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Supreme Court Antitrust 1991-92: The Revenge of the Amici

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Interested parties regularly flood the Supreme Court with briefs, but whether they accomplish much besides employing lawyers is open to question. This year the amici made a difference. In each of the three cases considered in this review of antitrust in the Supreme Court's 1991–92 term—FTC v. Ticor Title Insurance Co.,\(^1\) Morales v. TWA,\(^2\) and Eastman Kodak Co. v. Image Technical Services, Inc.\(^3\)—amici appear to have influenced the Court's reasoning and, perhaps, result.

In part because of the role of amici, this was one of the most interesting terms in memory. Ticor introduced an entirely new approach to applying part of the state action exemption, and raised questions about the viability of the exemption. Morales found federal preemption of state initiatives concerning the airline regulation, and featured a Chicago School approach to economic reasoning, with Justice Scalia writing for the majority, Justice Stevens for the dissent. These two Justices reversed positions in Kodak, potentially one of the most important antitrust cases in years. The Court addressed summary judgment, tying, market definition, and monopolization; perhaps even more significant, it showed a skepticism about Chicago School-type a priori reasoning and a lack of confidence in the market that could influence cases in every part of antitrust.

For each of these developments, amici played central roles. In Ticor the amici States joined the Federal Trade Commission in criticizing state regulation; this alliance made a difficult case seem easy. In Morales and the developments preceding it the federal government repeatedly objected to Texas's approach to airline regulation, which again made the

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\(^1\) 112 S. Ct. 2169 (1992).


outcome appear relatively obvious. In *Kodak* amici brought the Court both legal reasoning and information about marketplace realities.

In all three cases amici served as a reality check. In *Ticor* amici explained how regulation worked (or didn't). In *Morales* the amicus United States exploded any misimpression that the States were acting in harmony with the federal government. In *Kodak* amici explained how real-world competition differed from economic theory. In each case there were costs, however. These costs are especially apparent in *Ticor*, where amici made the case seem deceptively simple, and in *Kodak*, where amici contributed to a continuing evolution of arguments that required the Court to address issues that were never solidly joined.

I. FTC V. TICOR TITLE INSURANCE CO.

Every so often a case has a majority opinion, a dissent, and even a concurrence, each of which seems correct. *Ticor Title Insurance* was such a case.

A. Background

*Ticor* addressed a Federal Trade Commission decision condemning five large title insurance companies' use of rating bureaus in Arizona, Connecticut, Montana, New Jersey, Pennsylvania, and Wisconsin. At issue was the *Midcal* "active supervision" requirement and its application to various forms of "negative option" rate regulation. Under *California Retail Liquor Dealers Association v. Midcal Aluminum Inc.*, a private party is exempt under the state-action doctrine if two tests are met: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."

4 Complaint at ¶ 11, Ticor Title Insurance Co., 112 F.T.C. 344, 346 (complaint filed Jan. 7, 1985) ("Respondents have agreed on the price to be charged for title search and examination services or settlement services through rating bureaus in various states.").


6 445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (opinion of Justice Brennan)). The second test ("active supervision") was held inapplicable to regulated municipalities in Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985) (Powell, J.). This article necessarily assumes basic familiarity with the state action and *Noerr-Pennington* doctrines. For a more general overview see ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 965–1016 (3d ed. 1992).

The text gives a truncated version of the *Ticor* saga. After trial, Administrative Law Judge Morton Needelman found a violation with respect to Connecticut and Wisconsin. Judge Needelman rejected defenses based on the McCarran-Ferguson Act's insurance exemption, 15 U.S.C. § 1013, the *Noerr-Pennington* doctrine's protection of petitioning activity, and the state action exemption. The Federal Trade Commission, on review, found a violation in those states and also in Arizona, Montana, New Jersey, and Pennsylvania. The Commission dismissed charges for Idaho and Ohio. The Commission was evenly split on Idaho. 112
The Third Circuit reversed the FTC's decision finding violations. That court complained that the FTC was principally criticizing the quality of state supervision, which, the court said, was not the issue. The court relied heavily on a First Circuit formulation developed in *New England Motor Rate Bureau, Inc. v. FTC*:

Where as here the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established. Otherwise, the state action doctrine would be turned on its head. Instead of being a doctrine of preemption, allowing room for the state's own action, it would become a means for federal oversight of state officials and their programs.

Applying this test the Third Circuit found adequate supervision in Arizona, Connecticut, Montana, and Wisconsin, the states where FTC lawyers had conceded there was clear articulation of an intention to displace competition; and it found clear articulation of such an intention in New Jersey and Pennsylvania, where FTC lawyers had conceded there was active supervision.

After the Third Circuit defeat, FTC lawyers quickly retreated and regrouped around the claims concerning regulation by Montana and Wisconsin, the two states as to which the Commission had voted unani-
mously. The gambit succeeded. The Supreme Court followed this lead and found that respondents were not immune in Montana and Wisconsin. It remanded to permit the Third Circuit to reconsider its views on Arizona and Connecticut.

Ticor posed a dilemma. If one takes "active supervision" seriously one is almost compelled to monitor the performance of state regulators. But if one does monitor such performance, one has to engage in meddling that would appear to threaten federalism interests.

Few observers were confident of the likely outcome. On the one hand, defendants had lost each of the previous three Supreme Court "active supervision" cases. On the other hand, the Court in Southern Motor Carriers had blessed negative-option regulation in the context of a decision addressing Midcal's first (clear articulation) prong. Since then,
moreover, the Supreme Court and especially its more junior Justices had shown increased solicitude for federalism, most notably in Omni.\textsuperscript{17}

B. THE COURT'S OPINION

The Court's opinion, by Justice Kennedy, featured a new concept in state action active-supervision cases: a causation analysis. The Court wrote that the purpose of the active supervision inquiry

is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties. Much as in causation inquiries the analysis asks whether the State has played a substantial role in determining these specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.\textsuperscript{18}

In the context of negative-option regulation, "the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or rate setting scheme."\textsuperscript{19} Relying to an unusual extent on findings by the law judge, rather than the Commission,\textsuperscript{20} the Court found that neither Montana nor Wisconsin had done this.\textsuperscript{21}

This view changed when the Court found it sufficient that a state expressly permitted such conduct. In \textit{Southern Motor Carriers} the Government had conceded that the "active supervision" test had been met, so the Court did not address that issue. Yet the Court appeared to recognize the value of negative-option regulation, so the Ticor respondents relied heavily on that case and emphasized the risk that finding against them would severely curtail the use of such regulation. E.g., Respondents' Brief at 26 (one of seven pages on which case is cited) ("State programs such as those here are possible only if private parties participate. [citing \textit{Southern Motor Carriers}] If participation involves a substantial risk of antitrust liability—that is, if the quality or effectiveness of the States' regulatory determinations may be subject to later federal antitrust review—the programs will fail for lack of participation.").


\textsuperscript{18} 112 S. Ct. at 2177.

\textsuperscript{19} Id. at 2179.

\textsuperscript{20} The Commission can and often does make extensive factual findings, although it is not unusual for it to say it is adopting findings of the Administrative Law Judge (ALJ) that are not inconsistent with its opinion. Cf. \textit{Ticor}, 112 F.T.C. at 486 (ordering that the Law judge's decision "be adopted as findings of fact and conclusions of law except to the extent inconsistent with the accompanying opinion"). At least in theory, then, the only findings that matter are the Commission's. But cf: \textit{FTC v. Superior Court Trial Lawyers Ass'n}, 493 U.S. 411, 415–19, 422 (1990) (extensive citing of initial decision, also by ALJ Needelman); \textit{Ticor}, 922 F.2d at 1127 n.10 (Third Circuit's discussion of title insurance "is based on the excellent survey of this area that the ALJ compiled in his opinion").

\textsuperscript{21} "[F]atal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision," the Court wrote, were findings that rate
If you take Midcal's "active supervision" requirements seriously, the Court is right. Particularly significant was that thirty-three states, including the critical states of Montana and Wisconsin, made clear in an amicus brief that they did not consider an exemption justified. In Wisconsin and Montana "there was no review, whatsoever, of the merits of the prices for search and examination services set by respondents," according to the States' amicus brief. If words have their ordinary meaning, it is difficult to conclude that a state actively supervised when the state itself insists there was no review.

The most interesting aspect of the case was the debate about federalism, which provided important background to the decision. Ticor sought to portray itself as federalism's champion. "The Decision of the Federal Trade Commission Improperly Intruded into State Regulatory Decisions and Procedures," a heading in its brief boldly declared. To Ticor's presumable dismay, thirty-three states disagreed.

Filings were either unchecked or checked merely for mathematical errors; that in Montana a filing took effect without the filer's ever submitting requested information; and that in Wisconsin a filing took effect while the filer waited seven years to comply with a request for information. 112 S. Ct. at 2179.

Brief of Amicus Curiae states of Wisconsin et al. at ll n.9, Ticor.

For convenience, the text will refer only to the insurance company named in the case caption.

Brief for Respondents at 39, Ticor.

Why the states submitted this brief is an interesting question that will challenge historians. At least three factors are worth exploring. First, briefs were filed largely by state antitrust (not insurance) officials. Counsel of record was Kevin J. O'Connor, head of Wisconsin antitrust enforcement. Assistant Attorney General O'Connor is actively interested in antitrust matters, generally with a plaintiff's perspective. See Kevin O'Connor, Law and Economics: Collision or Synergy (The Case of Predation), in Issues After a Century of Federal Competition Policy 61 (Robert L. Wills et al. eds., 1987). Antitrust officials are more likely to be hostile to exemptions for regulated industries than attorneys working for the regulators.

Second, state and federal (especially FTC) antitrust officials have reestablished cordial relations. State antitrust officials were delighted when President Bush's antitrust officials evidenced much reduced hostility to the states. See 60 Minutes with Robert M. Langer, Chair of the National Association of Attorneys General Multistate Antitrust Task Force, 61 ANTITRUST L.J. 211 (1992). The states had a healthy interest in nurturing this relationship. This interest in harmony certainly had something to do with the states' willingness to come forward at the eleventh hour to support the Federal Trade Commission.

Finally, the states may not have been unmindful of their pending case against insurance companies, Hartford Fire Ins. Co. v. California, Dkt. 91-1111 (U.S. certiorari granted Oct. 5, 1992), Merrett Underwriting Agency Mgt., Ltd. v. State of California, Dkt. 91-1128 (U.S. certiorari granted Oct. 5, 1992). The principal focus of the case is on the McCarran-Ferguson Act's insurance antitrust exemption, and the case raises important questions concerning the extraterritorial reach of the antitrust laws, but the case also has a significant state action element. Although "active supervision" is not a critical issue today, it could become one on appeal; antitrust plaintiffs must worry, moreover, about rhetoric that might be part of a defense victory.
General observed that with the FTC and the States in agreement that antitrust enforcement was essential, "only the foxes are insisting that they were not left to guard the henhouse."26

The States' line of reasoning is not easy to understand. They claimed that the Third Circuit had undermined, not honored, federalism. States should be able "to regulate loosely or just monitor markets, relying on competition to govern market conduct."27 The court of appeals would limit regulatory choices, the States said, by immunizing from antitrust scrutiny "parties in many industries subjected to some basic level of [regulatory] activity."28

This is an odd argument. At its core is an assertion that rates in Montana and Wisconsin are determined by competition rather than regulation.29 Were this true, the first Midcal prong—clear articulation—would not be satisfied, yet from the very beginning FTC complaint counsel conceded that it was.30 Complaint counsel could hardly have done otherwise, since Montana and Wisconsin statutes clearly authorize rating bureaus to file rates and insurers to charge such rates.31 The States glossed

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26 Reply Brief for the Petitioner on Petition for a Writ of Certiorari at 8, Ticor.
27 Brief at 13. "[T]he Amici States ask no more than that this Court protect the states' right to adopt less-than-comprehensive regulatory schemes that use competition as the key component of regulatory policy." Id.
28 Brief at 15 (quoting Ticor, 922 F.2d at 1136, in turn quoting New England Motor Rate Bureau, 908 F.2d at 1071).
29 Brief at 14 ("Thus, the regulatory schemes in place in Wisconsin and Montana (a) provide for competition to determine the actual level of rates and, consequently, (b) do not provide for active oversight of the competitive price-setting process. Largely because of this conscious state policy to use competitive markets to determine rates, Wisconsin and Montana regulators adopted a 'hands-off' policy toward title insurance... "). See also Brief in Support of Petition for Certiorari at 3 ("The state regulatory regimes at issue here explicitly direct that the insurance commissioners rely on the competitive marketplace rather than regulate rates directly."). (footnote omitted).
30 112 F.T.C. at 377 (initial decision) ("Complaint counsel concede that the joint rate making activity by rating bureaus in six of the eight states [all except Pennsylvania and New Jersey]... was authorized by state law.").
31 Wisconsin: Wis. Stat. Ann. § 625.13(1) (1980) ("every rate service organization... which has been designated by any insurer for the filing of rates under § 625.15(2) shall file with the commissioner all rates and supplementary rate information"); id. § 625.15(1) (1980) ("An insurer may... use rates and supplementary rate information prepared by a rate service organization, with average expense factors determined by the rate service organization... "); id. § 625.15(2) (West Supp. 1991) ("An insurer may discharge its obligation... by giving notice to the commissioner that it uses rates and supplementary rate information prepared by a designated rate service organization... The insurer's rates and supplementary rate information shall be those filed from time to time by the rate service organization... subject, however, to the modifications filed by the insurer.").
Montana: Mont. Code Ann. § 33-16-203(1) (1980) ("Every... rating organization... shall file with the commissioner all rates intended for use within the state, together with supporting data sufficient to substantiate such filing."); id. § 33-16-303(1) (1980) ("Members
over these authorizations, characterizing the Montana and Wisconsin regulatory schemes as relying "on the competitive marketplace to determine prices." With the schemes so characterized, the States argued that "[u]pholding immunity . . . would limit the ability of states to choose regulatory policies that rely on competitive markets, rather than pervasive regulation, to determine prices."

The States persuaded six Justices:

The respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The state of Wisconsin, joined by Montana and 34 other states, has filed a brief as amici curiae on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the amici submission.

If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. . . . By adhering in most cases to fundamental and accepted assumptions about the benefits of

and subscribers of rating or advisory organizations may use the rates . . . either consistently or intermittently, but . . . shall not agree with each other or rating organizations or others to adhere thereto.").  

32 Brief at 2. The following two statutory provisions were cited in support of this claim: Wis. Stat. Ann. § 625.11(1) (1980) ("Rates shall not be excessive, inadequate or unfairly discriminatory, nor shall an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly."); and Mont. Code Ann. § 33-16-201(1)(b) (1991) ("No rate shall be held to be excessive unless such rate is unreasonably high for the insurance provided and a reasonable degree of competition does not exist in the area with respect to the classification to which such rate is applicable.").  

33 Brief at 2. Four states argued that federalism called for affirming the Third Circuit, although their brief did not criticize the briefs of their fellow states. Brief of Amici States California, Colorado, Nebraska and South Dakota in Support of Respondents. Ticor must have taken modest comfort, at best, from California's arguing that Montana and Wisconsin actively supervised, when Montana and Wisconsin disagreed.

34 Justice Kennedy's opinion for the Court was joined by Justices White, Blackmun, Stevens, Scalia, and Souter. Chief Justice Rehnquist dissented, in an opinion joined by Justices O'Connor and Thomas. Justice O'Connor filed a separate dissent in which Justice Thomas joined.

There is irony in Justice Kennedy being the author of the FTC victory. In Llewellyn v. Crothers, 765 F. 2d 769 (9th Cir. 1985), then-Judge Kennedy wrote a unanimous opinion finding state action immunity for officials and an insurance fund involved in Oregon's workers' compensation system. The opinion's hymn in praise of federalism was cited regularly by Ticor and its allies. E.g., Brief for Respondents at 25–26, Ticor (quoting and noting author), at 29; Brief of Amici States California, Colorado, Nebraska and South Dakota in Support of Respondents at 14, Ticor (quoting and noting author); Brief for Hartford Fire Insurance Co., et al., as Amicus Curiae in Support of Respondents at 18. The United States's first three briefs ignored the case; their last brief mentioned it in a footnote distinguishing various lower court cases cited by respondents. Reply Brief for Petitioner at n.10, Ticor.
competition within the framework of the antitrust laws, we increase the States' regulatory flexibility. 35

This analysis is quite beside the point of the dispute between the FTC and the insurance companies. 36 The statutes at issue here would have conferred immunity had regulators been more vigorous. Yet the States argued that an FTC victory ironically could advance federalism interests; and, seemingly, a majority of Justices were persuaded. 37

C. THE DISSENTS

The Chief Justice and Justice O'Connor each filed a dissenting opinion. Chief Justice Rehnquist, in a dissent joined by Justices O'Connor and Thomas, worried that private parties will be unlikely to participate in negative option regulation where liability may result from insufficiently active regulation. Chief Justice Rehnquist championed the court of appeals's test, and worried about antitrust review of the "efficacy of a particular State's regulatory scheme." 38 Justice O'Connor's dissent, in which Justice Thomas joined, protested that the "Court had created an impossible situation for those subject to state regulation." 39

The dissents may be right. 40 Negative-option regulation, in which rates take effect unless rejected, is not for the faint-hearted regulated firm if the firm cannot know in advance whether regulators will be sufficiently active to confer immunity. 41 The majority sought to limit its holding to

35 112 S. Ct. at 2178.

36 The States' novel argument that federalism would be advanced by denying immunity appears to be absent from the FTC's opinion, the FTC's briefs in the Third Circuit, and the United States's petition for certiorari. The United States's Reply Brief, however, devoted two pages to rebuffing Ticor's federalism claims by reviewing the "decidedly contrary view of federalism" that was "powerfully set forth" in the States' brief. Reply Brief at 8–9. See also Brief for the Petitioner [United States] at 22 (arguing that court of appeals's standard would limit state regulatory options).


38 112 S. Ct. at 2182–83.

39 Id. at 2183 (O'Connor, J., dissenting).


41 In his final word on the subject the Solicitor General conceded that private parties may be in jeopardy where there is no written record, but he was unmoved. "Absent such a
price-fixing cases, but "price-fixing" can be seen as including agreements on specific prices, agreements on bidding arrangements or pricing schemes, horizontal allocation of customers or territories, and even some forms of standardization—in other words, most of the activities likely to be subject to this kind of regulation.

D. The Concurrence

Most candid of all was the concurring opinion of Justice Scalia. He agreed with the dissenters that regulated individuals and firms will be at risk because they will find it difficult to know in advance that they are exempt. This uncertainty is acceptable, he said, because it is an inevitable consequence of the Midcal "active supervision" doctrine, and because he is "skeptical about the Parker v. Brown exemption for state-programmed collusion in the first place."

It is revealing that Justice Kennedy, for the Court, wrote that "state-action immunity is disfavored, much as are repeals by implication." This is the first such reference in the more than half dozen cases since Lafayette v. Louisiana Power & Light Co. Neither the Solicitor General nor supporting amici made this claim. Such a statement is quite remarkable, coming as it does only a year after the courts decided Omni. Not only is this idea missing from Omni; the whole thrust of Omni is to promote federalism and highlight the state action exemption as an important bulwark of federalism. The Court's opinion in Ticor can be seen as suggesting a new, more confrontational approach to federalism—federalism

record, there is no reason why private parties should not bear the burden of contacting state authorities to determine whether their conduct has been approved." Reply Brief for the Petitioner, text at n.10, Ticor.

42 112 S. Ct. at 2180:

This case involves horizontal price fixing under a vague imprimatur in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing.

... Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. [citing City of Columbia v. Omni Advertising, Inc., 111 S. Ct. 1344 (1991)].

43 112 S. Ct. at 2180 (Scalia, J., concurring). Justice Scalia was referring to the original state action case, Parker v. Brown, 317 U.S. 341 (1943).

44 112 S. Ct. at 2178.

as a sword instead of a shield. "States," wrote the Court, "must accept political responsibility for actions they intend to undertake." 46

In other words, Justice Scalia is right, too.

II. MORALES V. TWA

The airfare wars triggered by deregulation excited some and troubled others. Among those troubled were many state attorneys general. They perceived an important mission for the states. In views explained in a petition for certiorari in Morales v. TWA, many state attorneys general believed that "[s]tate regulation of airfare advertising plays an essential role in ensuring efficient functioning of the marketplace." 47 Although the Department of Transportation (DOT) is authorized to prevent "unfair or deceptive practices . . . in air transportation or the sale thereof," 48 state regulation is necessary because, according to the petition, "[u]nfortunately, the Department is not doing its job" 49 and "needs all the help it can get in policing advertising." 50

Perhaps not surprisingly, DOT thought it was doing its job and did not need any help. DOT opposed the states' proposals as inconsistent with federal policy and preempted by federal law. The Federal Trade Commission warned that the states were likely to lessen the vigor of price competition and harm rather than help consumers. 51

The states proceeded, nonetheless, to issue in December 1987, "Guidelines for Air Travel Advertising." The Guidelines' authors, conscious of the preemption risks they were running, sought to regulate airline advertising without appearing to issue regulations. The Guidelines were "not an attempt at rulemaking and should not be considered as such," according to an executive summary. 52 But the Guidelines were "intended

46 112 S. Ct. at 2178 ("Federalism serves to assign political responsibility, not to obscure it. . . . [O]ur insistence on real compliance with both parts of the Midcal test will serve to make clear that the State is responsible for the price fixing it has sanctioned. . . .").
47 Petition for a Writ of Certiorari to the United States Court of Appeals for the 5th Circuit at 10.
49 Petition at 11.
50 Petition at 13. See also NAAG Adopts Premerger Compact, Air Travel Ad Practices Guidelines, 53 Antitrust & Trade Reg. Rep. (BNA) 927, 927–28 (Dec. 17, 1987) (reporting that Texas Attorney General Jim Mattox "lamented" that federal agencies "have failed to act, and the states must move into this enforcement vacuum and do something to police abuses").
51 Federal opposition is summarized in Brief for the United States as Amicus Curiae Supporting Respondents at 5–6, Morales.
52 Guidelines for Air Travel Advertising Adopted on December 12, 1987 by the National Association of Attorneys General, 53 Antitrust & Trade Reg. Rep. (BNA) No. 1345, at S-2 (executive summary). See also Guidelines, 53 Antitrust & Trade Reg. Rep. (BNA) at S-7 ("It is important to note that these Guidelines do not create any new laws or regulations
to express the general enforcement policies of the states,"\textsuperscript{53} to be "a restatement of what is currently illegal under the laws of the various states," and "to advise the airline industry what conduct is permitted and what is prohibited"\textsuperscript{54}—although "individual attorneys general may still vary or supplement these Guidelines."\textsuperscript{55}

The Guidelines were incredibly detailed, taking up fourteen pages in the \textit{Supreme Court Reporter}.\textsuperscript{56} They did not sit long on the shelf unused.

In February 1988 the attorneys general of seven states, including Texas, issued a formal "advisory memorandum," directed to airlines and others, that began as follows: "Recently, it has come to our attention that although most airlines are making a concerted effort to bring their advertisements into compliance with the standards delineated in the National Association of Attorneys General (NAAG) guidelines for fare advertising, many carriers are still factoring $23 out of the price adver-

\footnotesize{regarding the advertising practices or other business practices of the airline industry. They merely explain in detail how existing state laws apply to air fare advertising and frequent flyer programs."}.

\textsuperscript{55} Id.

\textsuperscript{54} \textit{See also} Guidelines, \textit{supra} note 52, at S-5 ("The purposes of the Guidelines . . . are to reduce the apparent consumer confusion, to advise the airline industry what advertising and marketing practices are acceptable under state law throughout the United States, and to protect consumers from deceptive and misleading practices without the necessity of protracted litigation.").

\textsuperscript{56} 112 S. Ct. at 2041–54. The Court summarized the Guidelines as follows, \textit{id.} at 2038–39:

Taking them seriatim: § 2.1, governing print advertisements of fares, requires "clear and conspicuous disclosure [defined as the lesser of one-third the size of the largest typeface in the ad or ten-point type] of restrictions such as" limited time availability, limitations or refund or exchange rights, time-of-day or day-of-week restrictions, length-of-stay requirements, advance-purchase and round-trip-purchase requirements, variations in fares from or to different airports in the same metropolitan area, limitations on breaks or changes in itinerary, limits on fare availability, and "[a]ny other material restriction on the fare." Section 2.2 imposes similar, though somewhat less onerous, restrictions on broadcast advertisements of fares; and § 2.3 requires billboard fare ads to state clearly and conspicuously "Substantial restrictions apply" if there are any material restrictions on the fares' availability. The guidelines further mandate that an advertised fare be available in sufficient quantities to "meet reasonably foreseeable demand" on every flight on every day in every market in which the fare is advertised; if the fare will not be available on this basis, the ad must contain a "clear and conspicuous statement of the extent of unavailability." § 2.4. Section 2.5 requires that the advertised fare include all taxes and surcharges; round-trip fares, under § 2.6, must be disclosed at least as prominently as the one-way fare when the fare is only available on round trips; and § 2.7 prohibits use of the words "'sale,' 'discount,' [or] 'reduced'" unless the advertised fare is available only for a limited time and is "substantially below the usual price for the same fare with the same restrictions."
tised for international flights." The memorandum quoted Guideline 2.5, which prohibited the practice. The memorandum continued by saying that failure to include nonoptional costs in advertised prices violated state laws, and asked for assurances of compliance by February 10, so the attorneys general could avoid "initiating any immediate enforcement actions."

A month later DOT wrote the Texas Attorney General and reiterated its view that state involvement in this issue was "clearly preempted by Federal law." With respect to advertising not using total prices, and advertising using one-way fares (which DOT had heard also was of concern to the state attorneys general), DOT "specifically permitted the type of advertising to which the Attorneys General object." In November 1988 the Attorney General of Texas, speaking for five states, gave three major airlines "formal notice of intent to sue," and threatened suit if after November 30 the airline advertised a fare that did not include within it "any fuel, tax, or other surcharge." Without waiting to be sued, the airlines struck first and won a preliminary injunction barring enforcement action.

The question was the scope of preemption by the Airline Deregulation Act. Section 105(a)(1) of that Act provides that "no State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier" regulated by DOT. The deceptively simple question was whether what the state attorneys general were doing was "relating to rates."

57 Memorandum from Attorneys General of Colorado, Kansas, Massachusetts, Missouri, New York, Texas, and Wisconsin, to Airlines and other interested parties, at 1, 3 (Feb. 3, 1988), Morales App. 123a, 125a.
58 Guidelines 2.5 provides as follows: "Any fuel, tax, or other surcharge to a fare must be included in the total advertised price of the fare."
59 Memorandum at 3, Morales App. 125a.
61 Id. at 2, Morales App. 127a.
62 California, Massachusetts, New York, Texas, and Washington.
63 E.g., Letter from Stephen Gardner, Assistant Attorney General of Texas, to John Bloodworth, Director of Advertising and Sales Promotion, Pan American World Airways, at 1, 4 (Nov. 14, 1988); Morales J.A. 125a, 128a.
There was disagreement about the objectives of the attorneys general. Attorney General Morales's Petition for Certiorari never mentioned the word "guidelines"; it asked whether airlines can "falsely advertise air fares in Texas, in total disregard of state law prohibitions." Morales portrayed the threatened action as a routine attempt to enforce state law. In fact, Morales, in the first heading of his Reply Brief, declared, "The NAAG guidelines are irrelevant to this case."

A. Justice Scalia’s Opinion

The attempted recharacterization was unavailing. DOT joined the side of the airlines. The Acting Solicitor General argued that DOT and the NAAG guidelines "embody diametrically different conclusions" concerning the same advertising. During the oral argument of the Texas Assistant Attorney General, Justice O’Connor queried, "But can you say that advertisement of rates and fares does not relate to airline rates and fares?" With that question, Texas’s case was lost.

The question that Justice Scalia, for the Court, addressed as he began the heart of his opinion was "whether enforcement of the NAAG guide-

166 Petition for Certiorari, at Question Presented.
167 Reply Brief on the Merits at 1. Attorney General Morales insisted that the guidelines had "neither the force nor the effect of law," but rather were "an extremely informal Restatement of Torts relating state consumer protection laws to airline practices." Id. at 7.
168 Brief for the United States as Amicus Curiae Supporting Respondents at 28, Morales. See also Brief for the United States as Amicus Curiae on Petitions for a Writ of Certiorari at 11–12 (opposing certiorari on this issue); Brief of the American Ass'n of Advertising Agencies, Inc., et al., as Amicus Curiae in Support of Respondents at 10–18, Morales (extensive discussion of tension). The Acting Solicitor General pointed to DOT’s proposal to codify its enforcement policies concerning advertising of fares net of government-imposed or approved charges, and advertising of one-way fares available only through purchase of round-trip tickets, 54 Fed. Reg. 31,052 (1989). Ironically, petitioner Morales seemed to agree. Although he wrote that Texas and federal law are "congruent" and "in twain," Brief of Petitioner at 19, 27, he also complained that "DOT has consistently sided with the airline respondents in opposing state regulation of airline advertising and by permitting the exact practices which the state would prohibit," id. at 27. (To claim consistency, Morales pointed to a CAB-adopted regulation, 14 C.F.R. § 399.84 (1992) (adopted Dec. 20, 1984); when discussing opposition General Morales pointed to, among other things, the DOT proposal to amend that regulation. Section 399.84 states that the "Board" considers advertising to be unfair or deceptive whenever an advertised price is not "the entire price to be paid by the customer to the air carrier, or agent, for such air transportation."
169 State, Airline Wrangle in Supreme Court over Regulation of False Claims on Fares, 62 Antitrust and Trade Reg. Rep. (BNA) 286, 287 (Mar. 5, 1992). Justice Kennedy also observed, “It’s really quite difficult to say that the guidelines at issue here do not relate to rates, routes, and services.” Id. Texas Assistant Attorney General Stephen Gardner responded, “But we’re not here to address the guidelines. It’s a false issue.” Id.

This response was unpersuasive. “As Judge Easterbrook succinctly put it, compelling or restricting [p]rice advertising surely ‘relates to’ price.” 112 S. Ct. at 2039, quoting Illinois Corporate Travel v. American Airlines, Inc., 889 F.2d 751, 754 (7th Cir. 1989), cert. denied, 495 U.S. 919 (1990).
lines on fair advertising through a State's general consumer protection laws is preempted by the ADA.\textsuperscript{70} As is so often the case, the question answered itself (and a five-three majority agreed to the question and answered in the affirmative). Any opinion that included fourteen pages of the guidelines, as an appendix, was destined to find preemption. The Court duly noted the tension between Texas and DOT, observing, "State and federal law are in fact inconsistent here—DOT opposes the obligations contained in the guidelines, and Texas law imposes greater liability."\textsuperscript{71} The Court said this tension was "beside the point" given the statutory language,\textsuperscript{72} but the airlines clearly benefited from the vigorous support of federal agencies from the beginning of the dispute through oral argument.

Justice Scalia's opinion for the Court merits study not only for its outcome but also for its celebration of the economics of yield management. "[I]t is clear as an economic matter that state restrictions on fare advertising have the forbidden significant effect upon fares."\textsuperscript{73} This is not a simple matter of prohibiting falsehoods, he wrote. Instead, the guidelines would "severely burden" airlines' ability to practice yield management, i.e., to "place substantial restrictions on the availability of the lower priced seats" while simultaneously being "able to advertise the lower fares."\textsuperscript{74} Such marketing practices "ultimately redound to the benefit of price-conscious travelers,"\textsuperscript{75} by interfering with them the guidelines would have "a significant impact upon the fares they [airlines] charge."\textsuperscript{76}

\textsuperscript{70} 112 S. Ct. at 2036.
\textsuperscript{71} Id. at 2038.
\textsuperscript{72} Id. at 2038. The question posed by the statute was whether the states' enforcement efforts were "relating to rates, routes, or services." The Court relied on the "ordinary meaning" of "relating to," which it (and the Acting Solicitor General) found in \textit{BLACK'S LAW DICTIONARY} 1158 (5th ed. 1979), 112 S. Ct. at 2037; \textit{see} Brief for the United States as Amicus Curiae Supporting Respondents at 12 n.12. This meaning was bolstered by a series of ERISA cases that had read the same words broadly, and concluded: "State enforcement actions having a connection with or reference to airline 'rates, routes, or services' are preempted. . . ." 112 S. Ct. at 2037.

The Court declined to say how far this standard would extend beyond the case before it. 112 S. Ct. at 2040. Some connections would be more tenuous and the Court left for another day the drawing of additional lines. \textit{Cf.} Brief for the Respondent Airlines on Writ of Certiorari at 23 (urging Court not to address issue of preemption of broader consumer protection not directed at airlines); Brief for the United States as Amicus Curiae Supporting Respondents on Writ of Certiorari at 17 (limiting preemption to laws relating to rates, routes, or services "in a manner implicating competition or the procompetitive policies of the Deregulation Act").

\textsuperscript{73} 112 S. Ct. at 2039 (emphasis added).
\textsuperscript{74} Id. at 2040.
\textsuperscript{75} Id.

\textsuperscript{76} Id. Justice Scalia wrote that the dissent disagreed that the effect would be significant, a conclusion which "is unexplained, and seems to us inexplicable." Id. at 2040 n.3. The
B. Justice Stevens's Dissent

Justice Stevens, in a dissent joined by the Chief Justice and Justice Blackmun, disagreed. The disagreement is largely one of interpreting the Airline Deregulation Act. Justice Stevens started with a "'presumption that Congress did not intend to pre-empt areas of traditional state regulation.'" This presumption, he argued, meant that traditional state regulations are preempted only if they directly relate to rates, routes, or services, unless Congress intended the preemption. He found no such intention in the legislative history.

Supreme Court reversed in an unimportant respect. The trial court's order extended beyond fare advertising, enjoining "any enforcement action ... which would seek to regulate or restrict any aspect of the individually named plaintiff airlines' air fare advertising or the operations involving their rates routes and services." 712 F. Supp. at 102 (emphasis added). The only threatened enforcement concerned fare advertising, so the Court vacated the injunction insofar as it extended beyond that. 112 S. Ct. at 2036.

In the aftermath of Morales the Court vacated two opinions. In West v. Northwest Airlines, Inc., 923 F.2d 657 (9th Cir. 1991), the Ninth Circuit had permitted a state-law challenge to overbooking to go forward; that court had limited the Airline Deregulation Act's "relating to" language to situations where "the underlying statute or regulation itself relates to airline services," i.e., "state laws that merely have an effect on airline services are not preempted." 923 F.2d at 660. After denying certiorari a week after Morales was decided, the Supreme Court reversed itself, vacated, and remanded for further consideration in light of that case. 112 S. Ct. 2986 (1992). (West was represented by Public Citizen and Aviation Consumer Action Project, whose brief is discussed below at note 77.)

West's reasoning had been followed in American Airlines Inc. v. Wolens, 589 N.E.2d 533, 535 (III. 1992), which ruled that the Airline Deregulation Act precluded a state-law-based injunction action but not a damages challenge to a change in a frequent-flyer program. This judgment, too, was vacated. 61 U.S.L.W. 3219 (Oct. 5, 1992) (No. 92-249).

In making this argument the Acting Solicitor General was responding not to petitioner Morales, but rather to two amici. Public Citizen and Aviation Consumer Action Project submitted an elegant brief that focused attention on this presumption and reviewed the legislative history in detail. Their argument, in brief, was that Congress had sought merely to have airlines treated like other businesses (which are, of course, subject to state consumer protection laws). A claimed presumption against preemption was highlighted in this brief and in Brief of Thirty-One State Attorneys General Respondents in Support of Petitioner, Dan Morales, on Writ of Certiorari at 7-9. Had Morales won, credit would have gone to its amici.

Legal consistency was not advanced when, less than a month later, Justice Stevens again discussed a "presumption against preemption," this time for the Court in the celebrated cigarette-warning label preemption case, Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2618 (1992) (complete preemption not found in Federal Cigarette Labeling and Advertising Act's prohibition of state requirements of statements "relating to smoking and health"). Justice Scalia concurred in the judgment in part and dissented in part, relying significantly on his own opinion in Morales. 112 S. Ct. at 2632-33 (Scalia, J., dissenting).

77 Morales, 112 S. Ct. at 2055 (Stevens, J., dissenting) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 740 (1985)). The Court did not mention any such presumption. The Acting Solicitor General addressed this presumption by saying it was "plainly overcome by the express preemption provision," and, having been overcome, should vanish and "not resurface at every turn." Brief for the United States as Amicus Curiae Supporting Respondents at 12 n.9.

78 Justice Stevens said it was a mistake to follow interpretations fashioned in ERISA preemption cases, since ERISA has a "unique provision" supported by considerations "that have no parallel in other federal statutes." 112 S. Ct. at 2054-55.
Going further, Justice Stevens said the airlines had failed to show even that the guidelines "will have a significant impact upon the price of airline tickets." He launched an attack on Justice Scalia's use of economic theory that echoed his more successful attack four days earlier in Kodak. The "airlines' argument (which the Court adopts)" concerning yield management is merely a "theoretical argument" and "is not supported by any legislative or judicial findings." Even if "the Court's economic reasoning is sound . . . the airlines have not sustained their burden of proving that compliance with the NAAG guidelines would have a 'significant' effect on their ability to market their product and, therefore, on their rates."  

This is not the first time that Justices Scalia and Stevens have locked horns over the proper role and teaching of economics. In Business Electronics Corp., for instance, Justice Stevens criticized "the majority's total reliance on 'economic analysis.'" Justice Stevens's concern about excessive attention to economic theory is cousin to his criticism of Justice Scalia's reluctance to trust juries with questions of motivation. In Morales, as in Business Electronics and the October 1990 term's City of Columbia v. Omni Outdoor Advertising, Inc., Justice Scalia won. In Kodak, however, as in the October 1990 Term's Summit Health, Ltd. v. Pinhas, Justice Scalia lost.

III. EASTMAN KODAK CO. V. IMAGE TECHNICAL SERVICES, INC.

Kodak cannot be fully understood without knowing its unusual facts and unique history. At issue was a three-level group of alleged markets:

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79 112 S. Ct. at 2058.

80 Id. at 2058. The suggestion that the Court adopted the position of respondent airlines is a little unfair. Respondent airlines did devote substantial attention to this subject. Brief for the Respondent Airlines on Writ of Certiorari at 28-40. But the Acting Solicitor General devoted as much or more attention to the subject, Brief for the United States as Amicus Curiae Supporting Respondents at 18-23, and echoes of this brief can be seen more readily in the Court's opinion. Moreover, the airlines relied heavily on an October 1, 1987, letter from the Federal Trade Commission to California's deputy attorney general, as well as on TRANSPORTATION RESEARCH BOARD NATIONAL RESEARCH COUNCIL, WINDS OF CHANGE: DOMESTIC AIR TRANSPORT SINCE DEREGULATION 89-92, 135 (1991).

81 112 S. Ct. at 2058-59.

82 Id. at 2059 (omitting footnote arguing that specific guidelines' provisions have not been shown to be major hindrances).


84 485 U.S. at 756 (quoting Justice Scalia's opinion for the Court, 485 U.S. at 735).


(1) photocopier and micrographic equipment; (2) parts for Kodak equipment, some of which Kodak self-manufactured, some of which Kodak acquired from vendors; and (3) service of Kodak equipment. The claim that evolved, in essence, was that Kodak illegally tied parts and service, and monopolized service and perhaps parts. (Neither the complaint nor the opinions are models of clarity.) The factual underpinning of this claim was Kodak's refusal to sell parts to independent service organizations (ISOs) such as the plaintiffs.

A. Background

Image Technical sued Kodak on April 14, 1987. Four months later Kodak filed a motion for summary judgment. The issue, Kodak asserted, was "one of law: whether an equipment manufacturer that lacks market power in the relevant equipment market may choose not to sell replacement parts to independent service firms." The key was the existence of effective interbrand equipment competition: given that competition, Kodak argued, it could not restrain competition or exert market power

88 The parties sharply disputed which was more common. Kodak claimed it made 75%, Official Transcript at 6–7; Image Technical claimed Kodak made only 10%, Official Transcript at 48. The disagreement provoked Justice Stevens to lament, "I always hate cases where lawyers can't agree on what the record contains." Official Transcript at 50.

89 There is dispute about the history of this policy. Kodak claimed its policy had been consistent since it entered the photocopier business in 1975, and that it "never knowingly sold copier parts to anyone who would use those parts to service someone else's Kodak copier." Memorandum of Points and Authorities in Support of Defendant's Motion for Summary Judgment 18. See also Petitioner's Brief on the Merits at 6 n.2. Image Technical disagreed, asserting that Kodak sold ISOs parts for copiers until Kodak changed its policies in 1985 or 1986 (the complaint uses inconsistent dates). Brief of Respondent at 4–5; Complaint ¶¶ 36, 39. Both sides agreed that Kodak changed its policies for micrographic equipment parts in 1985, but Kodak claimed the change was prospective only, for new machines, Petitioner's Reply Brief on the Merits at 10, Official Transcript at 13–14, whereas Image Technical seemed to claim that the policy was applied, at least in effect, to customers with old machines as well, Brief in Opposition to Petition for Writ of Certiorari at 3. (As Justice Scalia pointed out in his dissent, Image Technical had earlier seemed to agree that the policy was applied only to new sales, 112 S. Ct. at 2095, citing complaint and quoting proffer below.)

90 Image Technical Servs., Inc. v. Eastman Kodak Co., No. C 87 1686 WWS (N.D. Cal. filed Apr. 14, 1987). Although the complaint was filed by 19 entities, for ease of discussion we will consider the complaint to have been filed only by Image Technical.


[The purpose of this summary judgment motion is not to say, "No, we didn't do it." For the most part, Kodak does refuse to sell replacement parts to plaintiffs, and Kodak does place conditions on servicing resold Kodak equipment. The purpose of this motion is to say, "Yes, these are our business practices, and they are perfectly lawful."

Id. at 3.
in any alleged service or other market.\(^9^2\) On Image Technical's tying claim, Kodak contended that it had not tied service to equipment, parts to equipment, or equipment to parts, and that, in any event, there was no tying violation because Kodak lacked market power in equipment and, therefore, in parts.\(^9^3\)

After a September 11, 1987, status conference, Judge Schwarzer, a noted authority on and aficionado of summary judgment,\(^9^4\) authorized Image Technical to file one set of interrogatories (by September 25), one set of requests for production of documents, and (by September 25) notices for four depositions.\(^9^5\) Additional discovery would be permitted only by leave of the court.

The court authorized two additional depositions ("regarding the issue of market power raised in defendant's motion for summary judgment") on January 4, 1988.\(^9^6\) Additional discovery could be requested, the court ordered, only pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, when Image Technical responded to the motion for summary judgment. Image Technical filed such a request. It was denied April 18, 1988, when Judge Schwarzer granted summary judgment without a hearing.\(^9^7\)

Judge Schwarzer bottomed his summary judgment on reasoning somewhat different from that suggested by Kodak.\(^9^8\) First, he ruled that there

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\(^9^2\) Memorandum at 28. Perhaps the best statement of Kodak’s position was in a footnote: Plaintiffs’ theory of the case is that Kodak used a by-product of its alleged monopoly in Kodak equipment, its exclusive control of Kodak parts, to monopolize the service markets. If Kodak has no equipment monopoly, as the undisputed facts demonstrate, then Kodak has no monopoly power to leverage into any other market, including any service market.

\(^9^3\) Id. at 27 n.4. Foreshadowing a pattern it would follow at the Supreme Court, see infra note 112, Kodak sometimes also argued that customers could consider service costs when purchasing equipment, id. at 28, or that customers do consider service costs, Kodak’s Reply Memorandum at 6.


\(^9^6\) Id.

\(^9^7\) Id..

\(^9^8\) Judge Schwarzer also expressed impatience with what he viewed as inefficient litigating: The parties have filed 120 pages of briefs and voluminous supplementary material.
was no tie at all.\textsuperscript{99} Second, he rejected the monopolization charge by ruling that even if Kodak had market power in a market for servicing its equipment, "plaintiffs have not come forward with any facts to suggest that Kodak has attempted to leverage power in that market to gain competitive advantage in another market."\textsuperscript{100} Judge Schwarzer added that Kodak has a "natural monopoly" in the market for Kodak parts, but this natural monopoly "imposes no duty on it to sell to plaintiffs."\textsuperscript{101}

Image Technical had complained of having only severely limited discovery on "the important issues in the marketplace with regard to: 1) relevant market; 2) market power; and competitive injury."\textsuperscript{102} Judge Schwarzer responded that Image Technical had failed to show how this discovery would help it "cure the fatal deficiencies in their case."\textsuperscript{103} Discovery would not contribute to determining whether a tie existed or whether Kodak's business practices, which were "well known to plainti\textsuperscript{f}fs," were lawful.\textsuperscript{104}

The Ninth Circuit reversed two to one.\textsuperscript{105} The court wrote that Judge Schwarzer had misunderstood that Kodak allegedly had tied parts to service, not just equipment and parts.\textsuperscript{106} Kodak tied service to parts when Kodak conditioned the receipt of parts on a promise not to purchase service from ISOs.\textsuperscript{107} As for monopolization, the freedom not to deal

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Regrettably this occurred because the opening brief was filed during the absence of the assigned judge who would not have permitted it. Because the briefs escaped the discipline imposed by the Court's 25 page limitation, they are verbose, disorganized, repetitive, overly argumentative and replete with immaterial matter, unnecessarily increasing the Court's burden. Counsel could have presented their case far more effectively if they had taken the trouble to write concise briefs directed to the issues.
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\textsuperscript{99} \textit{id.} at 60,211 n.1.

\textsuperscript{100} \textit{id.} at 60,212 ("Kodak does not require the buyer to agree to purchase parts or service from Kodak. Nor does it condition the sale of one product on the buyer's purchase of another product. A Kodak customer can buy equipment without having to buy parts; and he can buy parts if he simply owns Kodak equipment."). The Court also ruled, apparently responding in part to the tying claim, that there was no illegal conspiracy and thus no violation of Sherman Act Section 1 or Clayton Act Section 3. \textit{id.} at 60,211–12.

\textsuperscript{101} \textit{id.} at 60,213.

\textsuperscript{102} \textit{id.}

\textsuperscript{103} \textit{id.} (quoting declaration).

\textsuperscript{104} \textit{id.}

\textsuperscript{105} \textit{id.}


\textsuperscript{107} \textit{id.} at 615. In Judge Schwarzer's defense it should be noted that the complaint focused principally on a tie to equipment. Complaint ¶¶ 58–59.

\textsuperscript{99} "A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agrees that he
with competitors has exceptions, and the court ruled that factual issues were involved in deciding whether an exception applied.\footnote{903 F.2d at 615 (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5–6 (1958)).}

The Ninth Circuit's opinion focused less on Judge Schwarzer's decision than on Judge Wallace's dissent, which picked up themes from Kodak's motion that had not been addressed by Judge Schwarzer. Judge Wallace made two arguments. On the Section 1 charge, he argued that without power in the equipment market Kodak could not have power in the parts market, and thus there was no tying violation.\footnote{Id. at 620 ("Applicants have presented sufficient evidence . . . from which a reasonable trier of fact could find that Kodak's implementation of its policies was anticompetitive, exclusionary, and involved a specific intent to monopolize."). (citation omitted).} On monopolization, Judge Wallace would have ruled for Kodak because he found legitimate business justifications for Kodak's conduct.\footnote{903 F.2d at 623: Kodak submitted extensive and undisputed evidence of a marketing strategy based on high-quality service. Kodak alleges that independent service organizations (ISOs) such as Image Tech may provide low-quality service, which will reflect negatively on Kodak and undermine its quality-of-service strategy. According to Kodak, the tying of replacement parts to service is used to police against poor-quality service by the ISOs. To defeat a motion for summary judgment, Image Tech, as the party with the burden of proof, was required to present evidence to refute these allegations. It failed to do so. (citation omitted).} The majority found this reasoning attractive but not sufficiently compelling to justify summary judgment.

The Supreme Court, like the Ninth Circuit, focused its attention on Judge Wallace's arguments rather than Judge Schwarzer's reasons.\footnote{The Court devoted surprisingly little attention to Justice Scalia's dissent, mentioning it briefly in two footnotes and discussing it at length (albeit great length) in only one. 112 S. Ct. at 2080 n.7, 2087 n.24, 2089 n.29. The Court's opinion, which summarizes Judge Wallace's dissent in the text, 112 S. Ct. at 2079, is structured as a response to Judge Wallace and his champions.} Kodak found itself championing a dissent, not a judgment. Any attempted justification of summary judgment on new grounds risks seeming jerry-built. Judge Wallace and Kodak could not withstand the combined assaults of Judges Wiggins and Chambers, Image Technical (aided in the Supreme Court by a new law firm), and a host of amici. Kodak is now part of antitrust law, of course, and the opinion will take its place in
casebooks. One has to wonder whether the outcome would have been different had Judge Schwarzer's opinion been more like Judge Wallace's dissent, giving Kodak a stable foundation on which to build.

B. THE SUPREME COURT'S OPINION

This discussion of the Supreme Court's opinion will review first tying and then monopoly, and then consider the meaning of Kodak.

1. Tying

Kodak's principal tying argument was the one advanced by Judge Wallace: "An equipment manufacturer that faces vigorous competition from other manufacturers and that, accordingly, lacks interbrand market power cannot have power—in any sense that should concern the antitrust laws—in a wholly derivative aftermarket." Without market power, ty-

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112 Petitioner's Brief on the Merits at 16. See also id. at 30–31 ("The dispositive fact in this case, Kodak's lack of market power in the interbrand equipment market, was conceded."). Additional discovery would be "pointless. There is nothing that respondents could prove that would overcome Kodak's conceded lack of market power."); id. at 22 ("Kodak's conceded lack of market power in the equipment market dooms any attempt to extract monopoly profits, even in allegedly 'imperfect' aftermarkets."). Kodak summarized its argument as follows:

If Kodak raised its parts or service prices above competitive levels, potential customers would simply stop buying Kodak equipment. Perhaps Kodak would be able to increase short term profits through such a strategy, but at a devastating cost to its long term interests. Thus, due to fierce competition in the interbrand equipment markets, Kodak cannot exercise market power or act anticompetitively in any derivative parts or service aftermarkets.

Petitioner's Brief on the Merits at 12.

Kodak made much of what it claimed was an Image Technical concession in the court of appeals that customers "can shun an equipment seller whose parts and service are priced too high." Petitioner's Brief on the Merits at 4 n.1, 12, 17 (quoting Reply Brief of Appellants [in court of appeals], J.A. 855). Often but not always Kodak linked its discussion of this concession to its emphasis on Kodak's lack of market power in the equipment market. (Kodak meant always to link the two but sometimes may have appeared not to because it was speaking in shorthand, according to a Kodak lawyer. Daniel M. Wall, Kodak: A Personal Perspective, 7 Antitrust 4, 5 (Fall/Winter 1992)). Image Technical denied that it had made any such concession. Brief of Respondent at 10. Kodak reasserted that it had. Petitioner's Reply Brief on the Merits at 4. The much-controverted Image Technical sentence follows:

In the case at bar, the relevant inquiry is not the market faced by all prospective equipment buyers, who can shun an equipment seller whose parts and service are priced too high, but rather the market faced by current Kodak owners of relatively expensive equipment, who on this record keep their equipment for its economic life and do not and cannot economically switch, precisely as recognized in Dimidowich v. Bell & Howell, 803 F.2d 1473 (9th Cir. 1986), modified, 810 F.2d 1517 (1987).

The Supreme Court avoided the dispute, merely agreeing with the Solicitor General that "Kodak 'cannot set service or parts prices without regard to the impact on the market for equipment.' " 112 S. Ct. at 2084 n.17, quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 20.
ing claims fail.113

The Court, in an opinion by Justice Blackmun, disagreed with Kodak's analysis.114 Image Technical had offered evidence of market power by showing that customers had been coerced into switching to Kodak service from superior but less expensive ISO service, a process that had driven ISO firms out of business.115 The Court found Kodak's economics-based attack on this evidence wanting as a matter of theory and of fact. Even if competition in the equipment market is a constraint, Kodak can enjoy at least some power in parts, and perhaps enough to support a tying violation, the Court wrote. That Kodak cannot price parts without regard to equipment sales does not prove it lacks pricing discretion; it is a "false dichotomy" to assume that Kodak has to choose between competitive and ruinous pricing.116

113 In its third Supreme Court brief, Image Technical claimed that Kodak had substantial power in three narrower markets: high volume copiers, computer assisted retrieval systems, and micrographic capture equipment. Brief of Respondent at 16–18, 32–33. Image Technical had earlier focused attention on the high volume copier business, but it had not disputed "Kodak's assertion that it [Kodak] lacks market power in the interbrand markets." Image Technical, 903 F.2d at 616 n.3; cf. Brief in Opposition to Petition for Certiorari at 2 ("Kodak does not have a dominant share in either the market for photocopy or micrographic equipment, but Kodak acknowledged below that it does have about 23% of the market for high-volume photocopy machines, and somewhat less than 20% of the market for micrographic machines."). Coudert Brothers was of counsel on plaintiffs' brief on the merits but not its opposition to certiorari.

The Justices were not pleased by this change of position. The minute Image Technical's attorney said market power in equipment was "hotly debated," a Justice asked, "Excuse me, why didn't you debate that in the response to the petition for certiorari? Because frankly, I was not interested in considering whether there is market power in this primary market. That's not the question we took this for." Official Transcript at 28. The attorney was pressed on this point for what amounted to four pages of transcript. When he asserted that the Court was "entitled to make a de novo review of the record," Chief Justice Rehnquist rejoined, "But what we're entitled to do . . . is one thing. What we're willing to do may be another." Official Transcript at 31.

The Court's opinion pointedly said the Court would proceed "based on the same premise as the Court of Appeals, namely, that competition exists in the equipment market." 112 S. Ct. at 2081 n.10. It did this, it said, because a grant of certiorari is a commitment of scarce resources, and "respondents failed to bring their objections . . . to our attention in their opposition to the petition for certiorari." 112 S. Ct. at 2081 n.10.

114 The Court said Kodak appeared to phrase its rule alternatively as a dispositive rule of law and as a presumption satisfying its burden under Rule 56(c) summary judgment requirements, 112 S. Ct. at 2082 n.11; it rejected both. Justice Blackmun's opinion was joined by Chief Justice Rehnquist and Justices White, Stevens, Kennedy, and Souter. Justice Scalia filed a dissenting opinion joined by Justices O'Connor and Thomas. Although the Court peppered counsel with questions, Justice Blackmun asked no questions at all. Interview with Daniel Wall, attorney for Kodak (Nov. 13, 1992).

115 112 S. Ct. at 2081.

116 Kodak's lawyer twice conceded, during oral argument, that there may be less competition in parts than in equipment. Official Transcript at 9–10 ("QUESTION: Does your argument about the original equipment market necessarily mean that there's the same amount of competition in the parts market? MR. PICKETT: [T]he answer is no. . . .

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Perhaps most interesting, the Court found that Kodak's theory may not have accorded with market realities. The Court posited that if equipment and service prices are interrelated, equipment sales should rise with falling service prices. Yet the availability of inexpensive service caused distress, not rejoicing, at Kodak; conversely, equipment sales did not seem to fall after Kodak eliminated most inexpensive service.\(^{117}\)

The Court observed that Kodak's theory may be prevented from working in practice by the existence of high switching and information costs. Some customers are "locked in" to Kodak equipment by high switching costs and arguably can be profitably exploited.\(^{118}\) Even customers not

\(^{117}\)112 S. Ct. at 2085. The Solicitor General and, less directly, Kodak, suggested that a firm might choose a strategy of spreading equipment costs over time by charging artificially high prices for post-sale parts and service. Brief for the United States at 18; Petitioner's Brief on the Merits at 18. At oral argument Kodak's lawyer agreed with Justice Scalia's suggestion that Kodak was using an old approach, "[g]ive away the camera to sell the film." Official Transcript at 17 (identification of Justice from 61 Antitrust & Trade Reg. Rep. (BNA) 699 (Dec. 12, 1991)).

The Court pointedly responded that "Kodak never has asserted that it prices its equipment or parts subcompetitively and recoups its profits through service." Id. at 2085. Later, it said this point "bears repeating." Id. at 2088 n.26. Any such strategy, moreover, "is inconsistent with Kodak's policy toward its self-service customers," which provide no service revenues that could offset losses on equipment. Id. For a very similar argument, see Brief of Bell Atlantic Business Systems at 26 ("Kodak itself has never claimed that it has subcompetitively priced its equipment or parts. . . . Indeed, such an argument is facially inconsistent with the fact that Kodak allows its customers to service their own products.").

\(^{118}\)"[A] seller profitably could maintain supra-competitive prices in the aftermarket 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." 112 S. Ct. at 2087. Such a strategy is especially likely if Kodak can price-discriminate in favor of new customers, and there was evidence that Kodak engages in some price discrimination (although the Court did not explore whether Kodak discriminated between old and new customers). Id.

The exact nature of this "lock-in" argument is not clear. Lock-in could refer to Kodak's alleged ability to raise the price of parts or service to customers who purchased Kodak's equipment knowing (or capable of knowing) Kodak would then have these customers at its mercy; alternatively, it could refer to Kodak's ability to raise parts or service prices to customers who bought equipment before Kodak changed its policies in 1985. As noted above at note 89, the parties disagreed on whether this change was prospective. The Court's factual recitation fit more comfortably with the latter scenario, but the Court never made clear how it viewed these facts or which kind of lock-in effect concerned it. Justice Scalia squarely subscribed to the prospective-only story, however, id. at 2095–96, and since the Court discussed this part of his dissent without disagreeing with his factual recitation, the Court may have agreed with Justice Scalia and Kodak on the facts but disagreed on their consequences.
locked in are vulnerable, according to the Court. Kodak claimed that customers engage in life cycle costing, but life cycle costing is not easy and some purchasers, such as government agencies, do not engage in it. Competitors cannot be relied upon to bring necessary information to the market, because the market appears to be oligopolistic and there is reason to doubt that competitors' self-interest would spur them to improve customer pricing abilities. Finally, sophisticated purchasers cannot be relied upon to protect the unsophisticated, as is often the case, because Kodak practices price discrimination.

Particularly interesting was the role played by amici. Amici, not Image Technical, referred to the authorities cited by the Court in its lock-in

119 "Aggregate 'life cycle' costs are the true economic costs of Kodak's equipment. Any increase in parts or service prices necessarily increases life cycle costs and, therefore, has the same effect as a direct increase in equipment costs." Petitioner's Brief on the Merits at 4 (citation omitted). Kodak also argued, as a fallback, that it prices its products with the expectation that customers engage in life cycle costing. Petitioner's Reply Brief on the Merits at 12 n.12.

120 Justice Scalia protested that "we have never before premised the application of antitrust doctrine on the lowest common denominator of consumer." 112 S. Ct. at 2097 (Scalia, J., dissenting).

121 112 S. Ct. at 2086 & n.21. For a more Chicago School-based argument that the use of similar practices by competitors deserves attention, see Frank Easterbrook, Vertical Arrangements and the Rule of Reason, 53 ANTITRUST L.J. 135, 161-63 (1984) (calling for dismissal of challenges to vertical restraints unless engaged in by most market participants).

122 In particular, the most sophisticated customers service their own machines. Kodak is willing to supply parts to these customers, but not to customers lacking this service capability, which permits what could be effective price discrimination. 112 S. Ct. at 2086-87. The Court also noted that sophisticated customers do not prevent supracompetitive pricing if their number is relatively small.

The role of sophisticated buyers brought forth some sharp questioning during Assistant Attorney General Rill’s oral argument:

QUESTION [by Justice Stevens]: Well, what if only a few customers did it [life-cycle price]. Would that make a difference?

MR. RILL: [T]here's no claim in this record that Kodak discriminated among customers who made that assessment and did not make that . . . assessment.

Kodak would be required, in the competitive equipment market, to price the total package competitively. . . .

QUESTION: It would, if all the customers are fully informed.

MR. RILL: No, no, Justice Stevens, the fact of the matter is that the Ninth Circuit acknowledged that customers made that assessment. The fact that customers make that assessment requires Kodak to behave competitively in the equipment market.

QUESTION: Did they tell us how many customers make that assessment, how many—

MR. RILL: There's nothing in the record, Justice Stevens, that tells us that—

QUESTION: You don't think that's relevant, either, I don't suppose.

Official Transcript at 23-24 (identification of Justice Stevens by a litigant). As the debate continued, Justice Scalia contributed the "sharp cheese" theory: "Sharp cheese is very expensive. My wife calls this the sharp cheese theory. You can always tell which cheese is sharp. It's the one that costs more.” Id. at 24-25 (identification of Justice by a litigant).
Amici called attention to the authorities on which the Court relied while discussing life cycle costing. An amicus, to a much greater degree than Image Technical, argued that oligopoly may prevent competitors from educating customers. Public purchasing officials came forward to insist, moreover, that because statutes require competitive bidding and governments often separate budget responsibility for purchasing and operating, "Kodak's economic theory is largely irrelevant to the real world of public purchasing." Life cycle costing is "notoriously difficult and imprecise," so only a bold purchasing official would prefer future savings to a low initial cost. The Court cited the public purchasers' brief and another amicus brief to support its doubts about the fre-

123 The Court cited PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 519a (1978), and F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 16-17 (3d ed. 1990). The first was cited only by Bell Atlantic Business Systems Services, Inc. Brief at 21–22, the second only by State Farm Mutual Automobile Insurance Co. et al., Brief at 11 n.11. The Court's discussion closely parallels that of the Bell Atlantic brief, although the same general arguments can be found in Image Technical's Brief of Respondent at 20–22, 33–35.

124 The Court cited Richard Craswell, Tying Requirements in Competitive Markets: The Consumer Protection Issues, 62 B.U.L. REV. 661, 676 (1982), and Howard Beales, Richard Craswell & Steven C. Salop, The Efficient Regulation of Consumer Information, 24 J.L. & ECON. 491, 509–11 (1981). Both are cited on this point by State Farm, Brief at 9 n.8; the first is also cited by Bell Atlantic Business Systems, Brief at 17 n.13. Image Technical referred to the Craswell article in its opposition to certiorari, however (at 14), and the article was also cited in Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 n.24 (1986).

For its conclusion that it makes little sense to assume that equipment purchases are based on valid information, the Court cited Steven C. Salop & Joseph Stiglitz, Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion, 44 REV. ECON. STUDIES 493 (1977), Steven C. Salop, Information and Market Structure—Information and Monopolistic Competition, 66 AM. ECON. REV. 240 (1976), and George Stigler, The Economics of Information, 69 J. POL. ECON. 213 (1961). The last two were cited by State Farm, Brief at 9 n.8, 12 n.13; the first two were cited by Bell Atlantic Business Systems, Brief at 17. None was cited by Image Technical.

125 The Court first explained that competitors may prefer themselves to charge supercompetitive prices, leaving customers in ignorance; the Court cited a discussion of "collective monopolization," 2 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 404(b)(1) (1978). The same argument and citation are found in Brief for Bell Atlantic Business Systems Services, Inc. as Amicus Curiae Supporting Respondents at 18 ("in product markets that are served by a few large sellers, the sellers may end up tacitly concluding that a uniform practice of supercompetitive pricing would best serve all of them"). Consumers may be left in ignorance even if there are many competitors, the Court then said, because individual firms won't have incentives to educate consumers (to the benefit of their competitors as well as themselves). The Court and a different amicus, but not respondent, relied on Beales, Craswell, & Salop, supra note 124. See Brief for State Farm Mutual Automobile Insurance Co., et al., at 9 n.8. State Farm's brief stressed the importance of similar practices by competitors, id. at 10–11. The argument was touched on only briefly in Respondents' Supplemental Brief (on Petition for Certiorari) at 4.

126 Brief of Amici Curiae National Ass'n of State Purchasing Officials and National Institute of Governmental Purchasing, Inc. in Support of Respondents at 8.

127 Id. at 8.
quency with which customers engage in effective life cycle costing.\textsuperscript{128} As in Morales, a defendant painted a picture only to have its accuracy protested by a market participant.

2. Monopoly

Much of the Court's monopolization analysis followed from its tying analysis. Both Kodak and the Solicitor General devoted most of their briefs to the argument that competition in equipment prevented market power in parts;\textsuperscript{129} once the Court rejected that argument the game was over. Kodak argued without conviction or success that a single brand of product or service could not be a market.\textsuperscript{130} Kodak was handicapped by the district court's failure to discuss this issue except by saying that Kodak's "natural monopoly" over parts does not impose a duty to deal.\textsuperscript{131} Kodak was facing something of an uphill struggle once the Court started thinking in terms of a Kodak-dominated market.

The Supreme Court, as had the Ninth Circuit, squarely disagreed with Judge Schwarzer's views on a monopolist's discretion. A monopolist does not have an "absolute" right to refuse to deal with competitors, but can do so "only if there are legitimate competitive reasons for the refusal."\textsuperscript{132}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{128} 112 S. Ct. at 2086. The Court also cited the brief submitted by 29 states, which supported Image Technical but largely on legal grounds. A brief submitted by Public Citizen, also in support of Image Technical, disagreed with Kodak's vision of how the world of purchasing works. Image Technical's lawyer thought the brief so useful that he called the Court's attention to it during oral argument. Official Transcript at 40.
\item \textsuperscript{129} Petitioner's Brief on the Merits at 14–32; Petitioner's Reply Brief on the Merits at 6–15; Brief for the United States as Amicus Curiae Supporting Petitioner at 10–26.
\item \textsuperscript{130} See 112 S. Ct. at 2090 ("in some instances one brand of a product can constitute a separate market"). Although Kodak asserted briefly that a single brand cannot constitute a market, Petitioner's Brief on the Merits at 33–34, its principal tactic was to assume separate markets for Kodak-brand parts and service but demonstrate that "firms constrained by [interbrand] equipment competition cannot exercise market power in aftermarkets." Petitioner's Reply Brief on the Merits at 14–15. See also Petitioner's Brief on the Merits at 12, 16 & n.5; Petition for Writ of Certiorari at 9; Official Transcript at 12–13 (Kodak's lawyer arguing that any parts and service market should be evaluated in connection with equipment market). The Solicitor General assumed "for the sake of argument" that one manufacturer's parts could constitute a market. Brief for the United States, as Amicus Curiae Supporting Petitioner at 12 n.10.
\item Most courts have refused to find single-brand markets, ABA Antitrust Section, Antitrust Law Developments 206–07 (3d ed. 1992); e.g., Virtual Maintenance, Inc. v. Prime Computer, Inc., 957 F.2d 1318, 1326–27 (6th Cir. 1992), vacated and remanded for reconsideration, No. 92-90 (U.S. Oct. 13, 1992), but the Supreme Court was unwilling to say that a single brand can never be a market.
\item 131 1989-1 Trade Cas. (CCH) at 60,213.
\item 132 112 S. Ct. at 2091 n.32. See also 903 F.2d at 620 ("A monopolist may not refuse to deal with a competitor in an exclusionary attempt to impede competition without a legitimate business reason.") (citations omitted).
\end{itemize}
\end{footnotesize}
The Court then reviewed Kodak’s proffered justifications with a highly critical eye—an eye that may have been sharpened by one of the amicus briefs.\[^{135}\]

(1) Kodak claimed an interest in quality service and in concentrating responsibility for equipment functioning. But there is evidence “that ISO’s provide quality service and are preferred by some Kodak equipment owners.”\[^{134}\] The Court also rejoined that customers sophisticated enough to engage in life cycle costing should be able to isolate responsibility for equipment malfunctioning, and that a manufacturer truly concerned with concentrating responsibility would not permit self-service.\[^{135}\]

(2) Kodak claimed an interest in controlling inventory costs. But breakdown rates should be the same regardless of the servicer’s identity, and concern about inventory costs would not justify preventing Kodak’s suppliers from also supplying ISOs.

(3) Kodak claimed an interest in discouraging free-riding. But the Court’s previous expressions of concern about free-riding sought to encourage investment in the down-stream market (here, service). There was no claim of free-riding on Kodak’s investment in service; rather, Kodak was complaining because ISOs failed to enter the equipment and parts markets. The Court viewed the ability to enter only one market as something deserving of protection rather than condemnation.\[^{138}\]

\[^{135}\] For a short appraisal of the Court’s discussion, see infra, text accompanying notes 173 & 174.

\[^{134}\] 112 S. Ct. at 2091. The Court cited two venerable cases that had rejected similar goodwill arguments: IBM Corp. v. United States, 298 U.S. 131, 139-40 (1936), and International Salt Co. v. United States, 332 U.S. 392, 397-98 (1947).

\[^{135}\] 112 S. Ct. at 2091:

... Kodak simultaneously claims that its customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions, and yet too obtuse to distinguish which breakdowns are due to bad equipment and which are due to bad service. Kodak has failed to offer any reason why informational sophistication should be present in one circumstance and absent in the other.

For a very similar argument see Brief for Bell Atlantic, as Amicus Curiae Supporting Respondents at 25 (Kodak’s “basic argument is that these same customers are sophisticated enough to make complex and subtle lifecycle-pricing decisions and thereby prevent Kodak from taking advantage of its monopoly. There is no reason why informational sophistication should be present in one circumstance and absent in another.”).

\[^{136}\] 112 S. Ct. at 2091. This argument, too, was set out by Bell Atlantic, Brief at 25.

\[^{137}\] 112 S. Ct. at 2091: “Presumably, the inventory of parts needed to repair Kodak machines turns only on breakdown rates, and those rates should be the same whether Kodak or ISOs perform the repair.” Compare this with the Bell Atlantic Brief at 25: “The simple fact is that the inventory of parts needed to repair Kodak machines should turn only on breakdown rates. Those rates should be the same whether Kodak does the repair or ISOs do it.”

\[^{138}\] 112 S. Ct. at 2091–92; cf. Brief of Bell Atlantic at 25–26 (similar but not identical argument).
Since none of Kodak's claimed justifications were sufficient as a matter of law, summary judgment was deemed inappropriate.

C. THE MEANING OF KODAK

It is easy to dismiss Kodak as a discovery case. The Supreme Court was clearly surprised at the speed with which a sophisticated plaintiff, with a seemingly plausible story, had been tossed out of court. The summary judgment motion had been filed four months after the complaint. Discovery was limited, and the trial court never ruled that there was adequate discovery on the issues that turned out to be dispositive. Judge Schwarzer had ruled that any possible need for additional discovery on the market, market power, and competitive injury was unnecessary because the plaintiff deserved to win on other grounds. When the court of appeals and later the Supreme Court disagreed with his reasoning, finding that there was a tie and that there was no absolute freedom to refuse to deal, these issues became important. Kodak had to defend itself without benefit of findings on the important questions. These features of Kodak mean that the case will almost always be distinguishable.

Although easily distinguishable in the future, Kodak is part of antitrust law and supports several important propositions. Its teachings must be taken with an eye on the case's unusual facts and unique procedural history; but its precepts cannot be ignored.

1. Summary Judgment

The critical moment in the Kodak saga came at the very beginning of the oral argument of James Rill, Assistant Attorney General, arguing as

139 The Court ended its decision by observing that although Kodak may well prevail on the merits at trial for any of several reasons, the Court "cannot reach these conclusions as a matter of law on a record this sparse." 112 S. Ct. at 2092.

During oral argument, Justice Kennedy responded to Kodak's lawyer's description of competition by asking whether this was "a law of nature or a law of economics." When the lawyer said it was "certainly a law of economics," Justice Kennedy continued: "Because this case comes up to us after very little discovery. And it just seems hard for me to ... imagine ... writing an opinion setting forth all the propositions you make, without some factual support. ..." Official Transcript at 11 (identification of Justice Kennedy by a litigant).

Later, Chief Justice Rehnquist observed to Assistant Attorney General Rill that "there is a certain amount of very theoretical approach to your presentation, that this is the way the market is going to behave, without any real, empirical evidence, it seems to me." Official Transcript at 25. He agreed that Assistant Attorney General Rill's argument was "very logical," but said he was "still not totally persuaded that there wasn't something in what the Ninth Circuit said. How can we know, at this stage, that this is the way it would work out in practice?" Id. at 25-26.

140 See supra, text accompanying notes 102-04. See also 903 F.2d at 617 n.4 ("The district court permitted only very limited discovery on the market power issue. ... Not finding it necessary to reach the market power issue in its decision, the district court, of course, had no reason to grant this request [for additional discovery on market power].").
amicus curiae supporting Kodak. Rill opened his argument by asserting that

when a plaintiff, seeking to avoid summary judgment, attempts to put forward an implausible argument, or argument based on an implausible theory, it is required under rule 56 and under this Court’s decision in the Matsushita case, to come forward with particularly persuasive, probative, and substantial evidence in support of a cogent theory of antitrust liability.

Chief Justice Rehnquist immediately interrupted: “You say then that Matsushita . . . laid down a different rule as to summary judgment for antitrust cases than prevails in the rest of the legal area?” If there was any doubt before Kodak, there is no longer. Matsushita “did not introduce a special burden on plaintiffs facing summary judgment in antitrust cases. . . . Matsushita demands only that the nonmoving party’s inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision.”

This is one reading of Matsushita, but not the most common one. In Matsushita the Court wrote that “if the factual context renders respondents’ claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.” Many courts have viewed this as a license for the trial court to examine plaintiffs’ theories critically at early stages of litigation. Matsushita emboldened courts to address the merits at early stages; Kodak cautions against excessive enthusiasm. This caution is evident not just in Kodak’s result and language, but also in the lower court cases the Supreme Court cited with apparent approval. Even small shifts of attitudes

2 Official Transcript at 19.
3 id. The questioner was identified by one of the lawyers present.
4 Nor did Assistant Attorney General Rill argue that there was. He responded in the negative, although he went on to add that in antitrust cases summary judgment can be “particularly appropriate.” Official Transcript at 20.

5 112 S. Ct. at 2083 (footnote omitted).
6 475 U.S. at 587.
7 See De Santi & Kovacic, supra note 144.
8 See supra, note 139 and text accompanying note 145.
9 Of the lower court cases cited by the Court, two reversed or reversed in substantial part awards of summary judgment. Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc., 826 F.2d 1335 (3d Cir. 1987); Instructional Systems Dev. Corp. v. Aetna Casualty & Surety Co.,
toward summary judgment are important, moreover, given the frequency with which responses to such motions decide antitrust claims.\(^{150}\)

**B. TYING**

*Kodak* affects two aspects of tying law in addition to those noted above. First, Image Technical made the requisite showing of market power in significant part with evidence that Kodak raised prices and excluded competition in the tied (service) market. The typical tying case treats market share as the primary indicator of market power. In *Kodak* the Court looked equally to effects: "It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets, since respondents offer direct evidence that Kodak did

817 F.2d 639 (10th Cir. 1987); see 112 S. Ct. at 2083 n.14. *Arnold Pontiac* has been cited as an unusual case because it seemed to regard it as sufficient, to avoid summary judgment, that there was a "plausible motive" to conspire (there, for a group of dealers to agree to pressure a manufacturer to deprive a rival of a dealership), 826 F.2d at 1339; see De Santi & Kovacic, *supra* note 144, at 640 (criticizing case). In *Instructional Systems*, as the Supreme Court's parenthetical notes, it was sufficient that the defendants "could reasonably have been economically motivated," 817 F.2d at 646, *quoted in 112 S. Ct. at 2083 n.14.*

Although the Court does not mention the case, the *Kodak* opinion also contains some limited support for a distinction that benefited plaintiffs in a controversial Ninth Circuit decision, *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 439 (1990), *cert. denied*, 111 S. Ct. 2274 (1991). *Petroleum Products* limited Matsushita's special solicitude for summary judgment to cases which, if successful, "would have the effect of deterring significant procompetitive conduct." Under *Petroleum Products*, "the trial court must consider whether . . . the protection of innocent independent conduct outweighs the costs associated with the potential decrease in strict antitrust enforcement. If it does, then the plaintiff must come forward with additional, 'sufficiently unambiguous' evidence. . . ." 906 F.2d at 439.

Without citing *Petroleum Products*, the *Kodak* Court ended its opinion with words closely echoing that approach: "In this case, when we weigh the risk of deterring procompetitive behavior by proceeding to trial against the risk that illegal behavior go unpunished, the balance tips against summary judgment." 112 S. Ct. at 2088-89. The Court cited a part of *Matsushita* that can be read as favoring a balancing approach; now plaintiffs are sure to read *Kodak* as supporting a balancing approach.

*Petroleum Products* had been highlighted in the brief filed by 29 states, which also was the only brief to cite *Arnold Pontiac*, Brief Amicus Curiae States of Ohio, et al. at 14. (No brief cited *Instructional Systems*.) (It should be noted, however, that the *Kodak* Court did not follow the states' suggestion to limit *Matsushita* to cases where there is no direct evidence.)

\(^{150}\) *Kodak*'s discussion of summary judgment has already been relied upon by lower courts. The Third Circuit, in particular, has reversed summary judgment in a dealer boycott case. Big Apple BMW, Inc. v. BMW of North Am., Inc., 1992-2 Trade Cas. (CCH) ¶ 69,918 (3d Cir. 1992) (Mansmann, J.). Big Apple contended that it had been denied franchises because of a conspiracy among rival dealers and BMW. The district court granted summary judgment under *Matsushita*. The Third Circuit reversed, criticizing the district court for compartmentalizing evidence and requiring Big Apple to prove too much. Citing *Kodak*, the court said it is defendants' task to show that "an inference of concerted action . . . is unreasonable." *Id.* at 68,391-92.
Although the Court's opinion appeared to conclude that there could be a Kodak-dominated market for Kodak parts, the Court largely limited its discussion of market share to a rejection of Kodak's argument that relatively modest equipment market shares should prevent liability. There is nothing remarkable about finding liability in part by looking at anticompetitive results, if that is what the Court did; but the Court's discussion is somewhat reminiscent of the old tying cases which went almost so far as to find power from a successful tie. Kodak did not make clear how the Court would approach a tying case with similar effects evidence but without supporting market share evidence.

Kodak also merits reflection for what it says, or, rather, does not say, about the per se tying rule. The opinion opened by stating the tying rule as a simple, three-part test: Section 1 of the Sherman Act is violated by

112 S. Ct. at 2088. See also id. at 2081 (discussing effects evidence), 2083 (Kodak bears the "substantial burden" of showing "that despite evidence of increased prices and excluded competition, an inference of market power is unreasonable"). An intriguing footnote accompanies the sentence quoted in the text: "Cf. Instructional Systems, 817 F.2d at 646 (finding the conspiracy reasonable under Matsushita because its goals were in fact achieved)." 112 S. Ct. at 2088 n.25. The question in Instructional Systems was whether a competitor had been driven out of business by fair means or foul. The Tenth Circuit distinguished the then-recent Matsushita case in part because in Instructional Systems the "alleged goal" of the conspiracy had been achieved, although principally because the plaintiff had produced direct evidence of conspiracy and evidence of motivation.

See supra note 130.

Image Technical argued that any lack of market power in equipment markets was "beside the point." The issue, it said, was whether Kodak had sufficient power in parts to force the purchase of service, and there was at least sufficient evidence of such forcing to require a trial. It reasoned that under Jefferson Parish per se treatment is justified "if the existence of forcing is probable," 466 U.S. at 15, so "once a showing of actual forcing has been made, it is no longer necessary to show the mere likelihood of forcing as a result of 'market power.'" Brief of Respondent at 40 & n.27 (citing, with a "cf.," FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460-61 (1986)).

In Northern Pacific Ry. v. United States, 356 U.S. 1, 7-8 (1958), the Court ruled that "[t]he very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints." That Court also explained that it did not construe an earlier decision's talk about "monopoly power" or "dominance" "as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product." Id. at 11. In United States v. Loew's Inc., 371 U.S. 38, 45 n.4 (1962), the Court wrote that a "full-scale factual inquiry into the scope of the relevant market" should "seldom be necessary" because Section 2-type market dominance is not required, and "the requisite economic power may be found on the basis of either uniqueness or consumer appeal." A different approach had been signalled by United States Steel Corp. v. Fortner Enters., Inc. (Fortner II), 429 U.S. 610, 618 n.10 (1977), which emphasized that such a conclusion depends entirely on the absence of other explanations for the behavior. See also Grappone Inc. v. Subaru of New England, Inc., 858 F.2d 792, 796 (1st Cir. 1988) (Breyer, J.) ("the 'market power' hurdle is moderately high" and "cannot ordinarily be surmounted simply by pointing to the fact of the tie itself or to a handful of objecting customers").
a [1] tying arrangement\footnote{155} [2] "if the seller has 'appreciable economic power' in the tying product market and [3] if the arrangement affects a substantial volume of commerce in the tied market."\footnote{156} In contrast, many saw Joseph Parish\footnote{157} as supporting a test with so many factors and defenses, some very broad, that tying had become per se in name only.\footnote{158} Plaintiffs interested in a more streamlined per se rule can be expected to cite Kodak even though the language is dictum.

Many had wondered whether the Court would use Kodak as an opportunity to revisit the debate between Joseph Parish's majority and concurrence over whether tying should be per se illegal at all.\footnote{159} The words "per se" are conspicuously absent from Kodak's discussion of tying.\footnote{160} The

\footnote{155} "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" 112 S. Ct. at 2079 (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 5-6 (1958)). An identical sentence can be found in the Ninth Circuit's opinion, see supra note 107.

\footnote{156} 112 S. Ct. at 2079 (quoting Fortner Enters., Inc., v. United States Steel Corp. (Fortier 1), 394 U.S. 495, 503 (1969)).


\footnote{158} The various elements of a tying claim are reviewed in ABA Antitrust Section, Antitrust Law Developments 131-64 (3d ed. 1992).

\footnote{159} E.g., Michael L. Weiner & James A. Keyte, Image Technical Services: More than Meets the Eye, 6 Antitrust 18, 21 (Fall/Winter 1991). Justice O'Connor's Joseph Parish concurring opinion, which preferred a rule of reason, attracted three other votes. Only four Justices joined Justice Stevens's opinion for the Court. Although the Court's and Justice O'Connor's opinions have each lost two supporters (Justices Brennan and Marshall joined Justice Stevens's opinion for the Court; Chief Justice Burger and Justice Powell joined Justice O'Connor's concurrence), the conventional wisdom has been that the Court's opinion is the more vulnerable. See, e.g., Stephen Calkins, The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy, 59 Antitrust L.J. 339, 376 (1990) (commenting on the consequence of Justice Brennan's retirement); cf. Jefferson Parish, 466 U.S. at 32 (Brennan, J., with Marshall, J., concurring) ("We have long held that tying arrangements are subject to evaluation for per se illegality under Section I of the Sherman Act" and the Court should "stand by" this "settled statutory interpretation and leave the task of modifying the statute's reach to Congress").

Kodak, being more interested in winning than in changing antitrust law, had passed up the opportunity to tilt at the per se rule. It only hinted at the controversy and the possibility for resolution:

The Court may . . . wish to consider whether there is any continuing utility in referring to tying arrangements as per se illegal given that courts must consider tying market power, substantial adverse affects in the tied product market, and business justifications before condemning a tie. Compare Joseph Parish, 466 U.S. at 11-18, with Northern Pacific, 356 U.S. at 5 (per se offenses presumed unreasonable "without elaborate inquiry as to the precise harm they have caused or the business excuse for their use").

Petitioner's Brief on the Merits at 16 n.6.

\footnote{160} The words "per se" appear twice in the Court's opinion, each time as part of a rejection of what the Court describes as an argument for per se legality. 112 S. Ct. at 2082 n.11, 2089 n.29.
opinion included, moreover, what appears to be a nod toward the rule of reason. As part of its discussion of the tying claim, the Court wrote that it "need not decide" whether "any procompetitive effects . . . outweigh the anticompetitive effects." 6 At trial, the Court noted at the end of its opinion, "Kodak's arguments may prove to be correct. It may be that . . . any anti-competitive effects of Kodak's behavior are outweighed by its [pro]competitive effects." 6 The Supreme Court would not "reach these conclusions as a matter of law on a record this sparse." The clear implication is that Kodak will not be prevented from attempting to prove that procompetitive effects predominate, and, were it to succeed in doing so, it would prevail against the tying claim.

C. Market and Monopoly Power

It would be an exaggeration to say that a debate has raged over whether "monopoly power" and "market power" are one and the same. More accurately, a muddle has developed, with the words appearing inconsistently and without precision. 4 The Court took a step toward clarifying the situation: "Monopoly power under § 2 requires, of course, something greater than market power under § 1." 4

112 S. Ct. at 2088. "We note only that Kodak's service and parts policy is simply not one that appears always or almost always to enhance competition, and therefore to warrant a legal presumption without any evidence of its actual economic impact." Id. This phrasing of an approach to summary judgment is eerily similar to the Court's famous standard for identifying per se illegal practices: "Our inquiry must focus on . . . whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. CBS, 441 U.S. 1, 19-20 (1979).

112 S. Ct. at 2092. This language is from a closing paragraph not specifically addressed to the tying claim. The Court's specific rejection of Kodak's proffered justifications is in its discussion of monopolization. Id. at 2091-92. Given the tying-specific discussion of balancing quoted in the text, however, the Court's closing language seems equally applicable to both claims. Cf. Image Technical, 903 F.2d at 618-19 (court of appeals addressed Kodak's justifications as part of deciding tying claim).

112 S. Ct. at 2092.


112 S. Ct. at 2090 (citing Fortner I, 394 U.S. at 502) (also noting Section 2's "more stringent monopoly standard").

The parties did not really contest this issue. The Ninth Circuit had written that monopoly power "is something more than the market power that is a prerequisite to liability under Section 1." 903 F.2d at 621. Kodak agreed, arguing that this means that if Kodak lacks market power for Section 1 it must lack monopoly power for Section 2. Petitioner's Brief on the Merits at 17. Image Technical, too, seemed to agree. It argued, for instance, that proof of actual forcing obviates the need to show market power, Brief of Respondent at 40 & n.27, which at least implies that it was thinking of market power as something short of monopoly power.

The issue was, however, sharply contested by the amici. The Solicitor General minimized the distinction between monopoly power and the market power required for a tying violation:
Kodak has created great uncertainty, however, about market definition limited to a single brand of equipment, or parts for a single brand of equipment. Justice Scalia, in dissent, said that the majority's willingness to countenance such a market "threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good." The forecast of litigation is probably accurate but the outcome of that litigation is uncertain. Although the opinion is unclear on the point, the Court appears to have assumed, for purposes of the litigation, that there is a separate market for parts for Kodak equipment. The Court merely refused (1) to eliminate all possibility of a single-brand market, and (2) to find that competition in equipment made power in parts so unlikely as to justify summary judgment. The ultimate impact of Kodak may turn on the frequency with which courts recognize single-brand markets and especially markets for single-brand parts. Kodak has made this more likely but it need not and should not become commonplace.

D. Monopolization

The Kodak Court boldly wrote that a monopolist may refuse to deal with competitors "only if there are legitimate competitive reasons for the refusal." The Court had said this in Aspen Skiing but many doubted whether the Court really meant it. Aspen Skiing was in many ways a unique case. While the Court some years earlier said that per se unlawful tying does not depend on "monopoly power," even then it made clear that market power over price is required. Per se unlawful tying, then, appears to require substantial market power, power akin to monopoly power and quite close to monopoly power in degree.

Brief for the United States as Amicus Curiae Supporting Petitioner at 22 n.21 (citations omitted). Twenty-nine states rushed to disagree, with a brief more than half of which was devoted to this issue. Fortner I, they reminded the Court, declared that "[t]he standard of 'sufficient economic power' does not . . . require that the defendant have a monopoly or even a dominant position throughout the market for the tying product." Brief of Amicus Curiae States Ohio et al. in Support of Respondents at 6-7 (quoting 394 U.S. at 502) We have seen that the Kodak Court sided with the states, relying on Fortner I. 112 S. Ct. at 2090. Another amicus made the same point as the states, less strenuously but in words close to those subsequently used by the Court, in Brief Amicus Curiae of National Electrical Manufacturers Ass'n in Support of Petitioner at 5 ("Monopoly power, of course, is something greater than market power.").

166 112 S. Ct. at 2094. See also id. at 2101 ("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").

167 See supra note 130. See also Official Transcript at 21 (Assistant Attorney General Rill said it was conceded that parts could be a separate relevant market); id. at 26-27 (references to this concession in questions apparently by Chief Justice Rehnquist and Justice Kennedy).

168 112 S. Ct. at 2091 n.32 (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602-05 (1985)).
Now Aspen will be harder to limit; it (and Kodak) will continue to be a challenge to interpret and apply.\(^{169}\)

The Kodak Court wrote that there was evidence that \"Kodak took exclusionary action to maintain its parts monopoly and used its control over parts to strengthen its monopoly share of the Kodak service market. Liability turns, then, on whether \"valid business reasons\" can explain Kodak\'s actions.\(^{171}\)\n
The consequences of such a test depend on the manner of its application. The wording is indeterminate, much to the frustration of law-abiding firms. The Court was maddeningly silent, moreover, on burdens of proof.\(^{172}\)

Although Kodak provides only the beginning of an answer, it is significant that the Court appraised Kodak\'s proffered justifications critically.\(^{173}\) Anecdotes about customer preferences formed the basis of a rejection of

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\(^{169}\) In Aspen, the Court emphasized that the defendant had not rejected a new offer, but rather had \"elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.\" 472 U.S. at 603. \"Ski Co.\'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market.\" 472 U.S. at 604 (citing observation by Robert Bork that established patterns of distribution are likely to be efficient). For criticism and attempted limitation of Aspen, see Phillip E. Areeda & Herbert Hovenkamp, 1991 Supplement to Antitrust Law § 736.1f-.1g.

\(^{170}\) Merely one (albeit very serious) conundrum: declaring that one may not refuse to deal says little about the terms and conditions under which one must agree to deal. At some point terms and conditions become soonerous as to be tantamount to a refusal, yet it would be unfortunate were many courts forced to become de facto economic regulators.

\(^{171}\) The Court quoted Aspen Skiing, which in turn picked those words out of the jury instruction given below. See Aspen Skiing, 472 U.S. at 597 (\"\'[A] company which possesses monopoly power and which refuses to enter into a joint operating agreement with a competitor or otherwise refuses to deal with a competitor in some manner does not violate Section 2 if valid business reasons exists for that refusal.\'\") (quoting jury instruction). The Aspen Court reasoned that given this instruction and the jury\'s verdict for the plaintiff, the Court \"must assume that the jury concluded that there were no valid business reasons for the refusal.\" 472 U.S. at 605. The Court then found that the record adequately supported this conclusion.

Kodak also cited United States v. Aluminum Co. of America, 148 F.2d. 416, 432 (2d Cir. 1945); see 112 S. Ct. at 2091. Alcoa said the \"plaintiff was seeking to show that many transactions, neutral on their face, were not in fact necessary to the development of \'Alcoa\'s\' business, and had no motive except to exclude others and perpetuate its hold upon the ingot market.\" Further down that page it abbreviated this to say the plaintiff \"sought to convict \'Alcoa\' of practices in which it engaged, not because they were necessary to the development of its business, but only in order to suppress competitors.\"

\(^{172}\) In contrast, the Ninth Circuit crisply declared that the \"defendant bears the burden of proving legitimate business reasons under Section 1\" whereas the \"plaintiff . . . bears the burden of proving lack of legitimate business justifications in a Section 2 claim.\" 903 F.2d at 618 n.5, 620 n.9.

\(^{173}\) The Court\'s discussion is reviewed above, text accompanying notes 134–37.
a claimed concern about quality. Kodak's claimed interest in concentrating responsibility for breakdowns fell before a non sequitur, when the Court noted that Kodak said many customers are sophisticated enough to engage in life cycle costing. (There is no reason to presume that the ability to estimate costs is correlated with the ability to identify responsibility for breakdowns.) The Court also criticized Kodak for inconsistently permitting some firms to engage in self-service. Such behavior by Kodak could say more about Kodak's bargaining power than about its genuine interests. The Court rejected Kodak's concerns about inventory control by speculating that inventory should be unaffected by servicing arrangements, a conclusion that is not obvious. (Lags and uncertainties are introduced by anything that distances a firm from its market.) The point is not that Kodak was necessarily right, but that the Court was strikingly aggressive in its critique. Only time will tell how much this aggressiveness was influenced by the case's posture.

Also striking was the Kodak Court's treatment of foreclosure and leverage. For instance, the Court wrote that "Kodak's alleged conduct—higher service prices and market foreclosure—is facially anti-competitive and exactly the harm that antitrust laws aim to prevent." Conspicuously absent was any reference in Kodak to the generation of scholarship that downplayed concern about foreclosure. In response to the dissent's observation "that all manufacturers possess some inherent market power in the parts market," the Court wrote that it had "held many times that power gained through some natural and legal advantage... can give rise to liability if 'a seller exploits its dominant position in one market to expand his empire into the next.'"

The Court thus appeared at least implicitly, if offhandedly, to condemn leveraging as an antitrust violation. Whether leveraging by itself (i.e., using monopoly power in one market to gain an advantage in another

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174 Proof that there are many fine amateur musicians who please many customers proves little if anything about whether a couple is interested in quality when they hire a professional to play at their wedding. Confidence and certainty are part of quality-based decision-making.

175 112 S. Ct. at 2088.

176 For more recent scholarly concerns about single-firm strategic behavior, see, e.g., Michael L. Katz, Vertical Contractual Relations, in 1 Handbook of Industrial Organization 655 (Richard Schmalensee & Robert Willig eds., 1989).

177 112 S. Ct. at 2089 n.29.

without threatening to gain a monopoly in that market) is illegal, has long been controversial.\textsuperscript{170} Only last year the Ninth Circuit squarely rejected the theory, and the Supreme Court denied a petition for certiorari a month before deciding Kodak.\textsuperscript{180} Although Kodak's language about leveraging qualifies as dictum,\textsuperscript{181} it is sure to be used by plaintiffs and perhaps by courts.

\textbf{E. REBUFF OF THE CHICAGO SCHOOL?}

The Chicago School did not fare well in Kodak. What had been anticipated by many as a moment of triumph, the culmination of an appointments process that had lead to Republican domination of the Court, turned into a bitter setback for friends of Chicago.\textsuperscript{182} Some of the rejection can be seen in the Court's renewed interest in leverage and foreclosure, which is discussed in the preceding subsection. Three other points are worth noting.\textsuperscript{183}

\begin{footnotesize}
\textsuperscript{170} ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 250–52 (3d ed. 1992).
\textsuperscript{180} Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992). Justice White would have granted certiorari.
\textsuperscript{181} The Ninth Circuit, for instance, never discussed leveraging. The Supreme Court's analysis is imprecise, but the facts of Kodak, as described by the Court, are quite unlike the typical leveraging case. Image Technical's principal theory was that Kodak used its power in parts to maintain and enhance its power in service. The Court appears to have regarded Kodak as having monopoly power over both parts and service. See 112 S. Ct. at 2090. As the language quoted in text above shows, moreover, the Court said that Kodak also "took exclusionary action to maintain its parts monopoly." 112 S. Ct. at 2091. If these assertions are taken at face value, the case involved wrongful behavior in each of two monopolized markets, which would make leveraging unnecessary to the outcome.
\textsuperscript{182} See, e.g., Charles Rule, Back to the Dark Ages of Antitrust, WALL ST. J., June 17, 1992, at A17. Of the current members of the Court, only Justice White was nominated by a Democrat (President Kennedy). The other eight were nominated by Republicans: President Nixon (Justices Blackmun, Rehnquist, and Stevens), Reagan (Justices Kennedy, O'Connor, and Scalia), and Bush (Justices Souter and Thomas). President Reagan nominated Justice Rehnquist for Chief Justice.
\textsuperscript{183} Anticipation of change was especially sharp because in 1985, when a more liberal Court denied certiorari in Data General Corp. v. Digidyne Corp., 473 U.S. 908 (1985), Justice White, joined by Justice Blackmun, dissented. Data General, which had lost a lock-in tying case, persuaded these two Justices that the Court should address "what constitutes forcing power in the absence of a large market share" and "whether market power over 'locked in' customers must be analyzed at the outset of the original decision to purchase." 473 U.S. at 909. Since that denial of certiorari, Justices Kennedy, Scalia, Souter, and Thomas have replaced Chief Justice Burger and Justices Brennan, Marshall, and Powell.
\textsuperscript{185} Also interesting was Image Technical's effort to bolster the credibility of its economic arguments by associating itself with an economist. A footnote informed the Court that Image Technical's "analysis" of possible market or monopoly power had "been developed with the assistance of Professor Steven C. Salop, Professor of Economics and Law at Georgetown University Law School. Professor Salop is a recognized expert in the fields of industrial organization, competition, and antitrust. He is cited with approval by Kodak." Brief of Respondent at 20 n.13 (citation omitted). Professor Salop is now working for Image Technical in the case on remand.
\end{footnotesize}
1. "Folksy Evidence"

During Kodak's rebuttal argument, Justice Stevens observed that Image Technical "didn't offer theoretical evidence. But the Ninth Circuit relied on a kind of folksy evidence, that, in fact, the service was less expensive, provided by the competitors, and that sort of thing[]."\(^1\) Kodak's lawyer dismissed this as "a couple of anecdotes." When asked whether there wouldn't be a "scintilla of evidence" of market power if service competitors typically had prices "roughly half" of Kodak's, counsel conceded there would be some evidence, just not enough.\(^2\)

Justice Stevens's "folksy evidence" won the day. It would normally be enough, Justice Blackmun began his analysis for the Court, that Image Technical offered "evidence that consumers have switched to Kodak service even though they preferred ISO service, that Kodak service was of higher price and lower quality . . . , and that ISOs were driven out of business by Kodak's policies."\(^3\) Kodak countered with economic theory. "Folksy evidence," however, persuaded six Justices.\(^4\)

2. A Priori Reasoning

The Court was distinctly uncomfortable with the kind of a priori reasoning commonly used by the Chicago School. For instance, Justice Scalia's dissent argued that a tie between parts and service could not increase Kodak's ability to exploit "locked in consumers." Justice Scalia argued that if Kodak wished to exploit these consumers, "it could plainly do so without the inconvenience of a tie, through supracompetitive parts pricing alone."\(^5\) In making this argument, Justice Scalia was on the

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\(^1\) Official Transcript at 56 (an advocate identified the Justice); see 903 F.2d at 617: For example, appellants have presented evidence that Kodak charges up to twice as much as appellants for service that is of lower quality than appellants' service. Appellants presented evidence that in some instances competition from ISOs drove down the price that Kodak was willing to charge for service and that in other instances some owners of large Kodak equipment packages will pay higher prices for Kodak service rather than switch to competitors' systems.

\(^2\) Official Transcript at 56-57.

\(^3\) 112 S. Ct. at 2081.

\(^4\) It should be noted that this evidence was appraised in the context of Image Technical's claim that Kodak dominated a market for Kodak parts, and Kodak's rejoinder that it nonetheless lacked market power. Although "folksy evidence" trumped economic theory in *Kodak*, it is not clear whether such "folksy evidence" alone would have been sufficient. Immediately after the language quoted in the text the Court wrote that "this evidence would be sufficient to entitle respondents to a trial on their claim of market power." Grammarians would say that "this evidence" refers to the evidence discussed in that paragraph. It is at least conceivable that the Court meant to refer also to the evidence (about control of parts) in the preceding paragraph. 112 S. Ct. at 2081.

\(^5\) 112 S. Ct. 2072-99 (Scalia, J., dissenting). In its brief, Kodak dismissed Image Technical's "claim that market imperfections must exist"—despite their failure to show any—because "the actual 'aftermarkets' in which Kodak competes [have] not behaved as
The Court, however, turned this reasoning on its head, by wondering "why Kodak would adopt this expensive tying policy if it could achieve the same profits more conveniently through some other means."\(^{189}\)

This is a very different approach than was used in the more Chicago School Court opinions.\(^{190}\) Although the Court claimed it was continuing Kodak's economic theory would suggest" (quoting from page 9 of Image Technical's brief opposing certiorari).

But this misses the point. The question is not how the aftermarket perform standing alone, but whether super-competitive pricing in the aftermarket could enhance Kodak's overall position—and, conversely, harm consumers—given the inevitable effects of aftermarket pricing on Kodak's future equipment and service sales. The answer is no. Kodak's conceded lack of market power in the equipment market dooms any attempt to extract monopoly profits, even in allegedly "imperfect" aftermarket.

Petitioner's Brief on the Merits at 22.

Justice Scalia further ruminated that, although price discrimination would gain nothing because sophisticated consumers who are locked in are as helpless as unsophisticated ones, the Robinson-Patman Act would not prevent discrimination in favor of sophisticated consumers. Justice Scalia reasoned that the Robinson-Patman Act would not be violated because the requisite competitive effect is difficult to show in markets in which businesses purchase for their own consumption. 112 S. Ct. at 2099-2100 n.3.

\(^{189}\) Kodak quoted Professor Ward Bowman, who wrote that "[a] competitive supplier, selling at the prevailing price and attempting to impose a tie-in upon a buyer, would merely be displaced by a seller who did not," Tying Arrangements and the Leverage Problem, 67 YALE L.J. 19, 20 (1957) (footnote omitted), see Petitioner's Brief on the Merits at 19; Professor, now Judge, Frank Easterbrook, who wrote that a seller without market power "cannot sustain deleterious practices," Vertical Arrangements and the Rule of Reason, 53 ANTITRUST L.J. 135, 159 (1984), see Petitioner's Brief on the Merits at 19; and Judge Easterbrook again, who wrote:

Given that a practice indulged without market power is either beneficial to consumers or self-defeating to its practitioners, why use the courts to condemn the conduct? ... [C]ondemning questionable practices pursued by firms without [market] power will spin the wheels of the courts—at great expense—for no substantial result. Markets have a comparative advantage over courts in dealing with the conduct of firms that lack market power.

Comparative Advantage and Antitrust Law, 75 CAL. L. REV. 983, 989 (1987), see Petitioner's Brief on the Merits at 19. Kodak also quoted Justice O'Connor's concurrence in Jefferson Parish: "If the seller of flour has no market power over flour, it will gain none by insisting that its buyers take some sugar as well." 466 U.S. at 37-38 (O'Connor, J., concurring), see Petitioner's Brief on the Merits at 19-20.

\(^{190}\) 112 S. Ct. at 2089 n.29. The Court noted that Image Technical offered "an alternative theory, supported by the record, that suggests Kodak is able to exploit some customers who in the absence of a tie would be protected from increases in parts prices by knowledgeable consumers." Id. at 2089 n.29. The Court also pointed to the plaintiffs' claim of "forced unwanted purchases at higher prices and price discrimination." Id. at 2089 n.29. "While it may be, as the dissent predicts, that the equipment market will prevent any harms to consumers in the after markets, the dissent never makes plain why the Court should accept that theory on faith rather than requiring the usual evidence needed to win a summary judgment motion." 112 S. Ct. at 2089 n.29.

The most notable such opinions are Business Electronics and Justice O'Connor's four-Judge concurrence in Jefferson Parish. Kodak dashed Chicagoan dreams that these would be joined by many more.
settled practice (as courts so often do), it seemed deliberately to highlight the change: "Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." Kodak's procedural posture exacerbated this concern, but the concern has wide potential application.

3. Trust in the Market

More generally, the Court showed less faith in the robustness of the market than is associated with Chicago School thinkers. Even sophisticated buyers may lack information, the Court observed, because information is expensive to acquire and participants in the market may have untoward incentives. Competitors may remain reticent if the market is an oligopoly and they hope to profit from buyer ignorance. Sophisticated buyers may not solve the problem, because price discrimination may prevent their participation from improving the lot of the unsophisticated.

The potential importance of this new hesitancy cannot be overstated. Most notably, it has possible ramifications for the "sophisticated buyer" defense in merger law, but it goes well beyond that. Perhaps the essential difference between activists and more permissive antitrust thinkers is the degree of confidence in the market's ability to remedy problems.

192 112 S. Ct. at 2082. "This Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' In determining the existence of market power ... this Court has examined the economic reality of the market at issue." 112 S. Ct. at 2082 (citations and footnotes omitted). Among the authorities on which the Court relied was Justice White's concurring opinion in Continental TV., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 59 (1977), where he argued for preserving the per se rule against certain nonprice vertical restraints.

193 See supra text accompanying notes 139–40.

194 One can almost imagine plaintiffs' lawyers assembling parades of plaintiffs prepared to declare that they are less sophisticated than the plaintiffs in Kodak. Kodak made a point of reminding the Court that "'sophisticated business purchasers of technologically advanced and complex equipment' such as were involved in these markets were among the customers most capable of effectively estimating costs. Petitioner's Reply Brief on the Merits at 12 n.12 (quoting 9 PHILLIP AREEDA, ANTITRUST LAW § 1712, at 145 (1991)). This may have overstated the consistency of the buyer expertise, but surely there are many markets in which buyers are less capable than in Kodak.


196 Herbert Hovenkamp, Mergers and Buyers, 77 VA. L. REV. 1369 (1991). The 1992 Merger Guidelines analyze how buyer characteristics can in some circumstances reduce the risk of anticompetitive results. 1992 Merger Guidelines § 2.12. Kodak is unlikely to affect significantly this kind of very specific consideration of buyers; instead, it cautions against more blunderbuss assertions that large customers eliminate antitrust concern.

197 Also important is the converse of this, namely, the comparative confidence in the ability of government intervention to improve matters. See, e.g., Frank H. Easterbrook, Comparative Advantage and Antitrust Law, 75 CAL. L. REV. 983 (1987).
At the extreme, true believers in the power of markets would reject all or virtually all antitrust enforcement. Yet this choice is not binary; it is a continuum, and one's place on the continuum says much about one's view of antitrust. In *Kodak*, the Court staked out a position surprisingly far to the interventionist side.

Blame or credit for this positioning must go significantly to the amici who participated in the case. Amici protested that the world did not work the way Kodak suggested. Amici highlighted the distinction between monopoly and market power. Amici developed and provided many of the arguments and authorities the Court found persuasive. Kodak found itself fighting a rear-guard action against changing factual, economic, and legal assertions. The evolving nature of the argument handicapped not only Kodak but also the Court, which had to consider issues that continued to develop even during oral argument.

**D. Conclusion**

*Kodak* has sweeping declarations but confining facts. Everything about the case was premature: the summary judgment motion, Judge Schwarzer's decision, the grant of certiorari, the Court's addressing of critical economic and legal issues even while the arguments were changing. For better or worse, however, the case offers important teaching about summary judgment, tying, market and monopoly power, monopolization, and antitrust economics. How these lessons will be applied in particular cases will make all the difference. *Kodak*'s progeny, if any, will determine whether the case is sui generis, an antitrust fountainhead, or a Pandora's Box.

**IV. SUMMARY**

In this significant Supreme Court antitrust year amici played leading and in part beneficial roles. They highlighted tension between theories set forth by parties and alternative views of actual practices. In *Morales* the amicus federal government prevented the states from arguing successfully that they were acting consistently with federal interests. *Ticor* became a different case when the states explained the very limited extent of actual regulation. The *Kodak* litigation changed dramatically when

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199 At the very end of his oral argument, for instance, Kodak's lawyer was asked about Kodak's alleged favoring of its more sophisticated customers. He responded only very briefly, with time running out, that the self-servicing customers are merely the largest, not the most sophisticated; he thus did not address the argument that later appealed to the Court. Official Transcript at 18.
customers and insurance companies came forward to dispute Kodak's depiction of the competitive process.

Participation by amici also imposed costs, however. The Ticor amici camouflaged the case's difficulty, since the regulators (or their lawyers) said there was no regulation. In Morales, the United States's highlighting of inconsistencies between state and federal approaches made the outcome seem pre-ordained, but left difficult line-drawing for later. In Kodak the Court was obliged to address important issues, arguments, and authorities raised by amici very late in the proceedings. The timing made adequate briefing and debate impossible; the result was an opinion with a mother lode of analysis and discussion the import of which cannot now be known.