⁵ And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and "that a recovery is very remote and unlikely." *Ibid.* In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of *Rule 8(a)(2)* that the "plain statement" possess enough heft to "show that the pleader is entitled to relief." A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant's commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of "entitlement to relief." Cf. *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (CA1 1999) ("Terms like 'conspiracy,' or even 'agreement,' are border-line: they might well be sufficient in conjunction with a more specific allegation -- for example, identifying a written agreement or even a basis for inferring a tacit agreement, . . . but a court is not required to accept such terms as a sufficient basis for a complaint"). ⁶

⁵ Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, e.g., 6 Areeda & Hovenkamp P1425, at 167-185 (discussing "parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties"); Blechman, Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws, 24 N. Y. L. S. L. Rev. 881, 899 (1979) (describing "conduct [that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement"). The parties in this case agree that "complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason" would support a plausible inference of conspiracy. Brief for Respondents 37; see also Reply Brief for Petitioners 12.

⁶ The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability.

We alluded to the practical significance of the *Rule 8* entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with "a largely groundless claim" be allowed to "take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id.*, at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, "this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." 5 Wright & Miller § 1216, at 233-234 (quoting *Daves v. Hawaiian Dredging Co.*, 114 F. Supp. 643, 645 (Haw. 1953)); see also *Dura*, *supra*, at 346, 125 S. Ct. 1627, 161 L. Ed. 2d 577; *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F. Supp. 2d 986, 995 (ND Ill. 2003) (Posner, J., sitting by designation) ("Some threshold of plausibility must be crossed at the outset before a patent antitrust case should be permitted to go into its inevitably costly and protracted discovery phase").

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), "a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (CA7 1984) ("The costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint"); Note, Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation, 78 *N. Y. U. L. Rev.* 1887, 1898-1899 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises*, *Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible conflict with an early statement of ours construing *Rule 8*. Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to

relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see 425 F.3d at 106, 114 (invoking *Conley*'s "no set of facts" language in describing the standard for dismissal).

On such a focused and literal reading of *Conley*'s "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint does not set forth a single fact in a context that suggests an agreement. 425 F.3d at 106, 114. It seems fair to say that this approach to pleading would dispense with any showing of a "reasonably founded hope" that a plaintiff would be able to make a case, see *Dura*, 544 U.S., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (quoting *Blue Chip Stamps*, 421 U.S., at 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, e.g., *Car Carriers*, 745 F.2d at 1106 ("*Conley* has never been interpreted literally" and, "in practice, a complaint . . . must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (CA9 1989) (tension between *Conley*'s "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien v. Di Grazia*, 544 F.2d 543, 546, n. 3 (CA1 1976) ("When a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional . . . action into a substantial one"); *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (CA6 1988) (quoting *O'Brien*'s analysis); Hazard, From Whom No Secrets Are Hid, 76 *Tex. L. Rev.* 1665, 1685 (1998) (describing *Conley* as having "turned *Rule 8* on its head"); Marcus, The Revival of Fact Pleading Under the *Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 463-465 (1986) (noting tension between *Conley* and subsequent understandings of *Rule 8*).

We could go on, but there is no need to pile up further citations to show that *Conley*'s "no set of facts" language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan*, 40 F.3d at 251 (once a claim for relief has been stated, a plaintiff "receives the benefit of imagination, so long as the hypotheses are consistent with the complaint"); accord, *Swierkiewicz*, 534 U.S., at 514, 122 S. Ct. 992, 152 L. Ed. 2d 1; *National Organization for Women, Inc. v. Scheidler*, 510

U.S. 249, 256, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994); H. J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 249-250, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989); Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984). *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival. 7

III

When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra*, at 4. Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their . . . markets and have agreed not to compete with one another." Complaint P51, App. 278 The nub of the complaint, then, is the ILECs' parallel

7 Because *Conley's* "no set of facts" language was one of our earliest statements about pleading under the Federal Rules, it is no surprise that it has since been "cited as authority" by this Court and others. *Post*, at 8. Although we have not previously explained the circumstances and rejected the literal reading of the passage embraced by the Court of Appeals, our analysis comports with this Court's statements in the years since *Conley*. See *Dura*, 544 U.S., at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S. Ct. 1917, 44 L. Ed. 2d 539 (1975)); (requiring "reasonably founded hope that the [discovery] process will reveal relevant evidence" to support the claim (alteration in *Dura*)); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983) ("It is not . . . proper to assume that [the plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged"); *Wilson v. Schnettler*, 365 U.S. 381, 383, 81 S. Ct. 632, 5 L. Ed. 2d 620 (1961) ("In the absence of . . . an allegation [that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed . . . a narcotics offense").

8 If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by *Rule 8*. Apart from identifying a seven-year span in which the § 1 violations were supposed to have occurred (*i.e.*, "beginning at least as early as February 6, 1996, and continuing to the present," *id.*, P64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. *Post*, at 6. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where

behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.⁹

We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, see *id.*, P47, App. 23-24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." *Id.*, P50, App. 26-27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs." *313 F. Supp. 2d*, at 184; cf. *Kramer v. Pollock-Krasner Foundation*, *890 F. Supp. 250, 256 (SDNY 1995)* (while the plaintiff "may believe the defendants conspired . . . , the defendants' allegedly conspiratorial actions could equally have been prompted by lawful, independent goals which do not constitute a conspiracy").¹⁰

the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

⁹ The dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized. See *313 F. Supp. 2d 174, 182 (SDNY 2003)*; *425 F.3d 99, 102-104 (CA 2005)*.

¹⁰ From the allegation that the ILECs belong to various trade associations, see Complaint P46, App. 23, the dissent playfully suggests that they conspired to restrain trade, an inference said to be "buttressed by the common sense of Adam Smith." *Post*, at 22, 25-26. If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the "hope that the large incumbent local monopoly companies . . . might attack their neighbors' service areas, as they are the best situated to do so." Complaint P38, App. 20 (quoting Consumer Federation of America, *Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, p. 12 (Feb. 2000)). Contrary to hope, the ILECs declined "to enter each other's service territories in any significant way," Complaint P38, App. 20, and the local telephone and high speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with "especially attractive business opportunities" in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was "strongly suggestive of conspiracy." *Id.*, P40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but here we have an obvious alternative explanation. In the decade preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communs., Inc. v. FCC*, 535 U.S. 467, 477-478, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002) (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up "especially attractive business opportunities" by declining to compete as CLECs against other ILECs, Complaint P40, App. 21, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,¹¹ and the complaint is replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id.*, P47; App. 23-26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, "firms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets." Areeda & Hovenkamp P307d, at 155 (Supp. 2006) (commenting on the case at bar). The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust

¹¹ The complaint quoted a reported statement of Qwest's CEO, Richard Notebaert, to suggest that the ILECs declined to compete against each other despite recognizing that it "might be a good way to turn a quick dollar." P42, App. 22 (quoting Chicago Tribune, Oct. 31, 2002, Business Section, p. 1). This was only part of what he reportedly said, however, and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See *Fed. Rule Evid. 201*.

conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.¹²

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

The judgment of the Court of Appeals for the Second Circuit is reversed, and the cause is remanded for further proceedings consistent with this opinion.

It is so ordered.

* * *

Justice STEVENS, with whom Justice GINSBURG joins except as to Part IV, dissenting. In the first paragraph of its 24-page opinion the Court states that the question to be decided is whether allegations that "major telecommunications providers engaged in certain parallel conduct unfavorable to competition" suffice to state a violation of § 1 of the Sherman Act. *Ante*, at 1. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal citing *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S. Ct. 257, 98 L. Ed. 273 (1954), would adequately resolve this case. As *Theatre Enterprises* held, parallel conduct is circumstantial evidence admissible on the issue of conspiracy, but it is not itself illegal. *Id.*, at 540-542, 74 S. Ct. 257, 98 L. Ed. 273.

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. Plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not "plausible" provide a legally acceptable reason for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

"entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have

¹² In reaching this conclusion, we do not apply any "heightened" pleading standard, nor do we seek to broaden the scope of *Federal Rule of Civil Procedure 9*, which can only be accomplished "by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993)). On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than *Rule 8* requires. *Fed. Rules Civ. Proc. 9(b)-(c)*. Here, our concern is not that the allegations in the complaint were insufficiently "particularized", *ibid.*; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible.

agreed not to compete with one another and otherwise allocated customers and markets to one another." Amended Complaint in No. 02 CIV. 10220 (GEL) (SDNY) P51, App. 27 (hereinafter Complaint).

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have refused to permit nonincumbent competitors to access their networks. The complaint quotes Richard Notebaert, the former CEO of one such ILEC, as saying that competing in a neighboring ILEC's territory "might be a good way to turn a quick dollar but that doesn't make it right." *Id.*, P42, App. 22. Moreover, respondents allege that petitioners "communicate amongst themselves" through numerous industry associations. *Id.*, P46, App. 23. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* violation of the Sherman Act. See Report of the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises*, a judge ruling on a defendant's motion to dismiss a complaint, "must accept as true all of the factual allegations contained in the complaint." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002); see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 127, 63 S. Ct. 494, 87 L. Ed. 656 (1943). But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery -- and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement -- the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway," *ante*, at 19; that "there was just no need for joint encouragement to resist the 1996 Act," *ante*, at 20; and that the "natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing," *ante*, at 21.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners "agreed not to compete with one another" is not just one of "a few stray statements," *ante*, at 18; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of *Federal Rule of Civil Procedure 12(b)(6)* that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

Rule 8(a)(2) of the Federal Rules requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." The rule did not come about by happenstance and its language is not inadvertent. The English experience with Byzantine special pleading rules -- illustrated by the hypertechnical Hilary rules of 1834 13 -- made obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required "[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N. Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence").

A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead "facts" rather than "conclusions," a distinction that proved far easier to say than to apply. As commentators have noted,

"it is virtually impossible logically to distinguish among 'ultimate facts,' 'evidence,' and 'conclusions.' Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which the occurrences are described." Weinstein & Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 *Colum. L. Rev.* 518, 520-521 (1957).

See also Cook, *Statements of Fact in Pleading Under the Codes*, 21 *Colum. L. Rev.* 416, 417 (1921) (hereinafter Cook) ("There is no logical distinction between statements which are grouped by the courts under the phrases 'statements of fact' and 'conclusions of law'"). *Rule 8* was directly responsive to this difficulty. Its drafters intentionally avoided any reference to "facts" or "evidence" or "conclusions." See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, p. 207 (3d ed. 2004) (hereinafter Wright & Miller) ("The substitution of 'claim showing that the pleader is entitled to relief' for the code formulation of the 'facts' constituting a 'cause of action' was intended to avoid the distinctions drawn under the codes among 'evidentiary facts,' 'ultimate facts,' and 'conclusions' . . .").

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See *Swierkiewicz*, 534 *U.S.*, at 514, 122 *S. Ct.* 992, 152 *L. Ed. 2d* 1 ("The liberal notice pleading of *Rule 8(a)* is the starting point of a simplified pleading system, which was adopted to focus litigation on the

13 See 9 W. Holdsworth, *History of English Law* 324-327 (1926).

merits of a claim"). Charles E. Clark, the "principal draftsman" of the Federal Rules, 14 put it thus:

"Experience has shown . . . that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result." *The New Federal Rules of Civil Procedure: The Last Phase -- Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 A. B. A. J. 976, 977 (1937) (hereinafter Clark, *New Federal Rules*).

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, a complaint for negligence. As relevant, the Form 9 complaint states only: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Form 9, Complaint for Negligence, Forms App., Fed. Rules Civ. Proc., 28 U.S.C. App., p. 829 (hereinafter Form 9). The complaint then describes the plaintiff's injuries and demands judgment. The asserted ground for relief -- namely, the defendant's negligent driving -- would have been called a "conclusion of law" under the code pleading of old. See, e.g., Cook 419. But that bare allegation suffices under a system that "restricts the pleadings to the task of general notice-giving and invests the deposition-discovery process with a vital role in the preparation for trial." 15 *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S. Ct. 385, 91 L. Ed. 451 (1947); see also *Swierkiewicz*, 534 U.S., at 513, n. 4, 122 S. Ct. 992, 152 L. Ed. 2d 1 (citing Form 9 as an example of "the simplicity and brevity of statement which the rules contemplate"); *Thomson v. Washington*, 362 F.3d 969, 970 (CA7 2004) (Posner, J.) ("The federal rules replaced fact pleading with notice pleading").

II

It is in the context of this history that *Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing for a unanimous Court, Justice Black rejected the union's claim as foreclosed by the language of *Rule 8. Id.*, at 47-48, 78 S. Ct. 99, 2 L. Ed. 2d 80. In the course of doing so, he articulated the formulation the Court rejects today: "In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts

¹⁴ *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 283, 108 S. Ct. 1133, 99 L. Ed. 2d 296 (1988).

¹⁵ The Federal Rules do impose a "particularity" requirement on "all averments of fraud or mistake," *Fed. Rule Civ. Proc. 9(b)*, neither of which has been alleged in this case. We have recognized that the canon of *expresio unius est exclusio alterius* applies to *Rule 9(b)*. See *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993).

in support of his claim which would entitle him to relief." *Id.*, at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80.

Consistent with the design of the Federal Rules, *Conley's* "no set of facts" formulation permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley's* "no set of facts" language. Concluding that the phrase has been "questioned, criticized, and explained away long enough," *ante*, at 16, the Court dismisses it as careless composition.

If *Conley's* "no set of facts" language is to be interred, let it not be without a eulogy. That exact language, which the majority says has "puzzled the profession for 50 years," *ibid.*, has been cited as authority in a dozen opinions of this Court and four separate writings. 16 In not one of those 16 opinions was the language "questioned," "criticized," or "explained away." Indeed, today's opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears "beyond doubt" that "no set of facts" in support of the claim would entitle the plaintiff to relief. 17

16 *SEC v. Zandford*, 535 U.S. 813, 818, 122 S. Ct. 1899, 153 L. Ed. 2d 1 (2002); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993); *Brower v. County of Inyo*, 489 U.S. 593, 598, 109 S. Ct. 1378, 103 L. Ed. 2d 628 (1989); *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) (*per curiam*); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S. Ct. 285, 50 L. Ed. 2d 251 (1976); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (*per curiam*); *Haines v. Kerner*, 404 U.S. 519, 521, 92 S. Ct. 594, 30 L. Ed. 2d 652 (1972) (*per curiam*); *Jenkins v. McKeithen*, 395 U.S. 411, 422, 89 S. Ct. 1843, 23 L. Ed. 2d 404 (1969) (plurality opinion); see also *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 554, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (Brennan, J., concurring in part and dissenting in part); *Hoover v. Ronwin*, 466 U.S. 558, 587, 104 S. Ct. 1989, 80 L. Ed. 2d 590 (1984) (STEVENS, J., dissenting); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 561, n. 1, 97 S. Ct. 1885, 52 L. Ed. 2d 571 (1977) (Marshall, J., dissenting); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 55, n. 6, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (Brennan, J., concurring in judgment).

17 See, e.g., *EB Invs., LLC v. Atlantis Development, Inc.*, 930 So. 2d 502, 507 (Ala. 2005); *Department of Health & Social Servs. v. Native Village of Curyung*, 151 P. 3d 388, 396 (Alaska 2006); *Newman v. Maricopa Cty.*, 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App. 1991); *Public Serv. Co. of Colo. v. Van Wyk*, 27 P. 3d 377, 385-386 (Colo. 2001) (en banc); *Clawson v. St. Louis Post-Dispatch, LLC*, 906 A.2d 308, 312 (D. C. 2006); *Hillman Constr. Corp. v. Wainer*, 636 So. 2d 576, 578 (Fla. App. 1994); *Kaplan v. Kaplan*, 266 Ga. 612, 613, 469 S. E. 2d 198, 199 (1996); *Wright v. Home Depot U.S.A.*, 111 Haw. 401, 406, 142 P. 3d 265, 270 (2006); *Taylor v. Maile*, 142 Idaho 253, 257, 127 P. 3d 156, 160 (2005); *Fink v. Bryant*, 2001-CC-0987,

Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six *amici* who filed briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process -- a rulemaking process -- for revisions of that order. See 28 U.S.C. §§ 2072-2074 (2000 ed. and Supp. IV).

Today's majority calls *Conley*'s "no set of facts" language "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Ante*, at 16. This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even

*p. 4 (La. 11/28/01), 801 So. 2d 346, 349; Gagne v. Cianbro Corp., 431 A.2d 1313, 1318-1319 (Me. 1981); Gasior v. Massachusetts Gen. Hospital, 446 Mass. 645, 647, 846 N.E.2d 1133, 1135 (2006); Ralph Walker, Inc. v. Gallagher, 926 So. 2d 890, 893 (Miss. 2006); Jones v. Montana Univ. System, 337 Mont. 1, 7, 155 P. 3d 1247, ____ (2007); Johnston v. Neb. Dep't of Corr. Servs., 270 Neb. 987, 989, 709 N.W.2d 321, 324 (2006); Blackjack Bonding v. Las Vegas Munic. Ct., 116 Nev. 1213, 1217, 14 P. 3d 1275, 1278 (2000); Shepard v. Ocwen Fed. Bank, 361 N. C. 137, 139, 638 S. E. 2d 197, 199 (2006); Rose v. United Equitable Ins. Co., 2001 ND 154, P10, 632 N.W.2d 429, 434; State ex rel. Turner v. Houk, 112 Ohio St. 3d 561, 562, 2007-Ohio-814, P5, 862 N.E.2d 104, 105 (per curiam); Moneypenney v. Dawson, 2006 OK 53, P2, 141 P. 3d 549, 551; Gagnon v. State, 570 A.2d 656, 659 (R. I. 1990); Osloond v. Farrier, 2003 SD 28, P4, 659 N.W.2d 20, 22 (per curiam); Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 471 (Tenn. 1986); Association of Haystack Property Owners v. Sprague, 145 Vt. 443, 446, 494 A.2d 122, 124 (1985); In re Coday, 156 Wn. 2d 485, 497, 130 P. 3d 809, 815 (2006) (en banc); Haines v. Hampshire Cty. Comm'n, 216 W. Va. 499, 502, 607 S. E. 2d 828, 831 (2004); Warren v. Hart, 747 P.2d 511, 512 (Wyo. 1987); see also Malpiede v. Townson, 780 A.2d 1075, 1082-1083 (Del. 2001) (permitting dismissal only "where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well-pleaded allegations in the complaint" (internal quotation marks omitted)); Canel v. Topinka, 212 Ill. 2d 311, 318, 818 N.E.2d 311, 317, 288 Ill. Dec. 623 (2004) (replacing "appears beyond doubt" in the *Conley* formulation with "is clearly apparent"); In re Young, 522 N.E.2d 386, 388 (Ind. 1988) (per curiam) (replacing "appears beyond doubt" with "appears to a certainty"); Barkema v. Williams Pipeline Co., 666 N.W.2d 612, 614 (Iowa 2003) (holding that a motion to dismiss should be sustained "only when there exists no conceivable set of facts entitling the non-moving party to relief"); Pioneer Village v. Bullitt Cty., 104 S. W. 3d 757, 759 (Ky. 2003) (holding that judgment on the pleadings should be granted "if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief"); Corley v. Detroit Bd. of Ed., 470 Mich. 274, 277, 681 N.W.2d 342, 345 (2004) (per curiam) (holding that a motion for judgment on the pleadings should be granted only "'if no factual development could possibly justify recovery'"); Oberkramer v. Ellisville, 706 S.W.2d 440, 441 (Mo. 1986) (en banc) (omitting the words "beyond doubt" from the *Conley* formulation); Colman v. Utah State Land Bd., 795 P.2d 622, 624 (Utah 1990) (holding that a motion to dismiss is appropriate "only if it clearly appears that [the plaintiff] can prove no set of facts in support of his claim"); NRC Mgmt. Servs. Corp. v. First Va. Bank - Southwest, 63 Va. Cir. 68, 70 (2003) ("The Virginia standard is identical [to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it").*

invite, the pleading of facts. 18The "pleading standard" label the majority gives to what it reads into the *Conley* opinion -- a statement of the permissible factual support for an adequately pleaded complaint -- would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority's remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was "appraising the *sufficiency* of the complaint." 355 U.S., at 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (emphasis added). It was, to paraphrase today's majority, describing "the minimum standard of adequate pleading to govern a complaint's survival," *ante*, at 16-17.

We can be triply sure as to *Conley's* meaning by examining the three Court of Appeals cases the *Conley* Court cited as support for the "accepted rule" that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80. In the first case, *Leimer v. State Mut. Life Assur. Co. of Worcester, Mass.*, 108 F.2d 302 (CA8 1940), the plaintiff alleged that she was the beneficiary of a life insurance plan and that the insurance company was wrongfully withholding proceeds from her. In reversing the District Court's grant of the defendant's motion to dismiss, the Eighth Circuit noted that court's own longstanding rule that, to warrant dismissal, "it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated." *Id.*, at 305 (quoting *Winget v. Rockwood*, 69 F.2d 326, 329 (CA8 1934)).

The *Leimer* court viewed the Federal Rules -- specifically *Rules 8(a)(2), 12(b)(6), 12(e)* (motion for a more definite statement), and 56 (motion for summary judgment) -- as reinforcing the notion that "there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim." 108 F.2d at 306. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: "No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint." *Ibid.*

The Third Circuit relied on *Leimer's* admonition in *Continental Collieries, Inc. v. Shober*, 130 F.2d 631 (1942), which the *Conley* Court also cited in support of its "no set of facts"

18 The majority is correct to say that what the Federal Rules require is a "showing" of entitlement to relief. *Ante*, at 8, n. 3. Whether and to what extent that "showing" requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." See *supra*, at 1. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of "bareness" with which the Federal Rules are concerned. A plaintiff's inability to persuade a district court that the allegations actually included in her complaint are "plausible" is an altogether different kind of failing, and one that should not be fatal at the pleading stage.

formulation. In a diversity action the plaintiff alleged breach of contract, but the District Court dismissed the complaint on the ground that the contract appeared to be unenforceable under state law. The Court of Appeals reversed, concluding that there were facts in dispute that went to the enforceability of the contract, and that the rule at the pleading stage was as in *Leimer*: "No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it." *130 F.2d at 635*.

The third case the *Conley* Court cited approvingly was written by Judge Clark himself. In *Dioguardi v. Durning*, *139 F.2d 774 (CA2 1944)*, the *pro se* plaintiff, an importer of "tonics," charged the customs inspector with auctioning off the plaintiff's former merchandise for less than was bid for it -- and indeed for an amount equal to the plaintiff's own bid -- and complained that two cases of tonics went missing three weeks before the sale. The inference, hinted at by the averments but never stated in so many words, was that the defendant fraudulently denied the plaintiff his rightful claim to the tonics, which, if true, would have violated federal law. Writing six years after the adoption of the Federal Rules he held the lead rein in drafting, Judge Clark said that the defendant

"could have disclosed the facts from his point of view, in advance of a trial if he chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting." *Id.*, at 775.

As any civil procedure student knows, Judge Clark's opinion disquieted the defense bar and gave rise to a movement to revise *Rule 8* to require a plaintiff to plead a "cause of action." See 5 *Wright & Miller* § 1201, at 86-87. The movement failed, see *ibid.*; *Dioguardi* was explicitly approved in *Conley*; and "in retrospect the case itself seems to be a routine application of principles that are universally accepted," 5 *Wright & Miller* § 1220, at 284-285.

In light of *Leimer*, *Continental Collieries*, and *Dioguardi*, *Conley's* statement that a complaint is not to be dismissed unless "no set of facts" in support thereof would entitle the plaintiff to relief is hardly "puzzling," *ante*, at 16. It reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley's* language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*. For example, in *Scheuer v. Rhodes*, *416 U.S. 232, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (1974)*, we reversed the Court of Appeals' dismissal on the pleadings when the respondents, the Governor and other officials of the State of Ohio, argued that petitioners' claims were barred by sovereign immunity. In a unanimous opinion by then-Justice Rehnquist, we emphasized that

"when a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*" *Id.*, at 236, 94 S. Ct. 1683, 40 L. Ed. 2d 90 (emphasis added).

The *Rhodes* plaintiffs had "alleged generally and in conclusory terms" that the defendants, by calling out the National Guard to suppress the Kent State University student protests, "were guilty of wanton, wilful and negligent conduct." *Krause v. Rhodes*, *471 F.2d 430, 433 (CA6*

1972). We reversed the Court of Appeals on the ground that "whatever the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure," were not barred by the *Eleventh Amendment* because they were styled as suits against the defendants in their individual capacities. 416 U.S., at 238, 94 S. Ct. 1683, 40 L. Ed. 2d 90.

We again spoke with one voice against efforts to expand pleading requirements beyond their appointed limits in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). Writing for the unanimous Court, Chief Justice Rehnquist rebuffed the Fifth Circuit's effort to craft a standard for pleading municipal liability that accounted for "the enormous expense involved today in litigation," *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1057 (1992) (internal quotation marks omitted), by requiring a plaintiff to "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Leatherman*, 507 U.S., at 167, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (internal quotation marks omitted). We found this language inconsistent with *Rules 8(a)(2)* and *9(b)* and emphasized that motions to dismiss were not the place to combat discovery abuse: "In the absence of [an amendment to *Rule 9(b)*], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Id.*, at 168-169, 113 S. Ct. 1160, 122 L. Ed. 2d 517.

Most recently, in *Swierkiewicz*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). See, e.g., *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985). *Swierkiewicz* alleged that he had been terminated on account of national origin in violation of Title VII of the Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a prima facie case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that "under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case." *Swierkiewicz*, 534 U.S., at 511, 122 S. Ct. 992, 152 L. Ed. 2d 1. We also observed that *Rule 8(a)(2)* does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.*, at 512, 122 S. Ct. 992, 152 L. Ed. 2d 1; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz v. Sorema N. A.*, O. T. 2001, No. 00-1853, p. 10 (stating that a *Rule 12(b)(6)* motion is not "an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint" (internal quotation marks omitted)). 19

19 See also 5 Wright & Miller § 1202, at 89-90 ("Pleadings under the rules simply may be a general summary of the party's position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided

As in the discrimination context, we have developed an evidentiary framework for evaluating claims under § 1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). Under *Matsushita*, a plaintiff's allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a *Rule 56* motion, a § 1 plaintiff "must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." *Id.*, at 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (quoting *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984)). That is, the plaintiff "must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action." 475 U.S., at 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538.

Everything today's majority says would therefore make perfect sense if it were ruling on a *Rule 56* motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because -- in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior -- the claimed conspiracy is "conceivable" but not "plausible," *ante*, at 24. I have my doubts about the majority's assessment of the plausibility of this alleged conspiracy. See Part III, *infra*. But even if the majority's speculation is correct, its "plausibility" standard is irreconcilable with *Rule 8* and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman*, fear of the burdens of litigation does not justify factual conclusions supported only by lawyers' arguments rather than sworn denials or admissible evidence.

This case is a poor vehicle for the Court's new pleading rule, for we have observed that "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S. Ct. 1848, 48 L. Ed. 2d 338 (1976) (quoting *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)); see also *Knuth v. Erie-Crawford Dairy Cooperative Assn.*, 395 F.2d 420, 423 (CA3 1968) ("The 'liberal' approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings"). Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney's fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. See *Radovich v. National Football League*, 352 U.S. 445, 454, 77 S. Ct. 390, 1 L. Ed. 2d 456 (1957) ("Congress itself has placed the private antitrust litigant in a most favorable position In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws"). It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.

for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this; indeed, history shows that no more can be performed successfully by the pleadings" (footnotes omitted)).

The same year we decided *Conley*, Judge Clark wrote, presciently,

"I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular*." Special Pleading in the "Big Case"? in Procedure -- The Handmaid of Justice 147, 148 (C. Wright & H. Reasoner eds. 1965) (hereinafter Clark, Special Pleading in the Big Case) (emphasis added).

In this "Big Case," the Court succumbs to the temptation that previous Courts have steadfastly resisted. While the majority assures us that it is not applying any "heightened" pleading standard, see *ante*, at 23, n. 14, I shall now explain why I have a difficult time understanding its opinion any other way.

III

The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws, see, e.g., *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526-527, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983). Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws, see *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489-490, 97 S. Ct. 690, 50 L. Ed. 2d 701 (1977). Rather, the theory on which the Court permits dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

As the Court explains, prior to the enactment of the Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the regional monopolists to take affirmative steps to facilitate entry to new competitors, see *Verizon*

20 Our decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S. Ct. 1627, 161 L. Ed. 2d 577 (2005), is not to the contrary. There, the plaintiffs failed adequately to allege loss causation, a required element in a private securities fraud action. Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to "provide the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the [alleged] misrepresentation." *Id.*, at 347, 125 S. Ct. 1627, 161 L. Ed. 2d 577. Here, the failure the majority identifies is not a failure of notice -- which "notice pleading" rightly condemns -- but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of *notice* but of *proof*, it should not be answered without first hearing from the defendants (as apart from their lawyers).

Similarly, in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983), in which we also found an antitrust complaint wanting, the problem was not that the injuries the plaintiffs alleged failed to satisfy some threshold of plausibility, but rather that the injuries *as alleged* were not "the type that the antitrust statute was intended to forestall." *Id.*, at 540, 103 S. Ct. 897, 74 L. Ed. 2d 723; see *id.*, at 526, 103 S. Ct. 897, 74 L. Ed. 2d 723 ("As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged").

Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 402, 124 S. Ct. 872, 157 L. Ed. 2d 823 (2004); it also permitted the existing firms to compete with each other and to expand their operations into previously forbidden territory. See 47 U.S.C. § 271. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, PP 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)." *Ante*, at 8-9.

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct. *Ante*, at 18. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era, *supra*, at 5-7. That distinction was a defining feature of code pleading, see generally Clark, *The Complaint in Code Pleading*, 35 Yale L. J. 259 (1925-1926), but was conspicuously abolished when the Federal Rules were enacted in 1938. See *United States v. Employing Plasterers Ass'n*, 347 U.S. 186, 188, 74 S. Ct. 452, 98 L. Ed. 618 (1954) (holding, in an antitrust case, that the Government's allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint "whether these charges be called 'allegations of fact' or 'mere conclusions of the pleader'"); *Brownlee v. Conine*, 957 F.2d 353, 354 (CA7 1992) ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, . . . so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliché means, does not automatically condemn it"); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3-4 (CA9 1963) ("One purpose of *Rule 8* was to get away from the highly technical distinction between statements of fact and conclusions of law . . ."); *Oil, Chemical & Atomic Workers Int'l Union v. Delta*, 277 F.2d 694, 697 (CA6 1960) ("Under the notice system of pleading established by the Rules of Civil Procedure, . . . the ancient distinction between pleading 'facts' and 'conclusions' is no longer significant"); 5 Wright & Miller § 1218, at 267 ("The federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties"). "Defendants entered into a contract" is no more a legal conclusion than "defendant negligently drove," see Form 9; *supra*, at 6. Indeed it is less of one. 21

21 The Court suggests that the allegation of an agreement, even if credited, might not give the notice required by *Rule 8* because it lacks specificity. *Ante*, at 18-19, n. 10. The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a *Rule 12(e)* motion for a more definite statement. See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002). Petitioners made no such motion and indeed have conceded that "our problem with the current complaint is not a lack of specificity, it's quite specific." Tr. of Oral Arg. 14. Thus, the fact that "the pleadings mentioned no specific time, place, or persons involved in the alleged conspiracies," *ante*, at 18, n. 10, is, for our purposes, academic.

Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "people of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, in 39 *Great Books of the Western World* 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint points not only to petitioners' numerous opportunities to meet with each other, Complaint P46, App. 23, 22but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right," *id.*, P42, App. 22. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would be in his company's economic self-interest to compete with its brethren, he had agreed with his competitors not to do so. According to the complaint, that is how the Illinois Coalition for Competitive Telecom construed Notebaert's statement, *id.*, P44, App. 22 (calling the statement "evidence of potential collusion among regional Bell phone monopolies to not compete against one another and kill off potential competitors in local phone service"), and that is how Members of Congress construed his company's behavior, *id.*, P45, App. 23 (describing a letter to the Justice Department requesting an investigation into the possibility that the ILECs'"very apparent non-competition policy" was coordinated).

Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. See Brief for Petitioners 36. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other quotes from that and other articles and decides that what he meant was that entering new markets as a CLEC would not be a "sustainable economic model." *Ante*, at 22, n. 13. Never mind that -- as anyone ever interviewed knows -- a newspaper article is hardly a verbatim transcript; the writer selects quotes to package his story, not to record a subject's views for posterity. But more importantly the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor.²³ See *Allen v. Wright*, 468 U.S. 737, 768, n. 1, 104 S. Ct. 3315,

22 The Court describes my reference to the allegation that the defendants belong to various trade associations as "playfully" suggesting that the defendants conspired to restrain trade. *Ante*, at 20, n. 12. Quite the contrary: an allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with -- though not sufficient to prove -- the plaintiffs' entirely serious and unequivocal allegation that the defendants entered into an unlawful agreement. Indeed, if it were true that the plaintiffs "rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs," *ante*, at 18, there would have been no purpose in including a reference to the trade association meetings in the amended complaint.

23 It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing to a rule of evidence, *ante*, at 22, n. 13. Under *Federal Rule of Evidence 201(b)*, a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot

82 L. Ed. 2d 556 (1984). The inference the statement supports -- that simultaneous decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to do so were the product of an agreement -- sits comfortably within the realm of possibility. That is all the Rules require.

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint without requiring the defendants to answer the charge that they "have agreed not to compete with one another and otherwise allocated customers and markets to one another." 24 P51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

Respondents in this case proposed a plan of "phased discovery" limited to the existence of the alleged conspiracy and class certification. Brief for Respondents 25-26. Two petitioners rejected the plan. *Ibid.* Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation. 25 Given the charge in the complaint -- buttressed by the

reasonably be questioned." Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.

24 The Court worries that a defendant seeking to respond to this "conclusory" allegation "would have little idea where to begin." *Ante*, at 19, n. 10. A defendant could, of course, begin by either denying or admitting the charge.

25 The potential for "sprawling, costly, and hugely time-consuming" discovery, *ante*, at 13, n. 6, is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court's case-management arsenal. Before discovery even begins, the court may grant a defendant's *Rule 12(e)* motion; *Rule 7(a)* permits a trial court to order a plaintiff to reply to a defendant's answer, see *Crawford-El v. Britton*, 523 U.S. 574, 598, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998); and *Rule 23* requires "rigorous analysis" to ensure that class certification is appropriate, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 160, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982); see *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (CA2 2006) (holding that a district court may not certify a class without ruling that each *Rule 23* requirement is met, even if a requirement overlaps with a merits issue). *Rule 16* invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, "the elimination of frivolous claims or defenses," *Rule 16(c)(1)*; "the necessity or desirability of amendments to the pleadings," *Rule 16(c)(2)*; "the control and scheduling of discovery," *Rule 16(c)(6)*; and "the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems," *Rule 16(c)(12)*. Subsequently, *Rule 26* confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. See 523 U.S., at 598-599, 118 S. Ct. 1584, 140 L. Ed. 2d 759. Indeed, *Rule 26(c)* specifically permits a court to take actions "to protect a party or person

common sense of Adam Smith -- I cannot say that the possibility that joint discussions and perhaps some agreements played a role in petitioners' decisionmaking process is so implausible that dismissing the complaint before any defendant has denied the charge is preferable to granting respondents even a minimal opportunity to prove their claims. See Clark, New Federal Rules 977 ("Through the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function").

I fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar -- among whom "lament" as to inadequate judicial supervision of discovery is most "common," see *ante*, at 12 -- should lobby for this state of affairs. But "we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public." Clark, Special Pleading in the Big Case 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules -- not our interpretation of them. 26 See *Swierkiewicz*, 534 U.S., at

from annoyance, embarrassment, oppression, or undue burden or expense" by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant. See *Societe Internationale pour Participations Industrielles et Commerciales, S. A. v. Rogers*, 357 U.S. 197, 206, 78 S. Ct. 1087, 2 L. Ed. 2d 1255 (1958) ("Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation"). And should it become apparent over the course of litigation that a plaintiff's filings bespeak an *in terrorem* suit, the district court has at its call its own *in terrorem* device, in the form of a wide array of Rule 11 sanctions. See *Rules 11(b), (c)* (authorizing sanctions if a suit is presented "for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation"); see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S. Ct. 922, 112 L. Ed. 2d 1140 (1991) (holding that Rule 11 applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys); *Atkins v. Fischer*, 232 F.R.D. 116, 126 (DC 2005) ("As possible sanctions pursuant to Rule 11, the court has an arsenal of options at its disposal").

26 Given his "background in antitrust law," *ante*, at 13, n. 6, Judge Easterbrook has recognized that the most effective solution to discovery abuse lies in the legislative and rulemaking arenas. He has suggested that the remedy for the ills he complains of requires a revolution in the rules of civil procedure:

"Perhaps a system in which judges pare away issues and focus on investigation is too radical to contemplate in this country -- although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority If we are to rule out judge-directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery -- impositional and otherwise." *Discovery as Abuse*, 69 B. U. L. Rev. 635, 645 (1989).

515, 122 S. Ct. 992, 152 L. Ed. 2d 1; *Crawford-El v. Britton*, 523 U.S. 574, 595, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998); *Leatherman*, 507 U.S., at 168, 113 S. Ct. 1160, 122 L. Ed. 2d 517.

IV

Just a few weeks ago some of my colleagues explained that a strict interpretation of the literal text of statutory language is essential to avoid judicial decisions that are not faithful to the intent of Congress. *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. ___, ___, 127 S. Ct. 1534, 167 L. Ed. 2d 449 (2007) (SCALIA, J., dissenting). I happen to believe that there are cases in which other tools of construction are more reliable than text, but I agree of course that congressional intent should guide us in matters of statutory interpretation. *Id.*, at ___, 127 S. Ct. 1534, 167 L. Ed. 2d 449 (STEVENS, J., concurring). This is a case in which the intentions of the drafters of three important sources of law -- the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure -- all point unmistakably in the same direction, yet the Court marches resolutely the other way. Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any congressional command is glaringly obvious.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants -- who in this case are some of the wealthiest corporations in our economy -- from the burdens of pretrial discovery. *Ante*, at 11-13. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their *Rule 12(b)* motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners,²⁷ that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly serious factual allegations, that could account for this stark break from precedent.

If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental -- and unjustified -- change in the character of pretrial practice.

Accordingly, I respectfully dissent.

²⁷ It would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs. See *Fed. Rule Civ. Proc. 54(d)(1)* ("Costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs").

Chapter 3

Monopoly

3A. Monopolization

After ¶337, insert the following

WEYERHAEUSER CO. v. ROSS-SIMMONS HARDWOOD LUMBER CO.
127 S. Ct. 1069 (2007)

Justice THOMAS. Respondent Ross-Simmons, a sawmill, sued petitioner Weyerhaeuser, alleging that Weyerhaeuser drove it out of business by bidding up the price of sawlogs to a level that prevented Ross-Simmons from being profitable. A jury returned a verdict in favor of Ross-Simmons on its monopolization claim, and the Ninth Circuit affirmed. We granted certiorari to decide whether the test we applied to claims of predatory pricing in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (1993), also applies to claims of predatory bidding. We hold that it does. Accordingly, we vacate the judgment of the Court of Appeals.

I

This antitrust case concerns the acquisition of red alder sawlogs by the mills that process those logs in the Pacific Northwest. These hardwood-lumber mills usually acquire logs in one of three ways. Some logs are purchased on the open bidding market. Some come to the mill through standing short- and long-term agreements with timberland owners. And others are harvested from timberland owned by the sawmills themselves. The allegations relevant to our decision in this case relate to the bidding market.

Ross-Simmons began operating a hardwood-lumber sawmill in Longview, Washington, in 1962. Weyerhaeuser entered the Northwestern hardwood-lumber market in 1980 by acquiring an existing lumber company. Weyerhaeuser gradually increased the scope of its hardwood-lumber operation, and it now owns six hardwood sawmills in the region. By 2001, Weyerhaeuser's mills were acquiring approximately 65 percent of the alder logs available for sale in the region. App. 754a, 341a.

From 1990 to 2000, Weyerhaeuser made more than \$ 75 million in capital investments in its hardwood mills in the Pacific Northwest. *Id.*, at 159a. During this period, production increased at every Northwestern hardwood mill that Weyerhaeuser owned. *Id.*, at 160a. In addition to increasing production, Weyerhaeuser used "state-of-the-art technology," *id.*, at 500a, including sawing equipment, to increase the amount of lumber recovered from every log, *id.*, at 500a,

549a. By contrast, Ross-Simmons appears to have engaged in little efficiency-enhancing investment. See *id.*, at 438a-441a.

Logs represent up to 75 percent of a sawmill's total costs. See *id.*, at 169a. And from 1998 to 2001, the price of alder sawlogs increased while prices for finished hardwood lumber fell. These divergent trends in input and output prices cut into the mills' profit margins, and Ross-Simmons suffered heavy losses during this time. See *id.*, at 155a (showing a negative net income from 1998 to 2000). Saddled with several million dollars in debt, Ross-Simmons shut down its mill completely in May 2001. *Id.*, at 156a.

Ross-Simmons blamed Weyerhaeuser for driving it out of business by bidding up input costs, and it filed an antitrust suit against Weyerhaeuser for monopolization and attempted monopolization under § 2 of the Sherman Act. See 26 Stat. 209, as amended, 15 U.S.C. § 2 (2000 ed., Supp. IV). Ross-Simmons alleged that, among other anticompetitive acts, Weyerhaeuser had used "its dominant position in the alder sawlog market to drive up the prices for alder sawlogs to levels that severely reduced or eliminated the profit margins of Weyerhaeuser's alder sawmill competition." App. 135a. Proceeding in part on this "predatory-bidding" theory, Ross-Simmons argued that Weyerhaeuser had overpaid for alder sawlogs to cause sawlog prices to rise to artificially high levels as part of a plan to drive Ross-Simmons out of business. As proof that this practice had occurred, Ross-Simmons pointed to Weyerhaeuser's large share of the alder purchasing market, rising alder sawlog prices during the alleged predation period, and Weyerhaeuser's declining profits during that same period.

Prior to trial, Weyerhaeuser moved for summary judgment on Ross-Simmons' predatory-bidding theory. *Id.*, at 6a-24a. The District Court denied the motion. *Id.*, at 58a-69a. At the close of the 9-day trial, Weyerhaeuser moved for judgment as a matter of law, or alternatively, for a new trial. The motions were based in part on Weyerhaeuser's argument that Ross-Simmons had not satisfied the standard this Court set forth in *Brooke Group, supra*, 509 U.S. 209, 113 S. Ct. 2578, 125 L. Ed. 2d 168. App. 940a-942a. The District Court denied Weyerhaeuser's motion. *Id.*, at 720a, App. to Pet. for Cert. 46a. The District Court also rejected proposed predatory-bidding jury instructions that incorporated elements of the *Brooke Group* test. App. 725a-730a, 978a. Ultimately, the District Court instructed the jury that Ross-Simmons could prove that Weyerhaeuser's bidding practices were anticompetitive acts if the jury concluded that Weyerhaeuser "purchased more logs than it needed, or paid a higher price for logs than necessary, in order to prevent [Ross-Simmons] from obtaining the logs they needed at a fair price." *Id.*, at 978a. Finding that Ross-Simmons had proved its claim for monopolization, the jury returned a \$ 26 million verdict against Weyerhaeuser. *Id.*, at 967a. The verdict was trebled to approximately \$ 79 million.

Weyerhaeuser appealed to the Court of Appeals for the Ninth Circuit. There, Weyerhaeuser argued that *Brooke Group's* standard for claims of predatory pricing should also apply to claims of predatory bidding. The Ninth Circuit disagreed and affirmed the verdict against Weyerhaeuser. *Confederated Tribes of Siletz Indians of Or. v. Weyerhaeuser Co.*, 411 F.3d 1030, 1035-1036 (2005).

The Court of Appeals reasoned that "buy-side predatory bidding" and "sell-side predatory pricing," though similar, are materially different in that predatory bidding does not necessarily benefit consumers or stimulate competition in the way that predatory pricing does. *Id.*, at 1037. Concluding that "the concerns that led the *Brooke Group* Court to establish a high standard of liability in the predatory-pricing context do not carry over to this predatory bidding context with the same force," the Court of Appeals declined to apply *Brooke Group* to Ross-Simmons' claims

of predatory bidding. 411 F.3d at 1038. The Court of Appeals went on to conclude that substantial evidence supported a finding of liability on the predatory-bidding theory. *Id.*, at 1045. We granted certiorari to decide whether *Brooke Group* applies to claims of predatory bidding. 548 U.S. ___, 126 S. Ct. 2965, 165 L. Ed. 2d 948 (2006). We hold that it does, and we vacate the Court of Appeals' judgment.

II

In *Brooke Group*, we considered what a plaintiff must show in order to succeed on a claim of predatory pricing under § 2 of the Sherman Act. 1 In a typical predatory-pricing scheme, the predator reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business. Then, with competition vanquished, the predator raises output prices to a supracompetitive level. See *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 584-585, n. 8, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (describing predatory pricing). For the scheme to make economic sense, the losses suffered from pricing goods below cost must be recouped (with interest) during the supracompetitive-pricing stage of the scheme. *Id.*, at 588-589, 106 S. Ct. 1348, 89 L. Ed. 2d 538; *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 121-122, n. 17, 107 S. Ct. 484, 93 L. Ed. 2d 427 (1986); see also R. Bork, *The Antitrust Paradox* 145 (1978). Recognizing this economic reality, we established two prerequisites to recovery on claims of predatory pricing. "First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group*, 509 U.S., at 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168. Second, a plaintiff must demonstrate that "the competitor had . . . a dangerous probability of recouping its investment in below-cost prices." *Id.*, at 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168.

The first prong of the test -- requiring that prices be below cost -- is necessary because "as a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control." *Id.*, at 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168. We were particularly wary of allowing recovery for above-cost price cutting because allowing such claims could, perversely, "chill legitimate price cutting," which directly benefits consumers. See *id.*, at 223-224, 113 S. Ct. 2578, 125 L. Ed. 2d 168; *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) ("Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition"). Thus, we specifically declined to allow plaintiffs to recover for above-cost price cutting, concluding that "discouraging a price cut and . . . depriving consumers of the benefits of lower prices . . . does not constitute sound antitrust policy." *Brooke Group*, *supra*, at 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168.

The second prong of the *Brooke Group* test -- requiring that there be a dangerous probability of recoupment of losses -- is necessary because, without a dangerous probability of recoupment,

1 *Brooke Group* dealt with a claim under the Robinson-Patman Act, but as we observed, "primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act." 509 U.S., at 221, 113 S. Ct. 2578, 125 L. Ed. 2d 168. Because of this similarity, the standard adopted in *Brooke Group* applies to predatory-pricing claims under § 2 of the Sherman Act. *Id.*, at 222, 113 S. Ct. 2578, 125 L. Ed. 2d 168.

it is highly unlikely that a firm would engage in predatory pricing. As the Court explained in *Matsushita*, a firm engaged in a predatory-pricing scheme makes an investment -- the losses suffered plus the profits that would have been realized absent the scheme -- at the initial, below-cost-selling phase. 475 U.S., at 588-589, 106 S. Ct. 1348, 89 L. Ed. 2d 538. For that investment to be rational, a firm must reasonably expect to recoup in the long run at least its original investment with supracompetitive profits. *Ibid.*; *Brooke Group*, 509 U.S., at 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168. Without such a reasonable expectation, a rational firm would not willingly suffer definite, short-run losses. Recognizing the centrality of recoupment to a predatory-pricing scheme, we required predatory-pricing plaintiffs to "demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it." *Id.*, at 225, 113 S. Ct. 2578, 125 L. Ed. 2d 168.

We described the two parts of the *Brooke Group* test as "essential components of real market injury" that were "not easy to establish." *Id.*, at 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168. We also reiterated that the costs of erroneous findings of predatory-pricing liability were quite high because "the mechanism by which a firm engages in predatory pricing -- lowering prices -- is the same mechanism by which a firm stimulates competition," and therefore, mistaken findings of liability would "'chill the very conduct the antitrust laws are designed to protect.'" *Ibid.* (quoting *Cargill, supra*, at 122, n. 17, 107 S. Ct. 484, 93 L. Ed. 2d 427).

III

Predatory bidding, which Ross-Simmons alleges in this case, involves the exercise of market power on the buy side or input side of a market. In a predatory-bidding scheme, a purchaser of inputs "bids up the market price of a critical input to such high levels that rival buyers cannot survive (or compete as vigorously) and, as a result, the predating buyer acquires (or maintains or increases its) monopsony power." Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 *Antitrust L. J.* 625, 652 (2005) (hereinafter Kirkwood). Monopsony power is market power on the buy side of the market. Blair & Harrison, *Antitrust Policy and Monopsony*, 76 *Cornell L. Rev.* 297 (1991). As such, a monopsony is to the buy side of the market what a monopoly is to the sell side and is sometimes colloquially called a "buyer's monopoly." See *id.*, at 301, 320; Piraino, *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, 56 *Hastings L. J.* 1121, 1125 (2005).

A predatory bidder ultimately aims to exercise the monopsony power gained from bidding up input prices. To that end, once the predatory bidder has caused competing buyers to exit the market for purchasing inputs, it will seek to "restrict its input purchases below the competitive level," thus "reducing the unit price for the remaining inputs it purchases." Salop, *Anticompetitive Overbuying by Power Buyers*, 72 *Antitrust L. J.* 669, 672 (2005) (hereinafter Salop). The reduction in input prices will lead to "a significant cost saving that more than offsets the profits that would have been earned on the output." *Ibid.* If all goes as planned, the predatory bidder will reap monopsonistic profits that will offset any losses suffered in bidding up input prices. 2 (In this case, the plaintiff was the defendant's competitor in the input-purchasing

2 If the predatory firm's competitors in the input market and the output market are the same, then predatory bidding can also lead to the bidder's acquisition of monopoly power in the output market. In that case, which does not appear to be present here, the monopsonist could, under certain market conditions, also recoup its losses by raising output prices to monopolistic levels.

market. Thus, this case does not present a situation of suppliers suing a monopsonist buyer under § 2 of the Sherman Act, nor does it present a risk of significantly increased concentration in the market in which the monopsonist sells, *i.e.*, the market for finished lumber.)

IV

A

Predatory-pricing and predatory-bidding claims are analytically similar. See Hovenkamp, *The Law of Exclusionary Pricing*, 2 *Competition Policy Int'l*, No. 1, pp. 21, 35 (Spring 2006). This similarity results from the close theoretical connection between monopoly and monopsony. See *Kirkwood* 653 (describing monopsony as the "mirror image" of monopoly); *Khan v. State Oil Co.*, 93 F.3d 1358, 1361 (CA7 1996) ("Monopsony pricing . . . is analytically the same as monopoly or cartel pricing and [is] so treated by the law"), vacated and remanded on other grounds, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997); *Vogel v. American Soc. of Appraisers*, 744 F.2d 598, 601 (CA7 1984) ("Monopoly and monopsony are symmetrical distortions of competition from an economic standpoint"); see also Hearing on Monopsony Issues in Agriculture: Buying Power of Processors in Our Nation's Agricultural Markets before the Senate Committee on the Judiciary, 108th Cong., 1st Sess., 3 (2004). The kinship between monopoly and monopsony suggests that similar legal standards should apply to claims of monopolization and to claims of monopsonization. Cf. Noll, "Buyer Power" and Economic Policy, 72 *Antitrust L. J.* 589, 591 (2005) ("Asymmetric treatment of monopoly and monopsony has no basis in economic analysis").

Tracking the economic similarity between monopoly and monopsony, predatory-pricing plaintiffs and predatory-bidding plaintiffs make strikingly similar allegations. A predatory-pricing plaintiff alleges that a predator cut prices to drive the plaintiff out of business and, thereby, to reap monopoly profits from the output market. In parallel fashion, a predatory-bidding plaintiff alleges that a predator raised prices for a key input to drive the plaintiff out of business and, thereby, to reap monopsony profits in the input market. Both claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes.³ And both claims logically require firms to incur short-term losses on the chance that they might reap supracompetitive profits in the future.

B

See *Salop* 679-682 (describing a monopsonist's predatory strategy that depends upon raising prices in the output market).

³ Predatory bidding on inputs is not analytically different from predatory overbuying of inputs. Both practices fall under the rubric of monopsony predation and involve an input purchaser's use of input prices in an attempt to exclude rival input purchasers. The economic effect of the practices is identical: input prices rise. In a predatory-bidding scheme, the purchaser causes prices to rise by offering to pay more for inputs. In a predatory-overbuying scheme, the purchaser causes prices to rise by demanding more of the input. Either way, input prices increase. Our use of the term "predatory bidding" is not meant to suggest that different legal treatment is appropriate for the economically identical practice of "predatory overbuying."

More importantly, predatory bidding mirrors predatory pricing in respects that we deemed significant to our analysis in *Brooke Group*. In *Brooke Group*, we noted that "predatory pricing schemes are rarely tried, and even more rarely successful." 509 U.S., at 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (quoting *Matsushita*, 475 U.S., at 589, 106 S. Ct. 1348, 89 L. Ed. 2d 538). Predatory pricing requires a firm to suffer certain losses in the short term on the chance of reaping supracompetitive profits in the future. *Id.*, at 588-589, 106 S. Ct. 1348, 89 L. Ed. 2d 538. A rational business will rarely make this sacrifice. *Ibid.* The same reasoning applies to predatory bidding. A predatory-bidding scheme requires a buyer of inputs to suffer losses today on the chance that it will reap supracompetitive profits in the future. For this reason, "successful monopsony predation is probably as unlikely as successful monopoly predation." R. Blair & J. Harrison, *Monopsony* 66 (1993).

And like the predatory conduct alleged in *Brooke Group*, actions taken in a predatory-bidding scheme are often "the very essence of competition." 509 U.S., at 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (quoting *Cargill*, 479 U.S., at 122, n. 17, 107 S. Ct. 484, 93 L. Ed. 2d 427, in turn quoting *Matsushita*, *supra*, at 594, 106 S. Ct. 1348, 89 L. Ed. 2d 538). Just as sellers use output prices to compete for purchasers, buyers use bid prices to compete for scarce inputs. There are myriad legitimate reasons -- ranging from benign to affirmatively procompetitive -- why a buyer might bid up input prices. A firm might bid up inputs as a result of miscalculation of its input needs or as a response to increased consumer demand for its outputs. A more efficient firm might bid up input prices to acquire more inputs as a part of a procompetitive strategy to gain market share in the output market. A firm that has adopted an input-intensive production process might bid up inputs to acquire the inputs necessary for its process. Or a firm might bid up input prices to acquire excess inputs as a hedge against the risk of future rises in input costs or future input shortages. See Salop 682-683; Kirkwood 655. There is nothing illicit about these bidding decisions. Indeed, this sort of high bidding is essential to competition and innovation on the buy side of the market. 4

Brooke Group also noted that a failed predatory-pricing scheme may benefit consumers. 509 U.S., at 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168. The potential benefit results from the difficulty an aspiring predator faces in recouping losses suffered from below-cost pricing. Without successful recoupment, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced." *Ibid.* Failed predatory-bidding schemes can also, but will not necessarily, benefit consumers. See Salop 677-678. In the first stage of a predatory-bidding scheme, the predator's high bidding will likely lead to its acquisition of more inputs. Usually, the acquisition of more inputs leads to the manufacture of more outputs. And increases in output generally result in lower prices to consumers. 5 *Id.*, at 677; R. Blair & J. Harrison, *supra*, at 66-67. Thus, a failed predatory-bidding scheme can be a "boon to consumers" in the same way that

4 Higher prices for inputs obviously benefit existing sellers of inputs and encourage new firms to enter the market for input sales as well.

5 Consumer benefit does not necessarily result at the first stage because the predator might not use its excess inputs to manufacture additional outputs. It might instead destroy the excess inputs. See Salop 677, n. 22. Also, if the same firms compete in the input and output markets, any increase in outputs by the predator could be offset by decreases in outputs from the predator's struggling competitors.

we considered a predatory-pricing scheme to be. See *Brooke Group, supra*, at 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168.

In addition, predatory bidding presents less of a direct threat of consumer harm than predatory pricing. A predatory-pricing scheme ultimately achieves success by charging higher prices to consumers. By contrast, a predatory-bidding scheme could succeed with little or no effect on consumer prices because a predatory bidder does not necessarily rely on raising prices in the output market to recoup its losses. *Salop* 676. Even if output prices remain constant, a predatory bidder can use its power as the predominant buyer of inputs to force down input prices and capture monopsony profits. *Ibid.*

C

The general theoretical similarities of monopoly and monopsony combined with the theoretical and practical similarities of predatory pricing and predatory bidding convince us that our two-pronged *Brooke Group* test should apply to predatory-bidding claims.

The first prong of *Brooke Group's* test requires little adaptation for the predatory-bidding context. A plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. That is, the predator's bidding on the buy side must have caused the cost of the relevant output to rise above the revenues generated in the sale of those outputs. As with predatory pricing, the exclusionary effect of higher bidding that does not result in below-cost output pricing "is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate" procompetitive conduct. 509 U.S., at 223, 113 S. Ct. 2578, 125 L. Ed. 2d 168. Given the multitude of procompetitive ends served by higher bidding for inputs, the risk of chilling procompetitive behavior with too lax a liability standard is as serious here as it was in *Brooke Group*. Consequently, only higher bidding that leads to below-cost pricing in the relevant output market will suffice as a basis for liability for predatory bidding.

A predatory-bidding plaintiff also must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power. Absent proof of likely recoupment, a strategy of predatory bidding makes no economic sense because it would involve short-term losses with no likelihood of offsetting long-term gains. Cf. *id.*, at 224, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (citing *Matsushita*, 475 U.S., at 588-589, 106 S. Ct. 1348, 89 L. Ed. 2d 538). As with predatory pricing, making a showing on the recoupment prong will require "a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market." *Brooke Group, supra*, at 226, 113 S. Ct. 2578, 125 L. Ed. 2d 168.

Ross-Simmons has conceded that it has not satisfied the *Brooke Group* standard. Brief for Respondent 49; Tr. of Oral Arg. 49. Therefore, its predatory-bidding theory of liability cannot support the jury's verdict.

V

For these reasons, we vacate the judgment of the Court of Appeals and remand the case for further proceedings consistent with this opinion.

It is so ordered.

After ¶341, insert the following

Single Firm Conduct Hearings

The Antitrust Division of the U.S. Department of Justice and the Federal Trade Commission (FTC) cohosted hearings on single-firm conduct and antitrust law beginning in June 2006. Many academics, practitioners and industry leaders testified. The opinions varied enormously and it is not possible to summarize them here. Interested readers should visit http://www.usdoj.gov/atr/public/hearings/single_firm/sfchearing.htm.

Chapter 4

Vertical Restraints

4A. Restricted Distribution

After ¶412, insert the following

LEEGIN CREATIVE LEATHER PRODUCTS v. PSKS

2007 U.S. LEXIS 8668 (2007)

Justice KENNEDY. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911), the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. The question presented by the instant case is whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of § 1. The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.

I

Petitioner, Leegin Creative Leather Products, Inc. (Leegin), designs, manufactures, and distributes leather goods and accessories. In 1991, Leegin began to sell belts under the brand name "Brighton." The Brighton brand has now expanded into a variety of women's fashion accessories. It is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. Leegin's president, Jerry Kohl, also has an interest in about 70 stores that sell Brighton products. Leegin asserts that, at least for its products, small retailers treat customers better, provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers. Kohl explained: "We want the consumers to get a different experience than they get in Sam's Club or in Wal-Mart. And you can't get that kind of experience or support or customer service from a store like Wal-Mart." 5 Record 127.

Respondent, PSKS, Inc. (PSKS), operates Kay's Kloset, a women's apparel store in Lewisville, Texas. Kay's Kloset buys from about 75 different manufacturers and at one time sold the Brighton brand. It first started purchasing Brighton goods from Leegin in 1995. Once it began selling the brand, the store promoted Brighton. For example, it ran Brighton advertisements and had Brighton days in the store. Kay's Kloset became the destination retailer

in the area to buy Brighton products. Brighton was the store's most important brand and once accounted for 40 to 50 percent of its profits.

In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy." 4 *id.*, at 939. Following the policy, Leegin refused to sell to retailers that discounted Brighton goods below suggested prices. The policy contained an exception for products not selling well that the retailer did not plan on reordering. In the letter to retailers establishing the policy, Leegin stated:

"In this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.

"We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.

"We realize that half the equation is Leegin producing great Brighton product and the other half is you, our retailer, creating great looking stores selling our products in a quality manner." *Ibid.*

Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation.

A year after instituting the pricing policy Leegin introduced a marketing strategy known as the "Heart Store Program." *See id.*, at 962-972. It offered retailers incentives to become Heart Stores, and, in exchange, retailers pledged, among other things, to sell at Leegin's suggested prices. Kay's Kloset became a Heart Store soon after Leegin created the program. After a Leegin employee visited the store and found it unattractive, the parties appear to have agreed that Kay's Kloset would not be a Heart Store beyond 1998. Despite losing this status, Kay's Kloset continued to increase its Brighton sales.

In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by 20 percent. Kay's Kloset contended it placed Brighton products on sale to compete with nearby retailers who also were undercutting Leegin's suggested prices. Leegin, nonetheless, requested that Kay's Kloset cease discounting. Its request refused, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales.

PSKS sued Leegin in the United States District Court for the Eastern District of Texas. It alleged, among other claims, that Leegin had violated the antitrust laws by "entering into agreements with retailers to charge only those prices fixed by Leegin." *Id.*, at 1236. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The District Court excluded the testimony, relying on the *per se* rule established by *Dr. Miles*. At trial PSKS argued that the Heart Store program, among other things, demonstrated Leegin and its retailers had agreed to fix prices. Leegin responded that it had established a unilateral pricing policy lawful under § 1, which applies only to concerted action. *See United States v. Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919). The jury agreed with PSKS and awarded it \$ 1.2 million. Pursuant to 15 U.S.C. § 15(a), the District

Court trebled the damages and reimbursed PSKS for its attorney's fees and costs. It entered judgment against Leegin in the amount of \$ 3,975,000.80.

The Court of Appeals for the Fifth Circuit affirmed. *171 Fed. Appx. 464 (2006) (per curiam)*. On appeal Leegin did not dispute that it had entered into vertical price-fixing agreements with its retailers. Rather, it contended that the rule of reason should have applied to those agreements. The Court of Appeals rejected this argument. *Id.*, at 466-467. It was correct to explain that it remained bound by *Dr. Miles* "because [the Supreme] Court has consistently applied the *per se* rule to [vertical minimum price-fixing] agreements." *171 Fed. Appx.*, at 466. On this premise the Court of Appeals held that the District Court did not abuse its discretion in excluding the testimony of Leegin's economic expert, for the *per se* rule rendered irrelevant any procompetitive justifications for Leegin's pricing policy. *Id.*, at 467. We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful. *549 U.S. , 127 S. Ct. 28, 165 L. Ed. 2d 1008 (2006)* .

II

Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." Ch. 647, 26 Stat. 209, as amended, *15 U.S.C. § 1*. While § 1 could be interpreted to proscribe all contracts, see, e.g., *Board of Trade of Chicago v. United States*, *246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)*, the Court has never "taken a literal approach to [its] language," *Texaco Inc. v. Dagher*, *547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006)*. Rather, the Court has repeated time and again that § 1 "outlaws only unreasonable restraints." *State Oil Co. v. Khan*, *522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997)*.

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. See *Texaco*, *supra*, at 5, *126 S. Ct. 1276, 164 L. Ed. 2d 1*. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE Sylvania Inc.*, *433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Appropriate factors to take into account include "specific information about the relevant business" and "the restraint's history, nature, and effect." *Khan*, *supra*, at 10, *118 S. Ct. 275, 139 L. Ed. 2d 199*. Whether the businesses involved have market power is a further, significant consideration. See, e.g., *Copperweld Corp. v. Independence Tube Corp.*, *467 U.S. 752, 768, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984)* (equating the rule of reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect"); see also *Illinois Tool Works Inc. v. Independent Ink, Inc.*, *547 U.S. 28, 45-46, 126 S. Ct. 1281, 164 L. Ed. 2d 26 (2006)*. In its design and function the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*." *Khan*, *supra*, at 10, *118 S. Ct. 275, 139 L. Ed. 2d 199*. The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, *Business Electronics Corp. v. Sharp Electronics Corp.*, *485 U.S. 717, 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988)*; and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, see *Texaco*, *supra*, at 5, *126 S. Ct. 1276, 164 L. Ed. 2d 1*, or to divide markets, see *Palmer v. BRG of Ga., Inc.*, *498 U.S. 46, 49-50, 111 S. Ct. 401, 112 L. Ed. 2d 349 (1990) (per curiam)*.

Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics, supra*, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, *GTE Sylvania, supra*, at 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568, and "lack . . . any redeeming virtue," *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985) (internal quotation marks omitted).

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979), and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason, see *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 344, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982). It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Khan, supra*, at 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (internal quotation marks omitted); see also *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963) (refusing to adopt a *per se* rule for a vertical nonprice restraint because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a *per se* rule). And, as we have stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *GTE Sylvania, supra*, at 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568.

III

The Court has interpreted *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911), as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices. See, e.g., *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). In *Dr. Miles* the plaintiff, a manufacturer of medicines, sold its products only to distributors who agreed to resell them at set prices. The Court found the manufacturer's control of resale prices to be unlawful. It relied on the common-law rule that "a general restraint upon alienation is ordinarily invalid." 220 U.S., at 404-405, 31 S. Ct. 376, 55 L. Ed. 2d 502. The Court then explained that the agreements would advantage the distributors, not the manufacturer, and were analogous to a combination among competing distributors, which the law treated as void. *Id.*, at 407-408, 31 S. Ct. 376, 55 L. Ed. 2d 502.

The reasoning of the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based. By relying on the common-law rule against restraints on alienation, *id.*, at 404-405, 31 S. Ct. 376, 55 L. Ed. 2d 502, the Court justified its decision based on "formalistic" legal doctrine rather than "demonstrable economic effect," *GTE Sylvania, supra*, at 58-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568. The Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints. Yet the Sherman Act's use of "restraint of trade" "invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890." *Business Electronics, supra*, at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808. The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here. Usually associated with land, not chattels, the rule arose from restrictions removing real property from

the stream of commerce for generations. The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." *GTE Sylvania*, 433 U.S., at 53, n. 21, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (internal quotation marks omitted).

Dr. Miles, furthermore, treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. See 220 U.S., at 407-408, 31 S. Ct. 376, 55 L. Ed. 2d 502. In later cases, however, the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. See, e.g., *Business Electronics*, *supra*, at 734, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (disclaiming the "notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality"); *Maricopa County*, *supra*, at 348, n. 18 (noting that "horizontal restraints are generally less defensible than vertical restraints"). Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider.

The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate. See *Business Electronics*, 485 U.S., at 726, 108 S. Ct. 1515, 99 L. Ed. 2d 808.

A

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. See, e.g., Brief for Economists as *Amici Curiae* 16 ("In the theoretical literature, it is essentially undisputed that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects"); Brief for United States as *Amicus Curiae* 9 ("There is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote *interbrand* competition and consumer welfare in a variety of ways"); ABA Section of Antitrust Law, *Antitrust Law and Economics of Product Distribution* 76 (2006) ("The bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes"); see also H. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 184-191 (2005) (hereinafter Hovenkamp); R. Bork, *The Antitrust Paradox* 288-291 (1978) (hereinafter Bork). Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects. See, e.g., Brief for William S. Comanor et al. as *Amici Curiae* 3 ("Given [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted"); F.M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990) (hereinafter Scherer & Ross) ("The overall balance between benefits and costs [of resale price maintenance] is probably close").

The few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. See T. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence* 170 (1983) (hereinafter Overstreet) (noting that "efficient uses of [resale price maintenance] are evidently not unusual or rare"); see also Ippolito, *Resale Price Maintenance: Empirical Evidence From Litigation*, 34 J. Law & Econ. 263, 292-293 (1991) (hereinafter Ippolito).

The justifications for vertical price restraints are similar to those for other vertical restraints. See *GTE Sylvania*, 433 U.S., at 54-57, 97 S. Ct. 2549, 53 L. Ed. 2d 568. Minimum resale price maintenance can stimulate interbrand competition -- the competition among manufacturers selling different brands of the same type of product -- by reducing intrabrand competition -- the competition among retailers selling the same brand. See *id.*, at 51-52, 97 S. Ct. 2549, 53 L. Ed. 2d 568. The promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition." *Khan*, 522 U.S., at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. *GTE Sylvania*, *supra*, at 55, 97 S. Ct. 2549, 53 L. Ed. 2d 568. Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. R. Posner, *Antitrust Law* 172-173 (2d ed. 2001) (hereinafter Posner). Or consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. Marvel & McCafferty, *Resale Price Maintenance and Quality Certification*, 15 *Rand J. Econ.* 346, 347-349 (1984) (hereinafter Marvel & McCafferty). If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "New manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *GTE Sylvania*, *supra*, at 55, 97 S. Ct. 2549, 53 L. Ed. 2d 568; see Marvel & McCafferty 349 (noting that reliance on a retailer's reputation "will decline as the manufacturer's brand becomes better known, so that [resale price maintenance] may be particularly important as a competitive device for new entrants"). New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services. See Mathewson & Winter, *The Law and Economics*

of Resale Price Maintenance, 13 Rev. Indus. Org. 57, 74-75 (1998) (hereinafter Mathewson & Winter); Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265, 295 (1988); see also Deneckere, Marvel, & Peck, Demand Uncertainty, Inventories, and Resale Price Maintenance, 111 Q. J. Econ. 885, 911 (1996) (noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer's goods in the face of uncertain consumer demand).

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. See *Business Electronics*, 485 U.S., at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers. See *ibid.*; see also Posner 172; Overstreet 19-23.

Vertical price restraints also "might be used to organize cartels at the retailer level." *Business Electronics*, *supra*, at 725-726, 108 S. Ct. 1515, 99 L. Ed. 2d 808. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. See Posner 172; Overstreet 13-19. Historical examples suggest this possibility is a legitimate concern. See, e.g., Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985) (hereinafter Marvel) (providing an example of the power of the National Association of Retail Druggists to compel manufacturers to use resale price maintenance); Hovenkamp 186 (suggesting that the retail druggists in *Dr. Miles* formed a cartel and used manufacturers to enforce it).

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful. See *Texaco*, 547 U.S., at 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1; *GTE Sylvania*, 433 U.S., at 58, n. 28, 97 S. Ct. 2549, 53 L. Ed. 2d 568. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network. See Overstreet 31; 8 P. Areeda & H. Hovenkamp, Antitrust Law 47 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); cf. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937-938 (CA7 2000). A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants. See, e.g., Marvel 366-368. As should be evident, the

potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance "always or almost always tends to restrict competition and decrease output." *Business Electronics, supra*, at 723, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (internal quotation marks omitted). Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. See Overstreet 170; see also *id.*, at 80 (noting that for the majority of enforcement actions brought by the Federal Trade Commission between 1965 and 1982, "the use of [resale price maintenance] was not likely motivated by collusive dealers who had successfully coerced their suppliers"); Ippolito 292 (reaching a similar conclusion). As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

Respondent contends, nonetheless, that vertical price restraints should be *per se* unlawful because of the administrative convenience of *per se* rules. See, e.g., *GTE Sylvania, supra*, at 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (noting "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system"). That argument suggests *per se* illegality is the rule rather than the exception. This misinterprets our antitrust law. *Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage. See Easterbrook, Vertical Arrangements and the Rule of Reason, 53 *Antitrust L. J.* 135, 158 (1984) (hereinafter Easterbrook). They also may increase litigation costs by promoting frivolous suits against legitimate practices. The Court has thus explained that administrative "advantages are not sufficient in themselves to justify the creation of *per se* rules," *GTE Sylvania*, 433 U.S., at 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568, and has relegated their use to restraints that are "manifestly anticompetitive," *id.*, at 49-50, 97 S. Ct. 2549, 53 L. Ed. 2d 568. Were the Court now to conclude that vertical price restraints should be *per se* illegal based on administrative costs, we would undermine, if not overrule, the traditional "demanding standards" for adopting *per se* rules. *Id.*, at 50, 97 S. Ct. 2549, 53 L. Ed. 2d 568. Any possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.

Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods. See also Overstreet 160 (noting that "price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold"). Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. *id.*, at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories"). For, as has been indicated already, the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. See *Khan*, 522 U.S., at 15, 118 S. Ct. 275, 139 L. Ed. 2d 199. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be increased in the course of promoting procompetitive effects. See, e.g., *Business Electronics*, 485 U.S., at 728, 108 S. Ct. 1515, 99 L. Ed. 2d 808. And resale price

maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful. See *infra*, at 22-25; see also Marvel 371.

Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See *GTE Sylvania*, 433 U.S., at 56, n. 24, 97 S. Ct. 2549, 53 L. Ed. 2d 568; see also *id.*, at 56, 97 S. Ct. 2549, 53 L. Ed. 2d 568 ("Economists . . . have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." *Id.*, at 52, n. 19, 97 S. Ct. 2549, 53 L. Ed. 2d 568; see *Business Electronics*, *supra*, at 725, 108 S. Ct. 1515, 99 L. Ed. 2d 808. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service . . . will more than offset a negative impact on demand of a higher retail price." Mathewson & Winter 67.

The implications of respondent's position are far reaching. Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. See Overstreet 22; Bork 294. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. See Posner 172; Bork 292. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice. Cf. Scherer & Ross 558 (noting that "except when [resale price maintenance] spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets, most [resale price maintenance arrangements] are probably innocuous"); Easterbrook 162 (suggesting that "every one of the potentially-anticompetitive outcomes of vertical arrangements depends on the uniformity of the practice").

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the

restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. See Brief for William S. Comanor et al. as *Amici Curiae* 7-8. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. Cf. Posner 177 ("It makes all the difference whether minimum retail prices are imposed by the manufacturer in order to evoke point-of-sale services or by the dealers in order to obtain monopoly profits"). A manufacturer also has an incentive to protest inefficient retailer-induced price restraints because they can harm its competitive position.

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. See also *Business Electronics, supra*, at 727, n. 2, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (noting "retail market power is rare, because of the usual presence of interbrand competition and other dealers"). And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

For all of the foregoing reasons, we think that were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.

IV

We do not write on a clean slate, for the decision in *Dr. Miles* is almost a century old. So there is an argument for its retention on the basis of *stare decisis* alone. Even if *Dr. Miles* established an erroneous rule, "*stare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Khan*, 522 U.S., at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (internal quotation marks omitted). And concerns about maintaining settled law are strong when the question is one of statutory interpretation. See, e.g., *Hohn v. United States*, 524 U.S. 236, 251, 118 S. Ct. 1969, 141 L. Ed. 2d 242 (1998).

Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. *Khan, supra*, at 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 ("The general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. See *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); see also *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 98, n. 42, 101 S. Ct. 1571, 67 L. Ed. 2d 750 (1981) ("In antitrust, the federal courts . . . act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraints of trade" evolve to meet the dynamics of present economic

conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. See *National Soc. of Professional Engineers, supra*, at 688, 98 S. Ct. 1355, 55 L. Ed. 2d 637. Likewise, the boundaries of the doctrine of *per se* illegality should not be immovable. For "it would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstance and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics*, 485 U.S., at 732, 108 S. Ct. 1515, 99 L. Ed. 2d 808.

A

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. See, e.g., Brief for Economists as *Amici Curiae* 16. It is also significant that both the Department of Justice and the Federal Trade Commission -- the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance -- have recommended that this Court replace the *per se* rule with the traditional rule of reason. See Brief for United States as *Amicus Curiae* 6. In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it. *Khan, supra*, at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199.

Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson v. United States*, 530 U.S. 428, 443, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). The Court's treatment of vertical restraints has progressed away from *Dr. Miles*' strict approach. We have distanced ourselves from the opinion's rationales. See *supra*, at 7-8; see also *Khan, supra*, at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199 (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-481, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989) (same). This is unsurprising, for the case was decided not long after enactment of the Sherman Act when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles*, moreover, the Court reined in the decision by holding that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them. *Colgate*, 250 U.S., at 307-308, 39 S. Ct. 465, 63 L. Ed. 2d 992.

In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints. In 1977, the Court overturned the *per se* rule for vertical nonprice restraints, adopting the rule of reason in its stead. *GTE Sylvania*, 433 U.S., at 57-59, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967)); see also 433 U.S., at 58, n. 29, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (noting "that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms"). While the Court in a footnote in *GTE Sylvania* suggested that differences between vertical price and nonprice restraints could support different legal treatment, see 433 U.S., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568, the central part of the opinion relied on authorities and arguments that find unequal treatment "difficult to justify," *id.*, at 69-70, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (White, J., concurring in judgment).

Continuing in this direction, in two cases in the 1980's the Court defined legal rules to limit the reach of *Dr. Miles* and to accommodate the doctrines enunciated in *GTE Sylvania* and *Colgate*. See *Business Electronics, supra*, at 726-728, 108 S. Ct. 1515, 99 L. Ed. 2d 808;

Monsanto, 465 U.S., at 763-764, 104 S. Ct. 1464, 79 L. Ed. 2d 775. In *Monsanto*, the Court required that antitrust plaintiffs alleging a § 1 price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner. *Id.*, at 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775. Unlike Justice Brennan's concurrence, which rejected arguments that *Dr. Miles* should be overruled, see 465 U.S., at 769, 104 S. Ct. 1464, 79 L. Ed. 2d 775, the Court "declined to reach the question" whether vertical agreements fixing resale prices always should be unlawful because neither party suggested otherwise, *id.*, at 761-762, n. 7, 104 S. Ct. 1464, 79 L. Ed. 2d 775. In *Business Electronics* the Court further narrowed the scope of *Dr. Miles*. It held that the *per se* rule applied only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor. 485 U.S., at 726-727, 735-736, 108 S. Ct. 1515, 99 L. Ed. 2d 808.

Most recently, in 1997, after examining the issue of vertical maximum price-fixing agreements in light of commentary and real experience, the Court overruled a 29-year-old precedent treating those agreements as *per se* illegal. *Khan*, 522 U.S., at 22, 118 S. Ct. 275, 139 L. Ed. 2d 199 (overruling *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)). It held instead that they should be evaluated under the traditional rule of reason. 522 U.S., at 22, 118 S. Ct. 275, 139 L. Ed. 2d 199. Our continued limiting of the reach of the decision in *Dr. Miles* and our recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained.

The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints. If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles*, then cases such as *Colgate* and *GTE Sylvania* themselves would be called into question. These later decisions, while they may result in less intrabrand competition, can be justified because they permit manufacturers to secure the procompetitive benefits associated with vertical price restraints through other methods. The other methods, however, could be less efficient for a particular manufacturer to establish and sustain. The end result hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.

The manufacturer has a number of legitimate options to achieve benefits similar to those provided by vertical price restraints. A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. See 250 U.S., at 307, 39 S. Ct. 465, 63 L. Ed. 2d 992. The economic effects of unilateral and concerted price setting are in general the same. See, e.g., *Monsanto*, 465 U.S., at 762-764, 104 S. Ct. 1464, 79 L. Ed. 2d 775. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability. *Ibid.*; *Business Electronics*, *supra*, at 728, 108 S. Ct. 723, 99 L. Ed. 2d 808. Even with the stringent standards in *Monsanto* and *Business Electronics*, this danger can lead, and has led, rational manufacturers to take wasteful measures. See, e.g., Brief for PING, Inc., as *Amicus Curiae* 9-18. A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. See *ibid.* The increased costs these burdensome measures generate flow to consumers in the form of higher prices.

Furthermore, depending on the type of product it sells, a manufacturer might be able to achieve the procompetitive benefits of resale price maintenance by integrating downstream and selling its products directly to consumers. *Dr. Miles* tilts the relative costs of vertical integration

and vertical agreement by making the former more attractive based on the *per se* rule, not on real market conditions. See *Business Electronics, supra*, at 725, 108 S. Ct. 723, 99 L. Ed. 2d 808; see generally Coase, The Nature of the Firm, 4 *Economica*, New Series 386 (1937). This distortion might lead to inefficient integration that would not otherwise take place, so that consumers must again suffer the consequences of the suboptimal distribution strategy. And integration, unlike vertical price restraints, eliminates all intrabrand competition. See, e.g., *GTE Sylvania, 433 U.S.*, at 57, n. 26, 97 S. Ct. 2549, 53 L. Ed. 2d 568.

There is yet another consideration. A manufacturer can impose territorial restrictions on distributors and allow only one distributor to sell its goods in a given region. Our cases have recognized, and the economics literature confirms, that these vertical nonprice restraints have impacts similar to those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services. See, e.g., *Business Electronics, supra*, at 728, 108 S. Ct. 723, 99 L. Ed. 2d 808; *Monsanto, supra*, at 762-763, 104 S. Ct. 1464, 79 L. Ed. 2d 775; see also Brief for Economists as *Amici Curiae* 17-18. Cf. Scherer & Ross 560 (noting that vertical nonprice restraints "can engender inefficiencies at least as serious as those imposed upon the consumer by resale price maintenance"); Steiner, How Manufacturers Deal with the Price-Cutting Retailer: When Are Vertical Restraints Efficient?, 65 *Antitrust L. J.* 407, 446-447 (1997) (indicating that "antitrust law should recognize that the consumer interest is often better served by [resale price maintenance] -- contrary to its *per se* illegality and the rule-of-reason status of vertical nonprice restraints"). The same legal standard (*per se* unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect. There is likewise little economic justification for the current differential treatment of vertical price and nonprice restraints. Furthermore, vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition. See Brief for Economists as *Amici Curiae* 17-18.

In sum, it is a flawed antitrust doctrine that serves the interests of lawyers -- by creating legal distinctions that operate as traps for the unwary -- more than the interests of consumers -- by requiring manufacturers to choose second-best options to achieve sound business objectives.

B

Respondent's arguments for reaffirming *Dr. Miles* on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. In 1937, Congress passed the Miller-Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632. In 1975, however, Congress repealed both Acts. Consumer Goods Pricing Act, 89 Stat. 801. That the *Dr. Miles* rule applied to vertical price restraints in 1975, according to respondent, shows Congress ratified the rule.

This is not so. The text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal. Congress once again placed these restraints within the ambit of § 1 of the Sherman Act. And, as has been discussed, Congress intended § 1 to give courts the ability "to develop governing principles of law" in the common-law tradition. *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643, 101 S. Ct. 2061, 68 L. Ed. 2d 500 (1981); see *Business Electronics*, 485 U.S., at 731, 108 S. Ct. 723, 99 L. Ed. 2d 808 ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted").

Congress could have set the *Dr. Miles* rule in stone, but it chose a more flexible option. We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with traditional § 1 principles, including the principle that our antitrust doctrines "evolve with new circumstances and new wisdom." *Business Electronics, supra*, at 732, 108 S. Ct. 723, 99 L. Ed. 2d 808; see also Easterbrook 139.

The rule of reason, furthermore, is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as *per se* legal. In this respect, the justifications for the prior exemption are illuminating. Its goal "was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102, 100 S. Ct. 937, 63 L. Ed. 2d 233 (1980). The state fair trade laws also appear to have been justified on similar grounds. See Areeda & Hovenkamp 298. The rationales for these provisions are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete. The purpose of the antitrust laws, by contrast, is "the protection of *competition*, not *competitors*." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338, 110 S. Ct. 1884, 109 L. Ed. 2d 333 (1990) (internal quotation marks omitted). To the extent Congress repealed the exemption for some vertical price restraints to end its prior practice of encouraging anticompetitive conduct, the rule of reason promotes the same objective.

Respondent also relies on several congressional appropriations in the mid-1980's in which Congress did not permit the Department of Justice or the Federal Trade Commission to use funds to advocate overturning *Dr. Miles*. See, e.g., 97 Stat. 1071. We need not pause long in addressing this argument. The conditions on funding are no longer in place, see, e.g., Brief for United States as *Amicus Curiae* 21, and they were ambiguous at best. As much as they might show congressional approval for *Dr. Miles*, they might demonstrate a different proposition: that Congress could not pass legislation codifying the rule and reached a short-term compromise instead.

Reliance interests do not require us to reaffirm *Dr. Miles*. To be sure, reliance on a judicial opinion is a significant reason to adhere to it, *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), especially "in cases involving property and contract rights," *Khan*, 522 U.S., at 20, 118 S. Ct. 275, 39 L. Ed. 2d 199. The reliance interests here, however, like the reliance interests in *Khan*, cannot justify an inefficient rule, especially because the narrowness of the rule has allowed manufacturers to set minimum resale prices in other ways. And while the *Dr. Miles* rule is longstanding, resale price maintenance was legal under fair trade laws in a majority of States for a large part of the past century up until 1975.

It is also of note that during this time "when the legal environment in the [United States] was most favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts." Overstreet 6; see also *id.*, at 169 (noting that "no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States]"); Scherer & Ross 549 (noting that "the fraction of U.S. retail sales covered by [resale price maintenance] in its heyday has been variously estimated at from 4 to 10 percent"). To the extent consumers demand cheap goods, judging vertical price restraints under the rule of reason will not prevent the market from providing them. Cf. Easterbrook 152-153 (noting that "S.S. Kresge (the old K-Mart) flourished during the days of manufacturers' greatest freedom" because "discount stores offer a combination of price and service that many customers value"

and that "nothing in restricted dealing threatens the ability of consumers to find low prices"); *Scherer & Ross* 557 (noting that "for the most part, the effects of the [Consumer Goods Pricing Act] were imperceptible because the forces of competition had already repealed the [previous antitrust exemption] in their own quiet way").

For these reasons the Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S. Ct. 376, 55 L. Ed. 502 (1911), is now overruled. Vertical price restraints are to be judged according to the rule of reason.

V

Noting that Leegin's president has an ownership interest in retail stores that sell Brighton, respondent claims Leegin participated in an unlawful horizontal cartel with competing retailers. Respondent did not make this allegation in the lower courts, and we do not consider it here.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

* * *

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 394, 408-409, 31 S. Ct. 376, 55 L. Ed. 502 (1911), this Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was "invalid . . . under the [Sherman Act, 15 U.S.C. § 1]." This Court has consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are *per se* illegal. See, e.g., *United States v. Trenton Potteries Co.*, 273 U.S. 392, 399-401, 47 S. Ct. 377, 71 L. Ed. 700 (1927); *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 133, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). That *per se* rule is one upon which the legal profession, business, and the public have relied for close to a century. Today the Court holds that courts must determine the lawfulness of minimum resale price maintenance by applying, not a bright-line *per se* rule, but a circumstance-specific "rule of reason." *Ante*, at 28. And in doing so it overturns *Dr. Miles*.

The Court justifies its departure from ordinary considerations of *stare decisis* by pointing to a set of arguments well known in the antitrust literature for close to half a century. See *ante*, at 10-12. Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule. See, e.g., Hearings on H. R. 10527 et al. before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 74-76, 89, 99, 101-102, 192-195, 261-262 (1958). And, in my view, they do not warrant the Court's now overturning so well-established a legal precedent.

I

The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular those enforced by agreement among private firms. The law assumes that such a marketplace, free of private restrictions, will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire. In determining the lawfulness of particular practices, courts often apply a "rule of reason." They examine both a practice's likely anticompetitive effects and its beneficial business justifications. See, e.g., *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 109-110, 104 S. Ct. 2948, 82 L. Ed. 2d 70 and n. 39 (1984); *National Soc. of Professional Engineers v. United*

States, 435 U.S. 679, 688-691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978); *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918).

Nonetheless, sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, *e.g.*, so difficult to prove) that courts have departed from a pure "rule of reason" approach. And sometimes this Court has imposed a rule of *per se* unlawfulness -- a rule that instructs courts to find the practice unlawful all (or nearly all) the time. See, *e.g.*, *NYNEX*, *supra*, at 133; *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 343-344, 102 S. Ct. 2466, 73 L. Ed. 2d 48, and n. 16 (1982); *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50, n. 16, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977); *United States v. Topco Associates, Inc.*, 405 U.S. 596, 609-611, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 213-214, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (citing and quoting *Trenton Potteries*, *supra*, at 397-398, 47 S. Ct. 377, 71 L. Ed. 700).

The case before us asks which kind of approach the courts should follow where minimum resale price maintenance is at issue. Should they apply a *per se* rule (or a variation) that would make minimum resale price maintenance always (or *almost* always) unlawful? Should they apply a "rule of reason"? Were the Court writing on a blank slate, I would find these questions difficult. But, of course, the Court is not writing on a blank slate, and that fact makes a considerable legal difference.

To best explain why the question would be difficult were we deciding it afresh, I briefly summarize several classical arguments for and against the use of a *per se* rule. The arguments focus on three sets of considerations, those involving: (1) potential anticompetitive effects, (2) potential benefits, and (3) administration. The difficulty arises out of the fact that the different sets of considerations point in different directions. See, *e.g.*, 8 P. Areeda, *Antitrust Law* PP1628-1633, pp. 30-392 (1st ed. 1989) (hereinafter Areeda); 8 P. Areeda & H. Hovenkamp, *Antitrust Law* PP1628-1633, pp. 28-339 (2d ed. 2004) (hereinafter Areeda & Hovenkamp); Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 *Antitrust L. J.* 135, 146-152 (1984) (hereinafter Easterbrook); Pitofsky, *In Defense of Discounters: The No-Frills Case for a Per Se Rule Against Vertical Price Fixing*, 71 *Geo. L. J.* 1487 (1983) (hereinafter Pitofsky); Scherer, *The Economics of Vertical Restraints*, 52 *Antitrust L. J.* 687, 706-707 (1983) (hereinafter Scherer); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 *U. Chi. L. Rev.* 6, 22-26 (1981); Brief for William S. Comanor and Frederic M. Scherer as *Amici Curiae* 7-10.

On the one hand, agreements setting minimum resale prices may have serious anticompetitive consequences. *In respect to dealers*: Resale price maintenance agreements, rather like horizontal price agreements, can diminish or eliminate price competition among dealers of a single brand or (if practiced generally by manufacturers) among multibrand dealers. In doing so, they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes in demand, say falling demand, by cutting prices; they can encourage dealers to substitute service, for price, competition, thereby threatening wastefully to attract too many resources into that portion of the industry; they can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing; and so forth. See, *e.g.*, 8 Areeda & Hovenkamp P1632c, at 319-321; Steiner, *The Evolution and Applications of Dual-Stage Thinking*, 49 *The Antitrust Bulletin* 877, 899-900 (2004); Comanor, *Vertical Price-Fixing, Vertical Market Restrictions, and the New Antitrust Policy*, 98 *Harv. L. Rev.* 983, 990-1000 (1985).

In respect to producers: Resale price maintenance agreements can help to reinforce the competition-inhibiting behavior of firms in concentrated industries. In such industries firms may tacitly collude, *i.e.*, observe each other's pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all. See 8 Areeda & Hovenkamp P1632d, at 321-323; P. Areeda & L. Kaplow, *Antitrust Analysis* PP231-233, pp. 276-283 (4th ed. 1988) (hereinafter Areeda & Kaplow). Cf. *United States v. Container Corp. of America*, 393 U.S. 333, 89 S. Ct. 510, 21 L. Ed. 2d 526 (1969); Areeda & Kaplow PP247-253, at 327-348. Where that is so, resale price maintenance can make it easier for each producer to identify (by observing retail markets) when a competitor has begun to cut prices. And a producer who cuts wholesale prices *without* lowering the minimum resale price will stand to gain little, if anything, in increased profits, because the dealer will be unable to stimulate increased consumer demand by passing along the producer's price cut to consumers. In either case, resale price maintenance agreements will tend to prevent price competition from "breaking out"; and they will thereby tend to stabilize producer prices. See Pitofsky 1490-1491. Cf., *e.g.*, *Container Corp.*, *supra*, at 336-337, 89 S. Ct. 510, 21 L. Ed. 2d 526.

Those who express concern about the potential anticompetitive effects find empirical support in the behavior of prices before, and then after, Congress in 1975 repealed the Miller-Tydings Fair Trade Act, 50 Stat. 693, and the McGuire Act, 66 Stat. 631. Those Acts had permitted (but not required) individual States to enact "fair trade" laws authorizing minimum resale price maintenance. At the time of repeal minimum resale price maintenance was lawful in 36 States; it was unlawful in 14 States. See Hearings on S. 408 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 173 (1975) (hereinafter Hearings on S. 408) (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division). Comparing prices in the former States with prices in the latter States, the Department of Justice argued that minimum resale price maintenance had raised prices by 19% to 27%. See Hearings on H. R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975) (hereinafter Hearings on H. R. 2384) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

After repeal, minimum resale price maintenance agreements were unlawful *per se* in every State. The Federal Trade Commission (FTC) staff, after studying numerous price surveys, wrote that collectively the surveys "indicated that [resale price maintenance] in most cases increased the prices of products sold with [resale price maintenance]." Bureau of Economics Staff Report to the FTC, T. Overstreet, *Resale Price Maintenance: Economic Theories and Empirical Evidence*, 160 (1983) (hereinafter Overstreet). Most economists today agree that, in the words of a prominent antitrust treatise, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case." 8 Areeda & Hovenkamp P1604b, at 40 (finding "the evidence . . . persuasive on this point"). See also Brief for William S. Comanor and Frederic M. Scherer as *Amici Curiae* 4 ("It is uniformly acknowledged that [resale price maintenance] and other vertical restraints lead to higher consumer prices").

On the other hand, those favoring resale price maintenance have long argued that resale price maintenance agreements can provide important consumer benefits. The majority lists two: First, such agreements can facilitate new entry. *Ante*, at 11-12. For example, a newly entering producer wishing to build a product name might be able to convince dealers to help it do so -- if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment

and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer succeed. See 8 Areeda & Hovenkamp PP1617a, 1631b, at 193-196, 308. The result might be increased competition at the producer level, *i.e.*, greater *inter*-brand competition, that brings with it net consumer benefits.

Second, without resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call "free riding." *Ante*, at 10-11. Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image, and so forth. Without resale price maintenance, some dealers might take a "free ride" on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under these circumstances, dealers might prove unwilling to invest in the provision of necessary services. See, *e.g.*, 8 Areeda & Hovenkamp PP1611-1613, 1631c, at 126-165, 309-313; R. Posner, *Antitrust Law* 172-173 (2d ed. 2001); R. Bork, *The Antitrust Paradox* 290-291 (1978) (hereinafter Bork); Easterbrook 146-149.

Moreover, where a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some such benefits exist. That is because, other things being equal, producers should want to encourage price competition among their dealers. By doing so they will often increase profits by selling more of their product. See *Sylvania*, 433 U.S., at 56, n. 24, 97 S. Ct. 2549, 53 L. Ed. 2d 568; Bork 290. And that is so, even if the producer possesses sufficient market power to earn a super-normal profit. That is to say, other things being equal, the producer will benefit by charging his dealers a competitive (or even a higher-than-competitive) wholesale price while encouraging price competition among them. Hence, if the producer is the moving force, the producer must have some special reason for wanting resale price maintenance; and in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilize wholesale prices), that special reason may well reflect the special circumstances just described: new entry, "free riding," or variations on those themes.

The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits. See, *e.g.*, Brief for Economists as *Amici Curiae* 16; 8 Areeda & Hovenkamp PP1631-1632, at 306-328; Pitofsky 1495; Scherer 706-707. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?

Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits. See, *e.g.*, F.M. Scherer & D. Ross, *Industrial Market Structure and Economic Performance* 335-339 (3d ed. 1990) (hereinafter Scherer & Ross) (describing some circumstances under which price-fixing agreements could be

more beneficial than "unfettered competition," but also noting potential costs of moving from a *per se* ban to a rule of reasonableness assessment of such agreements).

I have already described studies and analyses that suggest (though they cannot prove) that resale price maintenance can cause harms with some regularity -- and certainly when dealers are the driving force. But what about benefits? How often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. There is a consensus in the literature that "free riding" takes place. But "free riding" often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a "free ride" on investments that others have made in building a product's name and reputation. The question is how often the "free riding" problem is serious enough significantly to deter dealer investment.

To be more specific, one can easily *imagine* a dealer who refuses to provide important presale services, say a detailed explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that "free" service (or enjoy the psychological benefit arising when a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. Sometimes this must happen in reality. But does it happen often? We do, after all, live in an economy where firms, despite *Dr. Miles' per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

All this is to say that the ultimate question is not whether, but *how much*, "free riding" of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain "sometimes." See, *e.g.*, Brief for William S. Comanor and Frederic M. Scherer as *Amici Curiae* 6-7 (noting "skepticism in the economic literature about how often [free riding] actually occurs"); Scherer & Ross 551-555 (explaining the "severe limitations" of the free-rider justification for resale price maintenance); Pitofsky, *Why Dr. Miles Was Right*, 8 Regulation, No. 1, pp. 2, 29-30 (Jan./Feb. 1984) (similar analysis).

How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*. For one thing, it is often difficult to identify *who* -- producer or dealer -- is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favor (say, by allocating better shelf-space) the goods of other producers who practice resale price maintenance. Who "initiated" this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.

I recognize that scholars have sought to develop check lists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. See, *e.g.*, 8 Areeda & Hovenkamp PP1633c-1633e, at 330-339. See also Brief for William S. Comanor and Frederic M. Scherer as *Amici Curiae* 8-10. But applying these criteria in court is often easier said than done. The Court's invitation to consider the existence of "market power," for example, *ante*, at 18, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or

monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs. See, *e.g.*, H. Hovenkamp, *The Antitrust Enterprise* 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"). See also Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 *Harv. L. Rev.* 226, 238-247 (1960) (describing lengthy FTC efforts to apply complex criteria in a merger case).

Are there special advantages to a bright-line rule? Without such a rule, it is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings. And since enforcement resources are limited, that loss may tempt some producers or dealers to enter into agreements that are, on balance, anticompetitive.

Given the uncertainties that surround key items in the overall balance sheet, particularly in respect to the "administrative" questions, I can concede to the majority that the problem is difficult. And, if forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable and temporary condition of "new entry." See Pitofsky 1495. But I am not now forced to decide this question. The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century.

II

We write, not on a blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases, massive amounts of advice that lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice. See, *e.g.*, *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721, 64 S. Ct. 805, 88 L. Ed. 1024 (1944); *Sylvania*, 433 U.S., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568 ("The *per se* illegality of [vertical] price restrictions has been established firmly for many years . . ."). Indeed a Westlaw search shows that *Dr. Miles* itself has been cited dozens of times in this Court and hundreds of times in lower courts. Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707 (1977) (noting, in declining to overrule an earlier case interpreting § 4 of the Clayton Act, that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I am not aware of any case in which this Court has overturned so well-established a statutory precedent. Regardless, I do not see how the Court can claim that ordinary criteria for over-ruling an earlier case have been met. See, *e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854-855, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). See also *Federal Election Comm'n v. Wisconsin Right to Life, Inc.*, *ante*, at 19-21, 2007 U.S. LEXIS 8515 (SCALIA, J., concurring in part and concurring in judgment).

A

I can find no change in circumstances in the past several decades that helps the majority's position. In fact, there has been one important change that argues strongly to the contrary. In 1975, Congress repealed the McGuire and Miller-Tydings Acts. See Consumer Goods Pricing Act of 1975, 89 Stat. 801. And it thereby consciously *extended Dr. Miles' per se* rule. Indeed, at that time the Department of Justice and the FTC, then urging application of the *per se* rule, discussed virtually every argument presented now to this Court as well as others not here

presented. And they explained to Congress why Congress should reject them. See Hearings on S. 408, at 176-177 (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *id.*, at 170-172 (testimony of Lewis A. Engman, Chairman of the FTC); Hearings on H. R. 2384, at 113-114 (testimony of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division). Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller-Tydings would be to make minimum resale price maintenance *per se* unlawful. See, e.g., S. Rep. No. 94-466, pp. 1-3 (1975) ("Without [the exemptions authorized by the Miller-Tydings and McGuire Acts,] the agreements they authorize would violate the antitrust laws. . . . Repeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices"). See also *Sylvania*, *supra*, at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568 ("Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States").

Congress did not prohibit this Court from reconsidering the *per se* rule. But enacting major legislation premised upon the existence of that rule constitutes important public reliance upon that rule. And doing so aware of the relevant arguments constitutes even stronger reliance upon the Court's keeping the rule, at least in the absence of some significant change in respect to those arguments.

Have there been any such changes? There have been a few economic studies, described in some of the briefs, that argue, contrary to the testimony of the Justice Department and FTC to Congress in 1975, that resale price maintenance is not harmful. One study, relying on an analysis of litigated resale price maintenance cases from 1975 to 1982, concludes that resale price maintenance does not ordinarily involve producer or dealer collusion. See Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. Law & Econ. 263, 281-282, 292 (1991). But this study equates the failure of plaintiffs to *allege* collusion with the *absence* of collusion -- an equation that overlooks the superfluous nature of allegations of horizontal collusion in a resale price maintenance case and the tacit form that such collusion might take. See H. Hovenkamp, Federal Antitrust Policy § 11.3c, p. 464, n. 19 (3d ed. 2005); *supra*, at 4-5, 118 S. Ct. 275, 139 L. Ed. 2d 199.

The other study provides a theoretical basis for concluding that resale price maintenance "need not lead to higher retail prices." Marvel & McCafferty, The Political Economy of Resale Price Maintenance, 94 J. Pol. Econ. 1074, 1075 (1986). But this study develops a theoretical model "under the assumption that [resale price maintenance] is efficiency-enhancing." *Ibid.* Its only empirical support is a 1940 study that the authors acknowledge is much criticized. See *id.*, at 1091. And many other economists take a different view. See Brief for William S. Comanor and Frederic M. Scherer as *Amici Curiae* 4.

Regardless, taken together, these studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances.

Petitioner and some *amici* have also presented us with newer studies that show that resale price maintenance sometimes brings consumer benefits. Overstreet 119-129 (describing numerous case studies). But the proponents of a *per se* rule have always conceded as much. What is remarkable about the majority's arguments is that *nothing* in this respect is *new*. See *supra*, at 3, 12, 118 S. Ct. 275, 139 L. Ed. 2d 199 (citing articles and congressional testimony going back several decades). The only new feature of these arguments lies in the fact that the most current advocates of overruling *Dr. Miles* have abandoned a host of other not-very-persuasive arguments upon which prior resale price maintenance proponents used to rely. See,

e.g., 8 Areeda P1631a, at 350-352 (listing "'traditional' justifications" for resale price maintenance).

The one arguable exception consists of the majority's claim that "even absent free riding," resale price maintenance "may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." *Ante*, at 12. I cannot count this as an exception, however, because I do not understand how, in the absence of free-riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not "expand" its "market share" as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand.

No one claims that the American economy has changed in ways that might support the majority. Concentration in retailing has increased. See, *e.g.*, Brief for Respondent 18 (since minimum resale price maintenance was banned nationwide in 1975, the total number of retailers has dropped while the growth in sales per store has risen); Brief for American Antitrust Institute as *Amicus Curiae* 17, n. 20 (citing private study reporting that the combined sales of the 10 largest retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers; also quoting 1999 Organisation for Economic Co-operation and Development report stating that the "last twenty years have seen momentous changes in retail distribution including significant increases in concentration"); Mamen, *Facing Goliath: Challenging the Impacts of Supermarket Consolidation on our Local Economies, Communities, and Food Security*, The Oakland Institute, 1 Policy Brief, No. 3, pp. 1, 2 (Spring 2007), http://www.oaklandinstitute.org/pdfs/facing_goliath.pdf (as visited June 25, 2007, and available in Clerks of Court's case file) (noting that "for many decades, the top five food retail firms in the U.S. controlled less than 20 percent of the market"; from 1997 to 2000, "the top five firms increased their market share from 24 to 42 percent of all retail sales"; and "by 2003, they controlled over half of all grocery sales"). That change, other things being equal, may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.

Nor has anyone argued that concentration among manufacturers that might use resale price maintenance has diminished significantly. And as far as I can tell, it has not. Consider household electrical appliances, which a study from the late 1950's suggests constituted a significant portion of those products subject to resale price maintenance at that time. See Hollander, *United States of America*, in *Resale Price Maintenance* 67, 80-81 (B. Yamey ed. 1966). Although it is somewhat difficult to compare census data from 2002 with that from several decades ago (because of changes in the classification system), it is clear that at least some subsets of the household electrical appliance industry are *more* concentrated, in terms of manufacturer market power, now than they were then. For instance, the top eight domestic manufacturers of household cooking appliances accounted for 68% of the domestic market (measured by value of shipments) in 1963 (the earliest date for which I was able to find data), compared with 77% in 2002. See Dept. of Commerce, Bureau of Census, *1972 Census of Manufacturers, Special Report Series, Concentration Ratios in Manufacturing*, No. MC72(SR)-2, p. SR2-38 (1975) (hereinafter 1972 Census); Dept. of Commerce, Bureau of Census, *2002 Economic Census, Concentration*

Ratios: 2002, No. EC02-31SR-1, p. 5 (2006) (hereinafter 2002 Census). The top eight domestic manufacturers of household laundry equipment accounted for 95% of the domestic market in 1963 (90% in 1958), compared with 99% in 2002. 1972 Census, at SR2-38; 2002 Census, at 55. And the top eight domestic manufacturers of household refrigerators and freezers accounted for 91% of the domestic market in 1963, compared with 95% in 2002. 1972 Census, at SR2-38; 2002 Census, at 55. Increased concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful. At the very least, the majority has not explained how these, or other changes in the economy could help support its position.

In sum, there is no relevant change. And without some such change, there is no ground for abandoning a well-established antitrust rule.

B

With the preceding discussion in mind, I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case. JUSTICE SCALIA, writing separately in another of our cases this Term, well summarizes that law. See *Wisconsin Right to Life, Inc.*, ante, at 19-21, 2007 U.S. LEXIS 8515. (opinion concurring in part and concurring in judgment). And every relevant factor he mentions argues against overruling *Dr. Miles* here.

First, the Court applies *stare decisis* more "rigidly" in statutory than in constitutional cases. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 543, 82 S. Ct. 1459, 8 L. Ed. 2d 671 (1962); *Illinois Brick Co.*, 431 U.S., at 736, 97 S. Ct. 2061, 52 L. Ed. 2d 707. This is a statutory case.

Second, the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago. As JUSTICE SCALIA put it, "overruling a *constitutional* case decided just a few years earlier is far from unprecedented." *Wisconsin Right to Life*, ante, at 19, 2007 U.S. LEXIS 8515 (emphasis added). We here overrule one *statutory* case, *Dr. Miles*, decided 100 years ago, and we overrule the cases that reaffirmed its *per se* rule in the intervening years. See, e.g., *Trenton Potteries*, 273 U.S., at 399-401, 47 S. Ct. 377, 71 L. Ed. 700; *Bausch & Lomb*, 321 U.S., at 721, 64 S. Ct. 805, 88 L. Ed. 2d 1024; *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45-47, 80 S. Ct. 503, 4 L. Ed. 2d 505 (1960); *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13, 16-17, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964).

Third, the fact that a decision creates an "unworkable" legal regime argues in favor of overruling. See *Payne v. Tennessee*, 501 U.S. 808, 827-828, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991); *Swift & Co. v. Wickham*, 382 U.S. 111, 116, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965). Implementation of the *per se* rule, even with the complications attendant the exception allowed for in *United States v. Colgate & Co.*, 250 U.S. 300, 39 S. Ct. 465, 63 L. Ed. 992, 1919 Dec. Comm'r Pat. 460 (1919), has proved practical over the course of the last century, particularly when compared with the many complexities of litigating a case under the "rule of reason" regime. No one has shown how moving from the *Dr. Miles* regime to "rule of reason" analysis would make the legal regime governing minimum resale price maintenance more "administrable," *Wisconsin Right to Life*, ante, at 20, 2007 U.S. LEXIS 8515 (opinion of SCALIA, J.), particularly since *Colgate* would remain good law with respect to *unreasonable* price maintenance.

Fourth, the fact that a decision "unsettles" the law may argue in favor of overruling. See *Sylvania*, 433 U.S., at 47, 97 S. Ct. 2549, 53 L. Ed. 568; *Wisconsin Right to Life*, ante, at 20-21, 2007 U.S. LEXIS 8515 (opinion of SCALIA, J.). The *per se* rule is well-settled law, as the Court

itself has previously recognized. *Sylvania, supra*, at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 568. It is the majority's change here that will unsettle the law.

Fifth, the fact that a case involves property rights or contract rights, where reliance interests are involved, argues against overruling. *Payne, supra*, at 828, 111 S. Ct. 2597, 115 L. Ed. 2d 720. This case involves contract rights and perhaps property rights (consider shopping malls). And there has been considerable reliance upon the *per se* rule. As I have said, Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller-Tydings and McGuire. *Supra*, at 12-13, 118 S. Ct. 275, 139 L. Ed. 2d 199. The Executive Branch argued for repeal on the assumption that *Dr. Miles* stated the law. *Ibid.* Moreover, whole sectors of the economy have come to rely upon the *per se* rule. A factory outlet store tells us that the rule "forms an essential part of the regulatory background against which [that firm] and many other discount retailers have financed, structured, and operated their businesses." Brief for Burlington Coat Factory Warehouse Corp. as *Amicus Curiae* 5. The Consumer Federation of America tells us that large low-price retailers would not exist without *Dr. Miles*; minimum resale price maintenance, "by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators." Brief for Consumer Federation of America as *Amicus Curiae* 5, 7-9 (discussing, *inter alia*, comments by Wal-Mart's founder 25 years ago that relaxation of the *per se* ban on minimum resale price maintenance would be a "great danger" to Wal-Mart's then-relatively-nascent business). See also Brief for American Antitrust Institute as *Amicus Curiae* 14-15, and sources cited therein (making the same point). New distributors, including internet distributors, have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans.

This Court's overruling of the *per se* rule jeopardizes this reliance, and more. What about malls built on the assumption that a discount distributor will remain an anchor tenant? What about home buyers who have taken a home's distance from such a mall into account? What about Americans, producers, distributors, and consumers, who have understandably assumed, at least for the last 30 years, that price competition is a legally guaranteed way of life? The majority denies none of this. It simply says that these "reliance interests . . . , like the reliance interests in *Khan*, cannot justify an inefficient rule." *Ante*, at 27.

The Court minimizes the importance of this reliance, adding that it "is also of note" that at the time resale price maintenance contracts were lawful "no more than a tiny fraction of manufacturers ever employed" the practice. *Ibid.* (quoting Overstreet 6). By "tiny" the Court means manufacturers that accounted for up to "ten percent of consumer goods purchases" annually. *Ibid.* That figure in today's economy equals just over \$ 300 billion. See Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2007, p. 649 (126th ed.) (over \$ 3 trillion in U.S. retail sales in 2002). Putting the Court's estimate together with the Justice Department's early 1970's study translates a legal regime that permits all resale price maintenance into retail bills that are higher by an average of roughly \$ 750 to \$ 1000 annually for an American family of four. Just how much higher retail bills will be after the Court's decision today, of course, depends upon what is now unknown, namely how courts will decide future cases under a "rule of reason." But these figures indicate that the amounts involved are important to American families and cannot be dismissed as "tiny."

Sixth, the fact that a rule of law has become "embedded" in our "national culture" argues strongly against overruling. *Dickerson v. United States*, 530 U.S. 428, 443-444, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). The *per se* rule forbidding minimum resale price maintenance agreements has long been "embedded" in the law of antitrust. It involves price, the economy's

"central nervous system." *National Soc. of Professional Engineers*, 435 U.S., at 692, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (quoting *Socony-Vacuum Oil*, 310 U.S., at 226, n. 59, 60 S. Ct. 811, 84 L. Ed. 2d 1129). It reflects a basic antitrust assumption (that consumers often prefer lower prices to more service). It embodies a basic antitrust objective (providing consumers with a free choice about such matters). And it creates an easily administered and enforceable bright line, "Do not agree about price," that businesses as well as lawyers have long understood.

The only contrary *stare decisis* factor that the majority mentions consists of its claim that this Court has "from the beginning . . . treated the Sherman Act as a common-law statute," and has previously overruled antitrust precedent. *Ante*, at 20, 21-22. It points in support to *State Oil Co. v. Khan*, 522 U.S. 3, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997), overruling *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968), in which this Court had held that *maximum* resale price agreements were unlawful *per se*, and to *Sylvania*, overruling *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 87 S. Ct. 1856, 18 L. Ed. 2d 1249 (1967), in which this Court had held that producer-imposed territorial limits were unlawful *per se*.

The Court decided *Khan*, however, 29 years after *Albrecht* -- still a significant period, but nowhere close to the century *Dr. Miles* has stood. The Court specifically noted the *lack* of any significant reliance upon *Albrecht*. 522 U.S., at 18-19, 118 S. Ct. 275, 139 L. Ed. 2d 199 (*Albrecht* has had "little or no relevance to ongoing enforcement of the Sherman Act"). *Albrecht* had far less support in traditional antitrust principles than did *Dr. Miles*. Compare, e.g., 8 Areeda & Hovenkamp P1632, at 316-328 (analyzing potential harms of minimum resale price maintenance), with *id.*, P1637, at 352-361 (analyzing potential harms of maximum resale price maintenance). See also, e.g., Pitofsky 1490, n. 17. And Congress had nowhere expressed support for *Albrecht's* rule. *Khan*, *supra*, at 19, 118 S. Ct. 275, 139 L. Ed. 2d 199.

In *Sylvania*, the Court, in overruling *Schwinn*, explicitly distinguished *Dr. Miles* on the ground that while Congress had "recently . . . expressed its approval of a *per se* analysis of vertical price restrictions" by repealing the Miller-Tydings and McGuire Acts, "no similar expression of congressional intent exists for nonprice restrictions." 433 U.S., at 51, n. 18, 97 S. Ct. 2549, 53 L. Ed. 2d 568. Moreover, the Court decided *Sylvania* only a decade after *Schwinn*. And it based its overruling on a generally perceived need to avoid "confusion" in the law, 433 U.S., at 47-49, 97 S. Ct. 2549, 53 L. Ed. 2d 568, a factor totally absent here.

The Court suggests that it is following "the common-law tradition." *Ante* at 26. But the common law would not have permitted overruling *Dr. Miles* in these circumstances. Common-law courts rarely overruled well-established earlier rules outright. Rather, they would over time issue decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest. One can argue that modifying the *per se* rule to make an exception, say, for new entry, see Pitofsky 1495, could prove consistent with this approach. To swallow up a century-old precedent, potentially affecting many billions of dollars of sales, is not. The reader should compare today's "common-law" decision with Justice Cardozo's decision in *Allegheny College v. National Chautauqua Cty. Bank of Jamestown*, 246 N. Y. 369, 159 N. E. 173 (1927), and note a gradualism that does not characterize today's decision.

Moreover, a Court that rests its decision upon economists' views of the economic merits should also take account of legal scholars' views about common-law overruling. Professors Hart and Sacks list 12 factors (similar to those I have mentioned) that support judicial "adherence to prior holdings." They all support adherence to *Dr. Miles* here. See H. Hart & A. Sacks, *The Legal Process* 568-569 (W. Eskridge & P. Frickey eds. 1994). Karl Llewellyn has written that

the common-law judge's "conscious reshaping" of prior law "must so move as to hold the degree of movement down to the degree to which need truly presses." *The Bramble Bush* 156 (1960). Where here is the pressing need? The Court notes that the FTC argues here in favor of a rule of reason. See *ante*, at 20-21. But both Congress and the FTC, unlike courts, are well-equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs.

In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here. It is difficult for me to understand how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies over-ruling a recent constitutional decision, *Wisconsin Right to Life, Inc., ante*, at 19-21, 2007 U.S. LEXIS 8515 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment), but (2) failing to satisfy any of those same concerns nonetheless permits overruling a longstanding statutory decision. Either those concerns are relevant or they are not.

The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles. I do not believe that the majority has shown new or changed conditions sufficient to warrant overruling a decision of such long standing. All ordinary *stare decisis* considerations indicate the contrary. For these reasons, with respect, I dissent.

4B. Tying Arrangements

After ¶448, insert the following

ILLINOIS TOOL WORKS v. INDEPENDENT INK

547 U.S. 1002 (2006)

Justice STEVENS. In *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984), we repeated the well-settled proposition that "if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *Id.*, at 16, 104 S. Ct. 1551, 80 L. Ed. 2d 2. This presumption of market power, applicable in the antitrust context when a seller conditions its sale of a patented product (the "tying" product) on the purchase of a second product (the "tied" product), has its foundation in the judicially created patent misuse doctrine. See *United States v. Loew's Inc.*, 371 U.S. 38, 46, 83 S. Ct. 97, 9 L. Ed. 2d 11 (1962). In 1988, Congress substantially undermined that foundation, amending the Patent Act to eliminate the market power presumption in patent misuse cases. See 102 Stat. 4674, codified at 35 U.S.C. § 271(d). The question presented to us today is whether the presumption of market power in a patented product should survive as a matter of antitrust law despite its demise in patent law. We conclude that the mere fact that a tying product is patented does not support such a presumption.

I

Petitioners, Trident, Inc., and its parent, Illinois Tool Works Inc., manufacture and market printing systems that include three relevant components: (1) a patented piezoelectric impulse ink jet printhead; (2) a patented ink container, consisting of a bottle and valved cap, which attaches to the printhead; and (3) specially designed, but unpatented, ink. Petitioners sell their systems to original equipment manufacturers (OEMs) who are licensed to incorporate the printheads and containers into printers that are in turn sold to companies for use in printing barcodes on cartons and packaging materials. The OEMs agree that they will purchase their ink exclusively from petitioners, and that neither they nor their customers will refill the patented containers with ink of any kind.

Respondent, Independent Ink, Inc., has developed an ink with the same chemical composition as the ink sold by petitioners. After an infringement action brought by Trident against Independent was dismissed for lack of personal jurisdiction, Independent filed suit against Trident seeking a judgment of noninfringement and invalidity of Trident's patents.²⁸ In an amended complaint, it alleged that petitioners are engaged in illegal tying and monopolization in violation of §§ 1 and 2 of the Sherman Act. 15 U.S.C. §§ 1, 2.

After discovery, the District Court granted petitioners' motion for summary judgment on the Sherman Act claims. *Independent Ink, Inc. v. Trident, Inc.*, 210 F. Supp. 2d 1155, 1177 (CD Cal. 2002). It rejected respondent's submission that petitioners "necessarily have market power in the market for the tying product as a matter of law solely by virtue of the patent on their printhead system, thereby rendering [the] tying arrangements *per se* violations of the antitrust laws." *Id.*, at 1159. Finding that respondent had submitted no affirmative evidence defining the

²⁸ Illinois Tool did not acquire Trident until February 19, 1999, approximately six months after this action commenced.

relevant market or establishing petitioners' power within it, the court concluded that respondent could not prevail on either antitrust claim. *Id.*, at 1167, 1173, 1177. The parties settled their other claims, and respondent appealed.

After a careful review of the "long history of Supreme Court consideration of the legality of tying arrangements," 396 *F.3d* 1342, 1346 (2005), the Court of Appeals for the Federal Circuit reversed the District Court's decision as to respondent's § 1 claim, *id.*, at 1354. Placing special reliance on our decisions in *International Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947), and *Loew's*, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11, as well as our *Jefferson Parish* dictum, and after taking note of the academic criticism of those cases, it concluded that the "fundamental error" in petitioners' submission was its disregard of "the duty of a court of appeals to follow the precedents of the Supreme Court until the Court itself chooses to expressly overrule them." 396 *F.3d* at 1351. We granted certiorari to undertake a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements. 545 U.S. ___, 125 S. Ct. 2937, 162 L. Ed. 2d 865 (2005). Our review is informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws.

II

American courts first encountered tying arrangements in the course of patent infringement litigation. See, e.g., *Heaton-Peninsular Button-Fastening Co. v. Eureka Specialty Co.*, 77 F. 288, 1897 Dec. Comm'r Pat. 216 (CA6 1896). Such a case came before this Court in *Henry v. A. B. Dick Co.*, 224 U.S. 1, 32 S. Ct. 364, 56 L. Ed. 645, 1912 Dec. Comm'r Pat. 575 (1912), in which, as in the case we decide today, unpatented ink was the product that was "tied" to the use of a patented product through the use of a licensing agreement. Without commenting on the tying arrangement, the Court held that use of a competitor's ink in violation of a condition of the agreement--that the rotary mimeograph "may be used only with the stencil, paper, ink and other supplies made by A. B. Dick Co."--constituted infringement of the patent on the machine. *Id.*, at 25-26, 32 S. Ct. 364, 56 L. Ed. 645, 1912 Dec. Comm'r Pat. 575 Chief Justice White dissented, explaining his disagreement with the Court's approval of a practice that he regarded as an "attempt to increase the scope of the monopoly granted by a patent . . . which tend[s] to increase monopoly and to burden the public in the exercise of their common rights." *Id.*, at 70, 32 S. Ct. 364, 56 L. Ed. 645, 1912 Dec. Comm'r Pat. 575 Two years later, Congress endorsed Chief Justice White's disapproval of tying arrangements, enacting § 3 of the Clayton Act. See 38 Stat. 731 (applying to "patented or unpatented" products); see also *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517-518, 37 S. Ct. 416, 61 L. Ed. 871, 1917 Dec. Comm'r Pat. 391 (1917) (explaining that, in light of § 3 of the Clayton Act, *A. B. Dick* "must be regarded as overruled"). And in this Court's subsequent cases reviewing the legality of tying arrangements we, too, embraced Chief Justice White's disapproval of those arrangements. See, e.g., *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-306, 69 S. Ct. 1051, 93 L. Ed. 1371 (1949); *Mercoïd Corp. v. Mid-Continent Investment Co.*, 320 U.S. 661, 664-665, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641 (1944).

In the years since *A. B. Dick*, four different rules of law have supported challenges to tying arrangements. They have been condemned as improper extensions of the patent monopoly under the patent misuse doctrine, as unfair methods of competition under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, as contracts tending to create a monopoly under § 3 of the Clayton Act, 15 U.S.C. § 13a, and as contracts in restraint of trade under § 1 of the Sherman

Act.29 In all of those instances, the justification for the challenge rested on either an assumption or a showing that the defendant's position of power in the market for the tying product was being used to restrain competition in the market for the tied product. As we explained in *Jefferson Parish*, 466 U.S., at 12, 104 S. Ct. 1551, 80 L. Ed. 2d 2, "[o]ur cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."

Over the years, however, this Court's strong disapproval of tying arrangements has substantially diminished. Rather than relying on assumptions, in its more recent opinions the Court has required a showing of market power in the tying product. Our early opinions consistently assumed that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition." *Standard Oil Co.*, 337 U.S., at 305-306, 69 S. Ct. 1051, 93 L. Ed. 1371. In 1962, in *Loew's*, 371 U.S., at 47-48, 83 S. Ct. 97, 9 L. Ed. 2d 11, the Court relied on this assumption despite evidence of significant competition in the market for the tying product. And as recently as 1969, Justice Black, writing for the majority, relied on the assumption as support for the proposition "that, at least when certain prerequisites are met, arrangements of this kind are illegal in and of themselves, and no specific showing of unreasonable competitive effect is required." *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 498-499, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)(*Fortner I*). Explaining the Court's decision to allow the suit to proceed to trial, he stated that "decisions rejecting the need for proof of truly dominant power over the tying product have all been based on a recognition that because tying arrangements generally serve no legitimate business purpose that cannot be achieved in some less restrictive way, the presence of any appreciable restraint on competition provides a sufficient reason for invalidating the tie." *Id.*, at 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495.

Reflecting a changing view of tying arrangements, four Justices dissented in *Fortner I*, arguing that the challenged "tie"--the extension of a \$2 million line of credit on condition that the borrower purchase prefabricated houses from the defendant--might well have served a legitimate purpose. *Id.*, at 510, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (opinion of White, J.); *id.*, at 520, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (opinion of Fortas, J.). In his opinion, Justice White noted that promotional tie-ins may provide "uniquely advantageous deals" to purchasers. *Id.*, at 519, 89 S. Ct. 1252, 22 L. Ed. 2d 495. And Justice Fortas concluded that the arrangement was best characterized as "a sale of a single product with the incidental provision of financing." *Id.*, at 522, 89 S. Ct. 1252, 22 L. Ed. 2d 495.

The dissenters' view that tying arrangements may well be procompetitive ultimately prevailed; indeed, it did so in the very same lawsuit. After the Court remanded the suit in *Fortner I*, a bench trial resulted in judgment for the plaintiff, and the case eventually made its way back to this Court. Upon return, we unanimously held that the plaintiff's failure of proof on the issue of market power was fatal to its case--the plaintiff had proved "nothing more than a willingness to provide cheap financing in order to sell expensive houses." *United States Steel*

29 See, e.g., *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2, 9, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (1984) (Sherman Act); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609, 73 S. Ct. 872, 97 L. Ed. 1277 (1953) (Federal Trade Commission Act); *International Salt Co. v. United States*, 332 U.S. 392, 395-396, 68 S. Ct. 12, 92 L. Ed. 20 (1947) (Clayton Act and Sherman Act); *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 494, 62 S. Ct. 402, 86 L. Ed. 363, 1942 Dec. Comm'r Pat. 733 (1942) (patent misuse); *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 516, 37 S. Ct. 416, 61 L. Ed. 871, 1917 Dec. Comm'r Pat. 391 (1917) (same).

Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 622, 97 S. Ct. 861, 51 L. Ed. 2d 80 (1977) (*Fortner II*).

The assumption that "[t]ying arrangements serve hardly any purpose beyond the suppression of competition," rejected in *Fortner II*, has not been endorsed in any opinion since. Instead, it was again rejected just seven years later in *Jefferson Parish*, where, as in *Fortner II*, we unanimously reversed a Court of Appeals judgment holding that an alleged tying arrangement constituted a *per se* violation of § 1 of the Sherman Act. 466 U.S., at 5, 104 S. Ct. 1551, 80 L. Ed. 2d 2. Like the product at issue in the *Fortner* cases, the tying product in *Jefferson Parish*--hospital services--was unpatented, and our holding again rested on the conclusion that the plaintiff had failed to prove sufficient power in the tying product market to restrain competition in the market for the tied product--services of anesthesiologists. 466 U.S., at 28-29, 104 S. Ct. 1551, 80 L. Ed. 2d 2.

In rejecting the application of a *per se* rule that all tying arrangements constitute antitrust violations, we explained:

"[W]e have condemned tying arrangements when the seller has some special ability--usually called 'market power'--to force a purchaser to do something that he would not do in a competitive market. . . .

"*Per se* condemnation--condemnation without inquiry into actual market conditions--is only appropriate if the existence of forcing is probable. Thus, application of the *per se* rule focuses on the probability of anticompetitive consequences. . . .

"For example, if the Government has granted the seller a patent or similar monopoly over a product, it is fair to presume that the inability to buy the product elsewhere gives the seller market power. *United States v. Loew's Inc.*, 371 U.S., at 45-47, 83 S. Ct. 97, 9 L. Ed. 2d 11. Any effort to enlarge the scope of the patent monopoly by using the market power it confers to restrain competition in the market for a second product will undermine competition on the merits in that second market. Thus, the sale or lease of a patented item on condition that the buyer make all his purchases of a separate tied product from the patentee is unlawful." *Id.*, at 13-16, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (footnote omitted).

Notably, nothing in our opinion suggested a rebuttable presumption of market power applicable to tying arrangements involving a patent on the tying good. See *infra*, at ____, 164 L. Ed. 2d, at 40; cf. 396 F.3d at 1352. Instead, it described the rule that a contract to sell a patented product on condition that the purchaser buy unpatented goods exclusively from the patentee is a *per se* violation of § 1 of the Sherman Act.

Justice O'Connor wrote separately in *Jefferson Parish*, concurring in the judgment on the ground that the case did not involve a true tying arrangement because, in her view, surgical services and anesthesia were not separate products. 466 U.S., at 43, 104 S. Ct. 1551, 80 L. Ed. 2d 2. In her opinion, she questioned not only the propriety of treating any tying arrangement as a *per se* violation of the Sherman Act, *id.*, at 35, 104 S. Ct. 1551, 80 L. Ed. 2d 2, but also the validity of the presumption that a patent always gives the patentee significant market power, observing that the presumption was actually a product of our patent misuse cases rather than our antitrust jurisprudence, *id.*, at 37-38, n. 7, 104 S. Ct. 1551, 80 L. Ed. 2d 2. It is that presumption, a vestige of the Court's historical distrust of tying arrangements, that we address squarely today.

III

. . . The presumption that a patent confers market power migrated from patent law to antitrust law in *International Salt Co. v. United States*, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20 (1947). In that case, we affirmed a District Court decision holding that leases of patented machines requiring the lessees to use the defendant's unpatented salt products violated § 1 of the Sherman Act and § 3 of the Clayton Act as a matter of law. *Id.*, at 396, 68 S. Ct. 12, 92 L. Ed. 20. Although the Court's opinion does not discuss market power or the patent misuse doctrine, it assumes that "[t]he volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious." *Ibid.*

The assumption that tying contracts "ten[d] . . . to accomplishment of monopoly" can be traced to the Government's brief in *International Salt*, which relied heavily on our earlier patent misuse decision in *Morton Salt*. The Government described *Morton Salt* as "present[ing] a factual situation almost identical with the instant case," and it asserted that "although the Court in that case did not find it necessary to decide whether the antitrust laws were violated, its language, its reasoning, and its citations indicate that the policy underlying the decision was the same as that of the Sherman Act." Brief for United States in *International Salt Co. v. United States*, O. T. 1947, No. 46, p 19 (United States Brief). Building on its assertion that *International Salt* was logically indistinguishable from *Morton Salt*, the Government argued that this Court should place tying arrangements involving patented products in the category of *per se* violations of the Sherman Act. United States Brief 26-33.

Our opinion in *International Salt* clearly shows that we accepted the Government's invitation to import the presumption of market power in a patented product into our antitrust jurisprudence. While we cited *Morton Salt* only for the narrower proposition that the defendant's patents did not confer any right to restrain competition in unpatented salt or afford the defendant any immunity from the antitrust laws, *International Salt*, 332 U.S., at 395-396, 68 S. Ct. 12, 92 L. Ed. 20, given the fact that the defendant was selling its unpatented salt at competitive prices, *id.*, at 396-397, 68 S. Ct. 12, 92 L. Ed. 20, the rule adopted in *International Salt* necessarily accepted the Government's submission that the earlier patent misuse cases supported the broader proposition "that this type of restraint is unlawful on its face under the Sherman Act," United States Brief 12.

Indeed, later in the same Term we cited *International Salt* for the proposition that the license of "a patented device on condition that unpatented materials be employed in conjunction with the patented device" is an example of a restraint that is "illegal *per se*." *United States v. Columbia Steel Co.*, 334 U.S. 495, 522-523, 68 S. Ct. 1107, 92 L. Ed. 1533, and n. 22 (1948). And in subsequent cases we have repeatedly grounded the presumption of market power over a patented device in *International Salt*. See, e.g., *Loew's*, 371 U.S., at 45-46, 83 S. Ct. 97, 9 L. Ed. 2d 11; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 608, 73 S. Ct. 872, 97 L. Ed. 1277 (1953); *Standard Oil Co.*, 337 U.S., at 304, 69 S. Ct. 1051, 93 L. Ed. 1371.

IV

Although the patent misuse doctrine and our antitrust jurisprudence became intertwined in *International Salt*, subsequent events initiated their untwining. This process has ultimately led to

today's reexamination of the presumption of *per se* illegality of a tying arrangement involving a patented product, the first case since 1947 in which we have granted review to consider the presumption's continuing validity.

Three years before we decided *International Salt*, this Court had expanded the scope of the patent misuse doctrine to include not only supplies or materials used by a patented device, but also tying arrangements involving a combination patent and "unpatented material or [a] device [that] is itself an integral part of the structure embodying the patent." *Mercoïd*, 320 U.S., at 665, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641; see also *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 188-198, 100 S. Ct. 2601, 65 L. Ed. 2d 696 (1980) (describing in detail *Mercoïd* and the cases leading up to it). In reaching this conclusion, the Court explained that it could see "no difference in principle" between cases involving elements essential to the inventive character of the patent and elements peripheral to it; both, in the Court's view, were attempts to "expan[d] the patent beyond the legitimate scope of its monopoly." *Mercoïd*, 320 U.S., at 665, 64 S. Ct. 268, 88 L. Ed. 376, 1944 Dec. Comm'r Pat. 641

Shortly thereafter, Congress codified the patent laws for the first time. See 66 Stat. 792, codified as 35 U.S.C. § 1 *et seq.* (2000 ed. and Supp. III). At least partly in response to our *Mercoïd* decision, Congress included a provision in its codification that excluded some conduct, such as a tying arrangement involving the sale of a patented product tied to an "essential" or "nonstaple" product that has no use except as part of the patented product or method, from the scope of the patent misuse doctrine. § 271(d); see also *Dawson*, 448 U.S., at 214, 100 S. Ct. 2601, 65 L. Ed. 2d 696. Thus, at the same time that our antitrust jurisprudence continued to rely on the assumption that "tying arrangements generally serve no legitimate business purpose," *Fortner I*, 394 U.S., at 503, 89 S. Ct. 1252, 22 L. Ed. 2d 495, Congress began chipping away at the assumption in the patent misuse context from whence it came.

It is Congress' most recent narrowing of the patent misuse defense, however, that is directly relevant to this case. Four years after our decision in *Jefferson Parish* repeated the patent-equals-market-power presumption, 466 U.S., at 16, 104 S. Ct. 1551, 80 L. Ed. 2d 2, Congress amended the Patent Code to eliminate that presumption in the patent misuse context, 102 Stat. 4674. The relevant provision reads:

"(d) No patent owner otherwise entitled to relief for infringement or contributory infringement of a patent shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having done one or more of the following: . . . (5) conditioned the license of any rights to the patent or the sale of the patented product on the acquisition of a license to rights in another patent or purchase of a separate product, *unless, in view of the circumstances, the patent owner has market power in the relevant market for the patent or patented product on which the license or sale is conditioned.*" 35 U.S.C. § 271(d)(5) (emphasis added).

The italicized clause makes it clear that Congress did not intend the mere existence of a patent to constitute the requisite "market power." Indeed, fairly read, it provides that without proof that Trident had market power in the relevant market, its conduct at issue in this case was neither "misuse" nor an "illegal extension of the patent right."

While the 1988 amendment does not expressly refer to the antitrust laws, it certainly invites a reappraisal of the *per se* rule announced in *International Salt*.³⁰ A rule denying a patentee the right to enjoin an infringer is significantly less severe than a rule that makes the conduct at issue a federal crime punishable by up to 10 years in prison. See 15 U.S.C. § 1. It would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute "misuse." Moreover, given the fact that the patent misuse doctrine provided the basis for the market power presumption, it would be anomalous to preserve the presumption in antitrust after Congress has eliminated its foundation. Cf. 10 P. Areeda, H. Hovenkamp, & E. Elhauge, *Antitrust Law* P 1737c (2d ed. 2004) (hereinafter *Areeda*).

After considering the congressional judgment reflected in the 1988 amendment, we conclude that tying arrangements involving patented products should be evaluated under the standards applied in cases like *Fortner II* and *Jefferson Parish* rather than under the *per se* rule applied in *Morton Salt* and *Loew's*. While some such arrangements are still unlawful, such as those that are the product of a true monopoly or a marketwide conspiracy, see, e.g., *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 145-146, 68 S. Ct. 915, 92 L. Ed. 1260 (1948), that conclusion must be supported by proof of power in the relevant market rather than by a mere presumption thereof.³¹

V

Rather than arguing that we should retain the rule of *per se* illegality, respondent contends that we should endorse a rebuttable presumption that patentees possess market power when they condition the purchase of the patented product on an agreement to buy unpatented goods exclusively from the patentee. Cf. *supra*, at ____ - ____, 164 L. Ed. 2d, at 35-36. Respondent recognizes that a large number of valid patents have little, if any, commercial significance, but submits that those that are used to impose tying arrangements on unwilling purchasers likely do exert significant market power. Hence, in respondent's view, the presumption would have no impact on patents of only slight value and would be justified, subject to being rebutted by evidence offered by the patentee, in cases in which the patent has sufficient value to enable the patentee to insist on acceptance of the tie.

Respondent also offers a narrower alternative, suggesting that we differentiate between tying arrangements involving the simultaneous purchase of two products that are arguably two components of a single product--such as the provision of surgical services and anesthesiology in the same operation, *Jefferson Parish*, 466 U.S., at 43, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (O'Connor, J., concurring in judgment), or the licensing of one copyrighted film on condition that the licensee take a package of several films in the same transaction, *Loew's*, 371 U.S. 38, 83 S. Ct.

³⁰ While our opinions have made clear that such an invitation is not necessary with respect to cases arising under the Sherman Act, see *State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997), it is certainly sufficient to warrant reevaluation of our precedent, *id.*, at 21, 118 S. Ct. 275, 139 L. Ed. 2d 199 ("[T]his Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question").

³¹ Our imposition of this requirement accords with the vast majority of academic literature on the subject. See, e.g., 10 *Areeda* P 1737a ("[T]here is no economic basis for inferring any amount of market power from the mere fact that the defendant holds a valid patent"); Burchfiel, Patent Misuse and Antitrust Reform: "Blessed be the Tie?" 4 *Harv. J. L. & Tech.* 1, 57, and n 340 (noting that the market power presumption has been extensively criticized and citing sources); 1 H. Hovenkamp, M. Janis, & M. Lemley, *IP and Antitrust* § 4.2a (2005 Supp.) ("[C]overage of one's product with an intellectual property right does not confer a monopoly"); W. Landes & R. Posner, *The Economic Structure of Intellectual Property Law* 374 (2003) (hereinafter *Landes & Posner*).

97, 9 L. Ed. 2d 11 --and a tying arrangement involving the purchase of unpatented goods over a period of time, a so-called "requirements tie." See also Brief for Barry Nalebuff et al. as *Amici Curiae*. According to respondent, we should recognize a presumption of market power when faced with the latter type of arrangements because they provide a means for charging large volume purchasers a higher royalty for use of the patent than small purchasers must pay, a form of discrimination that "is strong evidence of market power." Brief for Respondent 27; see generally *Jefferson Parish*, 466 U.S., at 15, n. 23, 104 S. Ct. 1551, 80 L. Ed. 2d 2 (discussing price discrimination of this sort and citing sources).

The opinion that imported the "patent equals market power" presumption into our antitrust jurisprudence, however, provides no support for respondent's proposed alternative. In *International Salt*, it was the existence of the patent on the tying product, rather than the use of a requirements tie, that led the Court to presume market power. 332 U.S., at 395, 68 S. Ct. 12, 92 L. Ed. 20 ("The appellant's patents confer a limited monopoly of the invention they reward"). Moreover, the requirements tie in that case did not involve any price discrimination between large volume and small volume purchasers or evidence of noncompetitive pricing. Instead, the leases at issue provided that if any competitor offered salt, the tied product, at a lower price, "the lessee should be free to buy in the open market, unless appellant would furnish the salt at an equal price." *Id.*, at 396, 68 S. Ct. 12, 92 L. Ed. 20.

As we have already noted, the vast majority of academic literature recognizes that a patent does not necessarily confer market power. See n 4, *supra*. Similarly, while price discrimination may provide evidence of market power, particularly if buttressed by evidence that the patentee has charged an above-market price for the tied package, see, e.g., 10 Areeda P 1769c, it is generally recognized that it also occurs in fully competitive markets, see, e.g., Baumol & Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 *Antitrust L. J.* 661, 666 (2003); 9 Areeda P 1711; Landes & Posner 374-375. We are not persuaded that the combination of these two factors should give rise to a presumption of market power when neither is sufficient to do so standing alone. Rather, the lesson to be learned from *International Salt* and the academic commentary is the same: Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market. For this reason, we reject both respondent's proposed rebuttable presumption and their narrower alternative.

It is no doubt the virtual consensus among economists that has persuaded the enforcement agencies to reject the position that the Government took when it supported the *per se* rule that the Court adopted in the 1940's. See *supra*, at ____, 164 L. Ed. 2d, at 36. In antitrust guidelines issued jointly by the Department of Justice and the Federal Trade Commission in 1995, the enforcement agencies stated that in the exercise of their prosecutorial discretion they "will not presume that a patent, copyright, or trade secret necessarily confers market power upon its owner." U. S. Dept. of Justice and FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* § 2.2 (Apr. 6, 1995), available at <http://www.usdoj.gov/atr/public/guidelines/0558.pdf> (as visited Feb. 24, 2006, and available in Clerk of Court's case file). While that choice is not binding on the Court, it would be unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with a rule of severity for a special category of antitrust cases.

Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee. Today, we reach the same conclusion, and therefore hold that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.

VI

In this case, respondent reasonably relied on our prior opinions in moving for summary judgment without offering evidence defining the relevant market or proving that petitioners possess power within it. When the case returns to the District Court, respondent should therefore be given a fair opportunity to develop and introduce evidence on that issue, as well as any other issues that are relevant to its remaining § 1 claims. Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

Chapter 6

Discrimination Under the Robinson-Patman Act

6B. Secondary-Line Injury

After ¶613, insert the following

VOLVO TRUCKS NORTH AMERICA v. REEDER-SIMCO GMC
546 U.S. 164 (2006)

Justice GINSBURG. This case concerns specially ordered products -- heavy-duty trucks supplied by Volvo Trucks North America, Inc. (Volvo), and sold by franchised dealers through a competitive bidding process. In this process, the retail customer states its specifications and invites bids, generally from dealers franchised by different manufacturers. Only when a Volvo dealer's bid proves successful does the dealer arrange to purchase the trucks, which Volvo then builds to meet the customer's specifications.

Reeder-Simco GMC, Inc. (Reeder), a Volvo dealer located in Fort Smith, Arkansas, commenced suit against Volvo alleging that Reeder's sales and profits declined because Volvo offered other dealers more favorable price concessions than those offered to Reeder. Reeder sought redress for its alleged losses under § 2 of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Price Discrimination Act, 49 Stat. 1526, *15 U.S.C. § 13* (Robinson-Patman Act or Act), and the Arkansas Franchise Practices Act, *Ark. Code Ann. § 4-72-201 et seq.* (2001). Reeder prevailed at trial and on appeal on both claims. We granted review on the federal claim to resolve the question whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer. While state law designed to protect franchisees may provide, and in this case has provided, a remedy for the dealer exposed to conduct of the kind Reeder alleged, the Robinson-Patman Act, we hold, does not reach the case Reeder presents. The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process.

I

Volvo manufactures heavy-duty trucks. Reeder sells new and used trucks, including heavy-duty trucks. *374 F.3d 701, 704 (CA8 2004)*. Reeder became an authorized dealer of Volvo trucks

in 1995, pursuant to a five-year franchise agreement that provided for automatic one-year extensions if Reeder met sales objectives set by Volvo. *Ibid.* Reeder generally sold Volvo's trucks through a competitive bidding process. *Ibid.* In this process, the retail customer describes its specific product requirements and invites bids from several dealers it selects. The customer's "decision to request a bid from a particular dealer or to allow a particular dealer to bid is controlled by such factors as an existing relationship, geography, reputation, and cold calling or other marketing strategies initiated by individual dealers." *Id.*, at 719 (Hansen, J., concurring in part and dissenting in part).

Once a Volvo dealer receives the customer's specifications, it turns to Volvo and requests a discount or "concession" off the wholesale price (set at 80% of the published retail price). *Id.*, at 704. It is common practice in the industry for manufacturers to offer customer-specific discounts to their dealers. *Ibid.*; App. 334, 337. Volvo decides on a case-by-case basis whether to offer a discount and, if so, what the discount rate will be, taking account of such factors as industry-wide demand and whether the retail customer has, historically, purchased a different brand of trucks. App. 348-349, 333-334.³² The dealer then uses the discount offered by Volvo in preparing its bid; it purchases trucks from Volvo only if and when the retail customer accepts its bid. *Ibid.*

Reeder was one of many Volvo dealers, each assigned by Volvo to a geographic territory. Reeder's territory encompassed ten counties in Arkansas and two in Oklahoma. *374 F.3d at 709.* Although nothing prohibits a Volvo dealer from bidding outside its territory, *ibid.*, Reeder rarely bid against another Volvo dealer, see *id.*, at 705; 5 App. in No. 02-2462 (CA8), pp. 1621-1622 (hereinafter C. A. App.). In the atypical event that the same retail customer solicited a bid from more than one Volvo dealer, Volvo's stated policy was to provide the same price concession to each dealer competing head to head for the same sale. 4 C. A. App. 1161-1162; 5 *id.*, at 1619, 1621.

In 1997, Volvo announced a program it called "Volvo Vision," in which the company addressed problems it faced in the market for heavy trucks, among them, the company's assessment that it had too many dealers. Volvo projected enlarging the size of its dealers' markets and reducing the number of dealers from 146 to 75. *374 F.3d at 705.* Coincidentally, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically received, and "Reeder came to suspect it was one of the dealers Volvo sought to eliminate." *Ibid.* Reeder filed suit against Volvo in February 2000, alleging losses attributable to Volvo's violation of the Arkansas Franchise Practices Act and the Robinson-Patman Act.

At trial, Reeder's vice-president, William E. Heck, acknowledged that Volvo's policy was to offer equal concessions to Volvo dealers bidding against one another for a particular contract, but he contended that the policy "was not executed." 4 C. A. App. 1162. Reeder presented evidence concerning two instances over the five-year course of its authorized dealership when Reeder bid against other Volvo dealers for a particular sale. *374 F.3d at 705, 708-709.* One of the two instances involved Reeder's bid on a sale to Tommy Davidson Trucking. 4 C. A. App. 1267-1268. Volvo initially offered Reeder a concession of 17%, which Volvo, unprompted, increased to 18.1% and then, one week later, to 18.9%, to match the concession Volvo had offered to another of its dealers. 5 *id.*, at 1268-1272. Neither dealer won the bid. *Id.*, at 1272. The

³² To shield its ability to compete with other manufacturers, Volvo keeps confidential its precise method for calculating concessions offered to dealers. *374 F.3d 701, 704-705 (CA8 2004)*; App. 337-338.

other instance involved Hiland Dairy, which solicited bids from both Reeder and Southwest Missouri Truck Center. *Id.*, at 1626-1627. Per its written policy, Volvo offered the two dealers the same concession, and Hiland selected Southwest Missouri, a dealer from which Hiland had previously purchased trucks. *Ibid.* After selecting Southwest Missouri, Hiland insisted on the price Southwest Missouri had bid prior to a general increase in Volvo's prices; Volvo obliged by increasing the size of the discount. *Id.*, at 1627. See also *id.*, at 1483-1488; 374 *F.3d* at 720 (Hansen, J., concurring in part and dissenting in part).

Reeder dominantly relied on comparisons between concessions Volvo offered when Reeder bid against non-Volvo dealers, with concessions accorded to other Volvo dealers similarly bidding against non-Volvo dealers for other sales. Reeder's evidence compared concessions Reeder received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks), with more favorable concessions other successful Volvo dealers received in connection with bidding processes in which Reeder did not participate. *Id.*, at 705-706. Reeder also compared concessions offered by Volvo on several occasions when Reeder bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks), with more favorable concessions received by other Volvo dealers who gained contracts on which Reeder did not bid. *Id.*, at 706-707.

Reeder's vice-president, Heck, testified that Reeder did not look for instances in which it received a *larger* concession than another Volvo dealer, although he acknowledged it was "quite possible" that such instances occurred. 5 C. A. App. 1462. Nor did Reeder endeavor to determine by any statistical analysis whether Reeder was disfavored on average as compared to another dealer or set of dealers. *Id.*, at 1462-1464.

The jury found that there was a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo truck dealers, and that Volvo's discriminatory pricing injured Reeder. App. 480-486. It further found that Reeder's damages from Volvo's Robinson-Patman Act violation exceeded \$ 1.3 million. *Id.*, at 486.33 . . .

A divided Court of Appeals for the Eighth Circuit affirmed. The appeals court noted that, "as a threshold matter[,] Reeder had to show [that] it was a 'purchaser' within the meaning of the [Act]," 374 *F.3d* at 708, *i.e.*, that "there were actual sales at two different prices[,] . . . a sale to [Reeder] and a sale to another Volvo dealer," *id.*, at 707-708. Rejecting Volvo's contention that competitive bidding situations do not give rise to claims under the Robinson-Patman Act, *id.*, at 708-709, the Court of Appeals observed that Reeder was "more than an unsuccessful bidder," *id.*, at 709. The four instances in which Reeder "actually purchased Volvo trucks following successful bids on contracts," the court concluded, sufficed to render Reeder a purchaser within the meaning of the Act. *Ibid.*

The Court of Appeals next determined that a jury could reasonably decide that Reeder was "in actual competition" with favored dealers. *Ibid.* "As of the time the price differential was imposed," the court reasoned, "the favored and disfavored purchasers competed at the same functional level . . . and within the same geographic market." *Ibid.* (quoting *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 *F.2d* 578, 585 (CA2 1987)). The court further held that the jury could properly find from the evidence that Reeder had proved competitive injury from price discrimination. Specifically, the court pointed to evidence showing that (1) Volvo

33 The jury also awarded Reeder damages of \$ 513,750 on Reeder's state-law claim under the Arkansas Franchise Practices Act. No question is before us respecting that claim, which trained on Volvo's alleged design to eliminate Reeder as a Volvo dealer. See *supra*, at 4.

intended to reduce the number of its dealers; (2) Reeder lost the Hiland Dairy contract, for which it competed head to head with another Volvo dealer; (3) Reeder would have earned more profits, had it received the concessions other dealers received; and (4) Reeder's sales had declined over a period of time. *374 F.3d at 711-712*. The court also affirmed the award of treble damages to Reeder. *Id.*, at 712-714.

...

We granted certiorari, *544 U.S. ____*, *125 S. Ct. 1596*, *161 L. Ed. 2d 276* (2005), to resolve this question: May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer? Satisfied that the Court of Appeals erred in answering that question in the affirmative, we reverse the Eighth Circuit's judgment.

II

Section 2, "when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers." *FTC v. Anheuser-Busch, Inc.*, *363 U.S. 536*, *543*, *80 S. Ct. 1267*, *4 L. Ed. 2d 1385*, and *n. 6* (1960) (citing H. R. Rep. No. 627, 63d Cong., 2d Sess., 8 (1914); S. Rep. No. 698, 63d Cong., 2d Sess., 2-4 (1914)). Augmenting that provision in 1936 with the Robinson-Patman Act, Congress sought to target the perceived harm to competition occasioned by powerful buyers, rather than sellers; specifically, Congress responded to the advent of large chain stores, enterprises with the clout to obtain lower prices for goods than smaller buyers could demand. See 14 H. Hovenkamp, *Antitrust Law* P2302, p. 11 (2d ed. 2006) (hereinafter Hovenkamp); P. Areeda & L. Kaplow, *Antitrust Analysis* P602, pp. 908-909 (5th ed. 1997) (hereinafter Areeda). The Act provides, in relevant part:

"It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them" *15 U.S.C. § 13(a)*.

Pursuant to § 4 of the Clayton Act, a private plaintiff may recover threefold for actual injury sustained as a result of a violation of the Robinson-Patman Act. See *15 U.S.C. § 15(a)*; *J. Truett Payne Co. v. Chrysler Motors Corp.*, *451 U.S. 557*, *562*, *101 S. Ct. 1923*, *68 L. Ed. 2d 442* (1981).

Mindful of the purposes of the Act and of the antitrust laws generally, we have explained that Robinson-Patman does not "ban all price differences charged to different purchasers of commodities of like grade and quality," *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, *509 U.S. 209*, *220*, *113 S. Ct. 2578*, *125 L. Ed. 2d 168* (1993) (internal quotation marks omitted); rather, the Act proscribes "price discrimination only to the extent that it threatens to injure competition," *ibid.* Our decisions describe three categories of competitive injury that may give rise to a Robinson-Patman Act claim: primary-line, secondary-line, and tertiary-line. Primary-line cases entail conduct -- most conspicuously, predatory pricing -- that injures competition at the level of the discriminating seller and its direct competitors. See, e.g., *id.*, at

220-222, 113 S. Ct. 2578, 125 L. Ed. 2d 168; see also Hovenkamp P2301a, pp. 4-6. Secondary-line cases, of which this is one, involve price discrimination that injures competition among the discriminating seller's customers (here, Volvo's dealerships); cases in this category typically refer to "favored" and "disfavored" purchasers. See *ibid.*; *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 558, n. 15, 110 S. Ct. 2535, 110 L. Ed. 2d 492 (1990). Tertiary-line cases involve injury to competition at the level of the purchaser's customers. See Areeda P601e, p. 907.

To establish the secondary-line injury of which it complains, Reeder had to show that (1) the relevant Volvo truck sales were made in interstate commerce; (2) the trucks were of "like grade and quality"; (3) Volvo "discriminated in price between" Reeder and another purchaser of Volvo trucks; and (4) "the effect of such discrimination may be . . . to injure, destroy, or prevent competition" to the advantage of a favored purchaser, *i.e.*, one who "received the benefit of such discrimination." 15 U.S.C. § 13(a). It is undisputed that Reeder has satisfied the first and second requirements. Volvo and the United States, as *amicus curiae*, maintain that Reeder cannot satisfy the third and fourth requirements, because Reeder has not identified any differentially-priced transaction in which it was both a "purchaser" under the Act and "in actual competition" with a favored purchaser for the same customer.

A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. *FTC v. Sun Oil Co.*, 371 U.S. 505, 518-519, 83 S. Ct. 358, 9 L. Ed. 2d 466 (1963) (evidence showed patronage shifted from disfavored dealers to favored dealers); *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437-438, 103 S. Ct. 1282, 75 L. Ed. 2d 174, and n. 8 (1983) (complaint "supported by direct evidence of diverted sales"). We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 49-51, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948); *Falls City Industries*, 460 U.S., at 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174. Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act.

III

The evidence Reeder offered at trial falls into three categories: (1) comparisons of concessions Reeder received for four successful bids against *non-Volvo* dealers, with larger concessions other successful Volvo dealers received for *different sales* on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to Reeder in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for *different sales* on which Reeder did not bid (offer-to-purchase comparisons); and (3) evidence of two occasions on which Reeder bid against another Volvo dealer (head-to-head comparisons). The Court of Appeals concluded that Reeder demonstrated competitive injury under the Act because Reeder competed with favored purchasers "at the same functional level . . . and within the same geographic market." 374 F.3d at 709 (quoting *Best Brands*, 842 F.2d at 585). As we see it, however, selective comparisons of the kind Reeder presented do not show the injury to competition targeted by the Robinson-Patman Act.

Both the purchase-to-purchase and the offer-to-purchase comparisons fall short, for in none of the discrete instances on which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination *for the same customer*. Nor did Reeder even attempt to show that the compared dealers were consistently favored vis-A-vis Reeder. Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months. See *374 F.3d at 706, 710*.

We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. See Tr. of Oral Arg. 34-35, 55. No similar risk of manipulation occurs in cases kin to the chain-store paradigm. Here, there is no discrete "favored" dealer comparable to a chain store or a large independent department store -- at least, Reeder's evidence is insufficient to support an inference of such a dealer or set of dealers. For all we know, Reeder, on occasion, might have gotten a better deal vis-A-vis one or more of the dealers in its comparisons. See *supra*, at 5.

Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic area. At that initial stage, however, competition is not affected by differential pricing; a dealer in the competitive bidding process here at issue approaches Volvo for a price concession only after it has been selected by a retail customer to submit a bid. Competition for an opportunity to bid, we earlier observed, is based on a variety of factors, including the existence *vel non* of a relationship between the potential bidder and the customer, geography, and reputation. See *supra*, at 2.34 We reiterate in this regard an observation made by Judge Hansen, dissenting from the Eighth Circuit's Robinson-Patman holding: Once a retail customer has chosen the particular dealers from which it will solicit bids, "the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale." *374 F.3d at 719*. That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales. In sum, the purchase-to-purchase and offer-to-purchase comparisons fail to show that Volvo sold at a lower price to Reeder's "competitors," hence those comparisons do not support an inference of competitive injury. See *Falls City Industries*, 460 U.S., at 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (inference of competitive injury under *Morton Salt* arises from "proof of a substantial price discrimination between *competing purchasers* over time" (emphasis added)).

B

Reeder did offer evidence of two instances in which it competed head to head with another Volvo dealer. See *supra*, at 4. When multiple dealers bid for the business of the *same* customer, only one dealer will win the business and thereafter purchase the supplier's product to fulfill its contractual commitment. Because Robinson-Patman "prohibits only discrimination 'between different *purchasers*,'" Brief for Petitioner 26 (quoting *15 U.S.C. § 13(a)*; emphasis added), Volvo and the United States argue, the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. See Brief for Petitioner 27;

34 A dealer's reputation for securing favorable concessions, we recognize, may influence the customer's bidding invitations. Cf. *post*, at 3, n. 2. We do not pursue that point here, however, because Reeder did not present -- or even look for -- evidence that Volvo consistently disfavored Reeder while it consistently favored certain other dealers. See *supra*, at 5.

Brief for United States as *Amicus Curiae* 9, 17-20. We need not decide that question today. Assuming the Act applies to the head-to-head transactions, Reeder did not establish that it was *disfavored* vis-A-vis other Volvo dealers in the rare instances in which they competed for the same sale -- let alone that the alleged discrimination was substantial. See 1 ABA Section of Antitrust Law, *Antitrust Law Developments* 478-479 (5th ed. 2002) ("No inference of injury to competition is permitted when the discrimination is not substantial." (collecting cases)).

Reeder's evidence showed loss of only one sale to another Volvo dealer, a sale of 12 trucks that would have generated \$ 30,000 in gross profits for Reeder. *374 F.3d at 705*. Per its policy, Volvo initially offered Reeder and the other dealer the same concession. Volvo ultimately granted a larger concession to the other dealer, but only after it had won the bid. In the only other instance of head-to-head competition Reeder identified, Volvo increased Reeder's initial 17% discount to 18.9%, to match the discount offered to the other competing Volvo dealer; neither dealer won the bid. See *supra*, at 4. In short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the "favored" Volvo dealer.

IV

Interbrand competition, our opinions affirm, is the "primary concern of antitrust law." *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51-52, n. 19, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977). The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*.³⁵ n4 In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. See *id.*, at 51-52, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (observing that the market impact of a vertical practice, such as a change in a supplier's distribution system, may be a "simultaneous reduction of intrabrand competition and stimulation of interbrand competition"). By declining to extend *Robinson-Patman's* governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws." *Brooke Group*, 509 U.S., at 220, 113 S. Ct. 2578, 125 L. Ed. 2d 168 (quoting *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80, n. 13, 99 S. Ct. 925, 59 L. Ed. 2d 153 (1979)); see *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63, 73 S. Ct. 1017, 97 L. Ed. 1454, 49 F.T.C. 1763 (1953) (cautioning against Robinson-Patman constructions that "extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation").

For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion. . . .

35 The dissent assails Volvo's decision to reduce the number of its dealers. *Post*, at 2, 5. But Robinson-Patman does not bar a manufacturer from restructuring its distribution networks to improve the efficiency of its operations. If Volvo did not honor its obligations to Reeder as its franchisee, "any remedy . . . lies in state laws addressing unfair competition and the rights of franchisees, not in the Robinson-Patman Act." Brief for United States as *Amicus Curiae* 28.

* * *

Justice STEVENS, with whom Justice THOMAS joins, dissenting. Franchised dealers who sell Volvo trucks, like those who sell automobiles, farm equipment, washing machines, and a variety of other expensive items, routinely engage in negotiations with prospective purchasers. Sometimes the prospect is simultaneously negotiating with two Volvo dealers, sometimes with a Volvo dealer and a dealer representing another manufacturer, and still other times a satisfied customer who is generally familiar with the options available in a competitive market may negotiate with only one dealer at a time. Until today, the Robinson-Patman Act's prohibition of price discrimination³⁶ n1 would have protected the dealer's ability to negotiate in all those situations. Today, however, by adopting a novel, transaction-specific concept of competition, the Court eliminates that statutory protection in all but those rare situations in which a prospective purchaser is negotiating with two Volvo dealers at the same time.

I

Setting aside for the moment the fact that the case involves goods specially ordered for particular customers rather than goods stocked in inventory, the case is a rather ordinary Robinson-Patman suit. Respondent Reeder alleged a violation of the Act; the parties submitted a good deal of conflicting evidence to the jury; the trial judge properly instructed the jurors on the elements of price discrimination, competitive injury, and damages; and the jury returned a verdict resolving all issues in Reeder's favor. The Court of Appeals found no error in either the instructions or the sufficiency of the evidence. *374 F.3d 701 (CA8 2004)*.

Two issues of fact bear particular mention.

First, Volvo does not challenge the jury's finding of price discrimination. Reeder's theory of the case was that Volvo sought to cut back its number of dealers and deemed Reeder expendable. To avoid possible violations of franchise agreements and state laws, Volvo chose to accomplish this goal by offering Reeder worse prices than other regional dealers.

Reeder introduced substantial evidence of this theory. It showed that Volvo had an explicit business strategy, known as the "Volvo Vision," of "fewer dealers, larger markets." App. 34. It showed that Volvo could afford to lose sales as it squeezed dealers out, since the boom years of the late 1990's left Volvo with about as many orders as it could fill. *Id.*, at 256-257, *113 S. Ct.* 2578, *125 L. Ed. 2d* 168. And it showed that Volvo frequently gave worse prices to it than to other regional dealers. On at least four occasions, Volvo sold trucks to Reeder at significantly higher prices than to other dealers buying similar trucks around the same time.³⁷ To give one example, in the spring of 1998 Volvo sold 20 trucks to Reeder at a 9% concession, but sold

36 Section 2 of the Clayton Act, as amended by § 1 of the Robinson-Patman Act, provides in relevant part that:

"It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 38 Stat. 730, as amended, 49 Stat. 1526, *15 U.S.C. § 13(a)*.

³⁷ Additionally, on more than 12 other occasions, Volvo offered worse deals to Reeder than it gave to dealers who made comparable purchases. Arguably due to Volvo's stingy concessions, Reeder failed to close with its customers in these instances and thus never ended up buying the trucks at issue from Volvo.

similar trucks to a Texas dealer at a 12.3% concession. *Id.*, at 132-134. This left Reeder paying \$ 2,606 more per truck. *Id.*, at 134. Although the Court chides Reeder for failing to perform statistical analyses, see *ante*, at 5, 11, the jury clearly had a sufficient basis for finding price discrimination. It could infer that Volvo's pricing policies were comparable to a secret catalog listing one set of low prices for its "A" dealers and a higher set for its "B" dealers like Reeder, with an exception providing for the same prices where an "A" dealer and a "B" dealer were engaged in negotiations with the same customer at the same time.

Second, the jury found that the favored dealers at issue in these comparisons were competitive players in the same geographic market as Reeder. This conclusion is implicit in the jury's finding of competitive injury, since the jury instruction on that element required Reeder to prove

"a substantial difference in price in sales by defendant to plaintiff and other competing Volvo dealers over a significant period of time. This requires plaintiff to show that it and the other Volvo dealer(s) were retail dealers within the same geographic market and that the effect of the price differential was to allow the other Volvo dealer(s) to draw sales or profits away from plaintiff." App. 480, Instruction No. 18.

Volvo does not dispute that the evidence was sufficient to support the jury finding that Reeder and the favored dealers operated in the same geographic market.³⁸ Volvo's restraint is wise, as Reeder offered evidence that truck buyers are unsurprisingly mobile, that it delivered trucks to purchasers throughout the region, and that customers would sometimes solicit bids from more than one regional Volvo dealer.

II

For decades, juries have routinely inferred the requisite injury to competition under the Robinson-Patman Act from the fact that a manufacturer sells goods to one retailer at a higher price than to its competitors. This rule dates back to the following discussion of competitive injury in Justice Black's opinion for the Court in *FTC v. Morton Salt Co.*, 334 U.S. 37, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (1948):

"It is argued that the findings fail to show that respondent's discriminatory discounts had in fact caused injury to competition. There are specific findings that such injuries had resulted from respondent's discounts, although the statute does not require the Commission to find that injury has actually resulted. The statute requires no more than that the effect of the prohibited price discriminations 'may be substantially to lessen competition . . . or to injure, destroy, or prevent competition.' After a careful consideration of this provision of the Robinson-Patman Act, we have said that 'the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they "may" have such an effect.' *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742, 65 S. Ct. 961, 89 L. Ed. 1320, 40 F.T.C. 892 (1945). Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate." *Id.*, at 45-47, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499 (footnote omitted).

³⁸ Similarly, and despite its selective discussion of the extensive evidentiary record, *ante*, at 2-5, the Court does not question the sufficiency of the evidence supporting the jury's finding that Volvo engaged in price discrimination against Reeder relative to other regional Volvo dealers for a significant period of time.

We have treated as competitors those who sell "in a single, interstate retail market." *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (1983); cf. *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S. Ct. 623, 5 L. Ed. 2d 580 (1961). Under this approach -- uncontroversial until today -- Reeder would readily prevail. There is ample evidence that Volvo charged Reeder higher prices than it charged to competing dealers in the same market over a period of many months. That those higher prices impaired Reeder's ability to compete with those dealers is just as obvious as the injury to competition described by the Court in *Morton Salt*.

Volvo nonetheless argues that no competitive injury could have occurred because it never discriminated against Reeder when Reeder and another Volvo dealer were seeking concessions with regard to the same ultimate customer. In Volvo's view, each transaction was a separate market, one defined by the customer and those dealers whom it had asked for bids. For each specific customer who has solicited bids, Reeder's only "competitors" were the other dealers making bids. Accordingly, if none of these other dealers were Volvo dealers, then Reeder suffered no competitive harm (relative to other Volvo dealers) when Volvo gave it a discriminatorily high price.

Unlike the Court, I cannot accept Volvo's vision. Nothing in the statute or in our precedent suggests that "competition" is evaluated by a transaction-specific inquiry, and such an approach makes little sense. It requires us to ignore the fact that competition among truck dealers is a continuing war waged over time rather than a series of wholly discrete events. Each time Reeder managed to resell trucks it had purchased at discriminatorily high prices, it was forced either to accept lower profit margins than were available to favored Volvo dealers or to pass on the higher costs to its customers (who then might well go to a different dealer the next time). And we have long indicated that lost profits relative to a competitor are a proper basis for permitting the *Morton Salt* inference. See, e.g., *Falls City Industries*, 460 U.S., at 435, 103 S. Ct. 1282, 75 L. Ed. 2d 174 (noting that to overcome the *Morton Salt* inference, a defendant needs "evidence breaking the causal connection between a price differential and lost sales *or profits*" (emphasis added)). By ignoring these commonsense points, the Court gives short shrift to the Robinson-Patman Act's prophylactic intent. See 15 U.S.C. § 13(a) (barring price discrimination where "the effect of such discrimination *may* be substantially to lessen competition" (emphasis added)); see also, e.g., *Morton Salt*, 334 U.S., at 46, 68 S. Ct. 822, 92 L. Ed. 1196, 44 F.T.C. 1499.

The Court appears to hold that, absent head-to-head bidding with a favored dealer, a dealer in a competitive bidding market can suffer no competitive injury.³⁹ It is unclear whether that holding is limited to franchised dealers who do not maintain inventories, or excludes virtually all franchisees from the effective protection of the Act. In either event, it is not faithful to the statutory text.

III

³⁹ Indeed, if Volvo's argument about the meaning of "purchaser," see *ante*, at 12-13, ultimately meets with this Court's approval, then the Robinson-Patman Act will simply not apply in the special-order context. Any time a special-order dealer fails to complete a transaction because the high price drives away its ultimate customer, there will be no Robinson-Patman violation because the dealer will not meet the "purchaser" requirement, and any time the dealer completes the transaction but at a discriminatorily high price, there will be no violation because the dealer has no "competition" (as the majority sees it) for that specific transaction at the moment of purchase.

As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of serious debate, but may well merit Judge Bork's characterization as "wholly mistaken economic theory."⁴⁰ I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a decision refusing to adhere to the text of the Act in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if Judge Bork's evaluation (with which I happen to agree) is completely accurate.

Accordingly, I respectfully dissent.

⁴⁰ R. Bork, *The Antitrust Paradox* 382 (1978).

Appendix

Antitrust Modernization Commission

The Antitrust Modernization Commission terminated on May 31, 2007, pursuant to the Antitrust Modernization Commission Act, as amended. The Antitrust Modernization Commission submitted its Report and Recommendations to Congress and the President on April 2, 2007

Professors and students may find it informative to read the Antitrust Modernization Commission Report at http://www.amc.gov/report_recommendation/toc.htm.