Multiproduct Discounting: A Myth of Nonprice Predation

Daniel A. Crane†

As Herbert Hovenkamp writes in this Symposium, antitrusters continue their search for the verbal formulation capturing the essence of a unilateral exclusionary practice.¹ Consensus on a single form of words encapsulating the full range of offending practices remains elusive. In recent memory, the Supreme Court has contented itself (on the relatively infrequent occasions it has shown any interest in the matter) with defining classes of forbidden conduct, without enunciating a grand unifying theory. So predatory pricing,² patent fraud,³ exclusive dealing,⁴ and certain refusals to deal⁵ are well-known classes of unlawful behavior with distinct legal elements, but one could not perfectly predict from the rules governing such practices all of the necessary and sufficient conditions for a different practice to qualify as exclusionary.

¹ Herbert Hovenkamp, Exclusion and the Sherman Act, 72 U Chi L Rev 147, 148 (2005) ("No generalized formulation of unilateral ... exclusionary conduct enjoys anything approaching universal acceptance."). For another thoughtful exploration of the definitional issue, see Einer Elhauge, Defining Better Monopolization Standards, 56 Stan L Rev 253, 343 (2003) (positing that the proper standard for exclusionary conduct would allow conduct that improves a monopolist's efficiency, while disallowing conduct that impairs rivals' efficiency).

² See Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 US 209, 222–24 (1993) (holding that predatory pricing is illegal only if the defendant's price is below an appropriate measure of cost and the defendant can recoup the costs of predation through supracompetitive pricing).

³ See Walker Process Equipment, Inc v Food Machinery & Chemical Corp, 382 US 172, 176–77 (1965) (holding that the enforcement of a patent procured by fraud constitutes a violation of § 2 of the Sherman Act, provided that all other elements of violation are proven).


⁵ See Aspen Skiing Co v Aspen Highlands Skiing Corp, 472 US 585, 600–01 (1985) (holding that, although a firm with monopoly power has no generalized duty to enter cooperative ventures with its competitors, the monopolist's decision not to enter such ventures has evidentiary value and may, in some circumstances, give rise to liability under the Sherman Act); Lorain Journal Co v United States, 342 US 143, 155 (1951) (holding that a monopolist's general right to choose its business partners is not absolute, and that the exercise of that right can run afoul of the Sherman Act when its impetus is to exclude competitors from the marketplace).
The Third Circuit's en banc decision in *LePage's Inc v 3M (Minnesota Mining and Manufacturing Co)*\(^6\) discovers a new form of exclusionary conduct: bundling through above-cost, multiproduct discounting. In a nutshell, the Third Circuit found 3M liable under § 2 of the Sherman Act\(^7\) for offering its retailer-customers financial incentives to purchase specified quantities of products in its product portfolio, to the detriment of LePage's, which offered only a single product (private-label transparent tape) competitive with 3M's product line. Since there was no evidence that 3M priced its products "below cost," even if all discounts in the package were reallocated to transparent tape,\(^8\) the Third Circuit could not condemn 3M's rebate program as an instance of predatory pricing.\(^9\) No matter. LePage's was not alleging predatory pricing but rather bundling through package discounting; thus, according to the Third Circuit, the standards for predatory pricing did not apply.\(^10\) It was sufficient that 3M's discounts were "exclusionary" of rivals.\(^11\)

The potential impact of the Third Circuit's decision on industrial pricing practices and price competition is substantial. Package discounting (or "mixed bundling") is a pervasive phenomenon in the national economy, and one that produces substantial consumer bene-

\(^6\) 324 F3d 141 (3d Cir 2003) (en banc), cert denied, 124 S Ct 2932 (2004). The Supreme Court denied certiorari after the Department of Justice and Federal Trade Commission opined that "it would be preferable to allow the case law and economic analysis to develop further and to await a case with a record better adapted to development of an appropriate standard" before deciding whether above-cost, multiproduct discounts are immune from antitrust condemnation. Brief for the United States as Amicus Curiae, *3M Co v LePage's Inc*, No 02-1865, *19* (S Ct filed May 28, 2004) (available on Westlaw at 2004 WL 1205191) ("U.S. LePage's Amicus").

\(^7\) 15 USC § 2 (2000).

\(^8\) Unless otherwise noted, throughout this Essay when I speak about cost/revenue comparisons for a particular product I assume that all discounts on other products in the package are subtracted from the revenues for the competitive product. Thus, if Firm X offers a 10 percent discount on Products A–C if customers will buy all three products from Firm X, Firm X's price for Product A would be "below cost" in the way in which I use those words if Firm X's revenues for Product A minus the 10 percent discounts that customers would forgo by buying Products A–C outside the package are less than Firm X's marginal cost of producing Product A. From the perspective of the firm offering the package, this discount reallocation method is the most draconian way of comparing costs and revenues for antitrust purposes; more lenient cost/revenue comparisons may well be justified in many circumstances.

\(^9\) The Supreme Court requires a showing of pricing below "an appropriate measure" of cost in cases of avowed predatory pricing, *Brooke Group*, 509 US at 222.

\(^10\) *LePage's*, 324 F3d at 154–55 (explaining that bundled rebate programs are more akin to tying than to predatory pricing).

\(^11\) Id at 154 (alluding to "the full panoply of 3M's exclusionary conduct"). The court refers to 3M's conduct as "exclusionary" fifty-two times, without ever giving a precise definition of that word's legal meaning. The closest we get is an explanation that there are forms of exclusionary conduct other than predatory pricing, id at 152–54, which is accurate, but no more helpful than defining murder by saying that homicides other than garroting can constitute the crime.
fits." By divorcing the legality of multiproduct discounting from the familiar, if inexact, cost/revenue comparisons of predatory pricing theory, the LePage's opinion sets package discounts sailing on then-Judge Taft's proverbial "sea of doubt" by requiring courts to pass on the reasonableness of prices and discounts without any concrete governing norms. Since even above-cost package discounts are illegal if "exclusionary" of rivals—and we are left with no guidance as to what "exclusionary" means—any multiproduct discount threatening the viability of a competitor could be deemed unlawful, whatever the efficiency of the competitor or the economic sensibility of the discount.

The Third Circuit's separation of multiproduct discounting from predatory pricing lacks any rigorous economic basis. Surely, the justification for discarded the Supreme Court's predatory pricing safe harbor—where revenues exceed costs"—cannot be that the plaintiff decided to label its suit something other than "predatory pricing." If above-cost package discounts are condemned while equivalent single product discounts are privileged, it must be that above-cost package discounts have a greater tendency to cause social harm than their single product counterparts. I will argue in this Essay that reality is just the opposite—that a multiproduct discount is generally less likely to have an exclusionary effect than would an equivalent discount on a single product because the presence of competitors for other products in the package will generally mean that the "victim" firm must absorb less than the entire package discount to remain price competitive. Further, a single product firm that absorbs the entire package discount but can still make sales above cost is no worse off than if the multi-product firm used an equivalent, and entirely legal, single product discount on the competitive product. Thus, above-cost package discounts—like above-cost price cuts of any kind—should be per se lawful.

12 See text accompanying notes 38–46.
13 See United States v Addyston Pipe and Steel Co, 85 F 271, 283–84 (6th Cir 1898) (Taft) (asserting that courts "set sail on a sea of doubt" when they "assume[] the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest and how much is not"), affd, 175 US 211 (1899).
14 See Brooke Group, 509 US at 223 (explaining that low yet still above-cost prices benefit consumers, and that the antitrust laws should not be construed to protect competitors from above-cost prices, since they would then render illegal any decision by a firm to cut prices in order to increase market share).
To unravel these "novel and difficult" questions," this Essay considers package discounts from three perspectives: Part I discusses the perspective of the ostensible "victim" of package discounts—the single product competitor; Part II addresses the view of the alleged "predator"—the diversified firm that offers the package discount; and Part III considers the customer who supposedly is coerced into buying products or services within the package offered by the "predator."

I. THE "VICTIM" PERSPECTIVE

Whatever the platonic definition of "exclusionary conduct," the general concern is over conduct that is without social welfare justifications and is capable of driving out competitors that society would prefer to remain in the market.\(^\text{15}\) Pricing below marginal cost on a single product theoretically meets these criteria.\(^\text{16}\) First, under most circumstances such pricing is irrational absent the prospect of a competitor's exit and recoupment; therefore, its necessary path is toward supra-competitive, and hence socially undesirable, prices.\(^\text{17}\) Second, pricing

\(^{15}\) U.S. \textit{LePage's} Amicus at *8 (cited in note 6). One might take issue with at least the government's "novelty" characterization. \textit{LePage's} is not the first case, even within the Third Circuit, to address the legality of package discounts, see \textit{SmithKline Corp v Eli Lilly and Co}, 575 F2d 1056 (3d Cir 1978) (holding that a discount that effectively required the purchase of a package of competitive and noncompetitive products in order to advance a monopolist's influence and crowd out competitors was an exclusionary practice triggering liability under the Sherman Act), and the issue has been fully discussed in other circuits as well. See, for example, \textit{Ortho Diagnostic Systems, Inc v Abbott Laboratories, Inc}, 920 F Supp 455 (SD NY 1996) (holding that the fact that a monopolist priced all products in a tie-in offer at or above its cost, before discounts were reallocated from monopoly market to competitive market, did not automatically derail a competitor's claims of anticompetitive behavior under the Sherman Act).

\(^{16}\) This formulation leaves for another day the question of whether only "equally efficient" competitors are worthy of remaining in the market or whether those who are not yet as efficient, but may be someday if they are not first excluded by the putative monopolist, are also worthy of some consideration. See Hovenkamp, 72 U Chi L Rev at 153–54 (cited in note 1) (discussing the use of the "equally efficient rival" test in predatory pricing cases, which states that a firm should not be penalized for having lower costs than its rivals and setting its price accordingly).

\(^{17}\) See Phillip Areeda and Donald F. Turner, \textit{Predatory Pricing and Related Practices Under Section 2 of the Sherman Act}, 88 Harv L Rev 697, 732–33 (1975) (concluding that when a company sells its products below marginal or average variable costs, that action should be deemed predatory by the courts and should trigger liability under the Sherman Act). John Lott has offered a persuasive case that the relevant game-theoretic models used to make this claim of predation lack real-world examples. See John R. Lott, Jr., \textit{Are Predatory Commitments Credible?: Who Should the Courts Believe?} 1–3 (Chicago 1999) (stating that few empirical studies have been undertaken to test assumptions about whether predation is in practice profitable).

\(^{18}\) Areeda and Turner, 88 Harv L Rev at 698 (cited in note 17) (arguing that predatory pricing would be irrational unless the potential predator had greater financial staying power than rivals and a substantial prospect of recoupment).
below marginal cost is capable of driving out a less-capitalized firm by forcing losses that the "victim" cannot afford."

Should package discounting be considered akin to below-cost pricing? Let us put aside for the moment the social welfare or efficiency prong and focus simply on the second criterion—the victim firm's ability to mount an effective response. Does the practice of giving customers discounts or rebates to purchase across the supplier's product line threaten single product firms with exclusion? That depends on the structure of both the market and the discount program, as well as the volume of the discounts.

The critical question from the victim firm's perspective is whether it can match the multiproduct firm's discounts without pricing below its cost. Since customers who purchase from the single product firm will forgo the package discounts available from the multiproduct firm, the single product firm must price the single product so as to make customers indifferent on price whether they purchase within the package or à la carte. In some cases, this may mean that the single product firm would have to offer such a large discount in order to remain price competitive that its costs would exceed its revenues. Whether or not the victim firm would be forced to price below cost depends on many case-specific factors.

The victim firm's ability to match the multiproduct firm's effective price depends in part on how much competition the predator firm faces with respect to other products included in the discount package. If the firm offering the package discount faces effective competition as to each product in its portfolio, under most circumstances package discounting cannot put any single firm competitor at any great disadvantage. Suppose, for example, that Multi-Firm makes five products—A, B, C, D, and E—and typically sells each for $10, with a marginal cost of production of $6 per unit. Multi-Firm decides to offer customers a new package discount—10 percent off of each product in its portfolio, but only if the customer purchases one unit of each product. Suppose further that Multi-Firm has five competitors, each of which produces only one of the five products and has the same price and cost structure as Multi-Firm. None of the five competitor firms can match Multi-Firm's entire package discount individually and remain profitable. The discount a customer receives for buying within Multi-Firm's package program is $5, and if any single competitor offered a $5 discount on its single product, it would be pricing at $1 below its marginal cost. But if each of the five competitor firms lowers its price below its cost, the victim firm's ability to match the multiproduct firm's effective price depends on how much competition the predator firm faces with respect to other products included in the discount package.

19 Id at 698-99 (noting that predatory pricing will succeed only where the predator firm has significantly more resources than the competing firm and the barriers to entry are high).
by $1 on its own product, each can profitably sell the goods at the same effective price as Multi-Firm’s package discount price.\textsuperscript{20}

In a market with reasonably good, low-cost information, and firms with reasonably equivalent strength, one would expect implicit coordination of price cuts by the five competitive firms, leading to across-the-board price cuts and something close to egalitarian absorption of the package discount by each of the five competitive firms. If many customers purchase all five products and Firms A through E keep their prices constant at amounts equivalent to Multi-Firm’s pre-discount level, they may lose substantial market share to Multi-Firm and possibly be driven out of business. But if each firm lowers its price by something close to 10 percent, it will make customers indifferent, from a pricing perspective, whether they buy within the package or outside.

It is highly unlikely that a diversified firm could simultaneously monopolize five separate markets through a package discount by starving the competitor in each market of revenues while neither the victim firm nor the victim firm’s counterparts in other markets responded with single product discounts sufficient to neutralize the effects of the package discount. But one can script a scenario where a single firm is forced to bear a disproportionate percentage of the price-cutting burden, perhaps to the point of unprofitability. It is possible, for example, that buyers who tend to buy all five products tend to buy more of Product A than Products B through E and therefore, package discounting leads to a more significant decline in demand for Product A as a stand-alone product than for the four other products in the package. Firms B through E may therefore be able to ignore the package discount and continue to focus on single product buyers, whereas Firm A has no choice but to attempt to match the discounts in Products B through E. Or, Firm A may have a higher minimum viable scale than the other firms such that, whereas Firms B through E choose not to lower price and compete for multiproduct purchasers, Firm A must either do so or exit the market.

Even the presence of competition in the other markets included in a multiproduct discount does not ensure that a firm that does not produce or sell those other products has to match only the discount on

\textsuperscript{20} For purposes of simplicity, I assume that marginal cost or average variable cost (its surrogate) is the appropriate measure of cost for predatory pricing determinations. See id at 702–03. The Supreme Court has never formally decided what the appropriate measure of cost should be, and the federal circuits remain split, although language in Brooke Group Ltd v Brown & Williamson Tobacco Corp, 509 US 209, 219–27 (1993), could be read as an implicit endorsement of a marginal cost test. See Phillip E. Areeda and Herbert Hovenkamp, 3 Antitrust Law: An Analysis of Antitrust Principles and Their Application § 725d2 at 280–81 (Aspen 2d ed 2002).
its own product in order to be competitive on price. It is possible that, even though Multi-Firm faces competition from Firms A through E in each of its five product categories, Firm A must match a discount greater than 10 percent (the amount hypothesized for Multi-Firm’s package discount) and possibly even approaching 50 percent (the 10 percent discount on all five equally priced products) in order to remain price competitive in the single product that Firm A produces. But what about in a world in which Multi-Firm has a monopoly in Products B through E? Firm A is probably going to have to drop its price even more than it would if there were competitors for Products B through E. In order to make customers who want all five products indifferent on price whether they buy the package from Multi-Firm or buy Product A from Firm A and the other four items at Multi-Firm’s undiscounted price, Firm A must drop its price by $5 (in our hypothetical). Since we suppose that Firm A has a marginal cost of $6, this would effectively mean pricing below Firm A’s marginal cost. From the victim perspective, then, such pricing may appear predatory.21

Pricing such as that described in the previous paragraph—where the single product firm would have to price below its marginal cost in order to make customers indifferent on price whether they purchased within or without the package—could be described as anticompetitive. Such pricing has the potential to exclude a competitor that is as efficient as the multiproduct firm (assuming that diversification is not itself a form of efficiency) and to permit the multiproduct firm to recoup the costs of offering the package discount through monopoly pricing. Such package pricing could be described as “below cost” under the theory that, as a matter of proper antitrust analysis, all of the discounts should be reallocated to the market where the single product firm competes. Particularly if the multiproduct firm has a monopoly in the other markets included in the package, one might say that any discounts being given in the monopoly markets should really be considered discounts in the competitive market, since the obvious purpose of such discounts is to maximize sales in the competitive market.22

---

21 I use “predatory” in roughly the same sense as the “sacrifice” theory of exclusionary conduct, see note 52 and accompanying text, where the single product “victim” would have reason to believe that the multiproduct firm would not have undertaken the pricing strategy unless it hoped to drive out the victim firm. Apologies to Richard Epstein, organizer of this Symposium, who believes that “[t]he language of predator and prey is best applied to lions stalking antelopes.” Richard A. Epstein, Simple Rules for a Complex World 110 (Harvard 1995).

22 Since firms have no incentive to discount in monopoly markets, one might say that the monopoly market discount is just a disguised discount in the competitive market.
The optimal legal treatment of such "below cost" package discounting is a difficult question—one that I do not attempt to address here. LePage's does not involve such a scenario, nor am I aware of any other case that does. It is not unusual, however, that a package discount forces the single product firm to lower its price—but only to a level that is still above cost. Such "above cost" package discounting raises different antitrust questions than "below cost" package discounting.

To see why, let us change the numbers in the last hypothetical. Suppose that Multi-Firm and Firm A both have a marginal cost of $6 for Product A, that prior to Multi-Firm's package discount the market price for Products A, B, and C was $10 each, that Multi-Firm has a monopoly over Products B and C, and that Multi-Firm announces a 10 percent discount for any customer who will purchase all three products from Multi-Firm. Assume for the sake of the model that customers generally buy all three products and want the three products in roughly equivalent amounts. In order to remain price competitive with Multi-Firm, Firm A must lower its price to $7. Now customers will pay $27 for one of each of Products A, B, and C whether they purchase within Multi-Firm's package discount or outside. Since Firm A's marginal cost is $6, it is still pricing above cost and will not be driven

---

23 Another difficult question, not presented by LePage's, is what to do if the diversified firm's revenues from all products offered in the package exceed its marginal cost of producing the package but, if all discounts were allocated to a single competitive product in the package, the cost of producing that product would exceed its discount-adjusted revenues. For a thoughtful treatment of this question, see Thomas A. Lambert, Evaluating Bundled Discounts, 89 Minn L Rev (forthcoming 2005). On the one hand, such a pricing strategy could potentially exclude (even in the short run) single product competitors who were as efficient in the production of the single product as the diversified firm. On the other hand, such discounting could be part of a legitimate and nonpredatory business strategy to increase profits. Further, if the discount reflected economies of scope or scale in multiproduct distribution, if consumers preferred purchasing in packages to purchasing à la carte, or if the package discount produced lower net prices than otherwise would be offered, it would seem very unwise to prohibit the discount, even if it led to the elimination of rivals.

24 Different assumptions would change the math, but not the principle. Regardless of the amount of each item purchased, the "victim" perspective would require a computation of the discount that the alleged victim would have to offer to make customers indifferent on price whether they purchased within the package discount or outside of it. For example, suppose Multi-Firm sold Product A for $10, Product B for $8, and Product C for $6, and offered an across-the-board 10 percent discount to customers who purchased at least $100 of goods in each of the categories. Suppose Customer X required fifteen units of Product A, twenty units of Product B, and twenty-five units of Product C. If it purchased all of its requirements from Multi-Firm, its price would be 0.9 \[ 10(15) + 8(20) + 6(25) \] = $414. If it purchased Product A from Firm A, its price from Multi-Firm on Products B and C would be $8(20) + $6(25) = $310. In order to make Customer X indifferent on price, Firm A must offer to sell fifteen units of Product A for $414 - $310 = $104, effectively a per-unit price of $6.93. That is still above Firm A's marginal cost, and the multiproduct discount therefore does not yield an exclusionary short-term effective price from the "victim" perspective.
from the market in the short run. (We take up the long-run implications later.)

Those, roughly, are the facts of LePage's, which instructs us that such bundled pricing is not below cost (even after all discounts are reallocated to the competitive market), but possibly still exclusionary. But, focusing still on the “victim” perspective, it is not at all clear why such pricing would tend to be more exclusionary (from Firm A’s perspective) than if Multi-Firm had simply dropped its price on the single Product A to $7 without using a multiproduct discount to achieve the $7 effective price. Under conventional antitrust principles, a single product discount of $3 would be considered an “above cost” price cut and therefore lawful. If we concede that it would be perfectly lawful, indeed socially beneficial, for Multi-Firm to drop its price on Product A to $7 through a unilateral price cut on Product A, why should it be any less lawful for Multi-Firm to charge an effective price of $7 on Product A by giving a 10 percent discount on Products A, B, and C? Can the package discount be more exclusionary of Firm A than a single product discount of the same amount?

It is possible to answer yes for two separate reasons. First, one could view Multi-Firm’s package discount as a means of price discriminating in a way inaccessible to Firm A. The price discrimination

\[25\] LePage's, 324 F3d at 154–55 (explaining that evidence of an above-cost price after accounting for discounts is not dispositive of monopolization claims); Petition for a Writ of Certiorari, 3M Co v LePage's Inc, No 02-1865, *5 (S Ct filed June 20, 2003) (available on Westlaw at 2003 WL 22428375) (“3M Cert Petition”) (arguing that however reallocated, the discounts did not cause 3M’s prices for private-label tape to fall below cost). If anything, the facts of LePage's were less favorable for the “victim’s” claim of exclusion than those hypothesized here, since 3M claims that it did not have monopolies in the other products in its package. 3M Cert Petition at *19.

\[26\] I am proceeding on the conventional assumption that above-cost pricing on a single product is per se legal, as the Supreme Court held in Brooke Group. 509 US at 222–23. The conventional position, of course, has its detractors. See, for example, Aaron S. Edlin, Stopping Above-Cost Predatory Pricing, 111 Yale L J 941, 945 (2002):

In markets where an incumbent monopoly enjoys significant advantages over potential entrants, but another firm enters and provides buyers with a substantial discount, the monopoly should be prevented from responding with substantial price cuts or significant product enhancements until the entrant has had a reasonable time to recover its entry costs and become viable, or until the entrant’s share grows enough so that the monopoly loses its dominance.

The detractors have their own detractors. See Einer Elhauge, Why Above-Cost Price Cuts to Drive Out Entrants Are Not Predatory—and the Implications for Defining Costs and Market Power, 112 Yale L J 681, 754–807 (2003) (arguing that efforts to restrict above-cost predatory pricing are both harmful and futile).

\[27\] LePage's did not assert a Robinson-Patman claim against 3M. See LePage's Inc v 3M (Minnesota Mining & Manufacturing Co), 1999 US Dist Lexis 8036, *7 (ED Pa); Robinson-Patman Anti-Discrimination Act, 15 USC §§ 13a, 13b, 21a (2000). The price discrimination theory has been floated not as a theory of statutory liability, but rather to explain why package discounting might be exclusionary of single product firms.
The story takes two different shapes, neither of which is persuasive. The first version asserts that package discounts prevent the single product firm from competing for the business of any customer who exhibits very strong demand for certain products in the multiproduct firm’s package discount portfolio. For example, if Multi-Firm offers a 10 percent discount on Products A through C to customers who buy all three, Firm A, which produces only Product A, allegedly faces a tremendous disadvantage in competing for the business of any customer who highly values Products B or C or who needs Products B or C in much greater quantities than Product A. But nothing in Multi-Firm’s package discount offer prevents the customer from buying Products B and C from Multi-Firm and Product A from Firm A, provided that Firm A is willing to make up whatever discount the customer has lost on Products B and C by lowering the price of Product A. If Firm A lowers its price on Product A to make up for whatever discount the customer has forgone on Products B and C and Firm A’s revenues still exceed marginal cost, Firm A is still no worse off than if Multi-Firm had simply dropped its price on Product A to the same above-cost level. The strength of the customer’s demand for the noncompetitive products is irrelevant if Firm A can profitably match Multi-Firm’s discount, and the amount of Products B and C demanded goes only to the computation of how much of a discount Firm A has to match. If the math turns out such that Firm A can match the discount and remain above marginal cost—that is to say, if the discount is “above cost” as that term is used in this Essay—then the single product firm cannot be excluded in the short run.8 (Again, long-run implications must wait.)

The second version of the price discrimination story goes as follows. If not every customer wants to buy all three products in Multi-Firm’s discount portfolio, Multi-Firm will continue to sell individual units of Products A through C at its undiscounted price. But since

---

8 There is no indication in the publicly available record as to whether LePage’s could have matched all of 3M’s discount and remained above cost. The record showed that if all of the discount were reallocated to private-label tape, 3M would have remained above cost. See 3M Cert Petition at *5 (cited in note 25). If LePage’s was as efficient as 3M in the production of private-label tape, it could have matched all of 3M’s discount and remained above cost. LePage’s expert economist testified that LePage’s was not as efficient as 3M in the production of private-label transparent tape. LePage’s, 324 F3d at 177 (Greenberg dissenting). If 3M’s bundled rebates were “exclusionary” because LePage’s could not match them and still be pricing above its marginal cost, then a 3M discount to the same price point but only applied to transparent tape would also be “exclusionary,” even though legal under Brooke Group. 509 US at 222–23. If Brooke Group’s categorical privileging of above-cost single product discounts is justified even when such discounts exclude less efficient competitors, there is no reason to be less protective of package discounts on the grounds that the single product firm may be less efficient in the production of the competitive product.
Firm A is offering only one product for sale—and hence only one price—if it is unable to price discriminate, it must price either all or none of Product A at $7. Such package discounting could be seen as a form of “reducing rivals’ revenues” by forcing a single product competitor to make all sales at the lowest common denominator price, even while the “predator” continues to earn higher profits on certain individual unit sales.

But that is also wrong, for two reasons. First, it assumes that Firm A is stuck with offering a single price on Product A and is unable to price discriminate. Those are not the facts of LePage’s, where the competing firms made their sales as part of individually negotiated contracts with large, powerful retailers such as Wal-Mart, Kmart, Staples, OfficeMax, and Walgreens. Those are not the facts in the general case either. Firms show significant resiliency in figuring out price discrimination schemes when their survival is on the line. For example, Firm A might offer a rebate to any customer who produced a receipt showing the purchase of Products B and C from Multi-Firm, it might ascertain the classes of customer most likely to need all three products and devise a discounted pricing plan targeted to such customers, or it might purchase Products B and C from Multi-Firm and sell its own Product A together with Multi-Firm’s Products B and C at a package-discounted price. While it is possible to devise a theoretical model in which Firm A has no ability to price discriminate and therefore must offer a single low price, it is far more likely in most cases that the single product firm will find a way to offer a discount equal to the package discount in those cases where it must do so to meet the multiproduct firm’s effective price.

Depending on the number of multiproduct and single product customers in the market, Firm A may choose either to drop its price to

\[ \text{29 See David T. Levy and David Reiffen, Vertical Integration as Strategic Behavior in a Spatial Setting: Reducing Rivals' Revenues (FTC Bureau of Economics Working Paper No 165, 1988) (analyzing how vertical integration may deter entry by restricting the potential entrant from selling to its most desirable customers, thus reducing rivals' revenues).} \]

\[ \text{30 See LePage's, 324 F3d at 171-73 (Greenberg dissenting). LePage's responded to 3M's rebate program with targeted price discounts to large customers, which shows that LePage's was not stuck with offering a uniform price scheme regardless of the effects of 3M's discounts.} \]

\[ \text{31 See F.M. Scherer and David Ross, Industrial Market Structure and Economic Performance 491-94 (Rand McNally 3d ed 1990) (cataloguing price discrimination mechanisms).} \]

\[ \text{32 Id at 492.} \]

\[ \text{33 Id.} \]

\[ \text{34 This was the strategy attempted in Aspen Skiing Co v Aspen Highlands Skiing Corp, 472 US 585 (1985), where Aspen Highlands' attempt to form a similar package was rendered unsuccessful by Aspen Skiing's refusal to sell its tickets to Aspen Highlands at retail price. The practice found illegal was not Aspen Skiing's three-mountain package pricing but its refusal to sell tickets to Aspen Highlands at retail price and other refusals to cooperate. Id at 608-09.} \]
meet the effective price of the multiproduct firm's package discount, or keep its price the same and sell only to those who do not want all three products. If the number of customers who would prefer to buy only Product A is relatively large, then Firm A may opt to concentrate on that segment of the market and not attempt to match Multi-Firm's entire discount. If, on the other hand, the number of customers who desire all three products is relatively large, then, unless Multi-Firm is discounting to levels below cost, Firm A could simply apply the entire discount offered by the package to its one product, rendering Multi-Firm's advantage from package discounting relatively insignificant.

The price discrimination story fails to offer a persuasive reason why the "victim" of a multiproduct discount scheme should care whether the $7 effective price it must meet on Product A is the result of a unilateral $3 price discount on Product A or three $1 discounts on Products A, B, and C. But there is a second objection to above-cost package discounting one might offer. Unlike single product predatory pricing, which is inordinately expensive as a long-run strategy, multiproduct discounting employs cross-subsidization and is therefore a sustainable form of long-run predation, or limit pricing, capable of excluding single product firms and creating impenetrable long-run barriers to entry—or so the theory goes. This objection no longer recounts a pure "victim" perspective because it has less to do with the single product firm's ability to meet the package discount than with the multiproduct firm's incentives and ability to sustain the discount program. So now we must move from the "victim's" perspective to the "predator's" perspective.

II. THE "PREDATOR" PERSPECTIVE

Why would a firm give a discount on its monopoly of Products B and C as part of a package sale including Product A on which it faced competition? One possible reason would be to drive out competitors that cannot match the Product A discount, allowing the discounting firm thereafter to recoup (and more than recoup) its price discounting

---

35 A long-run predatory pricing scheme would be foolish to attempt. "Predatory pricing is an extraordinarily expensive and risky way to create market power," Herbert Hovenkamp, Exclusive Joint Ventures and Antitrust Policy, 1995 Colum Bus L Rev 1, 81, and the longer the term of the campaign, the riskier and more expensive the strategy. Even if the "predator" were ultimately successful in driving out a competitor, the likelihood of recouping the present value of prior years' forgone revenues before new entry eliminated the monopolist's ability to charge supracompetitive prices would be highly attenuated. See Matsushita Electric Industrial Co v Zenith Radio Corp, 475 US 574, 588-93 (1986) (describing the speculative nature of predatory pricing schemes and emphasizing the need to determine whether the alleged predator would have had a credible motive to engage in the scheme, as indicated by a strong likelihood of success in neutralizing the competition).
on Products B and C by monopoly pricing on Product A. Such a scenario is economically no different than single product predation, where the monopolist purportedly draws on its "deep pockets" to finance the costs of below-cost pricing while capital market imperfections prevent the victim firm from raising money to mount an effective response. The fact that the "deep pocket" in a case like LePage's is the opportunity cost of not pricing Products B and C at their full monopoly price, rather than the bank account or rich parent corporation of the ordinary predation story, is irrelevant. Money is fungible. It should make little difference to the monopolist whether it finances its predatory campaign through cash in a bank account or through lowering prices on the monopoly products in a package discount. The fact that package discounting could be seen as a form of cross-subsidization of below-cost pricing in a competitive product market does not make the story any more or less plausible than any other predation story. In every predation story, the predator must have access to capital to make short-run investments with the hopes of long-run recoupment.

Although it is possible to recount a package discounting predation story, there is no reason to be generally suspicious of the practice. Package discounting—commonly referred to as "mixed bundling"—is a frequently observed phenomenon (think of "value" menu choices at fast food restaurants, vacation packages, and package pricing on skiing equipment). As the editors of a collection of articles on the marketing purposes of mixed bundling note, "[c]ollecting goods or services in a package and selling them at a (discounted) package price has become a widespread sales practice in many production or service oriented industries." Surely not all firms offering such discounts are predating. As David Evans and Michael Salinger observe, many of the motivations for bundling and tying arrangements also explain the

---


37 See Bolton, Brodley, and Riordan, 88 Georgetown L J at 2291–92 (cited in note 36).


presence of package discounts. Diversified firms may achieve economies of scope or scale, reduce transaction costs, or stimulate demand by selling products in a package, and, as discussed above, package discounting may permit price discrimination. A firm might also adopt package discounting as a strategy to defend or increase its market share. It is this last possibility that the LePage’s majority appeared to view as interchangeable with predation—without good reason.

Undoubtedly, package discounting may permit a firm to exploit its presence in multiple markets in order to obtain an advantage over firms that compete in fewer than all of the markets covered by the discount. The multiproduct firm may hope that single product competitors will not drop their prices to match the entire multiproduct discount, that customers will find it more convenient to purchase in a package deal, that customers using separate “mental accounts” for different products in the package portfolio will prefer the package discount to an equal discount on the single product, or that, for many

---


42 See Simon and Wuebker, Bundling at 13 (cited in note 41).


44 On bundling to price discriminate, see William James Adams and Janet L. Yellen, Commodity Bundling and the Burden of Monopoly, 90 Q J Econ 475, 476 (1976) (“[T]he profitability of commodity bundling can stem from its ability to sort customers into groups with different reservation price characteristics, and hence to extract consumer surplus.”); George J. Stigler, United States v. Loew’s Inc.: A Note on Block-Booking, 1963 S Ct Rev 152, 153 (demonstrating how block-booking of movies can extract larger sums from customers than would otherwise be possible).


46 On “mental accounts,” see Richard H. Thaler, The Winner’s Curse: Paradoxes and Anomalies of Economic Life 107–21 (Free Press 1992) (challenging the assumption that money from various sources is characterized by the same marginal propensity to consume (MPC) and arguing that people compartmentalize their life earnings into different “mental accounts,” exhibiting a high MPC from current income and an almost zero MPC from future income). One can imagine package discounting being a particularly effective strategy with respect to corporate customers, where purchasing decisions are made by different managers controlling separate budgets within a single firm. Since each manager would seek to optimize his or her own individual budget, the distribution of discounts across a range of product purchases might influence the
other reasons, the package discount will be successful in increasing sales. Notably, 3M increased its total sales and profits under its package discount program without LePage’s being forced out of the market.\textsuperscript{47} Unlike single product below-cost pricing, which is irrational in the long run absent the exclusion of a competitor,\textsuperscript{48} long-run package discounting may be a perfectly rational business strategy without regard to any competitor’s demise or the prospect of obtaining monopoly power and recouping.

In contrast to below-cost pricing, then, package discounting is not conduct that makes sense only if a rival fails and exits the market. Is that good or bad news for the practice? That depends on whom you ask. Reverting momentarily to the “victim” perspective, the potential permanence of package discounts seems to be a chief complaint of the single product firm.\textsuperscript{49} Unlike single product below-cost prices, multiproduct discounting is not merely a storm to be weathered. It is a market condition that could continue indefinitely, forcing the single product firm either to maintain a long-run price near marginal cost on its single product, or incur the costs to diversify and move into the other product segments in the multiproduct firm’s package. Either strategy could be fatal. Pricing at less than total cost will eventually put a firm out of business.\textsuperscript{50} Expanding into new areas may require incurring significant sunk costs and, depending on the state of the demand, operating at a less than efficient scale.\textsuperscript{51}

But from a conventional antitrust perspective, the “permanence” objection stands the theory of exclusionary conduct on its head. To take the sacrifice theory of predation that the Department of Justice has recently advanced in its major § 2 cases, conduct is not predatory.

customer’s collective purchasing decisions. The customer might not be willing to exchange a 10 percent discount on equally priced Products A, B, and C for a 30 percent discount on Product A if that meant that the managers responsible for B and C would believe that their oxen were being gored.

\textsuperscript{47} See \textit{LePage’s}, 324 F3d at 175–76 (Greenberg dissenting) (“\textit{N}otwithstanding 3M’s rebates, \textit{LePage’s} was able to retain most of the private-label [tape] business.”).

\textsuperscript{48} Short-run, below-cost pricing for the promotion of new goods or services is common and generally not thought to be predatory. See Areeda and Turner, 88 Harv L Rev at 713 (cited in note 17).

\textsuperscript{49} Herbert Hovenkamp complains that 3M’s discounts “were not only aggregated across multiple products, but also over a \textit{lengthy time period}” and that “[m]ulti-product discounts aggregated over a \textit{prolonged period} can in fact be used strategically with anticompetitive results.” Phillip E. Areeda and Herbert Hovenkamp, \textit{Antitrust Law: An Analysis of Antitrust Principles and Their Application} ¶ 749 at 182–83 (Aspen Supp 2004) (emphasis added).


\textsuperscript{51} See U.S. Department of Justice, \textit{1984 Merger Guidelines} § 4.212, 49 Fed Reg 26823, 26835–36 (observing that a vertical merger may be anticompetitive if it will require competitors to enter a second market at less than minimum efficient scale).
unless its only rational explanation is the exclusion of competitors. Pricing policies that could sensibly continue indefinitely, whatever the ongoing viability of competitors, necessarily fail that definition. The majority decision in LePage's condemns as anticompetitive price discounting that would be perfectly lawful if given on a single product and that could continue indefinitely as part of an ordinary business strategy to increase market share and profits in a competitive market.

Suppose the sacrifice definition of predatory conduct is too narrow. Should we condemn above-cost multiproduct discounting on the grounds that it is analogous to patent fraud, blowing up a competitor’s factory, or other tort-like conduct capable of excluding a competitor that does not involve short-term sacrifice? Surely not. Unlike intentional torts that produce no obvious social welfare gains and cause immediate harms at least to competitors (if not competition generally), above-cost package discounting brings immediate social gains by driving prices toward marginal cost. Further, any risk of future harm is remote. Conduct producing immediate and definite social gains and only speculative long-term social losses under narrowly defined conditions does not deserve its own “exclusionary conduct” subcategory.

LePage’s has it backward. If anything, we should be more indulgent of package discounts than of single product discounts. Even supposing that the reallocation of all discounts to the victim firm’s product market from other products made the effective price in the victim’s market fall below marginal cost, that should not be sufficient grounds for condemning the package discount as anticompetitive. Such a pricing strategy might be adopted for legitimate business reasons and, if effective competition exists for the other products, may not even require the victim firm to absorb much more than some pro rata percentage of the overall discount in order to remain price competitive. Pricing below cost through a unilateral price cut on a single product is more likely to be exclusionary than effectively pricing below cost on a single product subject to a package discount.

It is not my purpose here to propose a comprehensive legal rule governing the legality of below-cost package discounts. For now, it is enough to observe that if a bright line rule of per se legality for above-

---

52 See Virgin Atlantic Airways Ltd v British Airways PLC, 257 F3d 256, 269 (2d Cir 2001) (citing 1997 Department of Justice guidelines on airline pricing for the proposition that “[a] pricing strategy by a suspected predator harms consumers when the strategy is rational only if the victim exits the market”).

53 See Hovenkamp, 72 U Chi L Rev at 158 (cited in note 1) (discussing the problems with applying “sacrifice” or recoupment tests to situations where the practices exclude immediately and are likely to be profitable from the start).

54 See Part I.
cost price cuts on single products is defensible, then a rule of per se legality for package discounts that render above-cost effective prices on all individual products in the package is even more so. At a minimum, firms engaging in package discounting should be permitted to claim as a safe harbor that the effective price in any single product category—revenues from that product minus discounts on all other products forgone as a result of rejecting the package discount—exceeds the marginal cost of producing that product.\(^5\)

From the “predator” perspective, package discounting need not be predatory at all. Firms regularly employ mixed bundling strategies for all sorts of reasons that antitrust enforcers would rate from neutral to procompetitive. If we decide to try to ferret out those infrequent occasions when package discounts are employed for nefarious purposes,\(^56\) we should do so with great care. The Supreme Court has rightly warned that imprecision or error in the definition of pricing offenses would chill vigorous price competition.\(^7\) Discounting in response to competitive pressures is exactly the sort of behavior we hope antitrust law will engender. The _LePage’s_ decision regretfully condemns as anticompetitive above-cost discounting without offering any clear guidance on when mixed bundling will be deemed illegal. That the decision will have chilling effects on price discounting may be hard to demonstrate, but corporate lawyers will surely find it hard to bless package discounts without further clarity in the governing legal standards. And it is not hard to imagine that the threat of a treble damages lawsuit under a standardless above-cost bundling theory could be used

---

\(^{55}\) There is precedent in federal courts for such a rule. See _Virgin Atlantic Airways Ltd v British Airways PLC_, 69 F Supp 2d 571, 580 n 8 (SD NY 1999) (requiring a showing that “the competitive product in the bundle [was] sold for a price below average variable cost after the discounts on the monopoly items in the bundle were subtracted from the price of that competitive product”), affd, 257 F3d 256 (2d Cir 2001).

\(^{56}\) I do not mean to suggest that an otherwise lawful pricing policy should be rendered unlawful simply by evidence that its implementers hoped that it would drive a competitor out of the market. See Richard A. Posner, _Antitrust Law_ 214–15 (Chicago 2d ed 2001) (arguing against intent-based doctrines of exclusionary conduct). Rather, any theory of predatory bundling should be limited to those circumstances where the package discount makes no rational sense absent the exclusion of a competitor and the ability to recoup by charging monopoly prices.

\(^{57}\) See _Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP_, 540 US 398, 414 (2004) (“Mistaken inferences and the resulting false condemnations are especially costly, because they chill the very conduct the antitrust laws are designed to protect.”), quoting _Matsushita Electric Industrial Co v Zenith Radio Corp_, 475 US 574, 594 (1986). See also Frank H. Easterbrook, _Predatory Strategies and Counterstrategies_, 48 U Chi L Rev 263, 336 (1981) (“Conduct that might be predatory always involves lower prices, greater output, innovation, or other features that usually increase consumers’ welfare. Any attempt to administer a rule against predation entails a significant risk of condemning the outcome of hard competition.”).
by single product firms to deter vigorous price competition by diversified rivals.\textsuperscript{58}

We have now seen that the "victim's" best objection to package discounts is their potential permanence, which should also be the "predator's" best defense. It remains to ascertain the perspective of the third party to the transaction—the party antitrust law exists to protect\textsuperscript{59}—the customer.

III. THE CUSTOMER PERSPECTIVE

Customers generally like price discounting, but prefer not to pay lower short-run prices if this will drive some firm out of the market and permit the remaining firm to institute long-run monopolistic prices.\textsuperscript{60} That much is obvious and uncontroversial. The consumer preference question becomes stickier when the package discount program remains in place for the long term and, although it does not necessarily exclude any competitor, induces the customer to do business with a single supplier. In this vein, Herbert Hovenkamp believes that "the facts [of LePage's] are more readily likened to tying or exclusive dealing than to predatory pricing."\textsuperscript{61} Tying claims do not require the same showing of short-term sacrifice, predatory triumph over a competitor, and eventual supracompetitive pricing and recoupment as does a conventional predatory pricing claim.\textsuperscript{62} It is enough that the tying arrangement has "forced" the customer "to make a less than optimal choice" in the tied product market.\textsuperscript{63}


\textsuperscript{59} See \textit{State Oil Co v Khan}, 522 US 3, 15 (1997) (explaining that by protecting interbrand competition, antitrust law aims to promote lower prices, which benefit consumers).

\textsuperscript{60} Although consumers as a class prefer not to accept predatory prices if they result in long-term supracompetitive prices, this of course does not mean that predatory pricing schemes will always be beaten back by farsighted consumers, since consumers face collective action problems in resisting predatory schemes. See, for example, John Vickers, \textit{Market Power and Inefficiency: A Contracts Perspective}, 12 Oxford Rev Econ Policy 11, 24 (1996) (suggesting that, given economies of scale, there is no inconsistency between the statements that consumers overall would be better off if no consumer patronized a given company and that each individual consumer is best off by patronizing that company).

\textsuperscript{61} Areeda and Hovenkamp, \textit{Antitrust Law} ¶ 749 at 175 (cited in note 49).

\textsuperscript{62} See \textit{Nobody in Particular Presents, Inc v Clear Channel Communications, Inc}, 311 F Supp 2d 1048, 1091–92 (D Colo 2004) (explaining that § 1 tying claims do not require a showing that the defendant seeks to monopolize the tied market).

\textsuperscript{63} \textit{Fortner Enterprises, Inc v United States Steel Corp}, 394 US 495, 512 (1969) (White dissenting). See also \textit{Jefferson Parish Hospital District No 2 v Hyde}, 466 US 2, 12–15 (1984), on tying as a form of "forcing" the consumer into an undesired choice.
If they mind at all, consumers dislike tying arrangements because such practices deprive them of some preferred choice and increase their costs. For example, in *International Salt Co, Inc v United States*, International Salt's customers might have preferred to purchase their salt requirements from International Salt's competitors for any number of business reasons, but were prohibited from doing so if they wanted to lease International Salt's patented salt machines. But any analogy between the compulsory contractual terms in *International Salt* or other bona fide tying cases and the multiproduct discount in *LePage* is weak. If customers chose to purchase within 3M's discount package, it was only because the package discount offered them a better price than they otherwise would have obtained.

It is not sensible to object that package discounting behaves, as a practice, like tying because it forces customers to forgo their preferred products for other, less desirable ones. Customer product preferences assume a price point and, if the price point changes, so do the preferences. Suppose that Customer X would prefer Firm A's Product A to Multi-Firm's Product A if both were priced at $10. If Multi-Firm dropped its price from $10 to $8, Firm A stayed at $10, and Customer X now purchased from Multi-Firm because the quality differential between Multi-Firm's Product A and Firm A's Product A was worth less than $2, we would not say that the price discount coerced Customer X to forgo her true preference. We would say that Customer X revealed her true preference.

One might try to say the same thing about ordinary contractual tying, but the comparison does not work well. It is true that International Salt's customers revealed a preference for buying International Salt's patented salt machines together with International Salt's salt over whatever alternatives were available, but they might have preferred to buy the salt machines separately from the salt. That option was not available at any price. But suppose that, instead of requiring customers contractually to commit to purchasing its salt, International Salt had offered a discount on its salt machine to any customer who agreed to enter into a salt requirements purchase contract. Would any customer be unhappy with such an offer in the sense that she would

---

64 See Posner, *Antitrust Law* at 200–02 (cited in note 56) (arguing that tying arrangements are seldom harmful to consumers and are often beneficial).

65 332 US 392 (1947).

66 Id at 393. International Salt required customers who purchased its salt machines to agree contractually to purchase their salt requirements from International Salt as well. Customers were permitted to purchase salt from competitors if the competitors offered the salt at a lower price, but were required to give International Salt notice and an opportunity to match the competitor's price. Id at 394 n 5. The federal government successfully challenged this practice as a tying arrangement.
prefer that International Salt offered no discount on its salt machines? Clearly not—unless the long-term effect of the discount program was that International Salt would deprive other salt sellers of a market, obtain a monopoly over salt, and eventually increase the price of salt to monopolistic levels. When it comes to package discounts, then, the only sensible antitrust question is whether they threaten to drive out equally efficient rivals and permit recoupment at supra-competitive prices, not whether they act like tying arrangements in coercing customers to abandon preferred choices. Whatever their juridically proper legal category, package discounts should be tolerated, at least in cases where they do not render prices effectively below cost in any market covered by the package.

The tying analogy is not aided by the observation that customers would prefer it if the multiproduct firm offered the same level of discounts on each product in the package without making the discount contingent on purchases in another product category. If the multiproduct firm adopts package discounting as a strategy to increase its market share in a product category where it faces competition by giving discounts in product categories where it has a monopoly, there is no "but for" world in which the multiproduct firm lowers its price over the monopoly products without getting some gain in the competitive category. Monopolists do not lower their prices from the profit-maximizing point without inducement. A rule prohibiting package discounts as "tying" will mean a return to higher prices in the monopoly categories without any corresponding benefit in the competitive category.

The exclusive dealing analogy fares no better than the tying one. Einer Elhauge argues that multiproduct loyalty rebating should be treated as a nonprice offense because "by foreclosing the market share rivals need to reach the minimum efficient scale, loyalty rebates

67 See Phillip E. Areeda and Herbert Hovenkamp, 9 Antitrust Law: An Analysis of Antitrust Principles and Their Application § 1714e at 141-43 (Aspen 2d ed 2004) (identifying predation, not tying, as the proper primary concern for antitrust). I do not mean to deny that there is statutory and case law authority treating package discounts as tying arrangements. See id § 1700i at 9-10 (noting statutory support for the idea that a tie may be present without coercion and claiming that a transaction "may be 'voluntary' in the sense that a buyer can obtain the first product separately from a supplier and yet be a tie-in when the buyer's choice to purchase the second product from that supplier is substantially influenced by the terms under which the two products are sold together"). What I dispute is that there is any economically sound basis to condemn an above-cost package discount as a "tie" under § 3 of the Clayton Act or § 1 of the Sherman Act when the practice is not exclusionary of rivals or tending to create monopoly power. If a package discount is not exclusionary of competition, it cannot be condemned on the alternative grounds that it deprives customers of their independent choices, since package discounts can only offer customers more choices than they otherwise would have had.

68 This discussion assumes that the multiproduct firm has a monopoly—or at least "market power"—in the "tying" market, a prerequisite for a tying claim. Jefferson Parish, 466 US at 13-14. This appears not to have been the case in LePage's, which further weakens the tying analogy.
can raise rivals’ costs or exclude them from the market altogether. But above-cost package discounts do not “foreclose” the single product firm from competing for customers. If the single product firm can match the diversified firm’s effective price and remain above cost, it is no more “foreclosed” than if a single product rival dropped its price to the same above-cost level.

The exclusive dealing model of antitrust analysis does not do justice to above-cost package discounts. To be sure, the firm that offers the lowest quality-adjusted price may “foreclose” competitors from obtaining business from customers, and customers will naturally choose to deal exclusively with the firm offering the lowest quality-adjusted price. But that is true of any form of legitimate price competition—the firm offering the lowest price gets the business. Firms of equal efficiency to the discounting firm can—and should, if they want to stay in the market—drop their own prices in response to the discount leader’s price cuts. “Foreclosed” in the context of above-cost package discounting is just a euphemism for “unwilling to price compete.”

In contrast to tying and exclusive dealing arrangements, which purportedly tend to restrict consumers’ choices and increase their costs, package discounts tend to enhance consumers’ choices and decrease their costs. From the consumer perspective, then, package discounts should not be unwelcome unless they are exclusionary of rivals to the point of creating monopoly power in the discount offeror. This just takes us back to the question of whether a package discount is any worse from the “victim” perspective than a single product discount of the same magnitude. For the reasons discussed in the previous two Parts, the answer remains no.

If package discounts are neither coercive nor exclusionary of rivals, then a legal rule discouraging their use will only make products and services more expensive, much in the same way as a rule prohibiting pricing below total cost would. From the customer perspective, the LePage’s holding should rank along with Utah Pie Co v Continental Baking Co and United States v Von’s Grocery Co as a protection-
ist opinion with virtually no consumer benefits and substantial consumer costs.

CONCLUSION

Package discounting is a common phenomenon among firms that have no predatory ambition. It is a business strategy that often makes perfectly good economic sense without any need for injury to a rival. In the short run, it cannot harm competitors any more than an equivalent price discount on a single product and, in the long run, it increases consumer welfare by lowering the price of goods and services even if no competitor exits the market. While a firm could conceivably employ package discounting as part of a predatory strategy, the conditions under which such a strategy is likely to be successful are narrower, not broader, than those necessary for single product predation. LePage's thus errs in treating package discounting as less legally privileged than single product price discounting.

As Richard Epstein hints in this Symposium, there are persuasive reasons to abandon the entire enterprise of condemning prices as too low.\(^73\) If one believes in conventional predatory pricing theory, package discounting should be included as a narrower subset of the broader theory. Above-cost effective prices in the competitive market (after reallocation of discounts from the other markets) should be a safe harbor for any multiproduct firm. Any other legal rule will discourage discounting to the detriment of consumers.

The government's amicus brief recommending against certiorari in LePage's advocates percolation of the package discounting issue among the circuits while an economic consensus on the merits develops.\(^74\) One can only hope that by the time the Supreme Court reaches the issue, the consensus will not be that LePage's has cost consumers billions of dollars in lost discounts.

---

\(^73\) Richard A. Epstein, Monopoly Dominance or Level Playing Field? The New Antitrust Paradox, 72 U Chi L Rev 49, 49 (2005) (criticizing the ways in which antitrust law condemns unilateral practices without providing an explanation "as to why practices that are regarded as efficient for ordinary firms are treated as illegal for dominant ones"). See also Easterbrook, 48 U Chi L Rev at 336–37 (cited in note 57).

\(^74\) U.S. LePage's Amicus at *19 (cited in note 6).