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The U.S. Supreme Court's decision in *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, holds that a plaintiff, when asserting a tying claim under the familiar modified per se rule requiring market power for liability, must affirmatively prove such power even if the defendant owns a patent covering the tying product. Answering the specific question presented to it, the Court thus took the important step of abandoning an earlier presumption of market power in such circumstances. The contribution of the Court's opinion to antitrust law, however, does not stop there. The Court's opinion provides several additional lessons for those who live and litigate under the U.S. antitrust laws. The lessons are both substantive (about the content of antitrust rules and standards) and methodological (about the proper approach to deciding antitrust cases). As with any individual Supreme Court decision in a body of ever-changing common-law-like doctrine, aspects of the Court's analysis leading to the specific holding supply material, of varying strength and solidity, that lawyers must consider and use when analyzing and litigating antitrust issues.

I. Background to the Court's Opinion¹

Trident, Inc., eventually bought by Illinois Tool Works, Inc., made and sold components of inkjet printers specialized for printing barcodes on cartons and other packaging materials. Trident owned patents covering two of the components it sold to the manufacturers of the printers—a printhead and an ink container, described in the case as “printhead systems.” Trident also sold ink specialized for use in those printers, but it owned no patent covering the ink. The conduct that eventually became the subject of the U.S. Supreme Court’s ruling was a tying arrangement. In selling the printhead systems, Trident obtained promises from the printer manufacturers that they would buy their ink only from Trident, and that they and their end-user customers (the firms using the printers to print barcodes) would not refill the ink containers at all.²

According to the district court, Trident faced significant competition. At least two other firms sold competing printheads suitable for printing barcodes directly on certain packaging materials. Further rivalry came from several sellers of equipment for printing barcodes on labels that can then be affixed to packaging—a substitute for printing directly on the packaging. In addition, several competitors, including Independent Ink, sold ink, even ink that could be used with the Trident printhead itself.³

Independent Ink sued Trident. It alleged, among other things, that Trident’s tying arrangement was illegal under Section 1 of the Sherman Act, 15 U.S.C. § 1, for violation of the modified per se rule against tying established in precedents such as *Jefferson Parish*.⁴ Both in its own motion for summary judgment of illegality and in resisting Trident’s motion for summary judgment of legality, Independent Ink placed all its eggs in one basket, according to the district court. Relying on the Supreme Court decisions in *International Salt* and *Loew’s*,⁵ Independent Ink contended that Trident’s patents covering its printhead systems (the tying product) themselves sufficed to establish the market power required by the tying rule. The district court concluded, however, that those precedents were no longer good law and that patents neither conclusively nor even presumptive-

1 The case at the center of this paper is *Illinois Tool Works, Inc. v. Independent Ink, Inc.*, 126 S. Ct. 1281 (2006) [hereinafter *Illinois Tool Works*].

2 *Id.*; *Independent Ink, Inc. v. Trident, Inc.*, 210 F. Supp. 2d 1155, 1158 (C.D. Cal. 2002) [hereinafter *Independent Ink I*].

3 *Independent Ink I*, *supra* note 2, at 1158-59.

4 *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

5 *International Salt Co. v. United States*, 332 U.S. 392 (1947); *United States v. Loew’s, Inc.*, 371 U.S. 38 (1962).

ly proved market power.⁶ It then explained that Independent Ink had not submitted any other evidence that could establish either a market definition for the tying product or market power in that market, that Trident (through the evidence of competition) had in fact rebutted any presumption of market power that did exist, and that Trident therefore was entitled to summary judgment of no tying liability.⁷

On appeal, the U.S. Court of Appeals for the Federal Circuit rejected the district court's treatment of the older Supreme Court precedents, which the appellate court read as establishing a presumption of market power over patent-covered products in

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“patent tying” cases. It reasoned that those precedents, though subject to substantial criticism, had to be respected until the Supreme Court said otherwise.⁸ The Federal Circuit set aside the summary judgment that Trident had been awarded, concluding that, despite Trident's evidence of substitutes for its printhead systems, its economic analysis of market conditions was

inadequate to overcome the legally required market-power presumption on summary judgment.⁹

II. The Court's Opinion

The issue presented to and decided by the Supreme Court was whether the presumption of market power over patent covered tying products should be treated as good law. The Court held that it should not. Recognizing that it was changing the law, it then gave Independent Ink an opportunity on remand to make a normal economic case of market power and to address “any other issues that are relevant to its remaining § 1 claims.”¹⁰

6 *Independent Ink I*, *supra* note 2, at 1163-67 and 1167-70.

7 *Id.* at 1167-73. The district court case originally involved a patent-infringement dispute, but that was settled before decision. The district court ruling was limited to the tying claim and Independent Ink's claim under Section 2 of the Sherman Act, 15 U.S.C. § 2, involving actual or attempted monopolization of, or conspiracy to monopolize, the market for ink (the tied product). The court granted Trident summary judgment against the Section 2 charge on the ground that Independent Ink failed adequately to define or to prove a relevant monopoly power in that market. *Id.* at 1173-77. That ruling was affirmed on appeal, *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342, 1353 (Fed. Cir. 2005) [hereinafter *Independent Ink II*], and was not the subject of Supreme Court review.

8 *Independent Ink II*, *id.* at 1346-52.

9 *Id.* at 1352-53.

10 *Illinois Tool Works*, *supra* note 1, at 1293.

The Court began with a general survey of the history of tying law, not keyed to patents. Both the U.S. Congress, through the 1914 enactment of Section 3 of the Clayton Act, 15 U.S.C. § 14, and the Supreme Court, through several decisions from 1917 to 1969,¹¹ expressed “strong disapproval of tying arrangements” as allowing a firm with power in one market to restrain competition in another and as “serv[ing] hardly any purpose beyond the suppression of competition.”¹² Then, in 1977 and 1984, the Supreme Court rejected the premise that tying arrangements rarely serve a purpose beyond suppressing competition—a premise that “has not been endorsed in any opinion since” 1977—and clearly insisted on market power over the tying product as a condition of per se invalidity.¹³ Only after providing this non-patent-specific background account did the Court address “the validity of the presumption that a patent always gives the patentee significant market power.”¹⁴

The Court explained that the presumption originated in patent law cases, particularly those defining a “patent misuse” defense to infringement claims, and that the Court, in the 1947 *International Salt* decision, eventually “accepted the Government’s invitation to import the presumption of market power in a patented product into our antitrust jurisprudence.”¹⁵ The Court then set forth the key affirmative reasons for now abandoning the presumption. Most importantly, Congress changed the underlying patent law. After “chipping away at the assumption in the patent misuse context” even in the 1952 Patent Act, Congress acted in 1986 flatly “to eliminate that presumption in the patent misuse context” by limiting patent-misuse claims based on tying with language making clear that “the mere existence of a patent [does not] constitute the requisite ‘market power.’”¹⁶ That change in the patent statute undermined the presumption in the antitrust setting, not only because “it would be anomalous to preserve the presumption in antitrust after Congress has eliminated its foundation” (in patent law), but because the Sherman Act is a criminal statute, and “[i]t would be absurd to assume that Congress intended to provide that the use of a patent that merited punishment as a felony would not constitute ‘misuse,’” subject to the

11 See *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502 (1917); *Fortner Enters., Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969).

12 *Illinois Tool Works*, *supra* note 1, at 1286 (quoting *Standard Oil Co. v. United States*, 337 U.S. 293, 305-06 (1949)).

13 *Id.* at 1287-88 (discussing *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977), and *Jefferson Parish*, *supra* note 4).

14 *Id.* at 1288. The Court suggested that it read the “presumption” in earlier cases as irrebuttable – as simply rendering per se illegal any requirement by a patentee that its customers for a patent-covered product also buy unpatented goods from it.

15 *Id.* at 1289.

16 *Id.* at 1290 (discussing 35 U.S.C. § 271(d)(5)).

“significantly less severe” remedy of denying patent enforcement.¹⁷ The Court then declared that any conclusion of illegality for tying “must be supported by proof of power in the relevant market rather than by a mere presumption thereof,” dropping a footnote to say that this conclusion “accords with the vast majority of academic literature on the subject.”¹⁸

Only after reaching this conclusion did the Court address the only substantial argument put forth by Independent Ink, with the support of one important amicus brief (submitted on behalf of Professor Barry Nalebuff and a few colleagues). That argument, acknowledging that most patents carry no market power, defended a rebuttable presumption of market power for only some patent tying arrangements—those involving a requirements tie (a promise to purchase unpatented goods over time, not just simultaneously with the patented good)—on the ground that such arrangements effect price discrimination and price discrimination is strong evidence of market power.¹⁹ The Court’s first answer was that this was an argument for a different rule from the one created in *International Salt*, which placed no reliance on the fact that the tie was a requirements tie and which, in any event, seemed to involve no price discrimination.²⁰ The Court’s second answer made what is essentially the only contested substantive economics point in the opinion: that even price discrimination “occurs in fully competitive markets” and, therefore, does not suffice to support a presumption of market power.²¹ The Court drew the lesson: “Many tying arrangements, even those involving patents and requirements ties, are fully consistent with a free, competitive market.”²²

The Court wrapped up its opinion with one final support for its conclusion. The government enforcement agencies, which had led the Court to the presumption in 1947, have at least since 1995 expressly disclaimed any presumption of market power based on patents (or copyrights or trade secrets) in exercising their prosecutorial discretion. The Court explained that in antitrust law the enforcement agencies’ positions do not bind the courts (they’re not delegated substantive standard-setting authority), but the agencies’ position was nevertheless significant—because the Sherman Act is a criminal statute “it would be

17 *Id.* at 1291.

18 *Id.* at 1291 & n.4. Earlier, the Court advised that its review was “informed by extensive scholarly comment and a change in position by the administrative agencies charged with enforcement of the antitrust laws.” *Id.* at 1285.

19 *Id.* at 1291-92.

20 *Id.* at 1292.

21 *Id.*

22 *Id.*

unusual for the Judiciary to replace the normal rule of lenity that is applied in criminal cases with a rule of severity for a special category of antitrust cases.”²³

In sum, because “Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power on the patentee,” the Court held “that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product.”²⁴

III. Contributions of the Opinion to U.S. Antitrust Law

The Supreme Court’s opinion in *Illinois Tool Works*, consistent with the usual constraints on judicial decision-making, confines itself to discussing the specific question presented as the case reached the Court. Accordingly, the opinion does not address more general issues presented by tying law, such as whether the modified per se rule for tying liability should be abandoned, what market effects must be proved to establish liability under that rule, and what market benefits may be considered in applying the rule. Nevertheless, in the course of analyzing the specific issue of a patent’s bearing on the market-power requirement, the Court’s opinion makes a number of contributions to antitrust analysis that are of more general significance to the direct audience for antitrust decisions—lower courts, private and government lawyers, businesses, and consumers.

The decision presumably also provides grist for the economist’s mill, as commentaries other than this one will show. But economists’ analyses are one thing and lawyers’ (and hence judges’) analyses another. The latter unavoidably must filter the former through a series of lenses embodying limits on the capacities and perspectives of legal institutions and the players in them, including the judges and juries that decide cases and the lawyers who advise clients and prepare cases. Indeed, although legal analysis in antitrust does and must depend on sound economic analysis—an antitrust law approach that is either economically senseless or not supported by coherent economic understanding should not survive—the importance of institutional considerations in defining just how economics is used in antitrust law is one of the lessons that at least one lawyer finds suggested in *Illinois Tool Works*.

²³ *Id.* at 1292-93.

²⁴ *Id.* at 1293.

A. SUBSTANTIVE

1. Market Power Required

The Court stated clearly, more than once, that market power is a requirement for an antitrust challenge to a tying arrangement. And its usage was unitary: what is required is the market power demanded by the modified per se rule. Those statements undermine any notion that a tying arrangement might be condemned under a rule of reason approach even without market power or with proof of some lesser degree of market power.²⁵

2. Tying Not Inherently Suspicious

The Court's opinion pervasively reaffirms that the era of suspicion of tying arrangements is over. That discussion is presented as the backdrop for the Court's analysis of the specific issue presented in the case—the survival of any presumption of market power based on patent rights. The backdrop discussion is significant for what it says in terms: it restates with clarity and gives emphasis to the Court's repudiation of an earlier suspicion of tying arrangements. The discussion is especially significant, moreover, because the Court chose to include it in an opinion that in no way required it. The sole issue presented was whether patents support a presumption of market power. Resolving that question did not require commentary on whether tying arrangements, when they exist, are especially likely to meet proper standards for antitrust condemnation. The Court's choice to reaffirm that they are not, a merely relevant though unnecessary framework for its decision of the question presented, amplifies the message of that discussion.²⁶

3. What Market Power Means

The Court implicitly, but necessarily, adopted a robust understanding of the market power that must be proved for an antitrust challenge to a tying arrangement. That concept, as used by the Court, must mean more than a short-term absence of alternatives for purchasers or even the seller's ability profitably to set its own price above cost; it must mean something more than a departure from the classic model of pure competition under which individual sellers face horizontal demand curves. Although the Court does not define the required "market power" (i.e., durability?; degree?; focus on profits, not prices?), the robustness of the concept is implied by the citations that the Court deploys to support virtually the sole economic point in the opinion.

25 See, e.g., *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468 (3d Cir. 1992) (*en banc*).

26 The Court's opinion does not cite *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), though that decision discusses the law of tying after *Jefferson Parish* and the *Illinois Tool Works* opinion is otherwise fairly comprehensive in mentioning tying cases. Sometimes such a notable disregard of an earlier precedent reflects skepticism about its soundness, in whole or in part, at least by some on the Court.

The Court's lead citation is to an article by Baumol and Swanson that makes and defends the points that suppliers who are subject to meaningful competitive discipline engage in price discrimination.²⁷ The page cited by the Court, however, expressly accepts that such a firm must face a negatively sloping demand curve, as a firm in a model of perfect competition would not. Even so, discussing a familiar model of monopolistic competition, the cited page and surrounding pages observe that many such firms are subject to competitive discipline, so that price discrimination is not a reliable indicator of "market or monopoly power in any sense relevant to antitrust policy," even though the price-discriminating firm is in "violation of several of the commonly accepted indicia of market power."²⁸ The authors specifically favor a focus on levels of profits over time.

The Court's second citation is to a section of the leading legal treatise on American antitrust law, by Areeda and Hovenkamp.²⁹ The citation is a little curious, because the concern of the section is not to deny that price discrimination is an indicator of market power; rather, the section explains why a tying arrangement that cannot properly be condemned on other grounds should not be condemned because it is used for price discrimination—among other reasons, price discrimination often moves output to levels that a competitive market would produce. In citing this section to make its point about market power, the Court seems to be referring to a brief passage near the start of the treatise section. That passage affirmatively states that "some degree of market power" is required for price discrimination, but it immediately adds that the required degree need not be great—anything other than "intense competition."³⁰

The Court's final citation is to an excerpt from a book by Landes and Posner.³¹ The discussion cited stresses that a patent holder's price discrimination requires that it face a downward-sloping demand curve, unlike the horizontal curve faced by a firm in a model of perfect competition.³² The surrounding material criticizes certain arguments against characterizing the result in market power terms,³³ but

27 William J. Baumol & Daniel G. Swanson, *The New Economy and Ubiquitous Competitive Price Discrimination: Identifying Defensible Criteria of Market Power*, 70 ANTITRUST L.J. 661 (2003). The Supreme Court decision cites page 666.

28 *Id.* at 666.

29 Phillip E. Areeda & Herbert Hovenkamp, 9 ANTITRUST LAW ¶ 1711, at 100-15 (2d ed. 2004). The Supreme Court decision cites this section in toto.

30 *Id.* at 101-02 & n.4.

31 WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* (2003). The Supreme Court decision cites pages 374-75.

32 *Id.* at 375; see also, *id.* at 377.

33 *Id.* at 375-77.

insists that the “fundamental” point is that “market power is pervasive” and whatever market power a price discriminator has should not be a source of legal “worry”: it is “too little . . . in a meaningful economic sense to interest a rational antitrust enforcer.”³⁴ The Supreme Court, in citing this discussion, implicitly is adopting a robust legal standard for market power.

B. METHODOLOGICAL

1. Statutory Policy and Antitrust Precedent

The Court’s analysis of the market-power presumption issue relies overwhelmingly, though not quite exclusively, on an essentially non-economic analysis. It is based on legal considerations that would find a place in almost any statutory analysis. The Court traces the origin of the market-power presumption to a borrowing for antitrust law of a principle adopted early on in patent law and then relies centrally on the fact that Congress has repudiated the principle in the patent setting where it originated. The Court thus treats the change of statutory policy as critical for the resolution of the question in the context of antitrust law.

That approach reflects a traditional legal analysis in two respects. The first involves a delicate, essentially one-way principle, based on the strong common-law flavor of antitrust law, which comes from statutes that leave so much of the content of decisional rules to elaboration and evolution by the courts.³⁵ One guide for how courts can fill out the content of common law—or indeed of any open-ended standard—is statutory policy laid down by the legislature in closely related areas.³⁶ That guide is very limited: statutory duties not serving competition cannot be imported into antitrust law, and even statutory duties that might be characterized as serving competition in some sense (the senses are multifarious) generally should not be imported into the antitrust regime of criminal and treble-damages enforcement through non-expert decision makers.³⁷ Nevertheless, the “look to Congress” guide does support judicial repudiation of a special antitrust-law presumption when Congress has rejected it in substance by direct statutory enactment. The second, less delicate doctrinal grounding for *Illinois Tool Works*’s use of congressional modification of the patent statute is the law of stare decisis. The established standards for when a precedent should be overruled include, as one of their most solid elements, the consideration whether

34 *Id.* at 377, 374-75.

35 See *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 731-33 (1988). The Court adverts to this principle in *Illinois Tool Works*, *supra* note 1, at 1291 n.3, in citing *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).

36 See *Moragne v. States Marine Lines*, 398 U.S. 375, 390-91 (1970).

37 The Supreme Court made closely related points in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410-15 (2004).

the underpinnings of the earlier ruling have been eroded.³⁸ That is what the Court found to have happened when Congress repudiated a presumption of market power in the patent-law setting.

2. Enforcement Agency Position and the Rule of Lenity

Two additional aspects of the Court's legal analysis leading to its repudiation of the presumption of market power based on patent rights are noteworthy.

- First: The Court's opinion twice invokes the fact that the Sherman Act is a criminal statute, the second time noting that the rule of lenity—directing courts to resolve genuine ambiguities and uncertainties against breadth of prohibition—applies to criminal statutes. The invocation of the rule of lenity, even in a private civil case, is a striking aspect of the Court's analysis. It is of potentially quite general importance in the task of construing the Sherman Act, suggesting that doubts go against antitrust intervention in market activities.
- Second: The Court's opinion places express reliance on the position of the government enforcement agencies. That is not because the agencies have the kind of statute-implementing authority that would entitle them to the formal legal deference that other agencies receive for their substantive views about what statutes mean or how they should be applied. Rather, it is for a different reason, which works only in one direction, namely, leniency. The Sherman Act is a criminal statute, and it would be anomalous for the courts to apply a restrictive standard that the prosecutors have disclaimed. That principle establishes a legal basis for one kind of deference that supplements the simple fact of life that agencies with expertise and experience, though also with institutional biases, will get special attention from the Court when they speak, as they often do, with rigor and clarity.

3. Substantive Economics and Burdens of Proof

As the foregoing indicates, almost all of the Court's affirmative reasoning in support of overruling the market-power presumption is a traditional legal analysis. The Court's opinion says very little about substantive economics. It makes its economic point, that price discrimination does not strongly enough imply market power, only briefly, and only within an analytical structure that has already essentially shifted the burden of affirmative justification to the proponents of anything but general applicability of the requirement that plaintiffs must prove market power in tying cases.

The brevity of the economic discussion, its reliance on very simple points backed by a perceived broad (if not uniform) scholarly consensus, and its placement in an analytic structure so as not to make it bear too much of the weight

³⁸ See *United States v. Gaudin*, 515 U.S. 506, 521 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480-481 (1989).

for the Court's conclusion are telling. The Court's opinion does not finely parse the terms of the debate—a parsing that sometimes is essential to a proper resolution of an antitrust case, but that can easily strain the institutional capacity of courts, and that was ultimately unnecessary in *Illinois Tool Works*. Here, as in so many areas of the law, the Court relied critically on general considerations to establish a burden of proof that effectively determined the outcome. From the general recognition that tying is very often not an economically harmful practice, and the congressional and executive repudiation of a presumption of market power based on patents, the Court decided to insist across the board on affirmative proof, without aid of shortcuts, of the market power that is one important precondition for finding a particular tie deserving of legal condemnation. This approach reflects the centrality of limits on institutional capacity in deciding what to do, in law, with potentially complex debates among economists.

4. A General Approach?

In an area of law predominantly shaped by judicial opinions, individual decisions about particular issues combine to form patterns that can embody general principles or attitudes to guide legal analysis more broadly. Lawyers and judges reading such decisions can and do infer, even if they have difficulty precisely articulating, decision-shaping lessons for approaching new problems in the area. Such general dispositions, often conveying a message of skepticism or receptivity, play a persistent and powerful role in decision-making and in the evolution of doctrine that strives for overall coherence. Commentary on a particular decision is always at its most tentative when it moves from the particulars of the case to hazard a description of such a more general theme, but *Illinois Tool Works* lends itself to the attempt.

The Court's invocation of the rule of lenity, its decision to give so little emphasis to the substantive economic debate, and its re-assertion of the need for affirmative proof by the plaintiff can collectively be understood to support a more general disposition toward judicial antitrust analysis. At the heart of this disposition is a tenet of institutional epistemology, captured in the Johnny Mercer title, "How Little We Know." Such a disposition—given great prominence in the Supreme Court's 1993 *Brooke Group* decision on predatory pricing and its 2005 *Verizon v. Trinko* decision on unilateral refusals to deal³⁹—treats the limited capacity of legal institutions as a primary element, rather than an afterthought, in deciding what antitrust rules to adopt.

The epistemological modesty about how well the lay decision-makers in the legal system can make reliably accurate determinations, and how well lawyers acting as advisers can predict such determinations, has at least two aspects. One is skepticism about how well such decision-makers and advisers can understand and make objectively grounded assessments of economic behavior and its likely effects

39 *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 223 (1993); *Trinko*, *supra* note 37, at 414-15.

in an individual case—and whether they can do so at a cost that does not swamp the economic benefits of the substantive determination. The other, which is at least as important, is skepticism about how well—and, again, how cheaply—they can predict and control the systemic conduct-altering consequences of an antitrust rule or principle, or even of a seemingly narrow ruling on legality in a particular case (seemingly case-specific rulings in a common-law system shape future rulings and hence private decisions made in light of predictions about such rulings).

These two pillars of doubt about the reliability of legal antitrust decision-making support an ethical prescription, at least when coupled with a comparative assessment of markets, which rely on decentralized guesswork and experiment, as often better suited to identifying, responding to, and adjusting responses to competitively problematic conduct. The prescription would be an analytical starting point, a default position, that is a kind of Hippocratic oath for courts asked to intervene in private market activity: first do no harm. In practical doctrinal terms, a plaintiff's demand for antitrust intervention would be rejected unless and until the plaintiff articulates objective and generalized standards for antitrust intervention, defends those standards based both on how accurately and cheaply they can be applied in individual cases and (as important) how well they avoid systemically deterring desirable private market conduct, and proves that the standards apply to the facts of the case. For some common situations, such as price agreements among business rivals and some kinds of horizontal mergers, the default position is readily overcome by familiar and soundly based doctrine. For other situations, especially unilateral conduct, existing doctrine supplies no such general basis for overcoming a default rule of non-intervention.

The Supreme Court decision in *Illinois Tool Works*, which reads as a modest rather than ambitious pronouncement, does not venture to articulate such broad themes. But in its very cautiousness, and in its choices of premises for justifying its result, both substantive and methodological, the decision can be seen as part of a pattern that suggests a general modesty about judicial intervention under the antitrust laws. Such patterns, when they emerge from individual decisions, unavoidably exert great influence in an area of law where the decision-makers so often find the case-specific empirical analyses of particular problems indeterminate; where the standard jury instructions mix the meaningless, the confusing, and the misleading; and where even some of the common terms of judicial analysis (i.e., “anticompetitive,” “exclusionary,” “predatory”) are so far from having uniform, intuitive, and operationally practical meanings that they provide more in the nature of bottom-line conclusions than thought-clarifying guides to a mind trying to assess why conduct should or should not be condemned. ▼

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