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Coercion, Deception, and Other Demand-Increasing Practices in Antitrust Law

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COERCION, DECEPTION, AND OTHER DEMAND-INCREASING PRACTICES IN ANTITRUST LAW

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I. INTRODUCTION

Allegations of coercion and deception have been prominent in recent antitrust cases.[1] Such allegations are not entirely new to antitrust, of course: coercion has long been an element of tying claims,[2] and the Supreme Court has accepted that certain practices that mislead consumers—the manipulation of product standards, for example—can be antitrust violations.[3] But some of the recent cases do not fit neatly into these categories, and the Court has never articulated general rules for determining what coercive and deceptive practices violate the antitrust laws. Consequently, the lower courts are forced to decide these cases without Supreme Court guidance, and the result is much uncertainty.

One such recent case, *Jefferson County School District No. R-1 v. Moody's Investors Service, Inc.*,[4] will illustrate the difficulties that claims of coercion

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[1] These cases include claims that a bond-rating agency issued or threatened to issue inaccurate ratings to force bond issuers to purchase its rating services, *see infra* text accompanying notes 4–11 and 187–206; claims that a Florida electric utility deceived its customers regarding the electricity consumption of electric swimming pool heaters to discourage them from purchasing solar-powered ones, *see infra* text accompanying notes 259–67; and challenges to Microsoft's use of its operating system to increase demand for its other products, *see infra* part V.B.2.

[2] *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) ("Our cases have concluded that the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to *force* the buyer into the purchase of a tied product . . . .") (emphasis added).

[3] *See* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982).

[4] No. 95-WY-2649-WD, slip op. (D. Colo. Apr. 4, 1997), *appeal docketed*, No. 97-1157 (10th Cir.). The Department of Justice is also investigating Moody's marketing practices. *See* Suzanne Woolley et al., *Now It's Moody's Turn for a Review: The Justice Department Is Probing Possible Antitrust Violations*, BUS. WK., Apr. 8, 1996, at 116.

and deception present. The defendant is Moody's Investors Service, Inc., one of the two leaders in the business of rating the creditworthiness of debt issuers.[5] The plaintiff is a Colorado school district that chose not to hire Moody's in connection with a bond issue, relying instead on two other rating services.[6] Moody's learned on the morning of the issue that it would not be hired, and that morning issued a statement that "[t]he outlook on the district's general obligation debt is negative" and announced that it would issue an unsolicited rating of the district.[7] As a result, investors became concerned, and the district had to pay a higher interest rate to complete the issue.[8] The plaintiff alleged that the statement regarding the "outlook" for its debt was "materially false" and "misleading,"[9] and that an unsolicited rating from Moody's "is invariably lower" than solicited, paid-for ratings.[10] Moody's purposes in making the statement and the "threat" of the unsolicited rating, the plaintiff claimed, were to "penalize" it for not hiring Moody's and "to force [it] and other issuers to purchase Moody's ratings in future sales."[11] These actions, it claimed, constituted monopolization and attempted monopolization in violation of Sherman Act Section 2.

Assuming that the plaintiff's allegations in *Moody's* are factually correct,[12] do they indeed describe an antitrust violation?[13] As noted

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[5] There are six rating agencies that the SEC has approved as nationally recognized statistical rating organizations (NRSROs), but only four are "full-service" agencies: Moody's, Standard & Poor's Corporation, Fitch Investors Service, Inc., and Duff and Phelps, Inc. *See* Public Securities Ass'n, SEC No-Action Letter, Fed. Sec. L. Rep. (CCH) ¶ 77,114 (Sept. 29, 1995). The plaintiff in *Moody's* alleged that Moody's and Standard & Poor's are the market leaders. Second Amended Complaint at 11, *Moody's* (No. 95-WY-2649-WD). The plaintiff also alleged that because "under almost all circumstances" investors require ratings from two NRSROs, Moody's rates more than 80% of the municipal bonds issued in the United States. *Id.*

[6] Second Amended Complaint at 3, *Moody's* (No. 95-WY-2649-WD).

[7] *Id.* at 4–5. According to Moody's, it learned of the issue on the prior day and prepared the statement then, but it "confirmed" that it would not be hired on the morning of the issue. Memorandum of Law in Support of Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) or, in the Alternative, for Summary Judgment Pursuant to F.R.C.P. 56, at 12–13, *Moody's* (No. 95-WY-2649-WD). It issued the statement about one-and-one-half hours after the issue went to market. Second Amended Complaint at 4, *Moody's* (No. 95-WY-2649-WD).

[8] Second Amended Complaint at 5–8, *Moody's* (No. 95-WY-2649-WD).

[9] *Id.* at 5.

[10] *Id.* at 12.

[11] *Id.* at 12–13.

[12] *Moody's* was decided by the district court on a motion to dismiss, so the allegations were treated by the court as true.

[13] The district court did not consider the antitrust issues on the merits, holding instead that the Moody's statements were protected under the First Amendment because they were mere opinions that implied no underlying facts, true or false. *Moody's*, No. 95-WY-

above,[14] the demand effects of coercion and deception are not new to antitrust. In particular, the plaintiff's claim that the statement was misleading and its suggestion that unsolicited ratings are inaccurate allege a deception of investors that is reminiscent of the manipulations of product standards condemned in a number of antitrust cases.[15] There are differences, though: Moody's does not sell the product that it rates—that is, it is not itself a bond issuer—whereas the defendants in the standard-manipulation cases are typically sellers of the products to which the standards apply,[16] and Moody's is alleged to have manipulated its own ratings, whereas the standard-manipulation cases generally involve a seller manipulating a standard promulgated by a trade association. These differences may make the claims in *Moody's* somewhat less plausible than those in standard-manipulation cases,[17] but if true they still may constitute an antitrust violation.

2649-WD, slip op. at 9–14. Even putting aside the difficulty of reconciling that conclusion with Moody's claim that its ratings are "objective," *see* Memorandum of Law in Support of Defendant's Motion to Dismiss Pursuant to F.R.C.P. 12(b)(6) or, in the Alternative, for Summary Judgment Pursuant to F.R.C.P. 56, at 5, *Moody's* (No. 95-WY-2649-WD) (describing a Moody's rating as "an objective opinion about credit risk"), the district court's decision is almost certainly incorrect as a legal matter. The court relied heavily on the district court decision in *Massachusetts School of Law at Andover, Inc. v. American Bar Association,* 937 F. Supp. 435 (E.D. Pa. 1996), *aff'd on other grounds,* 107 F.3d 1026 (3d Cir. 1997). *See Moody's,* No. 95-WY-2649-WD, slip op. at 11–13 (discussing *Massachusetts School of Law,* 937 F. Supp. at 443–45). However, the Third Circuit in *Massachusetts School of Law* affirmed the district court's decision without considering the First Amendment issue, citing a Department of Justice amicus brief that argued that the district court was wrong on that point. *See* 107 F.3d at 1037 (citing Brief for the United States as Amicus Curiae, *Massachusetts School of Law,* 107 F.3d 1026 (3d Cir. 1997) (No. 96-1792)); *see also* Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) (condemning standard manipulation without discussing First Amendment); American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982) (same); Wilk v. American Med. Ass'n, 895 F.2d 352, 371 (7th Cir. 1990) (explicitly rejecting a First Amendment defense in a standard-setting case); National Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs., 850 F.2d 904 (2d Cir. 1988) (accepting possibility of antitrust liability for false advertising without discussing First Amendment).

[14] *See supra* text accompanying notes 2–3.

[15] Two recent Supreme Court cases are cited in note 3 *supra,* and many of the lower court cases are discussed in, for example, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 5.4c (1994).

[16] That is not always the case, however, as *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.,* 456 U.S. 556 (1982), illustrates. *See infra* text accompanying notes 62–68.

[17] They might be less plausible for two reasons. First, the potential gain to Moody's would be less direct than that to sellers of products whose standards are manipulated, because any deception by Moody's would be directed at investors, whose altered investing decisions would only indirectly cause issuers to buy Moody's services, whereas the manipulation of a standard directly affects the purchasing decisions of the manipulator's customers. Second, if it became known that Moody's manipulated its ratings, it would suffer all of the injury from its reduced credibility, whereas a seller that manipulated a standard and thereby injured its credibility would presumably suffer no more than from the reduced credibility than would other sellers to whose products the standard applied. *See infra* text accompanying notes 207–09.

The plaintiff in *Moody's* also alleged coercion, and those allegations too can be likened to an established antitrust violation: tying. In its most recent exposition of tying law, the Supreme Court described the "essential characteristic" of tying as the seller's use of its control over one product to force the buyer to purchase another,[18] and the school district in *Moody's* alleges that Moody's uses its control over bond purchases to force debt issuers to purchase its ratings services. It is true that a tying seller usually has control over the tying product because it is the seller of that product, and the "control" that Moody's has over the bond market consists only of its ability to make the school district's bonds more difficult to sell. But much as a tying seller can force buyers to take its tied product in order to have access to its tying product, Moody's is alleged to force issuers to purchase its rating services so as to avoid paying the high interest rates that would result from an unsolicited and unfavorable rating.[19] Thus, although the actions alleged in *Moody's* are not, strictly speaking, a tie, the Supreme Court's admonition that "[t]he legality of [a defendant's] conduct depends on its competitive consequences, not whether it can be labeled 'tying'"[20] suggests that the actions of Moody's might indeed be a violation.

It is difficult to say whether these analogies go too far. Although the Supreme Court has condemned coercion and deception in the tying and standard-manipulation contexts, it has provided little guidance for the treatment of similar practices in other contexts. Indeed, commentators have argued that even in its tying cases, the Court has been unclear about the harm it is seeking to prevent.[21] And the problem is exacerbated because coercion and deception are outside the mainstream of traditional antitrust law. Neither involves the sort of restriction of supply,

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[18] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 12 (1984) ("[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms."). The Court's most recent tying case, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), focused on a specific aspect of tying law and did not provide a similar general discussion of tying.

[19] The analogy is even closer in light of the fact that a seller need not actually deny access to the tying product alone to be guilty of a tying violation; the seller can also be liable if it makes the tying product available alone only at a price that makes its purchase alone impracticable. *See infra* note 47 and accompanying text. The actions alleged in *Moody's* would parallel this condition if an unsolicited, unfavorable rating by Moody's would raise the interest rate that an issuer would be required to pay to a level that would make its only practicable alternative that of purchasing a Moody's rating.

[20] *Jefferson Parish*, 466 U.S. at 21 n.34.

[21] *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 365 (1978) ("Antitrust treats [tying arrangements] as utterly pernicious, despite the increasingly obtrusive fact that it has found no adequate grounds for objection to them at all.").

made possible by a source of market power, such as a horizontal agreement or a large market share, that is present in most antitrust cases. Nor does either involve the sort of long-term elimination of supply that is the goal of predatory pricing.[22] Instead, coercion and deception exploit consumers in quite a different way: by increasing consumers' demand for their products, either through constraining the consumers' choices (coercion) or through providing them with false information (deception).[23]

My goal in this article is to develop an antitrust approach to evaluating practices, like coercion and deception, by which sellers seek to increase demand for their products. Most increases in demand are procompetitive, of course. For example, when a seller improves its product, or advertises it truthfully, demand for the product is likely to increase, as are its output and price, yet consumers generally benefit. Perhaps because such common practices tend to be procompetitive, some commentators have gone so far as to argue that *any* practice that increases output should be per se legal.[24] But coercion and deception can also increase

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[22] Because coercion and deception increase the demand for a seller's product at the expense of its competitors', these practices might, like predatory pricing, reduce the competitors' output below a viable level, and thus eliminate them from the market. Unlike predatory pricing, though, coercion and deception are profitable immediately; a seller using them need not wait until some future time to reap supracompetitive profits.

[23] In a recent article, Neil Averitt and Robert Lande outline a theory of antitrust and consumer protection law and say that both bodies of law "are intended to facilitate the exercise of . . . effective consumer choice." Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 713 (1997). Interestingly, they characterize coercion and deception as consumer protection problems because, they say, they are "internal" to consumers, in the sense that they are "market failures that take place . . . 'inside the consumer's head,'" *id.* at 714, and "impair the individual's ability to choose," *id.* at 734. However, the test I propose for antitrust evaluation of coercion and deception would find a violation only when those practices' anticompetitive effects extended to more than one market. For that reason, the coercion and deception on which I focus can fairly be characterized as "external" to consumers, in Averitt's and Lande's sense, and thus valid subjects of antitrust regulation. *Cf. id.* at 735–40 (observing that some standard-setting activities and tying arrangements can raise both antitrust and consumer protection concerns). That is not to say, though, that there are not other "internal" forms of coercion and deception that are more appropriately addressed through consumer protection law. *Cf. infra* note 149 and accompanying text.

[24] *See, e.g.*, Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 31 (1984) ("If arrangements are anticompetitive, the output and market share of those using them must fall."); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 19 (1977) (discussing vertical distribution restraints and proposing that they be legal if they increase output or "perhaps" even if they are only intended to increase output). Interestingly, though, when commentators focus specifically on the demand issue, they often acknowledge that it does present potential problems. *See, e.g.*, John E. Lopatka, *Antitrust and Professional Rules: A Framework for Analysis*, 28 SAN DIEGO L. REV. 301, 333 (1991) ("Joint actions that only increase demand are assumed to increase consumer welfare. However, an agreement to disseminate false information that increases demand could arguably reduce welfare . . . .").

demand and output, yet may injure consumers. In the end, a blanket rule of legality or illegality is inappropriate: an ability to raise price obtained by increasing demand—which I will call demand-based market power[25]—is sometimes procompetitive and sometimes anticompetitive, and it is the task of antitrust law to determine when such practices implicate the concerns to which the Sherman Act is addressed.

By "demand-based market power," I mean market power that is a product of sellers' specific efforts to increase the demand for their products—i.e., efforts that move the demand curve up and to the right.[26] Such power enables sellers to sell more of their products at the same price,[27] or to sell the same number of products at a higher price. The seller's increased demand will come primarily at the expense of its competitors, so overall industry output may or may not increase, but generally will not decrease. That distinguishes demand-based market power from traditional market-share-based power, which is exercised by restricting supply and therefore output. Demand-based market power is more similar to market power created by "raising rivals' costs,"[28] which is also a product of specific efforts by sellers to create power, rather than merely to exploit it.[29] But power derived by raising rivals' costs, though it need not reduce the output of the seller that creates it, does reduce overall industry output, and is therefore distinct from demand-based power.[30]

The approach to demand-based market power that I propose in this article would treat a practice that increased demand for one product as an antitrust violation if that practice imposed costs on buyers of some

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[25] "The term 'market power' refers to the ability of a firm (or a group of firms, acting jointly) to raise price above the competitive level without losing so many sales so rapidly that the price increase is unprofitable and must be rescinded." William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 937 (1981). In one sense, all market power, even that based on market share, is demand-based, since only a product that lacks satisfactory substitutes—i.e., that has its own unique demand, at least to some extent—can be sold at a supracompetitive price. *Cf. infra* note 144. But I use the term "demand-based market power" in a narrower sense, as the next paragraph discusses.

[26] In most cases, these efforts will also increase the slope of the demand curve, i.e., they will reduce the seller's elasticity of demand. *See generally infra* part III.B.

[27] Demand-based market power should therefore be distinguished from a decrease in price, which may increase the output of a product but will not increase the demand for it.

[28] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986); Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241 (1987).

[29] *See infra* text accompanying note 76.

[30] The differences between demand-based power and power derived from raising rivals' costs are discussed in more detail in part III.C *infra*.

other product. The "costs" that would be relevant for the purposes of this test would be only those inherent in the second product.[31] They would be changes to the product that would make it less valuable to buyers, as when a tie makes a tying product less desirable by including with it an obligation to buy a tied product, or when a standard is manipulated so that the information it provides is inaccurate. When, in this way, costs are imposed on one product to increase demand for another—a process I will refer to as cost shifting—the test I propose would point to an antitrust violation. On the other hand, some demand-increasing practices, such as product improvements, involve only one product and thus do not shift costs; they therefore present no antitrust problem. And other practices, like ties that create efficient package discounts, do involve two products, but do not increase demand for one by imposing costs on the other. On the contrary, an efficient tie increases demand for the tied product and at the same time makes buying the tying product a more attractive proposition (so the buyer can receive the package discount); therefore, it also presents no difficulties under the cost-shifting test. Of course, that a practice passes the cost-shifting test does not mean that it could not cause other competitive problems. I offer the test not as the only means of evaluating demand-increasing practices, but as one way of determining when such practices can, in the words of the Supreme Court, "foreclose[] competition on the merits."[32]

A cost-shifting test would reach results similar to the Supreme Court's current rules for cases involving standard setting and tying. In standard-setting cases, the cost-shifting test would focus on the costs that the manipulation of product standards imposes on users of those standards, which has also been the focus of the Court's close scrutiny of these cases.[33] In tying cases, the focus of the cost-shifting test would be different from that of current law, viewing the anticompetitive effect of a tie not

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[31] Costs that are *not* relevant for the purposes of this test include higher prices: although the additional profits from higher prices for one product can be used to increase the demand for another—by investing in improvements or advertising for that product, for example—it is not the higher prices themselves that cause the increased demand. *See infra* text accompanying notes 259–66.

[32] The phrase is from *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 21 (1984), and is discussed further in the text accompanying note 44 *infra*.

[33] *See infra* text accompanying notes 219 & 231. Although the Supreme Court in its standard-manipulation cases has reached results consistent with liability under the cost-shifting test, the postures of its recent cases have not required it to set out clear rules to determine such liability. As a result, there is some lack of clarity in the rules that govern these cases, and some lower courts have been much more deferential to organizations' standard-setting practices than has the high court. *See infra* text accompanying notes 226–44. Because the cost-shifting test would add some structure to the Supreme Court's statements, it might serve to bring the lower courts more in line with the Court's apparent views. *See id.*

as the forcing of buyers to accept the tied product, with the resulting distortion of the market for that product, but as the imposition of costs on buyers of the tying product. This redirected focus would not, however, reach results dramatically different from those of current law, primarily because the Supreme Court's applications of tying law are closer to the cost-shifting approach than the Court's stated test might suggest.[34] Thus, the cost-shifting test seems more or less in line with the Supreme Court's antitrust concerns, which provides some degree of confidence in applying the test both to standard-setting and tying cases in which lower courts appear to have deviated from those concerns[35] and to demand cases that fit into no established antitrust categories.

The article continues in Part II with a general discussion of coercion, deception, and other demand-increasing practices, and compares these practices to other anticompetitive practices, particularly those addressed by the "raising rivals' costs" theory. Part III of the article discusses commentators' skepticism regarding the antitrust significance of demand-based market power and shows that blanket dismissal of such power is not only inconsistent with the Supreme Court's expressed views, but is also economically unjustified. Part IV then sets out the cost-shifting test and discusses its economic implications. Part V of the article applies the test to a variety of cases in which coercion, deception, or other demand-increasing practices are alleged, and shows that the test reaches results that are intuitively sensible, though sometimes inconsistent with previous lower court decisions. Finally, Part VI discusses the cost-shifting test in the context of the statutory antitrust framework. Sellers' efforts to increase demand are often unilateral, so they may not satisfy Sherman Act Section 1's requirement of an agreement, and they are sometimes made without an apparent threat of monopoly power, in which case Section 2 may also be inapplicable. In most cases, these difficulties can be overcome, but some cases of anticompetitive cost shifting, like cases of oligopoly, may escape the antitrust laws.

II. COERCION, DECEPTION, AND DEMAND-BASED MARKET POWER

Coercion, deception, and other demand-increasing practices present difficult problems for antitrust law because their competitive harm—if

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[34] This claim of consistency can be only tentative, because the facts discussed in the Court's opinions are those that are relevant to its "forcing" test, and the facts that would be needed to apply the cost-shifting test are often not reported. *See infra* part V.B.1. It is worth noting, though, that in its more recent tying cases, the Court has made statements that seem more consistent with the cost-shifting test than with its own expressed test. *See infra* text accompanying notes 183–84.

[35] *See infra* parts V.A.1 (standard setting) and V.B.1 (tying).

any—appears not to be of the same kind as the harm caused by more traditional antitrust violations. These practices in fact share significant similarities with more universally condemned practices,[36] but in this part I focus on the differences. The Supreme Court's tying and standard-manipulation cases leave unclear the harm that they are seeking to prevent because they fail to address directly the distinction between harm caused by increases in demand and that caused by restrictions of supply. That distinction differentiates demand-increasing practices both from horizontal collusive activities and from vertical exclusionary practices that raise rivals' costs.

A. THE SUPREME COURT'S DEMAND CASES

The tests the Court has adopted in its tying and standard-setting cases present at least three sources of confusion. First, the tying cases rely on a requirement of "coercion" that the Court never defines. Second, in its most recent tying case,[37] the Court appeared to say that buyers led to make undesirable purchases by a lack of market information could be said to have been "coerced," thus blurring the boundary between coercion and deception and making it unclear why different tests should apply to the two practices. Third, in its standard-manipulation cases, the Court treats the unilateral actions of single members of standard-setting organizations as acts of the organizations themselves, thus leaving unclear to what extent unilateral acts of deception are subject to antitrust scrutiny.

1. *Coercion in Tying Cases*

Although the Supreme Court has established the rule that a tie[38] is illegal when it is "coercive"—when it "force[s] a purchaser to do something that he would not do in a competitive market"[39]—the Court has not been clear about what it means by "coercion" or "forcing." In first using these terms in tying cases, the Court seemed to associate them with the "leverage" theory of tying, which suggested that a seller might be able to use a tie to transform power in one market into power in

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[36] *See infra* part IV.B.

[37] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).

[38] A tie is "'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" *Id.* at 461 (quoting Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5–6 (1958)).

[39] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984) (citations omitted).

two.[40] Commentators subsequently pointed out that this "leveraging" theory, at least in its simplest form, could not be correct, because to impose the tie and thereby acquire power—in the form, say, of the ability to charge higher prices—in the tied product market, the seller would have to use up some of its power—and reduce prices—in the tying product market.[41] Imposing the tie would therefore result in no net gain in power, only a transfer of it from one market to another.

The Court's view now appears to be that the "coercive" effect of a tie consists simply in the shift of power from one market to another. In *Jefferson Parish Hospital District No. 2 v. Hyde*,[42] the Court said that "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other."[43] That is, the point is not that tying allows the seller to gain more power, but simply that the linking of the two markets distorts them: "the economic effect . . . condemned by the rule

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[40] In *Times Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953), where the Court first used these terms in a tying case, *see id.* at 605, 608 ("coerce"), 614 ("force"), it cited *United States v. Griffith*, 334 U.S. 100 (1948), a monopolization case. *Griffith* also referred to "coercion" and "threats," *id.* at 109, but it is primarily known for its exposition of the leverage concept, *see id.* at 106 (referring to a seller "expand[ing]" its monopoly) and 108 ("If monopoly power can be used to beget monopoly, the [Sherman] Act becomes a feeble instrument indeed."). In *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), the next tying case in which the Court described ties as involving "forc[ing]," *id.* at 6, it also cited *Griffith*, as well as *International Salt Co. v. United States*, 332 U.S. 392 (1947), which condemned terms of the defendant's machine leases that went beyond its "limited monopoly" in its patented machines to restrain trade in salt, *id.* at 395–96, and *United States v. Paramount Pictures*, 334 U.S. 131 (1948), which referred to the defendant's block booking of motion pictures as an "enlargement of the monopoly of the [defendant's] copyright," *id.* at 157.

[41] *See, e.g.*, Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); BORK, *supra* note 21, at 365–81. Other commentators have pointed out that ties can in fact create additional market power in some circumstances. *See, e.g.*, Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 516–39 (1985); Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. REV. 661, 671–81 (1982); W. David Slawson, *Excluding Competition Without Monopoly Power: The Use of Tying Arrangements to Exploit Market Failure*, 36 ANTITRUST BULL. 457, 473–77, 487–89 (1991); Warren S. Grimes, *Antitrust Tie-In Analysis After* Kodak*: Understanding the Role of Market Imperfections*, 62 ANTITRUST L.J. 263, 272–79 (1994); Mark R. Patterson, *Product Definition, Product Information, and Market Power:* Kodak *in Perspective*, 73 N.C. L. REV. 185, 213–31 (1994).

[42] 466 U.S. 2 (1984).

[43] *Id.* at 14. The Court still refers to its approach to tying cases as focused on "leverage," but it no longer relies on the discredited extension-of-power aspect of that analysis. *See id.* at 14 n.20 ("This type of market power [in tying cases] has sometimes been referred to as 'leverage.' Professors Areeda and Turner provide a definition that suits present purposes. '"Leverage" is loosely defined here as a supplier's ability to induce his customer for one product to buy a second product from him that would not otherwise be purchased solely on the merit of that second product.'") (quoting 5 PHILLIP E. AREEDA & DONALD F.

against tying" is "that [the tying seller] has foreclosed competition on the merits in a product market distinct from the market for the tying item."[44] But this sort of market linkage is not coextensive with the coercive harm that can be caused by tying arrangements. Distortion of the tied product market does not require coercion of, or even power over, buyers of the tying product. For example, a seller could impose a tie while at the same time lowering the price of the tying product to fully compensate buyers for the requirement that they accept the tied product. The tie would cause buyers who previously did not purchase the tied product to do so, thus "foreclos[ing] competition on the merits" in that market, but the price decrease on the tying product would make buyers indifferent to the change, so it would not be coercive.

Tying law's market power requirement does not solve this problem, because market power as a test for coercion is both overinclusive and underinclusive. It is overinclusive because a seller with market power, like a seller without it, can create a tie that buyers willingly accept. And it is underinclusive because, at least under some circumstances, a tie can be coercive even when the seller sells its products in a competitive market. Both these problems typically arise when the buyer and seller have a long-term relationship, as, for example, in franchise arrangements. In such circumstances, a tie may be necessary to allow the seller to hold buyers to terms of an agreement to which all buyers would agree but from which some might defect in the absence of the tie. Thus, in franchise cases, ties may be used to ensure quality control and prevent individual franchisees from free riding on the franchisor's reputation and other franchisees' investments by selling poor-quality goods under the franchisor's name.[45] And because a tie in such circumstances would benefit all buyers (and the seller), no market power would be required to cause buyers to accept it; nevertheless, the tie would be coercive to those buyers who in its absence would defect.[46] As a result, in the complicated relationships that make up most of today's tying cases, the Supreme

TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1134a, at 202 (1980)).

[44] *Id.* at 21; *see also id.* at 12 (stating that with illegal ties, "competition on the merits in the market for the tied item is restrained"). The Court's use of the term "foreclosed" echoes the Court's earlier concerns about foreclosure of the tied product market to the tying seller's competitors. *See, e.g.*, Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 6 (1958) (stating that ties "deny competitors free access to the market for the tied product"). In its more recent cases, as the text shows, its concern has shifted to the denial of consumers' free choice in the tied product market.

[45] *See* Benjamin Klein & Lester Saft, *The Law and Economics of Franchise Tying Contracts*, 28 J.L. & ECON. 345, 349–54 (1985); *see also* Alan J. Meese, *Antitrust Balancing in a (Near) Coasean World: The Case of Franchise Tying Contracts*, 95 MICH. L. REV. 111, 129–37 (1996).

[46] *See* Meese, *supra* note 45, at 158–60.

Court's continued use of the term "coercion," even where it seems inapplicable, makes it difficult to know what harm the Court is trying to prevent, and thus makes it difficult to evaluate claims of coercion that do not fit squarely in the tying mold.[47]

2. *Coercion and Deception in* Kodak

The Supreme Court had an opportunity to clarify these issues in its most recent tying case, *Eastman Kodak Co. v. Image Technical Services, Inc.*[48] The plaintiffs in *Kodak* were so-called independent service organizations (ISOs) that provided service for Kodak equipment; in doing so, the ISOs competed with Kodak itself, which also serviced its own equipment.[49] The case arose from Kodak's policy of refusing to sell parts for its equipment to the ISOs or to equipment owners who hired them.[50] The ISOs claimed that through this policy Kodak "unlawfully tied the sale of service for Kodak machines to the sale of parts."[51] Not surprisingly, given that *Kodak* was a tying case, the parties' arguments were framed in terms of coercion. The ISOs argued that the tie forced buyers to accept Kodak's service despite their belief that it was of lower quality than ISO service. Kodak argued that whatever reluctance the buyers might have had to using Kodak service was overcome by the advantages of Kodak equipment, as evidenced by buyers' continuing willingness to purchase the equipment (as opposed to purchasing some other brand of equipment that allowed the use of any service provider).[52]

Kodak has much in common with the franchising cases discussed above: Kodak is like a franchisor, arguing that its customers' initial purchasing decisions were entirely free, and the ISOs are like the franchisees, arguing that once those initial decisions were made, customers could be coerced into further purchases.[53] But instead of resolving this dispute by deciding

[47] *See supra* text accompanying notes 18–20.

[48] 504 U.S. 451 (1992).

[49] *Id.* at 455.

[50] Kodak sold parts only to owners of its equipment who either purchased service from Kodak itself or performed it themselves. *Id.* at 458. Kodak also entered into agreements with its outside parts manufacturers to sell parts only to Kodak. *Id.* There is some question whether Kodak's policy was instituted after buyers purchased its equipment or was already in place when buyers purchased the equipment. The Court stated that the policy was changed, *id.*, but Kodak claimed that the policy had always been in place for some of its equipment. *See* Petitioner's Brief on the Merits at 6 n.2, *Kodak* (No. 90-1029). For some implications of this issue, see part V.C.1 *infra.*

[51] *Kodak*, 504 U.S. at 459.

[52] *Id.* at 466; *cf. id.* at 495 (Scalia, J., dissenting) ("[A] rational consumer considering the purchase of Kodak equipment will inevitably factor into his purchasing decision the expected cost of aftermarket support.").

[53] It is possible to argue that *Kodak* is not a good analogy to the franchise situation. Such arguments can be based, for example, on the fact that the tying elements of franchise

whether Kodak's tie was one that, in the words of *Jefferson Parish*, "'coerce[d] the abdication of buyers' independent judgment,'"[54] the Court said that the buyers might not have had sufficient information at the time of their equipment purchases to *form* a judgment on the matter. The Court pointed out that buyers might have been unable to assess the long-term costs of owning Kodak equipment (including the cost of using Kodak service), and thus might have been led to purchase that equipment, only to find that its costs were higher than they would knowingly have incurred.[55] The Court thus replaced the usual question of coercion in a tying case—were buyers forced by the seller's market power to accept unwillingly the tie?—with one of deception[56]—did buyers have sufficient information to evaluate the costs of the tie?

This reformulation of tying law's coercion requirement leaves much unanswered.[57] For example, could a franchisor be liable for coercing its franchisees to purchase its branded products? Franchisees are often provided extensive information about the costs of the franchise, and *Kodak* addresses only the case where such information is lacking, so it is difficult to say.[58] And what of cases in which sellers take advantage of information costs in other ways? Would it be a violation, for example, for Moody's to threaten to convey misleading information to third-party investors in order to cause a debt issuer to purchase Moody's product? And would it matter whether it was difficult for those investors to determine whether the information Moody's provided to them was accurate? Would it be a "leveraging" violation, as the plaintiff in *Zschaler v. Claneil*

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arrangements are usually part of the original franchise contract, whereas the tie in *Kodak* was not part of the original terms of sale for Kodak equipment. *See, e.g.*, Alan H. Silberman, *The Myths of Franchise "Market Power,"* 65 ANTITRUST L.J. 181, 182–84 (1996). But the informational issue on which the Court in *Kodak* focused was the difficulty that Kodak equipment buyers faced in evaluating long-term costs at the time of their original equipment purchase, *see infra* text accompanying notes 54–56, and that is the same problem faced by franchisees at the time of entering into a franchise agreement. *See* Patterson, *supra* note 41, at 249–52; Meese, *supra* note 45.

[54] Jefferson Parish Hosp. Dist. No. 2. v. Hyde, 466 U.S. 2, 13 (1984) (quoting Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953)).

[55] *Kodak*, 504 U.S. at 473–75.

[56] I use the word "deception" to point out the parallel with other cases of deception, like the standard-setting cases discussed in the next section. I am not necessarily saying that Kodak actively deceived its customers, only that those customers may in fact have been deceived. *But see infra* text accompanying note 61.

[57] It was this uncertainty that occasioned the greatest alarm among commentators. *See, e.g.*, Thomas C. Arthur, *The Costly Quest for Perfect Competition:* Kodak *and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 55–56 (1994); Michael S. Jacobs, *Market Power Through Imperfect Information: The Staggering Implications of* Eastman Kodak Co. v. Image Technical Services *and a Modest Proposal for Limiting Them*, 52 MD. L. REV. 336, 337 (1993).

[58] George A. Hay, *Is the Glass Half-Empty or Half-Full?: Reflections on the* Kodak *Case*, 62 ANTITRUST L.J. 177, 188 (1993); Patterson, *supra* note 41, at 249–52.

Enterprises, Inc.[59] alleged, for a property lessor at a ski resort to use the resort's single telephone reservation service, which it controlled, to provide misleading information about a competitor's lodgings?[60] A focus on "coercion" in these cases provides only an incomplete picture of them, since in each the injury to buyers seems as much the product of deception as of coercion. Therefore, although it is possible to interpret *Kodak* in such a way as to fit its informational issues into tying's coercion framework,[61] it may be preferable to reexamine that framework itself.

3. *Deception in Standard-Manipulation Cases*

The Supreme Court's standard-manipulation cases, where deception is the central issue, also present difficulties. The Court has decided two cases of this kind,[62] *Allied Tube & Conduit Corp. v. Indian Head, Inc.*[63] and *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* (*ASME*),[64] each involving a standard-setting organization whose standard was manipulated by its members. Because of the postures in which these cases came to the Court,[65] neither is especially informative, but *ASME* is the more useful of the two. The American Society of Mechanical Engineers promulgates standards for a variety of products, and the case concerned the exploitation of the ASME's procedures by an employee of a seller

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[59] 958 F. Supp. 929 (D. Vt. 1997).

[60] The plaintiff in *Zschaler* alleged that the defendant's reservation service's telephone message misleadingly suggested that the defendants' properties were closer to the ski facilities than were the plaintiff's properties. *Id.* at 935. The court denied the defendant's motion for summary judgment on a monopoly leveraging claim. *Id.* at 946.

[61] The most satisfying approach, I believe, is one I have presented elsewhere: that it was the Kodak-imposed tie itself that made consumers unable to evaluate the long-term costs of using Kodak equipment. *See* Patterson, *supra* note 41, at 195–96. By imposing the tie, Kodak denied buyers the benefit of future competition among service providers, under which Kodak's service costs would presumably have been comparable to those of other service providers. Instead, Kodak confined buyers to its own service, which freed Kodak from the need to compete with other providers, and required buyers in making their purchasing decisions to evaluate the likely future quality and price of Kodak service under the monopoly conditions the tie created.

[62] The Court has decided one other standard-manipulation case, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961). But the Court in *Radiant Burners* focused on the additional allegation that the organization, the American Gas Association, and its members, some of which competed with the plaintiff in selling gas burners, had "'effectuate[d] the plan and purpose of the unlawful combination and conspiracy . . . by . . . refusing to provide gas for use in the plaintiff's [gas burners],'" *id.* at 658 (quoting complaint), thus treating the case not as one involving the manipulation of a standard but as one involving a concerted refusal to deal.

[63] 486 U.S. 492 (1988).

[64] 456 U.S. 556 (1982).

[65] *Allied Tube* presented only an issue of *Noerr-Pennington* immunity, *see infra* note 70, and in *ASME* the only defendant was the standard-setting organization itself, rather than the seller that had manipulated the standard, *see infra* text accompanying notes 67–69.

of one of those products. The employee used the society's procedures to cause it to send out a letter condemning the product of one of the seller's competitors,[66] which sued under the antitrust laws. By the time the case reached the Supreme Court, the only defendant remaining was the ASME itself,[67] and the Court decided the case by treating the employee as acting under the apparent authority of the society. Under this approach, the society was liable for allowing its agent to use its standard, and hence its reputation, anticompetitively.[68]

ASME left at least two important questions unanswered. First, could antitrust liability be premised on deceptive acts, or was the ASME perhaps liable only for its adoption of unreasonable procedures (which, in turn, permitted the deceptive acts)? On this issue, the Court seemed to hold the former view, since it indicated that the seller and its employee would also be liable,[69] and they presumably were not responsible for the ASME's rules, only for their manipulation. Second, if liability could be premised on deception, would it require an agreement, as among the members of the ASME, or would unilateral deceptive acts also create liability? Again, because the Court wrote as if the individual seller would be liable, the opinion suggests that unilateral acts of deception would be sufficient. Admittedly, though, *ASME* is far from clear on either of these questions. *Allied Tube*, to the extent that it can be read to speak to these issues, seems to confirm the interpretations above,[70] but it, too, leaves unclear whether unilateral acts of deception can create antitrust liability.

The uncertainty in *ASME* and *Allied Tube* is exacerbated by the Court's focus in both cases on the particular problems presented by the collective action involved in standard setting. It was the agreements among

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[66] *ASME*, 456 U.S. at 560–64.

[67] *Id.* at 574 n.13.

[68] *Id.* at 570–74.

[69] *Id.* at 574 n.13 (noting that plaintiffs would normally sue corporate defendants, like the seller involved in the manipulation, rather than a nonprofit society like ASME).

[70] *Allied Tube* actually has little to say about these issues because the issue before the Supreme Court in that case was limited to whether the actions of the defendant, Allied Tube & Conduit Corp., were immune from antitrust liability under the *Noerr-Pennington* doctrine as a petitioning of the government, since the standards at issue were routinely adopted into law by many states. Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 499 & n.3 (1988). *Allied Tube* does not present the question of the significance of unilateral action, because the defendant conceded that it had conspired with other sellers to engage in the anticompetitive acts at issue, enlisting new members for the standard-setting organization to vote against a new standard that would have helped a competitor of the conspirators. *See id.* at 497. The Court in *Allied Tube* did seem to agree, though, that deception is an antitrust violation, because it said that it would be a violation for Allied Tube to "bias the [standard-setting] process," *id.* at 511, suggesting that it was its manipulation of the process to provide inaccurate information that was the problem. *See also infra* note 71 and text accompanying notes 116–19.

members of the standard-setting organizations in the cases that gave their standards their power, and apparently for that reason the Court focused on the standard-setting processes rather than on the actual manipulation that caused the harm. That focus was perhaps not inappropriate, given the context of the cases, but it makes it difficult to assess how the Court would treat deception in other contexts. For example, could there be antitrust liability if a seller manipulated the tests of Consumers Union (the publisher of *Consumer Reports*) or of Underwriters Laboratories? Those entities occupy roles that are arguably similar to standard-setting organizations, but since they are not composed of member-competitors, their actions raise no issues of concerted action. Antitrust liability could therefore not be premised on Sherman Act Section 1, which requires an agreement, but it might be possible under Section 2, if the requirements of monopolization or attempted monopolization were met. And similar issues are raised in contexts other than standard setting.[71] For example, several courts and commentators have concluded that sellers may be liable under the antitrust laws for false advertising.[72] Reluctant to open the courts to a rash of such claims, though, the commentators have proposed and the courts have adopted a number of ad hoc requirements that have little in common with other antitrust claims or with Supreme Court precedent. This creativity is not surprising because, despite the similarity of the competitive harm in cases of deception, the Court has provided no general rule for the antitrust treatment of such cases.

B. DEMAND-BASED MARKET POWER AS A DISTINCT ANTITRUST PROBLEM

I believe that the uncertainty in the Supreme Court's demand cases is the product of the Court's attempt to treat them like other antitrust cases, when in fact they are quite different. The goal of coercive and deceptive acts is to increase the demand for the seller's product, yet the Court does not focus directly on this goal, instead emphasizing antitrust concepts that are better suited to practices whose goals are to restrict output. Thus, in tying cases the Court focuses on traditional antitrust

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[71] On this point, it is worth noting *Allied Tube*'s observation that the court of appeals had "determined that [the plaintiff] was awarded damages *only* on the theory 'that the stigma of not obtaining [the standard-setting organization's] approval of its products and [defendant's] "*marketing*" of that stigma caused independent marketplace harm.'" *Allied Tube*, 486 U.S. at 498 n.2 (quoting Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 941 n.3 (1987)) (emphasis on "marketing" added). The Supreme Court said that it was deciding the case on the same basis. *Id.*

[72] *See infra* part V.A.2.

market power, which is of limited relevance to coercion, the Court's expressed concern in the cases,[73] and in standard-setting cases it focuses on the power of standard-setting organizations, though standards are often manipulated by the acts of individual sellers, not by collective power. Demand-based market power requires a focus redirected toward the means of its creation.

Generally speaking, one can distinguish three sources of market power. First, if a seller has a large market share,[74] it will often by that very fact be able to raise price (albeit only by selling fewer products).[75] Because the seller controls a large share of the market, if it raises price, and therefore reduces output, competing sellers may not be able to step in and meet, at the original, lower price, the demand created by the reduced output; at least some buyers will therefore be forced to pay the large-market-share seller's supracompetitive price. Even if a seller does not have a large market share, it may still be possible for it to *create* market power. One way to do this—the second source of market power—is to raise its rivals' costs. As Professors Krattenmaker and Salop explain, "certain firms can attain monopoly power by making arrangements with their suppliers that place their competitors at a cost disadvantage."[76] The seller's resulting cost advantage allows it to price above its own marginal cost. Alternatively, the seller can turn to a third source of market power: it can alter the demand side of the cost-demand interaction that determines price.

This third source of market power, demand-based market power, is distinct from the other two sources of market power. Most significantly, perhaps, it differs from both in that its exercise need not result in any reduction in output. To use tying as an example, a seller that uses a tie to increase the demand for its tied product can increase the price for that product while maintaining the same level of output. If the tie does

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[73] *See supra* text accompanying notes 45–46.

[74] Because a seller's market share is a function of the differentiation of its product from others, and because the demand-increasing practices that are the subject of this article could be viewed as means of creating differentiated products, the practices discussed here could be viewed as means of creating larger market shares. But the power created by these demand-based practices is distinct from such supply-oriented sources of market share as horizontal agreements and the simple inability of competitors to produce a sufficient number of products to replace the reduced output of a large-market-share seller.

[75] Moreover, this source of market power is not available only to single sellers; it is also the source of power addressed by antitrust law's prohibition on horizontal agreements.

[76] Krattenmaker & Salop, *supra* note 28, at 214; *see also* Krattenmaker et al., *supra* note 28, at 255 ("It is the exclusionary conduct that creates the market power being evaluated, not the other way around.").

not result in perfect price discrimination,[77] output of the *tying* product may decrease, but the creation of market power in one product accompanied by a reduction in the output of *another* product distinguishes tying's demand-based market power from the other two forms.[78] And in deception cases, like those involving standard setting, a seller may be able to shift buyers from its competitors' products to its own without decreasing overall output.

Demand-based market power can be seen as complementary to the power produced by raising rivals' costs. A seller that seeks to achieve power through a cost advantage has two choices available to it: it can reduce its own costs, or raise its rivals'. As Krattenmaker and Salop argue, it is anticompetitive to choose the second approach, in which the seller imposes costs on its competitors through their suppliers.[79] A seller creating demand-based power also has two choices available to it: it can improve its product or advertise it (truthfully), so as to attract more buyers, or it can increase demand for its product by engaging in coercion or deception. Here, too, the latter approaches are anticompetitive because they impose costs on buyers of other products.[80] Hence, one can see demand-based market power as the demand-side complement to the supply-side raising-rivals'-costs analysis.

Indeed, some practices could be analyzed using either approach. For example, one can view the manipulation of a product standard either as an effort by a seller to increase the demand for its product or as an effort to raise its rivals' costs by denying (or making more costly) their access to an important input—approval for their products under the standard.[81] But approval under a standard is not really an input for the

[77] Several examples of price-discriminating ties that do not reduce tying product output are described in DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 471–79 (2d ed. 1994).

[78] One can get around this conceptual problem by focusing on the tying-and-tied-product combination and arguing that the seller has power in the market for that combination product and has reduced the output for it. Under this view, the seller creates market power by defining its product in a particular way, and then exercises its (newly created) power, which reduces the output of the combination product. *Cf.* Patterson, *supra* note 41. But the ultimate question is whether the seller's actions are anticompetitive, and that question cannot be answered by looking solely at the exercise of power. The analysis must also examine its creation by the combination of the products, and that requires a demand-based approach like that proposed in this article.

[79] *See generally* Krattenmaker & Salop, *supra* note 28.

[80] It can impose costs, for example, on the users of product standards or on the buyers of tying products. *See infra* part IV.A.3.

[81] Krattenmaker and Salop do not discuss cases of standard manipulation, perhaps because their focus is on vertical arrangements, and the vertical aspects of the Supreme Court's standards cases are not well developed. *See supra* part II.A.2.

products to which the standard applies; it is instead a factor that influences consumer demand. One could also perhaps treat a tying product as an input for sales of its related tied product, but it is not really natural to do so, since most tied products can also be sold independently.[82] And in other cases of demand-based market power, it is not even clear what one would characterize as the input to which access is restricted.[83]

Moreover, there is an important difference in orientation between practices that increase demand and those that raise costs: efforts to raise rivals' costs are aimed upstream, at restricting access to suppliers, while demand-increasing activities are aimed downstream, at increasing demand among buyers. This is significant because the success of a seller's efforts to raise its rivals' costs is limited by the self-interest of the suppliers to which it seeks to restrict access. Those suppliers will cooperate with the seller only to the extent that the seller compensates them for their reduced sales to the seller's rivals. Most demand-increasing activities, in contrast, are not subject to this constraint. Because an effort to increase demand usually involves only a seller and the buyers whose demand for its product the seller seeks to increase, there is no third-party market

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82 That is presumably why, though Krattenmaker and Salop mention ties as an example of raising rivals' costs in the introduction to their article, Krattenmaker & Salop, *supra* note 28, at 211–12, 216, they do not discuss them further in the article. The raising-rivals'-costs analysis of a tie would presumably point out that a seller that imposes a tie raises its rivals' costs by requiring the competitors to incur the costs of marketing their own versions of the tying product or by forcing it to operate at a smaller and less-efficient scale (though these understandings might not strictly fit into Krattenmaker's and Salop's scheme, which focuses on arrangements with suppliers). This analysis emphasizes the tie's effects in the tied-product market by focusing on how the tie raises costs for sellers in that market. But where the tying seller has only a small share of the tied-product market, these effects will be minimal. Judge Easterbrook goes so far as to say that the cases in which ties raise rivals' costs enough to create concern "are sufficiently rare that they cannot support any presumption against (or even suspicion of) the practices." Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 145 (1984).

83 In the *Moody's* case, for example, which was introduced in the text accompanying notes 4–11 *supra* and will be discussed again in the text accompanying notes 187–206 *infra*, the claim is that Moody's Investors Service, Inc. sought to increase its sales of bond-rating services by suggesting to bond issuers that if they did not buy its services, Moody's would issue, unsolicited, an unfavorable rating. Such a rating would impose costs on the issuers, in that they would then be forced to pay a higher interest rate for their bonds. The Moody's "threat" can thus be viewed as a means of increasing the demand for its services, in that it offers lower interest rates (or the avoidance of higher ones) to issuers who buy Moody's rating services. But it is not entirely clear how the Moody's threat raises rivals' costs. The best means for the competitors of Moody's to combat the practice would probably be to inform bond buyers that a Moody's rating is not entirely objective; the cost of so informing bond buyers, though, is not a cost that one would normally associate with competition in the market for bond-rating services, where the consumers are bond issuers, not bond buyers.

participant to impose independent limits on the seller's actions.[84] Demand-increasing activities are therefore not only different from those that raise rivals' costs, but are in some respects more dangerous.

III. OBJECTIONS TO ANTITRUST RECOGNITION OF DEMAND-BASED MARKET POWER

Before proceeding to describe a test that will address the distinct problems presented by demand-based market power, it is important to consider the views of those who agree that demand-based power is different, but disagree with the claim that it presents problems with which antitrust should be concerned. Some of these commentators have taken a specifically legal approach, mining Supreme Court opinions for statements that they see as foreclosing antitrust consideration of demand-based market power. Others have addressed the issue from a more economic viewpoint, arguing that market power that is a product of increased consumer demand is, ipso facto, a product of increased consumer welfare and is therefore no concern of antitrust. However, neither of these arguments—legal or economic—has really come to grips with the problem.

A. LEGAL OBJECTIONS

The statement by the Court that is most often pointed to as demonstrating the Court's rejection of demand-based market power is in *Jefferson*

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[84] Some demand-increasing practices, it is true, do involve more or less independent "suppliers." In a case in which a seller seeks to increase the demand for its product by influencing a product standard, for example, the standard-setting organization will have an interest in maintaining the objectivity of its standard, and that may place limits on the seller's efforts to disadvantage its competitors, just as in a more typical raising-rivals'-costs situation. But demand-oriented practices like standard setting and advertising present problems for raising-rivals'-costs analysis because they raise the costs of sellers whose products are disadvantaged by the information provided regardless of whether that information is accurate or deceptive, i.e., regardless of whether it benefits consumers. That is, it is not that anticompetitive standard manipulation raises rivals' costs and procompetitive standard setting does not, but that manipulation distorts the "true" demand for the products, whereas the legitimate standard-setting activities do not. A demand-oriented approach thus has advantages in this situation.

In some circumstances, of course, a seller's competitors may constrain its actions. In cases of deception, for example, a seller's competitors may ensure that buyers receive correct information, and in cases of coercion a seller may be constrained by its competitors' abilities to offer alternative sales arrangements. For various reasons, though, the constraints provided by competitors may not be entirely effective. *See* Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 474 & n.21 (1992) (observing that competitors may have neither the ability nor the incentive to inform consumers); Yongmin Chen, *Equilibrium Product Bundling,* 70 J. BUS. 85 (1997) (showing that two sellers in a duopoly can each reap higher profits if one of them ties).

Parish Hospital District No. 2 v. Hyde.[85] *Jefferson Parish* was a tying case in which the plaintiff alleged that the defendant hospital had power in the local market for hospital services, and had used that power to require its patients to purchase anesthesiological services from providers it had selected.[86] The court of appeals in *Jefferson Parish* had concluded that though the hospital's market share was not high enough to give it market power, the market at issue was subject to imperfections that nevertheless permitted the defendant to charge supracompetitive prices.[87] The imperfections to which it referred, "the prevalence of third-party payment for health care costs,"[88] which might lead consumers to be indifferent as to price, and the "lack of adequate information" about the "quality of the medical care provided,"[89] which might make consumers indifferent among medical care providers, seem somewhat similar to the informational sources of demand-based market power discussed above.[90] The Supreme Court, however, said that though those imperfections "may generate 'market power' in some abstract sense, they do not generate the kind of market power that justifies condemnation of tying."[91] It has been suggested that in this statement the Court "expressly rejected the notion that the pricing discretion from . . . imperfect information can be antitrust market power."[92] But even setting aside the fact that *Kodak*

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[85] 466 U.S. 2 (1984). Another statement, from *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956), is also often cited on this point, but is too vague to be of much significance, and is in any case directly contradicted by other statements in the same opinion. The Court said in *du Pont* that the "power that, let us say, automobile or soft-drink manufacturers have over their trademarked products is not the power that makes an illegal monopoly." *Id.* at 393. The Court then went on to say, however, that "[i]llegal power must be appraised in terms of the competitive market for the product," *id.*, and that "[d]etermination of the competitive market for commodities depends on how different from one another are the offered commodities in character or use, how far buyers will go to substitute one commodity for another," *id.* This seems to say that product differentiation *can* create "illegal power," so perhaps the Court in the first statement quoted above only meant to say that automobile and soft-drink manufacturers do not have monopoly power, i.e., power sufficient to bring Sherman Act § 2 into play, a proposition that no one would dispute.

[86] *Jefferson Parish*, 466 U.S. at 26.

[87] *Id.* at 27–28.

[88] *Id.* at 27.

[89] *Id.* It is interesting to note that this is how the Supreme Court describes the court of appeals' view of the imperfection, but that the Court itself describes the relevant information not as that about hospital services, the tying product, but anesthesiological services, the tied product. *See id.* at 27–28. This suggests that it is power in the *tied* product market that the Court views as important, which would not be consistent with current tying law. *Cf. supra* note 50.

[90] *See supra* text accompanying notes 57–61.

[91] *Id.* at 27 (footnote omitted).

[92] Arthur, *supra* note 57, at 41.

specifically accepted antitrust market power derived from imperfect information,[93] this interpretation is too broad.

In *Jefferson Parish* the Supreme Court focused specifically on the market imperfections cited by the court of appeals, and it said only that *those* imperfections did not generate antitrust market power,[94] not that *no* imperfections could. In fact, neither of the two specific imperfections described by the appeals court would necessarily generate demand-based market power. The first imperfection, third-party payment for health care costs, might, as the Supreme Court acknowledged, lead to a lack of price consciousness among consumers because they do not pay for their purchases.[95] It would not, however, make the third-party payers indifferent to price; on the contrary, insurers are quite capable of constraining the prices that they pay on behalf of their insureds. Nor would the second imperfection, a lack of information about medical care quality, provide market power in the context of *Jefferson Parish.* Inadequate information might, as the Court says, make consumers indifferent among providers,[96] but to the extent that consumers were indifferent, the hospital's tie would not have been coercive, so that it is not surprising that the Court found that imperfection insufficient in a tying case. It says nothing, however, about how the Court would view market imperfections that would permit sellers to impose a tie that buyers found burdensome, as in *Kodak.*

In addition to the comments in *Jefferson Parish* just discussed, which focused directly, if inconclusively, on demand-based market power, the Supreme Court has made other statements related less directly to the issue. These statements, though not always made in the context of demand-related claims, have also been cited as evidence that the Court would disapprove such claims. They were cited in this way, for example, in *Schachar v. American Academy of Ophthalmology, Inc.*,[97] a Seventh Circuit case with an opinion written by Judge Easterbrook. The inapplicability of the cited statements to the demand problems in *Schachar*, and by extension in other demand cases, requires some understanding of the facts of the case.

The plaintiffs in *Schachar* were ophthalmologists who had begun performing a new ophthalmological procedure for correcting near-sightedness. The defendants were an ophthalmological association and certain

[93] *See supra* part II.A.2.

[94] 466 U.S. at 28.

[95] *Id.*

[96] *Id.*

[97] 870 F.2d 397 (7th Cir. 1989).

of its members who did not perform the new procedure, but instead used more traditional means of treating near-sightedness. The challenged actions were public statements by the association and its members labeling the new procedure "experimental" and urging patients to approach it with caution.[98] The plaintiffs claimed that these statements were anticompetitive because they were made without regard to the merits of the new procedure; they argued that the statements were intended simply to injure the business of those ophthalmologists who performed the procedure and thereby protect the business of the ophthalmologists in the association.[99] Thus, the plaintiffs' claim was demand-based, alleging that the ophthalmologists in the association deceptively increased the demand for their own products at the expense of the plaintiffs'.

Judge Easterbrook began his analysis with a definition of market power as a restriction of supply.[100] He said that there was no such restriction in supply in *Schachar*, observing that "none [of the plaintiffs] maintains that the Academy prevented him from doing what he wished or imposed sanctions on those who facilitated the work."[101] Instead, he said, "[t]he Academy's declaration affected only the demand side of the market, and then only by appealing to consumers' (and third-party payors') better judgment."[102] That, Judge Easterbrook believed, was sufficient to require summary judgment: "Unless one group of suppliers diminishes another's ability to peddle its wares (technically, reduces rivals' elasticity of supply), there is not even the beginning of an antitrust case . . . ."[103] However, although he cited two Supreme Court cases in support of this proposition, the Court has never adopted such a purely supply-oriented approach.

In the first case Judge Easterbrook cited, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,[104] the defendant, the NCAA, had imposed restrictions on the number of college football

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[98] *Id.* at 398; Schachar v. American Academy of Ophthalmology, Inc., 1988-1 Trade Cas. (CCH) ¶ 67,986, at 58,050–51 (N.D. Ill. 1988).

[99] 870 F.2d at 398–99; 1988-1 Trade Cas. (CCH) ¶ 67,986, at 58,050–51.

[100] *See* 870 F.2d at 399 ("Antitrust law . . . condemns reductions in output that drive up prices as consumers bid for the remaining supply.") (citing NCAA v. Board of Regents of Univ. of Okla., 468 U.S. 85, 103–07 (1984)); Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 19–20 (1979); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989), slip op. at 6–8; Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n, Inc., 814 F.2d 358, 368–71 (7th Cir. 1987)).

[101] *Id.*

[102] *Id.* at 400.

[103] *Id.* at 399. In the elided portion of the sentence, Judge Easterbrook adds that there is "no reason to investigate further to determine whether the restraint is 'reasonable.'" *Id.*

[104] 468 U.S. 85 (1984).

games that could be broadcast.[105] The Court observed that, as a result of the restrictions, "[p]rice is higher and output lower than they would otherwise be,"[106] but that was simply a statement about the effects in that case, not a general rule that output restriction is necessary to an antitrust claim. The other case cited by Judge Easterbrook, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*,[107] provides even less support for his position. In *Broadcast Music* the issue was not even whether the challenged practices, the creation of blanket copyright licenses for musical compositions, were anticompetitive, but only whether the licenses should be tested by the per se rule, which is intended to apply only to the most obviously anticompetitive practices.[108] The Court said that the per se rule was applicable when a "practice facially appears to be one that would always or almost always tend to restrict competition and decrease output."[109] Even if this statement were interpreted to require output restriction for application of the per se rule,[110] *Broadcast Music* says nothing to suggest that the same requirement would apply to the rule of reason, which evaluates more competitively ambiguous practices on the basis of their actual effects.[111] Nor has any other Supreme Court opinion.[112]

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[105] *Id.* at 91–94.

[106] *Id.* at 107. The quoted statement continues, "and both are unresponsive to consumer preference." *Id.* The Court's comment about consumer preference could equally well be applied to actions that increase demand, since the goal of such actions is exactly to affect "consumer preference." The Court reinforced its concern regarding this issue by saying that "[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with the fundamental goal of antitrust law." *Id.*

[107] 441 U.S. 1 (1979).

[108] *See, e.g.*, National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978) (stating that the per se rule is applied to "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality"). The per se rule applies to price-fixing agreements, horizontal market allocations, group boycotts, and tying arrangements. HOVENKAMP, *supra* note 15, at 227–28. The rule as applied to ties, however, requires a showing of market power, Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9, 13–14 (1984), which gives it less of a per se character. *See* PSI Repair Servs., Inc. v. Honeywell, Inc., 104 F.3d 811, 815 n.2 (6th Cir. 1997).

[109] *Broadcast Music*, 441 U.S. at 19–20.

[110] Moreover, the Court said that the practice challenged in *Broadcast Music* was "unlikely to cause decreased output, *one of* the normal undesirable effects of a cartel," *id.* at 22 n.40 (emphasis added), suggesting that though decreased output is anticompetitive, other effects can be as well.

[111] I am not suggesting in this article that demand-increasing practices should be evaluated by the per se rule. To the extent that tie-ins *are* currently judged by the per se rule, *see supra* note 108, I believe that current law is inappropriate. The competitive effects of ties are too ambiguous for per se treatment. *See infra* part V.B.1.

[112] Although Justice Scalia in his *Kodak* dissent defined market power in exactly this way, as "the power to raise price by restricting output," Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 487 (1992) (Scalia, J., dissenting), he could not point to any opinion by the Court in support of his definition.

Moreover, both *NCAA* and *Broadcast Music* were horizontal-restraint cases. Even if the Court had adopted a rule that in such cases output restriction was necessary to find an antitrust violation, it would not necessarily apply in other kinds of cases. The purpose of an agreement among sellers is to create a group with a large market share, specifically so that the group will have the power to restrict output.[113] Demand-based power operates through different mechanisms, so the same principles need not apply. That is exactly why the Supreme Court, in tying cases like *Jefferson Parish* and *Kodak*, has described the competitive problem as the "coercion" of consumers; although the Court has not always been clear about what it meant by this term,[114] its use of it acknowledges that demand cases present unique problems. Thus, though Judge Easterbrook is correct that the Court has on occasion referred to the anticompetitive effect of a restriction of output, it has done so only when that was the particular anticompetitive mechanism alleged in the case that it was considering.

Judge Easterbrook also relied on Sherman Act Section 1's requirement that practices challenged under that section be "in restraint of trade" by arguing that the Academy's actions did not "restrain" trade because they did not prevent ophthalmologists from performing the new ophthalmological procedure.[115] Judge Easterbrook's apparent claim here, which is really a variation on his output restriction argument, is that any manipulation of the ophthalmological association's standard-setting process does not present an antitrust problem unless the resulting standard is enforced in some way against the disadvantaged sellers. That is, a "restraint" in the standard-setting process would not be an antitrust problem unless there were a corresponding restraint in the market for the product to which the standard applied. Here again, though, Judge Easterbrook's citation to the Supreme Court is unconvincing.

Judge Easterbrook relied on *Allied Tube*,[116] focusing on the Court's statement there that the members of the standard-setting organization

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[113] *See supra* note 75 and accompanying text.

[114] *See supra* part II.A.1–2.

[115] *Schachar*, 870 F.2d at 397.

[116] He also cited two lower court decisions, *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284 (5th Cir. 1988), and *Clamp-All Corp. v. Cast Iron Soil Pipe Institute*, 851 F.2d 478 (1st Cir. 1988), but neither supports his claim. Judge Easterbrook says that *Consolidated Metal Products* "holds that when a trade association . . . does not constrain others to follow its recommendations, it does not violate the antitrust laws." *Schachar*, 870 F.2d at 399. But *Consolidated Metal Products* required coercive conduct only for a per se violation of the antitrust laws. 846 F.2d at 292. Under the rule of reason, the court said, a violation could have been established through evidence either of coercion or of anticompetitive intent, such as "bad faith" or the "desire to suppress innovative products." *Id.* at 294–95. Similarly, the court in *Clamp-All* said that standard-setting activity could run afoul of the antitrust laws if it "serves no legitimate purpose" or "is unnecessarily

involved, the National Fire Protection Association (NFPA), "agreed 'not to manufacture, distribute, or purchase certain types of products.'"[117] It may be true that the members of the NFPA had such an agreement (though Judge Easterbrook silently removed the Court's reference to it as "implicit"[118]), but that was not the basis on which the Court decided the case. On the contrary, the Court's decision was based on the effects of the NFPA's standard on *demand*, not supply: the "marketplace harm" at issue in the case was caused by the "stigma" of the NFPA's disapproval, not by any agreement among NFPA members.[119] In *Schachar*, then, Judge Easterbrook should have allowed the plaintiffs the opportunity to prove similar demand-based marketplace harm.

In summary, although a number of Supreme Court statements have been said to deny the antitrust significance of demand-based market power, those statements cannot fairly be read so broadly. Rather than adopt a grand theory, the Court has decided cases presenting demand issues on their facts. Thus, in *Jefferson Parish*, where the facts did not present a competitive concern, the Court rejected the plaintiffs' claim of demand-based market power,[120] but in *Kodak*, where the facts were very different, it decided that demand effects *could* create market power.[121] Of course, that the Supreme Court has accepted the possibility of demand-based market power does not mean that it was justified in doing so, and commentators have argued that demand-based market power is inconsistent with the economic goals of antitrust. As the next section shows, however, quite the reverse is true.

B. ECONOMIC OBJECTIONS

The goal of antitrust law is now almost universally seen as an economic one: to promote consumer welfare.[122] Therefore, demand-based market

harmful." 851 F.2d at 487. These cases are discussed further in the text accompanying notes 226–44, *infra*.

[117] *Schachar*, 870 F.2d at 399 (quoting Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988)).

[118] *Allied Tube*, 486 U.S. at 500.

[119] The Supreme Court said that it was "decid[ing] the case as it was framed by the Court of Appeals," which had "determined that [the plaintiff] was awarded damages *only* on the theory 'that the stigma of not obtaining [NFPA] approval of its products and [the defendant's] "marketing" of that stigma caused independent marketplace harm.'" *Id.* at 498 n.2 (quoting Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 941 n.3 (2d Cir. 1987)).

[120] *See supra* text accompanying notes 85–96.

[121] *See supra* part II.A.2.

[122] *See* Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (stating that the legislative record "suggest[s] that Congress designed the Sherman Act as a 'consumer welfare prescription.'" (quoting BORK, *supra* note 21, at 66)); *but see* Atlantic Richfield Co. v. USA Petroleum

power's place in antitrust law will ultimately depend less on past Supreme Court statements, which are always subject to revision, than on the economic implications of such power. A number of commentators have argued that these implications are not of antitrust significance. Some have addressed the issue only briefly, others—responding particularly to *Kodak*—at more length, but in the end none of them makes the economic case for dismissing demand-based market power.[123]

One of the earlier attempts to take a comprehensive view of antitrust market power is William Landes's and Richard Posner's 1981 article, "Market Power in Antitrust Cases."[124] Landes and Posner "define market power in economic terms"[125] by reference to the Lerner index, "which measures the proportional deviation of price at the firm's profit-maximizing output from the firm's marginal cost at that output."[126] As they show, the Lerner index is equivalent to the reciprocal of the firm's elasticity of demand, the amount by which the demand for the firm's product would decrease in response to an increase in the product's price.[127]

Under this definition, demand-based market power qualifies as market power, as Landes and Posner acknowledge. They observe, for example, that sellers can lower their products' elasticities of demand by establishing strong brand identities.[128] Nevertheless, they reject the conclusion that the sellers therefore have market power: "Even if firms succeed in reducing the elasticity of demand for their brands in this way, they will not have any monopoly profits if there is competition among the firms, and consumers will benefit from the better quality and greater variety

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Co., 495 U.S. 328, 360 (1990) ("The Court, in its haste to excuse illegal behavior in the name of efficiency, has cast aside a century of understanding that our antitrust laws are designed to safeguard more than efficiency and consumer welfare. . . .") (footnotes omitted) (Stevens, J., dissenting). *See also infra* note 186.

[123] A similar critique can be found in Warren S. Grimes, *When Do Franchisors Have Market Power? Antitrust Remedies for Franchisor Opportunism*, 65 ANTITRUST L.J. 105, 112–23 (1996).

[124] Landes & Posner, *supra* note 25.

[125] *Id.* at 938.

[126] *Id.* at 939.

[127] *Id.* at 939–41. Elasticity of demand is calculated by dividing a change in a product's price into the change in demand caused by that price change (with both terms expressed as percentages, to eliminate any effects of their absolute magnitudes). *Id.* at 940–41 n.8. Thus, a product whose demand changes only little with price will have a low elasticity of demand, and a product whose demand changes greatly with price will have a high one. And the Lerner index, because it is the reciprocal of the elasticity of demand, reverses this relationship: products with inelastic demand have high Lerner indices—indicating that profit is maximized at prices well above marginal cost—and products with elastic demand have low Lerner indices—indicating a profit-maximizing price near marginal cost.

[128] *See id.* at 956–57.

of products."[129] But a lower elasticity of demand shows that there is *not* competition among the firms, at least in the sense in which the Lerner index measures competition. If the Lerner index is greater than zero, the seller *can* earn supracompetitive profits, even if not "monopoly" profits. Coke and Pepsi compete vigorously against each other, but each sells at a price higher than its marginal cost.[130] If one wants to reject demand-based market power, one must show that the Lerner index is an inappropriate measure of market power, at least in the demand context.

One possible means of doing so is suggested by Landes's and Posner's claim that with strong brand identities "consumers will benefit from the better quality and greater variety of products."[131] Professor Hay has addressed this issue more fully.[132] He uses as his example restaurants, which, he observes, are not perfect substitutes for each other—another way of saying that they have managed to create demand for their products, and lowered their elasticities of demand.[133] Hay says that restaurants therefore "will maximize profits by charging prices that exceed the relevant marginal costs."[134] (In other words, they will have Lerner indexes greater than zero, indicating market power.) He says, though, that restaurants acquire the ability to price supracompetitively "simply by doing a better job in pleasing customers" and that this "does not signify the kind of market power the antitrust laws ought to be concerned about."[135] The reason, he says, is that consumers subject to this sort of market power will switch to other products if the seller with market power does not continue to please them.[136] But that is not necessarily so.

Professor Hay begs the question by presenting the issue as if it only involved sellers that were "doing a better job in pleasing customers." In fact, a seller can increase the demand for its product through a wide variety of practices, from improving the product, to advertising (truly

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[129] *Id.* at 957. Interestingly, Judge Posner in a recent case seemed to acknowledge that this statement might be incorrect. *See* Khan v. State Oil Co. 93 F.3d 1358, 1362 (7th Cir. 1996) ("[S]uppose further that Union 76 is a sufficiently distinctive and popular brand to give the dealers in it at least a modicum of monopoly power."), *rev'd*, 1997 U.S. LEXIS 6705 (U.S. Feb 18, 1997) (No. 96-871).

[130] *See* Ellen Neuborne & Mary Motta, *A Peek Behind the Price Tag: Cereal Makers Not Only Ones Milking Profits*, USA TODAY, June 13, 1996, at 1B (for soft drinks, product costs are 30.4% of the price, and marketing costs and profits 69.6%; for beer, product costs, including marketing, make up $2.55 of average six-pack price of $4.01).

[131] *See supra* text accompanying note 129.

[132] George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807 (1992).

[133] *Id.* at 814–16.

[134] *Id.* at 814.

[135] *Id.* at 815.

[136] *Id.*

or falsely), to manipulating a standard that applies to the product. (A restaurant owner, for example, might manipulate its rating in the Zagat Restaurant Survey.) If consumers could costlessly obtain perfect information about the product alternatives available to them, and otherwise had free choice among those alternatives, we could perhaps be confident that any demand-based market power that a seller achieved was a result of its "doing a better job in pleasing customers." In fact, though, consumers do not have perfect information, which is why informational marketing practices—for example, advertising and standard setting—exist.[137] And consumers do not always have free choice among products; sales practices like ties do in fact exist.

For these reasons, we cannot be confident that, because a consumer has not switched to another product, the product the consumer is currently using best meets his or her needs. And without that confidence, we cannot be sure that the supracompetitive price that the consumer is paying as a result of the increased demand is procompetitive. Therefore, we need some other means of evaluating demand-based market power, and it is just such a means that I propose in the next section of this article.

Alternatively, one could give up the task of deciding whether demand-based market power is anticompetitive and choose instead to evaluate whether, assuming it is anticompetitive, the seller is in a position to use the power to do a significant amount of harm. This is the approach proposed by Professor Klein in the wake of the *Kodak* decision.[138] He uses as his example breakfast cereals rather than restaurants, hypothesizing a seller of breakfast cereal that faces an elasticity of demand of 2, and thus can price its cereal at twice its marginal cost,[139] but has only a small share of the breakfast cereal market.[140] Klein says that in this situation the seller's power will be limited to setting its own cereal's price; it "will have no ability to control the *market* price." Klein therefore argues (as does Hay) for the use of market share as the sole test of market power.[141]

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[137] More generally, only if a consumer's expected cost of obtaining information about alternative products is less than the expected benefits (in lower price or higher quality) of switching to them, will it make sense for consumers to seek out that information. If the costs of acquiring information exceed the expected benefits of the information, consumers will continue to use their current product; they will never learn of the other products that would better meet their needs.

[138] Benjamin Klein, *Market Power in Antitrust: Economic Analysis after* Kodak, 3 SUP. CT. ECON. REV. 43, 76 (1993).

[139] *See supra* note 127 and accompanying text.

[140] Klein, *supra* note 138, at 76.

[141] *Id.* at 71–85; *see also* Hay, *supra* note 132, at 816 ("[T]he ability to price above marginal costs should not be considered antitrust market power unless it is attributable to an absence of competition as indicated by a substantial market share.").

This, however, is the tail wagging the dog. Market share has long been used in antitrust as a measure of market power only because supracompetitive pricing is difficult to measure; in the absence of the ability to measure power from pricing information, market share is used as a sometimes-accurate *proxy* for market power.[142] But under any accepted definition of market power (even Professor Klein's own[143]), four sellers (say), each with 25 percent of a market, have market power if they are pricing supracompetitively. Indeed, the usual understanding in antitrust law is that supracompetitive pricing in the presence of (imperfectly) competing products is evidence that the high-priced product is in a market of its own.[144] Klein can, of course, redefine the term "market," but he should present a strong justification for doing so.[145]

The justification he offers is that "when courts find a firm has market power, they must mean a substantial amount of market power."[146] But a substantial amount of market power does not necessarily require a high market share. In the example used above, of four sellers each with a 25 percent market share, the sellers' prices could be 10 percent above their marginal cost; or they could be twice their marginal cost, as Professor Klein hypothesizes; or they could be ten times their marginal cost. Regardless of the amount by which prices exceed marginal costs, Professor Klein would not view those higher-than-cost prices as representing "substantial" market power so long as the sellers have small market shares

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[142] *See, e.g.*, FTC v. Indiana Fed'n of Dentists, 476 U.S. 447, 460–61 (1986) ("Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.'" (quoting 7 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1511, at 429 (1986)).

[143] "Although all firms in the real world deviate from the perfectly competitive model, one should define the degree of antitrust market power possessed by a firm in terms of the degree of deviation from the perfectly competitive model or the degree of the firm's ability to price above its marginal cost." Klein, *supra* note 138, at 73 (footnote omitted).

[144] The 1992 Horizontal Merger Guidelines, for example, define a market by determining the smallest set of products for which a "small but significant and nontransitory" price increase can be imposed. U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 1.0 (1992), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104. The Guidelines state that in most contexts it will interpret a "small but significant and nontransitory" price increase as a 5% increase lasting "for the foreseeable future." *Id.* § 1.11. Under this test, even a single restaurant that could profitably raise its price by 5% would be in a market of its own. *See* FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997).

[145] *Cf.* Hay, *supra* note 132, at 816 (acknowledging that "to some extent, this approach simply shifts the battle to one of market definition").

[146] Klein, *supra* note 138, at 55 (quoting DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 738 (1989)).

individually (though perhaps a large one collectively[147]). Yet he *would* view a single seller with a large market share pricing significantly above marginal cost as having "substantial" market power. He does not explain, though, why the "substantialness" of market power should turn on the number of sellers exercising it.

The fundamental problem here is that a buyer paying a supracompetitive price does not care whether the seller attained the ability to charge that price by acquiring a large market share or by creating increased demand for its product. Nor should antitrust law.[148] However, it may make sense for antitrust law to distinguish between procompetitive demand increases and anticompetitive ones, just as it does between procompetitive and anticompetitive means of achieving large market shares. In Professor Klein's breakfast-cereal market, any supracompetitive pricing is presumably a result of more-or-less truthful advertising, and I suggest that it is the procompetitive *source* of the cereal sellers' market power, not the number of sellers exercising it, or their individual market shares that explains why it does not constitute an antitrust problem. The situation would be very different if one of the cereal sellers had maintained its

[147] The competitive effects of some trade practices can depend on the collective market share of all sellers engaging in them. For example, under certain circumstances exclusive-dealing agreements can be anticompetitive if they foreclose a large proportion of the relevant market; in those circumstances, the effect of, say, a 100% foreclosure is the same regardless of whether it is a product of one seller with a 100% share or four sellers, each with a 25% share. *See* STEPHEN F. ROSS, PRINCIPLES OF ANTITRUST LAW 303–07 (1993). In an analogous way, the harm produced by supracompetitive pricing by four sellers with 25% shares is the same as that produced by one seller with the entire market. (It may, however, be difficult to fit the former case within the statutory requirements of the Sherman Act. *See infra* part VI.)

[148] Professor Thomas Arthur disagrees, but for practical, rather than theoretical, reasons. Arthur, like Klein, believes that market power should be of antitrust concern only when it is "substantial," and he argues that it should be considered "substantial" only when both the overall size of the market and the seller's share of it are significant. Arthur, *supra* note 57, at 28–30. His rationale for this requirement is that only when a significant number of buyers are affected will the benefits of enforcing the antitrust laws exceed the costs of enforcement. *Id.* at 30. There are two reasons why this claim does not provide sufficient reason to dismiss demand-based market power. First, it is *only* a claim: Arthur offers no empirical evidence for his view of costs and benefits. Without such evidence, his proposal of a size-of-market test appears to be based purely on speculation, especially when one considers that a particular antitrust enforcement action has deterrent effects that benefit markets beyond that in which the action takes place. Second, Arthur offers no reason why his size-of-market test should be applied only to cases involving demand-based market power, not to all antitrust cases. It seems that the costs of litigating the two kinds of cases would be comparable, so perhaps he believes that the benefits from enforcing the antitrust laws in cases of demand-based market power are less than the benefits of enforcement in cases involving output restriction. That, however, would be to claim that demand-based market power is not as anticompetitive—rather than just not as "substantial"—as other market power.

25 percent market share and supracompetitive pricing by systematically preventing new entrants from receiving, say, a consumer-recognized "Bug-Free" seal of approval of the Cereal Manufacturers' Association.

Thus, neither the legal nor the economic reasons that have been advanced for wholesale dismissal of demand-based market power from antitrust concern are convincing, and antitrust law should take on the task of distinguishing between procompetitive and anticompetitive means of increasing demand. Once that task is accomplished, it might be that more limited and focused objections to antitrust scrutiny of particular forms of demand-based market power would be convincing. Richard Craswell has argued, for example, that certain sources of demand-based market power—advertising is an example—are already regulated by expert agencies, so that questions of institutional competence might suggest excluding them from antitrust scrutiny.[149] But even for those sources of demand-based market power, antitrust should only defer to another body of law after the nature and extent of the antitrust harm is determined. In the next part of this article, I propose a test for making that determination.

IV. A TEST FOR DEMAND-BASED MARKET POWER

The test I propose for evaluating demand-based market power is fundamentally different from the tests courts have previously used. Specifically, I propose a test that focuses not on harm in the market in which demand is increased, but on harm in any other market in which the seller exerts its efforts to create the demand increase. For example, in evaluating a tie, the test proposed here would focus not on harm in the tied product market but on harm in the tying product market. The reason for this approach is that one cannot look at a particular increase in demand and determine whether it is procompetitive or anticompetitive. At bottom, it makes no sense to call a particular level of product demand either procompetitive *or* anticompetitive; that is why assessments of market power usually take demand as given.[150] But if a demand increase is created by some practice that has effects in some other market, those effects

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[149] In his classic article discussing the consumer-protection implications of tying agreements, Craswell argued that those consumer protection issues would be better handled outside antitrust courts. *See* Craswell, *supra* note 41, at 697–700. His reason for this recommendation, though, was that antitrust law was designed to handle issues of market power, rather than consumer protection. The point of this article is that even these consumer-protection problems do generate market power, at least as that term is understood by economists.

[150] For example, Easterbrook has said that in evaluating the competitive significance of changes in output, one should "[h]old other things, such as demand, constant." Easterbrook, *supra* note 24, at 31.

may be either procompetitive or anticompetitive, and thus may be used to judge the demand increase itself.

A. The Proposed Test: Shifting the Costs of Increasing Demand

When a seller seeks to increase demand for a product it sells and the seller also sells[151] another, related product, it can sometimes shift the costs of increasing the demand for the former product to the latter.[152] I believe that such cost shifting is the source of anticompetitive harm in cases involving demand-based market power, and therefore propose it as a general test for evaluating such power. More precisely, I propose that cost shifting be used as a screen in evaluating demand-increasing activities, just as preexisting market power is used as a screen in evaluating supply-restricting activities.[153] That is, if a demand-increasing activity does not involve a shifting of costs, it should not create antitrust liability. If, on the other hand, a demand-increasing activity does involve cost shifting, it should be subject to further antitrust scrutiny, though it would not thereby be conclusively established as anticompetitive.

1. *Cost Shifting*

A seller can incur a variety of different sorts of costs in order to help it sell its product. These costs might, for example, be advertising costs for the product, or they might be the costs of improving it so that it meets a product standard. They might also be, as in a tie, the costs of sales terms for one product that encourage (or require) buyers to buy another. Regardless of the specific nature of the costs, if the seller of, say, product *B* can impose them on buyers of product *A* rather than *B*, the seller can achieve an increase in the demand for *B*, and do so for free, while many of its competitors will have to pay for a comparable increase. As a result, the playing field will be tilted in the seller's direction. It is exactly this problem that the Supreme Court spoke of in *Jefferson*

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[151] Actually, the seller need not sell the related product; it need only exercise some degree of control over it, as sellers sometimes do over product standards. *See supra* part II.A.2.

[152] In tying cases, the costs of increasing demand for the tied product are reflected in the discounts offered on the tying product; these discounts are required to compensate buyers for the requirement that they purchase the tying seller's tied product. *See infra* part V.B.1. In standard-setting cases, the costs are the loss of objectivity for the standard itself. *See infra* part V.A.1.

[153] *See* SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958, 965 (10th Cir. 1994) ("Proof of market power, then, for many courts is a critical first step, or 'screen,' or 'filter,' which is often dispositive of the case.") (footnote and citations omitted); Grappone, Inc. v. Subaru of New England, Inc., 858 F.2d 792, 797 (1st Cir. 1988); Valley Liquors, Inc. v. Renfield Importers, Ltd., 822 F.2d 656, 666 (7th Cir. 1987); Easterbrook, *supra* note 24, at 14–23.

Parish when it expressed concern about maintaining "competition on the merits."[154]

Of course, shifting costs to product *A* will often make it more difficult to sell *A*, so it will not be an effective strategy for all sellers. It can work, though, in at least two circumstances. (Each of these possibilities will be discussed in more detail below; here the important point is just that this sort of cost shifting is possible.) First, even if a seller sells both *A* and *B*, it can sometimes benefit from shifting costs from *B* to *A* if the costs will have less of an impact in selling *A* than they would in selling *B*. *Kodak* is an example.[155] If Kodak's service prices were supracompetitive, buyers might not have been willing to purchase Kodak service in single transactions, where they could compare Kodak's prices with those of its competitors. But by tying its service to its equipment,[156] Kodak forced buyers to decide on their service provider once and for all at a time when it was more difficult for service costs to be determined. Therefore, those costs might not have had the impact on Kodak equipment sales that they would have had on service sales in the absence of the tie.

Second, a seller of product *B* might be able to shift costs to some *other* seller's product *A*. This may seem implausible, but standard-manipulation cases like *ASME* and *Allied Tube* are examples.[157] In these cases, an individual seller is able to manipulate the product standard offered by another entity, the standard-setting organization. By doing so, a seller is able to increase the demand for its own product (*B*), while imposing costs, both short-term and long-term, on users of the standard (*A*).[158] The short-term costs are those imposed on buyers who are led to purchase

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[154] *See supra* text accompanying note 44.

[155] *See also supra* part II.A.2.

[156] *See supra* note 51.

[157] *See supra* part II.A.2.

[158] One might object that a standard is not a product itself but is merely a part of, or information about, the products to which it applies. That is, one might view a standard as akin to advertising. But the two are quite different, primarily because a standard, unlike advertising, is not applicable only to a single product from one seller but is intended to provide objective information about a range of available products. A standard is thus more akin to an information source like *Consumer Reports* magazine: it seeks to attract users who will pay for it (perhaps indirectly), and it may have to contend with competing information sources. *See generally* FEDERAL TRADE COMMISSION, BUREAU OF CONSUMER PROTECTION, STANDARDS AND CERTIFICATION (FINAL STAFF REPORT 1983) [hereinafter STANDARDS AND CERTIFICATION].

Furthermore, many standards reflect not just an effort to provide information about products, but also an attempt to change their characteristics. Standards of this kind set forth the characteristics that buyers would like products to exhibit, and sellers can then choose whether to conform their products to the standard. In a sense, then, the standard is a source of, or perhaps an impetus for, product improvements. When a standard of this kind is manipulated, buyers may be denied not only a source of objective information less-than-optimal products because of the manipulated standards. The long-term costs are those imposed on buyers by the lessened credibility of the standards if the manipulation becomes known; that lessened credibility will require buyers to incur costs to confirm the information provided by the standards or gather their own product information.

When these sorts of cost shifting are effected, they will be anticompetitive. By shifting costs from one product to another, the seller distorts competition in both markets. This sort of distortion has long been the subject of antitrust condemnation in tying law, and the Supreme Court has recently made clear that it is specifically the market-linking effect—the effect on which a cost-shifting test focuses—that is the reason for its condemnation.[159] There is therefore reason to think that the Court would look favorably on such a test. In any event, as the next two sections show, a cost-shifting test appears to be well suited to distinguishing between procompetitive and anticompetitive demand-increasing practices.

2. *Demand-Increasing Practices That Do Not Shift Costs*

To begin with an example that is obviously *not* anticompetitive, one way for a seller to increase the demand for its product is to improve the product. Sellers, of course, frequently do improve their products, and when they do, they raise the products' prices to reflect their improved quality (as well as any increased costs). Rarely or never, though, would a seller shift the costs of improving one product to another.[160] There would be no reason to do so, because buyers would presumably be willing to pay for the improvements,[161] and the seller might even tout the higher price as a signal of the product's higher quality.[162] Therefore, the increased demand created by product improvements would generally

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about the products available to them, but also the improvements that the standard would have encouraged.

In any event, whether a standard is considered a product or not, the important point is that there are very real costs imposed when a standard is manipulated, and that those costs may be imposed on more buyers than just those that are deceived by the manipulation.

[159] *See supra* text accompanying notes 42–44.

[160] A seller might, of course, use the profits from one product to finance development of another. But doing so would not impose costs on buyers of the former product, who would presumably pay the profit-maximizing price regardless of how the seller used its profits. *See supra* note 31 and accompanying text; *infra* text accompanying notes 259–66.

[161] Even if the seller miscalculated and made improvements that cost more than buyers were willing to pay for them, the seller would not shift costs. The seller would presumably be charging the profit-maximizing price for its other products already, so to raise the price of those other products to pay for the mistakenly undertaken improvements would *reduce* the seller's profits, and thus would be counterproductive.

[162] *See* A. MICHAEL SPENCE, MARKET SIGNALING: INFORMATIONAL TRANSFER IN HIRING AND RELATED SCREENING PROCESSES (1974); A. Michael Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 561 (1977).

not cause cost shifting and would be screened out as a matter of no antitrust concern.

A similar analysis applies to advertising, even though there the competitive effects are not so universally admired. A seller would not spend more on advertising than it could recoup in sales of the advertised product, and if the advertising paid for itself, there would be no reason to shift its costs to another market.[163] Moreover, this is typically true whether the claims made in the advertising are true or false; in either case the seller expects the advertising to raise the price of the product enough to pay for itself. As a result, demand-based market power that is a product of advertising—true or false—typically does not involve cost shifting and thus should not be subject to antitrust scrutiny.[164] This does not mean, I should emphasize, that I would exclude false advertising from any scrutiny; it means only that I agree with other commentators[165] that it should not be reviewed under the antitrust laws.

Before discussing circumstances that *do* involve cost shifting, it is worth pointing out that the test's exclusion of product improvements and advertising should allay some concerns about antitrust treatment of demand-based market power.[166] To accept that some forms of demand-based market power can be anticompetitive is not to subject all demand-increasing activities to antitrust scrutiny. For example, the breakfast-cereal and restaurant examples discussed by Professors Klein and Hay[167] would not, under the cost-shifting test, be targets of antitrust attack. But that is so because the demand for those products is a result only of product improvements and advertising, neither of which involves cost shifting, not because it is self-evident that the demand is a result of how well the products satisfy consumers. In any event, product improvements

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[163] *But cf.* BORK, *supra* note 21, at 317 ("Advertising and promotion can be better understood if they are viewed as products or outputs in themselves.").

[164] As described in part V.A.2 *infra*, there might be exceptions to this rule in unusual circumstances.

[165] *See, e.g.*, Sutliff, Inc. v. Donovan Cos., 727 F.2d 648, 655 (7th Cir. 1984) ("This would be a species of unfair competition, like stealing a competitor's trade secret or using false advertising to divert a competitor's customers to oneself; but none of these things are antitrust violations; unfair competition, as such, does not violate the antitrust laws." (citation omitted)) (Posner, J.); Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 399 (7th Cir. 1989) ("[W]hen a trade association provides information . . . but does not constrain others to follow its recommendations, it does not violate the antitrust laws." (citations omitted)) (Easterbrook, J.); *but see* Harry S. Gerla, *Federal Antitrust Law and the Flow of Consumer Information*, 42 SYRACUSE L. REV. 1029 (1991) (arguing that the antitrust laws should be applied to the dissemination of false information and to the withholding of information desired by consumers).

[166] *See, e.g.*, Arthur, *supra* note 57.

[167] *See supra* part III.B.

and advertising have seldom prompted antitrust challenges; the real test of the cost-shifting approach comes in the kinds of cases in which antitrust violations are actually alleged.

3. *Demand-Increasing Practices That Can Shift Costs*

Standard-setting activities may or may not involve cost shifting. For instance, if a seller were to improve its product to conform with a preexisting standard, the costs of doing so, like the costs of product improvement generally,[168] could be recovered through higher prices charged for the product. But a seller could also seek to have its product meet a standard not by improving the product but by altering the standard. In some cases, this might be procompetitive: if the new standard reflected the needs of consumers better than did the old one, consumers would not be hurt; in fact, they would benefit.[169] But if the standard were altered (manipulated) so that it became deceptive or was otherwise less valuable to its users, the change would impose costs on them, either in purchases of products that the users believed would meet their needs and did not, or in the expense of gathering more information to replace that eliminated from the standard.[170] Alteration of a standard, therefore, whether it makes the standard more or less useful to consumers, affects costs not only in the product market, but in the market for the standard as well. Under the cost-shifting test, then, alteration of a standard would be subject to antitrust scrutiny.[171]

This attention to users of the standard appears to conform to the Supreme Court's approach in its standard-manipulation cases. As discussed above,[172] in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* (*ASME*)[173] the Court found the American Society of Mechanical Engineers, a standard-setting organization, liable for harm caused by the manipulation of its standard. The plaintiff in *ASME* was a seller of a product to which one of ASME's standards applied, so one might have expected the Court to focus on injury to buyers in that product market. It did not do so, however, instead focusing on the standard-setting process and on harm to users of the ASME's standard.[174] This might seem a

[168] *See supra* text accompanying notes 161–62.

[169] *See* STANDARDS AND CERTIFICATION, *supra* note 158, at 49–58.

[170] *See id.* at 58–64; *see also supra* text accompanying notes 157–58.

[171] That is, because it involves cost shifting, it is subject to further evaluation of its overall competitive effect. *See infra* part IV.A.

[172] *See supra* part II.A.2.

[173] 456 U.S. 556 (1982).

[174] The Court's approach in *ASME* is especially telling, in that it imposed liability despite the fact that ASME did not itself sell the products to which its standard applied. The Court rejected the ASME's argument that since its agents had not acted to benefit it, and

distinction not worth making, since the injury to users of the ASME's standards would seem to be identical to the injury they suffer from being led to buy the wrong product. But the Court's concerns were not limited to the injuries caused by the particular instance of manipulation challenged in the case. Instead, it justified its imposition of liability more generally, on the ground that it would encourage the ASME to ensure the objectivity of its "system of codes and interpretative advice," and thus would "benefit[] both ASME and the public whom ASME attempts to serve through its codes."[175]

This approach is a sensible one, because the fact that (some of) the costs of altering a standard are borne by customers of all sellers of products to which the standard applies makes the incentive to alter the standard greater. Because a seller that alters a standard presumably chooses to alter it in a way that precisely favors the seller, it will benefit from the standard's deviation from objectivity. (Other sellers may also benefit, or may lose, depending on how their products match up with the altered standard.) And the only possible downside for the altering seller would be that if the loss of objective information from the standard became widely known to buyers, they would cease using the standard. But even then, the altering seller would lose no more than its competitors, because all would be competing equally in a market now lacking a standard.[176] This is quite a different situation from that of a seller that is discovered to be producing false advertising, because that seller is likely to suffer all the loss of credibility itself when the deception is discovered. Thus, the manipulation of a standard brings much the same benefits to a seller as does false advertising, but with lower (or no) risk. That makes the seller more likely to engage in the anticompetitive activity, and supports the use of a cost-shifting test as a screen for anticompetitive effect.[177]

since it did not in fact receive any benefit from the manipulation, it should not be liable. *Id.* at 573–74. The Court observed that though ASME might not sell the products to which its codes apply, it "does derive benefits from its codes," *id.* at 576; therefore, since it was damage to those codes that was of concern, liability could rest simply on the harm to them.

[175] *Id.* at 567.

[176] This might not quite be true. If the manipulating seller had a larger market share than its competitors did, it might have more (supracompetitive) profits to lose than it competitors did. One might therefore view a claim of standard manipulation more skeptically when the seller accused of the manipulation has a large share of the market for the standardized product (assuming, of course, that the seller attained its large market share *before* the manipulation).

[177] Moreover, the collective-action problems in improving a standard suggest a similar conclusion. A seller that, by itself, succeeds in making a standard more objective (i.e., more closely aligned with consumers' concerns) will rarely reap all the benefits of the change. It will do so only if its own product is the only one whose conformity with consumers' needs is under-represented by the pre-change standard in the way that the

Finally, consider the applicability of the cost-shifting test to tying arrangements.[178] A seller that imposes a tie increases the demand for the tied product by imposing a restraint in the market for the tying product. The question for the cost-shifting test, then, is whether the increase in the demand for the tied product *B* involves any shifting of costs to the buyers of tying product *A*. This question can best be answered by examining more specifically what a seller must do to impose a tie. Imagine that, prior to imposing a tie, a seller is selling (what will be) the tying product at the product's profit-maximizing price. To impose the tie, the seller must adopt two new sales practices:[179] it must (1) offer the tying product at a price lower than its profit-maximizing price[180] to buyers who agree to purchase the tied product; and (2) refuse to offer the tying product alone (to buyers who decline the tie), or offer it alone only at a price high enough above its profit-maximizing price to discourage its purchase alone.[181] Tying law has traditionally focused

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change addresses. Since that unique relationship between a single seller's product and a change to a standard is probably the exception rather than the rule, it is probably appropriate in general to be skeptical of individual sellers' efforts to change standards. It seems that in such cases there would be a good chance that the seller is seeking to conform the standard not to consumers' needs but to its own product.

[178] The application of the test to ties is discussed in more detail below. *See infra* part V.B.1.

[179] This description of a tie as the presentation to buyers of two alternatives, both less desirable than their earlier position, is much the same as philosopher Robert Nozick's well-known definition of "coercion." *See* Robert Nozick, *Coercion*, *in* PHILOSOPHY, SCIENCE, AND METHOD. RIGHTS AND THEIR FOUNDATIONS 242 (Jules L. Coleman ed., 1994) (1969). Nozick defines a coercive act as one in which one party (which I will call the seller) changes the alternatives available to a second party (the buyer) in such a way that the buyer would prefer not to have had the alternatives changed (quite apart from which alternative the buyer chooses). *Id.* at 260–67. This definition distinguishes a coercive act from an offer: a coercive act makes all the buyer's available alternatives worse than those available before the act, whereas an offer leaves the buyer no worse off than before the offer was made. The application of this definition to a tie is straightforward. If both of a buyer's post-tie alternatives (buying the tying product and thereby accepting the obligation to also buy the tied product, and doing without the tying product) are worse than the opportunity that would be available to the buyer in the absence of the tie (buying the tying product at its profit-maximizing price), the tie is coercive.

[180] In general, a tying seller must lower the price of its tying product to compensate buyers for the tie. *See supra* text accompanying notes 38–41. In some cases, however, no such lowering of price is necessary, as if the tie serves only a price discrimination function, or if its costs are not apparent to buyers. *See infra* text accompanying notes 301–14 and part V.C.1.

[181] Although a few courts have held that there is no tie if the tying product is available alone (on any terms), most courts recognize that the adoption of that approach "would eviscerate tying scrutiny, even under the rule of reason, for any seller could tie with impunity simply by setting a sufficiently large package discount [or, to put it another way, by charging a sufficiently high price for the tying product alone]." 10 PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1758b, at 343–44 (1996) (footnote omitted). Therefore, as Professors Areeda, Elhauge, and Hovenkamp describe, the courts generally ask "whether the discount has an effect

almost exclusively on the former of these practices, but the latter is equally important, and in fact the two practices harm different classes of buyers.

Practice (1) injures buyers who buy the tying seller's tying product and are therefore forced to buy its tied product as well, when they would prefer to buy that product from some other seller (or not at all); it is these buyers that are the traditional concern of tying law. For those buyers, though, there is no cost shifting (or only formal cost shifting), because they buy both *A* and *B*. That is, because they buy the product whose demand the tie is intended to increase, any costs they suffer are not shifted, in any real sense, to buyers of some other product. In a sense, these buyers are like, for example, buyers of a product whose price is increased as the result of some improvement that they do not care about: they would prefer not to pay more for the change, but by doing so they acknowledge that the product's cost is not too high.[182]

The buyers injured by practice (2) make no such acknowledgment. These buyers are those who refuse the tie, but would buy the tying product at its profit-maximizing price if it were offered alone; they are therefore denied the tying product as a result of the seller's imposition of the tie. This denial imposes a cost on them if they are unable to replace the tying product with an equally attractive product from some other seller. Moreover, they—unlike the buyers who accept the tie—do not signal their acceptance of the tying seller's tying arrangement by purchasing the tied products. Therefore, the seller's efforts to increase demand for its tied product impose costs on these buyers in the market for the tying product. Under the cost-shifting test, then, tying arrangements appear to have the potential for competitive harm, and should be subject to antitrust scrutiny.

The Supreme Court has at times expressed concern about the plight of these latter buyers, despite its usual focus on buyers who comply with the tie. In *Jefferson Parish*,[183] where the defendant hospital had used its services to impose a tie of anesthesiological services, the usual tying law focus on harm in the tied product market would have suggested an examination of effects in the market for anesthesiological services. That was indeed the Court's focus in its per se discussion, where actual competitive impact is not at issue. But when the Court turned to a rule of reason

similar to an outright refusal to sell tying product *A* separately." *Id.* ¶ 1758a. The cost-shifting test takes a somewhat different approach. *See infra* text accompanying notes 276–78.

[182] This ignores the possible informational effects of ties, which are discussed in the text accompanying notes 328–31 *infra*.

[183] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984).

inquiry, where anticompetitive effects must be shown, it looked for those effects in the *hospital* services market and among buyers who refused the tie, observing that "there [was] no evidence that any patient who was sophisticated enough to know the difference between two anesthesiologists was not also able to go to a hospital that would provide him with the anesthesiologist of his choice."[184] This focus on harm to buyers who do not comply with a tie is exactly right, I believe, and is the focus of the cost-shifting test.

In sum, because standard-setting activities and tying present the potential of cost shifting, they require further scrutiny under the antitrust laws. Specifically, when particular instances of these activities are challenged, their actual competitive effects must be evaluated, under the traditional rule of reason. That is, the cost-shifting test does not complete the analysis; it simply identifies certain practices in which a defendant's conduct is unlikely to be anticompetitive, as a market-share screen identifies circumstances in which a defendant is unlikely to be able to restrict output. Those practices that remain, which are those that *do* shift costs, may be anticompetitive, and for those practices, the cost-shifting test counsels further inquiry. The next section describes the form that inquiry might take.

B. ECONOMIC ANALYSIS AND THE SIGNIFICANCE OF OUTPUT RESTRICTION

Cost shifting distorts both the market from which costs are shifted and, especially, that to which the costs are shifted. In general, the form this distortion takes is a reduction in demand for the product to which costs are shifted.[185] The source of this reduction in demand is a change that makes the product less desirable, either because—in the case of deceptive practices—the product provides less accurate information or—in the case of coercion—the product saddles the buyer with an obligation to purchase another product. In either case, the result of the demand reduction may be a lessening of consumer surplus, and this may be anticompetitive.[186]

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[184] *Id.* at 30 (footnote omitted).

[185] The cost shifting on which this article focuses includes only those costs that make a product inherently less desirable, not, for example, a raising of the price of one product to fund development of another. *See supra* text accompanying note 31 and *infra* text accompanying notes 259–67.

[186] Consumer surplus is the area below a product's demand curve (i.e., the curve representing the utility that consumers derive from the product) and above its price. *See* MIT DICTIONARY OF MODERN ECONOMICS 79 (David W. Pearce ed., 3d ed. 1986). It represents the consumers' gain from their purchases of the product. Producer surplus, in contrast, is the area above a product's supply curve (i.e., the producers' cost curve) and below its

1. *An Analysis of* Moody's

These points can be clarified with an example. Consider again the *Moody's* case.[187] *Moody's* is an appropriate choice because it presents aspects of both deception and coercion. As described earlier, the plaintiff in *Moody's*, a bond issuer, alleged that when it decided not to use the services of the defendant Moody's, a debt-rating service, Moody's made negative comments about the issuer and threatened to issue an unsolicited and unfavorable rating of its creditworthiness, with the goal of forcing it and other issuers to purchase rating services from Moody's.[188] These allegations implicate two distinct markets. The first is the focus of the plaintiff's allegations: the market in which debt issuers hire services like Moody's to rate their creditworthiness. The second relevant market is that in which bond buyers use credit ratings in order to determine whose bonds to buy; these investors stand to be deceived if, as the plaintiff alleged, unsolicited ratings issued by Moody's are inaccurate. Thus, the plaintiff alleged that Moody's sought to increase the demand for one of its own products—bond-rating services—in a way that would have imposed costs on users of another product—bond ratings.

Figure 1 represents conditions in the market in which debt issuers purchase Moody's rating services. The figure shows hypothetical industry demand and marginal-cost curves facing Moody's before it applied the pressure alleged by the plaintiff; these curves are $D_{industry}$ and MC, respectively. If we assume that Moody's has no power in this market,[189] it will be able to price only at marginal cost MC,[190] providing a producer sur-

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price. *See id.* at 342. It represents the producers' gain from sales of the product. There is a debate among antitrust scholars over whether consumer surplus is the only proper goal of antitrust law, or if total surplus (consumer *and* producer) is the better measure. *Compare* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged,* 34 HASTINGS L.J. 65 (1982), *with* BORK, *supra* note 21, at 110–12 (arguing that "income distribution effects . . . should be completely excluded from the determination of the antitrust legality of the activity"). In the text I will focus on consumer surplus, but I will also discuss producer effects in the notes. *See infra* notes 192 & 200.

[187] *See supra* text accompanying notes 4–11.

[188] *See supra* text accompanying notes 7–11.

[189] In fact, the plaintiff in *Moody's* alleged that Moody's rates "more than eighty percent of all municipal bonds issued in the United States." *See* Second Amended Complaint at 11, Jefferson County Sch. Dist. No. R-1 v. Moody's Investors Service, Inc., No. 95-WY-2649-WD (D. Colo. Apr. 4, 1997). But, in general, a seller that seeks to increase demand for its product need not have preexisting power in the market for that product. For example, tying sellers typically have no power in the tied product market prior to imposing a tie. The principles illustrated by the figure apply in either case.

[190] That is, Moody's, like other producers lacking market power, would be able to sell none of its rating services at any price above MC.

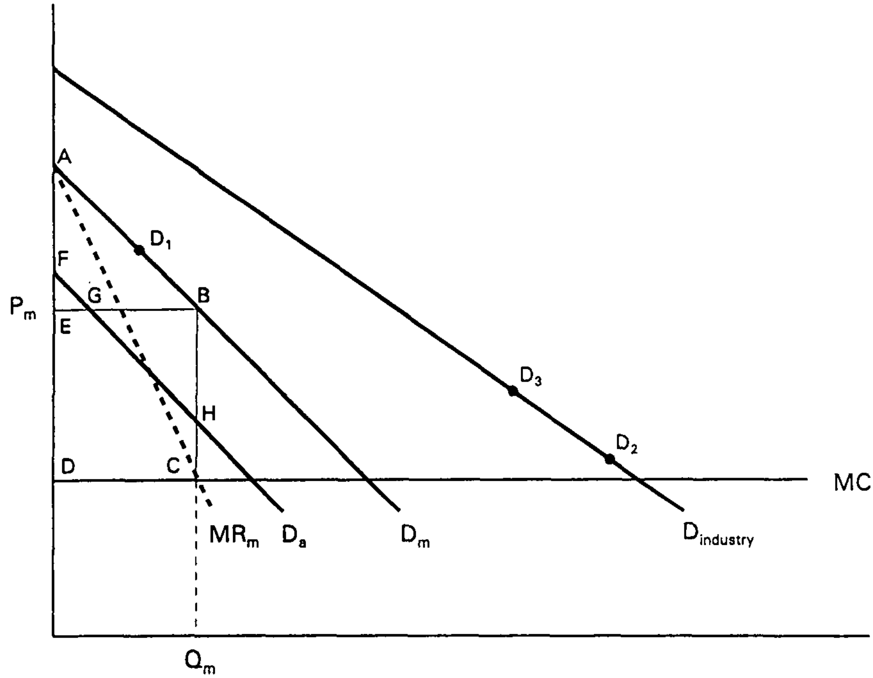

Figure 1. The Market in Which Demand Is Increased

plus[191] of zero. If, however, Moody's were able to force issuers to purchase its ratings, as the plaintiff alleged, it could create demand like that shown by D_m.[192] The increase in demand to D_m would result in a marginal-revenue curve of MR_m, and Moody's would price at P_m, providing an output of Q_m. Producer surplus would increase from zero to *BCDE*.

The important question, of course, is what are the overall competitive effects of the increase in demand for Moody's services? The answer to that question is unclear from Figure 1, for at least two reasons. First, although the consumer surplus for Moody's customers after the demand increase is *ABE*, it is difficult to know what it was before the increase. The pre-increase surplus for the buyers subject to the increase would have been the sum of the differences between their positions on the demand curve $D_{industry}$ and *MC*, but their (former) positions on $D_{industry}$ are

[191] For the definition of producer surplus, see note 186 *supra*.

[192] Part or all of D_m could in fact lie above $D_{industry}$, but that would not alter the consumer surplus effects discussed in the text. It is true that if D_m lay all or in part above $D_{industry}$, *total* surplus might increase, but that increase would be of little import, given the issues discussed in the text accompanying notes 194–95 *infra*.

unknown. One can, it is true, assume that a particular buyer's pre-increase demand on $D_{industry}$ was less than, or at least not more than, the buyer's post-increase position on D_m. But even so, the demand increase could cause either an increase in surplus—if, say, the buyer whose post-increase demand was D_1 had a pre-increase demand of D_2—or a decrease in surplus—if the buyer's pre-increase demand was D_3.[193]

A more fundamental difficulty, though, is that using D_m to calculate consumer surplus is misleading. If the plaintiff's allegations are correct, D_m represents how much issuers are forced (coerced) to pay,[194] not the actual competitive level of demand. The competitive level of demand would be the portion of $D_{industry}$ that corresponds to the buyers represented on D_m; a possible representation of the demand of these buyers is shown in Figure 1 as D_a.[195] Thus, D_a represents the actual demand of the issuers influenced by Moody's—the quantities they truly want to purchase—but those issuers purchase D_m to prevent Moody's from issuing inaccurate ratings. The actual post-increase consumer surplus is therefore not *ABE* but (*FGE* – *GBH*); the area *ABGF* is not truly a gain to consumers, and *GBH* is a loss to them.[196]

The problem lies in determining whether the plaintiff's allegations are true—whether in fact D_m is not the "true" demand. But proof that demand has been altered by coercion would be difficult. Buyers like the plaintiff in *Moody's* would testify that they purchased, or would purchase, Moody's ratings services unwillingly,[197] but even if they were correct, Moody's could counter that any pressure buyers felt was a result of Moody's successful effort to develop acceptance of its ratings among investors, not of any improper manipulation of its ratings. Such an argument should not be easily dismissed, because competition policy generally seeks to encourage practices that increase demand; if possible, therefore, antitrust law should avoid any test that turns on disputes about

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[193] The buyer's post-increase surplus would be $D_1 - P_m$, which is greater than the pre-increase surplus if the buyer's pre-increase demand was D_2, which is $D_2 - MC$, but less than the pre-increase surplus if the buyer's pre-increase demand was D_3, which is $D_3 - MC$.

[194] In another sort of case, like a standard-manipulation one, it could represent how much buyers are deceived, rather than coerced, into paying.

[195] This ignores buyers who buy the product independently of any coercive effect, but because the demand of those buyers does not change as a result of the demand-increasing practice, it can be ignored in evaluating the practice's competitive effect.

[196] *GBH* must be subtracted because it is an amount that consumers pay, but would not if they were not coerced by the threat of disparagement. It is therefore an amount they spend, but for which they receive nothing in return; it is a loss.

[197] In fact, the plaintiff in *Moody's* did not purchase Moody's services. It would presumably offer evidence that other issuers did, or that it or other issuers would feel pressure to do so in the future.

why buyers made the purchases they did. Such difficulties can be avoided by turning to Figure 2.

Figure 2 represents conditions in the market in which bond buyers purchase Moody's ratings. D_o and MR_o represent Moody's demand and marginal-revenue curves prior to its alleged coercive practices. Thus, Figure 2 assumes that prior to the challenged actions Moody's had market power[198] and was able to price above its marginal cost, at P_o, providing a producer surplus of *PQRS* and a consumer surplus of *NPS*. The figure also shows, as D_m and MR_m, the demand and marginal-revenue curves that might result if, as the plaintiff alleged, Moody's issued inaccurate unsolicited ratings, and if bond buyers became aware that Moody's issued such inaccurate ratings. (The implications of bond buyers remaining unaware of the issue of such ratings are considered below.[199]) Demand

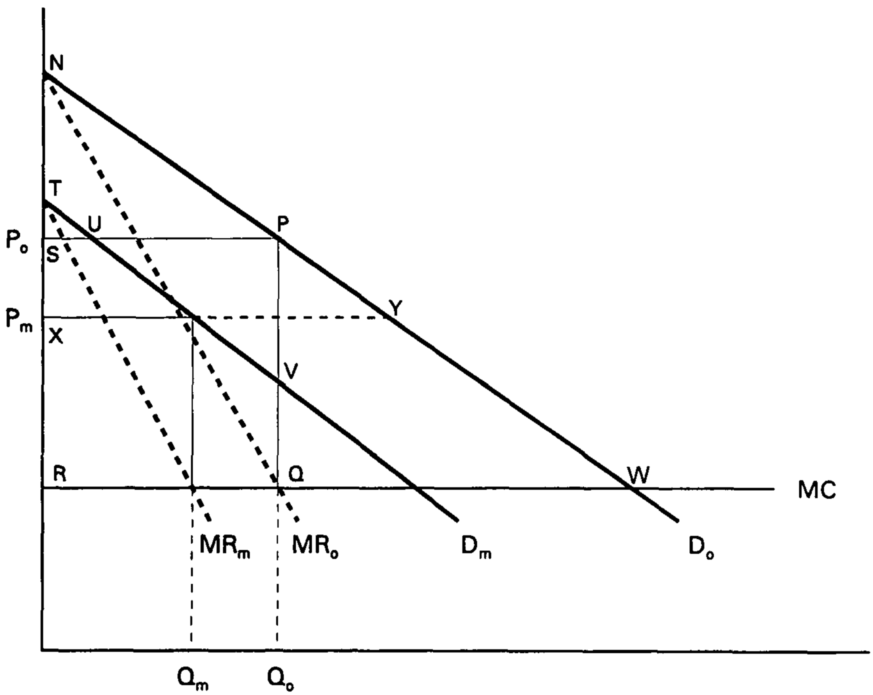

Figure 2. The Market to Which Costs Are Shifted

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[198] As discussed in part II.B.1 *supra*, a seller need not in fact have power in the market shown in Figure 2 to increase demand for the product in the market shown in Figure 1. But assuming that it has market power in Figure 2 makes the figure clearer.

[199] *See infra* text accompanying notes 201–06.

for Moody's ratings would be lower, as would be the market power of Moody's, which would be able to price only at P_m.[200]

If a decrease in demand (and output) like that shown in Figure 2 could be proven, the danger of condemning the practice that produced it would be much less than in the case of a demand increase, because decreases in output, unlike increases, are generally anticompetitive. In *Moody's*, proof of a decrease would require proof that investors, as a result of the issuance by Moody's of inaccurate ratings, reduced their use of Moody's ratings, or that Moody's could only maintain the same level of output at a lower price. The plaintiff in *Moody's* could, for example, offer a survey of investors that indicated that, as a result of Moody's actions, they switched to use the ratings of Standard & Poor's or some other service. This might be difficult, however, because the reduction in demand shown in Figure 2 might not in fact occur at all if investors were not aware that the unsolicited ratings that Moody's was issuing were inaccurate.[201] In other words, though demand would drop to D_m if buyers were aware of the inaccuracy, it might remain at D_o, or at some intermediate level, if the inaccuracy remained secret or if some other factor prevented demand from decreasing.[202]

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[200] The figure also shows a reduction in output, to Q_m. One might think that an increase in output would be necessary, because if output decreased, the seller's surplus would also decrease and the seller would not engage in the practice. But the seller could be willing to take a decreased surplus in Figure 2, because the same practice that causes that decrease also provides it with an increased surplus in Figure 1. This point has important implications if producer surplus is considered a valid goal of antitrust. In *Moody's* and other cases, like tying cases, in which the seller of the products in both Figures 1 and 2 is the same, producer surplus is likely to be increased, because otherwise the seller would not engage in the practice. (In other cases, like those involving standard manipulation, the decreased surplus in Figure 2 is shared by all sellers, not suffered solely by the one engaging in the demand-increasing practices, so the seller may engage in those practices despite an overall decrease in producer surplus. *See supra* text accompanying notes 157–58.) But to the extent that output is maintained by the deception of buyers, it is inappropriate to consider the producer surplus that results from that output as a benefit that antitrust should encourage.

[201] It also might not occur if investors had always been aware that unsolicited Moody's ratings were inaccurate, or if the accuracy of Moody's ratings were irrelevant to investors (perhaps because, whether the ratings are accurate or not, they affect the price of issued debt). In either case, the unsolicited ratings would impose no costs on investors, and a cost-shifting test would find no antitrust violation.

[202] In *Moody's* one such factor is the widespread statutory requirement that a bond issue be rated by either Moody's or Standard & Poor's. *See, e.g.*, ILL. ANN. STAT. ch. 30, para. 425/6(b) (Smith-Hurd 1996) (state may enter into various financial arrangements with "persons whose debt securities are rated in the highest long-term categories by both Moody's Investors Services, Inc. and Standard & Poor's Corporation"); MASS. GEN. L. ch. 175, § 63, ¶ 16(3) (1996) (insurance companies may invest in "corporate obligations maturing in one year or less which at the date of the investment are rated A or higher by Standard & Poor's or A or higher by Moody's").

Yet even if output were maintained, consumer surplus would still drop, from *NPS* to (*TUS* – *UPV*).[203] The mechanism here would be similar to that described above for Figure 1, with the difference that the issuers in Figure 1 would know what their true demand was but would be forced to buy more, whereas the investors in Figure 2 would buy more because they would not be aware of the true nature of the product they were purchasing. In other words, where the buyers in Figure 1 were injured by coercion, those in Figure 2 would be injured by deception. Nevertheless, the plaintiff in *Moody's* might still be able to prove anticompetitiveness. It could, for example, survey investors after providing them with information about the inaccuracy of unsolicited Moody's ratings to determine the true demand level. It might also be able to show directly that investors interpreted the Moody's statements regarding it as implying underlying facts about its creditworthiness that were not true.[204] The problem with that approach from the cost-shifting perspective, though, is that it would show only that one Moody's rating was inaccurate, not that Moody's had injured investors more generally. But the plaintiff could perhaps avoid this problem by proving that Moody's *systematically* used ratings in the way it alleged—by showing, for example, that unsolicited ratings by Moody's were different from solicited paid-for ratings of issuers whose financial situations were comparable; this would show an imposition of costs on investors using Moody's ratings.[205]

In the end, then, as this *Moody's* example shows, reductions in output play a major role in evaluating the competitive effect of demand-based market power, though that role is somewhat different than in cases of market-share-based power. Specifically, an output reduction in Figure 2 is important,[206] but its implications are not the same as when output is reduced through an exercise of market-share-based power. When a seller with a large market share limits its output, price rises as a result. In

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[203] *UPV* must be subtracted from consumer surplus as a product of deception, just as *GBH* in Figure 1 must be subtracted as a product of coercion. *UPV* is an amount that consumers pay but would not if they had full information. *See supra* note 196.

[204] This seems to be the approach that the plaintiff is taking. *See* Second Amended Complaint at 5–6, Jefferson County Sch. Dist. No. R-1 v. Moody's Investors Serv., Inc., No. 95-WY-2649-WD (D. Colo. Apr. 4, 1997):

> The Moody's statement and its repetition in the Dow Jones statement were materially false, misleading and derogatory in that they state, imply, and convey the impression that the School District's financial condition was not creditworthy . . . , and that this statement was based on current information concerning the School District and an analysis sufficient to support that conclusion and equivalent to the analysis performed by [Standard & Poor's] and Fitch.

[205] *But see supra* note 201.

[206] The evaluation of demand-based power focuses on Figure 2 because, as discussed in the text accompanying notes 194–97 *supra*, although Figure 1 reveals an output increase

Figure 2, an output decrease is likely to be accompanied by a *decrease* in price, because it is a result of a decrease in demand, not supply. Nevertheless, despite that price decrease, the decrease in output can reduce consumer surplus, and therefore can be anticompetitive. Furthermore, the discussion of Figure 2 shows that deceptive practices may be anticompetitive, even if they do not result in a decrease in output, because output may be maintained only by deception. As a result, a cost-shifting test would evaluate the competitive effects of the practices alleged by the plaintiff in *Moody's* by evaluating their effect on the output of Moody's ratings, a reduction in output being anticompetitive, with the proviso that the plaintiff should also be given the opportunity to show that output was artificially maintained by the seller's practices.

2. *Application of the Analysis to Other Practices*

A similar approach can be used in other sorts of demand cases, though it sometimes requires some modifications. Standard-manipulation cases, for example, differ from *Moody's* in that the sellers in Figures 1 and 2—the manipulating seller and the standard-setting organization, respectively—are different, whereas in *Moody's* the seller (Moody's) is the same in both figures. That does not change the focus of the evaluation of competitive effect, which remains on output in Figure 2, but it does complicate the task of determining what the output effects are. As mentioned above,[207] standard-manipulation cases, like other cases that can be characterized as involving efforts to raise rivals' costs, involve a "supplier" that has an interest in preventing decreased sales for its product. In a standard-manipulation case, this supplier is the standard-setting organization, which has an interest in preventing the manipulation of, and the resulting decreased demand for, its standard. A standard-setting organization might therefore respond to an instance of manipulation with changes in its procedures to prevent similar future instances and in order to reassure users of its standards. In *ASME*, in fact, just such corrective efforts were made by the ASME, the standard-setting organization in that case.[208] These efforts suggest an acknowledgment by the ASME that the incidents that gave rise to that case might have created concerns among users of the ASME's standards, and that it sought to address those concerns by ensuring that similar manipulation would not happen

as a result of the demand increase, its competitive effect is uncertain because the increase in demand is a result of the seller's coercive (or deceptive) practice.

[207] *See supra* text accompanying note 81.

[208] American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp., 456 U.S. 556, 576 n.15 (1982).

again.[209] And to the extent that the ASME's changes did indeed reassure its standard users, output of its standard might not decrease, but that would not mean that the manipulation was not anticompetitive. On the contrary, the changes might be viewed as a more or less impartial determination that costs *had* been imposed on the standard users and, at least in the absence of some alternative explanation for them, might make a finding of liability on the manipulating seller seem more appropriate.

For tying cases, the analysis is also analogous, but not identical, to that for *Moody's*. *Moody's* itself involved coercion, but in it the classes of buyers in the two markets were entirely distinct (though they were all Moody's customers). In tying cases, the analysis must be different because the class of buyers to which costs are shifted is, for the most part, the same as the class of buyers who purchase the product whose demand is increased. The former group are the buyers of the tying product, represented in Figure 2, and the latter are the buyers of the tied product, represented in Figure 1. The demand relationships between these two products are therefore closer than between the two in *Moody's*, and cost shifting between them is correspondingly more difficult.

As discussed above,[210] if a seller forces buyers of its tying product to take also its tied product, it usually must lower its price on the tying product. As a result, output of a tying product is more likely to be maintained than is output of the corresponding products in other demand cases.[211] Ties are therefore less likely to be anticompetitive, at least from a cost-shifting perspective.[212] But the lower price that tying

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209 The ASME's changes are not proof that its standard users were injured, however. A standard-setting organization might seek to improve its procedures even in the absence of any belief that its past procedures had caused any actual problems.

210 *See supra* text accompanying notes 38–41.

211 In this respect ties differ both from *Moody's* and from cases of standard manipulation. Moody's need not necessarily lower its price on debt ratings as a result of coercive activities in the market for ratings services, because Moody's customers in the two markets are distinct groups. The bond buyers that use Moody's ratings may not be aware of Moody's activities in the other market, so they may not be aware that the ratings they use may be inaccurate. The same is true for users of standards.

212 However, ties might also be condemned for other reasons. It is often pointed out, for example, that tying arrangements can be a means of price discrimination, the charging of different prices to different customers, which the antitrust laws forbid through the Robinson-Patman Act, 15 U.S.C. § 13. Price discrimination has procompetitive as well as anticompetitive effects, *see* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 494–508 (3d ed. 1990), so it is not clear that antitrust law is wise to condemn it. In any event, to the extent that the condemnation of tying arrangements is justified as an effort to prevent price discrimination, the condemnation should focus directly on that harm, and should condemn only ties that cause such harm.

Tying might also be anticompetitive to the extent that it foreclosed a substantial portion sellers offer on the tying product may not be sufficient to compensate all buyers for the tie. Some commentators seem to claim that the decrease in price for the tying product must necessarily compensate buyers for the tie, and that therefore output of the tying product will not decrease as a result of the tie; they claim, that is, that P_m in Figure 2 will drop sufficiently so that Q_m will equal Q_o.[213] That need not be so, however.

The tying seller will lower P_m until its marginal revenue is equal to its marginal cost, but the output at which that will occur depends on the two pre-demand-increase demand curves (in Figures 1 and 2) and on the relationship between them.[214] It is quite possible that the seller could maximize its profits by pricing the tying product at a level that left some buyers inadequately compensated for the tie. Those buyers would therefore decline to purchase the tying seller's tying product, and its output would drop. This output reduction would be an initial indication that the tie was anticompetitive. At the same time, though, the tie might provide benefits (such as a package discount) that would lead new buyers to purchase the tying product, thus lessening, and perhaps even eliminating, the drop in output. The net effect of the tie can be assessed by determining whether its output-enhancing effects could be obtained while avoiding its output-reducing ones, as will be discussed in the next part of the article.

V. APPLYING THE TEST

In this part of the article, I apply the analysis outlined in the last section to a variety of cases in which claims of demand-based market

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of a market to competing sellers of the tied product, and thus made it unprofitable for those competitors to remain in the market. *See* Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990). The exit of the tying seller's competitors from the tied product market might then give the tying seller significant power in that market, and it could act anticompetitively there. But these issues of foreclosure and exclusion would be better pursued under antitrust's law regarding exclusive-dealing arrangements, which focuses specifically on these issues. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 46–47 (1984) (O'Connor, J., concurring).

[213] In effect, these commentators contend that D_m, the post-tie demand curve for the tying product, does not look like the curve in Figure 2, but instead is either *SPW* or *XYW*. If D_m were *SPW*, the tying seller would not need to lower the price of the tying product at all, but would simply appropriate all the pre-tie consumer surplus, *NPS*. If D_m were *XYW*, the seller would have to lower the tying product's price to P_m, again appropriating *NPS* (and sacrificing the pre-tie producer surplus *SPYX* in the tying product, but presumably recovering it in sales of the tied product). To the extent that these commentators are correct about the post-tie demand curve, they are also correct that the tie does no harm (beyond the effects of price discrimination, which are discussed briefly in note 212 *supra*). They do not, however, show that any post-tie demand curves actually take the form they claim—they assume it.

[214] MR_m is not defined only by D_m for the tie, because the tying seller's marginal revenue from the tying product is defined not only by its revenue on the tying product but also

power have been made. These cases are divided into three categories. First are cases involving claims of deception, like cases alleging standard manipulation and false advertising. Second are cases involving coercion, including both tying cases and monopoly leveraging claims made against Microsoft Corporation. Finally, the third section applies the cost-shifting test to two Supreme Court demand cases that have engendered much controversy and that combine elements of both coercion and deception: *Kodak* and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[215]

A. CASES OF DECEPTION

1. *Standard Setting*

As described above,[216] under the cost-shifting test, a seller's use of a standard-setting process would violate the antitrust laws if it reduced the amount of accurate and objective information provided by the standard.[217] The problem, though, as is probably clear, is that the cost-shifting test's focus on whether costs to users of a standard are increased or decreased provides no independent means of making that determination. In the end, the competitive effect of a seller's efforts to change a standard cannot be determined without knowing whether the seller made the standard more or less useful to consumers. This conclusion may seem unhelpful, since it requires that the antitrust significance of standard-setting activities be determined by an inquiry into the substantive legitimacy of the standard itself, an inquiry that it might seem courts are ill-equipped to make. In fact, though, this sort of evaluation would be necessary regardless of what test were proposed; any test must determine whether on balance a particular standard-setting activity has benefits outweighing its costs.[218] Therefore, it is exactly such a test that the Supreme Court proposed in *Allied Tube* when it said that to be

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by the tied-product revenue that results from the tie. This results in a complex relationship between the two products, but one that may result in more profits for the seller with a tie. *See, e.g.*, John S. McGee, *Compound Pricing*, 25 ECON. INQUIRY 315 (1987).

[215] 472 U.S. 585 (1985).

[216] *See supra* text accompanying notes 168–77.

[217] The standards on which this section focuses are those, like the ones in *ASME* and *Allied Tube*, that purport to provide information about product characteristics that consumers find important. Other standards serve instead to ensure compatibility among different sellers' products; some of the competitive implications of standards of this kind are described in part V.B.2 *infra* (discussing Microsoft's marketing practices).

[218] In a previous article, relying on a more traditional analysis not incorporating the present cost-shifting rationale, I advocated a similar approach to standard manipulation. Mark R. Patterson, *Antitrust Liability for Collective Speech: Medical Society Practice Standards*, 27 IND. L. REV. 51, 90–105 (1993).

procompetitive, standards must be "based on the merits of objective expert judgments."[219]

The application of this test is relatively straightforward in cases like *ASME* and *Allied Tube*, where individual sellers manipulated the procedures of independent, well-respected standard-setting organizations.[220] It also seems reasonably easy to apply in other cases where specific, more or less objective information is at issue. For example, in *Schachar v. American Academy of Ophthalmology, Inc.*,[221] a case that was discussed earlier,[222] the claim was that statements made by the standards organization were intended to reduce the demand for a procedure performed by the plaintiffs by describing it as "experimental," despite "the allegedly proven safety and efficacy of the procedure."[223] The defendants were the governing members of the organization,[224] rather than one or a few renegade members, as in *ASME* and *Allied Tube*, but that does not alter the nature of the problem: the test should still be whether the information the organization's statement conveyed was accurate and useful to consumers. As outlined above, then, the plaintiff should have been permitted to establish an antitrust violation through a survey of consumers that showed that the information was misleading.[225]

In other cases, a plaintiff might be able to show that a standard-setting organization's procedures, rather than the substance of its standards, imposed costs on consumers. For example, in *Consolidated Metal Products, Inc. v. American Petroleum Institute*[226] the plaintiff claimed that it sought approval of its product from the American Petroleum Institute (API), but that the API's processes took so long that by the time the product was approved, the plaintiff had suffered serious injury from the (interim)

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[219] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988).

[220] The respect that these organizations were accorded by consumers indicates that their procedures were generally successful in producing standards that were useful to their consumers. One could imagine, however, a sort of "sham" standard-setting body, designed not to provide useful information to consumers, but to exclude competitors. *See* LAWRENCE A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 248 (1977) (discussing the possibility of such "sham" standards programs). Circumvention of the procedures of that sort of "standard-setting organization" might in fact benefit consumers.

[221] 870 F.2d 397 (7th Cir. 1989).

[222] *See supra* text accompanying notes 97–99.

[223] Schachar v. American Academy of Ophthalmology, Inc., 1988-1 Trade Cas. (CCH) ¶ 67,986, at 58,050–51, 58,054 (N.D. Ill. 1988).

[224] The defendants were members of the American Academy of Ophthalmology's board of directors. *Id.* at 58,050.

[225] *See supra text* accompanying note 204. *Cf. Schachar*, 870 F.2d at 400 ("If such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas.").

[226] 846 F.2d 284 (5th Cir. 1988).

lack of approval. The Fifth Circuit rejected the plaintiff's claim, primarily because the plaintiff "offer[ed] no evidence that its customers were coerced by API or otherwise constrained to buy only [approved] products."[227] Yet, as discussed above, coercion is not necessary—legally or factually—for standards to cause injury to competition.[228] If the API's denial of approval to the plaintiff's product was unjustified, as the court seemed to acknowledge, and as its eventual approval seemed to indicate,[229] the API's delay injured consumers, because they were misled by the absence of approval.[230]

This general approach seemed to be sanctioned by the Supreme Court in *Allied Tube*, where it said that private standards must not only be based on objective judgments, but must also be determined "through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling competition."[231] Nevertheless, in *Consolidated Metal Products* it would perhaps have been going too far to impose antitrust liability on the API as a result of the slowness of its procedures. There was apparently little or no evidence that approval was delayed by the plaintiff's competitors[232]; the delay (of slightly less than two years) seems instead to have been due to the time it took for the API to resolve several legitimate questions about the plaintiff's product.[233] That is not to say that delays could never create antitrust liability. One can imagine an organization whose procedures routinely delayed approval of new products for years, and the adoption and maintenance of such procedures would seem as valid a source of antitrust liability as the procedures of the ASME, which allowed one of its members to exploit its reputation. The important point is that the focus of the inquiry should be on the costs of the delay to users of the standard,

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[227] *Id.* at 296.

[228] *See supra* text accompanying notes 115–19.

[229] On the other hand, the committee responsible for considering the plaintiff's product included among its members users of the product as well as sellers, *Consolidated Metal Products*, 846 F.2d at 287 n.1, which makes manipulation of the standard seem less likely.

[230] The court said that it was undisputed that API approval had "great value," yet it seemed unwilling to draw the conclusion that consumers were injured, suggesting instead that the injury was only to the plaintiff. *Id.* at 292–93.

[231] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 501 (1988). In making this statement, the Court cited its earlier criticism of the procedures at issue in *ASME*, which it said provided no "meaningful safeguards" against self-interested activity. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 570–73 (1982).

[232] Originally, several competitors were apparently defendants, but the plaintiff did not appeal the district court's grant of summary judgment for them. *Consolidated Metal Products*, 846 F.2d at 288.

[233] *See id.* at 286–88.

because it is only there that the reasonableness of the delay can be evaluated, by balancing the interim inaccuracy of the standard against the costs of speedier action, which might also result in inaccuracy. Users of an inaccurate standard suffer costs as a result of the inaccuracy regardless of whether their use of it is voluntary or coerced.

A case that straddles the line between substance and procedure is *Clamp-All Corp. v. Cast Iron Soil Pipe Institute.*[234] In that case, the plaintiff Clamp-All Corporation manufactured and sold pipe couplings in competition with members of the defendant trade association (CISPI). Clamp-All brought several claims against CISPI, but the one most relevant here was a claim that CISPI anticompetitively influenced the standard-setting activities of the American Society of Sanitary Engineers (ASSE).[235] Judge Breyer described the circumstances:

> [A]t Clamp-All's request, the ASSE formed a subcommittee to write a hubless coupling standard. Clamp-All proposed a four-tier standard (rating couplings by their ability to withstand varying levels of water pressure). Initially, when only one CISPI representative was present, the subcommittee recommended a three-tier standard (which was also beneficial to Clamp-All). CISPI then decided to offer a single tier standard, which both the CISPI and Clamp-All couplings would have met. It wrote its members and urged them to attend the next meeting. At that next meeting, with six CISPI members attending out of a total of sixteen, the subcommittee changed its mind and voted for CISPI's proposed standard. The ASSE eventually decided not to accept its subcommittee's recommendation, and it took no further action.[236]

Judge Breyer said that these facts were not similar to those in *Allied Tube,*[237] but under a cost-shifting analysis the cases look identical. In both cases plaintiffs alleged that competing sellers had taken actions that denied consumers information that would have reduced demand for those competing sellers' products. In *Allied Tube* the information concerned the plaintiff's product's conformance to the relevant standard; this information was presumably valuable to consumers, and the Court condemned the defendant's efforts to suppress it.[238] In *Clamp-All* the information denied to consumers was that which would have been con-

[234] 851 F.2d 478 (1st Cir. 1988) (Breyer, J.).

[235] *Id.* at 481.

[236] *Id.* at 488–89.

[237] Specifically, he said that CISPI, unlike Allied Tube, had not "'packed' the meeting by hiring lay voters in numbers that unfairly gave it overrepresentation," and that there was no "concrete evidence that the submission of CISPI's proposal caused (or even influenced) ASSE's decision not to adopt any standard." *Id.* at 488. In light of the description accompanying note 236 *supra,* the distinctions between the cases do not seem so clear as to justify the directed verdict that Judge Breyer affirmed.

[238] *See supra* note 70 and text accompanying notes 219 & 231.

veyed by the rejected four- and three-tier standards.[239] This information, Judge Breyer said, would have been "beneficial to Clamp-All."[240] If so, the information would have been useful to consumers, since there was no suggestion that the Clamp-All-supported multi-tier proposals were in any way misleading. And because the information would have led consumers to buy fewer products from CISPI members, CISPI members had every incentive to suppress the proposed multi-tier standards, so as to preserve the demand for their products. They even seem to have "stacked" the meeting at which the vote occurred,[241] as the defendant in *Allied Tube* did.[242] Nevertheless, the court expressed no interest in comparing the substantive merits of the Clamp-All and CISPI proposals.[243] This is somewhat surprising, given that elsewhere in the opinion Judge Breyer defended CISPI's promotion of its own standard as "providing information" to consumers.[244] In making this inquiry into the substantive informational effects of the CISPI standard, Judge Breyer was entirely in accord both with the Supreme Court's views in *Allied Tube* and with the cost-shifting test. He should have conducted a similar inquiry into the informational effects of CISPI's actions on the ASSE standard.

2. *Advertising*

As discussed above,[245] advertising generally does not present cost-shifting problems, because the costs of advertising—true or false—are generally borne by buyers of the product advertised. Therefore, most antitrust challenges to false advertising could be rejected under a cost-shifting approach. Although such challenges have usually failed in any event, it seems desirable to address them under a test that is also applicable to related antitrust claims, rather than, as is currently often the case, through ad hoc tests that have little in common with other antitrust cases.

An example of the application of such ad hoc tests is *American Professional Testing Service, Inc. v. Harcourt Brace Jovanovich Legal and Professional Publications, Inc.*[246] In this case, the plaintiff, the seller of Barpassers bar review courses, accused the defendant, which sells BAR/BRI courses, of

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[239] 851 F.2d at 488–89.

[240] *Id.* at 489.

[241] *See supra* text accompanying note 236.

[242] *See supra* note 70. "Stacking" should always be a concern because it suggests that a standard is being chosen through voting power, rather than through expert judgment.

[243] The court contented itself with the observation that the evidence did not "show[] a significant abuse of ASSE's procedural standards or practices." *Clamp-All*, 851 F.2d at 489.

[244] *Id.* at 487.

[245] *See supra* text accompanying notes 163–65.

[246] 108 F.3d 1147 (9th Cir. 1997).

misleading potential customers of Barpassers. Specifically, the plaintiff claimed that when its parent company was in financial trouble, BAR/BRI distributed fliers at law schools falsely suggesting that Barpassers "might not be able to continue to offer its bar review courses."[247] The case was tried to a jury, which found BAR/BRI liable.[248] Nevertheless, the district court granted BAR/BRI judgment as a matter of law, and the Ninth Circuit affirmed.

The court of appeals acknowledged the introduction by Barpassers of survey evidence suggesting that students might have been misled by BAR/BRI's fliers, and the court even referred to the fliers as "false advertising," but it said that there was insufficient evidence that the students were "'clearly likely' to rely" on the advertising or that it was "not readily susceptible to neutralization" by Barpassers.[249] The court adopted these two requirements from Professor Areeda's antitrust treatise.[250] Professor Areeda recommended these additional hurdles for antitrust claims predicated on false advertising because, he said, advertising usually does not implicate the market power concerns central to antitrust law.[251] That may well be true, but the additional burdens that he proposed, and that the court in *Harcourt* adopted, also seem to have little relationship to market power or other more general antitrust considerations.[252]

One might therefore prefer in a case like *Harcourt* to apply a more general approach, like the cost-shifting one. Because the only injuries caused by the BAR/BRI statements seem to have been those suffered by buyers led to purchase some other bar review course, rather than the Barpassers one, there seems to be no shifting of costs from the market in which demand is affected—that for bar review courses—to any other. In this respect, false advertising differs from standard manipulation:

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[247] *Id.* at 1150.

[248] *Id.*

[249] *Id.* at 1152.

[250] Actually, *Harcourt* relied on a similar Second Circuit case, *National Association of Pharmaceutical Manufacturers, Inc. v. Ayerst Laboratories*, 850 F.2d 904 (2d Cir. 1988). *See Harcourt*, 108 F.3d at 1147 (quoting *Ayerst Laboratories*, 850 F.2d at 916). But *Ayerst Laboratories* had relied solely on Professor Areeda's treatise. *See* 850 F.2d at 916 (citing 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 738a, at 279 (1978)).

[251] 3 AREEDA & TURNER, *supra* note 250, ¶ 738a, at 279 ("The key problem here is the difficulty of assessing the connection between any improper representations and the speaker's monopoly power.").

[252] One could perhaps interpret the "not susceptible to neutralization" requirement as one that asks whether the defendant has some sort of advertising power that the plaintiff lacks. Even applying that interpretation, though, the "advertising power" would be in a market for information, not in the product market on which antitrust typically focuses. *Cf. infra* part V.A.2.

although standards normally have an existence apart from the products to which they apply, so that the manipulation of a standard injures not only those buyers who are misled by the manipulation but also those who learn of it and therefore avoid the standard, or even other standards from the same organization, false advertising generally injures only those who are misled by it.

A different conclusion might be reached in other cases involving advertising, however. For example, in *Twin Laboratories, Inc. v. Weider Health & Fitness*[253] the parties were producers of competing nutritional supplements for bodybuilders, and the defendant, Weider Health & Fitness, was also the publisher of "what [were] universally acknowledged to be the two leading magazines in the bodybuilding field."[254] After several years of publishing advertisements for the plaintiff's products in its magazines, Weider ceased accepting the plaintiff's advertising. The plaintiff sued under Sherman Act Section 2, but the court rejected its claims, holding that the plaintiff had failed to show that its inability to advertise in Weider's magazines was a "severe handicap." Although this may have been the correct resolution of the claim under the essential facilities theory under which the plaintiff sued,[255] it does not address the cost-shifting issues. By denying the readers of its magazines access to information about the plaintiff's nutritional supplements, Weider imposed costs on them, and apparently did so to increase the demand for its own supplements.[256] It is not clear why the antitrust laws should permit such practices: Weider's action used its monopoly power in magazines,[257] and did so in a way that allowed it to profit from that power

[253] 900 F.2d 566 (2d Cir. 1990).

[254] *Id.* at 567. The plaintiff alleged that Weider's magazines made up 66% of all sales of bodybuilding magazines. *Id.* at 569.

[255] The most common statement of the elements of an essential facilities claim is the following: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." MCI Communications Corp. v. AT&T, 708 F.2d 1081, 1132–33 (7th Cir. 1983), *quoted in Twin Laboratories*, 900 F.2d at 568–69. *Twin Laboratories* relied on a gloss that required that the "'denial of [the essential facility's] use inflict[] a *severe handicap* on potential [or current] market entrants.'" 900 F.2d at 568 (quoting Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977) (alteration in *Twin Laboratories*)).

[256] Weider did not contend that it would have been unprofitable to publish the plaintiff's advertising.

[257] *See supra* note 254 and accompanying text. Weider need not have possessed monopoly power to shift costs, and thus to be seen to have acted anticompetitively under the cost-shifting test. However, the plaintiff would probably have been unable to show that it suffered injury from being denied access to Weider's magazines if Weider had not possessed some degree of market power. *Cf. infra* text accompanying notes 291–313 (discussing market power as a requirement for tying injury). And in any event, since Weider's refusal

while exploiting its magazine readers in a way that was probably less likely to attract competitors than if it had directly raised prices for its nutritional supplements.[258]

Another antitrust claim involving advertising was presented by *Aquatherm Industries, Inc. v. Florida Power & Light Co.*[259] The claim in *Aquatherm* was that Florida Power & Light (FP&L), the electric utility company for a large portion of Florida, misled swimming pool owners regarding the electricity required for electric swimming pool heaters.[260] Aquatherm, the plaintiff, is a manufacturer of solar-powered pool heaters, and it claimed that the estimates that FP&L gave to pool owners of the electricity required by non-solar-powered heaters were too low, and that those estimates increased demand for the non-solar-powered heaters at the expense of Aquatherm's solar heaters.[261] FP&L's goal in making the misleading estimates, Aquatherm says, was to increase the demand for FP&L's electricity.[262] The plaintiff alleged that FP&L's actions violated Sherman Act Section 2.

The court dismissed Aquatherm's claims on the ground that FP&L did not compete in the market in which Aquatherm alleged harm, that for pool heaters.[263] It is not clear why the fact that FP&L did not sell in that market should be decisive, if FP&L had the incentive to distort the market and if in fact it caused harm there, as Aquatherm alleged. However, the case could also have been dismissed on cost-shifting grounds.

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to accept the plaintiff's advertising was a unilateral decision, the plaintiff's claim was brought under Sherman Act § 2, which requires monopoly power. *See infra* part VI.B.

[258] *See infra* part VI.B (discussing monopoly leveraging). A somewhat similar analysis could be made of the recent allegations, currently being investigated by the Justice Department, that Frito-Lay Corporation acts anticompetitively by insisting that grocery stores provide it with more shelf space than it can use effectively. *See, e.g.*, Kenneth N. Gilpin, *U.S. Examines Competition in Snack Industry*, N.Y. TIMES, May 25, 1996, at 31; Martin Zimmerman, *Struggle for Shelves: Paying for Favorable Display Pits Small Chipmakers Against Giant Frito-Lay*, DALLAS MORNING NEWS, June 18, 1996, at 1D. Frito-Lay's reason for doing this, the allegations contend, is to prevent its competitors from being able to effectively market their goods, which helps preserve the market share of Frito-Lay's own products. *See* Zimmerman, *supra*. One could analyze these claims by treating shelf space as analogous to advertising in Weider's magazines; then Frito-Lay would be disadvantaging grocery store customers by distorting the allocation of shelf space, in a way similar to Weider's disadvantaging of its magazine readers by distorting the advertising in its magazines. This analysis is perhaps less immediately compelling as applied to Frito-Lay because grocery shelf space is not so clearly a product separate from Frito-Lay's snack foods as Weider's magazines are distinct from its nutritional supplements, but the basic cost-shifting principles are the same.

[259] 971 F. Supp. 1419 (M.D. Fla. 1997).

[260] Memorandum of Plaintiff in Opposition to Defendant's Motion to Dismiss the Amended Complaint at 3–5, *Aquatherm* (No. 92-1047-Civ-Orl-22).

[261] *Id.* at 5.

[262] *Id.* at 2.

[263] 971 F. Supp. at 1427, 1432–33.

The plaintiff alleged that FP&L "use[d] its monopoly profits [in the electricity market] to underwrite the [advertising] campaign,"[264] which seems to suggest that FP&L was increasing the demand for electricity among a subset of its customers—pool owners—by imposing the (advertising) costs of doing so on all its customers.[265] But this is not cost shifting. The costs on which the cost-shifting test focuses are those that make the product in the market to which the costs are shifted less valuable to consumers. This lessening in value, which may be the result of a loss of credibility (as in standard manipulation) or an obligation to purchase a second product (as in tying), causes a reduction in demand, which in turn causes a loss of consumer surplus.[266] No such lessening in value was present in *Aquatherm*: regardless of the use to which FP&L put its profits from the sale of electricity, the value of that electricity to consumers remained the same.[267]

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[264] *Id.* at 1432. Somewhat similar allegations were made in the amicus brief filed in the Justice Department's case against Microsoft Corporation, where the amici claimed that Microsoft uses its monopoly operating system profits to subsidize its efforts in other markets. *See* Memorandum of Amici Curiae in Opposition to Proposed Final Judgment at 42, 44, 53, United States v. Microsoft Corp., 159 F.R.D. 318 (D.D.C.) (No. 94CV10564), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995).

[265] Alternatively, one could say that FP&L increased the demand for electricity by imposing costs on buyers who were led by its statements to purchase non-solar-powered pool heaters. But those buyers would be the same ones who would create the increased demand for electricity, so there would be no shifting of costs to a class of buyers who did not purchase the product whose demand was increased. (That is, there would be no shifting of costs for the buyers of non-solar-powered heaters, in the same way that there is no shifting of costs for buyers who comply with a tie. *See infra* text accompanying note 275.)

If, instead of making favorable comments about non-solar-powered heaters, FP&L had made unfavorable comments about solar-powered ones, the analysis would have been more difficult. (Recall that such unfavorable comments about a competing product were made by BAR/BRI in *Harcourt.*) In that case some buyers might have been led not to buy solar-powered heaters and some of those buyers might have chosen to go without heaters entirely rather than to buy non-solar-powered ones. Because those non-buyers could therefore have been injured by the statements, yet not have contributed to the increased demand in electricity, the increase in demand could be viewed as shifting costs to them. A cost-shifting test might therefore suggest liability in these circumstances. (In *Harcourt* there was only one product market involved, so there was no cost shifting; in *Aquatherm* two products—electricity and pool heaters—are involved.) I am not aware, however, of any case in which a seller of one product has attempted to increase demand for it by making disparaging comments about a product in another market.

[266] *See supra* part IV.B.

[267] To make out a claim along cost-shifting lines in *Aquatherm*, one could perhaps argue that FP&L's alleged false advertising imposed a cost on FP&L customers of reduced credibility for FP&L. This argument might make out a cost-shifting claim in principle, but the claim should only be accepted if consumers really depended on FP&L as a source of information, so that a loss of credibility for it injured those consumers. That sort of dependence on FP&L was in fact alleged by the plaintiff, *see* 971 F. Supp. at 1432 (describing the plaintiff's claim that "FP&L is 'viewed by consumers as being especially knowledgeable and credible in opining on energy matters'"), and it might be more plausible in other circumstances. For example, Microsoft is alleged to announce its products far in

B. CASES OF COERCION

1. *Tying Arrangements*

The best way to present the implications of the cost-shifting approach for tying cases is to compare it with the Supreme Court's current approach. Under current law, a tying claim has four elements:[268] (1) there must be separate tying and tied products; (2) the purchase of the tying product must be conditioned on the purchase of the tied product; (3) the seller must have sufficient power in the tying product market to coerce the buyer's purchase of the tied product; and (4) the tying arrangement must foreclose a substantial volume of commerce. The fourth of these elements is in most cases merely formal,[269] but the other three have rough analogs[270] in the three elements of a cost-shifting test, which would ask whether (1) the imposition of the tie caused some buyers to forgo purchase of the tying product; (2) the tying seller could have provided the tying product alone on terms that would have increased its profits on that product (and lessened the injury to buyers); and (3) the buyers forced to forgo the tying product suffered injury as a consequence.

Before comparing the elements of these two approaches, an important difference that the cost-shifting approach would make in the structure

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advance of the time at which they actually become available, in an attempt to dissuade buyers from buying the products of its competitors. *See generally* Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163 (1996). It might be the case that such announcements, to the extent they are false, disadvantage not just buyers led to wait longer than they expected for Microsoft products, but also other buyers who no longer believe that they can rely on Microsoft for useful information about product availability dates; if so, these "vaporware" allegations might make out a cost-shifting claim.

[268] The Court has not explicitly set out its test in these (or any other) terms, but its recent cases have required these four elements. *See* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 21 (1984) ("[A] tying arrangement cannot exist unless two separate product markets have been linked."); Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 461 (1992) ("A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.") (internal quotation marks omitted); *Jefferson Parish*, 466 U.S. at 13–14 ("[W]e have condemned tying arrangements when the seller has some special ability—usually called 'market power'—to force a purchaser to do something that he would not do in a competitive market.") (citations omitted); *Jefferson Parish*, 466 U.S. at 16 ("[W]e have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby.") (citations omitted). Other formulations of the test are possible, *see, e.g.*, HOVENKAMP, *supra* note 15, § 10.1, but "[i]n operation, the tests are roughly similar," *id.*

[269] The requirement demands only that the absolute quantity of commerce foreclosed be substantial. *See, e.g.*, United States v. Loew's, Inc., 371 U.S. 38, 49 (1962) (apparently finding $60,800 sufficient).

[270] The elements in the two tests are differently ordered, as will be made clear in the discussion below.

of tying litigation should be noted. Under current law, the injury of a tie is perceived to be the forced purchase of the tied product from the tying seller, so competing sellers of the tied product can claim injury from the loss of the sales preempted by the tie. Under the current test, those competitors need only allege that the tying seller has market power sufficient to coerce buyers and need not in fact produce any buyers who actually claim to have been coerced by the tie;[271] this makes it rather easy for competitors to bring tying claims, even where no competitive injury to buyers is apparent.[272] The cost-shifting approach eliminates this problem because under it the relevant injury to competition is not to buyers who accept the tie, but to those who do not. The injured buyers are free to make purchases from any of the tying seller's competitors, so there is no harm to those competitors. Consequently, competitors of the tying seller could not bring tying claims under a cost-shifting theory; such claims could only be brought by (potential) customers of the tying seller, whose injuries would more likely be the result of anticompetitive practices.[273] Competitors could, however, continue to bring exclusive-

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[271] This is most apparent in cases that infer coercion from a contract requiring purchase of the tied product. *See, e.g.*, Bogosian v. Gulf Oil Corp., 561 F.2d 434, 449–50 (3d Cir. 1977). *See also* 10 AREEDA ET AL., *supra* note 181, ¶ 1753, at 295 ("Thus, once the requisite agreement or conditioned sale appears, whether the agreement or condition *caused* buyers to purchase the defendant's tied product rather than a rival's is not at issue.") (footnote omitted). *But cf. Jefferson Parish*, 466 U.S. at 27 ("Tying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made.").

[272] The problem with competitor suits, of course, is that a tying seller's competitors in the tied product market are injured even by ties that are efficient, and therefore willingly accepted by buyers. Because they suffer real injury from these ties, competitors are led to sue, though the injury is only to them, not to competition. *See generally* Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551 (1991); William H. Page & Roger D. Blair, *Controlling the Competitor Plaintiff in Antitrust Litigation*, 91 MICH. L. REV. 111 (1992) (responding to Snyder & Kauper).

Similar problems exist for buyers, but to a lesser extent. Under current law, buyers who would have bought the tied product in any case might claim to have been coerced. And they might in fact believe they were coerced, because if the tying product were available at a lower price with the tied product, they might feel that they were forced to take the tied product to receive the discount. The fallacy in this reasoning, of course, is that the discount might only be available because of cost savings or other efficiencies provided by the tie. *See infra* text accompanying notes 275 & 280–92. Under the cost-shifting test, these buyers could not sue, because the injury of concern to the cost-shifting test is that to buyers who refuse the tie. To be sure, buyers who would not have bought the tying product from the tying seller in any case might claim to have been prevented from doing so by the tie, and these buyers could sue under the cost-shifting test. But this danger seems no greater than the one under current law, and it may even be that because buyers who do not deal with the tying seller—as those who buy the tying product elsewhere do not—might be unaware that the tie exists, the danger of spurious suits under the cost-shifting test would be less.

[273] Some potential plaintiffs fall into both categories, i.e., they are customers of the tying seller as well as its competitors. In fact, a large number of recent cases involve such

dealing claims, in which the relevant injury is the foreclosure of some portion of the tied product market to the tying seller's competitors.[274]

The first element of the cost-shifting test—requiring that the plaintiff show that the tie caused buyers to forgo the tying product—is similar to the requirement of current law that access to the tying product be conditioned on purchase of the tied product. However, it would not be enough under the cost-shifting test that buyers be forced to buy the tied product to receive the tying one—it would be required that some buyers refuse the tie. This requirement has the advantage of helping ensure that the tie actually is coercive by excluding ties whose terms are accepted by all buyers. A tie that is universally accepted may be so because it offers buyers an economical way to purchase the two products or because it eliminates a more costly alternative that the seller would otherwise use, such as establishing and enforcing contractual quality control protections;[275] a tie that is in fact coercive would presumably prompt at least some buyers to reject it. Of course, it is possible that a tying seller's tying product could be so valuable to buyers that *all* of them would accept the tie rather than be denied that product, and it might seem inappropriate to exclude such ties from antitrust scrutiny. But this problem is less severe than it might seem.

If all buyers bought the tying and tied products in the same proportion, the seller could generally accomplish the same effect as that produced by the tie by simply raising the price of its tying product.[276] Therefore,

plaintiffs. *See, e.g.*, Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992); *see also supra* text accompanying notes 48–52 (discussing facts of *Kodak*). Under the cost-shifting approach, these plaintiffs would be permitted to sue only for the injuries they suffered as customers; that is, they could sue for injuries suffered by the tying seller's denial to them of the tying product, but not for injuries they suffered from lost sales of the tied product (unless those injuries were the same).

[274] *See Jefferson Parish*, 466 U.S. at 44 (O'Connor, J., concurring in the judgment) (observing that "[w]hether or not the [case's alleged tying] contract is characterized as a tie between distinct products, the contract unquestionably does constitute exclusive dealing"). The advantage of handling competitor claims under the exclusive-dealing rubric is that when only a small portion of the tied product market is foreclosed, such claims could easily be dismissed. *See id.* at 45–46.

[275] *See supra* text accompanying note 45. In either of these cases a tie might be necessary even if all buyers would willingly purchase both products at the tied-together price. In the case in which there are economies in selling both products together, a tie might be necessary because without it some buyers might seek to buy the tying product, by itself, at the price that reflects the economies of selling it with the tied product; if enough buyers did this, the economies might be eliminated. And in the case in which a seller uses a tie in lieu of more costly contractual protections—of quality, for example—the tie may be necessary because, though the improved quality benefits all buyers, in the absence of the tie some might free ride on the others' efforts.

[276] *See* CARLTON & PERLOFF, *supra* note 77, at 473–74. This may not be true if the seller has market power in both the tying and tied products, *id.* at 471–72, but tying sellers usually have power only over the tying product.

in those circumstances it seems that little anticompetitive harm would be caused by the tie. Where, instead, buyers purchased the tying and tied products in different proportions, the tie would serve a price discrimination function, charging the most to those who purchased the largest quantities of the supracompetitively priced tied product. But perfect price discrimination is arguably procompetitive, and is at worst competitively ambiguous, injuring some buyers but benefiting others, so it is not clear that these ties would be anticompetitive, either.[277] In any event, the buyers who would suffer the most from a price-discriminating tie would in most cases be those who would derive the most value from the tying product,[278] so that if those buyers refused the tie, they would be best positioned to challenge the tie under a cost-shifting test.

The second element of the cost-shifting test asks, if the plaintiff has shown that it was denied access to the tying product, whether the injury was a result of "coercion," or cost shifting. More specifically, it asks whether the tying seller has sacrificed profits on its tying product by refusing to sell it alone, or by setting its price when purchased alone artificially high, in order to gain profits on the tied product. This element picks up some of the concerns of the element of the current test that asks if the tie involves two truly independent products. If there is not demand for each of two products independently, it will not be economical to sell them separately. In that case, although the tying product's price might be high if it were purchased alone (assuming it were available at all), the high price would be a result of diseconomies of scale, not of coercion by the seller. Of course, this is all a matter of degree,[279] and the real difficulty comes in developing a principled test for cases in which it is unclear whether the source of a higher price is diseconomies or coercion.

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[277] In any case, the fact that a tie is not condemned under the cost-shifting test proposed here would not preclude a claim based specifically on the tie's price-discrimination effects. *See generally* 9 PHILLIP E. AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1711 (1991).

[278] It is conceivable that a seller could create a tie that would impose high costs on buyers that valued the tying product little. Then, even if those buyers refused the tie, they would have little incentive to sue. But if the mismatch between costs and tying product valuation in such a tie applied to many of the seller's customers, the tie would be ineffective, and would presumably be short-lived. And if the mismatch applied only to a few customers, the tie would do little harm (because the denial of the tying product would impose only small costs on those customers).

[279] Therefore, the cost-shifting test does not offer the illusory promise of answering the two-product question through the sort of formal line drawing that sometimes consumes tying cases under current law. *See* 10 PHILLIP E. AREEDA ET AL., *supra* note 181, ¶ 1741a, at 177 (1996) ("Courts often decide whether two allegedly tied items 'really' constitute a single product as if the question involved metaphysics, intuition, or some other abstract inquiry divorced from the aims of tying law.").

At a minimum, it seems that a plaintiff who has shown that a seller discontinued access to the tying product alone (or made it prohibitively expensive) after instituting a tie should be seen to have made a prima facie case on this point. However, it might be that creating and selling the tying-and-tied product combination would raise the cost of producing and selling the tying product alone. Suppose that selling the tying product *A* by itself involved some fixed costs, so that when fewer of *A* were sold alone, the costs of selling it rose. This might have been the case, for example, in *Times-Picayune Publishing Co. v. United States.*[280] In *Times-Picayune* the government sued a publisher of both a morning and evening newspaper over the publisher's requirement that those who advertised in one of its papers advertise in both. The government claimed that the publisher was using its morning paper, which had no competition, as a tying product to force purchases of advertising space in its evening paper, which competed with another newspaper.[281] The publisher defended, however, by arguing that running the same advertisements in both its papers substantially reduced its costs,[282] which suggests that buyers might have accepted the package arrangement willingly. Although the publisher apparently did not argue that running a large proportion of common advertisements in both papers *raised* costs for advertisements that ran only in the morning paper, it seems likely that some portion of the layout costs for advertisements printed only in the morning paper would have been independent of the number of such advertisements, so that fewer advertisements would have resulted in higher costs for each one.

In a case like this, it seems that a seller should be able to defend against a tying claim by arguing that after institution of the tie, it can no longer sell the tying product alone at a price that buyers find attractive.[283] At least under the cost-shifting approach, the purpose of tying law should be to prevent sellers from raising prices specifically to cause buyers to accept a tie; it should not be to force sellers to market their products in any particular way. If many buyers prefer to buy the tying and tied products together, and there are too few buyers who want the

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[280] 345 U.S. 594 (1953).

[281] *Id.* at 596–97.

[282] *Id.* at 623. Although the Court awarded judgment to the publisher, it did not rely explicitly on the publisher's claim of reduced costs. *See id.* at 611–14 (stating that to advertisers morning and evening readers are "fungible customer potential," so that the *Times-Picayune*'s 40% overall market share and its monopoly position among morning readers were insufficient).

[283] A similar point is made by Professor Meese, who points out that in the situation in which a franchisor uses a tying requirement to prevent its franchisees from free riding on the franchisor's quality reputation, "while the franchisor may 'offer' franchise contracts

tying product by itself to make it economical to offer it alone, the seller should not be forced to do so, even if it sold it alone prior to offering the products together.[284]

If the tying seller has never sold the tying product alone, and particularly if none of its competitors has, either,[285] the plaintiff might find it difficult to prove that such sales are practical. But this is as it should be: if the seller (and other sellers) have always tied two products together, there is a good chance that the tying is efficient. On the other hand, even in these circumstances, a buyer could perhaps sometimes show that a seller could offer the products separately. Consider, for example, a tying seller that sold its tying and tied products together at price P_{both} and had a cost of producing its tied product of C_{tied}, and assume that the seller could increase the sales of its tying product by selling it, by itself, at $P_{both} - C_{tied}$. In such a case, offering the tying product alone would increase the seller's profits, so that it is difficult to see why the seller would not do it, except to artificially increase the demand for its tied product.

Although an argument along exactly these lines has been made in tying litigation on at least one occasion, in *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*,[286] it was rejected, in large part because the

that do not include such a requirement, it will do so only at a price higher than any franchisee is willing to pay." Meese, *supra* note 45, at 133 (footnote omitted).

[284] The burden of proof on this issue should be on the seller, though. The seller has access to the relevant information, and the task of proving these conditions, when they exist, should be small. One might be concerned that putting this burden on sellers would discourage them from offering possible tying products alone, for fear that if they discontinued doing so, their actions would have to be justified. But this disincentive already exists: sellers may currently avoid offering their products separately in the hope that they will be viewed as one and thus excluded from tying scrutiny. *See* 10 AREEDA ET AL., *supra* note 181, at ¶ 1762d.

[285] If the tying seller has never sold the tying product alone, but its rivals have, a plaintiff could perhaps point to the rivals' prices for the tying product to argue that the tying seller could price it similarly. But the sellers' cost structures might differ sufficiently to make that approach inaccurate. It seems, then, that at the least the plaintiff should also be required to make an initial showing that the tying seller's costs are no greater than those of the sellers to which it seeks to compare it.

[286] 920 F. Supp. 455 (S.D.N.Y.), *reargument denied*, 926 F. Supp. 371 (S.D.N.Y. 1996). As described by the court in *Ortho Diagnostic*, the plaintiff's expert, Janusz Ordover

> assumed that a hypothetical defendant sells a system comprised of two products, A and B. It has competitors in the sale of A, but not B. Its marginal cost for each product is $10. It sells a package consisting of both A and B for $100, and it sells B alone for $95. On these assumptions, the defendant would make $85 profit by selling a unit of B alone, but only $80 by selling a package unless there are cost savings uniquely attributable to selling the package. Since the hypothetical defendant would "lose" $5 of profit by selling the package as opposed to selling B alone, . . . this pricing therefore arguably is unlawful . . . .

926 F. Supp. at 373.

plaintiff offered insufficient evidence of the defendant's cost structure.[287] This would probably always be a problem, cost information being notoriously elusive, so it may be unwise to allow plaintiffs to force courts into this inquiry without requiring them to overcome some initial hurdle. In fact, Professors Areeda, Elhauge, and Hovenkamp propose a similar cost-based test, and include as part of it just such a hurdle. Their test would require defendants to disprove the cost condition discussed above, but only after the plaintiff had met an initial burden of showing that a large proportion of buyers had accepted the tie.[288]

Professor Areeda and his colleagues intend this burden to indicate when a tie is likely to be coercive.[289] As a test for coerciveness, though, it seems overinclusive, since it is possible that many, or all, buyers could accept the tie willingly. In these circumstances, where the tying seller has never sold the tying product alone, I would instead include a market share test in the plaintiff's initial burden. The danger, discussed below,[290] that a market share test might understate the seller's power by neglecting buyers who were injured by declining the tie, is relatively small here, especially when buyers have no non-tying sellers to which to turn. There is still some danger that market share would overstate the degree of coercion exercised by a seller, because many of its buyers might accept the tie willingly, but a seller with a large market share will at least present

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[287] The *Ortho Diagnostic* court "assume[d] *arguendo* that the preceding hypothetical example would raise an issue under Section 2," *id.*, but it rejected the argument on the facts of the case, which were considerably more complicated. *Id.* at 373–77.

[288] *See* 10 AREEDA ET AL., *supra* note 181, ¶ 1758b. A somewhat similar view is taken under current law because courts generally ask whether the tying seller's "pricing structure makes purchase of the tying and tied products together the only viable economic option." *See, e.g.*, *Ortho Diagnostic*, 920 F. Supp. at 471 (collecting cases). But as Professors Areeda, Elhauge, and Hovenkamp say, this test is "too extreme" because it would condemn only ties that coerced *all* buyers. 10 AREEDA ET AL., *supra* note 181, at 345–46; *see also Ortho Diagnostic*, 920 F. Supp. at 471 n.23. Instead, they "tentatively suggest that separate sales below ten percent presumptively indicate a de facto tie." 10 AREEDA ET AL., *supra* note 181, at 346. Although this test is characterized as a presumption (and they would allow it to be rebutted by a showing of cost savings), it appears that when it is not met, they would not allow a plaintiff to try to show that a pricing structure was coercive. *Id.* at 348

> [T]he ¶ b test of a high proportion of bundled purchases must be satisfied before a package discount should be deemed a presumptive tie. Absent such a prior finding of a presumptive tie, defendant's costs are not at issue. Thus, a package discount is not a tie merely because the defendant fails to show matching or larger cost savings.

Id. (footnote omitted). I do not include such a hurdle for the plaintiff, because I do not find 90% so greatly different from 100%.

[289] 10 AREEDA ET AL., *supra* note 181, ¶ 1758b, at 345 ("[A] trivial proportion of separate sales shows that the package discount is as effective as an outright refusal to sell product *A* separately.") (footnote omitted).

[290] *See infra* note 292.

the potential of coercive action. Given that the cost-shifting approach allows only buyers, not competing sellers, to sue, the danger of spurious suits with this approach seems sufficiently low, and in any event no greater than under current law.

Finally, the third element of the cost-shifting test requires a showing of injury from the tie's denial to the plaintiff of the tying product. This element of the test is the analog of the third element of the current test, the requirement that the seller have market power in the tying product market. The difference between the two requirements is that the cost-shifting approach focuses the inquiry on the particular form of market power that is especially relevant to tying. As discussed above,[291] a tie can be imposed without market power. The significance of market power in a cost-shifting analysis of tying cases turns not on its importance in imposing ties, but on its implications for injury to buyers who refuse them.[292] Buyers denied the tying product are injured only when there

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[291] *See supra* text accompanying notes 45–46 & 178–81.

[292] Obviously, these two things are related. Market power does aid in imposing a tie to the extent that buyers who would otherwise refuse the tie have no alternative to which they can turn, and therefore accept the tie. But because these buyers are difficult to distinguish from buyers who willingly accept the tie, the cost-shifting test focuses on buyers who refuse, and the significance of market power for them is in their injury from refusing it. *See supra* text accompanying notes 271–73.

Moreover, even to the extent that market power is relevant in imposition of the tie, it is not appropriate to use the post-tie market share that current law typically uses, for two reasons. First, the tying seller's post-tie share of the tying product market includes buyers who willingly accept the tie, and the seller's power over those buyers is irrelevant. Second, the seller's post-tie market share does *not* include buyers who refuse the tie and are therefore denied the tying product, yet those buyers are as subject to the seller's power as the buyers who are forced to accept the tie.

To clarify this point, consider a seller that produces two products, *A* and *B*, and that sells them at their competitive prices, C_A and C_B, respectively. Suppose that the seller can produce and sell *A* and *B* together at a cost of less than $C_A + C_B$; the seller therefore also offers *A* and *B* at prices lower than C_A and C_B, but only to buyers of both. Now, suppose that under these circumstances—which involve no tie—100 buyers buy both *A* and *B* from this seller; 200 buy only the tying product, *A*, from it; and 200 buy the tying product from other sellers. Then suppose that the seller discontinues selling *A* alone, and that the result is that 50 of the 200 buyers who previously purchased only *A* from it now buy both *A* and *B*, and 150 switch to other sellers. What is the relevant market share measure? Current law would say 30%, which is the post-tie fraction of the sales of *A* made by the tying seller. But the effect of the unavailability of *A* fell only on those buyers who bought *A* alone, and of those the seller's share was 50%.

One can just as easily construct an example in which current law overstates the seller's power. For example, suppose that, before the seller ceased selling *A* alone, when *A* was still available at C_A, 200 buyers bought both *A* and *B* from it; 100 bought only the tying product, *A*, from it; and 200 bought the tying product from other sellers. Then, when the seller ceased selling *A* alone, 50 of the 100 buyers who previously purchased only *A* from it began to buy both *A* and *B*, and 50 switched to other sellers. In this example, current law would say that the seller's market share was 50%, but the seller's share of those on whom the effect of the unavailability of *A* would fall was only 33⅓%.

are no substitutes for the tying seller's tying product,[293] a condition which indicates that the seller has market power, though not necessarily a large market share.[294]

In some cases, the importance to buyers of the tying seller's tying product might still be satisfactorily measured by market share, though not necessarily the same share measure that would be used under current law. For example, in *Times-Picayune Publishing Co. v. United States*,[295] discussed above,[296] one could measure the acceptability of substitutes for the defendant publisher's morning newspaper by looking to the percentage of individual advertisements that appeared in each newspaper. This measure seems appropriate because it presumably reflects the importance advertisers attach to reaching the buyers of each of the newspapers. The Court in *Times-Picayune* used a different market share measure, focusing on each newspaper's share of advertising revenue; that measure would have understated the morning paper's power if advertisers believed it was essential, or nearly so, to advertise in that paper. In fact, the Court's measure indicated a post-tie market share of 40 percent for the defendant, but approximately 82 percent of advertisements appeared in the morning paper even prior to the tie, suggesting that the Court underestimated the paper's importance.[297] An analogous approach would also be appropriate in other cases, as in recent allegations that Hasbro, Inc. requires game stores that carry its popular games, like Monopoly, to also carry other of its games.[298] Hasbro argued that it does

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[293] Similar considerations would apply in non-tying cases. For example, assuming that Moody's issued inaccurate unsolicited ratings, as the plaintiff alleged, Moody's should be able to defend the case against it by showing that investors who no longer purchased its ratings because of their inaccuracy were able to switch to Standard & Poor's or other alternatives. This defense would only apply, however, to those buyers who knew of the inaccuracy of the ratings. Moody's could not use this defense for those buyers who were unaware of the inaccuracy of the ratings, but would have ceased using them had they known. The defense is therefore more suited to cases of coercion, like tying cases, than to cases of deception.

[294] Of course, to the extent that substitutes are not available for the tying seller's tying product, that product is in some sense in a market by itself, in which the tying seller must have a large share. *See supra* note 144. But sellers of functionally similar products are often viewed as being in the same market, even if the product of one seller is so much more useful to buyers that the other sellers' products are unsatisfactory substitutes. This is particularly true in those cases in which a product is preferred only by certain buyers.

[295] 345 U.S. 594 (1953).

[296] *See supra* text accompanying notes 280–82.

[297] *Times-Picayune*, 345 U.S. at 611–12 (using 40% as morning newspaper's share), 619 (giving figures showing that between 76.8% and 88.4% of advertisements appear in the morning newspaper).

[298] *See* Anti-Monopoly, Inc. v. Hasbro, Inc., 958 F. Supp. 895, 901 (S.D.N.Y. 1997), *appeal docketed*, No. 97-7545 (2d Cir.). Although the opinion cited dismissed the plaintiff's complaint, the court did not make clear how it resolved this claim.

not have market power because it has only a small share of the game market,[299] but it seems likely that game store owners find that carrying Monopoly and other popular games is more important than the market share of those games would suggest. A better measure of the power that control over those popular games gives Hasbro might therefore be the percentage of stores that carry them.[300]

Another case that suggests a need for a conception of market power particularly oriented toward tying, this one with traditional market shares that are very small, is *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*[301] In *Parts and Electric* the defendant, Sterling Electric, a manufacturer of electric motors, required its distributors to buy a minimum number of its motors as a condition on the right to buy parts for them.[302] The plaintiff, a distributor, sold many parts for Sterling motors,[303] but was warned by Sterling that if it did not sell more motors, its right to buy both parts and motors would be terminated. Despite "steering customers toward Sterling electric motors even though [it] would have recommended other brands if its access to Sterling parts were not in jeopardy,"[304] the distributor failed to meet its quota and was terminated. The Seventh Circuit affirmed a jury verdict for the plaintiff, but only because Sterling had failed to preserve some of its better arguments, and Judge Posner dissented strongly. He pointed out that Sterling's shares of both the motor and motor parts markets were less than one percent, and said that its tie of parts and motors could therefore not have been anticompetitive.[305]

But Sterling could have acted coercively despite its small market share. It is true that if Sterling had sought to impose its motor sales requirement before the distributor had ever sold Sterling motors or parts, it probably could not have done so; the distributor would have turned to another motor manufacturer.[306] But in fact the distributor was an established

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[299] *See id.* at 902–03.

[300] Alternatively, game store owners could be surveyed to determine how important they believe it is to carry the popular games.

[301] 826 F.2d 712 (7th Cir. 1987), *opinion after remand*, 866 F.2d 228 (7th Cir. 1988).

[302] *Id.* at 714.

[303] It was the largest national distributor of Sterling parts. *Id.*

[304] *Id.*

[305] *Parts and Electric*, 866 F.2d at 236 (Posner, J., dissenting).

[306] Even if Sterling motors had particularly strong acceptance among some buyers, that would be unlikely to translate into a greater profit opportunity for the distributor; the manufacturer would presumably keep that profit for itself. *See* Meese, *supra* note 45, at 130 (arguing that a franchisor with market power would use its power to raise price, not to impose tying requirements).

seller of Sterling parts, so that denial of those parts to it denied it the benefits of the expertise and customer relationships that it had built up.[307] That expertise and those relationships were unrelated to Sterling's market share, but the threat of the denial of their value to the distributor nevertheless gave Sterling leverage with which to coerce Sterling's purchase of its motors. Moreover, the eventual denial of Sterling parts to the distributor harmed not only it but also the many users of Sterling motors who had previously bought their parts from the plaintiff, because those users were forced to go elsewhere for parts and their alternatives were presumably less desirable (as evidenced by their earlier patronage of the plaintiff).[308]

Commentators have objected that, although sellers in positions like Sterling's certainly possess power over their dealers, the power they possess is not antitrust market power.[309] This position seems to rest on an assumption that the buyer—in *Parts and Electric,* the distributor—could have protected itself against the seller's exploitation by contract, and thus avoided its injury.[310] As will be discussed below in the context

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[307] That is, the distributor's investments gave Sterling the power to, as Professor Craswell says, opportunistically exploit it. Craswell, *supra* note 41, at 674–75; *see also* Benjamin Klein et al., *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process,* 21 J.L. & ECON. 297 (1978); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts,* 65 MINN. L. REV. 521 (1981).

[308] A similar point can be made about injury in the tied market, for motors. Judge Posner said that "[s]ince the objective of the tying doctrine is to protect competition in the tied market, the plaintiff must show that the defendant has enough market power, present or prospective, in that market to make the tie-in a threat to competition." 866 F.2d at 235 (Posner, J., dissenting). Even beyond the fact that the Supreme Court in its tying cases has never required market power in the tied product market, Judge Posner's claim that Sterling's practices caused no harm in the motor market is incorrect. The majority noted that as a result of Sterling's tie, the plaintiff distributor (prior to its termination) "began steering customers toward Sterling motors even though, absent Sterling's warning, it would have recommended other brands." *Id.* at 229. This no doubt caused the distributor's customers either to buy Sterling motors for higher prices than they would have paid absent the "steering," or to buy Sterling motors when others would have better met their needs. In either case, Sterling gained market power, even if its market share remained low; this was possible because the market power was based on demand, and demand-based market power does not require a large market share.

[309] *See* Klein & Saft, *supra* note 45, at 356 ("Postcontract . . . , a franchisor can use the threat of termination to 'hold up' a franchisee that has made a specific investment in the marketing arrangement. However, this potential economic power has nothing to do with market power, ultimate consumers' welfare, or antitrust.").

[310] *See* Meese, *supra* note 45, at 153 ("[I]t should be noted that any such argument assumes that the franchisee has failed to protect itself ex ante from those actions—threats of termination, hold up of products, and the like—that constitute 'market power' under the regime established by *Kodak.*") (footnote omitted); *see also* Klein, *supra* note 138, at 49–52 (arguing that the absence of contractual protections is evidence that the potential for exploitation is small).

of *Kodak*, though, this sort of contractual protection will not always be possible because information about the costs of a possible tie will not always be available.[311] But even when the costs of a possible tie can be anticipated, as they perhaps could have been in *Parts and Electric*, it may not be efficient to negotiate contractual protections against the tie.

When the form of a tie (as distinguished from its costs) is difficult to anticipate, contractual protections would require negotiation regarding a variety of unlikely-to-occur possibilities. In *Parts and Electric*, for example, there was no suggestion that Sterling's policy was a commonly used one,[312] so for Sterling's distributors to have obtained contractual protections against it would presumably have required that they negotiate for protections against a multitude of potentially burdensome but unlikely tying arrangements (parts to motors, popular parts to unpopular parts, etc.) that Sterling might have imposed. Although that might have been possible, it would have been costly.[313] Therefore, to effectively require such negotiations, by denying Sterling's distributors the right to challenge practices like Sterling's, would probably be less efficient than to allow such claims and require Sterling to negotiate for the particular ties that it wishes to impose. Thus, in the same way that ties should sometimes be permitted because they eliminate the need for the buyer and seller to enter into complicated contractual relationships to protect the seller,[314] they should sometimes be forbidden because to permit them

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[311] *See infra* part V.C.1.

[312] Even when a practice is a commonly used one, contractual protections against it may be prohibitively expensive for buyers to obtain. *See infra* part V.C.1.

[313] In other cases, the contractual point is a stronger one. For example, in franchising arrangements, where federal law requires that franchisees be provided information regarding the costs of the franchise, it may be that the absence of a contractual protection against a particular act by the franchisor could be interpreted as an indication that the franchisee does not perceive that act as coercive. *See* Patterson, *supra* note 41, at 249–52.

On the other hand, even an explicit contractual reference may not be enough to show acceptance by a buyer. For example, in *Smith Machinery Co. v. Hesston Corp.*, 878 F.2d 1290 (10th Cir. 1989), the defendant Hesston Corporation, a manufacturer of farm equipment, had entered into distributorship contracts with its dealers requiring them "to 'order, keep on hand and display a representative sample of each type of Hesston products [*sic*].'" *Id.* at 1291 (quoting contract). When Hesston was acquired by Fiat Trattori S.p.A. of Italy, it sought to market a Fiat tractor under the Hesston name. To that end, it demanded that the plaintiff, Smith Machinery Co., carry the Hesston-Fiat tractor, and when Smith refused, Hesston terminated it as a dealer. *Id.* It would be reasonable under these circumstances to treat Smith as having willingly accepted the obligation to carry "each type of Hesston product" that was a Hesston product at the time it signed the distributorship contract, but it seems unreasonable to treat it as having accepted any obligation to carry the Fiat tractors, since it could not have anticipated at the time of contracting that they would be sold under the Hesston name.

[314] *See supra* note 275 and accompanying text.

would be to require complicated contractual arrangements to protect the buyer.

2. *Microsoft's Marketing Practices*

Several of the marketing practices of Microsoft Corporation have been challenged under the antitrust laws, both by the Justice Department and by Microsoft's competitors. Two of Microsoft's practices will be examined here. The first challenged practice is one alleged in the now-famous amicus brief filed on behalf of three anonymous software companies in the Justice Department's case against Microsoft.[315] The amici claimed, among other things, that Microsoft moved software functions from its operating system to its application programs in order to disadvantage competitors who had designed their own application programs to use the operating system functions that Microsoft moved.[316] The competitors were disadvantaged because they were required by Microsoft's action to develop their own software to perform the former operating system functions and to incorporate that new software into their application programs.[317] Assuming that these allegations are correct, and that their result was to increase demand for Microsoft's application programs at the expense of its competitors', the question is whether Microsoft's actions were anticompetitive. Under the cost-shifting test, this question would be answered by determining whether Microsoft's action imposed costs on consumers of Microsoft's operating system—costs that Microsoft recouped through increased demand for its application programs.

Microsoft's actions certainly made its operating system less valuable to its users, or at least to those of them that used the application programs of Microsoft's competitors. After Microsoft's software change, consumers could only use application programs that incorporated the former operating system functions; prior to the change, when those functions were in the Microsoft operating system, consumers' choice of application programs was broader. It is possible, of course, that the change had some countervailing benefit for consumers. It might, for example, have made the operating system smaller, which would have allowed consumers who owned computers with less memory to use it. The cost-shifting test

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[315] Memorandum of Amici Curiae in Opposition to Proposed Final Judgment, United States v. Microsoft Corp., 159 F.R.D. 318 (D.D.C. 1995) (No. 94CV10564), *rev'd*, 56 F.3d 1448 (D.C. Cir. 1995).

[316] *Id.* at 62. For instance, Microsoft's operating system might include a program that, say, word-processing programs could use to read inputs from a keyboard. If Microsoft were to move such a keyboard-reading program from the operating system into its own word-processing program, other sellers of word-processing programs would have to write their own keyboard-reading programs.

[317] *Id.*

suggests that evaluating the implications of Microsoft's actions for the application program market requires balancing these effects in the operating system market.[318]

The second instance of possibly anticompetitive activity by Microsoft is a practice alleged by Netscape Communications, Inc., one of Microsoft's competitors. In a letter to the Justice Department, Netscape claimed that Microsoft pressured personal computer sellers (OEMs) to make use of Microsoft's World Wide Web browser more likely by "offering OEMs discounts on the license price of the Windows operating system if the OEM not only continued to feature the Microsoft browser on its desktop, but also made competitors' browsers far less accessible to users."[319] Netscape claimed that this alleged arrangement increased demand for Microsoft's browser. Evaluating this claim under the cost-shifting test again requires determining whether Microsoft's practice increased demand for one product—its Web browser—by imposing costs on purchasers of some other product—in this case, personal computers with the Windows operating system. It seems clear that it did: if OEMs complied with Microsoft's terms, and made other vendors' browsers less accessible than they would otherwise have been,[320] buyers of the OEMs' computers would have suffered.[321]

It is important to note, though, that it is essential to the buyers' injury that Microsoft made access to other vendors' Web browsers more difficult; it would not be sufficient that it made access to its own browser easier.

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[318] Although this balancing approach might seem similar to the balancing that is always involved under the rule of reason, it is actually different. Under the rule of reason, all of the anticompetitive effects of Microsoft's practice, in all markets, would be balanced against all of its procompetitive effects. In contrast, the approach proposed here focuses specifically on the shifting of costs to the operating system market, so it requires balancing only the effects in that market. Although this task would not be easy, it would perhaps be less difficult than an approach like the (more general) rule of reason that would require balancing effects in different markets.

[319] Letter from Gary L. Reback to Joel Klein, Deputy Assistant Attorney General, International/Policy Matters, Department of Justice (Aug. 12, 1996), *reprinted in* 27 ANTITRUST L. & ECON. REV. 97 (1996). Specifically, Netscape claims that the OEMs get the discounts only if they do not put an icon for Netscape's browser on their computers' desktops. *Id.* Microsoft denies these allegations, *see* Statement of Microsoft Corporation (Aug. 22, 1996) (copy on file with author), and I offer them here only as an illustration of possible cost-shifting or demand issues.

[320] If Microsoft did in fact pay the OEMs not to put icons for its competitors' browsers on the desktop, it presumably did so because otherwise they would have.

[321] One might say that it is not Microsoft, but the OEMs, that impose these costs on consumers. But it is difficult to see why if Microsoft sets terms for its sales to OEMs that disadvantage consumers, its actions are any less anticompetitive than if it set anticompetitive terms for direct sales to consumers. The problem in either case is that Microsoft has set terms for one of its products that impose costs on the buyers of that product (but make up for those costs by increasing the demand for another Microsoft product).

Microsoft practices analogous to this latter possibility have also been challenged, however. For instance, when Microsoft introduced its own Internet service, the Microsoft Network, it placed an icon for that service on its Windows 95 desktop. Competing Internet service providers claimed that by placing its own icon, but not theirs, on the desktop, Microsoft made it more likely that consumers would use Microsoft's service. They claimed, that is, that by placing its icon on the desktop of its operating system, Microsoft created demand-based market power for its own Internet service. Microsoft's action no doubt did increase the demand for its Internet service, but it probably did not do so by shifting costs. Although users of Windows 95 might have preferred to have icons of all the (major) Internet services on their desktop, they presumably preferred to have Microsoft's icon than none at all, so although their (potential) surplus was reduced, they still benefited from the arrangement.[322]

Microsoft's competitors might acknowledge that Microsoft did not hurt its operating system users directly, but argue that it hurt them indirectly by giving Microsoft an advantage that would allow it to compete with a lower-quality Internet service.[323] This argument would arguably

[322] *Cf. supra* text accompanying note 186 (discussing the implications of a transfer of surplus from buyers to seller). Note, though, that there are some circumstances that would support a cost-shifting claim here. It might be, for example, that OEMs that include Microsoft's Web browser are less likely to include the browsers of Microsoft's competitors, even if those competing browsers are preferable. It might even be that some computers sold by OEMs have insufficient memory to include more than one browser, so that a Microsoft requirement like the one alleged would make it impossible for OEMs to also provide competing browsers. And if Microsoft were to integrate its browser with its operating system, it might be more difficult to use competing browsers with Microsoft's operating system. These possibilities may be explored in the recent action brought by the Justice Department against Microsoft. *See* Petition by the United States for an Order to Show Cause Why Respondent Microsoft Corporation Should Not Be Found in Civil Contempt, United States v. Microsoft Corp., No. 94-1564 (D.D.C. filed Oct. 20, 1997); Bryan Gruley et al., *U.S. Sues Microsoft Over PC Browser*, WALL ST. J., Oct. 21, 1997, at A3.

[323] It is worth noting that even to the extent that Microsoft's operating system power might allow it to market successfully products that are of lower quality than those of its competitors, its success in doing so might have a compensating benefit: so-called network externalities. Network externalities are benefits to users of a product that result from the product's use by many others. *See, e.g.*, Michael L. Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424 (1985); John E. Lopatka & William H. Page, *Microsoft, Monopolization, and Network Externalities: Some Uses and Abuses of Economic Theory in Antitrust Decision Making*, 40 ANTITRUST BULL. 317 (1995). For example, Microsoft's application programs are of more value to their users if they are widely used because then all their users are able to exchange software in compatible formats and because more vendors will make software that can be used with the programs. Some commentators have pointed out that in some markets, particularly those relating to computer software and the Internet, network externalities are sufficiently important so that only one product is likely to succeed. *See* Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 CONN. L. REV. 1041, 1056 (1996). Nevertheless, before these markets settle on a single winning product, there can be a period of competition among several products, which can result in considerable wasted investment by buyers in the eventual losing competitors.

make out a claim that Microsoft's practice could impose costs on buyers, but it would not allege that costs were shifted. It would only be users of the Microsoft Internet service who would suffer if it was of poor quality. The costs of that lower quality (if it existed) were therefore not shifted from buyers of the product whose demand was increased.[324] In effect, the users of the Microsoft Internet service would have been in a position similar to that of buyers who accept a tie; those buyers may lose potential benefits from the arrangement, but, in the absence of deception, they are not the victims of cost shifting.

C. OTHER DEMAND CASES

1. Kodak

As described above,[325] the Supreme Court in *Eastman Kodak Co. v. Image Technical Services, Inc.*[326] held that a tying case could be predicated on a lack of information in the tying product market. The tie in *Kodak* was Kodak's requirement that owners of its equipment who wanted to buy replacement parts also use its service organization. Kodak argued that this tie could not have imposed anticompetitive terms on its buyers because, if it had, buyers would have ceased buying Kodak equipment. But the Supreme Court pointed out that buyers would switch from Kodak equipment only if they were aware of the fact that the requirement that they use Kodak service would impose supracompetitive costs on them, and that in fact it was extremely difficult to calculate long-term service costs. A tying claim was therefore possible, despite Kodak's lack of power to coerce buyers to accept its equipment, because the claim could instead be grounded on the possible deception of buyers as to the costs of the tie. As I suggested in the discussion above, this conclusion leaves unclear much about the proper analysis of *Kodak*-like tying claims.

The cost-shifting test provides an analysis that avoids the difficult—and, I would argue, pointless—task of precisely categorizing the actions

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Id. at 1059. Therefore, to the extent that a seller could create sufficient early demand for its product to "tip" the market in its direction, some of this wasted investment could be avoided. In that case, even if the product on which buyers settled were less satisfactory than another that they rejected, buyers might benefit from the simple fact of having, early in this process, collectively chosen one product, rather than continuing (as a group) to use a variety of them. *Cf.* Daniel J. Gifford, *Microsoft Corporation, the Justice Department, and Antitrust Theory*, 25 SW. U. L. REV. 621, 638 (1996) (observing that "maybe [Microsoft's] present large market position is socially beneficial rather than the opposite"). This may be an important demand effect in these markets, but it does not involve cost shifting, so it is beyond the scope of this article.

[324] *See supra* text accompanying note 178 (discussing analogous effect in tying cases).

[325] *See supra* part II.A.2.

[326] 504 U.S. 451 (1992).

alleged by the plaintiff as either coercive or deceptive. The cost-shifting test simply asks whether costs were imposed on buyers of some product other than that for which the seller sought to increase demand. In *Kodak*, therefore, the test asks whether, if the plaintiff was correct that Kodak used a tie to force service purchases by buyers who were unable to determine the long-term cost of those services, buyers of equipment (and parts) would have suffered from the tie. As in the discussion above of *Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*,[327] one might first seek to answer this question by determining whether buyers could easily have anticipated a tie like Kodak's and contractually protected themselves from it. If so, the fact that they did not do so suggests that any injury that the buyers suffered from the tie might have been compensated in the price that the buyer paid for the product. Thus, in *Kodak* this approach would suggest that if parts-to-service ties were common in the industry, Kodak might have charged less for its equipment to compensate buyers for the possibility that it would later impose such a tie.

A case like *Kodak*, however, presents a problem for this sort of analysis.[328] Even if Kodak's customers might have anticipated the possibility of a parts-to-service tie, the difficulty of determining the long-term costs of Kodak service might have made it difficult for buyers to know how much compensation to demand for the tie.[329] Indeed, Kodak itself might also have been uncertain about the financial implications of the tie, which would have made negotiations regarding it more difficult still. As a consequence, it may be unreasonable to expect buyers to protect themselves when, as in *Kodak*, information about the costs of the tie "is difficult—some of it impossible—to acquire at the time of purchase."[330] It is important to note that the difficulty here is not one that is inherent in the market, so that the tying seller should not be held responsible for it. On the contrary, the tie itself, by committing the buyer to one supplier, the tying seller, denies the buyer the benefits of competition

[327] *See supra* text accompanying notes 301–14.

[328] To use Professor Craswell's terminology, *Kodak* presents not only the possibility of opportunism, *cf. supra* note 307, but a possibility of fraud or surprise. Craswell, *supra* note 41, at 672–74. In either case, the problem is the buyer's inability at the time of the original purchase to protect itself by contract from later forced purchases in a related market; the cost-shifting test's focus on injuries in a market other than the one in which the coercion takes place allows a focus directly on these contractual difficulties.

[329] Even in the absence of a tie, of course, buyers might have found it difficult to determine the long-term costs of owning Kodak equipment because Kodak's parts prices would in themselves have been difficult to anticipate. In the absence of the tie, though, there would have been no "contract" on which Sherman Act § 1 liability could have been based, *but see infra* text accompanying notes 375–82, and no "monopolization" for § 2 liability.

[330] *Kodak*, 504 U.S. at 473.

among different suppliers, and gives some degree of unpredictable pricing discretion to the tying seller.[331]

Moreover, as a result of these informational difficulties, the cost-shifting test in a case like *Kodak* would not necessarily find injury only to buyers who refuse the tie. In more typical ties, the cost-shifting test focuses on buyers who refuse the tie, primarily because of the difficulty of distinguishing between buyers who accept the tie because it is advantageous to them and those who accept it because they are forced to do so by the seller's market power.[332] Where there are information costs, however, buyers may accept the tie willingly, but later find that if they had known its true costs, they would have refused it. This possibility that buyers might be misled makes it appropriate, I believe, to consider also those buyers under the cost-shifting test. The lack of adequate information may cause them to mistakenly purchase the tying product, in the same way that the users of a manipulated product standard may continue to use it if they are unaware of the manipulation. In each case, the deception can cause the output of the product to which costs are shifted to be artificially maintained, so the test should incorporate the possibility of that deception.

2. Aspen Skiing

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,[333] the defendant's practices, variously considered by the Supreme Court as possibly a "refusal to deal,"[334] "exclusionary,"[335] or "predatory,"[336] were in fact aimed at increasing the demand for its product. The plaintiff and defendant both operated ski mountains at Aspen, Colorado; the plaintiff operated one mountain and the defendant three. For a number of years, the plaintiff and defendant had cooperated in offering all-Aspen tickets that allowed skiers to ski at any of the four mountains; skiers bought such a ticket for six days, for example, and then could choose which mountain to ski on each day. The plaintiff's claim arose when the defendant ceased cooperating in offering this all-Aspen, four-mountain ticket (and made it difficult for the plaintiff to create such a ticket itself), and instead began offering a three-mountain ticket, which gave skiers admission only

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[331] *See supra* note 61 and accompanying text. *Cf.* Chen, *supra* note 84 (describing how, in a two-seller market, tying by one seller can allow both reap supracompetitive profits).

[332] *See supra* text accompanying notes 178–84.

[333] 472 U.S. 585 (1985).

[334] *Id.* at 608 n.38, 600–03.

[335] *Id.* at 605.

[336] *Id.* at 605, 610–11.

to its mountains.[337] As a result, the plaintiff's share of the Aspen skiing market "declined steadily" and it challenged the defendant's actions as monopolization under Sherman Act Section 2.[338]

The defendant's actions in *Aspen Skiing* were intended to increase the demand for skiing at its mountains—specifically, to increase the number of days that skiers spent at its mountains—rather than to restrict the supply of skiing. It accomplished this goal through a means similar to the "coercion" in tying cases:[339] it presented buyers with new purchasing alternatives, each of which was less desirable than they buyers' previous choice. Whereas skiers previously could ski all of the Aspen mountains with the four-mountain ticket, the defendant's change in policy presented them with three less-desirable options: they could (1) buy the three-mountain ticket and ski only the defendant's mountains; (2) buy the three-mountain ticket and pay extra for days spent skiing the plaintiff's mountain; or (3) buy tickets each day for whichever mountain they chose to ski, thus forgoing the package discount. The defendant's policy was presumably successful in causing a sufficient number of buyers to choose option (1) to make the policy profitable.

To analyze the defendant's policy using the cost-shifting approach, one must ask whether the defendant increased the demand for its own product by shifting costs to buyers of some other product. In this case, one could ask whether the defendant increased the demand for skiing days at its mountains by imposing costs on buyers of multi-mountain "destination" tickets. The defendant did impose costs on those buyers; indeed, that its practice made Aspen destination tickets less satisfactory to skiers was an important focus of the Court's opinion.[340] One might object to this analysis by suggesting that day skiing and destination skiing are not in fact distinct products. But this objection is belied by the fact that, at the same time as the defendant's policy made the Aspen destination ticket less attractive, it increased the demand for skiing days at its own mountains; that is, the defendant increased the demand for one of its products at the expense of another, much as a tying seller increases the demand for its tied product at the expense of its tying one.[341] The demand for skiing at the defendant's mountains was coerced

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[337] *Id.* at 591–4.

[338] *Id.* at 594–95.

[339] *See supra* note 179 and accompanying text.

[340] *See* 472 U.S. at 605–07.

[341] The Court seemed to view the markets as distinct, observing that "[w]ithout a convenient all-Aspen ticket, [the plaintiff] basically 'becomes a day ski area in a destination resort.'" *Id.* at 594. Indeed, a view of destination skiing as a separate product provides a possible explanation of why the Court did not find it necessary to question the parties'

by the defendant's power to force skiers to accept the less-desirable three-mountain Aspen destination ticket,[342] just as demand for a tied product is coerced by a tying seller's power to force buyers to accept a less-desirable tying product (i.e., one that includes the obligation to purchase the tied product). The condemnation of the defendant's policy could therefore have been justified on cost-shifting grounds.

This analysis focused on buyers who bought the defendant's product, rather than, as with the coercion in typical tying cases, focusing on buyers who resisted the coercion.[343] As with *Kodak*, though, deception as well as coercion played a role in *Aspen Skiing*. The Supreme Court observed that at least some buyers purchased the defendant's three-mountain destination ticket, only to be surprised to find on arriving at Aspen that they could not use that ticket at the plaintiff's mountain.[344] These buyers, at least, were injured by the defendant's actions, despite having "voluntarily" chosen their purchases. It should also be noted that the plaintiff in *Aspen Skiing* was a proper party to pursue the action. It was observed above that in tying cases, the view that the harm of cost shifting occurs in the tying product market makes competing sellers of the tied product inappropriate plaintiffs.[345] In *Aspen Skiing*, however, the plaintiff was not only a seller of the product whose demand was altered—day skiing—but was also injured by the change in the market to which costs were shifted—destination skiing—because it was denied its previous share of sales in that market.

VI. DEMAND-BASED MARKET POWER AND THE STATUTES

Even if cost shifting were acknowledged to be an anticompetitive means of creating demand-based market power, it would not necessarily be an antitrust violation. Condemnation under the antitrust laws also requires that the practice at issue fall within the terms of an antitrust statute. For Sherman Act Section 1, that means that the practice must

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cooperation in offering the all-Aspen ticket. *See* Kenneth L. Glazer & Abbott B. Lipsky, Jr., *Unilateral Refusals to Deal Under Section 2 of the Sherman Act*, 63 ANTITRUST L.J. 749, 798 (1995) (discussing the anticompetitive potential of the joint selling arrangement in *Aspen Skiing*). If destination skiing is a separate product, the parties' cooperation in providing it might be permissible under the same rationale as the joint creation of new products in *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1 (1979).

342 Presumably some skiers refused the three-mountain ticket, switching instead to other skiing destinations. According to the opinion, though, many skiers accepted the three-mountain ticket but were unhappy about it. *Aspen Skiing*, 472 U.S. at 605–07.

343 *See supra* text accompanying notes 271–73.

344 *Aspen Skiing*, 472 U.S. at 606–07.

345 *See supra* text accompanying notes 271–73.

be a "contract . . . in restraint of trade"[346]; that is, the practice must involve an agreement. Sherman Act Section 2 does not require an agreement, but it condemns only monopolization and attempts to monopolize,[347] so it applies only when sellers possess considerable market power.

The first section below discusses practices, like standard setting and tying, that have traditionally been pursued under Section 1. As others have observed,[348] it is only in certain circumstances that these practices fit well within the terms of the statute, and a focus on cost shifting as the harm to be prevented in these cases helps clarify when those circumstances exist. The second section then discusses unilateral cases, which must be pursued under Section 2. Some such practices may create sufficient demand-based market power to constitute the "dangerous probability" of monopoly required for an attempt-to-monopolize claim under Section 2, but practices that do not could only be pursued under the controversial "monopoly leveraging" theory, and then only if the seller had monopoly power in the market to which costs were shifted.

A. Demand-Increasing Agreements Under Section 1

Standard-manipulation cases can be broadly divided into two categories: those in which the alleged manipulation is the act of several members of the standard-setting organization, and those in which it is the act of only a single member. The former category presents no difficulties in applying Section 1. It includes cases like *Clamp-All*[349] and *Schachar*,[350] in each of which the plaintiff alleged that its product was denied approval by members of a standard-setting organization seeking to avoid competition with the plaintiff. In these cases, if the members of the organization have indeed cooperated to exclude the plaintiff, they have entered into an agreement, and the legality of their actions, so far as their effect on demand goes, should depend on whether they imposed costs on users of the standard.[351]

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[346] 15 U.S.C. § 1.

[347] 15 U.S.C. § 2. Section 2 also condemns conspiracies to monopolize, but such conspiracies would generally also be condemned by § 1.

[348] *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 592 (1982) (Powell, J., dissenting) ("Section 1 of the Sherman Act requires a contract, combination, or conspiracy in restraint of trade. The Court attaches liability in this case on the dubious notion that [the defendant, a standard-setting organization] somehow has 'conspired' with [a competitor of the plaintiff].").

[349] *See supra* text accompanying notes 234–44.

[350] *See supra* text accompanying notes 97–99.

[351] The defendants' actions would meet § 1's requirement of an agreement regardless of whether they shifted costs, but the cost-shifting test must be applied to determine if the agreement is anticompetitive.

In other cases, though, where the manipulation is the product of only a single seller, the presence of an anticompetitive agreement is less clear.[352] The problem is illustrated by *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.* (*ASME*).[353] As described above,[354] in *ASME* the manipulation of the standard of the American Society of Mechanical Engineers, Inc. (ASME) was the act of several individual co-conspirators, all of whom were affiliated in some way with a single competitor of the plaintiff.[355] So far as the case indicates, the ASME itself was a victim, not a participant, in the manipulation of its standard.[356] It seems inappropriate to pursue such a case under Section 1 merely because the standard that the single seller manipulated is the product of an agreement, particularly because, as discussed earlier,[357] the manipulation reduces the value of the standard, a result at odds with the goals of (most of) those who created it.

Nevertheless, it may be fair in at least some cases to hold a standard-setting organization responsible for the manipulation of its standard, even if the manipulation itself is the act of only a single member of the organization. If, for example, the organization does not provide procedural mechanisms sufficient to protect the standard from manipulation, it might be reasonable to view the organization as at least in part responsible for the manipulation. This was basically the Supreme Court's theory in *ASME*, where it held the ASME liable on an apparent authority theory, observing that standard-setting "organizations can react to potential antitrust liability by making their associations less subject to fraudulent manipulation."[358] Although that is no doubt true,[359] one might still be concerned, as the dissent was,[360] that imposing liability on standard-

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[352] This issue was touched on briefly earlier. *See supra* text accompanying note 69.

[353] 456 U.S. 556 (1982).

[354] *See supra* text accompanying notes 62–68.

[355] Since these individuals were all affiliated with a single seller, the concerted action among them would presumably not be an agreement for the purposes of § 1. *See* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984) (deciding that entities with a "unity of interest" cannot conspire for the purpose of Sherman Act § 1).

[356] The jury in *ASME* apparently concluded that the ASME had ratified the interpretation in the letter, but that is not the basis on which the Supreme Court decided the case. *See* 456 U.S. at 564–65. The dissent says that the co-conspirators "acted solely for the benefit of [the plaintiff's competitor] and against the interests of ASME." *Id.* at 592 (Powell, J., dissenting) (footnote omitted).

[357] *See supra* text accompanying notes 168–77.

[358] *ASME*, 456 U.S. at 574 n.13.

[359] Indeed, the Court noted that the ASME had adopted new procedural protections in response to the suit against it. *Id.*

[360] *See id.* at 593 (Powell, J., dissenting).

setting organizations has the potential to chill procompetitive standard-setting activities.

In these circumstances, the cost-shifting test can be used to help determine when imposing liability is appropriate. No one, it is probably safe to say, would argue that a standard-setting organization need take *no* precautions to ensure that its standard is not manipulated.[361] The question, instead, is one of degree: how much should the organization spend to protect the integrity of its standard? The answer, presumably, depends on the harm that manipulation of the standards might cause[362]; it depends, that is, on the costs that manipulation would impose on users of the standard. This, of course, is exactly the focus of the cost-shifting test, which is therefore useful not only for determining whether manipulation of a standard is anticompetitive, but also for determining whether avoiding potential anticompetitive effects is cost-effective. Specifically, the inquiry should be whether the efforts made by the organization to protect its standard keep the potential harm of manipulation (that is, the cost of manipulation multiplied by its likelihood) less than the benefits provided by the standard. If the standard's benefits do outweigh its harms, the standard-setting organization's promulgation of it is procompetitive. If not, the market would be better off without the standard, and it would be appropriate to condemn the organization's actions in creating the competitive danger.[363]

Tying cases also sometimes present difficulties in determining whether anticompetitive agreements are involved. The difficulties in fact parallel the cost-shifting analysis: on the one hand, buyers who comply with the tie typically enter into an agreement to do so,[364] but, under the cost-

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[361] Even the dissent in *ASME* seems to be more concerned with the fact that a judgment against the society will subject it to treble damages than with the basic idea of imposing liability on it. *Id.* at 579–84 (Powell, J., dissenting).

[362] It also, as will be shown below, depends on the procompetitive benefits that the standard provides. One could certainly argue that the precautions should depend on other criteria—the *ASME* dissent argued against antitrust liability because the ASME, it said, had neither the ability to control its standard-setting process or the financial resources to pay a treble-damages award, *id.* at 593 (Powell, J., dissenting). However, it is the benefits and harm that the standard provides to the market that seem the relevant antitrust concerns.

[363] One could imagine a case in which the costs of preventing the possible competitive harm of a standard would be greater than the harm itself. In that case, the standard-setting organization should have no obligation to try to prevent the harm; to do so would not be cost-effective. This situation would be similar to that of a tie justified by quality concerns, where only if the seller's costs of achieving the quality goals by some other way than tying are greater than the costs of the tie itself is the tie justified. *See supra* text accompanying note 275.

[364] Actually, some buyers who comply with the tie may enter into no agreement to do so. *See infra* text accompanying note 373.

shifting test, injury to buyers who comply with a tie does not give rise to antitrust liability;[365] on the other hand, buyers who refuse to comply with the tie, for whom forced compliance presumably *would* be anticompetitive, enter into no agreement with the seller. As a result, it could be argued that there is no buyer injured by an agreement, and thus no basis for liability under Section 1. But courts have allowed plaintiffs who have themselves refused to enter into a tying agreement to sue on the ground that other buyers have entered into agreements with the tying seller, so that there exist agreements sufficient to bring Section 1 into play.[366] This seems reasonable because even a buyer who refuses a tie is injured by the tying agreements into which the seller enters with other buyers, since it is the success of those agreements that permits the seller profitably to refuse to sell the tying product alone.[367]

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[365] That is not to say that the buyers could not find themselves exploited by the agreement, but that could be seen as a contract problem, not an antitrust one. *See* Queen City Pizza, Inc. v. Domino's Pizza, Inc., 922 F. Supp. 1055, 1061–62 (E.D. Pa. 1996) (holding that the economic power of the defendant-franchisor derived from the franchise agreement, and was thus contractual) (citing Klein & Saft, *supra* note 45, at 356), *aff'd*, 124 F.3d 430 (3d Cir. 1997); *see also* Patterson, *supra* note 41, at 249–52. And the tie could be condemned on some ground other than cost shifting, such as price discrimination. *See supra* note 212 and accompanying text.

[366] Surprisingly, this issue seems to have been addressed directly by only one court. *See* Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors, 850 F.2d 803, 814 (1st Cir. 1988) ("A plaintiff need not have actually consented to the purchase of the tying and tied products in order to bring a claim under the Sherman Act.") (citations omitted); *see also* 10 AREEDA ET AL., *supra* note 181, ¶ 1770b (1996) (noting absence of cases); *but cf.* Warner Management Consultants, Inc. v. Data Gen. Corp., 545 F. Supp. 956, 962–64 & n.8 (N.D. Ill. 1982) (stating that a potential buyer has standing to bring a tying claim if it can prove that it would have bought the tying seller's products "but for the tie," but that where there is no agreement there will be no cause of action). However, many tying claims are brought by terminated dealers or franchisees, and the courts routinely consider these claims under § 1 despite the post-termination lack of a tying agreement.

[367] Professors Areeda, Elhauge, and Hovenkamp acknowledge this possibility, 10 AREEDA ET AL., *supra* note 181, ¶ 1770d, at 446 n.17, but they believe that would-be buyers in these circumstances will rarely be injured by declining the tie, *id.* ¶ 1770d. They reach this conclusion by beginning from the position that would-be buyers will rarely pay more than the tying seller's "effective price" for its tying product, where the "effective price" is the tying seller's "nominal price for the tying product plus the above-market portion, if any, of the tied product price." *Id.* at ¶ 1770d, at 446. It is unclear, though, why the seller's supracompetitive mark-up on the tied product should be incorporated in a baseline tying product price used to measure the non-complying buyer's damages. If it is other buyers' willingness to accept the tie that allows the seller to charge that supracompetitive mark-up, it is a product of the tie and might not exist at all in its absence.

The Tenth Circuit recently expressed views consistent with the position I advocate here, though in a slightly different context. In *Systemcare, Inc. v. Wang Laboratories Corp.*, 117 F.3d 1137 (10th Cir. 1997), the court overruled earlier Tenth Circuit cases that had held that the agreement requirement of § 1 required an agreement between sellers, and that the tying agreement itself, between the tying seller and its buyers, was not sufficient. *See id.* at 1145 (overruling City of Chanute v. Williams Natural Gas Co., 955 F.2d 641 (10th Cir. 1992), and McKenzie v. Mercy Hosp., 854 F.2d 365 (10th Cir. 1988)). The issue in *Systemcare* was thus one of what kind of agreement is sufficient for § 1, rather than of

In some cases, though, the seller does not enter into an agreement with *any* buyer. An example of such a case is *Service & Training, Inc. v. Data General Corp.*[368] The plaintiff in *Service & Training* brought a tying claim that was somewhat similar to the claim in *Kodak*,[369] alleging that Data General required owners of its computers to use Data General as a service provider if they wanted access to a sophisticated diagnostic software program.[370] Data General provided the software to owners of its equipment who performed their own service,[371] so it was feasible to provide the tying product independently of the tied repair services. But the court in *Service & Training* determined that the plaintiff had not shown the existence of any agreement. That some computer owners used Data General service, and thus received access to the software, it said, was "consistent with a conclusion that . . . customers independently concluded that they preferred Data General services using [the diagnostic software] over [third-party] services that do not use [the software]"[372]; that is, the court concluded that owners were not "forced" to comply with the tie, but willingly accepted its terms. And the court said that the owners who performed their own service, to whom Data General also provided its software, entered into no agreement regarding repair services, because they had no need for such service.[373] Finally, as to the owners whom the cost-shifting test would view as injured by Data General's policy—those who wanted to license Data General's software and at the same time use a third party's service—the court said that the refusal to license the software was "nothing more than a unilateral decision by Data General."[374]

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whether the plaintiff must be a party to the agreement, but the court's rationale seems to speak to the latter point as well. Its focus was on whether tying agreements "deprive the market of 'independent centers of decisionmaking'" and "'increase[] the economic power moving in one particular direction,'" *id.* at 1143 (quoting Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 769 (1984)), and tying agreements have that effect regardless of whether the plaintiff in a particular lawsuit is party to one. Therefore, a plaintiff injured by others' agreements that "increase the economic power moving in one particular direction" should be able to challenge such agreements even if it is not party to one.

[368] 963 F.2d 680 (4th Cir. 1992).

[369] *See supra* part II.A.2.

[370] 963 F.2d at 683.

[371] *Id.* at 684. Kodak was also willing to provide its tying product (parts) to self-servicing equipment owners. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 458 (1992).

[372] 963 F.2d at 687 (citing Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605 (1953)).

[373] *Id.* at 686.

[374] *Id.*

The absence of any agreement between Data General and its buyers should not have been dispositive, however, because Data General, like defendants in some other similar cases,[375] did enter into other agreements that made the tie possible. Specifically, in the licenses for its software, Data General provided that the software's use was "limit[ed] . . . to repair and maintenance of specific computer hardware," i.e., the hardware owned by the licensees,[376] thus preventing the licensees from using the software to offer repair services to other owners of Data General hardware. The court addressed this issue only briefly, observing that the license restriction was valid under copyright law.[377] That is not clear, however: antitrust law places limits on the protections of intellectual property law,[378] and the balancing of the two bodies of law requires more consideration than the *Service & Training* court gave it.[379] Most significantly, Data General's limiting of its licenses to particular equipment might not have been in its interest if it had only been interested in maximizing its licensing profits, the legitimate purpose of its copyright protection. If that had been its only goal, it seems likely that Data General would have offered its licensees less restrictive terms, possibly at a higher price, which would have permitted the licensees to provide repair services (using the software) in competition with Data General itself. The limitation seems to have been a sensible strategy only because it enabled Data General also to gain more profits in the repair service business; it therefore may have gone beyond the bounds of copyright law and become an agreement to effect a tie, which the court should have condemned.

To illustrate this point more generally, consider a seller that would like to impose a tie but cannot because there are other sellers of the

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[375] *See infra* notes 379 & 380 (discussing similar arrangements in *Kodak*); *see also* Warner Management Consultants, Inc. v. Data Gen. Corp., 545 F. Supp. 956, 964 n.8 (N.D. Ill. 1982) (stating that the distributor's refusal to comply with the tie would otherwise leave it without a cause of action, but that an alleged agreement between the sellers of the tying and tied products "brings the case within the ambit of the Sherman and Clayton Acts").

[376] *Id.* at 690.

[377] 963 F.2d at 690.

[378] The limitations are reflected primarily in the "patent misuse" doctrine, *see* HOVENKAMP, *supra* note 15, § 5.5b, but the issues for copyrights and trademarks are similar. *Id.* § 5.5d. Indeed, the same court of appeals that decided *Service & Training* has adopted a broad "copyright misuse" doctrine. *See* Lasercomb Am., Inc. v. Reynolds, 911 F.2d 970 (4th Cir. 1990).

[379] In responding to a similar argument from Kodak regarding somewhat analogous restrictions, *see infra* note 380, the Ninth Circuit said that "Kodak's argument that its tooling and engineering clauses were routine and legal is irrelevant. Legal actions, when taken by a monopolist, may give rise to liability if anticompetitive." Image Technical Servs., Inc. v. Eastman Kodak Co., 1997-2 Trade Cas. (CCH) ¶ 71,908, at 80,407, 80,414–17 (9th Cir. 1997) (citation omitted).

tying product to which buyers can turn. Such a seller might enter into an agreement with the other sellers under which they would sell their output of the tying product to it.[380] The seller would therefore be able to set the terms of sale for the tying product so as to force buyers to accept its tied product. There seems no reason not to condemn such an agreement among the sellers, quite apart from any agreement the tying seller might enter into with its buyers: although the seller would generally have the right to purchase goods from other sellers, it should not be permitted to do so as a means of creating market power.[381] The situation is more complicated in *Service & Training* because Data General's power came initially not from agreements with other sellers, but from its intellectual property protections. Yet it still is unclear why it should be permitted to enter into agreements that go beyond exploiting those protections in the market to which they apply.[382] Assuming that the purpose of the license restrictions was indeed to go beyond that market, they would have caused exactly the sort of harm at which the cost-shifting test is aimed: the denial to buyers of the availability of the tying product on terms undistorted by any attempt to increase demand for some other product.

B. MONOPOLY LEVERAGING UNDER SECTION 2

If a demand-increasing practice involved no agreement, and therefore did not violate Sherman Act Section 1, it might still violate Section 2. Most straightforwardly, if the degree of demand-based market power that was created presented a "dangerous probability" of monopoly power, the practice that created it could be condemned as an attempt to monopolize.[383] An attempt-to-monopolize challenge to the creation of demand-based market power presents no particular problems beyond

[380] In fact, in *Kodak* an agreement like this existed, in that Kodak contracted with the manufacturers of its repair parts not to sell those parts to anyone but Kodak itself. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 458 (1992).

[381] Indeed, to do so might make the seller liable for monopolization or attempted monopolization under § 2, quite apart from the presence of an agreement.

[382] Imagine that Data General had not developed its software itself, but instead had licensed it from some other seller. And imagine that Data General then entered into agreements with the other licensees that they would not be able to use the software on hardware other than their own. These agreements would be functionally equivalent both to the buying-up-the-tying-product agreements discussed in the text and to the actual agreements in *Service & Training*. This suggests that all of the agreements should be treated the same.

[383] In its most recent attempted-monopolization case, the Supreme Court said that "it is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power." Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (citation omitted).

those present in the supply restriction context, so it will not be discussed further here. But if no dangerous probability of demand-based *monopoly* power were present—that is, if only some degree of market power were at issue—a claim under Section 2 would have to be pursued under a "monopoly leveraging" theory, which presents more difficulties.

A claim of "monopoly leveraging" is a claim that a seller used a monopoly in one market to achieve an advantage in another market.[384] In the demand context, such a claim would allege that the seller used its monopoly in one market to increase demand, and thereby create demand-based market power, in another. A monopoly leveraging claim against Microsoft, for example, might allege that Microsoft used its operating system monopoly to create demand-based power in the application program or Internet service markets.[385] The status of monopoly leveraging as an antitrust theory is uncertain, however. Although the Supreme Court has made comments suggesting the possibility of a leverage claim,[386] and the Second Circuit has explicitly said that such a claim is possible "even if there has not been an attempt to monopolize the second market,"[387] other circuits have said that such a claim is valid only where the elements of an attempt-to-monopolize claim are present.[388]

A focus on cost shifting offers another approach to this issue. From a cost-shifting perspective, the harm of leveraging, like that of tying, is not in the leveraged (or tied) market at all. The harm is instead in the market from which the leverage is exercised, where consumers are denied

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[384] The monopoly-leveraging doctrine has its origin in *United States v. Griffith*, 334 U.S. 100 (1948), where the Court said that "the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *Id.* at 107. In its recent *Kodak* decision, the Court said that it "has held many times that power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'" Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 479 n.29 (1992) (citations omitted).

[385] *See supra* part V.B.2.

[386] *See supra* note 384.

[387] Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (1979); *see also* Kerasotes Mich. Theatres, Inc. v. National Amusements, Inc. 854 F.2d 135 (6th Cir. 1988) (accepting the possibility of a monopoly-leveraging claim); Advanced Health-Care Servs., Inc. v. Radford Community Hosp., 910 F.2d 139 (4th Cir. 1990) (reversing dismissal of monopoly-leveraging claim). However, more recently the Second Circuit characterized some of its statements regarding leveraging in *Berkey Photo* as dictum, and indicated that leveraging "requires tangible harm to competition." Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 570–71 (2d Cir. 1990).

[388] Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 546–49 (9th Cir. 1991); Fineman v. Armstrong World Indus., Inc., 980 F.2d 171, 203–06 (3d Cir. 1992); *see also* Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 63 F.3d 1540, 1551 n.8 (10th Cir. 1995) (noting split in circuits).

the leveraging product as a result of their refusal to accept its accompanying burdens in the second, leveraged market. Where leveraging results in this sort of denial of the leveraging product, whether the seller threatens to monopolize the leveraged market is irrelevant because the antitrust liability comes not from an extension of one monopoly to a second market, but "from the 'abuse' of economic power already held in the first market."[389] That is, monopoly leveraging, like tying and other demand-increasing practices, can cause a shifting of costs to, and a consequent reduction of output in, a market related to the one in which demand is increased. This reduction in output would, under the cost-shifting test, be an antitrust violation.[390]

VII. CONCLUSION

A seller can raise price in two ways: it can reduce supply or it can increase demand. Antitrust law has well-developed rules for dealing with sellers' efforts to reduce supply, but the law that applies to efforts to increase demand is both controversial and confused. In this article, I have proposed a test to evaluate the competitive effect of demand-increasing practices: if the costs of the seller's efforts to increase demand for a product are borne only by the buyers of that product, the seller's efforts would not be condemned;[391] if, instead, those costs are shifted to buyers of another product, the seller's efforts would be condemned under the antitrust laws as anticompetitive.

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[389] HOVENKAMP, *supra* note 15, § 7.9, at 284 (describing *Berkey Photo*'s view of the harm of monopoly leveraging); *cf.* Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 14 (1984) (stating that "the law draws a distinction between the exploitation of market power by merely enhancing the price of the tying product, on the one hand, and by attempting to impose restraints on competition in the market for a tied product, on the other").

[390] Interestingly, another, broader explanation of how monopoly leveraging (and tying) can be anticompetitive is a supply-oriented counterpart to the demand-oriented approach of the cost-shifting test. This alternative explanation argues that monopoly leveraging allows the monopolist to shift some of the exercise of its monopoly power from the leveraging market to the leveraged one, making it more difficult for a seller to enter into competition with the monopolist. More specifically, by dividing its supracompetitive profits across two markets, the monopolist ensures that a seller entering into competition with it will have access to (all of) those profits only if the competitor enters both markets, rather than just one. As other commentators have observed, various market imperfections, notably those in the capital markets, may make it more difficult to enter two markets than one. *See, e.g.*, Kaplow, *supra* note 41, at 536–39. Thus, the shifting of the exercise of power from the leveraging market to the leveraged one allows the monopolist to distribute its power in such a way to minimize the likelihood that other sellers will enter the market, just as the cost shifting involved in demand-based market power allows a seller to distribute its power in such a way to minimize the likelihood that buyers will switch to other sellers.

[391] They might, however, be condemned under some other rationale. *See supra* notes 165, 212, 274 & 277 and text accompanying notes 323–24.

This test serves two useful purposes. First, it meets the immediate need for a means to evaluate plaintiffs' novel claims of demand-based market power. Such claims are increasingly common, and antitrust law currently has no well-defined means of addressing them. Second, and more generally, it unifies the rules applicable to a variety of demand-increasing practices that appear to be diverse but are in fact fundamentally similar. It does this by recognizing that, in whatever exact form it takes, a shifting of costs from one market to another distorts consumer demand in both markets. More significantly, it is the cost-shifting seller that determines *how* demand in the two markets is distorted, just as an agreement among sellers allows them to determine how supply will be distorted. Hence, just as an agreement among sellers can injure competition when it restricts supply, a shifting of costs can do so when a seller creates demand-based market power.