The Merit of Meritor

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The Predominant Mechanism of Exclusion

- Begin with point of agreement: As Dan Crane's amicus brief on Meritor noted, Meritor

Factors *Meritor* Held Showed Price Not Clearly The Predominant Mechanism Of Exclusion

1. Condition bundles contestable & incontestable demand.
   – ***Meritor***, 696 F.3d at 278 (“even if an OEM decided to forgo the rebates and purchase a significant portion of its requirements from another supplier, there would still have been a significant demand from truck buyers for Eaton product”); id. at 283 (“no OEM could satisfy customer demand without at least some Eaton products”); also ***LePage's*** (bundle of incontestable branded tape and contestable private label tape in single tape market)
2. Condition raises rival's costs (e.g., prevents economies of scal
   – ***Meritor***, 696 F.3d at 287 (buyer freedom to buy from lower priced rival did not matter ‘because Eaton had assured that there would be no other supplier that could fulfill the OEM's needs or offer a lower price.”); id. at 281 (excluding “potentially” equally efficient rivals as bad as excluding equally efficient one); also ***LePage's*** (rival lost economies of scale)
3. Condition raises buyer switching costs
   – ***Meritor***, 696 F.3d at 287 (fact that “truck

Some Other Factors Showing Price Not Clearly The Predominant Mechanism Of Exclusion

4. If loyalty condition excludes sales of equivalent rival product th is lower priced or better rival product that is equally priced
   – ***Meritor*** was harder case because "Eaton's average prices were lower than Plaintiffs'". 696 F.3d at 266.
5. If prices > but-for prices, so really disloyalty penalty rather than loyalty discount. Crane argues impossible because sacrifices profits to charge price > monopoly price but:
   – Economic models show it is profit maximizing, and Crane logic equally implies tying and exclusive dealing threats are impossible
   – RTI (in 188 times, loyal price never lowered; disloyal price raised 187 tim
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Price-

Administrability

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Buyer Willingness or Terminability Irrelevant

- Each buyer agrees to loyalty condition that contributes to a rise marketwide prices because each buyer gets 100% of loyalty discount/avoided penalty for agreeing but externalizes the bulk his individual contribution to the marketwide price increase onto other buyers in their market or onto downstream buyers.
- In Cartel Ringmaster/Coasian bargain cases the seller and intermediate buyers inflict supracompetitive prices on downstream buyers and split the resulting gain in profits.
- Thus, whether buyers want or even initiate loyalty conditions is irrelevant because anticompetitive loyalty conditions are individually beneficial to them.
- Terminability irrelevant because same externalities that incentiv buyers to agree to anticompetitive conditions also mean buyers won't want to terminate them.
- Tragedy of the Commons was not negated by fact that farmers voluntarily brought their goats to commons and could have terminated doing so at any time.

Oft-Ignored Supreme Court Precedent

- Many relevant Supreme Court cases are ignored even though they were never overruled and remain binding.
- International Salt & Northern Pacific: condition that bars sales by rival at equal prices “forecloses” those sales even though rival could win sale by pricing 1 ¢ below defendant above-cost price if defendant did not respond.
- FTC v. Brown Shoe: 75% loyalty discount foreclosing even though freely terminable and no evidence it flunked price-cost test.
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