The Burger Court Opinion Writing Database

Jefferson Parish Hospital District No. 2 v. Hyde

466 U.S. 2 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

February 15, 1984

'84 FEB 17 A10:40

Re: Jefferson Parish Hosp. Dist. v. Hyde

Dear John:

I take your memo as an invitation to comment. As you know, I am not a "fan" of per se rules. I'll wait for developments.

Regards,

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 6, 1984

Re: 82-1031 - Jefferson Parish Hospital v. Hyde

Dear Sandra:

In common with others, I have had problems with this case. For many years I have resisted per se rules in this area and I conclude I will join Sandra's concurrence in the judgment.

Regards,

WEB

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

November 15, 1983

No. 82-1031

Jefferson Parish Hospital District, etc. v. Hyde

Dear Thurgood,

You and I are the only dissenters in the above. I'll be happy to take the dissent.

Sincerely,

Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

December 28, 1983

No. 82-1031

Jefferson Parish Hospital District
No. 2, et al. v. Hyde

Dear Thurgood:

My concerns that John might substantially depart from settled precedent have evaporated after reading his opinion. I therefore am inclined not to dissent but to join him. I don't want, however, to do that until you let me know your reaction. Will you at your earliest convenience?

Sincerely,

Bill

Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

January 31, 1984

No. 82-1031

Jefferson Parish Hospital District
No. 2, et al. v. Hyde

Dear Thurgood,

You will remember that you and I were in dissent in the above. Late in December I dropped you a note suggesting that John had written a persuasive opinion that I was inclined to join. However, I understand you are thinking of writing. If so, I am certainly going to wait until I see it. Are you?

Sincerely,

Justice Marshall

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 17, 1984

No. 82-1031

Jefferson Parish Hospital District
v. Hyde

Dear John,

Please join me. Depending on what else is written, I may write a concurring paragraph as well.

Sincerely,

Justice Stevens

Copies to the Conference

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 2/29/84

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February ——, 1984]

JUSTICE BRENNAN, concurring.

As the opinion for the Court demonstrates, we have long held that tying arrangments are subject to evaluation for *per se* illegality under Section 1 of the Sherman Act. Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress. I see no reason to depart from that principle in this case and therefore join the opinion and judgment of the Court.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: _____

Recirculated: 3/30/84

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February ——, 1984]

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, concurring.

As the opinion for the Court demonstrates, we have long held that tying arrangments are subject to evaluation for *per se* illegality under Section 1 of the Sherman Act. Whatever merit the policy arguments against this longstanding construction of the Act might have, Congress, presumably aware of our decisions, has never changed the rule by amending the Act. In such circumstances, our practice usually has been to stand by a settled statutory interpretation and leave the task of modifying the statute's reach to Congress. See *Monsanto Co.* v. *Spray-Rite Service Corp.* —— U.S. —— (1984) (BRENNAN, J., concurring). I see no reason to depart from that principle in this case and therefore join the opinion and judgment of the Court.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 14, 1984

Re: 82-1031 - Jefferson Parish v. Hyde

Dear John,

Your addition to footnote 23 on page 10 makes important points, and I would prefer that they be worked into the text. This I shall leave to you, however, and join your circulating draft.

Sincerely,

Justice Stevens

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

January 31, 1984

Re: No. 82-1031-Jefferson Parish Hospital District No. 2 v. Hyde

Dear Bill:

As of now, the best I can do is to join in the judgment. I will, therefore, wait to see what comes forth.

Sincerely,

T.M.

Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 7, 1984

Re: No. 82-1031-Jefferson Parish Hospital District No. 2 v. Edwin G. Hyde

Dear Bill:

Please join me in your concurrence.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

file

November 8, 1983

Re: No. 82-1031 - Jefferson Parish Hospital
District No. 2 v. Hyde

Dear Chief:

This will confirm my request at conference last Friday that I would prefer, for personal reasons, not to have this case assigned to me.

Sincerely,

HAB

The Chief Justice

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

January 4, 1984

Re: No. 82-1031 - Jefferson Parish Hospital District No. 2
v. Hyde

Dear John:

I have read your proposed opinion with great interest. For now, I shall await further writing.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 22, 1984

Re: No. 82-1031, Jefferson Parish Hospital Dist. v. Hyde

Dear John:

Please join me.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 10, 1984

MEMORANDUM TO THE CONFERENCE

Re: No. 82-1127, Helicopteros Nacionales de Colombia v. Hall

Our Rule 50.2 provides that in case of a reversal, costs shall be allowed to the petitioner "unless otherwise ordered by the Court." Rule 50.3 includes printing of the joint appendix as a taxable item.

The proposed mandate in this case has just been submitted to me for approval. It includes, in addition to the Clerk's costs of $300, the figure of $9,735.29 for printing the record. I must confess that I gag when I think of charging this printing figure to the plaintiffs in wrongful death actions. If I had my preference, I would charge only the $300 Clerk's fee as costs and let the helicopter operator stand the other burden. Some of you, perhaps most of you, will disagree.

I shall not approve the mandate in one form or the other until I have instructions from the Conference. Perhaps the Chief Justice will note this for consideration at the conference of May 17.

HAB

cc: Alexander L. Stevas
Clerk of the Court

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 28, 1983

82-1031 Jefferson Parish Hospital v. Hyde

Dear John:

I will certainly be with you on the judgment in this case, and may join parts of your opinion.

As you know, I have thought - both when practicing law and since coming to the Court - that the per se rule has been unwisely expanded. At least for me, the rule of reason - enabling judgments to be made on the basis of economic effects - is a far more sensible application of the Sherman Act in our free enterprise system. I therefore would be reluctant to join much of your opinion.

I want to think about this a good deal more, and may end up writing something.

Sincerely,

Lewis

Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 24, 1984

82-1031 Jefferson Parish Hospital v. Hyde

Dear Sandra:

Please join me in your opinion concurring in the judgment.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

January 4, 1984

Re: No. 82-1031 Jefferson Parish Hosp. v. Hyde

Dear John:

My recollection of the consensus of the Conference in this case, insofar as there was a consensus, differs somewhat from the views expressed in your proposed opinion. I thought we had decided to cut back on "tying" doctrine, either by holding that the Hospital's contract with Roux is not a "tying" arrangement at all, or by moving closer to the Rule of Reason--requiring market power in the markets for both the tying and the tied products before applying the per se rule. I gather from your proposed opinion that you disagree with both of these positions. Even though you conclude that the judgment of the Court of Appeals in this case should be reversed, your seeming redefinition of "separate products" and what seems to me to be a rather amorphous doctrine of "forcing" bid fair to expand tying doctrine beyond its previous bounds.

You suggest that the one product/two product inquiry turns not on the functional relation between the products, but rather on the character of the demand for the two items. Since anesthesia "could be provided separately and could be selected" by patients or doctors if the hospital "did not insist" on offering surgery and anesthesia as a package, you conclude that there are two products. But if any product were split into parts, there would arise a separate demand (though perhaps decreased by inefficiencies) for the parts. The engine component of a car "could be provided separately and could be selected" by consumers if GM "did not insist" on selling them as an integrated package. The same is true of left and right shoes; of bicycle frames and tires; and of every other product which could be split in parts (which is to say, every product).

I realize that the distinction between one product and two products will always involve an intuitive judgment of sorts. I think the only way to make sense of the distinction is to put it in terms of economic efficiency. But here the Hospital wishes to present its explanation for why it is more efficient, and improves patient care, to have an exclusive arrangement with Roux and yet your proposed opinion refuses to entertain the explanation. Op., at 19-20 nn. 39-40. I would think that in this case the Hospital, being ultimately responsible for the quality of service rendered in its operating rooms, may properly control the provision of anesthesiology in those operating rooms. Its decision to obtain such services through an exclusive dealing contract, with all the attendant benefits noted by the District Court, see Pet. App. at 32a, should not be subject to per se condemnation even if the Hospital could be said to have market power.

I also have reservations about what seems to be a recasting of the tying inquiry, in your opinion, so as to make it a question of whether the consumers are being "forced" to buy products they don't want. If the prime dangers of tying are the likelihood that the manufacturer would use his market power in the tying product either to obtain market power in the tied product or, through variable quantity sales in the tied product, to practice price discrimination in the tying product, the likelihood of either of these dangers should be the essential elements of the tying inquiry rather than reliance on the amorphous notion of "forcing."

I realize that some of our past opinions have used the metaphorical language of "forcing." As a metaphor, this choice may be harmless; but your opinion seeks to breathe life into the metaphor. Your analysis of tying raises the spectre of unwanted goods piling up in the basement of some hapless consumer. And you absolve the Hospital at least in part because there is no record evidence that any patient who wanted to face the knife without anesthesia was "forced" to go under regardless. Op., at 22-23. Both the "problem" and its "solution" seem to me quite abstracted from economic reality.

I think this case offers an opportunity to cut back on the broad sweep of the per se prohibition against tying, and I am reluctant to join an opinion which passes up that opportunity, to say nothing of one which may broaden its sweep. Accordingly, I will await further writings. Given

the difficulties in defining "products," perhaps Lewis is correct that the per se prohibition should be dropped altogether in favor of the Rule of Reason.

Sincerely,

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 15, 1984

Re: No. 82-1031 Jefferson Parish Hospital District No. 2 v. Hyde

Dear Sandra:

Please join me in your opinion concurring in the judgment.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: DEC 23 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a per se violation of § 1 of the Sherman Act[1] because every patient undergoing surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

In July 1977, respondent Edwin G. Hyde, a board certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him

[1] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1. Respondent has standing to enforce § 1 by virtue of § 4 of the Clayton Act, 15 U. S. C. § 15.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

January 4, 1984

MEMORANDUM TO THE CONFERENCE

Re: 82-1031 - Jefferson Parish Hosp. Dist. No. 2 v. Hyde

My thanks to Lewis, Sandra and Bill for their letters commenting on the draft opinion which I have circulated. As it seems to happen from time to time, the message the author intended to convey is apparently not that which the reader discerned in the opinion. I frankly had intended the "forcing" language to limit the per se concept rather than to expand it. My general notion was to follow pretty much the thinking in Byron's dissent in Fortner I. Because I have always admired his opinion in that case, I am inclined to await his reaction to my draft before I attempt any rewriting. Also, I look forward with interest to what Sandra may have to say.

I might just make this response to Bill Rehnquist's comments about the question of one product or two products. I think free market forces would pretty quickly take care of any attempt by General Motors to sell automobiles without engines or left shoes without right shoes. On the other hand, the mere fact that there is a functional relationship between two products cannot be sufficient to avoid tying clause analysis altogether unless we are prepared to overrule the IBM case and all the others in which the sale of a patented item was conditioned on use of unpatented materials with the patented product.

In short, this is merely a note indicating that I am by no means affirmatively wedded to the language in the draft I have circulated, but think it makes sense to postpone any rewriting until other comments are received.

Respectfully,

JPS

pp. 10 - 11

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JAN 27 '84

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a per se violation of § 1 of the Sherman Act[1] because every patient undergoing surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

In July 1977, respondent Edwin G. Hyde, a board certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital

[1] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1. Respondent has standing to enforce § 1 by virtue of § 4 of the Clayton Act, 15 U. S. C. § 15.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: FEB 22 '84

6-8, 12-13

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February ——, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a per se violation of § 1 of the Sherman Act[1] because every patient undergoing surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

In July 1977, respondent Edwin G. Hyde, a board certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital

[1] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1. Respondent has standing to enforce § 1 by virtue of § 4 of the Clayton Act, 15 U. S. C. § 15.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 27, 1984

Re: 82-1031 - Jefferson Parish v. Hyde

Dear Sandra:

It may be useful for me to comment on some of the similarities and differences between our drafts. I agree with you that what we refer to as a "per se" rule against tying perhaps does not warrant that sinister label because, except in the patent cases, market analysis is a necessary predicate to the identification of a tying arrangement. Although you eschew the label the Court has used in the past, your analysis indicates that tying is likely to be anticompetitive, and presumably therefore unlawful, if the three conditions you describe are present. In a sense, therefore, you also would apply a "per se" approach under a different label.

The first of your three conditions is one on which we both agree--there must be market power in the tying product. You would not infer such power from the existence of a statutory monopoly on the tying product--either by patent or copyright--whereas I think our prior cases and the history of the Clayton Act require us to draw the inference in such cases. In all events, we hardly need decide that question in this case which does not involve a patent or a copyright. Our more serious disagreements are on your second and third conditions.

Your second condition is that "there must be a substantial threat that the tying seller will acquire market power in the tied product market." (Page 6). You find that condition satisfied in this case because the hospital "can drive out other sellers of those services who might otherwise operate in the local market." (Page 10). I disagree. Because there is no showing that this arrangement has prevented anyone who wants to from using Dr. Hyde's services, there is no threat he will be driven out of the local market. You

also define "the market" as East Jefferson Hospital alone, even though there are easily accessible competing hospitals nearby. Your very liberal conclusion about what constitutes a separate market and a threat to competition threatens to expand the rule against tying far beyond the statement of the rule contained in my circulating draft, and could reach conduct that cannot threaten competition. The holding in my draft is exactly the opposite. Because consumers who want to use Dr. Hyde still can, there is no threat to competition.

Third, you say that there must be two separate services for a tie to exist. I, of course, agree. My draft recognizes, at 18, that when it is efficient to market services as a package, there is no tie. However, your conclusion that there are not separate services here is, I believe, unsupported by the record. Both the District Court and the Court of Appeals found that consumers (patients or their surgeons) select hospital services and anesthesia services separately. I am not sure what in the record supports your conclusion that hospitals and anesthesiologists do not provide separate services, except your statement that patients are interested in anesthesia only in conjunction with hospital services. However, consumers are also interested in buying computer punch cards in conjunction with computers, or antenna components in conjunction with antenna systems. Yet we have held in the IBM case that computers and punch cards are separate products, and in the Jerrold case that the various components of a community antenna system are separate products. The fact that a consumer may be interested in certain products only when used together (peanut butter and jelly) does not mean that they are not separate products. Your approach would overrule the cases I cite at pp. 15-16, n. 30 of my circulating draft, as well as prevent consumers from making separate purchasing decisions even when the District Court finds, as it did here, that consumers want to make separate purchasing decisions.

I would add two other comments. First, you rely in part on "patient care" justifications for the tying arrangement, thereby implying that the economic

analysis is not sufficient to defeat the respondent's claim. Under my analysis, the rule against tying is simply inapplicable and there is no need to consider such justifications. Moreover, the Court of Appeals set aside the findings concerning the justification for this arrangement as clearly erroneous; I am not sure what in the record persuades you that those findings should be reinstated.

Second, I wonder if you might not want to reconsider your comment on page 4 of your draft that a single seller with market power "may be regulated under §1 of the Sherman Act." If such a seller avoids conspiratorial conduct, as Lewis has so plainly explained in Monsanto, he would incur no liability under §1. Even under §2, I do not think there is anything unlawful in a monopolist's "exploitation of consumers in the market for the tying product" simply by charging as high a price as he can get.

In all events, even though I recognize that you find my draft unacceptable, since you have given the case so much study I would welcome any specific criticisms that might narrow our differences or improve my draft.

Respectfully,

Justice O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

March 7, 1984

Re: 82-1031 - Jefferson Parish Hosp. Dist. No. 2 v. Hyde

Dear Harry:

In this case perhaps I have already written too much. Nevertheless, I hope you will pardon me if I add this comment for your consideration.

In connection with my work on the dissent in Hoover v. Ronwin, I have just reread your separate opinion in Cantor, 428 U.S., at 605. (In retrospect, I wish I had plagiarized some of your analysis and included it in mine.) In passing you make some comments on tie-ins (see especially 612-614) that I think you may find relevant to the issue that seems to separate Sandra's approach to this case from mine.

If I read her opinion correctly, she would find one product rather than two--and therefore no tie-in--if the second product can only be used with the first (see her opinion at p. 7 and at p. 11). Thus, anesthesia is useless without an operation and therefore is not a separate product. On her reasoning I would suppose that light bulbs would be useless without electricity and therefore there could have been no tie in Cantor. In addition, of course, her approach would overrule IBM and similar cases.

With respect to my draft, as I am sure you know, any criticisms or suggestions will be welcome even if you conclude that you prefer Sandra's approach.

Respectfully,

Justice Blackmun

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: MAR 26 1984

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES: 28

4TH Draft

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 27, 1984]

JUSTICE STEVENS delivered the opinion of the Court.

At issue in this case is the validity of an exclusive contract between a hospital and a firm of anesthesiologists. We must decide whether the contract gives rise to a per se violation of § 1 of the Sherman Act[1] because every patient undergoing surgery at the hospital must use the services of one firm of anesthesiologists, and, if not, whether the contract is nevertheless illegal because it unreasonably restrains competition among anesthesiologists.

In July 1977, respondent Edwin G. Hyde, a board certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital

[1] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1. Respondent has standing to enforce § 1 by virtue of § 4 of the Clayton Act, 15 U. S. C. § 15.

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: _____

Recirculated: MAR 26 1984

P. 28

5th Draft

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 27, 1984]

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In July 1977, respondent Edwin G. Hyde, a board certified anesthesiologist, applied for admission to the medical staff of East Jefferson Hospital. The credentials committee and the medical staff executive committee recommended approval, but the hospital board denied the application because the hospital was a party to a contract providing that all anesthesiological services required by the hospital's patients would be performed by Roux & Associates, a professional medical corporation. Respondent then commenced this action seeking a declaratory judgment that the contract is unlawful and an injunction ordering petitioners to appoint him to the hospital

[1] Section 1 of the Sherman Act states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." 15 U. S. C. § 1. Respondent has standing to enforce § 1 by virtue of § 4 of the Clayton Act, 15 U. S. C. § 15.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

January 3, 1984

No. 82-1031 Jefferson Parish District
No. 2 v. Hyde

Dear John,

I have read your opinion in this case with interest. I agree with the result, but am concerned that your new theory of consumer "forcing" in the long run will perhaps add to the confusion and frustration of courts and litigants in this difficult area of antitrust law.

It seems to me it would be useful to attempt to use this opportunity to put the law of "tying" on a sounder economic basis: tying arrangements should be subject to a "per se" rule under § 1 of the Sherman Act only when the seller's market power in the tying product could be used to impair competition on the merits in the market for the tied product. Otherwise, I think we should abandon the per se rule application in cases such as this.

I will circulate a separate opinion concurring in the result as soon as I can get around to it.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

1st draft

No. 82-1031

Jefferson Parish Hospital v. Hyde

JUSTICE O'CONNOR, concurring in the judgment.

Petitioner, a public hospital, requires patients to use the anesthesiological services provided by Roux and Associates, as they are the only doctors authorized to administer anesthesia to patients in the hospital. The Court of Appeals found that this arrangement was a tie-in illegal under the Sherman Act. I concur in the Court's decision to reverse but write separately to explain why I believe the Hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the Hospital and certain anesthesiologists, is properly analyzed under the Rule of Reason.

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Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[January ——, 1984]

JUSTICE O'CONNOR, concurring. in the judgment

I concur in the result reached by the Court but write separately to explain why I believe the Hospital-Roux contract, whether viewed as effecting a tie between distinct products, or merely as an exclusive dealing arrangement, is properly analyzed under the Rule of Reason.

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Tying is a form of marketing in which a seller insists on selling two distinct products or services as a package. A supermarket that will sell flour to consumers only if they will also buy sugar is engaged in tying. Flour is referred to as the *tying* product, sugar as the *tied* product. In this case the allegation is that East Jefferson Hospital has unlawfully tied the sale of general hospital services and operating room facilities (the tying service) to the sale of anesthesiologists' services (the tied services). The Court has on occasion applied a *per se* rule of illegality in actions alleging tying in violation of § 1 of the Sherman Act. *International Salt Corp.* v. *United States*, 332 U. S. 392 (1947).

In my view tying may have adverse economic effects when, and only when, the seller's market power in the tying product could be used to impair competition on the merits in the market for the tied product. Whether a *per se* rule or the Rule

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 23, 1984

No. 82-1031 Jefferson Parish Hosp. Dist. No. 2 v. Hyde

Dear John,

Attached is a substantially revised opinion concurring in the judgment. As you know, Lewis was also considering writing separately. Rather than circulating another opinion, he graciously offered to help me revise the one I had circulated. Draft #2 incorporates Lewis' suggestions.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

Rewritten

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: 2/23/84

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[February ——, 1984]

JUSTICE O'CONNOR, concurring in the judgment.

Petitioner, a public hospital, requires patients to use the anesthesiological services provided by Roux and Associates, as they are the only doctors authorized to administer anesthesia to patients in the hospital. The Court of Appeals found that this arrangement was a tie-in illegal under the Sherman Act. I concur in the Court's decision to reverse but write separately to explain why I believe the Hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the Hospital and certain anesthesiologists, is properly analyzed under the Rule of Reason.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 27, 1984

No. 82-1031 Jefferson Parish v. Hyde

Dear John,

Thank you for your letter. Let me attempt to respond to the points you make in order.

I must emphasize that I would not apply a "per se" approach in any circumstances. If that does not come through in my draft, I will offer appropriate changes. I have tried to make clear that the three conditions I describe are merely threshold conditions, necessary, but not sufficient, to establish harmful economic effects from the tie. It is only when the three conditions are met that a further inquiry into economic impacts is required under the Rule of Reason. My "different label," in other words, is intended to go with a different mode of analysis. The purpose of the threshold conditions is to avoid the lengthy and cumbersome processes of a trial if it is unnecessary.

Contrary to the suggestion in your letter, I agree that a statutory monopoly such as a patent may generate market power in the tying product. I reject only the assumption that such power is inevitable. Market power can be derived from a patent only when close substitutes for the patented product are not readily available.

As to the second threshold condition outlined in my draft, I believe your letter--and your circulating draft--confuse two quite different markets. Patients shop for hospital services (and anesthesiology) in one market; anesthesiologists sell their services in another. The two markets are identical only if patients and anesthesiologists are equally mobile, an assumption which seems unlikely. It seems quite clear to me that if a certain group of patients have no choice but to use Jefferson Parish's hospital services, they also have no choice but to use anesthesia furnished by Roux through Jefferson. If the patients can readily go to another hospital, as you seem to assume in your letter, then Jefferson has no market power at all, and that is the end of the case. But once you accept that Jefferson has power over the provision of hospital services in some appropriately defined patients' market, you must also accept that Jefferson can easily acquire--and has in fact acquired--power over the provision of ancillary services such as anesthesia in that same market. There is nothing in the record, so far as I know, that suggests that patients in Jefferson's market buy anesthesia from anyone but Roux.

I would emphasize, however, that market power in the tied product market follows inevitably from market power in the tying product only in the rare case where we are dealing with a package that is properly characterized as "one" product. It is precisely in such a case that my third threshold condition will not be met. When consumers have absolutely no interest in buying anesthesia except with hospital services, a producer with power over hospital services must have power over anesthesia. But hospital services and anesthesia will not then properly be characterized as separate products. When we are dealing with only "one" product it is not at all surprising to find that market power over one half of the product implies market power over the other half too. In short, I am confident that this approach does not threaten to expand the rule against tying "far beyond"--or even a bit beyond--that proposed in your circulating draft. The intent--and, I believe, the effect--of my draft is quite the opposite.

This brings me to the heart of our disagreement--the approach you adopt for determining whether we are dealing with "one" product or "two." Frankly, I am not sure I understand your approach. I do know that I disagree with your conclusion. Patients undoubtedly do select anesthesiology and hospital services separately when those services are offered separately. If cars and engines were offered separately consumers would no doubt also select a car from column A and an engine from column B. This is of little help in determining whether we are dealing with "one" product or "two" for purposes of tying law.

Is it not preferable to consider the economic realities of the situation? First, if the "second" product is one that would never be bought without the "first," we should acknowledge that they constitute only one product. The volume of production of the second product is absolutely controlled by the volume of production of the first, and the adverse effects of any monopoly in the first are necessarily projected into the market for the second. Wholly apart from that special case, linking two distinct products may involve economic efficiencies that, under the rule of reason, nevertheless justify the tie. Thus even when my third threshold condition is not met, there may be conditions where two products should be treated as one. This case happens to be easy because, as your draft recognizes, few patients choose operations without anesthesia.

The IBM case involved potential price discrimination, with the cards used as a metering device. I acknowledge in my draft that price discrimination made possible by tying is a separate problem, one not involved here. I do not think that our six-line per curiam affirmance in Jerrold (substantially approving an alleged tie) can be read as significant authority for the proposition that the various components of a community antenna system are separate products. In any event, while the facts are not altogether clear, I read the District Court's opinion as stating that the tied products had separate uses. The

court emphasized that "the number of pieces in each system varied considerably, so that hardly any two versions of the alleged product were the same. ... " 187 F.Supp. at 559. This suggests to me that the separate pieces were properly treated as separate products under the test I outline in my draft.

More generally, your focus on a consumer's inchoate preference for buying products separately seems very open-ended. I may wish to buy baked beans in a medium-sized can, but can I attack the manufacturer for selling the top half of his "large" can "tied" to the bottom half? That "consumers want to make separate purchasing decisions" is hardly enough to establish that products are separate. Suppliers must also have economic reasons to "want" to sell the products separately.

The reference to patient care in my draft is intended to buttress, not to undermine, the economic arguments. That consumers are in fact receiving a desirable package service at an acceptable price strongly suggests that the economic arrangement that created the package should not be condemned.

You are right about my reference to Sherman Act §1. It should be to §2 and will be corrected.

I would be very pleased indeed if you find we are in agrement on this case.

Sincerely,

Sandra

Justice Stevens

Copies to the Conference

pp. 1, 4, 5, 7, 8

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March ——, 1984]

JUSTICE O'CONNOR, with whom CHIEF JUSTICE BURGER, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

Petitioner, a public hospital, requires patients to use the anesthesiological services provided by Roux and Associates, as they are the only doctors authorized to administer anesthesia to patients in the hospital. The Court of Appeals found that this arrangement was a tie-in illegal under the Sherman Act. I concur in the Court's decision to reverse but write separately to explain why I believe the Hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the Hospital and certain anesthesiologists, is properly analyzed under the Rule of Reason.

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pp. 15

Stylistic Changes Throughout

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: Justice O'Connor

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Recirculated: MAR 26 1

4 Draft

SUPREME COURT OF THE UNITED STATES

No. 82-1031

JEFFERSON PARISH HOSPITAL DISTRICT NO. 2, ET AL., PETITIONERS *v.* EDWIN G. HYDE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[March 27, 1984]

JUSTICE O'CONNOR, with whom CHIEF JUSTICE BURGER, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

Petitioner, a public hospital, requires patients to use the anesthesiological services provided by Roux and Associates, as they are the only doctors authorized to administer anesthesia to patients in the hospital. The Court of Appeals found that this arrangement was a tie-in illegal under the Sherman Act. I concur in the Court's decision to reverse but write separately to explain why I believe the Hospital-Roux contract, whether treated as effecting a tie between services provided to patients, or as an exclusive dealing arrangement between the Hospital and certain anesthesiologists, is properly analyzed under the Rule of Reason.

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