POTENTIAL IMPAIRMENT OF COMPETITION—THE
IMPACT OF *STANDARD OIL CO. OF CALIFORNIA*
V. UNITED STATES ON THE STANDARD OF
LEGALITY UNDER THE CLAYTON ACT

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Monopoly survived the bite of the Sherman Act of 1890 in part because the courts held that the prohibition of "restraint of trade" covered only "unreasonable" restraints, and further that a restraint was not unreasonable if imposed for recognized business purposes and without obviously bad economic consequences. The Clayton Act of 1914 was supposed to put teeth in the old Sherman Act gums by specifically naming and prohibiting the worst restraints: price discrimination, exclusive dealing, and mergers of competing companies through acquisition of stock control. The defenders of the *status quo* succeeded in writing into the Clayton Act a limitation to cases

Where the effect . . . may be to substantially lessen competition or tend to create a monopoly.

Still, this was not too bad. It seemed to limit inquiry to "effect," ruling out justification by motive or intent, and it clearly referred to potentiality of harm rather than actual effects as the criterion of legality. How the courts, in the years after 1914, read the Sherman Act "rule of reason" into the Clayton Act standard of legality is an old story partly retold in the pages that follow. *Standard Oil Company of California v. United States*,¹ however, marks the culmination of a noticeable recent tendency to reaffirm the distinctive standard of the Clayton Act.

The case created a curious division in the Supreme Court, as might be expected in a day of uncertainty as to the meaning and continued validity of the old ideal of competition. As acute and positive a judge as Jackson could profess doubt whether an exclusive dealing contract was "a device for suppressing competition" or for "waging competition." "Conservative" Justice Frankfurter wrote the majority opinion striking down the device as anti-competitive, with "radical" Justice Douglas dissenting. An analysis of these divergent views will be helpful in determining the true impact of the decision, after which it is proposed to consider its probable effect on the interpretation of the Clayton Act standard of legality in relation to mergers and price discrimination, as well as exclusive dealing.

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1. 337 U. S. 293 (1949).

Standard Oil Co. of California was the largest seller of gasoline in the Western Area,² accounting for 23% of the total gallonage. Of this 6.8% was sold through company-owned service stations and 6.7% (\$58,000,000 of annual business) through "independent" stations bound by contract to purchase all their gasoline from Standard. Standard's six leading competitors, who also employed the exclusive outlet device, handled approximately 42.5% of the gasoline sold in the Western Area, the remaining business being divided among more than 70 smaller suppliers. In 1948 only 1.6% of the service stations in the Area were "split-pump" stations, handling gasoline of more than one supplier. The 5937 "independents" under exclusive dealing arrangements with Standard constituted 16% of the retail gasoline outlets in the area. Standard's exclusive dealing contracts extended in some cases to tires and other automobile accessories, covering about 2% of that business in the Western Area, with another 2% being handled through company-owned stores.

A contract by which a dealer agrees to buy all his requirements from one supplier is plainly within the language of the prohibition in Section 3 of the Clayton Act,³ a "contract for the sale of goods . . . on the condition, agreement, or understanding that . . . the purchaser shall not use or deal in the goods . . . of a competitor." And Judge Yankwich in the District Court held that a contract system covering so large a volume of business and excluding suppliers from so many retail outlets did lessen competition substantially. He excluded as immaterial testimony offered by Standard as to the business reasons for the arrangement, and refused to make findings on the basis of admitted evidence showing that Standard's comparative position in the gasoline market had actually deteriorated slightly during the period while exclusive supply contracts were employed. The opinion rejected the notion that exclusive supply contracts are "illegal per se" and seemed to call for a judicial inquiry into the "actual" economic effect of the device.⁴ But the rulings on admission of evidence and the findings show that the inquiry was limited to a determination of the volume of business covered by the contract ("a substantial segment") and the relative position of Standard in the market. Perhaps the holding can be fairly summarized as follows: exclusive supply contracts affecting a substantial amount of business are illegal per se when employed by a seller who is the major, although not necessarily dominant, factor in the market.

2. The states of Arizona, California, Idaho, Nevada, Oregon, Utah and Washington.

3. 38 STAT. 731 (1914), 15 U. S. C. § 14 (1946).

4. United States v. Standard Oil Company, 78 F. Supp. 850, 863-864 (S. D. Cal. 1948).

The Supreme Court of the United States affirmed the decision in an opinion by Mr. Justice Frankfurter. He reviewed the Court's previous interpretations of the Clayton Act standard and pointed out that prior to *International Salt Company v. United States*⁵ some showing of dominance of the market had been necessary to establish the tendency of tying clauses to substantially lessen competition. In that case, however, the Court had enjoined enforcement of provisions in International's leases of patented salt dispensers requiring the lessee to dispense only International salt through the leased machines. Although International was the largest seller of salt for industrial purposes, the record did not show that it "dominated" either the industrial market for salt or the dispenser business. Upon a showing that \$500,000 of salt had been sold under the challenged leases in one year, the tying clauses were held invalid, and Mr. Justice Jackson had written that it was "unreasonable per se to foreclose competitors from any substantial market."⁶ That case might have been regarded as controlling, but Mr. Justice Frankfurter did not treat it so. The circumstance of International's patent control and the economic distinctions between "tying" and requirements contracts might be enough to distinguish the two cases. Patent control could be said to have given the patentee "domination" of the salt business of those who must use the patented dispenser, and doctrines independent of the antitrust laws can be employed to hem in the patentee who so abuses the monopoly privileges conferred by the patent.⁷ Tying can rarely serve any purpose except to suppress competition, while requirements contracts, it was said, might be to the buyer's as well as the seller's advantage, assuring the former a constant supply of goods at a definite price without the financial burden of a large inventory.⁸ Accordingly, evidence sufficient to establish that a tying clause tends to substantially lessen competition might not support the same conclusion regarding a requirements contract.⁹

Nevertheless, Justice Frankfurter felt compelled to carry over to exclusive dealing contracts the strict rule formulated in the

5. 332 U. S. 392 (1947).

6. *Id.* at 396.

7. *Morton Salt Co. v. Suppiger*, 314 U. S. 488 (1942).

8. At this point in the discussion Justice Frankfurter was obviously thinking of a contract by which the seller guarantees to supply the buyer's requirements. There is no economic advantage to a buyer in a contract limiting him to a single source of supply, which is the specific issue presented by the ordinary Section 3 case. The distinction between the two can best be kept in mind by speaking of the restrictive aspect of the arrangement as an "exclusive dealing contract" rather than a "requirements contract."

9. On this basis a Note in 49 *COL. L. REV.* 241 (1949) argues for a dual standard of legality under section 3: a comparative substantiality test for exclusive dealing and an absolute substantiality test for tying contracts.

International Salt case for tying clauses, thus foreclosing, in a case where the restrictive device is applied to a substantial segment of the trade, inquiry into such questions as whether competition has increased or diminished during the exclusive dealing period, whether the contract is being employed by established oligarchs in the trade or against them, and whether the contracts are reasonable in duration considering the business needs of the particular line of commerce. The majority's refusal to compel consideration of such matters was based on two grounds: (1) The result of such inquiries would be inconclusive; no one could ever know whether Standard had maintained its relative position as against its leading competitors by means of the exclusive supply provisions or whether abolition of these contracts would increase competition in view of alternative and possibly legal methods open to Standard for preempting retail outlets; (2) Inquiry into the economic merits of exclusive supply contracts, would be tantamount to an investigation of their "reasonableness," reviving the very issue which had rendered the Sherman Act ineffective against well known restrictive devices, and which Congress intended to remove by the Clayton Act.¹⁰ The trial court, therefore, had properly refused to hear or consider evidence as to the actual effects and economic justification of Standard's practices.

The demonstration that a broad economic inquiry would be impractical and contrary to Congressional intent justifies the District Court's exclusion and disregard of evidence that Standard's hold on the market had declined during the exclusive dealing period. It does not, however, furnish support for the necessary affirmative finding that exclusive dealing was likely to impair competition substantially. Here the majority logic falters: "We conclude, therefore, that the qualifying clause of § 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected."¹¹ This conclusion certainly does not follow from the discussion which immediately preceded it, sustaining the trial court's exclusion of evidence. It states the holding in such a fashion as to lead Justice Jackson to protest against treating proof of the quantity of commerce covered by the contracts as proof of their "forbidden quality," *i. e.*, that there was a causal relationship between the contracts and an observed or anticipated lessening of competition. It invited Justice Douglas' alarm, since a 2% share of the automobile accessory market is treated as "substantial" under the rule, apparently without regard to whether

10. *United States v. United Shoe Machinery Co.*, 247 U. S. 32 (1918); H. R. REP. No. 627 on H. R. 15657, 63d Cong., 2d Sess. 10-13 (1914); *United Shoe Machinery Co. v. United States*, 258 U. S. 451 (1922).

11. 337 U. S. 293, 314 (1949).

this is held by a powerful corporate giant or a newcomer breaking into a market dominated by others.¹² It does not follow the suggestion in the body of the opinion that the basis for the necessary affirmative finding as to the effect of the contracts is the fact that the relative and combined positions of Standard and its competitors in the gasoline market had remained nearly constant for some years, from which "it would not be farfetched to infer" that they had "collectively, even though not collusively" prevented late arrivals from breaking into the market.¹³

A further doubt whether "foreclosure from a substantial share" aptly expresses the holding of the *Standard Oil* case arises from the significant shift in the theory upon which the injunction was sustained in the Supreme Court. The District Court opinion can indeed be read in support of the "substantial quantity affected" theory, for there the case was treated as one of *actual* injury to competition measured by the amount of business done under Standard's exclusive supply contracts. This "appreciable segment" of the trade was said to have been fenced in, and comparisons were made with the boycott cases. But the Supreme Court affirmed on the basis of *probability* of impaired competition: "such a potential clog on competition as it was the purpose of Section 3 to remove wherever, were it to become actual, it would impede a substantial amount of competitive activity."¹⁴ Clearly, if the amount of commerce affected determines the harmful character of a restrictive device, there was no question of possibilities or probabilities in this case. The amount of commerce affected was known, measured by the gallonage sold under the suspect contracts. The Supreme Court, like the District Court, would have weighed the substantiality of the actual restraint. Instead, despite uncontested proof that the restrictive contract applied to 16% of the western service stations and some 65 million dollars of annual business, Justice Frankfurter held only that the potentiality of impaired competition required an adverse ruling. As will be more fully shown, the majority decision can be rested more securely on the facts of Standard's position in the trade rather than on the declared rule as to exclusion from a substantial quantity of commerce.

12. At one point Justice Frankfurter's opinion seems explicitly to exclude this consideration. *Id.* at 308.

13. It is not surprising that the opinion merely suggests this, for Judge Yankwich had drawn no such inference and had even deliberately refused to make the factual findings as to relative position of Standard and its competitors, from which such an inference might have been drawn. He was asked to reconsider his original decision on the ground that *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948), which had just been decided, required legality to be determined with reference to "competitive setting" rather than the mere quantity of commerce restrained. See Standard's Brief in the Supreme Court, pp. 48-52, and Record, pp. 142-157.

14. 337 U. S. 293, 314 (1949).

Justice Jackson, speaking also for the Chief Justice and Justice Burton, saw no way of deciding whether exclusive supply contracts tend to substantially lessen competition except by considering evidence of the sort offered by the defendant. He would, therefore, have vacated the decree with a direction to complete the case by hearing evidence as to the actual effect of the practice. If the contracts were to be judged without such evidence, Justice Jackson thought them "an almost necessary means" of maintaining the all important competition between the oil companies. The majority decision is characterized as applying the "lash of the antitrust laws" to "a successful method of competing". Jackson argued that the exclusive supply contracts are desirable from the retailer's point of view because they assure him a continuous supply of gasoline to sell, since no supplier would be willing to guarantee continuous supply to a dealer who was free to buy elsewhere. This reasoning converts an obligation restricting the retailer to a single source of supply into a source of strength to the retailer. To this argument the following observation from the majority opinion seems a complete answer :

If in fact it is economically desirable for service stations to confine themselves to the sale of petroleum products of a single supplier, they will continue to do so though not bound by contract, and if in fact it is important to retail dealers to assure the supply of their requirements by obtaining the commitment of a single supplier to fulfill them, competition for their patronage should enable them to insist upon such an arrangement without binding them to refrain from looking elsewhere.¹⁵

But the main import of Jackson's dissenting opinion is that the individual dealer does not count for much. There is a complete abandonment of the ideal of preserving individual initiative and economic freedom as the aim of the competitive system, a full embrace of the conception of "monopolistic competition" which big business or perhaps the inevitable drift of our institutions seems to be substituting for the Sherman Act ideal. Individual retail gas dealers are mere "conduits" for gasoline, in Jackson's view, without initiative or economic freedom worth preserving—mere "means by which the oil companies compete."¹⁶ This is competition of the sort envisioned by the Miller-

15. *Id.* at 313; *cf.* note 8 *supra*. The dealer in any event should be free to select what seems to him the most desirable relationship; *i. e.*, exclusive or non-exclusive arrangements. The policy of all the leading oil companies to make only exclusive arrangements can hardly be justified on the basis that it is for the dealer's best interest, if it gives the dealer no choice in the matter.

16. *Id.* at 323.

Tydings amendment to Section 1 of the Sherman Act, under which manufacturers prescribe prices for retailers of their goods, and commercial rivalry is safely confined to relations between manufacturers. But the Miller-Tydings amendment was a conscious relaxation of Sherman Act standards, while the Clayton Act provisions here in question were supposed to reinforce the Sherman Act. The combination of prescribed prices and exclusive dealing reduces the "independent" service station to a capitalistic zero. His profit, which supposedly reflects his skill as an entrepreneur in selecting sources of supply and gauging the price at which operation in his own immediate market will be most successful, loses touch with these factors.

Justice Douglas' dissenting opinion is as remarkable. Where Jackson vindicates the exclusive supply contract as an instrument of competition among the oil companies, Douglas eulogizes it as the last bastion of independent retailers, "an inducement for their survival."¹⁷ Douglas treats certain statements in the majority opinion as an invitation to the oil companies to substitute station ownership or "agency" arrangements for the relatively innocuous exclusive supply relationship, and finds in these statements an advisory opinion in favor of the legality of such arrangements.¹⁸ There is indeed little basis in the present state of the antitrust decisions for challenging the legality of a 23% market control not achieved by illegal methods nor employed coercively; but one may doubt whether the majority opinion was intended to foreclose that question, especially in view of the concurrence of such known subscribers to the antitrust philosophy as Justices Black, Murphy and Rutledge. Moreover, the majority decision favors decentralization of control at least to the extent that the companies are forced back upon techniques of expansion which they had found less desirable than the independent exclusive dealer. Under the agency system which preceded it, the companies found themselves burdened with the legal responsibilities of employers in such regards as tort liability, social security taxes and obligation to reemploy veterans,¹⁹ whereas the exclusive dealer set-up gave substantially the same centralized control without these disadvantages.

In this most paradoxical case it is Frankfurter who brushes aside a factitious "independence" of dealers tied to Standard by exclusive supply contracts, thus clearing the way to a direct facing of the issue whether Standard lawfully controls its large share of the western

17. *Id.* at 320.

18. Justice Douglas is more likely to regret his own advisory opinion that "today there is vigorous competition between the oil companies for the market," *ibid.*, a view which would do more to protect the existing structure of the petroleum industry than the abolition of exclusive supply contracts as a competitive weapon for industry leaders.

19. *Cf. Hudspeth v. Esso Standard Oil Co.*, 170 F. 2d 418 (8th Cir. 1948).

business; while Douglas, the apostle of economic liberty on the Court, clings to the fiction of retailer independence despite the realities of company ownership of the land, leases on terms which give the operator little discretion in the operation of "his" business, and the obligation of the dealer to buy exclusively from his lessor. The Douglas opinion must be regarded as only a reiteration of his disappointment with the Court's conservatism in the *Columbia Steel*²⁰ and *Paramount*²¹ cases, where threats to free enterprise graver than the exclusive supply contract did not incur condemnation under the Sherman Act.

Douglas' opinion aside, the basic issue which divided the Court was the kind and amount of evidence required under the Clayton Act to establish that "the effect" of a given restraint "may be to substantially lessen competition." Majority as well as minority proceed on the hypothesis that something more than a mere possibility of impaired competition is required by the Act.²² Both sides agree on the necessity of proof on this issue. However, since the dissenting opinion does take the majority to task for holding exclusive supply contracts "illegal per se" and dispensing with proof of substantial lessening of competition, it will be necessary to demonstrate briefly that the area of disagreement was narrower than the dissent indicates.

In the first place there is not a word in the majority opinion to support the suggestion that exclusive supply contracts are held "illegal per se." The phrase is a part of the common vocabulary of this area of the law and could not have been omitted unintentionally by as precise a draftsman as Justice Frankfurter. The deliberate failure to use the phrase can only mean that the propriety of the exclusive supply contract remains to be determined by the circumstances. This judgment is confirmed by references in the majority opinion to circumstances which in this case could be deemed sufficient to bring the contracts under the ban of the Clayton Act: Standard's leading, although not singly dominant, position in the gasoline business in the area, and the prevalence of the device among the other most powerful oil companies competing with Standard. The first of these circumstances invokes a principle that pervades all the antitrust laws, that legal rights innocent in themselves easily become the instrument of abuse when lodged in the hands of economic giants. Given an enterprise of suffi-

20. 334 U. S. 495 (1948).

21. 334 U. S. 131 (1948).

22. 337 U. S. 293, 300-301 (1949); *but cf.* FTC v. Morton Salt Co., 334 U. S. 37, 46 (1948), espousing the "reasonable possibility" test, with Justices Jackson and Frankfurter dissenting. A legislative declaration of the "reasonable probability" rule seems likely to be enacted by the current Congress. See §4(D) of S. 1008, 81st Cong., 1st Sess., as printed for the Senate on August 8, 1949.

cient size even the elementary legal privileges to contract, to acquire property, to expand one's business in anticipation of expanding demand, have been circumscribed.²³ The importance of industry position in determining whether a given practice has dangerous anti-competitive potentialities has frequently been noted. As Justice Douglas pointed out in *United States v. Paramount Pictures*: "Size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse."²⁴

The second circumstance, general employment of the exclusive supply contracts by all the leading petroleum suppliers, has this significance, that for the great majority of independent service stations there was no opportunity to elect between an exclusive relationship with Company A and a non-exclusive relationship with Company B. Whatever generalizations can safely be made as to the advantage or disadvantage of the exclusive supply contract to the buyer, *some* buyers left to their own devices would undoubtedly prefer to handle more than one brand and to be free to change suppliers at will. Their choice in this regard is plainly more restricted when all the leading suppliers offer only exclusive supply contracts or give preferential treatment to exclusive supply dealers. The impact on dealer freedom is sharper when all companies use the same restrictive device even if it be assumed that they do not act collusively.²⁵

If the *Standard Oil* case is regarded as holding (1) that the inference of adverse effect on competition may be drawn from the sole circumstance of defendant's powerful, though not monopolistic, position in the trade, and (2) that such a defendant cannot justify the employment of *prima facie* restrictive devices by evidence purporting to show the non-monopolistic effects or the business advantages of the practice; then the case falls neatly into a tradition which goes back to the famous *Standard Fashion* case,²⁶ and needs no reliance on the *Inter-*

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

24. 334 U. S. 131, 174 (1948). See Stockhausen, *The Commercial and Antitrust Aspects of Term Requirements Contracts*, 23 N. Y. U. L. Q. 412, 428-431 (1948); Handler, *Unfair Competition*, 21 IOWA L. REV. 175, 223 (1936); Mr. Justice Brandeis, dissenting in *FTC v. Gratz*, 253 U. S. 421, 438, 441 (1920).

25. Cf. *Triangle Conduit & Cable Co. v. FTC*, 168 F. 2d 175 (7th Cir. 1948), sustaining a count under § 5 of the Federal Trade Commission Act, which, without alleging conspiracy, charged that each defendant employed a basing point pricing formula with knowledge that the others were doing the same and with the result that price competition between them was restrained. The case was affirmed by an equally divided court in *Clayton Mark & Co. v. FTC*, 336 U. S. 902 (1949). See *Signode Steel Strapping Co. v. FTC*, 132 F. 2d 48, 54 (4th Cir. 1942). Compare *Ford Motor Co. v. United States*, 335 U. S. 303 (1948) as to effect on free competition in automobile financing of affiliations between each of the Big Three manufacturers with a single finance company. See *Monopolies and Restrictive Practices (Inquiry and Control) Act, 1948*, 11 & 12 GEO. VI, c. 66, §§ 3, 4, applying to groups who "whether by agreement or arrangement or not, so conduct their respective affairs as in any way to prevent or restrict competition."

26. *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346 (1922).

national Salt case, which is distinguishable by the circumstance of patent control. It furnishes a logical answer to the demand of the defendants and the dissenters that some factor in addition to the restraint inherent in the device be found, in order to satisfy the qualifying clause of Section 3. It minimizes the danger of encouraging bigness which alienated Justice Douglas. Finally, it makes good sense in terms of legislative history and the objectives of the antitrust laws, recognizing that small businessmen and newcomers may safely be allowed to use business devices which would be lethal to competition if employed by powerful economic organizations.

EXCLUSIVE DEALING AND TYING

The decision in the *Standard Oil* case condemning exclusive supply contracts when employed by a giant distributor, without further inquiry into the effects of or the business justification for the device, is a reaffirmation under remarkably similar circumstances of the Supreme Court's judgment in *Standard Fashion Co. v. Magrane-Houston Co.*²⁷ That case is better known for its dictum that the word "may" in the Clayton Act standard means probability rather than possibility of impairment of competition, than it is for the holding which, upon analysis, proves to be precisely that the leader in a line of business may not use exclusive supply contracts, and that a court may disregard evidence of the alleged beneficent effects of such contracts under these circumstances.

Standard Fashion Company sought to enjoin Magrane-Houston, a Boston department store, from selling dress patterns of the rival McCall Company. Magrane-Houston had contracted to handle Standard Fashion patterns exclusively for a term of two years. The defendant invoked the then recently enacted Clayton Act, whereupon plaintiff undertook to prove that its contracts were customary in the trade and beneficial alike to manufacturers, dealers and the public. Although the trial judge initially showed some resistance to a broad inquiry into industry practice,²⁸ the evidence took a wide range. Plaintiff's President Scanlon was allowed to explain the advantage to "the manufacturer, the agent and the public, to have an agent handle only one make of pattern."²⁹ He testified that exclusive arrangements were the normal way of doing business in this trade,³⁰ that duplication of investment in inventory and additional selling expense involved in handling a

27. 258 U. S. 346 (1922).

28. Transcript of Record, p. 36, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U. S. 346 (1922).

29. *Ibid.*

30. *Id.* at 45.

number of different brands of patterns would handicap the dealer. The public would be hurt because a dealer who undertook to handle several lines of patterns would probably be unable to stock all sizes in each line. From the manufacturer's point of view there would be an increase in the number of unsold patterns returned by dealers. The cost of doing business would therefore rise to the point of requiring a very substantial increase in the retail price to the public.³¹ Scanlon also testified to bitter competition among pattern manufacturers,³² and showed that the leading competitors of Standard had gone into business and grown to power during the period while the Standard exclusive supply contract was in use.³³ On cross-examination defense counsel extracted from Scanlon admissions that large retailers like Macy's and Marshall Field, who were in a position to bargain effectively with the manufacturers, were permitted to handle several pattern lines and found it profitable; and that it was the manufacturers who chose the exclusive supply system, "the basis on which they find it most advantageous to do business."³⁴

The principal defense contribution to the inquiry as to the legality of the contract was proof that Standard Fashion was under common control with two other leading pattern manufacturers and that the combination had exclusive supply contracts with 20,000 of the 52,000 retail outlets in the country.³⁵

This testimony as to the position of Standard Fashion in the trade was the only circumstance referred to in the opinion of District Judge Johnson.³⁶ Like Judge Yankwich 30 years later, Judge Johnson had received in evidence a considerable amount of testimony which, upon reflection, he determined to ignore, since, as he put it, the issue under the Clayton Act was "whether or not the contract has provided *means* for a real or substantial lessening of competition, irrespective of what use has been made or is being made of these means." The Circuit Court of Appeals for the First Circuit affirmed.³⁷ Again the only circumstance specifically referred to is plaintiff's control of 20,000 out of 52,000 pattern outlets. Not a word is devoted to the evidence of the contract's alleged advantages to manufacturer, dealer and public, although the opinion does profess generally to "consider this restriction in the light of the facts peculiar to the business to which the

31. *Id.* at 36-38.

32. *Id.* at 41, 64.

33. *Id.* at 40, 42-3.

34. *Id.* at 78, 122.

35. *Id.* at 83-4, 107.

36. *Standard Fashion Co. v. Magrane-Houston Co.*, 254 Fed. 493, 499 (D. Mass. 1918).

37. *Standard Fashion Co. v. Magrane-Houston Co.*, 259 Fed. 793 (1st Cir. 1919).

restraint is applied, to the conditions already achieved under such restraint, as well as the nature of the restraint and its effect, actual or probable.”³⁸ The opinion reviewed the legislative history of the Clayton Act, quoting from Committee Reports to show Congress’ purpose to go beyond the Sherman Act by specifically prohibiting certain trade practices.³⁹

The case was argued before the Supreme Court of the United States by Charles Evans Hughes, later Chief Justice. His powerful brief wrung the utmost from the language of the Clayton Act and its legislative history.⁴⁰ Considering with justification that the Circuit

38. *Id.* at 798.

39. *Id.* at 796-7.

40. In brief outline the course of enactment of the presently relevant Clayton Act provisions was as follows: As part of the Wilsonian Fair Deal and in satisfaction of Democratic platform declaration for strengthening the antitrust laws [see 51 CONG. REC. 16, 143 (1914)], the President’s message to Congress of Jan. 20, 1914, called for “prohibition” of restrictive practices which had become familiar enough by experience to permit definition, “in such terms as will practically eliminate uncertainty.” 51 CONG. REC. 1163 (1914). The Clayton Bill, H. R. 15657, 63d Cong., undertook to do this by prescribing criminal penalties for price discrimination, exclusive dealing and tying contracts, and “holding companies,” among other things. The discrimination offense required an intent to injure a competitor. The holding company section (equivalent to present section 7) applied “where the effect is to eliminate or substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to create a monopoly of any line of trade in any section or community.” The exclusive dealing offense required neither intent nor any effect.

Congressman Clayton’s report for the House Judiciary Committee described the use of local price cutting as a “common practice of great and powerful combinations engaged in commerce—notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence.” H. R. REP. NO. 627, 63d Cong., 2d Sess. 8 (1914). Exclusive dealing was attacked as an impairment of the dealer’s right to select his own suppliers: “Where the concern making these contracts is already great and powerful . . . the exclusive or tying contract made with local dealers becomes one of the greatest agencies and instrumentalities of monopoly ever devised by the brain of man. It completely shuts out competitors, not only from trade in which they are already engaged, but from the opportunities to build up trade in any community where these great and powerful combinations are operating under this system and practice.” *Id.* at 13. The qualification of the prohibition against stock acquisition is not specifically commented on.

The Senate Judiciary Committee deleted the criminal penalties in view of the “experimental” character of the legislation and the concurrent creation of the Federal Trade Commission to enforce civil sanctions. SEN. REP. NO. 698, 63d Cong., 2d Sess. 43 (1914). Explicit reference to competition in localities was stricken out as surplusage. *Id.* at 43, 46.

The Conference Report shows the adoption of a substitute Section 2, accepting the Senate view on civil enforcement, but substituting the test of putative effect for that of intent to injure competition. The House Managers remarked that this “eliminates the penalty of the original House bill, but declares the acts therein forbidden to be unlawful.” H. R. REP. 1168, 63d Cong., 2d Sess. 11 (1914). The insertion of the same qualifying clause in Section 3, where intent had never been required, was not explained in the report, and was severely criticized in the subsequent Senate debates. In Section 7, the Conferees pointedly substituted “effect may be” for “effect is,” in conformity with the clause inserted in Sections 2 and 3, evidently an additional quid pro quo for the House yielding on criminal penalties. *Id.* at 12-13. The reference to local restraints was restored in Section 7 without explaining either this action or the failure to do the same in Sections 2 and 3. *Id.* at 12-13.

The debates resist rational summary, especially since the advocates of sternest antitrust measures, in their opposition to amendments weakening the original House measure, expressed extreme views of the debilitating consequences of the changes, while moderates and conservatives deprecated as purely formal such changes as the

Court of Appeals had paid little heed to any of the circumstances other than the 20/52 control of Standard Fashion and its affiliates, he attacked the judgment below for holding the contract "bad on its face without any evidence that it tended to substantially lessen competition," and treated the qualifying clause as an outright return to the Sherman Act standard of legality, requiring an investigation of actual effects, purposes, etc.⁴¹

Because of the important public questions involved the Supreme Court invited the United States to file a brief. Solicitor General James M. Beck's response for the first time defined the issue otherwise than in terms of the impossible alternatives of illegality per se and a complete return to the Sherman Act standard, the first ruled out by the qualifying clause in the Clayton Act prohibitions, the second by the obvious determination of the 63rd Congress to tighten the antitrust laws. He took the position that the sole purpose of the qualifying clause was to save the use of exclusive dealing for "a small manufacturer attempting to enter a field already occupied by a monopoly or by a very powerful economic unit."⁴²

The decision of the Supreme Court must be evaluated against this background of the plaintiff's consistent effort to secure consideration by the courts of the actual effects of its contracts, and their consistent refusal to give that evidence any weight as against the circumstance of Standard Fashion's position in the field. Mr. Justice Day delivered the opinion affirming the judgment below. He had no difficulty concluding that the Sherman Act "rule of reason" had been rejected by the plain words of the Clayton Act which: ". . . sought to reach the agreements embraced within its sphere in their incipiency, and, in the section under consideration, to determine their legality by specific tests of its own . . ." ⁴³ However, there are in Justice Day's opinion equivocations dangerous to the thesis of the present essay. The forbidden agreements are those which "under the circumstances disclosed" will probably lessen competition. Is this a reference to all the testimony for which Hughes vainly sought consideration, an admission of its relevance, a requirement that the danger to competition be ad-

insertion of the word "substantial" in the Clayton Act standard. See, for example, Sen. Reed at 51 CONG. REC. 15,830-1 (1914), and Sen. Walsh at 15,856-7, 16,149. Small wonder that the Supreme Court has resorted to "plain language" construction in interpreting the Clayton Act. *Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245 (1929). But cf. note 10 in the *Standard Oil* case, 337 U. S. 293, 307 (1949), citing opposition from the floor of the House [51 CONG. REC. 9267 (1914)] to an absolute prohibition of exclusive dealing on the ground of adverse effect on newcomers.

41. Petitioner's Brief, pp. 23, 46, 52, *Standard Fashion v. Magrane-Houston Co.*, 258 U. S. 346 (1922).

42. Brief for the United States as *Amicus Curiae*, pp. 12-13, *Standard Fashion v. Magrane-Houston Co.*, 258 U. S. 346 (1922).

43. 258 U. S. 346, 356 (1922).

judged on the basis of an appraisal of actual effects and on testimony by economic experts forecasting the results of use or abolition of particular devices? It could be so argued, but Justice Day's brief opinion concludes with a reference to only one circumstance of all those in evidence, plaintiff's control of two-fifths of the pattern outlets of the country, and with a significant quotation from the Circuit Court of Appeals opinion:

The restriction of each merchant to one pattern manufacturer must in hundreds, perhaps in thousands, of small communities, amount to giving such single pattern manufacturer a monopoly of the business in such community. Even in the larger cities, to limit to a single pattern maker the pattern business of dealers most resorted to by customers whose purchases tend to give fashions their vogue may tend to facilitate further combinations; so that the plaintiff, or some other aggressive concern, instead of controlling two fifths, will shortly have almost, if not quite all the pattern business.

This vision of danger is not derived from anything in the record. These are "potentialities" inferred exclusively from the character of the device and the position of its user—inferred directly in the face of testimony that during the 20 years while Standard Fashion Company's exclusive contracts had been in effect a number of powerful competitors had successfully invaded the market and Standard's relative position therein had declined.

The import of the *Standard Fashion* case may then be stated as follows: A general inquiry of Sherman Act scope into the effect of the exclusive supply contract is not called for by the Clayton Act; the door is kept open for some showing of circumstances which might legalize the use of these devices; the circumstance of paramount import is the relative standing in the industry of the person who uses the device; if he be among the leaders, then no demonstration of virtues of the contract or actual effects of its use will overcome the substantial potentiality of competitive impairment derived from the combination of large size and restrictive contracts. In this connection large size does not mean complete dominance in the Sherman Act monopoly sense,⁴⁴ but only a place among the leaders of the industry.

It is a formula which completely covers the *Standard Oil* case, except that justifying testimony was admitted and counted for naught in the earlier case, while Judge Yankwich simply refused to hear some

44. Cf. *United States v. U. S. Steel Corp.*, 251 U. S. 417 (1920); *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945), indicating that something more than 50% of the market must be controlled to bring business under § 2 of the Sherman Act.

of the justifying testimony, since what was offered could not under the *Standard Fashion* case have prevailed in his judgment. That hardly rises to a difference of substance. Even under the broad public interest standard of the Sherman Act the Supreme Court has made it clear that evidence of reasonableness need not be heard when it could not swing the balance in favor of the restraint.⁴⁵

It remains to inquire whether the cases between *Standard Fashion* and *Standard Oil of California* so limited the earlier holding as to account for the dissenting opinions in the latter. To the extent that any of them did modify the *Standard Fashion* rule, we must then consider how far the *Standard Oil* case in turn discredits these intervening weakening decisions. For the present purpose cases like *United Shoe Machinery Corp. v. United States*,⁴⁶ and *International Business Machines Corp. v. United States*,⁴⁷ involving patent control, indisputable domination of the industry, and tying clauses as well as exclusive supply provisions, may be disregarded. They are plainly within the narrowest construction of Section 3 of the Clayton Act, although the *United Shoe* case is significant for its holding that contract provisions which *in practical effect* prevent dealing in goods of a competitor are covered by Section 3 and must be judged by its standard, although the contract does not expressly preclude such dealings. *Federal Trade Commission v. Curtis Publishing Co.*,⁴⁸ holding that a particular contract is not within the explicit coverage of Section 3 because it sets up an agency rather than a sale transaction, is likewise beside the present point.

Federal Trade Commission v. Sinclair Refining Co.,⁴⁹ however, requires consideration. It is referred to in Justice Frankfurter's opinion as one of the cases favorable to the Standard Oil contract. The *Sinclair* case deals with one of the older methods of tying an "independent" station to a single supplier. In that case it was shown that the leading oil companies leased tanks and pumps at nominal cost to retailers under a contract by which the retailer agreed to use this equipment only with gasoline furnished by the lessor. The Federal Trade Commission found that a large majority of service station operators had no use for more than one set of this equipment and that in practical effect, therefore, the lease was on the understanding that the

45. *United States v. Trenton Potteries Co.*, 273 U. S. 392 (1927); cf. *Fashion Originators' Guild of America v. FTC*, 312 U. S. 457 (1941); *FTC v. Morton Salt Co.*, 334 U. S. 37, 50 (1948) ("it would greatly handicap enforcement of the act to require testimony to show what we believe to be self-evident . . .").

46. 258 U. S. 451 (1922).

47. 298 U. S. 131 (1936).

48. 260 U. S. 568 (1923).

49. 261 U. S. 463 (1923).

lessee would deal exclusively in lessor's products. The Supreme Court in an opinion by Mr. Justice McReynolds held (rightly or wrongly) that the evidence was insufficient to establish that the practical effect of the arrangement was to make the dealer buy exclusively from his equipment lessor.⁵⁰ It was pointed out that the leases were terminable at will on short notice and that lessees were always free to install additional equipment of their own or of other oil companies. The basis for this decision, therefore, is that the leases in question were not devices within the specific coverage of Section 3. It was, therefore, unnecessary to determine whether the effect of such leases might be to substantially lessen competition, *i. e.*, to apply the Clayton Act standard of legality.

However, the Federal Trade Commission had also proceeded under Section 5 of the Federal Trade Commission Act which outlaws "unfair methods of competition" in interstate commerce. Here Congress had not legislated any new specific standard of legality and Justice McReynolds had previously held that this phrase extended only to practices otherwise condemned by law "as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly."⁵¹ The Clayton Act being inapplicable, the only standards remaining to be applied were the more flexible yardsticks of the Sherman Act or the common law. It was only with respect to those standards as embraced in Section 5 of the Federal Trade Commission Act that the Court reviewed the evidence, finding it inadequate to prove a probability of substantially lessened competition. Justice McReynolds' opinion gives no countenance to the erroneous dictum of the Circuit Court of Appeals that "in determining whether given acts . . . substantially lessen competition and tend to create a monopoly within the meaning of the Clayton Act, the only standard of legality with which we are acquainted is the standard established by the Sherman Act . . ."⁵² Accordingly the *Sinclair* case gives little support to the demand for a general economic inquiry in the *Standard Oil* case, nor does it militate against the thesis that in the case of a device admittedly within the coverage of the Clayton Act, the inference of competitive harm can be drawn from the leading position of the defendant.

50. On this point the circuit courts of appeal have distinguished the *Sinclair* case so often and so subtly that it hardly survives as a precedent. See, for example, *Signode Steel Strapping Co. v. FTC*, 132 F. 2d 48 (4th Cir. 1942); *Judson L. Thomson Mfg. Co. v. FTC*, 150 F. 2d 952 (1st Cir. 1945); *cf. International Business Machines Corp. v. U. S.*, 298 U. S. 131 (1936).

51. *FTC v. Gratz*, 253 U. S. 421, 427-8 (1920).

52. *Cf. Standard Oil Co. of N. Y. v. FTC*, 273, 478, 482 (2d Cir. 1921) also ignoring the important difference in the standards of legality between § 3 of the Clayton Act and § 5 of the Federal Trade Commission Act.

However, the *Sinclair* case, particularly the Circuit Court of Appeals opinion, misled the Seventh Circuit into a full Sherman Act economic inquiry in a case calling for the application of the Clayton Act standard. *Pick Mfg. Co. v. General Motors Corp.*,⁵³ involved the legality of provisions in General Motors dealer contracts requiring the dealer not to "sell, offer for sale, or use in the repair of [General Motors automobiles] any part or parts not manufactured or authorized" by General Motors. The Seventh Circuit held that General Motors' interest in maintaining customer good will in relation to its cars and particularly the manufacturer's 90-day warranty against defective parts

can be the basis for exception to the applicability of the Clayton Act. . . . The record shows that competition in the sale of replacement parts for automobiles instead of growing less had substantially increased through the period during which the provisions complained of have been in force and, while it may be that competition would have increased more rapidly in the absence of such provisions, the trial court rightfully concluded that such was not the 'substantial lessening of competition' which the Clayton Act was designed to prevent.⁵⁴

The Supreme Court affirmed *per curiam*, three justices not participating, with a sentence accepting the findings of the lower courts that "the effect of the clause had not been in any way substantially to lessen competition or to create a monopoly in any line of commerce."⁵⁵ Here then is a real holding that an exclusive supply contract employed by a leader in the industry may be justified by business considerations.

The *Standard Oil* case must be regarded as overruling the *Pick* case, unless a distinction is to be made between the two cases based upon the relationship of spare parts to an intricate machine for whose performance General Motors feels a continuing responsibility.⁵⁶ A number of recent cases indicate that the distinction is not valid; that neither supplies⁵⁷ nor replacement parts⁵⁸ may be tied to the sale of

53. 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936).

54. 80 F. 2d 641, 643-644 (7th Cir. 1935).

55. 299 U. S. 3, 4 (1936).

56. The *Pick* case was not even limited to this situation. The contract in terms forbade the dealer to sell non-GM parts even for use in non-GM automobiles, and there was evidence that it was so construed by GM field inspectors and salesmen. Printed Record in the Supreme Court, p. 86. See also Petitioner's Reply Brief, pp. 2-3.

57. *International Business Machines Corp. v. United States*, 298 U. S. 131, 138-139 (1936) (the opinion exhibits an indifference to whether the tabulating cards were regarded as supplies or parts); *Judson L. Thomson Mfg. Co. v. FTC*, 150 F. 2d 952, 958 (1st Cir. 1945); *Radio Corp. of America v. Lord*, 28 F. 2d 257, 260 (3d Cir. 1928) (Are radio tubes in a patented radio circuit "parts" or "supplies?").

58. See note 57 *supra*; *General Talking Pictures Corp. v. American Tel. & Tel. Co.*, 18 F. Supp. 650 (D. Del. 1937).

the original machine, however dependent the machine is on the quality of the product used in or with it. Perhaps these cases are not controlling because most of them involve patent licenses to which special rules are applicable. But their language supports a broad proposition that the efficiency of uniting two products in use is a matter to be judged by the user. The seller can protect his goodwill by insisting that replacement parts meet his standards of efficiency, without prejudicing competition by requiring that the parts be bought from him.⁵⁹

An extraordinary inversion of the principle that exclusive dealing is too dangerous a weapon to be placed in the hands of industry leaders is exemplified by *General Talking Pictures Corp. v. American Telephone & Telegraph Co.*,⁶⁰ decided in the District Court for Delaware in 1937. The case involved the legality of the patent licenses of A. T. & T. covering sound recording and reproducing equipment in the moving picture field. The licenses tied recording to reproducing equipment and required replacement parts to be purchased from the licensor. The court held that this was lawful during the "promotional" period, before others had developed competing equipment, on the ground that it is impossible to restrain competition when there are no competitors yet prepared to compete.⁶¹ It is hard to imagine a more effective means of forestalling development of competing processes than the imposition of exclusive dealing contracts on the trade by a great corporation which already has a patent lead on the field. In evaluating this decision it is only necessary to note that it starts from the false major premise that the Sherman and Clayton Act standards of legality are identical.⁶² The fact that the exclusive supply contracts are employed at the promotional stage is indeed significant, if the promotion is by a new competitor invading a field where others are already entrenched; it can hardly justify the first person in the field in augmenting his patent domination by contract clauses specifically condemned in the Clayton Act.⁶³

59. Even the doctrine of deference to the concurrent findings of two lower courts, upon which the Supreme Court rested in affirming the *Pick* case, is not likely again to save a restriction of this character, for the Court has shown a willingness to discriminate between factual controversies, which it is reluctant to review, and controversies which, although resolved in terms that sound factual, really turn on standards of judgment to be applied. See *Watts v. Indiana*, 69 Sup. Ct. 1347, 1348 (1949).

60. 18 F. Supp. 650 (D. Del. 1937).

61. *Id.* at 666.

62. *Id.* at 664; *Excelsior Motor Mfg. Co. v. Sound Equipment, Inc.*, 73 F. 2d 725, 728 (7th Cir. 1934), *cert. denied*, 294 U. S. 706 (1935); *cf.* *United States Tel. Co. v. Central Union Tel. Co.*, 202 U. S. 65, 73 (1912) (disapproving under the Sherman Act contracts of weaker competitor for exclusive rendering of long distance service to local exchanges, in part because of excessive 99 year term). See Stockhausen, *The Commercial and Anti-Trust Aspects of Term Requirements Contracts*, 23 N. Y. U. L. Q. 412, 424-428 (1948).

63. Another case difficult to reconcile with the current of authority on tendency to lessen competition is *Lipson v. Socony Vacuum Corp. and Standard Oil of New*

The principle which this essay draws from the *Standard Oil* case, that leadership in a line of commerce is a sufficient and conclusive bar to the employment of the anti-competitive devices named in the Clayton Act, is not impugned by cases like *Oxford Varnish Corp. v. Ault and Wiborg Corp.*⁶⁴ and *Signode Steel Strapping Co. v. Federal Trade Commission*,⁶⁵ in each of which appear statements that the company's relative position in the trade is not the measure of the monopolistic tendency of its practices. In each instance the statement is made in the course of an opinion adverse to the use of the tying clause, in answer to the company's contention that the Clayton Act forbids tying *only* by industry leaders. Neither the *Standard Fashion* nor the *Standard Oil* case supports that contention; they hold only that anti-competitive devices are illegal when they are employed by big organizations. It is still open to the Federal Trade Commission to conclude on the basis of testimony that exclusive dealing contracts of smaller corporations involve a probability of substantial lessening of competition.

In the *Oxford* case this conclusion was reached in relation to a company doing only one percent of the business, but since the company was tying to patents the Court could lean on the abuse of patent theory as an independent basis of illegality. In the *Signode* case the company did about 25% of the national business in the "line of commerce" as ultimately defined by the Commission and the Court. Together with its two leading competitors, who followed a similar practice, it did two thirds to three quarters of the business. Such a position in the field would under our interpretation of the *Standard Oil* case justify the Commission in refusing to hear evidence as to the actual effect of the practice on competitors, the good faith, non-monopolistic intentions of the respondent, or the advantages to customers and the public. The respondent had, however, argued that the line of commerce embraced all wire and strapping used in packaging, rather than wire and strapping used in machine packaging, which

York, 87 F. 2d 265 (1st Cir. 1937). Plaintiff, a retail gas distributor, alleged that defendant in violation of § 3 sold tank car lots of gasoline at lower prices to dealers who agreed to handle only Socony gas. Plaintiff alleged that his tank car competitors who had accepted exclusive arrangements were advantaged by this price concession. A demurrer to the complaint was sustained partly on the ground that this was not a sufficient allegation of substantial lessening of competition. The court held that in view of the uniform retail price for gasoline Standard's practice had not affected Lipson's sales but only his profit margin, as compared with that of his exclusive dealing competitors, so that competition was not substantially lessened! If this case is to be understood as requiring proof that the particular private complainant has lost business, as a necessary element of Clayton Act illegality, it goes far beyond any other holding. It is hardly to be doubted, in view of the *Standard Oil* case, that Socony's practice was illegal, and the only problem for future Lipson's is to establish damages.

64. 83 F. 2d 764 (6th Cir. 1936).

65. 132 F. 2d 48 (4th Cir. 1942).

the Commission conceived to be the relevant field of competition. On the company's hypothesis it did only 5 to 7% of the business. While this figure seems adequate to invoke the doctrine of the *Standard Oil* case,⁶⁶ it is low enough to have justified the Commission's willingness to entertain a broader economic inquiry in the unsettled state of the law prior to the *Standard Oil* decision. A bolder course calculated to shorten hearings by pretermittting theoretical and inconclusive analyses and forecasts of interested experts may be looked for in future cases under Section 3 of the Clayton Act involving industry leaders.

ACQUISITION OF STOCK CONTROL

The most interesting effects of the *Standard Oil* construction of Section 3 of the Clayton Act may be expected in connection with two other sections of the Act which employ substantially the same standard of legality. Section 2, as amended by the Robinson-Patman Act, deals with discrimination 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 in any line of commerce, or to injure, destroy, or prevent competition with any persons who either grant or knowingly receive the benefit of such discrimination, or with customers of either of them." Section 7 deals with acquisition of stock in competing corporations "where the effect of such acquisition may be to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce."⁶⁷

The Supreme Court's decisions have reduced the substantive scope of Section 7 to an easily evaded technical obstruction to mergers and consolidations,⁶⁸ but the transactions that remain within the restricted coverage of the section must still be measured by the Clayton Act standard. *International Shoe Company v. Federal Trade Com-*

66. See discussion *infra* p. 38. Cf. *B. S. Pearsall Butter Co. v. FTC*, 292 Fed. 720 (7th Cir. 1923) (one-percent position with other suppliers offering non-exclusive distributions, justifies broader inquiry into actual effect); *Judson L. Thomson Mfg. Co. v. FTC*, 150 F. 2d 952 (1st Cir. 1945) [Company doing 25% of the business and all other important competitors also employing leases of riveting machines with tying clauses—evidence of technical or economic justification for tying given no weight: "the open market not the court should be the forum for the presentation of claims as to the merits of tied articles" (p. 958)].

67. The standard contains appropriate adaptations in other paragraphs of §7 dealing with acquisition of stock in competing corporations by a holding company not itself engaged in that competition.

68. The Act does not in terms cover transfers of assets, and the Supreme Court in *Thatcher Mfg. Co. v. FTC*, 272 U. S. 554 (1926) held that the Commission was powerless to undo such a transfer even if it was accomplished by illegal stock acquisition unless the Commission instituted proceedings while the company still held the illegally acquired stock; cf. *Arrow-Hart & Hegeman Elec. Co. v. FTC*, 291 U. S. 587 (1934); FINAL REPORT AND RECOMMENDATIONS OF THE TEMPORARY NATIONAL ECONOMIC COMMITTEE, S. Doc. No. 35, 77th Cong., 1st Sess. 38 (1941).

*mission*⁶⁹ is the leading case in which the Supreme Court had an opportunity to apply the standard of legality to a transaction within the specific coverage of Section 7. In May 1921 International Shoe Company acquired the stock of the McElwain Company. These were two of the largest shoe manufacturers in the world. The Federal Trade Commission issued a cease and desist order based on a finding that the transaction would substantially lessen competition between the two companies in the sale of dress shoes. The Supreme Court set aside the Commission's order on the grounds that (1) the companies did not substantially compete with each other in view of differences in their shoes and distribution methods; and (2) the financial straits in which McElwain found itself at the end of the 1920-1921 depression coupled with International's need for additional manufacturing facilities indicated a good faith⁷⁰ choice by the parties of the best means of salvaging the investment in McElwain and solving the production problems of International. The merger was sustained by a vote of 6-3, with Justices Stone, Holmes and Brandeis dissenting. The majority opinion by Justice Sutherland in effect obliterated the distinction between the Sherman and Clayton Act standards of legality, citing with approval a Third Circuit opinion which "applied the test to the Clayton Act which had theretofore been applicable to the Sherman Act, namely that the standard of legality was the absence or presence of *prejudice to the public interest by unduly* restricting competition or *unduly* obstructing the due course of trade"⁷¹ (italics supplied).

The opinion can be accounted for only by the fact that, in contrast with the briefing of the *Standard Fashion* case, the government's perfunctory brief here let the question of the distinctive meaning of the Clayton Act standard go by default, accepting battle on the narrow issue tendered by the petitioner as to the sufficiency of evidence of the motives for the merger and the likelihood of further competition if the merger were disapproved, as if there were common agreement on the scope of inquiry called for by the Clayton Act standard. It is not by inadvertence that the Clayton Act speaks in terms of effect rather than motive or intent, and in giving consideration to such arguments the *International Shoe* case is certainly discredited by the *Standard Oil* decision refusing even to hear evidence

69. 280 U. S. 291 (1930).

70. "Not with a purpose to lessen competition," *id.* at 302.

71. *Id.* at 299. The case referred to was *Standard Oil Co. v. FTC*, 282 Fed. 81 (3d Cir. 1922), involving an equipment deal similar to the one sustained in *FTC v. Sinclair Co.*, 261 U. S. 463 (1923), discussed *supra* p. 24.

on the economic justifications for the forbidden device.⁷² Powerful competitors can always pay more for a business than independent buyers. It is not merely that the leaders of the industry have the advantage of accumulated capital and "know-how." They can and will pay a premium for eliminating competition. International Shoe could well afford to pay more than the forced sale value of the McElwain property in order to end McElwain as a competitor and to prevent the more effective competition which could be expected if outsiders bought the McElwain property at low liquidation prices⁷³ or if the company were reorganized to reduce capital costs. To encourage such bidding for partial protection from the rigors of competition is to turn the antitrust laws upside down and to increase by law the existing advantages of the largest units in the field in the race to preempt markets.

Furthermore, there was no necessity for the *International Shoe* case to turn on the substantiality of competition between International and McElwain. The government was remiss in its presentation, in failing to call attention to the substantial probability that the merger of two leading shoe manufacturers would impair competition not only between them in the sale of shoes, but also between their distributors, the breadth of whose commercial rivalry would certainly be reduced when their sources of supply came under a single domination. Vertical as well as horizontal competition is protected by Section 7; the suspect transaction is acquisition of stock in any corporation, not merely in a competing corporation, for the reference in the qualifying clause to diminution of competition between competing corporations is placed in the alternative with the usual phraseology found in the other Sections of the Act as to effect on competition generally. In

72. The circuit courts of appeal prior to the *International Shoe* case had also refused to give weight to such considerations. See *Swift & Company v. FTC*, 8 F. 2d 595, 599 (7th Cir. 1925): "if an exception to the operation of the statute ought and is to be raised in cases where the concern whose stock is acquired is comparatively small or weak, or for any reason unlikely long to endure, it must come through statutory enactment, and not by judicial construction"; *Aluminum Co. of America v. FTC*, 284 Fed. 401 (3d Cir. 1922), *cert. denied*, 261 U. S. 616, rejecting, as justification for acquisition of stock control of competing aluminum fabricator by the dominant aluminum company, the contention that the fabricator was failing and its output under ALCOA management necessary to the war effort. The physical assets were subsequently acquired by ALCOA. See *Aluminum Co. of America v. Federal Trade Comm.*, 299 Fed. 361 (3d Cir. 1924). *United States v. Republic Steel Corp.*, 11 F. Supp. 117 (N. D. Ohio 1935) represents the extreme application of the view that the qualifying clause in Section 7 retains in the Clayton Act the broad Sherman Act "rule of reason" and "public interest" standards. But see n. 78, *infra*. Cf. *Vancouver Malt & Sake Co. v. Vancouver Breweries, Ltd.*, [1934] App. Cas. 181, rejecting covenantor's financial straits as justification for a non-ancillary restraint of trade.

73. Compare the acquisition of Consolidated Steel Co. by United States Steel Corp. approved by the Supreme Court in *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948); and the successful high bid of the United States Steel Corp. for the war surplus steel plant at Geneva, Utah, approved by the Attorney General as consistent with the antitrust laws. *Id.* at 505.

view of the various possibilities of impairing competition by the merger of dominant units in the field, it is apparent that the authority of the *International Shoe* case, and its progeny⁷⁴ has been considerably undermined by the *Standard Oil* decision.

Even so recent a decision as *Ford Motor Co. v. United States*⁷⁵ must be reappraised in the light of the latest reaffirmation of the crucial significance of size under the Clayton Act. In that case Justice Frankfurter, writing for the majority in a 4-3 decision, refused to extend a provision in a Sherman Act consent decree barring Ford from acquiring an interest in Commercial Investment Trust, an automobile finance company. Justices Black, Rutledge and Douglas protested, in effect, that affiliation between the producer of 25% of the nation's automobiles and a single financier was illegal per se. Any doubt that Justice Frankfurter's opinion in the *Ford* case rests on the peculiar procedural situation in that case rather than on the legality of the affiliation is now dispelled. Certainly if the Ford—C. I. T. affiliation takes the form of acquisition of stock within Section 7, it may be anticipated that a majority of the Court will be willing to infer substantial impairment of competition from the major position of Ford and C. I. T. in the automobile and financing business, and ready to sustain the Federal Trade Commission and the lower courts in turning a deaf ear to arguments of competitive necessity, business expedience and the like. Certainly we shall not find the courts as receptive as formerly to evidence or argument that competition between two companies may continue and even increase following the establishment of common control between them!⁷⁶ On the other hand, although the language of Section 7 would literally forbid merger of small competitors if, as would inevitably be the case, competition *between them* would be eliminated, it would be unlikely and undesirable that the Federal Trade Commission proceed in such case. Consolidation of competitors too small for efficient operation may actually promote competition as the effective regulator of trade in a field dominated by others.⁷⁷ Thus the acquisition by one of the big five meat packers of two competing provincial packing houses might

74. For example, *In re Pressed Steel Car Co.*, 16 F. Supp. 329, 338-339 (N. D. Pa. 1936) approving plan of reorganization involving sale of stock in an important producer of freight cars to a corporation engaged in manufacturing cars and in transportation.

75. 335 U. S. 303 (1948).

76. See Standard Fashion's argument that it was in competition with its affiliates. Petitioner's Original Brief in No. 20, Oct. Term 1921, U. S. S. C., p. 47; *Interstate Commerce Commission v. Penna. R. R.*, 66 F. 2d 37, 39 (3d Cir. 1933), *aff'd* 4-4, 291 U. S. 651 (1934); *Temple Anthracite Coal Co. v. FTC*, 51 F. 2d 656 (3d Cir. 1931); *Intercompany Stock Ownership and the Clayton Act*, 47 HARV. L. REV. 1395, 1397 (1934).

77. *Cf. U. S. v. Columbia Steel Co.*, 334 U. S. 495, 539 (1948).

be prevented,⁷⁸ whereas a consolidation of the local firms to meet the threat from the giants in the industry might be condoned.

Summarizing the analysis of the Clayton Act standard as applied under Section 7, it must be recognized that the Courts have heretofore very nearly obliterated in the merger field all distinction between the Sherman Act and the Clayton Act standards of legality. Following the lead of the *International Shoe* dictum that only such acquisitions are forbidden as "probably will result in lessening competition . . . to such a degree as will injuriously affect the public . . .,"⁷⁹ they have rarely refused to give ear to an argument of business expedience or putative public benefits from a challenged consolidation, even by large units in the field. Mr. Justice Frankfurter's reminder that the Clayton Act standard of legality is distinct and narrower than that of the Sherman Act should serve to check the boundless inquiries into "public interest" which the advocates of merger have heretofore successfully pressed on the courts. At least where merger involves already predominant units, we may expect as a result of the *Standard Oil* case to see the courts take a firmer grip on the notion that it is the *potential* danger to competition from inter-corporate stockholding and not presently demonstrable results which is the issue put by Section 7, and that this potentiality rises to prohibitive levels when an enterprise which has already achieved great power expands by this method.

PRICE DISCRIMINATION

Again and again we encounter in Clayton Act controversies a predilection for putting issues in the form of extreme alternatives, neither of which is acceptable to an unbiased analyst. A device is either "illegal per se" or else an untrammelled investigation of "public interest" must be had. Nowhere is this polarity more frequently encountered than in the touchy field of price discrimination under Section 2 of the Clayton Act as amended by the Robinson-Patman Act,⁸⁰ especially in its application to delivered price systems. Both the government and industry are driven by different circumstances to exag-

78. As was done in *Swift & Co. v. FTC*, 8 F. 2d 595 (7th Cir. 1925), *reversed on other grounds in* *Swift & Co. v. FTC*, 272 U. S. 554 (1926). The opinion in *United States v. Republic Steel Corp.*, 11 Fed. Supp. 117 (N. D. Ohio 1935), permitting the third largest steel company (7.2% of the national ingot capacity) to acquire stock control of a competitor which was the twelfth largest unit in the industry rests on a complete and erroneous assimilation of the Clayton Act standard of legality to that of the Sherman Act. But the opinion also reflects an inclination to permit defensive integration of smaller units in an industry already dominated by U. S. Steel and Bethlehem Steel.

79. 280 U. S. 291, 298 (1930).

80. 49 STAT. 1526 (1936), 15 U. S. C. § 13 (1941).

gerated constructions of Supreme Court decisions. The Federal Trade Commission and the Antitrust Division, with limited staff, must quail at the prospect of endless hearings on the competitive virtues of basing point and other pricing systems involving discrimination,⁸¹ and press close to illegality per se as an aid to effective enforcement. On the other hand, counsel for industry will for obvious reasons acknowledge no restriction on the scope of inquiry into the reasonableness of uniform delivered prices in a competitive market. But let the Court write an opinion favorable to the government and the positions are reversed. Industry storms the halls of Congress contending that all delivered pricing has now been rendered illegal per se so that legislative relief is necessary. Meanwhile the commission, apprehensive of crippling amendments, deprecates the latest pronouncement, but moderately.⁸² It cannot disclaim too much; no experienced government attorney would countenance a broad concession in public statements of policy on so complicated an issue, for fear of compromising the next case. So ensues an era of "confusion" regarding delivered pricing, which Congress undertakes to clarify.⁸³ At the time of this writing a bill awaits Senate action on amendments adopted by the House.⁸⁴ The familiar Clayton Act standard of legality would be retained by the House amendments, but the Senate version would constitute a radical retrogression towards Sherman Act standards. The Senate proposes to define "effect may be" so as to require "substantial and probative evidence" of the specified anti-competitive tendencies, rather than reasonable probability. It would also substitute "will" for "may" in the clause "where the effect may be to substantially lessen competition." Both houses have approved a provision that "price shall have the meaning which it has under the commercial law applicable to the transaction," which ambiguously curtails the substantive reach of the discrimination section.

If Congress retains the traditional Clayton Act formula, the *Standard Oil* case as herein interpreted offers a basis for avoiding, in the most important applications of Section 2, both the rigid doctrine

81. See *FTC v. Cement Institute*, 333 U. S. 683, 686 (1948), referring to 49,000 pages of oral testimony and 50,000 pages of exhibits. A "digest" of the evidence before the Commission in the *Cement* case, filed as "Appendix A" to the Circuit Court of Appeals brief, runs to 3110 pages.

82. See Federal Trade Commission statement of "Policy Towards Geographic Pricing Practices," Oct. 12, 1948; *Study of Federal Trade Commission Pricing Policies, Interim Report of the Trade Policies Subcommittee of the Senate Committee on Interstate and Foreign Commerce*, SEN. DOC. No. 27, 81st Cong., 1st Sess. 9 (1949).

83. See *STUDY OF FEDERAL TRADE COMMISSION PRICING POLICIES*, note 82 *supra*, especially the legislation recommended at pages 75-77, which has been radically modified by both Senate and House.

84. S. 1008, 81st Cong., 1st Sess. (Senate print of Aug. 8, 1949), §§ 2, 3 and 4.

of illegality per se and the administratively impossible "public interest" inquiry. Discriminations within the specific coverage of the section will be held unlawful without further investigation, if found to be employed by major units in the trade. To smaller units wider scope of proof will be allowed on the issue of tendency to lessen competition.

In the price discrimination field, the courts have been more concerned with the difficult problem of determining what transactions are within the specific coverage of Section 2 than with the application of the standard of legality. The current controversy over delivered price systems is largely a quarrel over the definition of "price." Does the seller "discriminate in price" when he charges the same amount to near and distant buyers, although it costs more to deliver the goods to the distant buyer? Does price mean the amount realized by the seller after deducting delivery cost to the particular buyer? If so, the seller engages in discrimination unless he charges all customers the same price at the point of production plus actual delivery cost, *i. e.*, unless he sells on an f. o. b. basis. The opinions in the *Corn Products*⁸⁵ and *Cement Institute*⁸⁶ cases appear to answer the foregoing questions in the affirmative, unless Congress redefines "price" as indicated above.⁸⁷ Even if a discrimination or difference of price is established, it may be excluded from the scope of the section by one of the provisos, still without reaching the problem of the Clayton Act standard of legality. Thus a differential among customers can be justified by showing that it reflects only cost savings resulting from different methods or quantities of sale or delivery,⁸⁸ or by showing that changes in market conditions between successive sales account for any difference in price to the different purchasers.⁸⁹ But if the seller cannot justify his price differential in one of these ways, then it becomes necessary to determine whether the effect of the discrimination may be that condemned by the Act.

Typically the evidence used to establish the anti-competitive tendency of price discrimination is proof that the discrimination was large enough to enable the seller or his favored customer to lure busi-

85. *Corn Products Ref. Co. v. FTC*, 324 U. S. 726 (1945).

86. *FTC v. Cement Inst.*, 333 U. S. 683 (1948).

87. Cf. § 4(g) of S. 236 recommended by the Trade Policies Subcommittee, *supra* note 82, at page 77: "For the purpose of determining the existence of discrimination, the word price as used in this section shall mean the delivered cost paid by the buyer for the commodity or product at the time and place such commodity or product is accepted by him, without deduction on account of any transportation or delivery charge incidental thereto."

88. First proviso to § 2(a) of the Robinson-Patman Act. Prior to the Act quantity discounts were legal although they might exceed cost savings, regardless of effect on competition.

89. Fourth proviso to § 2(a), *id.*

ness away from competitors.⁹⁰ There is little opportunity in the ordinary price discrimination case for economic justifications of the kind which have had some success under Sections 3 and 7 of the Clayton Act. It is difficult to argue that a price discrimination serves any business purpose comparable to the protection of good will said to result from tying the sale of replacement parts to the sale of the original machine, or to the promotion of dealer zeal and responsibility said to result from exclusive dealing, or to the enhancement of productive efficiency said to result from vertical integration achieved by merger.

One argument of this character that is met in price discrimination cases is that a discrimination which impairs competition among buyers may nevertheless be lawful because it promotes competition among sellers.⁹¹ Thus, uniform delivered prices which are preferential to distant buyers are defended on the ground that these price concessions enable the seller to compete in distant markets which would otherwise be monopolized by local suppliers. Such arguments would require the court or commission to gauge not only the harmful potentialities of the practice on competition at the retail level but also the beneficent potentialities at the wholesale level and then to balance the two, a hopeless exercise in the arithmetic of intangibles. Some recognition seems to be given to this line of argument by the text of the Robinson-Patman Act itself; Section 2 (b) provides that a seller may, in rebutting a prima facie case of discrimination, show that his lower price was made in good faith to meet an equally low price of a competing seller. But this explicit provision does no more than assure the respondent an opportunity to introduce evidence which might otherwise be excluded as irrelevant. Proof of good faith meeting of competition does not require an acquittal under Section 2. The Commission may, despite such proof, conclude that the impairment of competition at the retail level is a greater threat to competition in that line of commerce than the injury which wholesale competition may suffer if the discrimination is forbidden. In *Standard Oil Co. of Indiana v. Federal Trade Commission*,⁹² now pending in the Supreme

90. See *Corn Products Co. v. FTC*, 324 U. S. 726, 738-739 (1945); *Standard Oil Co. v. FTC*, 173 F. 2d 210, 213 (7th Cir. 1949); *Samuel H. Moss, Inc. v. FTC*, 148 F. 2d 378-379 (2d Cir. 1945); but cf. *FTC v. Morton Salt Co.*, 334 U. S. 37, 45 (1948). The Robinson-Patman Act amended the standard of legality under § 2 by adding a specific reference to impairment of competition among buyers and their customers. The Supreme Court had already held that such competition was protected under the original Clayton Act standard. *Van Camp & Sons Co. v. American Can Co.*, 278 U. S. 245 (1929).

91. STUDY OF FEDERAL TRADE COMMISSION PRICE POLICIES, SEN. DOC. NO. 27, 81st Cong., 1st Sess. pp. 9-12 (1949).

92. 173 F. 2d 210 (7th Cir. 1949); but see *Samuel H. Moss, Inc. v. FTC*, 148 F. 2d 378, 379 (2d Cir. 1945) (good faith meeting of competition characterized as a "defense"). Under the House amendments to S. 1008, a seller "may justify" a discrimination on the ground of good faith meeting of competition only if the effect on

Court, this nice question was resolved against the seller by the Commission and the Court of Appeal. If the Supreme Court is willing to carry over into Section 2 the test of potential impairment of competition which this essay derives from the *Standard of California* case, the decision could be affirmed with little difficulty.

A second argument heard in justification of price discrimination is that it may promote competition among buyers by enabling the favored buyer to stay in business.⁹³ Thus, in the uniform delivered price debate it is said that the distant buyer must have price concessions in order to stay in competition with buyers closer to the source of supply. This is a fantastic perversion of the ideal of competition, suggesting that businessmen with uneconomic locations should be subsidized at the expense of their competitors and the public, whereas the whole point of competition as the law of trade is that entrepreneurs who misjudge any of the economic factors relevant to their business should lose out to their wiser rivals. This defense of price discrimination involves a principle which, once adopted, can lead only to a theoretical and practical muddle in the regulation of our economic affairs. If "competition" is to be maintained by allowing sellers to subsidize uneconomically located buyers, why not also permit a seller to discriminate in favor of a buyer whose inefficient plant or bad labor relations also place him at a disadvantage? For the present purpose it is enough to note that, like the defense of discrimination previously considered, this one would require the Federal Trade Commission and the courts to undertake the almost impossible administrative task of determining just how much discrimination can be tolerated in order to overcome the favored buyer's disadvantage in location, productive efficiency, etc.

The doctrine of the *Standard Oil* case offers a practicable means of avoiding these difficulties in the cases that really count. If it is remembered that the whole apparatus of the antitrust laws was erected to deal with the problem of concentration of economic power, we can

competition is not that prohibited by the familiar Clayton Act standard. § 3 of S. 1008, 81st Cong., 1st Sess., Sen. print of Aug. 8, 1949.

The justification of meeting competition is unavailing where competitors' prices are met so systematically and precisely, with never an offer to undersell in one's own freight advantage territory, that the arrangement is evidently one to avoid price competition rather than to compete. Such a showing not only negatives good faith, but affirmatively shows that the effect of the systematic discrimination is to substantially lessen competition among the sellers. *FTC v. A. E. Staley Mfg. Co.*, 324 U. S. 746 (1945).

93. *Supra* note 91. The Interstate Commerce Commission has acted on this basis in approving "Group Rates." *Ayrshire Collieries Corp. v. U. S.*, 69 Sup. Ct. 278 (1949); *Lynchburg Traffic Bureau v. U. S.*, 84 F. Supp. 1012 (D. W. Va. 1949). But judicial approval rests on a statute expressly conferring on the administrative agency the power to fix rates in an area of the economy where concededly the role of competition has been circumscribed.

for practical purposes forget about price discrimination as a vice of individual small businesses.⁹⁴ If the Commission initiates such cases, no great harm can come from allowing a generous scope to evidence designed to show the non-monopolistic tendency of the accused practice. Respondents lacking the resources of the great corporations for litigation are unlikely to create a serious administrative problem.

But for the leaders in any line of trade all efforts to justify price discrimination should be precluded. The *Standard Oil* case and its predecessor the *Standard Fashion* case show that the anti-competitive potentiality of devices like exclusive dealing, the holding company, and price discrimination, which led Congress to place them under the special standard of the Clayton Act, are enhanced beyond the legal tolerance level whenever the device is employed by an organization already possessed of great economic power.⁹⁵

WHEN COMPANY IS "MAJOR FACTOR"

The discussion has purposely avoided attempting to define the scope of operations which will make a company a "major factor" or a "leading, though not singly dominant, unit" in the trade, so that it must abjure the devices named in the Clayton Act. The problem is not unlike that of stating the amount of commerce necessary to constitute a "monopoly" under Section 2 of the Sherman Act, and in both instances is almost inextricably intermingled with the decision as to the base figure with which defendant's share of business is to be compared, *i. e.*, definition of the relevant market.⁹⁶ The critical

94. The case is different, of course, where small businesses participate in an industry-wide system of price discrimination designed to produce price uniformity.

95. MACHLUP, *THE BASING POINT SYSTEM* 23 (1948), points out that basing point pricing injures competition not only because it lends itself to agreement for price maintenance, "but also because, *in the hands of powerful firms*, it can be an instrument of oppression used to dominate weaker competitors" (italics supplied). See also *id.* at 159-164, 170-171. On the relationship between economic concentration and basing point pricing see Latham, *Giantism and Basing Points: a Political Analysis*, 58 *YALE L. J.* 383 (1949); LYNCH, *THE CONCENTRATION OF ECONOMIC POWER* (1946), discussing relationship of basing point pricing to price leadership at pages 174 *et seq.* An awareness of this relationship appears also in the dissenting opinion of Judge Stone in *Boss Mfg. Co. v. Payne Glove Co.*, 71 F. 2d 768-771 (8th Cir. 1934).

96. *E. g.*, *United States v. Columbia Steel Co.*, 334 U. S. 495 (1948); *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *United States v. Aluminum Co. of America*, 148 F. 2d 416 (2d Cir. 1945) under the Sherman Act; *Oxford Varnish Corp. v. Ault & Wiborg Corp.* and *Judson L. Thomson Co. v. FTC*, *supra* notes 57, 64, under the Clayton Act.

In this connection it seems clear that the specific reference in § 7 of the Clayton Act to restraint of commerce "in any section or community" does not impose a stricter test for local restraints than does the phrase "in any line of commerce" used in §§ 2 and 3. The variation seems to have been one of the accidents of the legislative process, for the Senate Judiciary Committee explained the deletion of the more restrictive language on the ground of surplusage. SEN. REP. No. 698, 63d Cong., 2d Sess. 43, 46 (1914). Local markets are commonly regarded as the base for determining Sherman Act violations. See *Columbia Steel* case, *supra*.

figure will in any event be much lower under the Clayton Act, consistent with its basic purpose to reach trade restraints in their incipency and to nip monopoly in the bud.

The *Standard Oil* case, involving the leading company in the area, with 23% of the gasoline business, is suggestive but hardly sets the lower limits of the application of the doctrine. Much more significant is the fact that the decision struck down Standard's exclusive dealing arrangements on tires and batteries. In each of these lines, Standard's exclusive contracts covered approximately 2% of the Western trade.⁹⁷ These figures underline a danger in the "substantial share of the market" test espoused by the Supreme Court opinion. If a 2% share is substantial when held by Standard, it is hard to see how it could be held insubstantial in the hands of a new competitor invading the field. Yet neither on policy nor as a matter of legislative intent are the two situations identical with respect to likelihood of substantial lessening of competition. They can be distinguished only by comparing the total power which the two organizations can bring to bear in the particular field of competition. Such a comparison would take into account not only the share of the tire market already encompassed by Standard, but also its special access to tire buyers resulting from control of gasoline stations, and might well lead to the result that Standard can have no exclusive dealing contracts whatever for tires.⁹⁸ When a giant corporation expands in its own or adjacent markets, it can hardly assert the equities of the small newcomer in whose interest Congress qualified the absolute prohibition of exclusive dealing during the enactment of the Clayton Act.⁹⁹

It is interesting to speculate on what the Supreme Court would now do if called upon to apply the Clayton Act to a set of facts like those in the *Columbia Steel* case. There the Court refused, 5-4, to find a violation of the Sherman Act in the acquisition by the greatest steel company in the world of the physical assets of the largest independent steel fabricator in the West. The acquired company consumed about 3% of the rolled steel plates and shapes sold in the West. This was held an insubstantial share of the market, so that the exclusion of U. S. Steel's competitors from this outlet was "reasonable" and lawful in view of the sound business reasons for the

97. Including business handled through company-owned stations, Standard's total share is about 4%. See *United States v. Standard Oil Co.*, 78 F. Supp. 850, 868-869 (S. D. Cal. 1948).

98. See *Oxford Varnish Corp. v. Ault & Wiborg Corp.*, 83 F. 2d 764, 766 (6th Cir. 1936) ("Conceivably a business practice may tend to create monopoly though barely entered upon").

99. See Argument of Solicitor General Beck in the *Standard Fashion* case, *supra* note 42; *Standard Oil Co. of Calif. v. U. S.*, 337 U. S. 293, 307 n. 10 (1949).

transaction advanced by the participants. Mr. Justice Reed said, "Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product."¹⁰⁰ But perhaps this dictum was meant to be confined to interpretation of the Sherman Act, the only charge before the Court. Would the Court in a Clayton Act case hold that the monopolistic potentialities of Clayton Act devices must be judged by the power of the user rather than the degree of exclusion already achieved? Unless it takes this tack, refusing to encourage elaborate inquiries into purposes, future markets, prospects for regional development, and the virtues of vertical integration, which were permitted in the *Columbia* case, the Clayton Act is in poorer state than its most anxious friends have supposed. U. S. Steel would be free to swallow its competitors and their market outlets, so long as it bit off only 3% at a time, whether by exclusive dealing contract or by acquisition of controlling stock. Even the long pending proposals to check the merger movement by extending Section 7 to acquisition of assets as well as stock will prove ineffectual under such a standard of legality. A new critical issue in the antitrust controversy will have been formulated: Should the Clayton Act be amended to prohibit, without qualification, the employment of specified anti-competitive devices by business units having more than X millions of assets or Y% of any relevant market?¹⁰¹

100. *United States v. Columbia Steel Co.*, 334 U. S. 495, 524 (1948).

101. The Temporary National Economic Committee made a similar recommendation limited to the merger problem. See its FINAL REPORT AND RECOMMENDATIONS, SEN. Doc. 35, 77th Cong., 1st Sess. 39 (1941).