Monopoly Dominance or Level Playing Field - The New Antitrust Paradox

Richard A. Epstein

Follow this and additional works at: https://chicagounbound.uchicago.edu/journal_articles

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.
The central theme of antitrust law is its decided preference for competition over monopoly in a wide range of product and service markets. The argument for this position does not rest on any simple or mechanical application of the general libertarian prohibition against force and fraud. Instead, ultimately it depends strongly on an explicitly utilitarian framework whose central tenet is that in the general case, social welfare is greater in competitive than monopoly industries. Yet beneath this general agreement lies much disagreement about just what sort of conduct should be caught by antitrust law. In Part I, I argue that the wisest course of action is to confine the operation of antitrust law to cartels and mergers that have the consequence of raising prices and restricting output. Even in this context, treble damages create serious risks of overdeterrence, but at least it is possible to tell a consistent story as to why antitrust law moves beyond the libertarian prohibitions against force and fraud. In contrast, the treatment of unilateral practices—predation, exclusive dealing, and tie-ins—are not grounded on a similar theory, and are thus subject to three key objections: their excessive reliance on “intent” evidence that is easily misconstrued; their inability to come up with a powerful explanation as to why practices that are regarded as efficient for ordinary firms are treated as illegal for dominant ones; and their inability to separate reliably pro- from anticompetitive practices. In Part II of this Essay, I examine in some greater detail the controversial decision in *LePage’s Inc v 3M (Minnesota Mining and Manufacturing Co)*\(^1\) in order to show the deleterious consequences that flow from the aggressive condemnation of unilateral practices. The general conclusion is that antitrust law should abandon its attack on these unilateral practices altogether, or at least sharply circumscribe their use.

\(^{\dagger}\) James Parker Hall Distinguished Service Professor of Law, The University of Chicago, and Peter and Kirsten Bedford Senior Fellow, The Hoover Institution. My thanks to Aditya Bamzai for his excellent independent study, “An Antitrust Framework: Single-Product and Bundled Loyalty Rebates,” which also examines the scope of § 2 liability, and to Eric Murphy and Alix Weisfeld for their usual stellar research assistance.

\(^{1}\) 324 F3d 141 (3d Cir 2003) (en banc), cert denied 124 S Ct 2932 (2004).
I. A TALE OF TWO SECTIONS

A. Section 1: Paradigmatic Violations

It is easy to find a strong theory that accounts for the imposition of some liability in the standard cases brought under § 1 of the Sherman Act, which, roughly speaking, punishes any contract or combination that operates in restraint of trade. The paradigmatic antitrust violation is the cartel agreement, whereby firms that control a substantial share of some market collude with respect to prices, territories, or other terms in ways that allow them to raise prices above the competitive level by restricting output. These monopoly practices result in lost sales of units priced below the monopoly but above the competitive prices, so that the change in market structure does more than shift wealth to the monopolist from its customers; it also forecloses beneficial transactions that would otherwise take place.

Making good on this simple premise in cartelization cases is no easy task. There are a number of heavy evidentiary burdens that have to be met, and oftentimes the proof of collusion, which is a concealed offense, can be difficult to obtain even if circumstantial evidence is permitted, as it should be. The mistakes can run in either direction, so that both Type I and Type II errors can occur. But even if the evidence cuts in favor of the plaintiff, it is unlikely that antitrust law has chosen the optimal level of damages consistent with its professed welfareist orientation. In principle, the correct measure of private damages to the individual plaintiff should reflect the social loss from the practice. Any errors in making this calculation should not be biased to favor either plaintiff or defendant.

That result turns out to be quite difficult to achieve. Thus, in a physical injury case, suppose a defendant saves $100 by failing to take

---

2 15 USC § 1 (2000):
§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

3 See Matsushita Electric Industrial Co, Ltd v Zenith Radio Corp, 475 US 574 (1986) (holding that the evidence in question must tend to exclude the likelihood that independent conduct could lead to the same result). For the role of error costs in antitrust law generally, see Frank H. Easterbrook, When Is It Worthwhile to Use Courts to Search for Exclusionary Conduct?, 2003 Colum Bus L Rev 345, 357–58 (arguing against the use of raising rivals' costs arguments in antitrust cases because it leads to high error costs).
the precautions that result in injury, while the plaintiff suffers $1000 in damages. Setting the ultimate award at $1000 imposes a net cost on the defendant of only $900, which is equal to the social harm caused by his action. So far it looks as though the two accounts balance out quite nicely. Indeed on these assumptions there is no need to make any estimate of the extent of the defendant's gain from the failure to take precautions. Call that figure $X. When the defendant pays out the $1000, his net losses are $1000 minus $X, which turns out to be the social loss in question. The simple transfer payment thus eliminates the need to quantify the amount the defendant saved in not taking the requisite precautions.

Using this simple measure of damages in the ordinary physical injury case tends to undercompensate relative to social loss, however, because it ignores all harm caused to the relational interests of third persons whose own welfare has been harmed by their inability to do business with the injured plaintiff. Save in the few cases of loss of consortium, these actions tend to be disallowed because of the large number of potential plaintiffs and the major administrative costs that each of their separate actions spawns. One common way to achieve this result is to claim that none of these third parties have "standing," even though they have suffered real losses.

These damage calculations from general tort law should caution us that we cannot be perfectly confident of the magnitude of the losses associated with monopoly or cartel behavior, which in a different fashion also involve a disruption of business behavior. Thus, as a first approximation, the increase in price that the cartel imposes will have two major consequences. The first of these is an increase in price for those customers who decide to remain with the original firm. To be sure, any net gain to these customers from the transaction is reduced by the price increment, but from a social point of view that loss is precisely set off by the gains to the monopolist or cartel, as the case may

\[ \text{4 See Richard A. Epstein, } \text{Torts } \text{§} 17.10 \text{ at } 451-53 \text{ (Aspen 1999) (providing an overview of loss of consortium damages and explaining the rationale for limiting the availability of similar suits to other third parties). As there is no reliable way to calculate the damages suffered by customers unable to do business with the injured plaintiff in either the short or long term, this loss is undercompensated. The difficulty of calculating this social loss is further complicated by the fact that the injured plaintiffs' competitors absorb the business of the injured plaintiffs' customers, partially offsetting whatever social loss was caused. So in the end, the overall sense is in the routine case to ignore virtually all of these complications except in those situations where the damage to a given firm is done with the specific intention, narrowly conceived, to disrupt the business relations of the customers. See, for example, } \text{Tarleton v M'Gawley, } 170 \text{ Eng Rep } 153, 153-54 \text{ (KB 1793) (finding actionable the firing of shots to keep natives from trading).} \]

\[ \text{5 See, for example, } \text{Pruitt v Allied Chemical Corp, } 523 \text{ F Supp } 975, 979-80 \text{ (ED Va 1981) (denying actions to seafood wholesalers and retailers who suffered indirect losses from the spillage of Kepone into the James River and Chesapeake Bay).} \]
be. If that transfer were the only consequence of monopolization, then it would be hard to identify any strong social reason to bother with antitrust law at all: why should the law seek to transfer the wealth back to the customers who have been victimized by the behavior? Administrative and error costs must be incurred without the prospect of allocative gain.

It is precisely because this story is false that antitrust law gains its traction. The increase in price not only produces a transfer of wealth from buyers to sellers. It also results in the loss of transactions that would otherwise take place under conditions of pure competition. That result arises because any buyer who is prepared to pay more than the competitive but less than the monopoly price will drop out of the market. The issue becomes how to calculate the social losses given this state of affairs, which could then serve as a basis of any private antitrust damage award to follow. The first approximation for those social losses is simply the consumer surplus from the lost transactions, which should be paid to those customers who dropped out of the market. If every customer cut back his purchases pro rata, then it would make perfect sense to pay these damages to the existing customers, because they are now the same people as those who left the market. Yet in most cases, the proportionate withdrawal from the market is likely to prove the exception and not the rule, in which case it is virtually impossible to track those people who exited, or never entered, the market. The overcharge in question there is paid back to those customers who remain in the market.

Now if the only sum paid back is an amount equal to the social losses from the forgone transactions, then the cartel will happily continue in operation because in general the amount that is transferred from customers to the cartel members is larger than the social losses from the forgone transactions. That problem is obviated if the cartel is required to disgorge all its increased profits which equal twice the social losses from the lost sales. Once those damages are trebled, then it follows that as a first approximation, under the current treble damages regime, the antitrust plaintiffs recover an amount equal to six times the social losses. This high level of apparent overdeterrence may be

6 Indeed, on some simple assumptions, the loss from forgone transactions equals one-half the amount of wealth transferred. See Keith N. Hylton, Antitrust Law: Economic Theory & Common Law Evolution 46–47 (Cambridge 2003) (arguing that the optimal fine equals the sum of the deadweight loss borne by consumers and the monopoly transfer, insuring that monopolies that increase society's wealth are encouraged), relying on William M. Landes, Optimal Sanctions for Antitrust Violations, 50 U Chi L Rev 652, 653–57 (1983) (arguing that the optimal fine equals the total harm to consumers, which is the sum of the aggregate overcharge and deadweight loss). The key assumption is that the demand curve is linear with a negative slope.
justified as a means to deal with concealed offenses that could easily escape detection. Yet while some multiple looks to be justified, it is far from clear that a sixfold increase is needed. Hence there may still be some residual overdeterrence in the oversized awards offered, which could lead to further allocative imbalances. The amount that will be spent to contest antitrust violations, for example, will increase because of the artificial increase in the size of the stakes. And efforts at further concealment will be heightened in light of the heavy penalties involved. The treble damages action works well to the extent that it persuades firms to swear off illegal activities altogether. But it complicates litigation in the cases where cartels function, or are alleged to function.

The situation becomes even more complicated because the previous model took into account only the position of the cartel and its immediate customers. But like the ordinary physical injury case, it is instructive to trace through the sequence of events that ordinary business parties take in response to the increase in prices. One common prospect is that the buyers in question will be able to pass on all or some of their costs to their own subpurchasers, and hence their losses are equal to the amount of the overcharge paid less the amount recouped. But if the damages are reduced in that regard, then the common assumption is that the subpurchasers would now count as injured parties who are entitled to recoup the excess that they have paid to their sellers. These purchasers too would face the defense that they had recouped some or all of their overcharge from their customers, and so on, ad infinitum.

In order to avoid this endless regression, the Supreme Court lodged the entire right of action in the immediate purchasers. Thus in Hanover Shoe, Inc v United Shoe Machinery Corp, the Court held that any liability of an antitrust violator was not reduced by any sums that it recouped from its subpurchasers. Then in Illinois Brick Co v Illinois, it completed the picture by reading the phrase “person injured” under § 4 and § 15 of the Clayton Act only to apply to immediate purchasers, consistent with a long line of regulatory decisions that imposed this same direct purchaser limitation in determining who

---

7 392 US 481 (1968).
8 Id at 489 (holding that “the buyer is equally entitled to damages if he raises the price for his own product”).
10 15 USC § 12 et seq (2000). See id § 15(a) (“[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States.”).
could sue a regulated industry to collect a refund from an improper overcharge approved by a public utility commission.\(^1\)

Yet even these calculations do not address the question of what happens to those purchasers who drop out of the market. Presumably, they do not cease all economic activity, which means that they have shifted their energies into related businesses that profit from their new arrival. Put simply, these firms have mitigated their economic loss, such that the simple calculations above appear to overstate the amount of loss from cartel behavior. But as in the physical injury cases, the shift of old cartel customers to new firms could complicate the business efforts of the existing customers of these firms, which in turn increases the harm that the cartel has caused. But once again the ordinary tort actions provide the best advice. The difficulties in sorting out these multiple levels are so great that the entire project is just forgotten. The simple trebling of the price increase to those customers that remain in the market becomes the standard measure of damages. At this point the sixfold level of compensation in the example means that the error rate in detecting violations should be extremely low for the entire statutory enterprise to make sense, especially since the administrative costs needed to detect and punish these violations can be very large. I confess that my own brief fling as a disappointed plaintiff's antitrust litigator has led me to doubt that any of this grand program will work, given the ability of defendants to escape liability even in cases where the evidence on collusion is remarkably strong.\(^2\) It therefore is a close question as to whether the expenses of administration and the risk of error make even this poster child case for antitrust enforcement a wise social proposition. But, for these purposes, I shall suppress all the doubts I have about the current regime of treble damages in § 1 cases, and turn my attention to the question of market dominance as it relates to violations of § 2 of the Sherman Act, dealing with monopolization or attempts to monopolize,\(^3\) which gives rise

---

\(^1\) Illinois Brick, 431 US at 728-29.

\(^2\) See Blomkest Fertilizer, Inc v Potash Corp of Saskatchewan, Inc, 203 F3d 1028 (8th Cir 2000) (en banc). For the record, I was counsel for the losing party on the appeal; the case was lost by a 6-5 vote after winning by a 2-1 vote before the original panel. See Blomkest Fertilizer, Inc v Potash Corp of Saskatchewan, Inc, 176 F3d 1055 (8th Cir 1999) (vacated). For the relative strength of the two cases, the reader need, without further comment from me, simply compare the opinions of Judge Beam for the majority, 203 F3d at 1031, and Judge Gibson for the dissent, 203 F3d at 1038. Why bother with any private actions in a system that cannot find liability even in the easy cases?

\(^3\) 15 USC § 2 (2000):

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce
to a private right of action for treble damages and attorneys’ fees under § 15 of the Clayton Act.

B. Section 2: Searching for a Theoretical Base

The difficulties that we observe in making sense of private actions for § 1 violations should raise huge caution flags in dealing with § 2. To be sure, the same treble damage provisions apply, and all of the § 2 violations involve unilateral conduct, such as predatory pricing, tie-ins, and exclusive dealing arrangements, that is plain for the world to see. But § 2 cases lack a strong theory of why the practices in question count as social harms at all, for, unlike the standard theory against cartels, there is no comparably strong theory that undergirds § 2, which deals with monopolization or attempts at monopolization. The most obvious reading of this provision is that it imports the criminal law of attempts into antitrust, so that attempts to cartelize can be punished by the state even if they fail to cohere. At this point, there is no reason to think that the section has any relevance to private antitrust actions at all because failed attempts do not have any real victims. But the entire tenor of the law has moved sharply in the opposite direction, to allow actions against certain unilateral forms of conduct that are said to allow a dominant firm to gain or consolidate its monopoly position. Yet here the absence of a single theory comparable to that which applies to cartels makes this section a jumble of inconsistent tests that serve as a rickety foundation for any potent treble damage action. Predatory pricing, for example, is supposed to pave the way for monopoly profits once the competitors are dispatched. But these theories fail to explain how the predator can recoup tomorrow the huge losses that it has to sustain today, especially when new competitors are always free to enter the market. The poverty of § 2 cases is

among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

14 For some of the doubts, see Hylton, Antitrust Law at 186–229 (cited in note 6) (critiquing some theories of liability under § 2, such as leveraging and predatory pricing, and emphasizing the need to balance anticompetitive effects against efficiency gains).

15 See, for example, LePage’s, 324 F3d at 152.

16 For a summary of the various approaches on exclusion, see generally Herbert Hovenkamp, Exclusion and the Sherman Act, 72 U Chi L Rev 147 (2005).

17 One important qualification to this basic point is that § 1 does not differentiate between concealed combinations that work to raise prices by restricting output and public combinations that seek to gain market share by lowering price. These latter predation cases have received in practice a somewhat different treatment under the Act, as the Supreme Court has been more willing to grant summary judgment in predation cases because of the inherent unlikelihood that the actions in question will produce anticompetitive effects. See Brooke Group Ltd v Brown &

HeinOnline -- 72 U. Chi. L. Rev. 55 2005
revealed by looking at the suspect evidence used to sustain them, the inability to identify any form of paradigmatic wrong to which they are directed, and the high error in administrative costs that these actions entail.

1. Evidence: intentions versus behavior.

The contrast between the two sections is well caught by looking at the relevant types of evidence in both. Most standard approaches to economics hold that it is the behavior that matters and not the verbal statements or intentions that accompany them. Thus, the social effects of cartelization are negative even if individuals think that they have thereby performed some valuable social function. In order to make out their case, they normally are required to show that the cooperation among competitors has some legitimate function, like the prevention of fraud or the expansion of service. Even then, however, cooperation between the parties is allowed only to the extent needed to facilitate the underlying business justification. At every juncture, the judges work to separate out the collusive from the efficient by looking at the probable consequences of the challenged practice. In contrast, in monopolization cases, the theories of legal responsibility often remind one of religious disquisitions on the doctrine of double effect. It is not permissible to think of, let alone wish for, the destruction of one's competitor, but it is permissible to think about the introduction of certain steps that will promote efficiency, even if it is known that

---

Williamson Tobacco Corp, 509 US 209 (1993) (holding that the defendant was entitled to judgment as a matter of law because, under the Robinson-Patman Act, predatory pricing is illegal only to the extent that it threatens to injure competition); Matsushita, 475 US at 592–93 (explaining that without some evidence that an alleged predatory conspiracy would have achieved its monopolistic goals and recouped its losses, it was highly unlikely that such a conspiracy was actually behind the decision to lower prices). For criticism of the predation cases, see Frank H. Easterbrook, Predatory Strategies and Counterstrategies, 48 U Chi L Rev 263, 276–318 (1981), critiquing the standard below-cost test of predatory pricing found in Phillip Areeda and Donald F. Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv L Rev 697, 712–13 (1975) (proposing a rule characterizing pricing as predatory only when the price falls below marginal cost).

18 See California Dental Association v FTC, 526 US 756, 771–75 (1999) (conceding that an association's ban on across-the-board discount advertising could have procompetitive effects if such a ban discourages misleading statements and enhances consumer information through advertising that is accurate and more easily verifiable).

19 See United States v Citizens & Southern National Bank, 422 US 86 (1975) (holding that where there are stringent state restrictions on a bank's ability to establish branches, a bank's program of founding new de facto branches with the intent to acquire them as soon as possible was not a restraint of trade).


21 See id at 784–89 (Breyer concurring in part and dissenting in part); Citizens & Southern National Bank, 422 US at 118–19.
their secondary effect will be to drive a competitor from the market or effectively reduce its market share.

The most famous articulation of this principle is found in Learned Hand's opinion in *United States v Aluminum Co of America* (Alcoa), which addressed the §2 claim as follows: "It does not follow because 'Alcoa' had such a monopoly, that it 'monopolized' the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it." And, to continue the trope that makes monopoly appear like an accession to unwanted greatness, "persons may unwittingly find themselves in possession of a monopoly, automatically so to say: that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; they may become monopolists by force of accident." Thereafter, the Supreme Court in *United States v Grinnell Corp* echoed the theme of Alcoa by noting that §2 cases after Alcoa depended on the conjunction of two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."

Doctrinally, in this formulation, the first element alone is not sufficient to constitute a violation of §2 because it is consistent with the proposition that no wrongful act was used to obtain the initial monopoly position. Hence, the second element with its focus on mental states is critical, but its verbal ingenuity provides no clear guidance as to how any test for liability should be made operational. As a general matter, all competitors wish to "crush" their rivals, and there is no doubt that liability should follow if they choose illicit means—force or fraud, for example—in order to achieve that end." But in ordinary language words like "crush" carry with them a second tier meaning, of someone who desires to secure a decisive victory even by playing within the rules. It makes all the difference whether one baseball team wants to crush another by hitting the ball out of the park, or by sticking pebbles under the soles of their opponents' shoes, or worse, by beaning their batters. The key question of means is elided when this kind of language is treated as though the defendant had used force, as Newton would understand it, against the plaintiff. To hear therefore of

---

22 148 F2d 416 (2d Cir 1945).
23 Id at 429.
24 Id at 429–30.
26 Id at 570–71.
27 See Hylton, *Antitrust Law* at 192 (cited in note 6) for a parallel point.
an intention to crush, without an articulation of the illegal means (force and fraud, typically) is to make liability turn on metaphor and not the criterion of social welfare on which the field itself rests.

2. Effects: adverse consequences or social efficiencies.

The difficulties associated with this conception are compounded by how antitrust law seeks to deal with the endless interplay between the adverse consequences of monopoly behavior and the social efficiencies generated by certain practices. In dealing with §1 cartelization cases, it is possible to identify the prima facie harm from cartelization or territorial division, and then to require the defendant to offer some specific explanation as to why the presumption does not hold in the given case. But with §2 monopolization cases, there is no clear illustration of the paradigmatic wrong, so that the form of argumentation runs quite differently. Any practices prompted by slippery intentions are presumed to have adverse consequences, so that it is now the defendant’s burden to advance some legitimate business justification to defeat the charges lodged against it. But since the vices of monopolization are so poorly understood, the accounts of any business justification are hard to come by, if they are needed at all. The tangles of economic effects are in my view quite misguided: complex industrial practices do not have just a single consequence, either negative or positive.

Let me give one simple example that was suggested to me by Judge Richard Posner’s presentation at this Symposium, which also dealt with matters of market dominance and exclusivity. In *Standard Fashion Co v Magrane-Houston Co*, petitioner, a distributor of standard dress patterns for women and children, brought an action to restrain a potential breach of contract by the respondent, which operated a dry goods store in Boston. The key provision of this contract was one requiring that “the respondent shall not sell or permit to be sold on its premises during the term of the contract [two years, with provisions for renewal] any other make of patterns.” That provision was challenged under §3 of the Clayton Act on the ground that it was a sale whose effect “may be to substantially lessen competition or tend to create a monopoly in any line of commerce.” The parallel to

29 258 US 346 (1922).
30 Id at 354.
31 15 USC § 14.
the attempted monopolization seems clear, only here the defendant
did not face any of the dangers of a treble damage action.

The plaintiff complained that the defendant’s practices excluded
it from this niche in the retail market. Judge Posner made the argu-
ment that the exclusive dealing contract could restrict competition
because it blocked entry by an efficient competitor whose entry strat-
egy was to compete against part of the line. 3 No one would throw off
the old contract if they could not get a replacement that covered the
same territory. True, but also incomplete. Standard Fashion had to
spend considerable advertisement capital in order to build up its reputa-
tion. Indeed, the disputed contract contained advertisement allow-
ances to the respondent, which suggested that Standard Fashion was
investing in building its market. 34 It is therefore equally possible that
this contract should be thought to encourage, not lessen, competition,
on the ground that it prevents new entrants from piggybacking on
Standard Fashion’s advertisement expenditures by using clever internal
displays after Standard Fashion lured them into the store.

The Supreme Court discussed neither exclusion nor free riding,
but took its cue from the decision below:

As the Circuit Court of Appeals, summarizing the matter, perti-
nently observed: “The restriction of each merchant to one pat-
tern manufacturer must in hundreds, perhaps in thousands, of
small communities amount to giving such single pattern manufac-
turer a monopoly of the business in such community. Even in the
larger cities, to limit to a single pattern maker the pattern busi-
ness of dealers most resorted to by customers whose purchases
tend to give fashions their vogue, may tend to facilitate further
combinations; so that the plaintiff, or some other aggressive con-
cern, instead of controlling two-fifths, will shortly have almost, if
not quite, all the pattern business.” We agree with these conclu-
sions, and have no doubt that the contract, properly interpreted,
with its restrictive covenant, brings it fairly within the section of
the Clayton Act under consideration. 35

Unfortunately, the Court’s argument breaks down in both direc-
tions. First, in smaller towns the exclusivity clause does not give the
pattern manufacturer the monopoly. If there is only one outlet, the
retailer will pay a competitive price to suppliers and then extract a
monopoly price from consumers. The exclusive dealing contract does

35 Id at 357, quoting Standard Fashion Co v Magrane Houston Co, 259 F 793, 798 (1st Cir
1919).
not alter this pattern at all; nor does it create a second monopoly. The
retail monopoly suffices. In larger towns, such as Boston, where there
is extensive competition between shops, the exclusive dealing contract
in some shops may well increase, not lower, competition. The same
manufacturer will find it difficult if not impossible to sign up all the
outlets within that given market. The larger the fraction of the market
that he retains, the more attractive it is for some retailers to seek out
other suppliers. If, moreover, the exclusive contracts led to the sup-
posed level of concentration, then it would be impossible to explain
why (in the face of what seems to have been a standard practice) huge
numbers of small pattern manufacturers were able to keep their mar-
et niches. There is no evidence of whether they used the same exclu-
sive clauses that Standard Fashion adopted. But by the same token,
there is no reason to suppose that they would have been subject to
any liability if they had.

*Standard Fashion* thus illustrates the point that for every bad con-
sequence we can attach to exclusive arrangements, we can find other
good ones of comparable weight. It is possible now to generalize from
the unease with *Standard Fashion* to the entire doctrine of market
dominance so critical to the use of § 2. The objection is simple enough:
there are certain business practices that are routinely allowed by firms
that do not possess monopoly power. Since these firms do not have
any market power, the appropriate assumption is that these practices
offer some efficiencies that improve the gains from trade, even if a
reviewing court cannot quite understand exactly why these practices
survive or how they work. At this point, it is best not to interfere with
customary practices because of the limitations of our own knowl-
dge—a useful application of the standard Hayekian theme that
warns against making unlawful practices that are not fully understood.
Section 2 calls all these practices into question because “a monopolist
is not free to take certain actions that a company in a competitive (or
even oligopolistic) market may take, because there is no market con-
straint on a monopolist’s behavior.”

3. Decision calculus: error costs.

This ostensible explanation rests on the confusion between a ty-
rant and a monopolist. The former is not subject to any constraint, but

36 For a parallel version of the argument, independently developed, see David S. Evans and
A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago
Approach*, 72 U Chi L Rev 73, 81–82 (2005) (posing that because nondominant firms also en-
gage in unilateral practices, they must achieve efficiencies for both nondominant and dominant
firms).

37 *LePage's*, 324 F3d at 151–52.
the latter is. It may be able to set prices, but, if so, it is then constrained as to the quantity that it can sell. In addition, the monopolist has two courses of action: one is to take advantage of the absence of competitors, which is socially undesirable. But the second is to reduce its costs in order to increase its profits, which is socially desirable. The difficulty that antitrust law faces therefore is to make tolerably likely that the desire to control anticompetitive practices does not undercut the incentives to become more efficient. Once certain practices used by others are denied to the dominant firm, the law introduces two unwanted sources of inefficiency. First, the efficient practice is now denied to that firm, whose operations must suffer in consequence of that restriction. Second, limiting that prohibition to the dominant firm has the further detriment of distorting competition between it and its rivals, by giving them an undeserved leg up. In the face of these downsides, it seems as though the presumption should be reversed, so that the outsider has to explain clearly why the practice in question is conducive to improper market dominance, and then to separate out clearly the damage elements that are attributable, respectively, to the efficient and restrictive elements of the practice, taking care to see that (treble) damages are awarded only for the second component. The failure to make these appropriate adjustments is a source of major economic misallocation if efficient practices are subject to treble damages at the hands of disappointed competitors who are allowed to recoup through litigation the gains that they could not get through competition in the marketplace. We already know that the cases of predatory pricing often generate exactly this effect. It is hard to figure out when competition falls below (marginal) cost, so that inefficient competitors recover for losses that are attributable to their inability to match the dominant firm.

The same misallocation can happen even when prices do not go below some measure of marginal cost. In order to show how this happens, I propose to review in detail one recent decision, LePage's, which by a 7-3 en banc vote went in the wrong direction in a case of this sort.

II. LePage's Inc v 3M

A. Overview

It is useful to set out the facts of the principal case in some detail. 3M has long been the manufacturer of Scotch tape that is sold for both home and business use. The parties agreed that 3M had a monopoly in the transparent tape market, with a share of over 90 per-
cent. As a frontal attack on Scotch tape did not seem to promise much success, a new rival in the market, LePage's, embarked in 1980 on a campaign to introduce a "second brand" which was sold under a private label, that is, the name of the retailer who sold the product. The strategy proved a success in part because many of the major retail chains such as Office Depot and Staples had developed substantial skills in marketing their own brands. Hence, by 1992, the strategy had secured LePage's a dominant position of 88 percent in this market niche, which remained 10 percent of the national market with nifty profits to boot.

Faced with this threat, 3M launched its own private-label brand to recoup some fraction of the lost business. LePage's lost several of its major accounts to a program of "loyalty discounts" initiated by 3M. These were first introduced under the Executive Growth Fund (EGF), which offered discounts that ranged from 0.2 to 1.25 percent of total sales, resulting in savings to 3M's customers who met their plan targets. The net effect of these programs was striking; LePage's went from a strong profit position to extensive losses on sales during the 1996 to 1999 years. Faced with this debacle, LePage's responded with an antitrust claim that alleged violations of both § 1 and § 2 of the Sherman Act, and § 3 of the Clayton Act. The jury rejected the § 1 Sherman Act claim and the Clayton Act claim, but held for the plaintiff on the monopolization claim. The gist of LePage's claim was that "3M willfully maintained its monopoly in the transparent tape market through exclusionary conduct, primarily by bundling its rebates and entering into contracts that expressly or effectively required dealing virtually exclusively with 3M." These contracts, according to LePage's, were "de facto exclusive."

The exclusionary practices were not simple volume discounts on a single product, which are regarded as legal because they just mirror the reductions in average cost needed to supply large quantities to single buyers. Rather, the loyalty discounts ingeniously offered rebates that were attached to sales for six distinct 3M product lines. The kicker was that if a buyer failed to meet its targets on any given division, it would lose the rebates otherwise available for purchases made in all

38 Id at 144.
39 Id.
40 Id.
41 Id.
42 Id at 170 (Greenberg dissenting).
43 Id at 161 (majority).
44 Id at 147.
45 Id.
divisions. The incentives were therefore to buy across the board in order to maximize the size of the rebate. Note, however, that Scotch tape (both in the first- and second-line brands) did not constitute a separate division for the purposes of this rebate, but was part and parcel of Stationery Products. Thus, it was possible in principle for large chain buyers to meet the targets in this category and still purchase their private-label tape from LePage’s or any other second-line distributor, foreign or domestic, that entered that market segment.

B. LePage’s and Conventional § 2 Violations

The arrangement in question in LePage’s fell between the cracks of the three violations that are normally included in the area of § 2 violations. First, the loyalty discounts did not create any tie-in arrangement, for there was no one product that a buyer had to accept in order to get another that it desired. The system in question allowed all buyers freedom of choice within each category, so that the stated rebate targets could be made by firms that found attractive side deals, including any offered by LePage’s. Indeed, one striking omission in the treatment of the case on appeal was any reference to the percentages of purchases in the various categories that different 3M customers made to meet their targets. Second, there was no sustainable claim of predatory pricing because none of the prices in any of the various categories was set below cost. Third, there was no exclusivity requirement in the deal. The only exclusions were what LePage’s termed “de facto,” based on the fiercely competitive nature of the business.

Throughout the case, 3M’s constant refrain was that hybrid cases did not constitute § 2 violations. In the absence of any tie-in or exclusive dealing arrangement, predation was out because the discounts did not reduce the price of any of the goods below cost. Even that discussion of how the discounts were allocated may have been out of place because it tacitly accepts the view that predation is a viable theory of liability under the Sherman Act, even though the short-term consumer

---

46 Id at 154.
47 Id.
48 I put aside one instructive slip where the court speaks about “exclusionary, i.e., predatory, conduct” as though the two practices overlapped. Id at 152.
49 Id at 151.
50 Id at 147.
51 3M argued that “they were no more exclusive than procompetitive lawful discount programs. And, as it responds to each of LePage’s allegations, it returns to its central premise ‘that it is not unlawful to lower one’s prices so long as they remain above cost.’” Id at 155. See also Daniel A. Crane, Multiproduct Discounting: A Myth of Nonprice Predation, 72 U Chi L Rev 27, 28 (2005) (explaining that since there was no evidence that 3M priced its products below cost, the court could not condemn the rebate program as an instance of predatory pricing).
benefits from this practice more than offset any remote risk that the seller will (at some future and uncertain time) obtain a monopoly by driving all rivals out of the field. 52

To defeat this inference, LePage's reviews the history of litigation under § 2. 53 But this is cold comfort for those who champion the section. Here the court's opening bromide is that the forms of monopolization are so protean that it becomes impossible to articulate a single theory that covers all forms of abuse. 54 But that broad statement should be treated as a sign of weakness that is especially troublesome under a law that trebles damages for a ragtag assortment of violations. Nor is the law that chaotic, for the cases cited by Judge Sloviter in LePage's fall into definite classes, many of which are clearly distinguishable from 3M's pricing rebate strategy. As noted above, the great intellectual tension over antitrust law arises because it does not fit comfortably within the libertarian prohibition against force and fraud that accounts for so much of the tort law in general.

C. LePage's and § 2 Violations by Metaphor

1. Force and fraud.

At first blush, it is hard to see how cases of force and fraud overlap with the types of market injuries that are the province of antitrust law. But that connection is easily formed once a third person is introduced into the picture. In this regard, it is instructive to look at the key cases that the court relied on in LePage's. Thus, in Caribbean Broadcast System, Ltd v Cable & Wireless PLC, 55 the plaintiff claimed that the defendant had made false statements about the plaintiff to third-party advertisers who carried his ads. 56 The purpose of these statements was to keep them from dealing with the plaintiff in the hope that the reduced competition would allow the defendant to preserve its own monopoly position. This case rests on a garden variety defamation claim, which is actionable in both competitive and monopoly markets, but more critical in the latter. Within a competitive industry, most firms are reluctant to defame a successful competitor because any lost business is shared by the other firms in the industry. The defamer incurs all of the cost but garners only a fraction of the business.

52 On the difficulties of proving that the predator could recoup his damages in future periods, see Easterbrook, 48 U Chi L Rev at 333–34 (cited in note 17).
53 LePage's, 324 F3d at 152–64.
54 Id at 152, citing Caribbean Broadcasting System, Ltd v Cable & Wireless PLC, 148 F3d 1080, 1087 (DC Cir 1998).
55 148 F3d 1080 (DC Cir 1998).
56 Id at 1082.
But any firm seeking a monopoly position against a lone competitor
gets all the business that remains, except for any customers that en-
tirely exit the market. Nonetheless, these differences fail to explain
why an antitrust action is needed when a defamation claim, with puni-
tive damages no less, is routinely available.

Similarly, common law theories of fraud properly apply to cases
in which a party seeks to enforce a patent monopoly procured through
fraud, wholly without regard to § 2. In *Walker Process Equipment, Inc
v Food Machinery & Chemical Corp.*, the defendant, who was sued
for the violation of a patent involving an aeration system used for
sewage treatment, turned the tables on the plaintiff by bringing a § 2
claim on the ground that the patent holder had maintained its mo-
nopoly by fraudulently obtaining and maintaining its patent position.58
The social justification for the action is easy to articulate: we grant
patent monopolies with the dislocations that they foster as a quid pro
quo for the initial investment. That quid pro quo is not present when
fraud induces a patent grant that fails to meet this elementary stan-
dard.

Last in this group of cases is *Conwood Co, LP v United States To-
bacco Co,* where the defendant sought to maintain its monopoly in
the sale of moist snuff by removing and destroying the plaintiff's dis-
play racks, by persuading inattentive store clerks to allow its employ-
ees to rearrange the plaintiff's products on store shelves in order to
"bury" plaintiff's products from consumers, by seeking to dupe store
buyers by lying about the relative merits of their respective products,
and by allowing the defendant to have its exclusive racks in key out-
lets.59 Garden variety common law theories cover these first three
counts. Only this fourth allegation, dealing with the exclusive market-
ing agreements, falls outside the area covered by common law prohibi-
tions, but its merits are as controversial here as in *Standard Fashion.*60
*Conwood* therefore does not demonstrate how a demand for an ex-
clusive agreement, independent of other illegal practices, should be
treated.

57 382 US 172 (1965).
58 Id at 176–77 (holding that the enforcement of a patent procured by fraud can constitute
a violation of § 2, provided that all other elements of the violation are proven). See also
LePage's, 324 F3d at 152–53 (citing *Walker* as one of a category of § 2 cases holding that en-
forcement of a legal monopoly provided by a patent procured through fraud may violate § 2).
59 290 F3d 768 (6th Cir 2002).
60 Id at 775–80.
2. Essential facility doctrine.

The fraud cases to which the court in LePage's referred do nothing to bolster the case against 3M's pricing and marketing strategies. But some monopolization cases under § 2 are not instances of force and fraud. Some of these, which are alluded to in LePage's, rely on the theory that the defendants in question have a chokehold position in some critical network industry. The basic insight of this theory is that any party that occupies some form of an "essential facility" through which all of its competitors have to run must make some accommodation so that they can compete in the overall marketplace. The granddaddy of these cases is United States v Terminal Railroad Association of St. Louis, which arose because of the bottleneck position that the Terminal Railroad Association of St. Louis (which contained eighteen member railways) held over the terminal, bridge, and switching facilities in St. Louis, then a major junction point for east-west rail traffic. The physical configuration of the network, therefore, required that the Association give access to competitors who were not members of the Association in order for the system to operate, which it appears that the Association did. Careful review of the record below makes it tolerably clear that the Association allowed nonmembers to use the facility on equal terms with members, even if it did not give them free membership into the Association. At this point, it appears that the dominant firm can extract some monopoly profits from nonusers even with the nondiscriminatory policy in question. The insiders who pay the high prices get their own contributions back in full and divide up the gains from the charges to the outsiders. By the same token, it is difficult to know what remedy should be imposed apart from giving free, or below-cost, membership to the Association to the outsiders. Yet that approach has the evident efficiency cost of giving no credit to the Association members whose foresight initiated the network in the first place. In this regard, the arguments with respect to networks start to resemble those associated with patents, in which the strongest justification for the monopoly position of the patentee is that it speeds up

62 LePage's, 324 F3d at 153 ("A monopolist's denial to competitors of access to its 'essential' goods, services or resources has been held to violate § 2.").
63 224 US 383 (1912).
64 Id at 393–94.
65 Id at 401 ("That the proprietary companies have not availed themselves of the full measure of their power to impede free competition of outside companies, may be true.").
66 See David Reiffen and Andrew N. Kleit, Terminal Railroad Revisited: Foreclosure of an Essential Facility or Simple Horizontal Monopoly?, 33 J L & Econ 419, 435 (1990) (explaining that the government never made a foreclosure argument and a government witness testified that all terminals were available to all railroads on exactly the same terms).
the arrival of new goods or services into the marketplace. It is possible to have the government condemn or build the needed facilities, only to face the familiar marginal cost controversy—the taxes in question lead to distortion in other markets, without there being any guarantee that the government will know which projects to undertake, or where or how to do so.67

As Judge Sloviter noted in LePage's,68 the same problem arose in United States v Microsoft Corp,69 where the gist of the Sherman Act claim was that Microsoft had “foreclosed” entry by Netscape into the browser market as an effort to preserve its dominance in its basic market.70 The underlying theory of the case was that Microsoft sought, by entering into certain exclusive contracts with its key distributors, to undercut the Netscape browser, which could have offered an alternative platform to Microsoft's own operating system.71 To the extent that the Microsoft case involves a single firm in control of a hub, it certainly echoes Terminal Railroad. That parallel is instructive on the questions of both liability and remedy. Here it makes little sense to treat Microsoft as a common carrier, subject to rate regulation. No one doubted that Netscape and others could hook onto the basic service for free.

The key question, therefore, should have been whether the interconnections should have allowed the new entrant to compete in the browser market with Microsoft. One possible solution in this case is to stress the importance of ex post equivalence in the browser market, which could have been achieved perhaps by a rule that required Microsoft's Internet Explorer to be marketed separately from the operating system, but not as part of it.72 This rule is part of what was required in the trade proceedings before the European Union. The point here is that the parallel modes of installation mean that Microsoft

68 324 F3d at 158–59.
69 253 F3d 34 (DC Cir 2001).
70 Id at 58–59.
71 Id at 60–64.
72 See Randal C. Picker, Pursuing a Remedy in Microsoft: The Declining Need for Centralized Coordination in a Networked World, 158 J Inst & Theoretical Econ 113, 137–51 (2002) (arguing that the increased networking of computers reduces the need for bundled software, suggesting the most desirable remedy in Microsoft and similar cases is independent software distribution to avoid market distortions).
cannot parlay its control over the base to giving it an advantage in the
follow-on market. So long as this solution operates only prospectively,
it is not subject to the critique that treble damages overstate the level
of the social losses in question. But, at the same time, mandated sepa-
ration is a structural remedy, which, unlike a fine or damages, intro-
duces at least two related inefficiencies. First, the reduced return in
question may well delay the introduction of any systemwide im-
provement: the willingness to enter is diminished by a requirement
that these improvements be shared with others under an equal-access
constraint. And second, to the extent that the Microsoft product as an
“integrated” unit works better if the browser or other peripheral is
engineered as a single whole with the basic product, then those tech-
nical efficiencies are lost through the mandated separation. We have
therefore a situation in which the purported monopoly gain must be
offset against the delayed innovation of introduction for the new sys-
tem, and increased costs of its operation once in place.

Judge Sloviter tries to assimilate the problem of loyalty discounts
in LePage’s with the network industry cases when she writes: “By
wielding its monopoly power in transparent tape and its vast array of
product lines, 3M foreclosed LePage’s from that critical bridge to con-
sumers that superstores provide, namely, cheap, high volume supply
lines.” Yet once again the metaphor is asked to do the work of a more
complete argument on the key question at hand. There is no single
bridge over which all travelers must move in order for their goods to
reach market. It is well understood that all of the many customers who
once carried, or still carry, LePage’s products are viable conduits to
the ultimate consumer. There is, in a word, no structural element of
monopoly in the distribution market that resembles either Terminal
Railroad or Microsoft. LePage’s makes sense only if there is some § 2
theory that appeals neither to force and fraud nor bottlenecks to es-

d

D. LePage’s and Market Foreclosure

In dealing with this issue, one dominant motif is that of “foreclo-
sure.” The basic argument is that loyalty devices resemble exclusive
dealing arrangements by foreclosing the market to those who cannot
offer parallel discounts across the board. At the very least the theory

73 LePage’s, 324 F3d at 160 n 14 (emphasis added).
74 See, for example, Phillip E. Areeda and Herbert Hovenkamp, Antitrust Law: An Analysis of
question is . . . whether the challenged bundling practices would have excluded an equally effi-
cient rival, without reasonable justification. . . . Multi-product discounts aggregated over a pro-
longed period can in fact be used strategically with anti-competitive results.”).
is subject to the exceptions noted above to explicit exclusivity provisions in cases like Standard Fashion. But here the argument is still weaker. LePage's operates on the assumption that the rival seller of a single product has to combine all of his discounts into the sale of that item because he does not have the comparative luxury to spread that discount over a broader product line. Yet everyone concedes that a discount for the single product alone is lawful, for otherwise antitrust law is turned on its head by penalizing competitive price cuts. Why then ought a different result apply when the dominant seller offers across the board discounts?

Any argument from foreclosure, without more, does not justify antitrust liability because foreclosure is an inevitable consequence of all completed contracts. The successful seller who lures away a customer from a new entrant has foreclosed a competitor, no matter what tactic is used. To hold that foreclosure per se raises an explicit antitrust concern creates the real risk that the new entrant, such as LePage's, will be able to carve out a monopoly niche in some submarket that cannot be attacked by the dominant player. As Judge Greenberg wrote in his LePage's dissent:

In the circumstances, it is ironical that LePage's complains of 3M's use of monopoly power as the undisputed fact is that LePage's, not 3M, was the dominant supplier of private label tape both before and after 3M initiated its rebate programs. Indeed, the record suggests that inasmuch as LePage's could not make a profit with a 67% share of the private label sales, it must have needed to be essentially the exclusive supplier of such tape for its business to be profitable as it in fact was when it had an 88% share of the private label tape sales business.  

This last point is especially instructive because it shows that 3M's tactics were not uniformly successful in the marketplace. Any full account of the situation must explain why LePage's retained some accounts but not others. On this score, the dissent was right to stress the multiple crosscurrents in the struggle for individual accounts that the majority overlooked. The dissent noted that in some instances the buyers testified that they preferred to stay with 3M for reasons that were unrelated to its pricing program. The buyer from OfficeMax spoke of "the consistency of [3M's] service," while the buyer from

---

75 258 US 346. See text accompanying notes 29–36.
76 LePage's, 324 F3d at 175–76 (Greenberg dissenting).
77 Id at 171–73.
78 Id at 172.
American Stores spoke of “quality concerns” with LePage’s tape.\footnote{Id at 172–73.} Only an account-by-account review can show off the relative strength of the dual motives before figuring out the antitrust damages. Is this what antitrust law should do?

Yet the problems with \textit{LePage’s} arguably cut deeper than the dual motive problem. The basic concern of the majority was that the possibility of de facto exclusion from the cross-line discounts could not be matched by any entrant that wished to chip away at a larger monopoly by attacking the system at its most vulnerable point.\footnote{On this theme, see Robin Cooper Feldman, \textit{Defensive Leveraging in Antitrust}, 87 \textit{Georgetown L J} \textit{2079}, 2115 (1999) (arguing that monopolists may engage in "defensive leveraging" by using their monopoly power in one market to enter new markets and shore up their monopoly position).} There is of course nothing wrong with adopting this strategy to break into a new market, including offering sharp discounts on initial purchases, even below costs, in order to generate the goodwill that translates into continued customer loyalty after prices are raised above cost. Loyalty discounts offer an appropriate strategy to implement this plan because establishing a full-line business represents an astute investment in marketing that is entitled to a positive return like any other. The full-line firm need not wait until the first new entrant comes into the market, for it could well use this method before any named competitor comes into view. In so doing it works to cement loyalty by consolidating customer accounts, while leaving customers the opportunity to go outside the net when other good deals present themselves.

In practice, I do not envision any strategy that the entrant can use to counter this advantage. This efficiency advantage could not, for example, be eroded if LePage’s were able to borrow money to withstand the losses in the initial period. No lender would be prepared to make this loan because the incumbent’s strategy is sustainable over the long haul since it is above cost and represents some genuine efficiencies that only one form of market organization can supply. But suppose the practice were at or below cost to 3M if all the discounts were concentrated on this element. At this point, we are back to a claim of predation, which is suspect precisely because it is not sustainable. The situation, moreover, is still odder because if LePage’s could raise the predation claim by acting as though all the discounts were concentrated on tape, then someone else could do the same if it sought to take away some other slice of the vast 3M business. Are these the fine-spun distinctions that we want under § 2? A better social welfare approach is for LePage’s to change its business model by pairing, for example, with a full-service competitor of 3M whose product line its tape could...
fill out; the partnership could gain market share by imitating 3M’s marketing tactics.

Thus far, I have examined this situation solely from the perspective that the only target of the 3M practice is LePage’s. But it seems highly unlikely that 3M would tailor practices that cover six of its departments solely because of the effects that it would have on one very valuable brand. The same practice has ripple effects over 3M’s entire product line. To some extent the majority acknowledged the point by noting that “the courts must look to the monopolist’s conduct taken as a whole rather than considering each aspect in isolation.” That concern does more than treat first- and second-tier transparent tape as part of a single market. It also cries out for some examination of how the loyalty discounts play out across the full range of products in question. Here it is not simply enough to insist that this discount should be attributed in full to the one product that LePage’s sells. It is imperative to know how the pricing policy in question influences competition in all other 3M product lines. On that point, general and specific data count. On the plus side of the ledger, buyers were eager to claim the benefits of the rebate. We have here a situation, therefore, in which antitrust law, which is intended to advance consumer welfare, is now being used to harm at least some consumers in order to benefit a failed competitor. Yet the majority makes no effort to net out the gains to consumers from the losses to LePage’s in deciding either liability or damages. In addition, we do not know how the loyalty discounts play out in other markets. Perhaps they allow 3M to make inroads in product markets once dominated by its competitors. The same process that is said to promote monopoly in one market is far more likely to combat it in a second. But we will engage in massive double-counting if the full extent of the rebate is counted against LePage’s in this case, only to gain a second life against another disappointed competitor in another product line in the next. None of the large buyers in question adopted this weird accounting convention in their own businesses. Antitrust law should not use it either.

CONCLUSION

The three key antitrust violations that have found a home under § 2 are tie-in sales, exclusive dealing arrangements, and predatory pricing, all of which are subject to incisive criticism. LePage’s repre-

---

81 LePage’s, 324 F3d at 162.
82 See Evans and Padilla, 72 U Chi L Rev at 88–90 (cited in note 36).
83 See generally Hovenkamp, 72 U Chi L Rev 147 (cited in note 16).
84 See generally Crane, 72 U Chi L Rev 27 (cited in note 51).
sents none of these dubious categories of antitrust liability. While it involves the bundling of goods for loyalty discounts, it does not require tie-ins. While it involves inducements to purchase more goods from the same firm, it does not involve any explicit exclusive contract. While it involves inducements to purchase more goods from the same firm, it does not involve any explicit exclusive contract. While it involves lowered prices, those prices were not dropped below cost. What the decision stands for is the grim proposition that three misses count as a major hit. In so doing, it ignores the sad truth that antitrust law tries to plow on stony soil when it pushes § 2 liability. The number of § 2 cases that involve false positives is high, the harms that these actions are meant to combat are difficult to identify with confidence, the benefits that these practices create for consumers in the short run are ignored, and the administrative costs of the system are great. Given this somber scorecard, a strong case exists to eliminate civil liability under § 2 altogether, reserving it solely for criminal prosecution against attempted cartels. As a compromise position, eliminating treble damages under § 2 seems to make sense. Failing both, courts should scale back § 2 liability given the evident weaknesses of its intellectual foundations. Let us hope that the Supreme Court, which refused to take certiorari in *LePage's*, ⁸⁵ will eventually set things right.

⁸⁵ 124 S Ct 2932 (2004).