THE YALE LAW JOURNAL

VOLUME 63 JANUARY, 1954 NUMBER 3

A LEGAL AND ECONOMIC APPRAISAL OF THE "NEW" SHERMAN AND CLAYTON ACTS

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ACADEMIC economists have traditionally supported the basic purposes and underlying assumptions of the antitrust laws, stressing the feasibility and desirability of competition as the prime regulator of economic activity. Their major criticisms in the past have been directed not so much against the laws themselves as against the Supreme Court's adoption and application of a qualifying "rule of reason" in interpreting them between 1911 and 1936.[1] Under this test, the illegality of big businesses did not depend on the enjoyment of monopoly power, but on whether or not defendants had obtained or exerted economic power "unreasonably"—*e.g.*, employing predatory competitive tactics — thereby evincing an "intent to monopolize." Many economists felt that the rule of reason rendered the law impotent.[2]

The last decade has witnessed a striking reversal in judicial interpretation of the antitrust laws. There has been some tendency for the courts to dilute the rule of reason, creating a more effective "new" Sherman, as well as Clayton, Act.[3] This dilution has been manifested by a tendency to condemn per se business size, integration, and monopoly power. The courts have also been condemning such business practices and procedures as differential pricing, exclusive dealing, and tie-in agreements, on the ground that by these tactics

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1. In Sugar Institute, Inc. v. United States, 297 U.S. 553 (1936), the Supreme Court reversed the apparent tendency of Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933), to apply the rule of reason even to price-fixing associations. The change in the application of the rule of reason to § 2 "monopolies" did not come until the *Alcoa* case, note 18 *infra*.

2. See, *e.g.*, Watkins, *Business and the Law* in READINGS IN THE SOCIAL CONTROL OF INDUSTRY 48 *et seq.* (1942); Mason, *Monopoly in Law and Economics* in *id.* at 25, 28-9, 37-41, 44-7.

3. For an early and approving recognition of some of these tendencies, see Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745 (1949).

the offending concerns, usually big and powerful sellers, have excluded or disadvantaged smaller competitors.[4]

Concomitant with these recent legal developments, academic economists have unleashed a "new criticism" of the antitrust laws. These "new critics" do not deny that the recent legal developments have made it easier for the antitrust authorities to win cases. But they question, with increasing boldness, whether the developments have not contravened rather than promoted the basic purpose of the laws.[5] They point out that big business is not just an inevitable evil but a necessary agent of effective competition in modern industrial society.[6] A firm may emerge with a large share of the market because of its superior efficiency and enterprise. In the same way, exclusive dealing and full requirements contracts may be indispensable instruments or methods of competing under modern conditions. They contend, therefore, that the Supreme Court was on firm economic ground in the 1920's when it held, under the rule of reason, that business size and market power were not in themselves offensive; that the Clayton Act was justified in condemning the enumerated practices only if their "effect may be to substantially lessen competition";[7] and that the recent dilutions of these escape clauses have paradoxically permitted the authorities to harass enterprising big businesses in order to protect small and inefficient competitors, thus discouraging competition itself. These critics propose that the rule of reason be restored to its former vigor, and that antitrust decisions depend henceforth on the impact of the disputed market structures or practices on *workable* (as distinguished from pure or perfect)

4. For a detailed study of recent leading price discrimination cases, see Dirlam & Kahn, *Price Discrimination in Law and Economics*, 11 AM. J. OF ECON. & SOC. 281 (1952).

5. See, *e.g.*, Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289 (1948); Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27 (1949).

6. See LILIENTHAL, BIG BUSINESS, A NEW ERA (1953); Kaplan & Kahn, *Big Business in a Competitive Society*, 47 Fortune, February, 1953, § 2.

7. "Sec. 2(a). That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly. . . ." 38 STAT. 730 (1914), 15 U.S.C. § 13 (1946).

"Sec. 3. That it shall be unlawful for any person engaged in commerce . . . to lease or make a sale or contract for sale or fix a price, charged therefor, or discount from, or rebate upon, such price on the condition, agreement or understanding that the lessee or purchaser . . . shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect . . . may be to substantially lessen competition or tend to create a monopoly. . . ." 38 STAT. 731 (1914), 15 U.S.C. § 14 (1946).

"Sec. 7. That no corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital or another corporation engaged also in commerce, where effect of such acquisition may be to substantially lessen competition . . . or tend to create a monopoly. . . ." 38 STAT. 731 (1914), 15 U.S.C. § 18 (1946). Section 7 has since been amended to embrace the acquisition of assets as well. 64 STAT. 1125 (1950), 15 U.S.C. § 18 (Supp. 1952). See Note, 63 YALE L.J. 233 (1953).

competition,[8] measured in terms either of concrete economic results or of the continuing vitality of competitive forces in the market as a whole.[9]

In appraising these criticisms, this article examines the recent antitrust decisions in a legal and economic context. The significant legal question is to what extent the traditional rule of reason has in fact been abandoned. The crucial economic question is whether the decisions have, as has been so often alleged, made for less effective competition. The article focuses on the recent antitrust cases involving business size and integration, and includes within its compass integration not only by financial control, but also by means of tie-ins, exclusive dealing, and full requirements contracts. All of these practices represent methods of obtaining or exercising some of the advantages conferred by integration, and have similar effects on competition. Underlying the entire discussion is the conviction that the legal criteria of unreasonable restraint and monopoly are always dictated primarily by the mores of a free enterprise society, rather than by the clear-cut requirements of optimum economic performance.

Business Size and Integration in Monopoly Cases

The Sherman Act was not intended to attack the mere enjoyment of monopoly power. Rather, the stigma of "monopolizing"[10] has attached, tradition-

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8. As economists have come to recognize that pure or perfect competition are neither practically attainable nor even desirable, they have in recent years embraced the alternative standard, falling somewhere between pure competition and pure monopoly, as the appropriate guide to public policy. The concept of workable or effective competition is necessarily imprecise and controversial. However, its various definitions usually include the presence of sufficiently intense rivalry among a sufficient number of sellers to offer buyers a reasonable number of competing alternative sources of supply and thus hold monopoly power in check; and the presence of sufficient elements of monopoly power to prevent cutthroat competition, to assure technological progress, and to permit sellers to achieve the technological efficiencies of size. Economists differ in the extent to which they would look primarily to an industry's *structure*, or to the *behavior* of the firms in it, or to its actual economic *results* to see whether it deserves approval as workably competitive, *i.e.*, as containing the best attainable balance of monopolistic and competitive elements. See sources cited notes 5 and 6 *supra*, 9 and 26 *infra*.

9. See Griffin, An Economic Approach to Antitrust Problems (1951); Business Advisory Council, Rep. to the Sec'y of Commerce: Effective Competition (1952); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139 (1952).

In Kahn, *Standards for Antitrust Policy*, 67 Harv. L. Rev. 28 (1953), the author described and appraised the possible alternative economic criteria of monopoly and monopolizing.

10. "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a misdemeanor. . . ." 26 Stat. 209 (1890), 15 U.S.C. § 2 (1946).

The word "monopolize" does not appear in § 1 of the Sherman Act: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or comally, to the unreasonable *acts* incident to attempts to acquire or maintain substantial monopoly power.[11] Indeed, the *American Can,*[12] *United Shoe Machinery,*[13] *U.S. Steel,*[14] and *International Harvester*[15] decisions all seemed to argue that even dominant firms—the result of mergers whose purpose was virtually to eradicate competition in their respective industries—could not be condemned or dissolved, if they had not achieved almost complete monopoly, and had not employed flagrantly oppressive competitive methods.[16] Recently, the courts have gone far to reverse this earlier attitude, and have applied Section 2 of the Sherman Act[17] to monopolists whose actions were not found to be unreasonable or motivated by a clear intent to monopolize; oligopolists (a few dominant sellers), without clear evidence of collusion between them; integrated companies that excluded competitors merely from the patronage of their own integrated subsidiaries or of customers with whom the integrated companies had signed full requirements contracts; "hard bargainers" that enjoyed little monopoly power but undoubtedly enjoyed some strategic advantages over their smaller, non-integrated rivals.

"Monopolizing" as the Enjoyment of a Monopoly

The Alcoa and United Shoe Machinery decisions:

The beginnings of the "new" Sherman Act are customarily traced to Judge Hand's decision in the *Alcoa* case.[18] After resolving the complex issue of

merce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." 26 STAT. 209 (1890), 15 U.S.C. § 1 (1946). However, under the rule of reason enunciated in the *Standard Oil* case, note 24 *infra*, an important test of illegal "intent to monopolize," under § 2, was the accomplishment of an unreasonable restraint in contravention of § 1. Similarly the *American Tobacco* decision of 1946, note 63 *infra*, found, in a price-fixing conspiracy illegal under § 1, part of the evidence sustaining a charge of "monopolization" as well, even though three separate companies were involved.

11. "In answer to the specific question whether an enterprise would be considered a monopoly if, because of superior skill, it alone received all the orders for a particular article, Senator Hoar replied, 'The word "monopoly" . . . [means] the sole engrossing to a man's self *by means which prevent other men from engaging in fair competition with him.*' " Mason, *supra* note 2, at 41.

12. United States v. American Can Co., 230 Fed. 859 (D. Md. 1916), *decree denying dissolution,* 234 Fed. 1019 (D. Md. 1916).

13. United States v. United Shoe Machinery Co., 247 U.S. 32 (1918).

14. United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

15. United States v. Int'l Harvester Co., 274 U.S. 693 (1927).

16. In United States v. Reading Co., 253 U.S. 26 (1920), the Supreme Court found illegal monopolization under § 2, as well as unreasonable restraint of trade under § 1, even though the defendants controlled only about one-third of the nation's production of anthracite coal. To some extent, this decision conflicted with United States v. U.S. Steel Corp., 251 U.S. 417 (1920). Three of the four members of the *U.S. Steel* majority dissented in *Reading.* However, certainly another important reason for the decision in *Reading* was the Court's finding of a clear-cut intent to monopolize in the long history of the defendant companies.

17. See note 10 *supra.*

18. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

how best to measure the company's share in the national aluminum market by selecting the combination of figures that yielded the highest possible percentage, Hand stated that Alcoa's ninety percent control "is enough to constitute a monopoly," and that "having proved that 'Alcoa' had a monopoly . . . the plaintiff had gone far enough."[19] His opinion paid its respects to the traditional doctrine that mere size is no offense, and accepted the necessity for considering the mitigating if not exonerating possibility that monopoly might have been "thrust upon" the company.[20] But Hand met this hurdle merely by stating that no one attains 100 percent control of domestic production unwittingly, and by offering in evidence the fact that Alcoa, in steadfastly increasing its capacity to meet all demands, "effectively anticipated and forestalled all competition."[21] Although used to show illegal intent, such evidence could also show forthrightly competitive conduct. If these actions were reprehensible, it was only on the ground that the outcome, the monopoly position, was itself illegal.[22]

The basis on which Judge Hand chose to condemn Alcoa represented a substantial departure from the traditional rule of reason and its conception of monopolizing. One might argue that *Alcoa* was not particularly novel, since previous decisions exonerating big business defendants were heavily influenced by the fact that the defendants were not pure monopolists.[23] But in previous decisions, the defendants had originally been put together by mammoth mergers that left them with preponderant shares of total national production. Had they retained those market positions, the courts would have been justified in condemning them for monopolizing, "not as a result of normal methods of industrial development, but by new means . . . resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed. . . ."[24] Judge Hand's decision, on the other hand, seemed to

19. *Id.* at 424, 427.

20. "[T]he successful competitor, having been urged to compete, must not be turned upon when he wins." *Id.* at 430.

21. *Id.* at 430-1.

22. "No intent is relevant except . . . [the] intent to bring about the forbidden act." *Id.* at 432. But the "act" was the enjoyment of 90% of the market. See Adams, *The Aluminum Case: Legal Victory—Economic Defeat*, 41 AM. ECON. REV. 917 (1951).

There is a clear implication of the same attitude in the earlier *Pullman* case. In effect, Judge Goodrich said that a monopoly is a monopoly, and that the problem of drawing the line under the rule of reason enters somewhere below 100% market control. United States v. Pullman Co., 50 F. Supp. 123, 134-5 (E.D. Pa. 1943). In his appraisal, however, he insisted on looking "at the whole picture." *Id.* at 133. And in this picture was a conscious purposeful program for obtaining and then cementing this monopoly control by mergers, exclusive agreements, and the like.

23. "[T]he corporation did not achieve monopoly . . . and it is against monopoly that the statute is directed." United States v. U. S. Steel Corp., 251 U.S. 417, 444 (1920). See also cases cited in notes 12 and 15 *supra*.

24. Standard Oil Co. v. United States, 221 U.S. 1, 75 (1911). This was Chief Justice White's historic enunciation of the rule of reason.

define monopolizing as the mere enjoyment of monopoly, even if attained entirely as a result of efficiency, foresight and technological innovations.

But *Alcoa* is not as revolutionary as it seems. Its condemnation of monopolies as such is explicitly confined to classic, single-firm monopolies.[25] Professor Mason criticizes Hand's measures of Alcoa's market position—both the particular divisor and dividend that yielded the ninety percent quotient, and the identification of market control with percentage shares in a given product —as "very dubious economics."[26] The criticism is partially justified, since the ninety percent figure ignored the competition between Alcoa's virgin ingot and secondary aluminum, as well as other metals. But significantly, Mason offers no better economic measure. None is available. The figure of ninety percent was as indicative as any other of the unquestionable fact that one company had a very substantial range of discretion in the pricing and the rate of development of an entire industry.[27]

Another and more important reason for questioning the revolutionary character of the *Alcoa* and later *United Shoe Machinery*[28] decisions is that the defendants had monopolized their respective markets in the traditional sense as well. Although emphasizing United Shoe Machinery's eighty-five percent market share, Judge Wyzanski plainly predicated his condemnation of the company on his finding that it had not attained and maintained its overwhelming strength solely by virtue of its "ability, economics of scale, research, natural advantages, and adaptation to inevitable economic laws."[29] Rather, United Shoe Machinery's business policies, *i.e.*, its *actions*, while not inherently predatory or immoral, had erected arbitrary barriers to competition.[30]

Judge Hand could have reached the same conclusion in *Alcoa*. It should not have been necessary to find a precise measure of Alcoa's market power in order to convict it under the antitrust laws. The economic assumption of those laws is that vigorous, fair competition in finding and satisfying customers will not result in a monopoly. The history of the aluminum industry, of the

25. *See* 148 F.2d 416, 424 (2d Cir. 1945).

26. Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1273-4 (1949).

27. No monopolist has a completely inelastic demand, except within extremely narrow limits. Except for imports, which were included in Hand's computation, Alcoa had the primary power to determine how rapidly aluminum made its way in competition with other metals. On the relative acceptability of secondary ingot, see 148 F.2d 416, 423-4 (2d Cir. 1945); MULLER, LIGHT METALS MONOPLY 21, c, 1, *passim* (1946). Wallace says that scrap falls short in essential respects of completely preventing the exercise of monopoly power by producers of the primary metal. Wallace, *Aluminum* in INTERNATIONAL CONTROL IN THE NON-FERROUS METALS 210, 258 n.87 (Elliott ed. 1937) (hereinafter cited as ELLIOTT).

28. United States v. United Shoe Machinery Co., 110 F. Supp. 295 (D. Mass. 1953).

29. *Id.* at 343.

30. "They are contracts, arrangements, and policies which . . . further the dominance of a particular firm. In this sense, they are unnatural barriers; they unnecessarily exclude actual and potential competition; they restrict a free market." *Id.* at 344-5.

ways in which Alcoa obtained, retained, and used its market power, does not disprove this assumption.[31] Alcoa might have enjoyed its predominant position in the American market in 1944 without having bought out the Cowles Brothers and the critical Bradley patent in 1903;[32] without the expressly exclusive clauses in its bauxite and power purchase contracts, annulled by a 1912 consent decree;[33] without the acquisition of at least one imminently threatening domestic competitor in the 1920's, the squeeze on fabricators,[34] and the direct and indirect understandings with foreign producers,[35] including the strangely cooperative "competitor" Southern Aluminum Company. Its head start and advantages of "experience, trade connections, and elite of personnel"[36] might alone have sufficed to discourage or destroy competitors. Neither an economist nor a lawyer can be sure. But in fact these actions provided ample evidence to support a finding of an intent to monopolize—to keep the American aluminum market Alcoa's exclusive preserve by whatever methods were required.[37]

Although Judge Hand's virtual per se condemnation of Alcoa as a monopolist did not extend to the company's vertical integration, perhaps it should have. A strong case can be made for the condemnation of the market structure here. Alcoa tied together a domestic monopoly in aluminum, protected for a time by patents, with control of extensive bauxite deposits and power sites, and with large operations in the more competitive field of fabrication.

31. Nor does the history of the Pullman Company. See *supra* note 22.

32. The keen competition between Alcoa's predecessor and the Cowles Brothers between 1887 and 1893 was in large measure responsible for the price reduction of aluminum from $5.00 to $0.75 a pound in these six years. The Cowles Brothers went out of the business in 1893, when Alcoa's predecessor company launched and won an initial victory in a patent infringement suit; they stayed out even though their own patent was upheld in 1903, selling out to Alcoa for $1,429,000 and annual royalties. See WALLACE, MARKET CONTROL IN THE ALUMINUM INDUSTRY 101 (1937); STOCKING & WATKINS, CARTELS IN ACTION 221-2 (1946).

"Had patent protection ended in 1906 it is highly improbable that the Aluminum Company would have attained by that time the degree of size, integration, and power which, after the intervening boom years, faced potential competitors in 1909. . . . Extension of patent protection to twenty years [by acquisition of the Bradley patent] destroyed the opportunity for competitors to enter at a period when conditions were perhaps more favorable than they have ever been since." WALLACE, *op. cit. supra*, at 101.

33. United States. v. Aluminum Co. of America, 1 DECREES & JUDGMENTS 341 (W.D. Pa. 1912) (consent decree entered).

34. See 148 F.2d 416, 436-8 (2d Cir. 1945); WALLACE, *op. cit. supra* note 32, at 380-92.

35. See STOCKING & WATKINS, *op. cit. supra* note 32, at 224-73.

36. 148 F.2d 416, 431 (2d Cir. 1945).

37. See, *e.g.*, MULLER, *op. cit. supra* note 27, cc. 2-6. In view of this record of Alcoa's conduct, it is difficult to take seriously the contention of one commentator that Alcoa's monopoly position was a simple and inevitable consequence of today's "monster technology" and of its success in the competitive struggle. Levitt, *The Dilemma of Antitrust Aims: Comment*, 42 AM. ECON. REV. 893 (1952).

These tie-ins, whether accomplished by exclusive purchase contracts or by financial integration, unquestionably made it more difficult for competitors to engage in the production of ingot. And they exposed fabricators to a squeeze, either because of their inability to command adequate supplies of ingot in time of shortage, or as a result of Alcoa's narrowing the margin between its ingot and product prices.[38] In either event, monopoly positions at certain levels reinforced monopoly power at other levels.

The district court's view of the law was that proof of a specific intent to monopolize was necessary to convict Alcoa. The trial judge found not illegal intent but merely prudent business motivations in Alcoa's accumulation and exercise of the competitive advantages that flowed from its vertical integration.[39] Judge Hand did not reverse this finding as "clearly erroneous,"[40] except to hold that the price squeeze on rolling mills was prima facie evidence of illegal intent.[41] Even the price squeeze, however, did not necessarily evince a specific intent to injure or to exclude, since it represented, in part, a means of probing the opportunities for increasing the use of aluminum sheet in competition with other metals—a kind of promotional price discrimination.[42] An economist might reasonably contend that an inquiry into Alcoa's intent was not worthwhile. Alcoa's vertical integration imposed severe and entirely strategic handicaps upon non-integrated competitors, and erected substantial barriers against competitive entry.[43] The fact of market power alone, it might reasonably be argued, was significant. Given the market structure in aluminum, perhaps the vertical integration itself should have been held objectionable.

However, it was not necessary for the law to go to either extreme: condemning Alcoa's vertical integration per se, or condemning it contingent upon a

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38. The two kinds of squeeze are in some measure alternatives. In the late 1920's and early 1930's ingot production was the profitable operation, and it was the price squeeze which forced sheet rollers to close down. In the recent defense boom, the low price of aluminum relative to the costs of new construction and additional power apparently made reduction less profitable than fabrication; but for that very reason, integrated producers were reluctant to sell, and non-integrated fabricators could not get the ingot to take advantage of the wide margins. See ANDERSON, ALUMINUM FOR DEFENCE AND PROSPERITY 22-3 (1951); H.R. REP. No. 255, 82d Cong., 1st Sess. 3, 5, 7, 22 (1951) (Celler Subcommittee on Monopoly Power: Aluminum).

39. 44 F. Supp. 97 (S.D.N.Y. 1941). The company's vertical integration did represent in large measure a socially beneficial exercise of competitive foresight and initiative in exploring and developing new sources of supply, in uncovering and exploiting new uses for aluminum.

40. 148 F.2d 416, 434 (2d Cir. 1945).

41. *Id.* at 437-8.

42. WALLACE, *op. cit. supra* note 32, at 390-5. Was it evidence of predatory intent when Alcoa officials pointed out to two utensil manufacturers contemplating construction of their own rolling mills that future ingot shortages would naturally shut down their projected mills before Alcoa's own? See *id.* at 437-40, 374-9, and c. 18, *passim*.

43. Compare Adelman's analysis: "The vice of integration, therefore, is its superior efficiency, for that makes it impossible for nonintegrated concerns to be 'able to compete.' " Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 53 (1949).

demonstration of predatory intent. The decision could have hinged on the traditional test of monopolization, the evidence of what the defendant *did.* Alcoa had the power to exclude. It maintained the power in part at least by methods other than those of normal competition. It *exercised* the power, with the result that actual and potential competitors were seriously squeezed. Because exclusion was the consequence not merely of its market power and structure but of its policies, an intent to monopolize might reasonably have been inferred. The test of intent is not a test of the purity of a company's motives, but an evaluation of its conduct.[44] A company in Alcoa's position in ingot cannot be permitted to reduce prices *selectively* in such a way as to wipe out the profit margins of those who must buy from it as well as sell in competition with it. Nor can it be permitted, without limit, to extend its monopoly by such means as Alcoa employed.

Alcoa and the requirements of workable competition:

In determining whether or not the *Alcoa* decision violated the requirements of workable competition, the market performance of the industry, under the competitive stimulus of scrap, imports, and other metals, must be examined. While it is impossible to assess the complicated record with any pretension to scientific accuracy,[45] Alcoa must unquestionably receive substantial credit for the rapid growth of the American aluminum industry, for the dramatic secular decline in prices and costs, and the corresponding expansion of capacity and in the uses of aluminum.[46] But it is certainly doubtful that a complete monopoly of American ingot production was a necessary condition of this development. Economies of large-scale operation in production and research did not require a single producer.[47] Moreover, one cautious and diffident appraisal concluded that the single seller was responsible for some substantial restriction of output and investment and that an oligopoly would probably have done better.[48] The pressure of a few competitors would probably have remedied the particularly flagrant lag of investment behind rising demand in the boom years 1900-07 and 1923-26. Even the expansions during the periods 1908-14, 1926-29, and 1935-39 probably fell short of not only the ideal but also the attainable.[49] And in both the 1907 and 1929 depressions, "lower prices would have enabled much better utilization of capacity without bringing losses."[50] Moreover, the successful demand for an increase in the

44. See Kahn, *supra* note 9, at 50-3.

45. WALLACE, *op. cit. supra* note 32, at xxvii, xxix. These disclaimers lend support to my own arguments for rejecting an appraisal of market performance as a substantive basis for antitrust judgments.

46. *Id.* at 10-16, 114, 152, 179-203, 254-7.

47. *Id.* at 189-203.

48. *Id.* at 331-66.

49. ELLIOTT 231, 254-7; WALLACE, *op. cit. supra* note 32, at 247-8; STOCKING & WATKINS, *op. cit. supra* note 32, c. 6.

50. ELLIOTT 231; WALLACE, *op. cit. supra* note 32, at 28, c. 14.

protective duty in 1922 (from 2c to 5c per lb., at which level it remained until 1930), and the prompt elevation of the price by the same amount, were surely evidence of unworkable competition.[51] Alcoa's high profits, particularly in the monopoly ingot field, are further evidence.[52] Average overall annual returns of 9.63% on stockholders' equity during the decade of the 1930's, 16.61% in 1935-39, and 27% in 1939 alone, would appear to vindicate the "dubious economics" of Judge Hand. Both economics and law appear to agree, then, that the *Alcoa* decision was correct in giving the Government the right to lay its hands on the aluminum industry.

The new market structure and prospects of better performance:

The decree in *Alcoa*[53] and the Government's disposal of surplus World War II plants to Reynolds and Kaiser have substantially altered the market structure of the aluminum industry. There are now three large, vertically integrated domestic producers of aluminum, instead of one. And there is a huge potential competitor in Canada, enjoying unusually low costs, which will in time have no ties to Alcoa. The American producers enjoy rights under Alcoa's patents, and have been freed of the obligation to license that company under any patents which they may develop in the future.

Although the structure is changed, the performance in the aluminum industry may not be drastically different, at least in certain important respects. It seems clear, from the district court's exhaustive assessment, that Kaiser and Reynolds are both weaker than Alcoa in financial strength, in cost of production, in patents and research facilities. And, unfortunately, Alcoa may

51. The tariff might have been expected to encourage new domestic entrants, or at least expansion of capacity by Alcoa. However, Alcoa effectively precluded the entry of two major interests by buying them out—the Uihleins, who had secured control of extensive bauxite deposits, and J. B. Duke, who had an excellent power site on the Saguenay River and had made arrangements with George Haskell to go into the aluminum business. WALLACE, *op. cit. supra* note 32, at 129-35. Moreover, despite severe shortages in the intervening years, Alcoa delayed *beginning* an expansion of capacity until 1925. Nourse and Drury blame the price increases and shortages during the early 1920's for the substantial retardation in the growth of demand for aluminum, especially within the automobile industry. NOURSE & DRURY, INDUSTRIAL PRICE POLICIES AND ECONOMIC PROGRESS 203-08 (1938).

52. The rate of return in ingot production was "considerably higher" than in total company operations. WALLACE, *op. cit. supra* note 32, at 30-1, 233, 250-2, 258-60, 263; STOCKING & WATKINS, *op. cit. supra* note 32, at 231.

53. United States v. Aluminum Co. of America. 91 F. Supp. 333 (S.D.N.Y. 1950). Judge Knox refused to break up Alcoa, because, the competitive position of Reynolds and Kaiser appearing reasonably secure, it no longer enjoyed a complete monopoly in virgin aluminum, and also because of its excellent economic performance. *Id.* at 401, 416. Instead he ordered (1) dissolution of the "community of interest" between Alcoa and Aluminum Ltd. of Canada—"no matter how lawful the relations with Limited may have been in the past," *id.* at 399—and (2) cancellation of the grant-back provisions in the patent licenses which Alcoa had granted to its competitors. Finally, he retained jurisdiction for an additional five years, to permit a later review of the efficacy of the decree.

think twice before competing aggressively with the others, if in so doing it stands a good chance of falling heir again to the monopoly which the court of appeals condemned "out of Hand."[54] In any event, three domestic sellers are unlikely to engage in vigorous price competition in so standardized a product as ingot. As for Aluminum, Ltd., of Canada, Congress is likely to exert pressure to exclude its product in the interest of the new domestic producers;[55] and in any event, Aluminum, Ltd., is unlikely to endanger Alcoa's price leadership.[56] On the contrary, its 1953 contract to supply Alcoa with 600,000 tons of ingot over the next six years tends to frustrate the antitrust decree's purpose of bringing Aluminum, Ltd., into the American market as a direct competitor.[57]

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54. However, Judge Knox's opinion is reassuring on this score: "I hardly think . . . that normal competitive activity can be used to show an inveterate purpose to dominate an industry. . . . Any such theory, in my judgment, might lead to the vengeful imposition of a penalty upon conduct that is compelled by law." *Id.* at 415.

55. See, *e.g.*, *Aluminum from Canada was frowned upon by Congress this week*, Business Week, July 5, 1952, p. 38. *Compare* the hostility toward relying on Canadian ingot exhibited by the Celler Subcommittee, H.R. REP. No. 255, *op. cit. supra* note 38, by Adams, *supra* note 22, at 922, and by the Joint Committee on Defense Production in *Defense Production Act Progress, Report No. 20*, SEN. REP. No. 1987, 82d Cong., 2d Sess. (1952), *with* the convincing case on the other side made by ANDERSON, *op. cit. supra* note 38, at 8-9, 30-2, and by Congressman Celler himself, after changing his mind, CELLER, THE ALUMINUM PROGRAM, AN ANALYSIS OF THE REPORT OF THE JOINT COMMITTEE ON DEFENSE PRODUCTION (privately printed 1952). See also testimony of representatives of Reynolds and Kaiser before the Celler Comm. *Hearings before Subcommittee on the Study of Monopoly Power of the Committee on the Judiciary, House of Representatives*, 82nd Cong., 1st Sess. Ser. 1, pt. 1, 111-76, 268 (1951) (hereinafter cited as *Hearings*).

56. Nathanial Davis, president of Aluminum Ltd., testified that his company would not as a matter of policy undercut American prices, even if its costs were lower, for fear of provoking a rise in the United States tariff. H.R. REP. No. 255, *op. cit. supra* note 38; *Hearings*, Ser. 1, pt. 1, 440, 449-50.

However, the immediate need in aluminum ingot is apparently not for downward price competition but for a price high enough to permit the required expansion of capacity in the face of increasing costs of transporting bauxite from more distant sources, generating electric power, and constructing new facilities in an inflationary period. The price of ingot has apparently been too low in recent years to permit private capital to construct additional capacity for the purpose of selling it in the open market and a conservative retardation of investment may occur under oligopoly as well as under monopoly:

"Mr. Halleck. It has been said to me that certain alleged monopolistic positions of some of the larger aluminum-producing companies have intervened to interfere with the increasing production of aluminum. Is that true or not?

"Mr. [Charles E.] Wilson. [then Director of Defense Mobilization] It was true; yes." *Joint Hearings before Committees on Banking and Currency and Select Committees on Small Business*, 82d Cong., 1st Sess. 17-18 (1951).

57. See Petition in Equity No. 85-73, United States v. Aluminum Co. of America (S.D.N.Y. 1953). Alcoa replied that most American fabricators do not require ingot, but need instead the semi-fabricated materials which Alcoa will now be able to supply them, because of its contract with Aluminum Ltd. See *Alcoa-Alcan Tie in Court*, Business Week,

However, these doubts about the future of the industry do not support the claims of the critics of the "new" Sherman Act, that the law flouts the requirements of workable competition. Most economists, including the proponents of workable competition, agree that four independent sellers and potential innovators are better than one. The introduction of some uncertainty about the division of the market, the likelihood of independent decision-making and action with respect not so much to pricing as to research, investment, and product development surely diminishes the prospect of restrictionism in the long run.[58] The effect of the *Alcoa* decree is therefore likely to be more, not less, effective competition.

The only supportable economic criticism of *Alcoa* is not that the decree went too far, but that it did not go far enough. Competition in aluminum fabrication is still burdened by the industry's tight vertical integration. The introduction of two vertically integrated domestic producers has not greatly increased the availability of ingot to independent fabricators; the latter continue to be dependent upon their integrated competitors. The difficulties of the 17,000 independent fabricators during the recent defense program add appeal to the suggestion that Alcoa's fabrication and reduction facilities be separated.[59]

The courts need not hesitate in splitting Alcoa along horizontal lines in 1954 merely because vertical integration has enabled the company in the past to press forward the development of sources of raw material and power, and new fabricating uses of aluminum. It might be possible to preserve the dynamic contributions of vertical integration, and still dilute Alcoa's power and increase the competitive opportunities of non-integrated fabricators. For example, all or part of Alcoa's *present* fabrication activities could be split off, while permitting the company to develop whatever *new* market outlets it chooses.[60] Vertical integration is a threat to competition only where competition is seriously imperfect in one of the interconnected horizontal strata.[61] In alumi-

Aug. 22, 1953, pp. 88, 90. Alcoa ignored the contention of the Department of Justice that Aluminum, Ltd., should compete with Alcoa, rather than enable the latter to retain its share of the American market for semi-fabricated products.

58. See, *e.g.*, Martin, *The Dilemma of Antitrust Aims: Further Comment*, 42 AM. ECON. REV. 900, 905 (1952).

59. See ANDERSON, *op. cit. supra* note 38; H.R. REP. No. 255, *op. cit. supra* note 38; *Hearings*, Ser. 1, pt. 1; Martin, *supra* note 58, at 902 n.5; Comment, *Vertical Integration in Aluminum: A Bar to 'Effective Competition'*, 60 YALE L.J. 294, 300, 304, 307, *passim* (1951). Also see *Hearings before Senate Select Committee on Small Business on Material Shortages: Aluminum*, 82d Cong., 1st Sess. pt. 4 (1951).

60. Adams makes exactly the opposite suggestion: "What the government should have demanded as a minimum ... was that Alcoa be enjoined from any further *vertical* integration —especially in the fabrication field." Adams, *supra* note 22, at 919 n.8. His proposal ignores the possible dynamic contributions of vertical extensions of company activities. It is in the old fabrication fields that the social values of innovation through integration are most likely to be outweighed by the drawbacks of Alcoa's static advantages over non-integrated competitors.

61. See Hale, *Vertical Integration*, 49 COL. L. REV. 921, 937 *et seq.* (1949).

num, the evil was Alcoa's monopoly of ingot. To the extent that this monopoly can be further dissipated, vertical integration, with its possible contributions to efficiency and innovation, may be safely left undisturbed.

Unless integrated firms so clearly abuse the power conferred by control of scarce materials that antitrust divestiture is justified, Government intervention outside of the antitrust laws is probably the only possible way of attempting to assure fairness in the distribution of such materials. Recent actions of the Government offer the prospect of considerable relief along these lines. It has been granting contracts for expansion of ingot capacity, contingent on the reservation of a minimum portion of the forthcoming ingot for independent fabricators. A long-term Government purchase contract with Aluminum, Ltd., would serve the same end. Even without further prosecution or a Government purchase contract, independent aluminum fabricators in the United States can probably look forward to reliable and increasing supplies from Aluminum, Ltd., which needs their patronage and political support in contesting increased duties on aluminum ingot, as much as they need its supplies.[62]

"Monopolizing" as Possession of the Power to Exclude

The Cigarette and Movie decisions:

The *American Tobacco* decision[63] strengthened the "new" Sherman Act's flat prohibition of monopoly power. The Supreme Court upheld a finding of conspiracy among three separate companies to fix prices and to monopolize, even though the record contained no direct evidence of collusion.[64] Also, the mere joint possession by the "Big 3" in the tobacco industry of the power to exclude, accompanied by a conspiratorial intent to use it, was declared illegal; evidence of actual exclusion of competitors was unnecessary. There is strong reason to believe that the rigid and non-competitive price leadership practiced by the "Big 3" required no collusion, but followed naturally from an independent and rational pursuit of individual, oligopolistic interests. *American Tobacco* seemed, therefore, to go far in bringing normal oligopoly behavior, hence oligopoly itself, within the compass of the antitrust laws.[65]

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62. See, *e.g.*, *Aid for Fabricators Here*, N.Y. Times, May 22, 1953, p. 36, col. 5. However, it will probably help if the Government succeeds in rescinding the contract between Aluminum, Ltd., and Alcoa. See note 57 *supra*.

63. American Tobacco Co. v. United States, 328 U.S. 781 (1946).

64. The acceptability of a conviction for conspiratorial price-fixing inferred from the pursuit of uniform price policies was sustained again in United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948). The doctrine of "conscious parallelism" was most fully and explicitly developed in Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175, 181 (7th Cir. 1948), *aff'd sub nom. by an evenly divided court*, Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).

65. See NICHOLLS, PRICE POLICIES IN THE CIGARETTE INDUSTRY 172-86, 352-403 (1951). Some commentators have also found in *American Tobacco* a forthright condemnation of non-collusive power to fix prices, but this interpretation is unjustified. See Kahn, *supra* note 9, at 31-2.

This development was extended in the movie decisions of 1948. In the *Griffith* case,[66] the chain embraced theatres in both one-theater and multi-theater towns, and bargained with distributors for exhibition rights in all theaters as a group. Griffith used the leverage of local monopolies in one-theater towns, where the distributor had to offer his pictures to Griffith if he was to have an audience at all, to obtain vital competitive advantages in the other towns. Among the valuable privileges obtained in this fashion were the rights of pre-emption in selecting films and long clearances over competitors. The Supreme Court held that such a situation conferred monopoly power; and, citing the *Alcoa* doctrine that "no monopolist monopolizes unconscious of what he is doing,"[67] it found, in the ways in which the chain bargained, abuse of that power sufficient to meet the test of the *Tobacco* case.[68] Thus, the Court came close to condemning, per se, integration embracing a monopoly market. The situation need only confer a strategic advantage over competitors, and the leverage need only be employed. Integration almost inevitably confers such an advantage over non-integrated competitors in one or another of the markets in which the integrated firm operates.[69]

In the *Paramount* case,[70] as in *Alcoa* and *Griffith,* the court of final jurisdiction was forced to resort to market structure arguments in the face of certain negative findings of fact by the district court.[71] The district court had found that the five major producers had neither enjoyed nor sought, individually or collectively, a "national monopoly in exhibition."[72] The Supreme Court focused, instead, on the market that the "Big 5" unquestionably monopolized—the first run field or "cream of the exhibition business"[73]—and on the inherent advantages in access to first runs enjoyed by the exhibition houses of the vertically integrated producers.[74] The Court followed the *Griffith* doctrine that a "specific intent" to monopolize need not be proven "if monopoly results as a necessary consequence of what was done."[75] It therefore set aside the lower court's exculpation of the defendants, and granted the divestiture remedy.[76]

66. United States v. Griffith, 334 U.S. 100 (1948).

67. *Id.* at 105.

68. "It is . . . not always necessary to find a specific intent to restrain trade or to build a monopoly. . . . It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements." *Ibid.*

69. See Kahn, *supra* note 9, at 43-6; Rostow, *Problems of Size and Integration* in BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS 122 (1952) (hereinafter cited as 1951 SYMPOSIUM).

70. United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

71. United States v. Paramount Pictures, Inc., 70 F. Supp. 53, 54-71 (S.D.N.Y. 1946); United States v. Aluminum Co. of America, 44 F. Supp. 97, 107 (S.D.N.Y. 1941); United States v. Griffith Amusement Co., 68 F. Supp. 180, 182-6 (W.D. Okla. 1946).

72. United States v. Paramount Pictures, Inc., 334 U.S. 131, 168 (1948).

73. *Id.* at 172-3.

74. *Id.* at 172, 174.

75. *Id.* at 173.

76. *Id.* at 174.

Although the cigarette and movie decisions unquestionably strengthened the antitrust laws, their novelty has been exaggerated. First, strong circumstantial evidence indicated that the defendants in *American Tobacco* and *Paramount* had in effect agreed to eradicate price competition among themselves. Apart from the absence of direct evidence, the decisions on this score represented no advance over *Trenton Potteries*[77] or *Socony-Vacuum*.[78] Second, the *Tobacco* decision did not authorize attacks on the unexercised power to exclude. The Court said the Government had to prove that the companies had conspired to obtain and maintain the power to exclude competitors *and* had demonstrated an intent to use it.[79] Since such an intent can be shown only by actual abuse of the power, the Court summarized the evidence of the exclusive tactics of the cigarette companies, which established the requisite intent to drive out competitors.[80]

The movie cases of 1948 were even more replete with extreme competitive disadvantages imposed upon independents not only by the structure but also by the *actions* of the defendants. In *Paramount*, the Court held the five vertically integrated producers guilty of collaborative monopolization on the basis of a lengthy record of unreasonable clearances, pooling agreements, formula deals, master agreements, block booking, and discrimination, all at the expense of unaffiliated theaters. In *Griffith*, it found monopsony power exerted to obtain

77. United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

78. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). One could explain each item of circumstantial evidence in the *Tobacco* case in terms of an independent recognition and scrupulous pursuit of oligopolistic self-interest. Yet, the course of conduct was so punctilious that to draw the line between such oligopolistic behavior and collusion would be entirely academic from the economic viewpoint. Witness the conscientious refusal of each of the "Big 3" to enter any tobacco market unless the others were represented, or to fill any orders at its unchanged and still nominally prevailing price the instant the leader announced an increase; witness their systematic policing of retail prices to avoid any discrepancies between the prices of their respective products in *either* direction. See NICHOLLS, *op. cit. supra* note 65, at 399; STOCKING & WATKINS, MONOPOLY AND FREE ENTERPRISE 136-66 (1951). But see, BAUM, WORKABLE COMPETITION IN THE TOBACCO INDUSTRY cc. 3-7 (unpublished dissertation, Harvard University, 1949). Baum demonstrates that much of the Government's evidence of "conspiracy" was extremely feeble.

79. 328 U.S. 781, 809, 811 (1946).

80. *Id.* at 803-04, 806-08. This evidence too is not entirely convincing. The alleged manipulation of the price of low grade tobacco leaf in order to squeeze the cheaper brands was insufficiently demonstrated. NICHOLLS, *op. cit. supra* note 65, at 323-36; BAUM, *op. cit. supra* note 78, at 168-74. The Court's condemnation of the drastic price reductions of early 1933 on the ground that they had been "directed at the competition of the 10-cent cigarettes" was also questionable. However, the conclusion that these cuts were predatory in character can be evaluated only in the context of the case: the flagrant price rises of mid-1931, the pressure on retailers to keep the differential between major and economy brands down to 3 cents, and the simultaneous increase in prices only when the interlopers had been cut back to size. Only a consideration of intent can fulfill the inescapable function of differentiating vigorous price competition from predatory price cutting in quest of monopoly.

unfair competitive advantages, at the expense of exhibitors whose deficiency was one of bargaining power only.[81] It did not strike at business arrangements that have the merely incidental consequence of excluding competitors from some area of the market. It rejected the Government's claim that vertical integration in the motion picture industry was inherently objectionable.[82] The inescapable monopoly power of a movie house in a one-theater town was held not in itself to violate the law.[83] Power over price was condemned only if it was the product of collusion, and the power to exclude only after a showing that the defendants had actually exerted it.[84]

The evil in both cigarettes and movies, then, was market power manifested in so clearly non-competitive a pattern of pricing as strongly to suggest conspiracy; vertical integration so clearly manifesting a struggle for monopolistic advantage,[85] and market leverage so flagrantly *exerted* to impose unreasonable injury on competitors, as to justify condemnation for monopolizing.

The economics of the cigarette and movie decisions:

A convincing argument can surely be made, with respect to both the *Tobacco* and *Paramount* cases, that the oligopolistic character of the markets together with the commanding power and strategic advantages of the defendants, were the appropriate grounds for the suit and should have sufficed to convict.[86] In the cigarette industry, this market structure produced results about which no economist seems to have anything good to say.[87] In movies, the severe imperfections of competition in both production and exhibition, resulting from fewness of sellers, the uniqueness of each product, and the monopoly power issuing from favorable location of theaters, suggest a particular threat to competition in permitting oligopolists to operate at both levels. In these circumstances, vertical integration inevitably reinforced the monopoly elements by increasing the impediments to entry at both levels, and engendered

81. See, *e.g.*, *What's Playing at the Grove?*, 38 Fortune, August, 1948, pp. 95-8.

82. United States v. Paramount Pictures, Inc., 334 U.S. 131, 173-4 (1948).

83. *See* United States v. Griffith, 334 U.S. 100, 106 (1948). Compare this dictum with Adelman's statement, in support of which he cites this same case: "It is now established doctrine that 'unreasonable' control over any local market, or any significant area of interstate commerce, is illegal." Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27, 48 (1949).

84. See Fuchs, *Economic Considerations in the Enforcement of the Antitrust Laws of the United States*, 34 MINN. L. REV. 210, 226, 229 (1950).

85. LUTHER, THE MOTION PICTURE INDUSTRY 38, 39 (unpublished dissertation, Univ. of Minnesota, 1949).

86. See BAUM, *op. cit. supra* note 78, *passim*.

87. See, *e.g.*, *id.* c. 6; KAPLAN, BIG BUSINESS IN A COMPETITIVE SYSTEM c. 5, 24-5, c. 6, 19-20 (unpublished ms., Brookings Inst., 1952); NICHOLLS, *op. cit. supra* note 65, at 401; Markham, *The Nature and Significance of Price Leadership*, 41 AM. ECON. REV. 891, 903-05 (1951); Mason, *supra* note 2, at 1275. See the more qualified verdict of Tennant, *The Cigarette Industry* in THE STRUCTURE OF AMERICAN INDUSTRY 257-65 (Adams ed. 1950).

the rigidly channelized, essentially cooperative kind of competition that prevailed between the majors.[88]

Even in these cases, however, it would have been dangerous to condemn the defendants merely because they were few, or few and vertically integrated, or enjoyed monopoly power.[89] Their small number might have mirrored the survival of the fittest, the economies of scale, and the limitations of the market. As for condemning vertical integration per se, this form of business integration undoubtedly made a dynamic contribution. The leading producers had a particular incentive to make huge investments in the construction of new theaters, equipped for "talkies"; they wanted the widest possible audience for their films.[90] They claimed that the resultant assurance of wide distribution and exhibition in turn justified the heavy investments required to produce modern "A" films.[91]

And in the movie cases, at least, it would have been equally undesirable to try to evaluate economic performance.[92] A court should not be asked to decide, in an antitrust proceeding against movie companies, whether or not the

88. See Hellmuth, *The Motion Picture Industry* in THE STRUCTURE OF AMERICAN INDUSTRY c. 8 (Adams ed. 1951).

If this analysis is valid, it gives little comfort to the "new critics" of antitrust laws. Where oligopolists are so punctilious in avoiding effective competition as to run afoul of the *Socony-Vacuum* precedent of "conscious parallelism," see note 78 *supra*, the economist can hardly complain that the antitrust laws are condemning "hard" and encouraging "soft" competition.

89. See Kahn, *supra* note 9, at 33-7, 46-7.

90. Hale, *supra* note 61, at 934 n.85. On the other hand, as in the case of *Alcoa*, while such dynamic contributions militate against any blanket prohibitions of vertical integration, they do not necessarily vindicate *past* integration which has made its contribution and now confers excessive market leverage. See p. 304 *supra*.

91. See LUTHER, *op. cit. supra* note 85, at 164; Helmuth, *supra* note 88, at 289-90. Neither writer fully accepts this argument; nor do I. "[I]t is fair to say that the producer-exhibitor divorce led straight to the present trend in movie-making—fewer productions, but huger ones, more expensive, and of higher quality." *A Turn for the Bigger*, Business Week, Nov. 14, 1953, p. 146. But the judgment in each case stems largely from the opinion that heavy investments to produce films for guaranteed markets does not necessarily make for the best product. And an essential part of the argument here is that value judgments about the quality of product are not suitable criteria for antitrust decisions.

92. Adelman criticizes the courts for failing to consider "the adverse effect on the movie-going public" of the monopoly power enjoyed by the Schine chain of theaters. Schine Chain Theaters v. United States, 334 U.S. 110 (1948). Yet his own brief evaluation suggests the futility of such an investigation: "Schine's power . . . enabled it to disregard . . . the demands of the distributors for price maintenance. The public benefits of competition enforced by the big buyer might very plausibly have been called transitory and therefore no offset to the larger drawback of local monopoly. The important thing is that they were never considered." Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1319 (1948). The courts were right not to consider them. They might have made the gesture of supplying plausible economic considerations of the foregoing type, but the results could scarcely have been any more decisive than is the result of Adelman's own brief attempt persuasive.

quality and price of the extraordinarily variegated composite service in question, or the past or prospective contributions to that record of the particular restraints at issue, merit condemnation. Nor, as it would have to do in appraising the price record of the industry, should any Government agency decide whether or not the "stars" or motion picture executives deserve their extraordinary salaries and bonuses.

Although it is extremely difficult to predict the impact of the cigarette and movie decisions on the economic performance of the industries concerned, the change is certainly for the better. To the extent that the movie decrees are effective in improving the competitive opportunities of independent producers and exhibitors, they can only contribute at both levels to a greater ease of entry, which is the prime requisite of workable competition. The divorce of production and exhibition should make it more difficult for the producers to avoid price competition down the line. Breaking up the big theater chains may diminish their "countervailing power," and so incur the censure of Professor Galbraith,[93] but there is no evidence that the chains used this power in any other way than to get monopolistic preferences for themselves. The cigarette companies, on the other hand, have only the implicit injunction not to do those imprecisely identifiable things which caused the jury to find them guilty. Yet even such a rule may be to some extent salutary. The conviction has apparently helped to engender a more moderate pricing policy.[94] If the "Big 3" cannot be forced to compete, at least they can be discouraged from extortionate pricing under rigid price leadership.

The major impediments to entry and effective competition in cigarettes are not the threat of exclusionary tactics—about which the "Big 3" will presumably be more circumspect in the future—but rather the immense cost of advertising, consumer acceptance of the familiar brands, and the regressive federal excise tax.[95] The antitrust laws alone cannot eradicate all these influences. But they can do much even here. The Supreme Court has already taken cognizance of the fact that heavy advertising expenditures represent a substantial bulwark of the "Big 3's" monopoly power.[96] In line with past decrees

93. Galbraith's thesis is that the primary protection of consumers in the American economy today is not competition among sellers, but the power of organized buyers, *e.g.*, mail order houses and chain stores, which opposes that of monopolistic sellers. GALBRAITH, AMERICAN CAPITALISM, THE CONCEPT OF COUNTERVAILING POWER (1952).

94. NICHOLLS, *op. cit. supra* note 65, at 164-6; Tennant, *supra* note 87, at 255.

95. Suppose one manufacturer is willing to get a net price of 4 cents a pack, while another charges 7 cents, or 75% more. Addition of a flat federal excise of 7 cents, without the other equally rigid local taxes and distribution costs, raises the price of the cheaper brand 175%, of the more expensive one only 100%, and reduces the price discrepancy sharply. If a manufacturer cuts his price from 7 cents to 4 cents, *i.e.*, by 43%, his final price goes down only 21½% (from 14 cents to 11 cents). So price rivalry is discouraged. A proportional or progressive excise tax, *e.g.*, 5 cents on the cheaper pack, 10 cents on the more expensive, would assure the firm choosing to compete in price that its full percentage price cut would be passed on to the public.

96. American Tobacco Co. v. United States, 328 U.S. 781, 797 (1946).

requiring compulsory licensing in patent cases,[97] and condemning otherwise legal practices and relationships when power has been abused,[98] a decree which limited advertising expenditures of each of the "Big 3" to a certain percentage of gross revenues would seem feasible. If economists agree on anything, they probably agree that in cigarettes a limitation of advertising would offer some hope for freer entry and bona fide competition of a socially useful kind.[99]

"Monopolizing" without Achieving Monopoly

After *Alcoa*, "new" Sherman Act decisions went further than merely bringing the law nearer to a position of outlawing monopoly power as such. They suggested the possibility of condemning companies for controlling some appreciable portion of interstate commerce. This conception of monopolizing was much more disturbing to economists than the one in *Alcoa*, because the "any part" of commerce which might be "monopolized" was not defined in economically realistic terms. Consequently, a company might be held to have monopolized without ever having achieved significant monopoly power.

The *A & P* decision[100] condemned a company that had helped to introduce strong competition into the distribution of grocery products. The conviction hinged essentially on abuses of power, in the traditional sense.[101] *A & P* thus represents an extension of the logic of the movie decisions. In both, the defendants enjoyed a strategic superiority over their competitors, by virtue of their size, bargaining power, and vertical integration, as well as the geographic dispersion of their operations. And, as in the movie decisions, the existence of power was combined with some evidence of an intent to exercise it. A & P coercively bargained for discriminatory discounts, and operated on unusually low retail margins in selected market areas to "put the heat on" competitors.[102]

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97. *E.g.*, Hartford-Empire Co. v. United States, 323 U.S. 386 (1945).

98. See, *e.g.*, the treatment of vertical integration in the second *Reading* case, United States v. Reading Co., 253 U.S. 26 (1920).

99. Evidently on the assumption that competition would continue along present lines exclusively, Tennant argues that a mere increase in the number of sellers would probably increase the costs of distribution. Tennant, *supra* note 87, at 261-3. A limitation of advertising and a proportional, if not a progressive excise tax, would certainly help preclude such an outcome. But even dissolution alone might have this effect. The pattern of extremely high advertising expenditures, and extreme importance of brand, seems characteristic of consumer goods industries dominated by a very small number of large sellers, as in cigarettes and soap. In men's suits and shoes, on the other hand, where sellers are more numerous (and there are no technological factors precluding this in cigarettes), there seems to be a good deal more competition on the basis of genuine quality and price. See STOCKING & WATKINS, MONOPOLY AND FREE ENTERPRISE 72-6 (1951).

100. United States v. New York Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

101. See pp. 338-9 *infra*.

102. See the exchange between Dirlam & Kahn and Adelman, in 61 J. POL. ECON. 436 (1953).

But in the absence of anything approaching convincing evidence of undesirable market consequences, the *A & P* opinions also demonstrate *some* tendency to attack the quest for bargains and discounts justified by the performance of functions; efficient vertical integration on the ground that the profits earned therefrom illegally subsidized retail competition; any regional discrepancies in margins maintained by a big and powerful company, whether promotional, defensive, or predatory in nature.[103]

A similar disregard for the overall market consequences of an integrated firm's strategic competitive advantages was suggested in the first *Yellow Cab* case.[104] In *Yellow Cab* the Supreme Court held that *if* the evidence demonstrated an intent to monopolize, the mere fact that the vertical integration of taxicab manufacturing and operating companies precluded competitor manufacturers from a substantial market would be sufficient to condemn the arrangement under Section 2 of the Sherman Act.[105] Taxicabs are sold in a nation-wide market, and only a very small portion of that market was affected by the defendant's activities, particularly since most taxicabs are nothing more than specially painted passenger cars. By defining "any part" of interstate commerce as nothing more than a *volume of business* large enough to satisfy a *de minimis* requirement,[106] and by extending the doctrine of conspiracy to the organizers of a proprietary consolidation,[107] the Court in effect condemned all vertical integration, contingent on the necessary demonstration of intent to monopolize. However, subsequent proceedings have shown that the latter condition is truly a substantial one.[108]

Similarly the *International Salt* case [109] in effect found any patent tie-in a violation of both Section 1 of the Sherman Act and Section 3 of the Clayton Act,[110] without regard to whether or not it substantially reduced competition in the tied-in field as a whole. After declaring that "it is unreasonable, *per se*,

103. See Adelman, *The A & P Case: A Study in Applied Economic Theory*, 53 Q. J. ECON. 238-57 (1949); GALBRAITH, *op. cit. supra* note 93, c. 10.

104. United States v. Yellow Cab Co., 332 U.S. 218 (1947). For a discussion of this and other intra-enterprise conspiracy cases, see Comment, 63 YALE L.J. 372 (1954).

105. "The amount of interstate trade thus affected by the conspiracy is immaterial.... Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected. . . . And § 2 of the Act makes it unlawful to conspire to monopolize 'any part' of interstate commerce, without specifying how large a part must be affected. Hence it is enough if some appreciable part of interstate commerce is the subject of a monopoly, a restraint or a conspiracy. The complaint in this case deals with interstate purchases or replacements of some 5,000 licensed taxicabs. . . . That is an appreciable amount of commerce under any standard....

"Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States. . . ." *Id.* at 225-6.

106. See note 105 *supra*.

107. 332 U.S. 218, 229 (1947).

108. See pp. 341-3 *infra*.

109. International Salt Co. v. United States, 332 U.S. 392 (1947).

110. See notes 7, 10 *supra*.

to foreclose competitors from any substantial market," the Supreme Court inferred a sufficient effect on competition from the mere fact that "the volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious. . . ."[111] The "any part" of interstate commerce deemed sufficient in *Yellow Cab* to condemn vertical integration which was improperly motivated is obviously the same thing as the not insignificant volume of business from which patent tie-ins may no longer legally foreclose competitors.

It was the later extension of the reasoning in *International Salt* to exclusive dealing, and the apparently ominous implications of *Yellow Cab* for vertical integration achieved by financial consolidation, which make these two opinions significant.

Exclusive Dealing and Full Requirements Contracts

A realistic policy of maintaining competition must be flexible. It must leave room within limits for price discrimination, exclusive dealing and full requirements contracts, tie-ins and package deals. Yet, it must prevent the *unfair* or *excessive* constriction of market opportunities of competitors that these practices may entail.[112] Striking the balance between these offsetting considerations has been the historic purpose and function of the rule of reason, embodied not only in the courts' interpretations of the Sherman Act but also in the Clayton Act which restricts its prohibitions to instances where competition is threatened.[113]

The *A & P, International Salt* and first *Yellow Cab* decisions, though involving dissimilar business structures and practices had this in common: they suggested that the Sherman Act condemns any of the above-mentioned practices if they represent the use of market leverage or financial resources to put competitors at a disadvantage, regardless of any other economic consequences.

Recent Clayton Act decisions have shown the same tendency. At the risk of some oversimplification, it may be said that Sections 2 and 3 [114] of the Clayton Act were for many years interpreted to require a demonstration that the

111. 332 U.S. 392, 396 (1947).

112. The basic question before us is whether it would suffice to delete the words "unfair or" from this sentence. The "new critics" of antitrust favor deletion, since they would have us judge these practices mainly, if not entirely, by appraising their overall consequences. My view is that "unfair or" should be retained, since the act of exclusion, properly defined as an act to unfairly preclude competitive entry, should itself be prohibited.

113. See, Watkins, Public Regulation of Competitive Practices in Business Enterprise 209-28 (1940); Lockhart & Sacks, *The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act*, 65 Harv. L. Rev. 913 (1952); Curran, *Exclusive Dealing and Public Policy*, 15 J. of Marketing 133-44 (1950).

114. See note 7 *supra*.

practices would *probably* have the effect of weakening the force of competition in the *entire interstate* market affected; and that recent decisions have tended to reduce the requirement to a showing that the practices may *possibly* weaken the forces of competition, now or in the future, in some *not insubstantial portion* of the market, sectional or national, by putting *some competitors* of the defendant, or his customers, at a disadvantage.[115] The modern view clearly comes much closer to, indeed may be tantamount to, outlawing the specified practices per se, which would mean the adoption of pure competition as the law's standard.

Standard Oil Co. v. United States (Standard Stations)[116] is the most important recent case under Section 3 of the Clayton Act. Assessment of the competitive impact of Standard's full requirements contracts was the primary issue. In contrast with the previous decisions,[117] the Supreme Court in this case set out to require the Government to assume the burden of "some sort of showing as to the *actual* or *probable economic consequences of* the agreements. . . ."[118] However, it found "the qualifying clause of § 3 . . . satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."[119] The satisfying "proof" was the demonstration that Standard's full requirements contracts covered 16% of the retail gasoline outlets and 6.7% of the total gasoline sales in the western states. The substantiality of Standard's percentage share of the market was certainly a more significant evidence of competitive impact than sufficed in *International Salt*.[120] But still, the Court really declined to appraise the economic consequences, to consider whether or not the requirements contracts were economically beneficial, or intensified rather than reduced competition in the market. In short, *Standard Stations* seemed to say that all full requirements contracts covering any "substantial" share of commerce are *ipso facto* illegal

115. In price discrimination cases, this gradual weakening of the required demonstration of competitive impact was halted and partially reversed in FTC v. Minneapolis Honeywell Co., 191 F.2d 786 (7th Cir. 1951), *cert. denied*, 344 U.S. 206 (1952). Only Justice Black, it appears from his dissent, was entirely prepared to accept the Commission's flimsy evidence of injury to competition. *Id.* at 213. Justice Douglas' dissent specifically dissociated itself from Black's analysis. *Id.* at 217.

More important, a majority of the Commission, as reconstituted under President Eisenhower, now apparently feels that the opposition to price discrimination has gone much too far, and intends henceforth to assess market consequences in the light of standards of workable rather than pure competition.

116. 337 U.S. 293 (1949).

117. See International Salt Co. v. United States, 332 U.S. 392 (1947). Also see FTC v. Morton Salt Co., 334 U.S. 37 (1948) (reducing the burden of proof of anti-competitive impact under § 2 of the Clayton Act).

118. Standard Oil Co. v. United States, 337 U.S. 293, 302 (1949) (emphasis added). Also see *id.* at 305-08.

119. *Id.* at 314.

120. In *International Salt*, the only measurement offered of the market affected was the fact that tied-in sales of salt amounted to $500,000 in 1944. 332 U.S. 392, 395 (1947).

because by their very nature they exclude competitors from that segment of trade which they cover.[121]

The *Richfield* decision[122] merely extended *Standard Stations'* prohibition to another member of the petroleum industry's "Big 7" on the West Coast.[123] The main formal difference between the two cases concerned Richfield's defense of its contracts with the 1,343 dealers (about 45 percent of the total) who were its own lessees. These, it contended, were not independent businessmen, but, in effect, its employees; it had "created" their businesses and could therefore hardly be suppressing pre-existing competition in confining their sales to its own products. The district court dismissed this argument on the ground that by all the traditional tests the lessees were independent businessmen who assumed all the usual responsibilities and risks.[124]

In appraising these developments, we will have two major questions to ask. First, how much of the rule of reason is left? Second, can the attenuated rule of reason that remains still play its historic economic role in modern markets, where pure competition is neither attainable nor desirable? The discussion will relate mainly to tie-ins, exclusive dealing, and requirements contracts, though much of it applies to price discrimination as well.

The law does not turn on the incidental exclusion of competitors effected by contracts issuing from a process of fair competition. Legality depends on whether or not power has been *exerted* in such a way as to impose an unreasonable handicap on competitors. Condemnation requires, in short, something like an intent to monopolize, carried into effect. Only if the requisite power and intent are present, *i.e.*, if the objectionable character of the action is established, does the law strike down arrangements, contractual or proprietary, which do no more than exclude competitors from a "not insubstantial" market. Admittedly, however, the leading cases do not say this clearly.

121. See Schwartz, *Potential Impairment of Competition—The Impact of Standard Oil of California v. United States on the Standard of Legality under the Clayton Act*, 98 U. of Pa. L. Rev. 10 *et seq.* (1949); Austern, *The Supreme Court and Section 3 of the Clayton Act—The Standard Oil of California Decision* in A New Look at Antitrust Enforcement Trends: Antitrust Law Symposium 43 (1950) (hereinafter cited as 1950 Symposium); Lockhart & Sacks, *supra* note 113; Adelman in 1951 Symposium 145.

122. United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U.S. 922 (1952).

123. In *Richfield* Judge Yankwich apparently considered it unnecessary to consider the percentages of the market affected by these contracts; he pointed out only that the contracts at issue involved thousands of service stations and sales of over $40 million annually. This absolute volume probably amounted to less than 3% of total gasoline sales in the area, though a substantially higher proportion of the sales through service stations alone. *Compare* figures he offered in *Richfield*, 99 F. Supp. 280, 284-6 (S.D. Cal. 1951), *with* those he cited in his earlier *Standard Stations* decision, 78 F. Supp. 850, 859 (S.D. Cal. 1948).

124. 99 F. Supp. 280, 287-94 (S.D. Cal. 1951).

Patent Tie-ins as Techniques of Monopolizing

In *International Salt*, the objectionable character of the act was clear. International Salt used its patent monopoly power in machines to force lessees to deny their patronage to competitors in the salt market. There has been relatively little criticism of this decision. Yet the same economic criticism of *Standard Stations* and *Richfield* might have applied to *International Salt*: The Supreme Court did not inquire into *how* substantial a monopoly power International Salt's patents gave it in the supply of machines, or whether or not competition in the *entire* market for salt was significantly affected by the tie-ins.[125] Perhaps the reasons are that the intent was clearly to exclude,[126] and that the law has been traditionally opposed to such abuses of a governmentally-conferred monopoly privilege.[127] But these are traditional legal distinctions, not economic assessments of market power or consequence.

The Court did consider International Salt's economic justifications for the

125. See, *e.g.*, Lockhart & Sacks, *supra* note 113, at 942-54, whose severe strictures against *Standard Stations*, for its failure to ask these broader economic questions, do not extend to patent tie-in cases. And see the discussion of the *Times-Picayune* case, pp. 324-7 *infra*, where the Supreme Court made precisely these economic appraisals (and made them badly) under the Sherman Act, and acquitted the defendants.

126. Some observers have interpreted Justice Jackson's dictum "it is unreasonable, *per se*, to foreclose competitors from any substantial market," 332 U.S. 392, 396 (1947), as threatening the legality of all vertical integration or exclusive dealing regardless of intent or consequence. See, *e.g.*, Adelman, in 1951 Symposium 143. This interpretation seems unjustified. "Foreclosing" could not have meant the incidental exclusion of competitors involved in every vertical merger, in every requirements contract. He could have meant only deliberate exclusion by exercise of coercion.

There are only two reasonable constructions one may place upon this dictum. Neither corresponds with the one offered by Adelman. Jackson may not have meant what he said; the facts of the case required no such broad and sweeping declaration. Alternatively, his definition of "foreclosing" could not have embraced the "exclusion" which follows incidentally from requirements contracts (note his *Standard Stations* dissent) or from vertical mergers (note his votes to exonerate the defendants in United States v. Columbia Steel Co., 334 U.S. 495 (1948), and United States v. Yellow Cab Co., 338 U.S. 338 (1949). The latter construction has an interesting historical precedent; the dispute over the rule of reason before 1912 was entirely analogous. Justices Peckham, Taft, and Harlan, who rejected the rule of reason on the ground that Congress had prohibited all restraints of trade, did not thereby condemn all contracts, or all partnership agreements—which, as Justice Holmes pointed out in 1904, inevitably "restrain trade" in a sense. *See* Northern Securities Co. v. United States, 193 U.S. 197, 400, 411 (1904) (dissenting opinion). Rather, they defined restraints of trade as embracing only those contracts having the primary purpose and effect of eliminating or weakening competition in the market. In precisely the same way Jackson's conception of "foreclosing" embraced only the exclusion which is deliberate, collusive (as in Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941), which he cites to support his dictum), or coercive as in *International Salt*.

127. Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502 (1917), explicitly reversed the earlier Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co., 77 Fed. 288 (6th Cir. 1896), and Henry v. A. B. Dick Co., 224 U.S. 1 (1912).

tie-in provision, and in so doing suggested a reconciliation of the legal proscriptions and the requirements of workable competition:

> "Of course, a lessor may impose . . . reasonable restrictions designed in good faith to minimize maintenance burdens and to assure satisfactory operation. . . . But it is not . . . argued that the machine is allergic to salt of equal quality produced by anyone except International. . . . It is admitted that, at times, at least, competitors do offer such a product. They are, however, shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor."[128]

In short, restrictive provisions in contracts which are reasonably required for the protection of the legitimate interests of one or both of the contracting parties may still be upheld.[129] The deciding question is really one of the underlying intent, for only thus can the act be properly defined.[130]

Anti-Competitive Aspects of Restrictive Agreements

Exclusive dealing is anti-competitive when used by dominant firms to ensconce themselves in the market. A sale or lease requires a buyer or lessee as well as a seller or lessor, but it is against the latter two only that Section 3 [131] of the Clayton Act is directed. The purpose of Section 3 is to preserve the buyer's (lessee's) freedom of choice, and thus to protect access to the market by competing sellers (lessors).[132] When full requirements contracts were outlawed in *Standard Stations* the defendant was Standard, not its dealers.[133] And in appraising the competitive impact of the contracts,

128. 332 U.S. 392, 397-8 (1947).

129. See McLaren, *Related Problems of 'Requirements' Contracts and Acquisitions in Vertical Integration under the Anti-trust Laws*, 45 ILL. L. REV. 141 (1950). See also United States v. United Shoe Machinery Corp., 258 U.S. 451 (1922); FTC v. Sinclair Refining Co., 261 U.S. 463 (1923); Pick Mfg. Co. v. General Motors, 80 F.2d 641 (7th Cir. 1935), *aff'd*, 299 U.S. 3 (1936). It is not at all clear that the *Pick* decision survives unscathed the general proposition of *International Salt* that "the efficiency of uniting two products in use is a matter to be judged by the user. The seller can protect his good will by insisting that replacement parts meet his standards of efficiency, without prejudicing competition by requirement that the parts be bought from him." See Schwartz, *supra* note 121, at 27. However, *International Salt* and *Standard Stations* do not destroy the reasonable right of manufacturers contractually to restrain competition *to the extent necessary* to protect their legitimate interests.

130. See Kahn, *supra* note 9, at 50-3.

131. See note 7 *supra*.

132. See Timberg, *The Rights of Customer-Seller Selection* in 1951 SYMPOSIUM 152, 156-7.

133. The district court opinion steadfastly refers not so much to the contracts themselves as to Standard's adoption of them, the seller binding the buyer, or inducing the buyer by various means, to accept such conditions. United States v. Standard Oil Co., 78 F. Supp. 850, 857, 859, 886 (S.D. Cal. 1948).

the Supreme Court concluded that their use not only by Standard, but by its six leading competitors as well, may reasonably be interpreted as having had the effect of enabling

> "[T]he *established suppliers* individually to maintain their own standing and at the same time collectively, even though not collusively, to prevent a late arrival from wresting away more than an insignificant portion of the market."[134]

The contracts thus represented an instrument of *policy* by dominant sellers, with the effect if not the purpose of exclusion over a wide market area.[135]

The *Standard Stations* decision was not revolutionary. It seems reasonable to conclude that what was forbidden here as well as in *Richfield* was a dominant company's using its market power to *impose* full requirements contracts as a condition of sale.[136] The evidence of market power actually exerted, with the effect[137] of creating a serious potential impediment to competition, surely sufficed to satisfy even the traditional rule of reason. Because of their size, the public acceptance of their brands, the uniformity of their market practices, and their direct financial control of numerous retail outlets, each of the "Big 7" on the West Coast has obviously been in a position to insist on exclusive handling. By so doing, the "Big 7" imposed on the industry a pattern of retailing gasoline that gave the individual dealer virtually no opportunity to acquire gasoline on a non-exclusive basis. Moreover, the pattern probably entrenched the position of each oligopolist, and posed substantial obstacles to new entrants. But *Standard Stations* and *Richfield* do not prohibit a voluntary choice of such a method of doing business, by dealers who

134. 337 U.S. 293, 309 (1949) (emphasis added). See also Signode Steel Strapping Co. v. FTC, 132 F.2d 48 (4th Cir. 1942) (in appraising the competitive impact of tie-ins employed by the individual defendant, the court similarly considers the parallel restrictive practices of other dominant firms).

135. "Standard's *use* of the contracts creates just such a potential clog on competition as it was the purpose of § 3 to remove. . . ." 337 U.S. 293, 314 (1949) (emphasis added).

136. This is definitely Justice Frankfurter's present interpretation of his *Standard Stations* opinion. In his dissent in *MPA* he contrasts the facts with those in *Standard Stations*: "The obvious bargaining power of the seller vis-a-vis the retailer does not, so far as we are advised, have a parallel here. . . . In the [*Standard Stations* case] . . . we recognized the discrepancy of bargaining power and pointed out that the retailers might still insist on exclusive contracts if they wanted. . . . [In fact, his statement in the earlier decision was not nearly so clear on this point. See note 150 *infra*.] And although we are not told in this case whether the pressure for exclusive contracts comes mainly from the distributor or the theater, there are indications that theaters often insist on exclusive provisions." FTC v. Motion Picture Advertising Service Co., 344 U.S. 392, 402 (1953).

137. Judge Yankwich condemned "the intent, purpose and effect of the exclusive supply provisions." 78 F. Supp. 850, 888 (S.D. Cal. 1948). In *Richfield*, the same judge speaks of the defendant's "coercive" tactics. 99 F. Supp. 280, 295-6 (S.D. Cal. 1951). See Comment, *Vertical Forestalling under the Antitrust Laws*, 19 U. of Chi. L. Rev. 583, 599-601 (1952).

are offered a substantial freedom of choice to do business in other ways.[138] A seller, even a very big one, may still be able to contract to supply a customer's full requirements, if so requested.

The recent *Motion Picture Advertising Service (MPA)* decision [139] seemed to deny this interpretation of *Standard Stations*. The Supreme Court upheld a Federal Trade Commission order condemning exclusive exhibition agreements between the four leading distributors of advertising films and their theater customers as unfair methods of competition.[140] Both the Commission and the Court ignored the contention that no coercion was involved in obtaining the contracts of exclusive supply, and that the theater owners actively requested them.[141] Neither showed how, if the distributors merely acceded to these requests, they could be said to have competed unfairly. However, the Court was strongly influenced by the view that it is up to an expert body like the Commission to decide on the basis of the circumstances of each case whether or not a particular competitive practice is unfair;[142] the FTC as now reconstituted will probably do more in the future than it did in this case to justify such confidence.[143]

Exclusive Dealing in Oil and Effective Competition

In *Standard Stations*, the Court prudently refused to apply economic performance tests.[144] It chose to ignore the fact that exclusive dealing is "a device for waging competition," as well as for denying competitors access to the market, and that "retail stations . . . are the instrumentalities through which competition for . . . [the] ultimate market is waged."[145] It is not at all

138. See McLaren, *supra* note 129, at 160-6. Some but not all members of the Antitrust Division take a view opposite to the one expressed here; they believe that *Standard Stations* made it illegal per se for any company to sign full requirements contracts covering a "substantial" volume of business. See p. 314 *supra*.

139. FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1953).

140. This litigation was based on § 5 of the Federal Trade Commission Act. 38 STAT. 719 (1914), 15 U.S.C. § 45 (1946).

141. It was this argument, mainly, which supported the respective dissents of Commissioner Mason, 47 F.T.C. 378, 394 (1950), Justice Frankfurter with Justice Burton concurring, 344 U.S. 392, 402 (1953), as well as the opinion of the circuit court overruling the Commission, 194 F.2d 633 (5th Cir. 1952). See also note 136 *supra*.

142. 344 U.S. 392, 396 (1953).

143. If Mason's attitude becomes that of the majority of the Commission, the latter should henceforth apply something very close to the rule I have suggested in Clayton Act § 3 cases. See p. 315 *supra*.

144. 337 U.S. 293, 306-07 (1949). The reasons given were very similar to those we have ourselves advanced for rejecting such tests. See Kahn, *supra* note 9, at 40-1. "Justice Frankfurter said of the excluded considerations that they were 'most ill-suited for ascertainment by the courts.' I would go further, and dare to insinuate that they would baffle even trained economists." Timberg, *supra* note 132, at 154. *See* United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 283-4 (6th Cir. 1898).

145. Standard Oil Co. v. United States, 337 U.S. 293, 321-4 (1949) (dissenting opinion).

clear that the dominant companies were progressively able to entrench themselves through exclusive dealing, or to eliminate competition among themselves.[146] Numerous elements of intense and socially beneficial competition exist in the rivalry among majors and independents *for* dealers and retail outlets, and *through* dealers for consumer patronage. It is unlikely that the major oil companies or any one else would have constructed so many conveniently situated service stations had not the refiners some assurance that the stations would carry their own products exclusively,[147] or that, without the exclusive link, the refiner could so successfully have induced dealers to maintain clean rest rooms and provide the motorist with many other services. Oil companies have constructed their own exclusive outlets in order to compete more effectively in the final market with refiners and distributors already entrenched in that market. And exclusive dealing has often helped to assure adequate representation for the producer of an unknown brand.

On the other hand, exclusive dealing has detrimental effects on workable competition. Competition by pre-emption of desirable sites and market out-

146. This is the Government's contention, however. See Complaint, ¶¶ 62-4, United States v. Standard Oil Co., Civil No. 11584-C, S.D. Cal., May 12, 1950. Lockhart and Sacks, who persuasively argue the need for a more thorough investigation of the economic consequences of exclusive dealing in § 3 cases, will apparently be satisfied if courts in the future choose to regard *Standard Stations* as having turned not on the mere "substantiality" of the commerce affected by these contracts, but on the dominant position of Standard and the fact that the "Big 7," all using exclusive dealing, tied up stations selling over 55% of the gasoline in the area, and an even higher percentage of sales through retail stations alone. Lockhart & Sacks, *supra* note 113, at 930-1, 940-1.

But even such a finding does not really resolve the economic issue. It does not prove that competition in the industry was unworkable, or that exclusive dealing tended significantly to make it so. Consider the very real rivalry between the "Big 7" and the powerful market impact of the substantial fringe of independents in refining and marketing. See CASSADY & JONES, THE NATURE OF COMPETITION IN GASOLINE DISTRIBUTION AT THE RETAIL LEVEL (1951); Madison, *Proposed Amendments of the Federal Antitrust Law and its Relation to "Big Business"*, in 1951 SYMPOSIUM 116-117. Consider, also, the increased efficiency of marketing under methods of controlled distribution, and the industry's impressive record of expansion of capacity and product improvement. See Dirlam & Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 YALE L.J. 818 (1952).

147. Here is an illustration of the familiar Schumpeterian thesis about monopolistic incentives to investment and innovation. Similarly, oil companies might (though one could never prove this) have been less willing to invest heavily in exploration and discovery of new sources of crude oil, and in expansion of refining capacity, without controlled market outlets.

Richfield contended that it could not reasonably be accused of "foreclosing" competition when it denied other refiners access to service stations *which it had itself constructed.* 99 F. Supp. 280, 291-4 (S.D. Cal. 1951). It was by similar reasoning that the common law reconciled the grant of letters patent for inventions or new industries with a general hostility to other monopolies which denied to people rights of entry *that they had previously enjoyed.* This contention surely has some merit. On the other hand, much of the acquisition of service stations by majors has represented not new construction but preemption of desirable sites, and control of already constructed stations by purchase and long-term lease.

lets has probably produced an uneconomic profusion of service stations.[148] Moreover, competition through tied outlets is competition of a channelized and limited kind. Control over these outlets confers on the big refiner a means of limiting price rivalry at both retail and wholesale levels, and of impeding access to the market by the smaller, independent refiners and marketers, who are usually the price cutters. Standard of California has been the price leader on the West Coast and a price cutter in the East largely because in the one it enjoys, and in the other it lacks, a broad market coverage with controlled outlets.[149]

Moreover, it is difficult to see why many of the mutual benefits and socially beneficent consequences of exclusive dealing require coercion for their achievement.[150] Nothing prevents refiners from granting discounts that measure the cost savings of regularly scheduled, volume purchases. There is no reason why a supplier could not continue to give advice, assistance, and free paint to dealers who handle its products, as long as these favors are not conditioned on exclusive handling, and still exert pressure on dealers to keep their rest rooms clean, wipe windshields, and provide free air. In any case, now that the motorist has become accustomed to these free services, the keen competition among dealers should ensure that they will continue to be forthcoming.

148. See 2 Bain, The Economics of the Pacific Coast Petroleum Industry 239-50 (1945). In listing the various economic considerations that they feel the courts should take into account in § 3 cases, Lockhart and Sacks mention the "effect [of exclusive dealing] on bringing additional dealers into the market." Lockhart & Sacks, *supra* note 113, at 926-7. However, they recognize this may not be an unmixed economic gain. *Ibid.* Do they imply therefore that the Supreme Court should have had to decide whether there were too many gas stations on the West Coast, and weigh against this possible waste the economic benefits of competition among the excessively numerous dealers? Or should the Court have decided what portion of these offsetting consequences were properly attributable to exclusive dealing, and weigh these benefits of exclusive dealing against the losses, before deciding whether Standard might legally exert its leverage to close a substantial market to competitors? Would such a procedure make the law clearer to businessmen, as the critics of antitrust demand, and diminish the uncertainties of the law as now interpreted?

149. Richfield explained its $20 million investment in retail stations, leased out with a stipulation of exclusive dealing, on the ground that after World War II it was compelled to secure an assured market for its expanded refinery capacity. On the other hand, since it would have been compelled by the pressure of refinery capacity to find some outlet for its products, it seems probable that without such a guaranteed market Richfield would have been forced to offer price inducements to get dealers to carry its products, just as Standard of California has apparently been doing in the last few years on the East Coast. The resultant price competition might have taken on a cut-throat character, as it has sporadically on the East Coast. But the critics of *Standard Stations* have not, to my knowledge, pressed the defense of exclusive dealing that it holds price rivalry in check.

150. "If in fact it is economically desirable for service stations to confine themselves to the sale of the petroleum products of a single supplier, they will continue to do so though not bound by contract. . . ." 337 U.S. 293, 313-14 (1949). The language of this dictum, among others, apparently forecloses the possibility of dealers voluntarily signing requirements contracts. The fact remains that they were not given this choice in the present instance, and it is by no means certain what the Court would have done had they been.

An economist can hardly be certain that a law which denies to dominant refiners the right to insist on exclusive dealing will weaken the force of market competition. The probabilities would seem to be to the contrary, and this is, after all, what the Clayton Act presumed and *Standard Stations* contends. It is not necessarily an undesirable consequence of *Standard Stations* that a major refiner wishing to exercise firmer control over retail outlets than the law now permits must assume the additional risks and responsibilities of owning and operating them itself.[151] That full integration may permit greater operating control is balanced by the fact that it is also more expensive. In the face of social security and chain store taxes, it seems unlikely that the oil companies will attempt full integration.

Tie-ins and Requirements Contracts to Maintain and Consolidate a Dominant Market Position

Five-year requirements contracts, and alleged tie-ins between leases of can-closing machinery and the sale of cans, were under scrutiny in *American Can.*[152] Unlike Standard of California, American Can did not flatly refuse to do business on a non-exclusive basis; it solicited and obtained the requirements contracts largely by the offer of numerous competitive inducements:[153] discounts in ancillary contracts; payments of large sums of money and purchases of can-making equipment from customers at inflated values, in order to obtain can business; the leasing of machines and other equipment to customers at nominal rentals.[154] The district court conceded that some of these tactics were indistinguishable from ordinary methods of competitive salesmanship, such as extension of credit, servicing of leased machinery, and equalization of freight rates.[155] But, considering American Can's position in the industry

151. Lockhart and Sacks would have the courts accept as a conclusive defense of exclusive dealing the prospect that its elimination would be "likely to cause the supplier to obtain the same results through integrating. . . ." Lockhart & Sacks, *supra* note 113, at 928. The proposal seems both unrealistic and undesirable. The prediction it requires is surely almost impossible. What one can predict with some certainty is that the demand for exclusive representation is, like most demand curves, positively elastic; if courts raise the price, by denying sellers the cheap way of achieving it, less will be demanded. In any event, a firm that wishes to chance its own capital and managerial effort in undertaking a new function must be permitted to do so in a free enterprise system, unless the effect is a substantial restraint on competition. It must not be permitted to achieve the anticipated benefits by coercing businessmen who are supposed to be independent bargaining agents.

152. United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949).

153. Standard too used "competitive inducements"; it assisted its dealers in numerous ways which were certainly regarded by both parties as a *quid pro quo* for being a "Standard dealer." But the courts did not consider these blandishments in that case; they condemned the contracts themselves. Of course, the Clayton Act prohibition includes the offer of discounts or rebates which are conditional on acceptance of exclusive dealing or tie-ins. See statute cited note 7 *supra*.

154. 87 F. Supp. 18, 27-8 (N.D. Cal. 1949).

155. *Id.* at 28.

and the entire course of its business dealings over the years, the district court finally concluded that the tie-ins and requirements contracts, and the methods employed to obtain them, represented something quite different from forthright, bona fide competition. To the court, they bore an unmistakable odor of monopolizing.[156]

The findings in *American Can* did not controvert economic common sense. In 1946, American Can's share in national production of cans, sales of cans, and ownership of can-closing machines available for lease was 40, 46, and 54 percent respectively. Its share of can sales in the several regional market areas was often higher and sometimes lower. It seems indisputable that the tying together of two such dominant positions, in cans and machinery, whether by persuasion or rigid company policy, created additional monopoly power, each position reinforcing the other. The same conclusion seems justified with respect to the requirements contracts. While the inherent tendency in the district court's evaluation of American Can's methods is to deny to large firms the use of certain competitive devices to gain or retain customers, the same thing might be said of almost every Section 2 case from *Standard of New Jersey* in 1911,[157] to *United Shoe Machinery* in 1953.[158] The courts have always condemned business practices which, though not inherently predatory and not unreasonable in other circumstances or if employed by other companies, amounted in the circumstances of these cases to the use of market leverage to maintain long-established dominant market positions.

Tie-ins are ordinarily dangerous only if the contract embraces one product or operation in which the company enjoys substantial monopoly power. This monopoly provides the lever for extending power into otherwise competitive areas. *American Can* seems to identify the lever as the defendant's dominant position in leasing can-closing machines. But the major reason for this position, apparently, was that American Can rented the machines cheaply, in order to induce canners to take its cans exclusively. If American Can's "power" in the machinery field, which gave it leverage to force its cans on lessees, issued merely from its willingness to absorb book losses on leasing, it might not seem as clear to an economist as to the court that a monopoly power in one area was used to reduce competition in another, or indeed that the low charge on leasing machines was anything more than an accounting fiction.[159] The only relevant price might be that of the total package, not of any one

156. *Ibid.*

157. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

158. United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953).

159. Were patents involved, as in *International Salt*, the company's apparent policy of making its money on cans rather than on machines might have reasonably been adduced as additional evidence of an intent to use a legal monopoly in one area to obtain a preferred, profitable position in another. See Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 516-17 (1917). The court took note of the effect of American Can's low rentals in restricting the market opportunities of independent manufacturers of can-closing machines as well as of cans. 87 F. Supp. 18, 24 (N.D. Cal. 1949). But if American Can

part of it. If this combined price for machines and cans under five-year contracts was not satisfactory, the customers might have turned elsewhere. And, if a customer's alternatives were too limited, the responsibility may have lain not with American Can's tie-ins, but with inability of competitors to offer the combined services as satisfactorily.[160]

American Can, however, should not have turned on the comparative efficiency or market performance of the defendant and its integrated or non-integrated competitors. Antitrust policy should not inquire into whether or not a package bargain is the most satisfactory for customer and supplier alike. The appropriate inquiry is whether or not the customer is given a real opportunity to accept or reject the combination on its merits. Most canners enjoyed no such opportunity on reasonable terms;[161] access to the market by independent canners was thus unreasonably constricted.

The economic consequences of the *American Can* decision cannot be predicted at this early date. The decree did not substantially alter the industry's structure. However, within sixteen months after final judgment was entered, canners chose to purchase outright approximately 27% of American Can's machines.[162] Evidently the defendant's "package" did not suit all the customers. If this greater freedom of choice on the part of canners has any effect at all, it can only contribute to easier entry of competitors into the can industry.

The unfortunate *Times-Picayune* decision[163] denied a similar free choice to newspaper advertisers in New Orleans. The defendants required pur-

was accused of using the attractiveness of its combined offer to eliminate competition at one and the same time in can-closing machines and in cans, was it not attacked merely for making an attractive combined offer, *i.e.*, for its size and efficient integration alone?

160. For an argument that such a package offer might suit the needs of small users (canners in this instance) who lack the capital to purchase the machines, see Lockhart & Sacks, *supra* note 113, at 947-8. That exposition fails to indicate why offering users the *option* of leasing machines requires a tie-in. Nor, of course, does it justify American Can's policy which offered no such option, but insisted on leasing. 87 F. Supp. 18, 23 (N.D. Cal. 1949).

161. The determination of where one product or service ends and another begins, crucial to the identification of tie-ins, is inevitably in some measure arbitrary. When the court ordered American Can to offer cans and machinery separately, it was merely accepting the company's own formal usage. The two did not constitute inseparable parts of a unit; it would not have been unreasonable to ask for either one without the other on proportionally the same terms as they were available in combination. The same is true of the supply of cans for any one year, which American Can tied to the supply for the subsequent four years. It does not follow that American Can must henceforth fill some canner's order for half cans, or for a single day's supply of cans.

162. Report of the Antitrust Division, p. 34, United States v. American Can Co., 87 F. Supp. 18 (N.D. Cal. 1949) (made pursuant to order entered on July 9, 1952, concerning Pacific American Fisheries, Inc., dated Dec. 22, 1952).

163. Times Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), 63 YALE L.J. 389 (1954).

chasers of general display and classified advertising to take space in both the morning Times-Picayune (the only morning and the most important newspaper in New Orleans) and the evening States, which competed with the city's only other newspaper, the evening Item. The defendants contended that their two publications were really separate editions of a single newspaper. Yet a substantial volume of evidence, including assertions by the company's own executives in soliciting advertising, argued to the contrary. The tie-in was not an inevitable, "natural" single package, but in part at least a policy decision adopted "to slow the Item down."[164]

Despite the precedents of *International Salt* and *Griffith*,[165] the Supreme Court decided that such a tie-in did not violate the Sherman Act. It said that the decisive question in gauging the legality of the unit plan was whether or not the defendants enjoyed a "dominant position," since "the essence of illegality in tying agreements is the wielding of monopolistic leverage. . . .[166] Since the morning newspaper's sales of general display and classified advertising were only 40% of the total in New Orleans, and would have been 33⅓% if all papers were of equal size, the Court concluded that the defendant's power fell short of the necessary "dominance."

This computation compounded three errors, in ascending order of importance. First, the Court said that the relevant market in this case was the one where newspapers compete for advertisers, not readers. Accordingly, it computed the share of the morning newspaper, the Times-Picayune, in advertising lineage, not in circulation. But in the advertising market, a newspaper in effect tries to sell its readership to the buyers of advertising space.[167] The Times-Picayune had 46% of the combined *circulation* of the three newspapers. Its 40% share of combined advertising lineage was necessarily lower, because of the unit rule itself; under that rule, no one could buy space in the morning paper without buying it in the lower circulation States as well. So, even if the Item closed up shop entirely, giving the defendants a complete monopoly, the morning Times-Picayune could not possibly obtain over 50% of the relevant advertising business.

Second, if the correct computation was of the position of the defendants in the combined morning and evening newspaper market, the Court should have added together the lineage of the two papers bound together by the unit

164. *See* 105 F. Supp. 670, 678 (E.D. La. 1952). Many advertisers obviously did not consider the package a single product until they were forced to do so. Before adoption of the unit rule, less than half as many classified advertisers and something less than two-thirds as many general display advertisers bought space in the States as in the Times-Picayune. Afterward, of course, the percentage rose at once to almost 100. *See* 345 U.S. 594, 618-19 (1953).

165. See pp. 306, 312-13 *supra*.

166. 345 U.S. 594, 611 (1953).

167. *Id.* at 610.

rule. This would have given the Court a figure of 78% of the general display and classified advertising market being dominated by the defendants.

The Court's simple, glaring and third error was to add together the "tying" and the "tied-in" markets in its calculation. The Court justified its consideration of the morning and evening fields as a single market on the ground that:

> "No dominant 'tying' product exists (in fact, since space in neither the Times-Picayune nor the States can be bought alone, one may be viewed as 'tying' as the other); no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same."[168]

But, it was the position of the Times-Picayune in the morning field that provided the leverage. This share was 100%; the same as the share of the Griffith chain in towns where it owned the only theater, and of International Salt in its patented machines. The Court might have seen through its spurious contention merely by looking at the consequences of imposing the unit rule. The immediate result was to pull the lineage of the States up to that of the Times-Picayune, and not the other way around.[169] Any advertiser who wanted to reach a morning audience had to patronize the States as well. This must have been precisely what the defendants had in mind in imposing the rule,[170] and this is what happened.

The Court should certainly have concluded, as the district court did in *American Can*, that the insistence on a combination, package deal by so dominant a seller unfairly constricted the market opportunities of other, non-integrated sellers, without regard to their relative efficiency or to the economic merits of the arrangements. The most unfortunate consequence of *Times-Picayune* is that it implies the Court will henceforth have to be convinced of substantial deleterious effects on existing competition before it will condemn a device which has nothing to be said in its favor, and which discourages competitive entry into a field increasingly dominated by local monopolies.[171]

Reasonable "package" bargains need not be prohibited. *American Can* recognized that the canning industry, dependent as it is on variable crops, needs contracts imposing mutual obligations: the canner to buy its cans solely from one supplier; and the manufacturer to supply as many cans as the size

168. *Id.* at 614.

169. See the statistics, *id.* at 618-19.

170. There was one partially offsetting consideration in the case of classified advertising alone. The Item had previously owned a morning paper and used the unit rule for classified advertising before the Times-Picayune adopted it in 1933. This fact hardly justifies the latter's adoption of the same rule for general advertising in 1949, eight years after the demise of its morning competitor, and after it had become the dominant newspaper and had attained a monopoly of the morning field.

171. Justice Clark ingenuously admits this consequence. 345 U.S. 594, 603-05, 623 (1953). See Comment, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L.J. 948 (1952).

of the harvest dictates. Consequently, one-year requirements contracts were approved as meeting the needs of both parties, while permitting "competitive influences to operate at the expiration of said period."[172] And, nothing in *American Can* denied defendant the right to offer canners, without coercion, the opportunity to take its machines and cans together. The market could then judge the advantages of the combination, as it could not before. But in *Times-Picayune*, the Supreme Court was so impressed with the cost-savings of integration that it completely ignored the possibility of permitting an integrated newspaper to pass the lower costs of joint advertising on by offering advertisers a unit *rate*, fairly mirroring the savings, without permitting the use of the inflexible unit *rule*.[173]

The apparent willingness of the courts to permit exclusive supply arrangements which are not the product of coercion, and which are beneficial to both parties without unreasonably excluding competitors, suggests that the earlier *Bausch & Lomb* [174] decision still stands. This case involved a contract between Bausch & Lomb, which manufactured and ground pink-tinted lenses, and the Soft-Lite Lens Co., the exclusive distributor, which sold the lenses under its trade name. These arrangements were held legal, because they "were developed through arm's length negotiations," and protected Soft-Lite, which was "spending large sums to develop [its] good will and enlarge the public patronage of a relatively new article of commerce."[175] Moreover, Bausch & Lomb did not have a monopoly in the manufacture of glass for lenses. "On the contrary . . . other manufacturers of lenses have had access to pink glasses from other sources and . . . the success of Soft-Lite . . . stimulated emulation and competition." Furthermore, "there [was] competition between untinted and tinted lenses, as well as in the various tints of lenses and among the distributors of pink tinted lenses. . . ."[176] In short, the agreement did not involve the use of market power by a dominant seller to exclude competitors. It was not anti-competitive either in intent or in effect.

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172. United States v. American Can Co., 87 F. Supp. 18, 31 (N.D. Cal. 1949). For a similar decree, see United States v. Linde Air Products Co., 83 F. Supp. 978 (N.D. Ill. 1949); see also the FTC orders in the cases involving the four leading producers and distributors of advertising films, *supra* note 141. Since the defect in the reasoning of the Commission's majority was its failure to consider that theater owners may have wanted these long-term contracts, nothing would have been lost by a decree which forced distributors to *offer* shorter contracts, while permitting theaters to sign longer ones if they wished.

173. *See* 345 U.S. 594, 623-4 (1953). The decision of the lower court, condemning the tie-in, likewise failed to differentiate the unit rule (a refusal to sell space except on a unit basis) and the unit rate (a favorable combined price to induce advertisers to take space in both papers). The Times-Picayune went far beyond the legitimate competitive persuasion of passing on to customers the cost-savings of producing a joint service.

174. United States v. Bausch & Lomb Optical Co., 45 F. Supp. 387 (S.D.N.Y. 1942), *aff'd*, 321 U.S. 707 (1944).

175. *Id.* at 391, 398-9.

176. *Id.* at 398-9.

The Borderline between Competing and Foreclosing

National City Lines:

The practice of offering customers inducements to make it worth their while to enter an exclusive relationship is a widespread phenomenon.[177] The *National City Lines* decision[178] seems to indicate much more clearly than *American Can* that such practices and arrangements may be unequivocally illegal under either the Sherman or Clayton Act,[179] if a few million dollars of sales are involved.

In *National City Lines,* Firestone Tire and Rubber, General Motors, Mack Manufacturing, Phillips Petroleum, and Standard of California were convicted of conspiring to monopolize "certain portions of interstate commerce,"[180] because they had jointly furnished capital to two busline holding companies in exchange for ten-year contracts for the exclusive supply of tires, busses and petroleum products. In testing whether or not the exclusive arrangements with 46 bus lines in 45 cities amounted to a monopoly, under Section 2 of the Sherman Act, of "any part" of interstate commerce, the effect on competition was established by analogy to the *Yellow Cab* decision: the contracts (vertical

177. During an inflationary period, it may be more common for customers to solicit the favorable attention of suppliers by such means. See, *e.g.,* the proposed loan of $28 million from General Motors to Jones & Laughlin, in exchange for "an assured supply of steel until the loan is paid off." The relationship in this case was not exclusive, but preferential. Business Week, Dec. 16, 1950, pp. 111-112. An interesting variant is the contract in which Phillips Petroleum gave the Barium Steel Corp. a share in its crude oil and gas leases, reportedly in exchange for supplies of scarce steel. N.Y. Herald Tribune, June 14, 1951, p. 41, col. 3.

178. United States v. National City Lines, Inc., 186 F.2d 562 (7th Cir.), *cert. denied,* 341 U.S. 916 (1951).

179. *National City Lines* illustrates clearly the tendency of the courts in recent years to obliterate the distinction between the two Acts, while weakening the rule of reason as applied to both. With the *International Salt* and *Standard Stations* decisions greatly reducing the required demonstration of competitive impact (under § 3 of the Clayton Act), with the former decision declaring it also unreasonable per se and illegal (under § 1 of the Sherman Act) to foreclose competitors from any substantial market, and with the first *Yellow Cab* opinion finding that such an action might constitute monopolization of "any part" of the national market (under § 2 of the Sherman Act), the way was paved for applying any and all of these statutory provisions to condemn tie-ins or exclusive dealing by any big company, despite Justice Frankfurter's attempt in *Standard Stations* to limit the reduced burden of proof to the Clayton Act. 337 U.S. 293, 297, 311-14 (1949). Thus American Can was condemned under §§ 1 and 2 (Sherman) and 3 (Clayton); Richfield under §§ 1 (Sherman) and 3 (Clayton); and National City Lines under § 2 (Sherman). There were of course some differences between these cases, in some measure justifying different legal treatment. But the fact that the tie-in in *National City Lines* (a tie-in of exclusive supply contracts to *loans*) did not fall within the language of the Clayton Act, did not prevent the success of a far more limited proof of consequences than sufficed in *Standard Stations. But see* Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), which attempts to preserve the distinction between the two laws.

180. 186 F.2d 562, 564 (7th Cir. 1951).

integration) involved sales to bus (taxicab) operating companies, amounting in 1946 to more than $11 million (replacements for 5,000 cabs), from which competitors were excluded.[181] Although the percentage of the total national or regional sales of the companies or products in question was negligible, the effect on competition in both cases was more than "insubstantial." But, while Yellow Cab was ultimately exonerated because the lower court found no evidence of illegal intent,[182] evidence indicating that it was the bus companies that had been in financial straits and had approached the suppliers for assistance did not save the defendants in *National City Lines*.[183]

National City Lines hinged largely on a finding of conspiracy.[184] The supplier defendants were separate firms, whose individual subscriptions to the bus-line holding companies' stock were apparently predicated on an understanding that the others were doing the same. But the question arises whether acts, which might escape censure if committed individually, are made offensive because they arise out of a "conspiracy" between non-competing firms.[185] Moreover, the *Yellow Cab* defendants were likewise held to have conspired.[186] Nevertheless, in *National City Lines* the exclusive contracts were held sufficient evidence of an intent to exclude.[187] So the Clayton Act's prohibition of specific practices, regardless of intent,[188] together with the diminished standard of substantiality of effect of the first *Yellow Cab* case,[189] was incorporated into Section 2 of the Sherman Act. Yet, there was no incorporation of the saving proviso in *Yellow Cab*, requiring evidence of an intent to monopolize.[190]

National City Lines stands at the frontier between competition and freedom of contract, on the one hand, and exclusion on the other. Competition consists in large measure of offering financial inducements— "free" service, discounts, credit, leases at nominal rentals, assistance in decorating, constructing or arranging a place of business—in exchange for a contract of sale. Are such inducements illegal if they succeed in getting and holding a customer? While it

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181. *Id.* at 567-8.

182. 80 F. Supp. 936 (N.D. Ill. 1948).

183. 186 F.2d 562, 572-3 (7th Cir. 1951). The defendants could find small comfort in the court's concession that they "obviously . . . were entitled to offer evidence as to their intent and motives . . . in entering into the transactions," since the court really found the resulting arrangements per se void.

184. *Id.* at 564-6, 570-1.

185. Since each supplier received an exclusive contract, the plan obviously had no room for direct competitors. Each of the two oil companies obtained the exclusive contract for bus companies operating in its own market area.

186. United States v. Yellow Cab Co., 332 U.S. 218, 229 (1947).

187. 186 F.2d 562, 571 (7th Cir. 1951). See also Comment, *Vertical Forestalling under the Antitrust Laws*, 19 U. of Chi. L. Rev. 583, 601-11 (1952).

188. See, *e.g.*, Miller, Unfair Competition 62-3 (1941); Watkins, Public Regulation of Competitive Practices in Business Enterprise 38 (1940).

189. See p. 312 *supra*.

190. 332 U.S. 218, 220, 224, 227, 228 (1947). The defendants were subsequently exonerated because the alleged specific intent to monopolize was not found. 338 U.S. 338 (1949).

is doubtful that the case was worth bringing or that the decision was sound, it probably does not go so far. What was involved here was a program embarked upon by a group of companies, who joined through an intermediary to purchase control of a number of potential customers, in exchange for the intermediary's promise to divert to them for ten years all the patronage of the subsidiaries thus acquired. Their course of action might reasonably have been characterized as demonstrating an intent to gain assured customers by other than normal competitive methods.[191] It is surely one of the traditional purposes of the antitrust laws to prevent the exercise of financial power for no other purpose than to sew up markets. It does not follow, then, that a supplier must henceforth deny a customer's uncoerced and uninduced request for a full requirements contract.

And though it is certainly doubtful that the actions of the *National City Lines* defendants had an appreciable deleterious effect on competition, the decision is not likely to have harmful economic consequences. In the long run, the cause of effective competition is served if firms are not permitted to use their financial resources to bind customers to them for long periods of time.[192] Indeed, perhaps suppliers should not be encouraged to be investment bankers for their customers. The economist must consider the alternative uses of such

191. This evaluation is implicit in the Seventh Circuit's description of the plan. It points out that the suppliers subscribed to the preferred stock "at prices in excess of prevailing market prices"; that before the arrangements in question National and Pacific City Lines had bought their equipment and supplies from "different suppliers, with no long-term contract with any of them." 186 F.2d 562, 565 (7th Cir. 1951).

192. This is certainly the case where the customer is a regulated monopoly whose rates depend on book costs. As Adelman points out with reference to the *Yellow Cab* situation, so here the decision might have turned on the possible injury to the consuming public resulting from obtaining a monopoly in the supply of equipment to such public utilities. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1317 n.103 (1948). In fact, however, it did not. It is not clear that a supplier, acting as a banker, should be permitted to attach conditions to its loans which no banker would be permitted to attach, even if it were the borrower who came to him first. See the analogous, but much stronger, case against a company in the business of making loans on real estate, for requiring borrowers to take out hazard insurance exclusively through or from it. Complaint, United States v. Investors Diversified Services, Inc., 102 F. Supp. 645 (D. Minn. 1951). The Department of Justice does not claim that the defendants in this case any more than in *National City Lines* enjoy a monopoly in the lending business, to which they tie their other sales; or that they have achieved or threaten to achieve a monopoly in the tied-in markets, other than that portion of the business which they obtain for themselves in this fashion. However, no evidence seems necessary to show that a company which made over $192,000,000 of mortgage loans in 1949 enjoyed a substantial power to limit the freedom of borrowers in their choice of insurance companies. The resultant restraint in the tied-in field was surely unreasonable.

The Government's definition of "monopolizing"—without reference to market shares or elasticity of demand—may seem meaningless to an economist. Its use, however, is a sign not necessarily of economic illiteracy but of the irrelevancy of market structure or performance tests; monopolizing at law is a coercive and unreasonable course of conduct.

funds, and the possible distortion of investment when the capital market is circumvented and extraneous criteria guide it.[193]

When it is necessary for suppliers to offer services or credit to make sales, it may be presumed they will continue to do so, even if they can not get an exclusive relationship in exchange. In fact, to the extent that the law strengthens the hand and increases the discretion of purchasers or dealers, sellers may have to compete more vigorously than before for their custom, and perhaps in socially more beneficial ways.[194] Any slackening of competitive efforts that may occur because the law has removed the prize of an exclusive relationship should be more than offset by greater freedom of entry into markets now rendered expensive to penetrate by the necessity of providing capital to customers, or of setting up one's own distributive outlets.

J. I. Case:

The recent antitrust suit against J. I. Case [195] illustrates how complex the task often is of drawing the line between competition and exclusion. Most farm machinery is sold through dealers, each of whom is the exclusive local representative of a single full-line manufacturer, and for the most part handles the line of only one manufacturer. The exclusiveness is not tight, since only a small minority of dealers handle no competitive equipment whatsoever. Although these arrangements are not embodied in binding contracts, the exclusive agency-exclusive dealing pattern is typical, particularly as far as the full line is concerned.[196] To break up this pattern, the Department of Justice launched civil suits against International Harvester, John Deere and J. I. Case; when it lost the suit against Case in the district court, the only one to go to trial, it dropped them all.

The Government contended that it was the general policy of J. I. Case to have its dealers handle its products exclusively. The district court agreed "that Case has been intent . . . on obtaining dealers who will devote the major part of their activities to the Case line. . . ."[197] The Government also argued that the company's field representatives continually exerted pressure on the retailers, backed by the threat of contract termination, to drop competitive

193. The suppliers presumably consider the "investment" a remunerative one, regarding it perhaps like a price concession that returns a net price still above incremental costs. It remains possible that the ultimate use to which the funds were put was uneconomic from the social point of view, in the same way as the excessive construction of service stations by major oil companies in the past. See note 149 *supra*.

194. The big oil companies compete very vigorously for large commercial accounts, usually offering secret discounts from the openly posted prices. The ability of the National City bus lines to bargain in this fashion was obviously seriously restricted by their contractual obligation to buy all requirements from Standard of California and Phillips.

195. United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

196. FTC, Report on Manufacture and Distribution of Farm Implements 113-114, 126-7 (1948).

197. United States v. J. I. Case Co., 101 F. Supp. 856, 861 (D. Minn. 1951).

lines. It cited 108 dealers as having been subjected to specific acts of coercion and pressure of this kind. The court conceded that there had been "flagrant attempts to coerce and put pressure on a few dealers to give up competing lines as a condition for obtaining a Case contract or to obtain a renewal. . . ."[198] These policies and pressures, the Government contended, had caused contracts with a substantial and increasing number of dealers to be accompanied by understandings that they would be exclusive, and therefore effected an unreasonable restraint of trade under Section 1 of the Sherman Act.[199] These understandings also violated Section 3 of the Clayton Act, it argued, regardless of whether they were secured by coercion, since the effect was to exclude competitors from selling to large numbers of the Case dealership organization.[200] In short, the Government contended that the market must be free of even voluntary contractual constraints; at every moment everyone must be free to contract with everyone else.

The court, on the other hand, saw no legal objection to exclusive dealing as such, whether secured by contract or understanding. The manufacturer had the right to select distributors according to whether or not they gave its products "fair representation," and were "sold, so to speak, and enthusiastic about its line."[201] And, the manufacturer might reasonably withdraw its machines from a dealer who divided his loyalties and attention between two full lines. But, the purpose of these methods must not be to effect a monopoly, and the methods cannot be "unreasonably coercive."[202] Moreover, there must

198. *Id.* at 864-5. The Government claimed that in almost none of the 108 instances of alleged coercion did the company bring to the stand the territorial representatives responsible; that in 28 it offered no controverting evidence of any kind; that there was no evidence that the home office took to task the branch managers or salesmen responsible for admitted acts of coercion and inducement to handle Case products exclusively. The FTC pointed out that it was the industry's frequent or general practice to refer all such complaints back to the very district representatives about whom the dealers were complaining. FTC, REPORT ON MANUFACTURE AND DISTRIBUTION OF FARM IMPLEMENTS 126, 136, 151 (1948). In these circumstances the Government argued the court should have given far heavier probative value to the written, documentary evidence of individual acts of coercion than to public statements by central office executives renouncing the exercise of such pressure, or to testimony that the dealers in question had been dropped for some other reasons than persistent handling of competitors' products. Motion by Plaintiff for Amendment of Findings of Fact and Conclusions of Law and of the Judgment, pp. 10-13, United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

199. *Ibid.*; Brief for the United States, § 3, ¶ 5, United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

200. "[D]efendant Case is not immunized from the antitrust laws merely because in many instances the oral understanding . . . was thought to be mutually beneficial. . . . The decision of the Supreme Court in the Standard Oil of California case did not turn upon evidence of coercion. . . ." Motion of Plaintiff for Amendment of Findings of Fact and Conclusions of Law and of the Judgment, p. 18, United States v. J. I. Case Co., 101 F. Supp. 856 (D. Minn. 1951).

201. 101 F. Supp. 856, 865 (D. Minn. 1951).

202. *Id.* at 863, 865.

be little likelihood that the intensity of competition in the final market will be diminished.[203]

The court found that Case's actions fell within these rather vague boundaries of legitimacy. Company bulletins advised sales personnel not to be "overzealous," to avoid "dictating" to or "coercing" dealers with respect to the lines they carried, while at the same time assuring the personnel that they could insist on adequate representation[204] of the company's line. The court attributed exclusive handling of Case's products not to pressure by the manufacturer, but to a mutual recognition that sound business practice demanded it, and held that arrangements thus arrived at are legal.[205]

The court held that Case's policies had no substantial deleterious effect on competition, actual or potential. Over 70% of Case's dealers carried competitive products, though few carried another full line. There was no testimony from competing manufacturers that exclusive dealing had excluded them from markets.[206] On the contrary, the court found that most towns had dealers representing nearly every full-line and many short-line manufacturers. It found, in short, that workable competition prevailed.[207]

The opinion in *J. I. Case* was an accurate interpretation of the law. Exclusive dealing in farm equipment cannot be illegal per se. On the other hand, there is force in the Government's contention that the record may have justified an equity decree to redress a market situation characterized by inequalities of competitive access, and of bargaining power between supplier and dealer. It is impossible to characterize such inequality with any precision. Manufacturers depend heavily on their dealers, who are their only direct contact with the final customer. A good dealer can therefore offer considerable resistance to what he considers unjustified demands by a supplier, and dealers have often been able to shift from one supplier to another. This opportunity has been enhanced by the entry of new full-line companies like Ford and Ferguson. A big company, however, can get along without a particular dealer, and the number of full-line companies is very limited.[208] The right to handle the line of one of these companies may mean the dealer's

203. *Ibid.*

204. The judge conceded that "[T]he home office executives were inclined to leave the problems of dealership largely to the branch managers and at times may have accepted their decisions without a thorough investigation when controversies arose as to competitive lines being carried by dealers. . . ." *Id.* at 861-2.

205. *Id.* at 867.

206. The Government pointed out that such evidence would have been difficult to obtain for the years 1944-8 when the bottleneck in the industry was supply, not market outlets.

207. "[T]he evidence reflects that there is healthy competition among all farm machinery manufacturers." *Id.* at 866.

208. The number of farm equipment manufacturers has substantially increased in recent years, but most of them are highly specialized, and cannot offer anything like a full line. FTC REPORT *op. cit. supra* note 196, at 66, 102-105. The production of farm implements, considering the entire, highly variegated group as a whole (omitting only tractors) is relatively unconcentrated. In 1947, the first four manufacturers accounted for 36.0%, the first eight for 46.6%, and the first twenty for 58.3% of national production. But the production

entire livelihood, and be sufficiently precious to induce him to succumb to the supplier's pressure to do things that are not necessarily in his or the public's interest.[209]

In these circumstances, the fact that buyers and sellers find exclusive contractual relationships sufficiently satisfactory to enter into them does not necessarily make them socially acceptable. The existence of mutual economic advantages in such an arrangement does not justify a seller's *insisting* on it. The presumption in antitrust law must be against exclusive tactics, and in favor of easier entry into oligopolistic markets. The structure of the farm machinery industry is not greatly different from that of the west coast petroleum industry.[210] Since the policies of all the farm machinery leaders[211] paralleled those of Case, the court might well have found in this case, as the Supreme Court did in *Standard Stations*, that exclusive dealing policies illegally perpetuated a pattern of oligopoly.[212] The important difference between the two cases is that in *Standard Stations* exclusive dealing was the clearly established practice and openly avowed policy of the defendant, and in *Case* the practice was far looser. None the less, a decree prohibiting coercive pressure for exclusive dealing might have forced Case to be more scrupulous in keeping its field representatives from overstepping the bounds of reasonable salesmanship.[213]

The antitrust laws have traditionally condemned certain kinds of business behavior; they do not attack market situations or business arrangements.

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of tractors, to which the full line is usually attached, is highly concentrated—with ratios of 67.3, 87.6, and 97.0, respectively. Information submitted by the Secretary of Commerce to the Celler Comm., *Hearings*, Ser. 14, pt. 2-B, p. 1438. See also United States v. J. I. Case Co., 101 F. Supp. 856, 858 (D. Minn. 1951).

209. This is especially true if the dealer has invested heavily in specialized, distinctive facilities in a location not readily convertible to other uses. After the war, several of the manufacturers urged their dealers to erect more or less uniform "prototype" buildings, on the outskirts of towns, where, many of the dealers complained, such buildings could not be easily converted to another business. FTC REPORT, *op. cit. supra* note 196, at 132-54.

210. *Compare* data on farm machinery industry, note 208 *supra*, *with* 1 BAIN, *op. cit. supra* note 148, at 130-49.

211. The major exception is Allis Chalmers, which did not become an important factor in the industry until after 1936, and was therefore forced to contract with many dealers already handling the lines of other manufacturers. FTC REPORT, *op. cit. supra* note 196, at 128.

212. See p. 318 *supra*.

213. "[I]n a substantial number of concrete instances oral exclusive dealing understandings were in fact entered into and . . . acts of coercion or inducement were performed by Case to obtain such. . . . Such concrete instances . . . though limited in absolute or relative numbers, when coupled with proof of expressions of a general exclusive dealer policy—were sufficient to support an inference by the Court that a considerably larger number of dealers than those shown by the proof have entered into similar . . . understandings, or might be expected to . . . unless the defendant was enjoined." Motion of Plaintiff for Amendment, *supra* note 198, at 17.

Accordingly, the legal appraisal of full requirements contracts must turn on whether or not they issue from the *exertion* of market or financial power, with the effect of constructing substantial impediments to competitive entry.[214] The more flagrant the exclusive tactics, the more clearly they betray an intent to exclude, the less stringent should be the test of market consequences. The prime question is whether the act of exclusion is unreasonable, or stems merely from socially acceptable methods of vying for customer patronage, and from the free decision of the dealer or buyer. These are the traditional tests of the rule of reason, and they probably still apply.[215]

When judged by these standards, the *National City Lines* and *Motion Picture Advertising Service* decisions emerge as the most doubtful of those dis-

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214. See the persuasive argument along similar lines in Comment, *Vertical Forestalling under the Antitrust Laws*, 19 U. OF CHI. L. REV. 583, 617-19 (1952).

215. See McLaren, *supra* note 129, at 168-9. The foregoing summary has made no reference to numerous actions brought by the FTC in recent years against exclusive dealings. Only two of these actions, involving Automatic Canteen Co. and Motion Picture Advertising Service Co. have thus far (November, 1953) been tested in the courts since *Standard Stations*. Automatic Canteen occupied a "predominant position" in the leasing of candy vending machines; it forced its distributors to handle its machines on an exclusive basis, and tied to the leases of the machines the supply of the candy sold in them, thereby becoming an important factor in the wholesaling of candy bars as well. The conclusion of the Seventh Circuit seems entirely justified: "there certainly can be no question . . . that the actual effect . . . was to foreclose competitors from a substantial share of the market as to both lines of petitioner's business. . . ." Automatic Canteen Co. v. United States, 194 F.2d 433, 437 (7th Cir. 1952). Automatic Canteen appealed to the Supreme Court only that portion of the Commission's order which was issued under § 2(f) of the Robinson-Patman Act. See Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953), 63 YALE L.J. 260.

Commission attorneys who have worked on Clayton Act § 3 cases state that they have moved to void exclusive arrangements only where they find evidence of appreciable injury to competitors, and that it has not been their intention to condemn exclusive dealing as a general, voluntarily selected method of doing business. See, *e.g.*, Dictograph Products, Inc., FTC Dkt. 5655, p. 6 (initial decision Nov. 10, 1950); Revlon Products Corp., FTC Dkt. 5685, pp. 2-3, 8-13 (initial decision July 15, 1952).

However, many individual decisions by FTC Trial Examiners seem content merely to establish the fact of a manufacturer's insistence on exclusive dealing, often in exchange for the grant of exclusive territorial distributorships, and to conclude on the basis of this evidence alone either that the manufacturer had effectively established a "monopoly" in the business of its tied distributors, or that "the effect . . . may be to substantially lessen competition . . . and tend to create a monopoly." See, *e.g.*, Beltone Hearing Aid Co., FTC Dkt. 5825, p. 2 (initial decision Nov. 15, 1952).

This observer cannot escape the feeling that the Commission has carried out to the point of absurdity the apparent suggestion of FTC v. Morton Salt Co., 334 U.S. 37 (1948) and *Standard Stations*, that serious consideration of the competitive impact of the practices in question is unnecessary. It has failed to realize the anticipated advantages of flexible and expert regulation of business practices by administrative commissions, rather than by judicial combat, and has come perilously close to undermining its very reason for existence. *See* the *MPA* case, 344 U.S. 392, 401-03 (1953) (dissenting opinion); FTC v. Ruberoid Co., 343 U.S. 470 (1952). See also WATKINS, PUBLIC REGULATION OF COMPETITIVE PRACTICES 219, 225 (1940); Statement of James M. Landis in STOCKING & WATKINS, MONOPOLY AND FREE ENTERPRISE 548 n.7 (1951).

cussed.[216] No evidence of coercion was introduced in either case. In the absence of exclusive tactics, the demonstration of competitive impact was surely inadequate.[217] On the other hand, in *J. I. Case* the importance of an intermediate market represented by thousands of farm equipment dealers should certainly have justified a decree prohibiting the few firms that dominate this market from exerting unreasonable pressure to exclude competitors.

These criteria do not require that all exclusive arrangements be outlawed. If a marketing arrangement helps a firm to break into a new market, it clearly does not represent the use of appreciable market power [218] to create an unreasonable obstruction to competitive entry.[219] If, as in *J. I. Case*, the courts can be convinced that exclusive dealing is necessary to protect the good will attaching to a manufacturer's product, they will not condemn it:[220] either because, under Clayton Act proceedings, the effect could not raise an inference of reasonable probability of harm to competition, or because, under the Sherman Act's traditional criterion of reasonable restraint, the *intent* in such cases is to compete rather than to exclude.

The cases show the impracticality of drawing the line between reasonable and unreasonable restraints on the basis of purely economic judgments of industrial performance. Whether the economist would agree with the court in *J. I. Case* that competition is effective in farm machinery would depend on the economist.[221] The same is true in petroleum. One must concede that an unhampered insistence on exclusive dealing or full requirements contracts by

216. *Times-Picayune* is also doubtful but for different reasons. See pp. 325-6 *supra.*

217. On *MPA*, see Hodson, *The Manufacturer's Right to His Dealer's Loyalty in the Light of the M.P.A. Case* in 1952 SYMPOSIUM 187-92, 199-200.

218. This admittedly implies the need for a market structure test, see Kahn, *supra* note 9, at 53-4, and explains the necessity for deciding, in such cases as *American Can* and *Times-Picayune*, whether the defendants enjoyed a "dominant position." The application of the test of "dominance" cannot be rigorous in economic terms: How does one measure "dominance" or "power," and draw the line between the unreasonable exercise of substantial market power from the uncoercive adoption of a reasonable exclusive relationship? The primary evidence of the sufficiency of the power must be its *exercise*. Moreover, there is no implication here that the law should condemn market power itself, unless abused or attained by unreasonable means.

219. Courts have refused to condemn exclusive dealing arrangements by small or new firms. See United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); Excelsior Motor Mfg. & Supply Co. v. Sound Equipment, Inc., 73 F.2d 725 (7th Cir.), *cert. denied*, 294 U.S. 706 (1934); B. S. Pearsall Butter Co. v. FTC, 292 Fed. 720 (7th Cir. 1923).

Obviously none of the recently outlawed exclusive dealing arrangements could have been justified on the ground that they were used by small manufacturers as a means of breaking into a market.

220. See note 129 *supra* and accompanying text.

221. See, *e.g.*, WILCOX, COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY 126-7, 168-70. (TNEC Monograph 21, 1940) (classes the farm machinery industry as "monopolized," partly because of its exclusive dealing practices). *Accord*: NUTTER, THE EXTENT OF ENTERPRISE MONOPOLY IN THE UNITED STATES, 1899-1939 p. 86 (1951); STIGLER, FIVE LECTURES ON ECONOMIC PROBLEMS 56 (1949).

J. I. Case, Standard of California or American Can would be most unlikely in itself to increase substantially their respective market shares. Nor would sweeping antitrust condemnations of exclusive arrangements radically change either the competitive methods or the economic performance of the farm machinery, petroleum and can industries. Yet, it is reasonable to conclude that a pattern of oligopoly control of markets may be indefinitely extended, and entry continually hampered, by the insistence of all the dominant producers on this marketing practice. Against the benefit to the consumer because a big manufacturer can plan more effectively and can hold retailers to higher levels of performance under exclusive systems of marketing, must be weighed the consumer's interest in the widest possible range of choice among manufacturers and in being served by retailers sufficiently expert and *free* to help him choose the particular products that best meet his particular needs.[222] Although some commentators imply that a blanket prohibition of the use of power to exclude competitors from "a substantial market" may "indiscriminately strike down the good with the bad,"[223] the seriousness of the risk has yet to be demonstrated.

VERTICAL INTEGRATION—PERSISTENCE OF THE DOUBLE STANDARD

There has always been a double standard in the antitrust laws. Restrictive agreements between separate firms are more severely treated than proprietary consolidations enjoying just as great or greater market power. The double standard appeared in the contrasting treatment accorded the first two groups of business defendants whose cases reached the Supreme Court—one involving a merger, the other a price-fixing conspiracy.[224] The decision which

222. The proponents of workable competition have pointed out that where the market is imperfect in some respects, other imperfections may be required for effective performance. For example, if sellers are few, price rivalry may be greater to the extent that sellers are imperfectly aware of what their rivals are charging. See CLARK, *Toward a Concept of Workable Competition* in READINGS IN THE SOCIAL CONTROL OF INDUSTRY 453-4, 464-5, 468-71 (1942). Imperfect market information may be regarded as a sort of "offsetting imperfection"—offsetting the imperfection of fewness of sellers. In the case of exclusive dealing, perhaps, we have the opposite situation. The contention that exclusive dealers (who are not given the opportunity to be anything but exclusive), each vying for the customer's patronage, will provide effective competitive performance perhaps assumes greater market perfection than actually prevails. The imperfection of competition resulting from inadequate consumer knowledge, discernment, and ability to shop around necessitates an "offsetting perfection"—the protection of dealers who are themselves free to shop around and advise their customers. Exclusive dealing is supposed to make for the provision of better service; here is a service it eliminates.

223. Lockhart & Sacks, *supra* note 113, at 940.

224. *Compare* United States v. E. C. Knight Co., 156 U.S. 1 (1895), *with* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897). The American Sugar Refining Company's acquisition of 98% control over domestic sugar production by purchasing the stock of four competitors was exonerated in *E. C. Knight* on constitutional grounds;

finally established that the law could reach mergers in industry [225] at the same time set forth the rule of reason, which, subsequent decisions demonstrated, re-established the double standard in another form.[226] A big firm, however powerful, had to misbehave to fall afoul of the law; a price-fixing or market-sharing agreement among separate firms, though covering no greater a share of the market than the single firm, was illegal per se. Judge Hand's decision in *Alcoa* was the first instance in which a court of final jurisdiction [227] explicitly rejected this dual approach; the evil, he said, was monopoly power, in whatever form.[228] But this vigorous attack on monopoly power per se was limited to true "monopolies" in the classic sense. And the subsequent cigarette and movie cases hinged not merely on the market power conveyed by size and integration, but on the *intent* to exclude competitors.

Probably no single case has been more responsible than the criminal and civil suits against A & P [229] for the widespread but erroneous impression that

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the Court held that the consolidation affected manufacturing, not interstate commerce. The resulting consolidation enjoyed at least as effective a monopoly power as the loose price-fixing agreement in *Trans-Missouri Freight*, and a far greater share of the market than was covered by the market sharing agreement condemned in Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899). Here was an early version of the double standard: a price-fixing or market sharing agreement is illegal per se because it restrains trade directly; a consolidation cannot be reached because it influences commerce only indirectly. HANDLER, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS 40, 46-7 (TNEC Monograph 38, 1941).

225. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

226. See STOCKING & WATKINS, MONOPOLY AND FREE ENTERPRISE 276 (1951). Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933) sought to eradicate this double standard, basing its evaluation of a restrictive agreement on its market power: "We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants. . . ." *Id.* at 376. However, United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) re-established the double standard: so far as "loose" combinations were concerned, measurements of market power were held unnecessary. See HANDLER, *op. cit. supra* note 224, at 33-4, 85-6.

For a documentation and criticism of the double standard in the more severe treatment of group boycotts than of individual refusals to sell, see Comment, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1136-41 (1949).

227. Since four Supreme Court Justices disqualified themselves from sitting, the circuit court of appeals was constituted the court of final jurisdiction by special statutory enactment. 15 U.S.C. 6A, par. 29. 28 U.S.C. § 2109 (1946).

228. Judge L. Hand said it would be "absurd" to condemn unconditionally price-fixing conspiracies "and not to extend the condemnation to monopolies." 148 F.2d 416, 428 (2d Cir. 1945).

229. United States v. New York Great Atlantic & Pacific Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949); Civil Action No. 52-139, S.D.N.Y., Sept. 15, 1949 (divestiture and dissolution proceedings). "When one examines in detail the 'abuses,' they turn out to be only a complicated way of describing size, efficiency and integration." Adelman, *Rejoinder on the A & P Case*, 15 J. OF MARKETING 219 (1950). See also Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A & P Case*, 58 YALE L.J. 969 (1949).

the law now condemns integration and size.[230] Admittedly, the courts inadequately differentiated the economically beneficial and legally "reasonable" from the undesirable and unreasonable aspects of A & P's organization and tactics and their consequences. However, even a hasty perusal of the district court's opinion should satisfy any fair reader that the impression is essentially an illusion. To be sure, A & P would probably have escaped antitrust prosecution had it not also been large, integrated, and aggressive. But it was not convicted on these grounds. According to the court, the Government had contended, and would have to prove "that the size of A & P, its integration . . . were so *employed* as to bring about inevitably unreasonable advantages. . . . The charge is that defendants have so *utilized* their power and integration as unreasonably to restrain commerce."[231] Certainly this is what the court thought the Government had proved. The opinion is replete with clear-cut disavowals of hostility to size and integration alone.[232]

It seems impossible to doubt that the court conscientiously tried to apply a rule of reason in the *A & P* case, and to differentiate mere size and integration from abuse of the power that they conferred. The court's analysis of A & P's operations centered on the sources and uses of the company's "headquarters profits." Scattered references to the "subsidization" of retail operations by these "profits," particularly those referring to the "profits" from manufacturing, appear to betray a basic hostility toward vertical integration itself. But the discussion consists almost entirely of a demonstration that all but the "profits" from manufacturing were tainted in their source—being the product of coercive bargaining—and all were deliberately misused at the retail level.[233]

According to the "new critics" of the Sherman Act, A & P would not have been condemned under the "old" rule of reason. Competition may be fostered by big

230. See Adelman in 1951 SYMPOSIUM 143-7; Adelman, *Integration and Antitrust Policy*, 63 HARV. L. REV. 27 (1949). Spengler, *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347 (1950). See sources cited in notes 103 and 229 *supra*.

231. 67 F. Supp. 626, 642 (E.D. Ill. 1946) (emphasis added).

232. *Id.* at 630-1, 638.

233. See Dirlam & Kahn, *Integration and Dissolution of the A & P Company*, 29 IND. L.J. 1 (1953). Thus, significantly, Judge Lindley has very little to say about manufacturing operations themselves, which, considered in isolation, were certainly unexceptionable.

A quantitative breakdown of the district court's opinion shows clearly where the heaviest stress was placed. A factual analysis of the defendant's operations covers 29 pages distributed in the following manner: persistent efforts after 1936 to receive the equivalent of brokerage from suppliers (3 pages); systematic quest for discriminatory concessions bearing no relationship to savings in cost or the performance of functions (9 pages); practices of A & P's buying subsidiary, the Atlantic Commission Co. (ACCO), which also acted as broker for the trade, particularly emphasizing ACCO's abuse of its monopsonistic and monopolistic powers (9 pages); retail policies which exhibited instance after instance of manifestly predatory local price cutting, operation of individual stores and regions "in the red," etc. (8 pages).

buyers bargaining hard with suppliers or cutting retail margins, even if selectively. The antitrust laws did not interfere with this impure yet competitive market behavior as long as the rule of reason took into consideration the market results, and not merely the unfair disadvantaging of smaller competitors. There was no evidence that A & P had achieved any substantial monopoly power, or that its retail and bargaining tactics had seriously jeopardized competition in the retail grocery business. It is therefore difficult to construct a positive defense of the A & P decision in purely economic terms. Nevertheless, in terms of the values of a free enterprise system, many of the company's actions were indefensible. A & P may not have enjoyed substantial monopoly power in most of its markets; yet in some, where it controlled a very large share, it must have had some such power; and it unquestionably enjoyed and abused certain kinds of "power."[234]

The appropriate question, then, is whether or not the *A & P* case has brought to light a conflict between the requirements of workable competition and the mores of a free enterprise system.[235] The conflict is not a serious one. The contributions to superior economic performance by those activities of A & P which are now clearly illegal were relatively unimportant when compared with the legitimate contributions of its integrated organization and operations.[236] Against the possible contributions to workable competition by A & P's pressure on suppliers for discriminatory preferences and its selective local price cutting must be weighed the exploitation of weaker suppliers, and

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234. See Hirsch & Votaw, *Giant Grocery Retailing and the Antitrust Laws*, 25 J. of Business 1 (1952).

235. Appraisal of this apparent conflict is impossible on *a priori* grounds. Having labelled big buyers in general as practitioners of "countervailing power," and having defined the latter as offsetting "original" power, hence beneficent, Galbraith is able to write at length and with conviction about the *A & P* case with only minimal reference to the facts. Galbraith, American Capitalism cc. 9-10 (1952). In much the same way, he is able to explain the rise of unions in terms of countervailing power. "As a general though not invariable rule there are strong unions in the United States only where markets are served by strong corporations." *Id.* at 122. He failed to point out that four of the six biggest national unions in the United States today are the teamsters, carpenters and joiners, machinists, and mine workers.

"Countervailing power" is not always or necessarily beneficial, unless one defines it so. The same power may be used to "countervail" or to exploit. It may be used in a way which in the end benefits the consumer, or it may be exercised only in the interest of its possessor. It may enhance competition; it may, by its spread, result in the comprehensive cartelization of the corporate state. It is difficult to distinguish the latter outcome from the one Galbraith has in mind in suggesting that the solution for all problems of power is counterorganization on the other side of the market. When everyone is organized, all power is countervailing, and the only possible arbiter is the government.

236. See Dirlam & Kahn, *Antitrust Law and the Big Buyer: Another Look at the A & P Case*, 60 J. Pol. Econ. 118 (1952). However, there is no justification for divestiture of the manufacturing divisions; the competitive advantages they conferred were legally and economically unexceptionable.

the discouragement to new entrants and to retail competition posed by discriminatory sharpshooting designed to demonstrate to the grocery that dares to open in an A & P town "that they have no place in the supermarket business in Richmond."[237] The industry's performance is likely to improve rather than suffer if A & P is broken up in order to reduce its power to engage in unfair competition. As in the retailing of gasoline, so in groceries, the large-volume, low-margin outlet was an innovation of local independents, not the great chains. To the extent that grocery chains are denied recourse to price discrimination and to the resources of parents and affiliates, the opportunities for such independent entry are enhanced, and the chains themselves might be forced into more drastic and socially more beneficial adjustments to meet competition.

Vertical Integration and "Specific" Intent

The "new" Sherman Act, like the "old," condemns vertical integration only when it represents a device for extending monopoly power from one stratum to another.[238] Very little is required in the way of a demonstration of market consequences, if a course of conduct may clearly be characterized as betraying such an intent to monopolize. On the other hand, if a course of conduct cannot be so clearly characterized, the "new" Sherman Act reserves its censure for actions or structures that threaten to impair the effectiveness of competition in the market regarded as a whole. Thus, in *Yellow Cab* the defendants' stock purchases did not reveal an intent to monopolize,[239] and, since the impact on market competition was minimal, the Government eventually lost the case.[240] Similarly in *Columbia Steel*,[241] the Supreme Court established beyond all question that in the presence of legitimate business reasons for the acquisition of a customer, vertical integration [242] is not invalid merely because it shuts competitors out of three percent of a market.[243] However, the Court recognized that "legitimate" intent would not exonerate mergers with truly substantial overall market consequences, and therefore grappled conscientious-

237. 67 F. Supp. 626, 669 (E.D. Ill. 1946).

238. See discussion in Hale, *supra* note 61, at 923-27. See also Comment, *Vertical Forestalling under the Antitrust Laws*, 19 U. of Chi. L. Rev. 583, 584-6 (1952).

239. 80 F. Supp. 936, 942 (N.D. Ill. 1948).

240. 338 U.S. 338 (1949).

241. United States v. Columbia Steel Co., 334 U.S. 495 (1948).

242. We confine our discussion to the vertical integration aspects of the merger. To some extent, U.S. Steel and Consolidated, two of the defendants, were also competitors in the fabricated steel market.

243. Note the contrast with International Salt Co. v. United States, 332 U.S. 392 (1947), where the action itself was suspect, and the required test of consequences therefore minimal; and with United States v. Richfield Oil Corp., 99 F. Supp. 280 (S.D. Cal. 1951), *aff'd per curiam*, 343 U.S. 922 (1952), where requirements contracts involved a share of the entire West Coast gasoline market, see note 123 *supra*, comparable to the share of the regional market at issue in *Columbia Steel*.

ly with the economic facts to see whether or not the defendant's acquisition would have "the effect . . . [of] unreasonably restrict[ing] the opportunities of competitors to market their product."[244]

Columbia Steel was based on questionable findings of fact. In ascertaining the intent underlying the acquisition, the Court essentially accepted at face value U.S. Steel's contention that it had to control an outlet for its Geneva output.[245] Moreover, in terms of the size, origin and already substantial power of U.S. Steel, and the pattern of limited competition that has for decades characterized the steel industry,[246] the market consequences of the acquisition should have been apparent. However, the blessing which the Attorney General previously conferred on the disposal of the Geneva plant to U.S. Steel unfortunately confined the instant case to the narrower question of the legality of the one subsequent acquisition.[247]

Given the limited issue, the Court might still have interpreted the facts differently.[248] It might well have concluded that the social drawbacks of permitting the dominant steel company to *acquire* rather than to construct a controlled outlet more than offset "the legitimate business reasons" for choosing the former course. Certainly the Federal Trade Commission, in enforcing the amended Section 7 of the Clayton Act,[249] should make precisely this kind of

244. 334 U.S. 495, 524 (1948). "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition . . . the probable development of the industry, consumer demands, and other characteristics of the market. We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.* at 527-8. The one criterion applied by the Court which is omitted from the foregoing quotation is the one of intent: "whether the action springs from business requirements or purpose to monopolize." *Ibid.* Under the "new" Sherman Act this consideration is alternative to the other; if the intent is to exclude, the action is objectionable if any appreciable dollar volume is affected. As the majority opinion put it, an individual acquisition is illegal if it "results in or is aimed at unreasonable restraint." *Ibid.* See the clear statement of this legal criterion in United States v. Reading Co., 226 U.S. 324, 370 (1912). See also note 105 *supra.*

245. In contrast, the dissenting Justices condemned the merger because it was a "purchase for control" in avoidance of competition. *See* 334 U.S. 495, 537 (1948).

246. See ADAMS, THE STRUCTURE OF AMERICAN INDUSTRY c. 5 (1951).

247. The Court mentioned the long history of acquisitions by U.S. Steel, offered by the Government to support its charge that the purchase of Consolidated was only one link in a chain of "monopolizing." But, without ever really appraising that record, it turned its attention immediately to the intent underlying the Consolidated merger alone, finding it a reasonable supplement to the Geneva purchase. 334 U.S. 495, 532 (1948).

248. One of the economic criteria suggested by the Court was the effect of the merger on the opportunities of competitors. For the evidence, not presented to the Court, that the acquisition of Consolidated was a direct and heavy blow to Kaiser, see Comment, *Vertical Forestalling under the Antitrust Laws,* 19 U. OF CHI. L. REV. 583, 591-2 n.62 (1952).

249. See note 257 *infra.*

appraisal of the relative economic merits of mergers *versus* expansion by construction of new facilities.[250]

The dissenters in the second *Yellow Cab* case would have relieved the Government of the necessity of demonstrating a "specific intent" to monopolize, and retained the attenuated requirement of competitive impact accepted in the *International Salt* and first *Yellow Cab* cases. They would have had the decision turn on whether or not "the freedom of the taxicab companies to buy taxicabs has been hobbled by the defendants' business arrangements. . . ."[251] Since vertical integration by merger ordinarily "hobbles" the subsequent freedom of choice of the merged firms, the dissenters apparently seek the complete abolition of the rule of reason applied to such acquisitions. However, a good case can be made for upholding the Government's complaint in *Yellow Cab*, even under the rule of reason. Here, as in *Columbia Steel*, we have the phenomenon of mergers for "ordinary business reasons" which may none the less be economically undesirable, even though it is difficult to prove a substantial resultant impairment of the force of competition in the market as a whole. The rule of reason does not preclude asking what socially beneficent considerations might justify a taxicab manufacturer's acquiring control of a number of operating companies, most of which held monopolies in their respective local markets. And if, as appears to have been the case here, the operating companies, after the transfer of financial control, began to buy the higher-priced cabs of the acquiring manufacturer exclusively, the economist may wonder whether the cab rider did not eventually pay higher prices; and the judge may well agree with the Government that the defendants had effected an unreasonable restraint by using vertical integration to extend the benefits of monopoly from one market to another.[252]

The Inevitability of a Double Standard

Restrictive agreements and the exertion of monopolistic leverage reveal a manifest intent to exclude or unfairly handicap competitors, which is not neces-

250. It would be advantageous if "the limitation of [business] size applied to mergers only and the growth of the single concern, by acquiring more customers, were permitted without limit." Clark, *The Orientation of Antitrust Policy*, 40 AMER. ECON. REV. SUPP. 93, 96 (1950).

251. United States v. Yellow Cab Co., 338 U.S. 338, 343 (1949).

252. Professor Spengler has demonstrated that vertical integration should make for lower, not higher, prices when suppliers with monopoly power are merged with customers downstream. *Vertical Integration and Antitrust Policy*, 58 J. POL. ECON. 347-52 (1950). However if, as is the case in most businesses, a downstream monopolist's pricing formula before merger was on a cost-plus basis, a supplier who gains control of that customer may be in a position to insert a monopoly surcharge which will be passed on to the customer. The supplying firm is particularly likely to do so if the financial interest of its managers in the downstream affiliate is less than in the manufacturing end of the business. The "Spengler effect" occurs only to the extent that intermediate goods are passed between affiliates at cost.

sarily present in cases involving vertical integration. The *Griffith* case involved manifestly exclusive tactics; an integrated theater chain *used* its bargaining power and market leverage to obtain unfair advantages over competitors. What was true of the tactics of the Griffith chain was also true in a sense of the condemned activities or contracts in *Standard Stations, Richfield, American Can, International Salt,* and even *National City Lines.* The company policies producing these contractual provisions or understandings were exclusionary on their face. Moreover, the defendants could have achieved most of the economically legitimate benefits without the *imposition* of restrictive, exclusive clauses. Condemnation, therefore, required—and in *Times-Picayune* should have required—demonstration of a lesser degree of competitive impact than in the case of vertical integration. In *Columbia Steel* and *Yellow Cab,* on the other hand, any handicaps imposed on competitors were merely the incidental consequences of integration by merger. The intent underlying vertical integration by merger is seldom clearly exclusionary. It may have other, socially acceptable purposes and consequences. Only if market leverage is exerted to force the transaction, or, after the merger has occurred, to put competitors at an unreasonable disadvantage is a virtually per se condemnation, similar to that of restrictive agreements, either legally or economically justified. This is the inescapable double standard.[253]

Critics of the *Columbia Steel* and second *Yellow Cab* decisions on the one hand, and of *Standard Stations* and *National City Lines* on the other, join in arguing that it is inconsistent to permit a firm to do by financial acquisition what it may not do by contract.[254] The criticism has considerable force. It supports the logic of the recent amendment to Section 7 of the Clayton Act, or to proposed amendments which would condemn excessively monopolistic market structures.[255]

253. The line between *National City Lines* and *Yellow Cab* is in many ways so fine as to be nearly invisible. In both, a supplier provided long-term capital and obtained in exchange exclusive supply arrangements. Even the evidence bearing on intent was strikingly similar; in both, apparently, financial difficulties of the customer companies provided the occasion for seeking capital of the suppliers; in both it was alleged that the suppliers had purchased the stock at inflated values. The "standards" of competitive impact were identical.

The only differences were that (a) the supplier was a group of non-competing "conspirators" in *National City Lines,* and one manufacturer in *Yellow Cab*; (b) formal financial and managerial consolidation took place in *Yellow Cab* but not in *National City Lines*; and (c) apparently the courts found something more in the way of evidence of a concert and plan of action by the supplier defendants with the primary purpose of obtaining exclusive supply contracts in *National City Lines* than in *Yellow Cab.*

254. *See* the dissent of Justice Douglas in United States v. Standard Oil Co., 337 U.S. 293, 315 (1949); McLaren, *supra* note 129, at 143.

"Not the incidence of objectionable market control, but the adventitious possibility of forcing a situation into a familiar legal mold, controls our antitrust policy." Adelman, *Effective Competition and the Antitrust Laws,* 61 HARV. L. REV. 1289, 1349 (1948).

255. See, *e.g.*, the draft of a statute submitted by Walter Adams to the Celler Comm. *Hearings,* Ser. 14, pt. 2B, 1600; the proposal of George Stigler, *id.*, pt. 4A, 133-4; also

But any attempt to apply to integration, even if by merger, the same treatment as the new Sherman Act applies to exclusive dealing imposed by a dominant firm ignores an essential element of a profit system. If a company is willing to assume the risks of ownership, it must be permitted a wider measure of control than where it is contracting with independent parties. Investment cannot be equated at law with coercion and exclusion. It would also be economically disastrous to deny to a big business the right to produce for its own needs or to do its own marketing; to utilize some by-product idea or material in a new field; or to enter some new market, perhaps by acquiring a firm already there. Such integration is a prime source of economic progress, and effective competition. The achievement of such differential advantages by coercion of suppliers into discriminatory preferences, or of marketers or customers into exclusive arrangements, does not make a comparable contribution.[256]

For this reason, it is inconceivable that the courts will apply the same test of competitive impact under the amended Section 7 of the Clayton Act [257] as they now do in Section 3 cases. The Senate Committee reported that the amended Section 7 "would not apply to the mere possibility but only to the reasonable probability of the prescribed effect. . . ."[258] Even apart from this evidence of congressional intent, the courts will continue to require a broader consideration of overall economic consequences in cases involving mutually agreed-upon transfers of property, particularly those motivated by an intent to increase competition, than in cases where defendants have made coercive

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Bowman, *Toward Less Monopoly*, 101 U. OF PA. L. REV. 577 (1953). I do not reject such proposals. My contention is only that such economic criteria can never play more than a subsidiary role in a general antitrust law, whose purpose is to provide general rules of business conduct appropriate to a free enterprise system. Particularly in the case of mergers, which represent no new investment for society, it may be entirely appropriate to apply standards of probable economic effect. But even here the test will have to be in part the traditional one (what were the contracting parties doing or trying to do?) rather than merely the economic one (is the result of what they are proposing likely to be "good" or "bad"?). This view is supported by the approving quotation from *International Shoe*, refusing to condemn a merger "not with a purpose to lessen competition," in the Initial Decision of the FTC Hearing Examiner in the *Pillsbury Mills* case, under the amended § 7; Dkt. 6000 (filed April 22, 1953). See Comment, *Vertical Forestalling under the Antitrust Laws*, 19 U. OF CHI. L. REV. 583, 611 n.173 (1952).

256. If, for example, a powerful buyer is denied the right to demand discriminatory concessions, this is all the more reason why he should be permitted to "roll his own" in order to circumvent the monopoly power of suppliers.

257. "No corporation engaged in commerce shall acquire . . . the whole or any part of the stock or other share capital and no corporation . . . shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 64 STAT. 1125 (1950), 15 U.S.C. § 18 (Supp. 1952).

258. SEN. REP. No. 1775, 81st Cong., 2d Sess., 6 (1950).

use of market leverage to exclude competitors.[259] It is doubtful, therefore, that "the new law repeals . . . the rule of reason."[260]

Conclusion

The underlying assumption of our antitrust laws is that competition cannot long remain effective if it is not also regulated in such a way as to keep it a fair contest on the basis of efficiency in serving the public. The laws seek to preserve both fairness and effectiveness by prohibiting collusion, unreasonable agglomeration, the wielding of massed power, and exclusive practices which suppress or pervert the competitive process. It is doubtful that economics supplies any more effective criteria of unreasonable restraint or undesirable monopolization than these traditional legal concepts. The "new critics" of antitrust argue that it is possible for exclusive, coercive or discriminatory contracts or actions to contribute to workable competition and economic progress.[261] Although a plausible *a priori* case can be made for this contention, the economic evidence is by no means convincing. Attempts to demonstrate the beneficial consequences of discrimination and exclusive systems of distribution are usually confined to an exposition of their undeniably com-

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259. See Eaton, *Joint Ventures* in 1952 SYMPOSIUM 139. The Committee's statement applies, strictly, to the required degree of proof rather than to the scope of the required economic investigation, as Lockhart and Sacks have pointed out in another connection, *supra* note 113, at 939. But the two inquiries are related. If it were necessary to demonstrate merely that a merger *might* possibly injure competition, a narrower inquiry would suffice; the demonstration of a reasonable probability of injury calls for a balanced appraisal of the net impact on the market as a whole.

See also the initial decision in the *Pillsbury Mills* case, note 255 *supra*, and the analogous case before the FCC involving the proposed merger of United Paramount Theaters and the American Broadcasting Company. A majority of the Commission sanctioned the merger, on the ground that it would create a strong competitor to CBS and NBC in radio and television, and would be prevented by its competitors both in television and in motion picture exhibition from exercising any monopolistic restriction in either field. In short, it looked to the probable effects on competition in the market as a whole. In her dissent, Commissioner Hennock looked instead to the immediate suppression of competition *between* the merging parties, and cited Morton Salt Co. v. FTC, 334 U.S. 37 (1948), as supporting her view that Section 7 requires the demonstration only of a " 'reasonable possibility' that the merger may lessen competition." FCC Dkt. 10046 (February 9, 1953).

260. Adelman in 1951 SYMPOSIUM 149. See also Carson, *Corporate Merger* in 1952 SYMPOSIUM 172-5 (supporting my view).

261. It has been argued, for example, that the exclusive arrangement permits an ethical manufacturer to ensure careful fitting and intelligent prescription of hearing aids and thus to avoid the evils of "self-service" or "5 and 10 cent store distribution" in a field where the customer needs expert advice and protection from his own ignorance. The question remains whether exclusive dealing is either a *necessary* or a *sufficient* condition for achieving these desirable ends. As for the former, ethical manufacturers might still refuse to sell to 5 and 10 cent stores. As for the latter, see the stipulations as to the facts, and the agreements to cease and desist from alleged misleading advertising in the cases of Beltone Hearing Aid Company, Dictograph Products, Sonotone Corporation, and Microtone Company, FTC Stipulation Nos. 8269, 8277, 8278, 8279 (June 14, 1952).

petitive aspects: the supplier is forced to reduce his price selectively to get the business;[262] the manufacturer imposes exclusive dealing to cut costs or intensify his selling effort.[263] On the other hand, opponents of such practices usually confine themselves to a demonstration of their anti-competitive aspects: the supplier maintains his price to less powerful or fortunately situated buyers; exclusive dealing excludes competitors. Both arguments are inadequate.

The conclusion drawn from the foregoing appraisal of leading antitrust cases of the last ten years is that the traditional presumption against exclusive tactics and systematic discrimination remains at the core of the law, and is a justified one. A free enterprise system cannot tolerate substantial and persistent disparities between reality and the ideal of a fair field and no favors. Inevitable differences in competitive strength and threats to free competition on the basis of efficiency are created by inequalities in access to capital, and by the inherent competitive advantages of size, established position, and integration. The "new" Sherman and Clayton Acts intervene only when these advantages and these threats are compounded through coercion, exclusion, and systematic discrimination; it would require more convincing demonstrations that these tactics are necessary for effective competition than have hertofore been offered, to prove that the economic theory of the "new" Sherman and Clayton Acts is unsound.

262. Even selective price reductions offered in good faith may conceivably be objected to on the ground that they permit powerful sellers, enjoying the earnings from a broader market, in effect, to discipline unruly smaller price cutters or at least to subject them to unfair competitive pressure. Thus, in a number of cases, the FTC has taken the position that an illegal "injury to competition" occurs if a big seller succeeds in taking customers away from competitors by offering selective price concessions. See Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert. denied*, 344 U.S. 206 (1952); Brief for the Commission, pp. 16-17, Curtiss Candy Co., Dkts. 4673 and 4556 (Nov. 29, 1945). The attack on such price differentiation should surely be required to make a more convincing showing of substantial effect than the Commission has been demanding.

263. However it is difficult to avoid the conclusion that current pressures for exclusive dealing in electrical appliances, for example, are aimed primarily at halting the "chaos" of severe price competition at the retail level. See *Appliances Head for a Showdown*, Business Week, July 18, 1953, pp. 66-8.