SUPREME COURT OF THE UNITED STATES

No. 90–1029

EASTMAN KODAK COMPANY, PETITIONER *v.* IMAGE TECHNICAL SERVICES, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[June 8, 1992]

JUSTICE SCALIA, with whom JUSTICE O'CONNOR and JUSTICE THOMAS join, dissenting.

This is not, as the Court describes it, just "another case that concerns the standard for summary judgment in an antitrust controversy." *Ante*, at 1. Rather, the case presents a very narrow—but extremely important—question of substantive antitrust law: Whether, for purposes of applying our *per se* rule condemning "ties," and for purposes of applying our exacting rules governing the behavior of would-be monopolists, a manufacturer's conceded lack of power in the interbrand market for its equipment is somehow consistent with its possession of "market," or even "monopoly," power in wholly derivative aftermarkets for that equipment. In my view, the Court supplies an erroneous answer to this question, and I dissent.

Per se rules of antitrust illegality are reserved for those situations where logic and experience show that the risk of injury to competition from the defendant's behavior is so pronounced that it is needless and wasteful to conduct the usual judicial inquiry into the balance between the behavior's procompetitive benefits and its anticompetitive costs. See, *e. g.*, *Arizona* v. *Maricopa County Medical Society*, 457 U. S. 332, 350–351 (1982). "The character of the restraint produced by [behavior to which a *per se* rule applies] is considered a sufficient basis for presuming unreasonableness without the necessity of any analysis of the market context in

which the [behavior] may be found." *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S. 2, 9 (1984). The *per se* rule against tying is just such a rule: Where the conditions precedent to application of the rule are met, *i.e.*, where the tying arrangement is backed up by the defendant's market power in the "tying" product, the arrangement is adjudged in violation of §1 of the Sherman Act, 15 U. S. C. §1, without *any* inquiry into the practice's actual effect on competition and consumer welfare. But see *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545, 560 (ED Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961) (accepting affirmative defense to *per se* tying allegation).

Despite intense criticism of the tying doctrine in academic circles, see, *e. g.*, R. Bork, The Antitrust Paradox 365–381 (1978), the stated rationale for our *per se* rule has varied little over the years. When the defendant has genuine "market power" in the tying product—the power to raise price by reducing output—the tie potentially enables him to extend that power into a second distinct market, enhancing barriers to entry in each. In addition:

> "[T]ying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line." *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U. S. 495, 513–514 (1969) (*Fortner I*) (WHITE, J., dissenting) (footnotes omitted).

For these reasons, as we explained in *Jefferson Parish*, "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other." 466 U. S., at 14.

Our Section 2 monopolization doctrines are similarly directed to discrete situations in which a defendant's possession of substantial market power, combined with his exclusionary or anticompetitive behavior, threatens to defeat or forestall the corrective forces of competition and thereby sustain or extend the defendant's agglomeration of power. See *United States* v. *Grinnell Corp.*, 384 U. S. 563, 570–571 (1966). Where a defendant maintains substantial market power, his activities are examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be

viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist. 3 P. Areeda & D. Turner, Antitrust Law ¶813, pp. 300–302 (1978) (hereinafter 3 Areeda & Turner).

The concerns, however, that have led the courts to heightened scrutiny both of the "exclusionary conduct" practiced by a monopolist and of tying arrangements subject to *per se* prohibition, are completely without force when the participants lack market power. As to the former, "[t]he [very] definition of exclusionary conduct," as practiced by a monopolist, ". . . [is] predicated on the existence of substantial market power." *Id.*, at ¶813, p. 301 (1978); see, *e. g.*, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U. S. 172, 177–178 (1965) (fraudulent patent procurement); *Standard Oil Co. of N.J.* v. *United States*, 221 U. S. 1, 75 (1911) (acquisition of competitors); 3 Areeda and Turner ¶724, at 195–197 (vertical integration). And with respect to tying, we have recognized that bundling arrangements not coerced by the heavy hand of market power can serve the procompetitive functions of facilitating new entry into certain markets, see, *e. g.*, *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962), permitting "clandestine price cutting in products which otherwise would have no price competition at all because of fear of retaliation from the few other producers dealing in the market," *Fortner I*, *supra*, at 514, n. 9 (WHITE, J., dissenting), assuring quality control, see, *e. g.*, *Standard Oil Co. of Cal.* v. *United States*, 337 U. S. 293, 306 (1949), and, where "the tied and tying products are functionally related, . . . reduc[ing] costs through economies of joint production and distribution." *Fortner I*, *supra*, at 514, n. 9 (WHITE, J., dissenting). "Accordingly, we have [only] condemned tying arrangements [under the *per se* rule] 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." *Jefferson Parish*, *supra*, at 13–14.

The Court today finds in the typical manufacturer's inherent power over its own brand of equipment—over the sale of distinctive repair parts for that equipment, for example—the sort of "monopoly power" sufficient to bring the sledgehammer of §2 into play. And, not surprisingly in light of that insight, it readily labels single-brand power over aftermarket products "market power" sufficient to permit an antitrust plaintiff to invoke the *per se* rule against tying. In my opinion, this makes no economic sense. The holding that market power can be found on the present record causes these venerable rules of selective proscription to extend well beyond the point where the reasoning that supports them leaves off. Moreover, because the sort of power condemned by the Court today is possessed by every manufacturer of durable goods with distinctive parts, the Court's opinion threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good to enforcement of the antitrust laws and to genuine competition. I shall explain, in Parts II and III, respectively, how neither logic *nor* experience suggests, let alone compels, application of the *per se* tying prohibition and monopolization doctrine to a seller's behavior in its single-brand aftermarkets, when that seller is without power at the interbrand level.

On appeal in the Ninth Circuit, respondents, having waived their "rule of reason" claim, were limited to arguing that the record, construed in the light most favorable to them, *Anderson* v. *Liberty Lobby, Inc.*, 477 U. S. 242, 255 (1986), supported application of the *per se* tying prohibition to Kodak's restrictive parts and service policy. See *Image Technical Services, Inc.* v. *Eastman Kodak Co.*, 903 F. 2d 612,

615, n. 1 (CA9 1990). As the Court observes, in order to survive Kodak's motion for summary judgment on this claim, respondents bore the burden of proffering evidence on which a reasonable trier of fact could conclude that Kodak possesses power in the market for the alleged "tying" product. See *ante*, at 10; *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 13–14.

We must assume, for purposes of deciding this case, that petitioner is without market, much less monopoly, power in the interbrand markets for its micrographics and photocopying equipment. See *ante*, at 11–12, n. 10; *Oklahoma City* v. *Tuttle*, 471 U. S. 808, 816 (1985). In the District Court, respondents did, in fact, include in their complaint an allegation which posited the interbrand equipment markets as the relevant markets; in particular, they alleged a §1 "tie" of micrographics and photocopying equipment to the parts and service for those machines. 1 App. 22–23. Though this allegation was apparently abandoned in pursuit of §1 and §2 claims focused exclusively on the parts and service aftermarkets (about which more later), I think it helpful to analyze how that claim would have fared under the *per se* rule.

Had Kodak—from the date of its entry into the micrographics and photocopying equipment markets—included a lifetime parts and service warranty with all original equipment, or required consumers to purchase a lifetime parts and service contract with each machine, that bundling of equipment, parts and service would no doubt constitute a tie under the tests enunciated in *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, *supra*. Nevertheless, it would be immune from *per se* scrutiny under the antitrust laws because the *tying* product would be *equipment*, a market in which (we assume) Kodak has no power to influence price or quantity. See *Jefferson Parish*, *supra*, at 13–

14; *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U. S. 610, 620 (1977) (*Fortner II*); *Northern Pacific R. Co.* v. *United States*, 356 U. S. 1, 6–7 (1958). The same result would obtain, I think, had Kodak—from the date of its market entry—consistently pursued an announced policy of limiting parts sales in the manner alleged in this case, so that customers bought with the knowledge that aftermarket support could be obtained only from Kodak. The foreclosure of respondents from the business of servicing Kodak's micrographics and photocopying machines in these illustrations would be undeniably complete—as complete as the foreclosure described in respondents' complaint. Nonetheless, we would inquire no further than to ask whether Kodak's *market power* in the equipment market effectively forced consumers to purchase Kodak micrographics or photocopying machines subject to the company's restrictive aftermarket practices. If not, that would end the case insofar as the *per se* rule was concerned. See *Jefferson Parish*, *supra*, at 13–14; 9 P. Areeda, Antitrust Law ¶1709c5, pp. 101–102 (1991); Klein & Saft, The Law and Economics of Franchise Tying Contracts, 28 J. Law & Econ. 345, 356 (1985). The evils against which the tying prohibition is directed would simply not be presented. Interbrand competition would render Kodak powerless to gain economic power over an additional class of consumers, to price discriminate by charging each customer a "system" price equal to the system's economic value to that customer, or to raise barriers to entry in the interbrand equipment markets. See 3 Areeda and Turner ¶829d, at 331–332.

I have described these illustrations as hypothetical, but in fact they are not far removed from this case. The record below is consistent—in large part—with just this sort of bundling of equipment on the one hand, with parts and service on the other. The restrictive parts policy, with respect to micrographics

equipment at least, was not even alleged to be anything but prospective. See 1 App. 17. As respondents summarized their factual proffer below:

> "Under this policy, Kodak cut off parts on new products to Kodak micrographics ISOs. The effect of this, of course, was that as customers of Kodak micrographics ISOs obtained new equipment, the ISOs were unable to service the equipment for that customer, and, service for these customers was lost by the Kodak ISOs. Additionally, as equipment became obsolete, and the equipment population became all "new equipment" (post April 1985 models), Kodak micrographics ISOs would be able to service no equipment at all." 2 *id.*, at 360.

As to Kodak copiers, Kodak's restrictive parts policy had a broader foundation: Considered in the light most favorable to respondents, see *Anderson*, *supra*, at 255, the record suggests that, from its inception, the policy was applied to new and existing copier customers alike. But at least all post-1985 purchasers of micrographics equipment, like all post-1985 purchasers of new Kodak copiers, could have been aware of Kodak's parts practices. The only thing lacking to bring all of these purchasers (accounting for the vast bulk of the commerce at issue here) squarely within the hypotheticals we have described is concrete evidence that the restrictive parts policy was announced or generally known. Thus, under the Court's approach the existence *vel non* of such evidence is determinative of the legal standard (the *per se* rule versus the rule of reason) under which the alleged tie is examined. In my judgment, this makes no sense. It is quite simply anomalous that a manufacturer functioning in a competitive equipment market should be exempt from the *per se* rule when it bundles equipment with parts-and-service, but not when it bundles parts with service. This vast difference in the treatment of what will ordinarily be

economically similar phenomena is alone enough to call today's decision into question.

In the Court of Appeals, respondents sought to sidestep the impediment posed by interbrand competition to their invocation of the *per se* tying rule by zeroing in on the parts and service "aftermarkets" for Kodak equipment. By alleging a tie of *parts* to service, rather than of *equipment* to parts-and-service, they identified a tying product in which Kodak unquestionably held a near-monopoly share: the parts uniquely associated with Kodak's brand of machines. See *Jefferson Parish*, 466 U. S., at 17. The Court today holds that such a facial showing of market share in a single-brand aftermarket is sufficient to invoke the *per se* rule. The existence of even vibrant interbrand competition is no defense. See *ante*, at 17–18.

I find this a curious form of market power on which to premise the application of a *per se* proscription. It is enjoyed by virtually every manufacturer of durable goods requiring aftermarket support with unique, or relatively unique, goods. See P. Areeda & H. Hovenkamp, Antitrust Law ¶525.1, p. 563 (Supp. 1991). "[S]uch reasoning makes every maker of unique parts for its own product a holder of market power *no matter how unimportant its product might be in the market*." *Ibid.* (emphasis added).[1] Under

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[1]That there exist innumerable parts and service firms in such industries as the automobile industry, see Brief for Automotive Warehouse Distributors Assn., et al., as *Amici Curiae* 2–3, does not detract from this point. The question whether power to control an aftermarket exists is quite distinct from the question whether the power has been exercised. Manufacturers in some markets have no doubt determined that exclusionary intrabrand conduct works to their disadvantage at the competitive

the Court's analysis, the *per se* rule may now be applied to single-brand ties effected by the most insignificant players in fully competitive interbrand markets, as long as the arrangement forecloses aftermarket competitors from more than a *de minimis* amount of business, *Fortner I*, 394 U. S., at 501. This seems to me quite wrong. A tying arrangement "forced" through the exercise of such power no more implicates the leveraging and price discrimination concerns behind the *per se* tying prohibition than does a tie of the foremarket brand to its aftermarket derivatives, which—as I have explained—would not be subject to *per se* condemnation.[2] As implemented,

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interbrand level, but this in no way refutes the self-evident reality that control over unique replacement parts for single-branded goods is ordinarily available to such manufacturers for the taking. It confounds sound analysis to suggest, as respondents do, see Brief for Respondents 5, 37, that the asserted fact that Kodak manufactures only 10% of its replacement parts, and purchases the rest from original equipment manufacturers, casts doubt on Kodak's possession of an inherent advantage in the aftermarkets. It does no such thing, any more than Kodak's contracting with others for the manufacture of all constituent parts included in its original equipment would alone suggest that Kodak lacks power in the *interbrand* micrographics and photocopying equipment markets. The suggestion implicit in respondents' analysis—that if a seller chooses to contract for the manufacture of its branded merchandise, it must permit the contractors to compete in the sale of that merchandise—is plainly unprecedented.

[2]Even *with* interbrand power, I may observe, it is unlikely that Kodak could have incrementally exploited its position through the tie of parts to service alleged here. Most of the "service" at issue is inherently associated with the parts, *i.e.*, that service

the Kodak arrangement challenged in this case may have implicated truth-in-advertising or other consumer protection concerns, but those concerns do not alone suggest an antitrust prohibition. See, *e.g.*, *Town Sound and Custom Tops, Inc.* v. *Chrysler Motors Corp.*, 959 F.2d 468 (CA3 1992) (en banc).

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

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involved in incorporating the parts into Kodak equipment, and the two items tend to be demanded by customers in fixed proportions (one part with one unit of service necessary to install the part). When that situation obtains, "no revenue can be derived from setting a higher price for the tied product which could not have been made by setting the optimum price for the tying product." P. Areeda & L. Kaplow, Antitrust Analysis ¶426(a), p. 706 (4th ed. 1988) (quoting Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19 (1957)). These observations strongly suggest that Kodak parts and the service involved in installing them should not be treated as distinct products for antitrust tying purposes. See *Jefferson Parish*, 466 U. S. 2, 39 (O'CONNOR, J., concurring in judgment) ("For products to be treated as distinct, the tied product must, at a minimum, be one that some consumers might wish to purchase separately *without also purchasing the tying product*") (emphasis in original) (footnote omitted); Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L. J. 963, 1009–1010 (1974).

price of the equipment and the price of parts and service over the life of the equipment are expenditures that are necessary to obtain copying and micrographic services." Brief for United States as *Amicus Curiae* 13. If Kodak set generally supracompetitive prices for either spare parts or repair services without making an offsetting reduction in the price of its machines, rational consumers would simply turn to Kodak's competitors for photocopying and micrographic systems. See, *e. g.*, *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F. 2d 792, 796–798 (CA1 1988). True, there are—as the Court notes, see *ante*, at 21––the occasional irrational consumers that consider only the hardware cost at the time of purchase (a category that regrettably includes the Federal Government, whose "purchasing system," we are told, assigns foremarket purchases and aftermarket purchases to different entities). But we have never before premised the application of antitrust doctrine on the lowest common denominator of consumer.

The Court attempts to counter this theoretical point with theory of its own. It says that there are "information costs"—the costs and inconvenience to the consumer of acquiring and processing life-cycle pricing data for Kodak machines—that "could create a less responsive connection between service and parts prices and equipment sales." *Ante*, at 19. But this truism about the functioning of markets for sophisticated equipment cannot create "market power" of concern to the antitrust laws where otherwise there is none. "Information costs," or, more accurately, gaps in the availability and quality of consumer information, pervade real-world markets; and because consumers generally make do with "rough cut" judgments about price in such circumstances, in virtually any market there are zones within which otherwise competitive suppliers may overprice their products without losing

appreciable market share. We have never suggested that the principal players in a market with such commonplace informational deficiencies (and, thus, bands of apparent consumer pricing indifference) exercise market power in any sense relevant to the antitrust laws. "While [such] factors may generate `market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying." *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 27; see, *e.g.*, *Town Sound and Custom Tops, Inc.* v. *Chrysler Motors Corp.*, *supra*.

Respondents suggest that, even if the existence of interbrand competition prevents Kodak from raising prices *generally* in its single-brand aftermarkets, there remain certain consumers who are necessarily subject to abusive Kodak pricing behavior by reason of their being "locked in" to their investments in Kodak machines. The Court agrees; indeed, it goes further by suggesting that even a *general* policy of supracompetitive aftermarket prices might be profitable over the long run because of the "lock-in" phenomenon. "[A] seller profitably could maintain supracompetitive prices in the aftermarket," the Court explains, "if the switching costs were high relative to the increase in service prices, and the number of locked-in customers were high relative to the number of new purchasers." *Ante*, at 23. In speculating about this latter possibility, the Court is essentially repudiating the assumption on which we are bound to decide this case, *viz.*, Kodak's lack of any power whatsoever in the interbrand market. If Kodak's *general* increase in aftermarket prices were to bring the total "system" price above competitive levels in the interbrand market, Kodak would be wholly unable to make further foremarket sales—and would find itself exploiting an ever-dwindling aftermarket, as those Kodak micrographic and photocopying machines already in circulation passed

into disuse.

The Court's narrower point, however, is undeniably true. There will be consumers who, because of their capital investment in Kodak equipment, "will tolerate some level of service-price increases before changing equipment brands," *ante*, at 23; this is *necessarily* true for "every maker of unique parts for its own product." Areeda & Hovenkamp, Antitrust Law ¶525.1b, at 563. But this "circumstantial" leverage created by consumer investment regularly crops up in smoothly functioning, even perfectly competitive, markets, and in most—if not all—of its manifestations, it is of no concern to the antitrust laws. The leverage held by the manufacturer of a malfunctioning refrigerator (which is measured by the consumer's reluctance to walk away from his initial investment in that device) is no different in kind or degree from the leverage held by the swimming pool contractor when he discovers a 5-ton boulder in his customer's backyard and demands an additional sum of money to remove it; or the leverage held by an airplane manufacturer over an airline that has "standardized" its fleet around the manufacturer's models; or the leverage held by a drill press manufacturer whose customers have built their production lines around the manufacturer's particular style of drill press; the leverage held by an insurance company over its independent sales force that has invested in company-specific paraphernalia; or the leverage held by a mobile home park owner over his tenants, who are unable to transfer their homes to a different park except at great expense, see generally *Yee* v. *Escondido*, 503 U. S. ___ (1992). Leverage, in the form of *circumstantial* power, plays a role in each of these relationships; but in none of them is the leverage attributable to the dominant party's *market* power in any relevant sense. Though that power can plainly work to the injury of certain consumers, it produces only "a brief perturbation in competitive

conditions—not the sort of thing the antitrust laws do or should worry about." *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F. 2d 228, 236 (CA7 1988) (Posner, J., dissenting).

The Court correctly observes that the antitrust laws do not permit even a *natural* monopolist to project its monopoly power into another market, *i.e.*, to "`exploi[t] his dominant position in one market to expand his empire into the next.'" *Ante*, at 27, n. 29 (quoting *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 611 (1953)). However, when a manufacturer uses its control over single-branded parts to acquire influence in single-branded service, the monopoly "leverage" is almost invariably of no practical consequence, because of perfect identity between the consumers in each of the subject aftermarkets (those who need replacement parts for Kodak equipment, and those who need servicing of Kodak equipment). When that condition exists, the tie does not permit the manufacturer to project power over a class of consumers distinct from that which it is already able to exploit (and fully) without the inconvenience of the tie. Cf., *e.g.*, Bowman, Tying Arrangements and the Leverage Problem, 67 Yale L. J. 19, 21–27 (1957).

We have never before accepted the thesis the Court today embraces: that a seller's inherent control over the unique parts for its own brand amounts to "market power" of a character sufficient to permit invocation of the *per se* rule against tying. As the Court observes, *ante*, at 27, n. 29, we have applied the *per se* rule to manufacturer ties of *foremarket* equipment to aftermarket derivatives—but only when the manufacturer's monopoly power in the equipment, coupled with the use of derivative sales as "counting devices" to measure the intensity of customer equipment usage, enabled the manufacturer to engage in price discrimination, and thereby more fully exploit its interbrand power. See

International Salt Co. v. *United States*, 332 U. S. 392 (1947); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936); *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922). That sort of enduring opportunity to engage in price discrimination is unavailable to a manufacturer—like Kodak—that lacks power at the interbrand level. A tie between two aftermarket derivatives does next to nothing to improve a competitive manufacturer's ability to extract monopoly rents from its consumers.[3]

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[3]The Court insists that the record in this case suggests otherwise, *i.e.*, that a tie between parts and service somehow *does* enable Kodak to increase overall monopoly profits. See *ante*, at 27, n. 29. Although the Court does not identify the record evidence on which it relies, the suggestion, apparently, is that such a tie facilitates price discrimination between sophisticated, “high-volume” users of Kodak equipment and their unsophisticated counterparts. The sophisticated users (who, the Court presumes, invariably self-service their equipment) are permitted to buy Kodak parts without also purchasing supracompetitively-priced Kodak service, while the unsophisticated are—through the imposition of the tie—compelled to buy both. See *ante*, at 22–23.

While superficially appealing, at bottom this explanation lacks coherence. Whether they self-service their equipment or not, rational foremarket consumers (those consumers who are not yet “locked in” to Kodak hardware) will be driven to Kodak's competitors if the price of Kodak equipment, together with the expected cost of aftermarket support, exceeds competitive levels. This will be true no matter how Kodak distributes the total system price among equipment, parts, and service. See *supra*, at 10. Thus, as to these consumers, Kodak's lack of

Nor has any court of appeals (save for the Ninth Circuit panel below) recognized single-branded aftermarket power as a basis for invoking the *per se* tying prohibition. See *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 957 F.2d 1318, 1328 (CA6 1992) ("Defining the market by customer demand *after* the customer has chosen a single supplier fails to take into account that the supplier . . . must

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interbrand power wholly prevents it from employing a tie between parts and service as a vehicle for price discrimination. Nor does a tie between parts and service offer Kodak incremental exploitative power over those consumers—sophisticated or not—who have the supposed misfortune of being "locked in" to Kodak equipment. If Kodak desired to exploit its circumstantial power over this wretched class by pressing them up to the point where the cost to each consumer of switching equipment brands barely exceeded the cost of retaining Kodak equipment and remaining subject to Kodak's abusive practices, it could plainly do so without the inconvenience of a tie, through supracompetitive parts pricing alone. Since the locked-in *sophisticated* parts purchaser is as helpless as the locked-in *unsophisticated* one, I see nothing to be gained by price discrimination in favor of the former. If such price discrimination were desired, however, it would not have to be accomplished indirectly, through a tie of parts to service. Section 2(a) of the Robinson-Patman Act, 15 U. S. C. §13(a), would prevent giving lower parts prices to the sophisticated customers only "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 . . . ." *Ibid.*; see, *e.g.*, *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*,

compete with other similar suppliers to be designated the sole source in the first place"); *Grappone, Inc.* v. *Subaru of New England, Inc.*, 858 F. 2d 792, 798 (CA1 1988) ("[W]e do not see how such dealer investment [in facilities to sell Subaru products] . . . could easily translate into Subaru market power of a kind that, through tying, could ultimately lead to higher than competitive prices for consumers"); *A.I. Root Co.* v. *Computer/Dynamics, Inc.*, 806 F. 2d 673, 675–677, and n. 3 (CA6 1986) (competition at "small business computer" level precluded assertion of computer manufacturer's power over software designed for use only with manufacturer's brand of computer); *General Business Systems* v. *North American Philips Corp.*, 699 F. 2d 965, 977 (CA9 1983) ("To have attempted to impose significant pressure to buy [aftermarket hardware] by use of the tying service only would have hastened the date on which Philips surrendered to its competitors in the small business computer market"). See also *Parts & Elec. Motors, Inc.* v. *Sterling Elec., Inc.*, 866 F. 2d, at 233 (law-of-the-case doctrine compelled finding of market power in replacement parts for single-brand engine).

We have recognized in closely related contexts that

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460 U. S. 428, 434–435 (1983). That prohibited effect often occurs when price-discriminated goods are sold for resale (*i.e.*, to purchasers who are necessarily in competition with one another). *E.g.*, *Federal Trade Commission* v. *Morton Salt Co.*, 334 U. S. 37, 47 (1948); see P. Areeda & L. Kaplow, Antitrust Analysis ¶600, p. 923 (1988) ("Secondary-line injury arises [under the Robinson-Patman Act] when a powerful firm buying supplies at favorable prices thereby gains a decisive advantage over its competitors that are forced to pay higher prices for their supplies"). It rarely occurs where, as would be the case here, the price-discriminated goods are sold to various businesses for consumption.

the deterrent effect of *inter*brand competition on the exploitation of *intra*brand market power should make courts exceedingly reluctant to apply rules of *per se* illegality to intrabrand restraints. For instance, we have refused to apply a rule of *per se* illegality to vertical nonprice restraints "because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition," *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U. S. 36, 51–52 (1977), the latter of which we described as "the primary concern of antitrust law." *Id.*, at 52, n. 19. We noted, for instance, that "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," and that "[e]stablished manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *Id.*, at 55. See also *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U. S. 717, 726 (1988). The same assumptions, in my opinion, should govern our analysis of ties alleged to have been "forced" solely through *intra*brand market power. In the absence of interbrand power, a manufacturer's bundling of aftermarket products may serve a multitude of legitimate purposes: It may facilitate manufacturer efforts to ensure that the equipment remains operable and thus protect the seller's business reputation, see *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp., at 560, aff'd *per curiam*, 365 U. S. 567 (1961); it may create the conditions for implicit consumer financing of the acquisition cost of the tying equipment through supracompetitively-priced aftermarket purchases, see, *e. g.*, A. Oxenfeldt, Industrial Pricing and Market Practices 378 (1951); and it may, through the

resultant manufacturer control of aftermarket activity, "yield valuable information about component or design weaknesses that will materially contribute to product improvement," 3 Areeda & Turner ¶733c, at 258–259; see also *id.* ¶829d, at 331–332. Because the interbrand market will generally punish intrabrand restraints that consumers do not find in their interest, we should not—under the guise of a *per se* rule—condemn such potentially procompetitive arrangements simply because of the antitrust defendant's inherent power over the unique parts for its own brand.

I would instead evaluate the aftermarket tie alleged in this case under the rule of reason, where the tie's *actual* anticompetitive effect in the tied product market, together with its potential economic benefits, can be fully captured in the analysis, see, *e.g.*, *Jefferson Parish Hospital Dist. No. 2* v. *Hyde*, 466 U. S., at 41 (O'CONNOR, J., concurring in judgment). Disposition of this case does not require such an examination, however, as respondents apparently waived any rule-of-reason claim they may have had in the District Court. I would thus reverse the Ninth Circuit's judgment on the tying claim outright.

These considerations apply equally to respondents' §2 claims. An antitrust defendant lacking relevant "market power" sufficient to permit invocation of the *per se* prohibition against tying *a fortiori* lacks the monopoly power that warrants heightened scrutiny of his allegedly exclusionary behavior. Without even so much as asking whether the purposes of §2 are implicated here, the Court points to Kodak's control of "100% of the parts market and 80% to 95% of the service market," markets with "no readily available substitutes," *ante*, at 28, and finds that the proffer of such statistics is sufficient to fend off summary judgment. But this showing could easily be made, as I have explained, with respect to virtually any

manufacturer of differentiated products requiring aftermarket support. By permitting antitrust plaintiffs to invoke §2 simply upon the unexceptional demonstration that a manufacturer controls the supplies of its single-branded merchandise, the Court transforms §2 from a specialized mechanism for responding to extraordinary agglomerations (or threatened agglomerations) of economic power to an all-purpose remedy against run-of-the-mill business torts.

In my view, if the interbrand market is vibrant, it is simply not necessary to enlist §2's machinery to police a seller's intrabrand restraints. In such circumstances, the interbrand market functions as an infinitely more efficient and more precise corrective to such behavior, rewarding the seller whose intrabrand restraints enhance consumer welfare while punishing the seller whose control of the aftermarkets is viewed unfavorably by interbrand consumers. See *Business Electronics Corp.*, *supra*, at 725; *Continental T.V., Inc.*, *supra*, at 52, n. 19, 54. Because this case comes to us on the assumption that Kodak is without such interbrand power, I believe we are compelled to reverse the judgment of the Court of Appeals. I respectfully dissent.