TOM CLARK: THE ROLE OF ANTITRUST LAW
IN THE AMERICAN ECONOMY

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TOM CLARK:  THE ROLE OF ANTITRUST LAW
IN THE AMERICAN ECONOMY

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CHAPTER I

INTRODUCTION

From the secure vantage point of hindsight, the actions of all public servants can be made to appear good or evil, wise or foolish. Certainly this is the case with respect to the men who sit on the nation's highest tribunal -- the United States Supreme Court. During the course of American history, no institution of government has been more controversial, or for that matter, more unjustly criticized in its attempts to formulate social and economic policy. With the rise of legal realism and the development of the social sciences, the Supreme Court's work has come under much more complete scrutiny, most of which is designed to appraise the Court's opinions and processes.

This thesis is an attempt to further that objective by analyzing the work of one member of the Court, Mr. Justice Tom C. Clark, in one field of law -- antitrust legislation. By so doing, it is hoped that a more thorough insight can be gained into the accomplishments and shortcomings of Mr. Justice Clark, while, at the same time, providing an appraisal of the Court's participation in the formulation of policy in the antitrust field. On the basis of Justice Clark's past
performance, it is also hoped that future trends in the Court's adjudication of antitrust issues can be identified and objectively appraised.

At the outset, it must be admitted that the proposed objective is fraught with uncertainty. In accordance with the Court's tradition of "judicial lockjaw," Justice Clark has written very little for publication beyond his formal opinions in court cases. Hence, these opinions will serve almost exclusively as primary source material; a great deal of secondary source material is available for purposes of analysis. Equally unfortunate is the fact that Justice Clark has declined to participate in a number of very significant antitrust decisions because of prior acquaintance with the cases.\(^1\) In spite of this, it is probable that Mr. Justice Clark has written "as many important antitrust decisions as any other Justice in American history."\(^2\)

The work is further limited by the absence of any personal acquaintance with the Justice; therefore, no attempt will be made to delve deeply into the private life of Justice Clark, and only limited mention will be made of his individual role on the Court itself. The work is by no means designed

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to be a complete biography, but rather a careful description of Clark's role as a policy-maker in the antitrust field. It is believed that his formal opinions reveal an overall philosophy of the effect of antitrust law as a legal tool to regulate a vital segment of the American economy.

Because the Court's work in antitrust law is not generally studied as extensively as its adjudication of constitutional questions, Chapter II briefly describes the objectives toward which antitrust law is directed. The majority of the informed American public still pays lip service to maintenance of a competitive, free market economy. The antitrust laws are given credit for forestalling the drive toward monopoly or its more decentralized complement, oligopoly. Yet antitrust scholars and practitioners are finding it increasingly difficult to rationalize the maintenance of competition with the contemporary organization of the business world. This fact is reflected in the trial of antitrust cases in which the courts are called upon to resolve extremely complicated economic issues. Because the adequacy of the judicial process to resolve economic phenomena is a source of continuing debate, the chapter examines contemporary thinking about the present and future state of antitrust enforcement. Although the chapter does not focus on Mr. Justice Clark, it provides an essential framework for analysis of his work in antitrust law.
Chapter III provides an analysis of Justice Clark's opinions under the Sherman Act of 1890. The Act evidenced the desire to abandon the older \textit{leisure faire} concept in favor of a more comprehensive system of economic regulation. The result was a curious mixture of private enterprise and governmental supervision, both of which are deeply rooted in the American traditions of individualism and rule of law. The Act's dual prohibitions — unreasonable restraints of trade and monopolization — leave to the enforcement agencies a great deal of discretion in applying the Act to specific instances. Evidence of this fact can be seen in Justice Clark's attempts to formulate suitable standards for the delineation of relevant markets and for determining the scope of the Act. The equally difficult problems which confront the Court in its dealings with the Act's elusive requirement of "conspiracy" illustrate its handling of borderline questions of fact and law. And finally, Justice Clark's opinions in the areas of tying contracts and vertical arrangements present a study in contrasts as to the desirability of the two business techniques.

The enactment of supplementary legislation in 1914 testified to the fact that the Sherman Act was incapable of attaining its statutory purpose of prohibiting deviations from the competitive model. The Clayton Act is designed to arrest the tendency toward economic concentration in its incipiency; the Sherman Act's requirement of conspiracy to
restrain trade is not inherent to Clayton Act proceedings. In recent years, the Act has been invoked in two significant areas: (1) the use of exclusive arrangements to stabilize sources of supply and to ensure the existence of retail outlets; (2) the use of the merger technique to acquire added facilities. Justice Clark's opinions in these areas reveal his pragmatic approach to the law. Because exclusive arrangements have the capacity for economic good, the Justice has sketched a legal approach which encourages their use to fulfill legitimate objectives. Yet, in the case of the merger movement, Justice Clark and the Court have found little good in the drive toward further economic concentration. These opinions, plus the Clayton Act's exemption of agricultural cooperatives from the full brunt of the antitrust laws, are analyzed in Chapter IV.

The Robinson-Patman amendments to Section 2 of the Clayton Act are further evidence of the practical difficulties which inhere in legal efforts to maintain a competitive system. Section 2's ban on price discrimination was overhauled in 1936 in order to facilitate a more comprehensive program of federal regulation. The burden of refining the Act's application to individual instances of discriminatory pricing was turned over to the Federal Trade Commission and the courts. Mr. Justice Clark's interpretative opinions under the Robinson-Patman Act are examined in Chapter V. In addition, that chapter analyzes the Justice's only opinion under the Federal
Trade Commission Act’s prohibition of "unfair methods of competition."

The study concludes with a general analysis of Mr. Justice Clark’s participation in the formulation of antitrust policy. Since the study was initiated with no preconceived notions, objectivity has been the standard of analysis. Yet, antitrust law and its a priori assumption of competition are being besieged by critics because of changes in the American economy from the competitive model. The future course of antitrust law as a vital link in the chain of public economic regulation will depend in large measure on the Supreme Court’s ability to adapt the law to sweeping changes which have occurred in the American economy since 1890.

Only a brief biographical comment about Mr. Justice Clark is necessary, since this study is limited to his participation in the antitrust field. As has been the case with many Supreme Court justices, Clark was introduced to the law through his family; his father was a prominent lawyer in Dallas, Texas, for over half a century. After his graduation from the University of Texas Law School in 1922, Clark entered his father’s

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firm and became a successful private attorney. In 1937, Clark entered federal service as an assistant to the Attorney General in the War Risk Litigation Section of the Department of Justice. Clark's ability was soon recognized by higher officials in the Department -- including Thurman Arnold, the aggressive head of the Antitrust Division -- and he was promoted to a secure position within the rapidly expanding Antitrust Division. Clark's antitrust career was interrupted during the War years, but the experience proved fruitful because he acquired the lifelong friendship of the Senator from Missouri, Harry S. Truman.

In 1945, Clark succeeded Francis Biddle, President Roosevelt's wartime Attorney General. He was the first man to work himself up from the lowest ranks of the Department of Justice to the office of Attorney General. Clark was a close friend of President Truman and as such was within Truman's inner circle of immediate advisors. As Attorney General, Clark personally argued three cases before the Supreme Court, one of which was the famous antitrust case of United States v. Paramount Pictures.

Upon the death of Mr. Justice Murphy in 1949, President Truman promptly entered Clark's name in nomination for the United States Supreme Court. With the warm endorsements of

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5Frank, The Warren Court, p. 86.

6334 U.S. 131 (1948).
Senators Connally and Johnson, the nomination was confirmed over a number of loud but generally unfounded protests. Thus, in 1949 Clark joined the Court and has been Mr. Justice Clark ever since.

There can be little doubt that Justice Clark has risen to the occasion of serving on the nation's highest court. His sixteen years on the Court have been characterized by competence and devotion to duty; his opinions have been some of the most controversial to come from the Court, but close examination produces general respect for Justice Clark's handling of this difficult task.
CHAPTER II

THE GOALS AND IMPLEMENTATION OF ANTITRUST LAW

With the passage of its basic antitrust legislation, the United States entered into a unique experiment in economic regulation. In no other country in the world is there a comparable body of legislation and case law which is devoted to the policing of a vital segment of the economy. Antitrust law as an essential element of American public law reflects the overriding need to protect certain values which are deemed good for the entire society and its individual members as well. In this sense, antitrust law is ultimately based on the assumption that its contributions have been and will continue to be valuable in fostering social and economic progress. If this assumption is correct, then it is imperative that Americans continue to reevaluate the underlying structure upon which antitrust law is built in order to ensure that it continues to serve the public interest to the greatest extent possible.

Antitrust legislation and its accompanying case law have won general acceptance in American tradition and history. A short time before his death, President Franklin D. Roosevelt observed that, "The Sherman and Clayton Acts have become as
much a part of the American way of life as the due process clause of the Constitution."\(^1\) Despite the wide acceptance of the ends to be accomplished, antitrust policy is subjected to varying types of analysis, most of which are designed to improve the appropriate means to these ends. The most ardent advocates of antitrust law do not pretend that this legislation has been solely responsible for their country's success in the economic sphere. Yet, its achievements have been substantial in meeting many of the difficult problems which must be resolved in a highly complex and affluent society.\(^2\) The starting point of any examination of antitrust legislation must be the pertinent objectives upon which it is based.

The Maintenance of Competition

The Attorney General's National Committee to Study the Antitrust Laws characterized the general objective of antitrust legislation as "the promotion of competition in open markets."\(^3\) American economic organization was established long ago upon a foundation of private enterprise in which the free market is the cornerstone. In the market-controlled sector of the economy,

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\(^1\)President Franklin D. Roosevelt in a letter to Secretary of State Cordell Hull, September 6, 1944, quoted in Hans B. Thorelli, The Federal Antitrust Policy (Baltimore, 1955), p. 111.


competition is seen as an end in itself, rather than simply as a means to promote desirable economic results.\textsuperscript{4} The theoretical justification for this belief ultimately rests on at least two factors. First, there is a minimum level of competition which must be maintained in the market sector of the economy in order to prevent either public ownership or private monopolistic control. Second, this minimum level of competition is not self-maintaining; in the absence of antitrust law, the level of competition will drop below the minimum.\textsuperscript{5} Thus, the continued success of the market-controlled, competitive economy may be determined in part by the adequacy of the antitrust laws to check undue concentrations of private economic power.\textsuperscript{6}

In its theoretical context, the merits of a competitive system are particularly noteworthy in that the middle course of impersonal market control is superior to either personal control by powerful businessmen or direct control by government bureaucrats. In their search for a workable definition of competition, economists and lawyers alike have come to realize that the economy cannot be evaluated realistically in such oversimplified and unrealistic terms as pure competition or


\textsuperscript{5}\textit{Ibid.}, pp. 4-5.

absolute monopoly. Rather, the emphasis has been placed on the more useful concepts of mixed enterprise, 7 "workable" or "effective" competition, 8 and market analysis. 9 Every appreciable market situation is a combination of competitive and non-competitive forces.

The Attorney General's National Committee classified the meaning of effective competition as follows. "In an effectively competitive market, the individual seller cannot control his rivals' offerings, and those offerings set narrow limits on his discretion as to price and production." 10 In other words, the effectively competitive market provides an atmosphere in which sellers attempt to further their own economic interest by offering the consumer inducements in the form of lower prices or superior services and products in order to secure his patronage. 11 If this situation exists, the behavior of the competing firms will be reduced to a pattern of conduct


10 The Attorney General's National Committee, p. 320.

11 Market rivalry may take many forms in addition to price competition, such as delivery service, superior warranty and repair facilities, advertising, the respect for brand names and many others.
which is economically feasible in accordance with the limitations of the market.\textsuperscript{12}

In those situations where undue market power exists, the scope of discretion of the firm may be much wider. If potential entrants into a profitable market can be blocked and if acceptable substitutes can be discouraged, the dominant firm may be able to maximize and stabilize profits to the detriment of the public. Although absolute market power rarely exists, the degree to which it does indicates the failure of the competitive market to curb it.

The antitrust laws were designed to control undesirable market situations. The Sherman Act prohibits "conspiracies" which result in "restraints of trade" and "monopolization" by dominant firms.\textsuperscript{13} The Act broadly defines and condemns certain kinds of reprehensible business conduct, and by so doing, it contributes to the maintenance of an economic environment conducive to competition. The Clayton Act is aimed at those predatory practices which "lessen competition or tend to create a monopoly,"\textsuperscript{14} while the Federal Trade Commission Act covers "unfair methods of competition."\textsuperscript{15}

\textsuperscript{12}Clark, \textit{Competition as a Dynamic Process}, p. 9.

\textsuperscript{13}\textit{U. S. Statutes at Large}, XXVI, Part I, 209 (1890).

\textsuperscript{14}\textit{U. S. Statutes at Large}, XXXVIII, Part I, 730 (1914).

\textsuperscript{15}\textit{U. S. Statutes at Large}, XXXVIII, Part I, 717 (1914).
Political Goals Affecting Competition

American antitrust law has been a distinctive means of promoting competition "on which our political and social freedom under representative government in part depend." The direct relationship between political freedom and active competition has caused many scholars and practitioners of antitrust law to conclude that undue concentrations of economic power should be discouraged. This attitude was clearly demonstrated in the early days of antitrust. More recently, Mr. Justice Black has summarized the underlying nature of the Sherman Act as follows:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our resources, . . . while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Much is made of the fact that economic concentration may affect democratic institutions much the same as political

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16The Attorney General's National Committee, p. 2.

17For an authoritative analysis of the various approaches to this contention see J. D. Glover, The Attack on Big Business (Boston, 1954), pp. 103-166.

18For a leading work on the passage of the Sherman Act, see Hans B. Thorelli, The Federal Antitrust Policy (Baltimore, 1955), Thorelli concludes that the Sherman Act "helps us to distinguish liberty from license." Ibid., p. 608.

19Northern Pacific Railway Company v. United States, 365 U.S. 1, 4 (1938).
tyranny, and competition, as a self-regulator in the market, reduces the tendency toward economic domination. The concern over concentrations of political power caused the constitutional framers to limit such power by providing a system of checks and balances. By so doing, the framers matched one center of power against another and a more direct limitation on the use of power was applied through the Federal Bill of Rights and judicial review. This process of limiting political power has been compared with the means employed to check undue power in the economic sector. Antitrust law serves as an indirect control over concentration and exercise of economic power, while the regulatory agencies provide direct control in the form of rate regulation. If market competition serves as an important cog in the wheel of a democratic society, it is essential that governmental restrictions be imposed to lay down the rules of the game.

From a political standpoint, the relationship between individual freedom and economic efficiency is highly important. It is generally assumed that Americans prefer freedom even at the cost of decreased efficiency; however, these concepts are not thought to be mutually exclusive. After an analysis of


the alternatives to competition, Lee Loevinger concludes that: "... the only method of achieving economic efficiency and expansion in the long run that is compatible with our values and the character of our society is reliance on competition for rewards in an economy that is as free as we are able to make it." Although the relative merits of efficiency within a competitive democratic system are debatable and empirical proof is inconclusive, it is fair to assume that Americans take for granted that economic efficiency and political freedom are compatible.

The maintenance of a market-controlled, competitive system has also been given active support by a large segment of the business community. In spite of the controversy over the desired forms of competition, it is preferred to the more direct forms of government control. Of course, public ownership and direct government supervision are found in many sectors such as public utilities and the industries under the jurisdiction of the various regulatory commissions. These classifications are outside the jurisdiction of the antitrust laws. The industrial sector is apparently very much aware of the


possibility that if a positive effort is made to substitute widespread monopolistic control for the competitive system, it may find itself in a similar situation.

Economic Objectives Affecting Competition

To a large degree, antitrust legislation is based on the premise that it will facilitate the attainment of certain desirable economic results. High on the list of objectives is the most efficient use of available resources. Economic growth and improved living standards are ultimately related to the ability of the economy to utilize its resources in such a way as to develop improved products and new methods of production, i.e., progress. Also, the rate of growth of the economy should be relatively stable so as to avoid sharp fluctuations; the income resulting from such growth should be distributed as equitably as possible in accordance with market efficiency. 24

The relationship between market rivalry and economic growth in the form of greater efficiency has been a topic of much concern in both economic and legal circles. In spite of the risks involved in generalizing about the dynamics of economic growth, American public policy is based on the "assumption that competition will on the average result in much more progressiveness

and efficiency than monopoly."²⁵ From the days of Adam Smith, it has been argued that first "perfect" competition and later "effective" competition provide the atmosphere most conducive to the utilization of the nation’s resources.²⁶

Much doubt has been cast on the assumption that market competition facilitates greater efficiency and economic growth. The dynamic nature of technology and its effect on the entire institutional structure have led to a serious reconsideration of older economic doctrines. In many market situations, more efficient operation may depend largely on new innovations. Because of high costs and substantial risks involved, innovation may well be discouraged in a highly competitive market. Thus more firms with large accumulations of capital for research may take such risks to develop new products and techniques only if they are protected from the dangerous effects of strong competition. Likewise, such firms may require minimum assurance that the resulting rewards from new innovations will be worth the time and expense involved in their creation and development.²⁷

J. M. Clark, in his cogent work on competition, analyzes the relationship between innovation and competition.²⁸ Although

²⁵The Attorney General's National Committee, p. 324.

²⁶For a discussion of the economic benefits of competition, see Ibid., pp. 317-318.


²⁸Clark, Competition as a Dynamic Process, pp. 178-211. Of course, this summary is an oversimplification of Clark's argument.
Clarke recognizes that the argument above presents formidable problems, he concludes that on the whole the competitive atmosphere provides a greater stimulus to innovation than any other. Such protective devices as patent rights and the large profits which are often available offer almost irresistible incentives to the innovator. Once the innovation is introduced, "this puts the innovator under pressure to make further innovations if he is to maintain a competitive advantage." Thus, the effect of competition is to erode the innovator's natural and imperfect advantage and by so doing stimulate new advances.

In recent years, considerations involving the economic benefits of competition have turned to questions of business size. J. D. Glover summarized the argument as follows:

The economic attack on big business boils down to two arguments: that it is inefficient; that it is monopolistic. These two propositions run as continuous strands down through the history of the criticism which has been leveled at big business on economic grounds.

Since the turn of the century, an untold number of pages have been written on the merits of "big" business. Its advocates have pointed to the tremendous growth of the economy as evidence of the inherent advantages that accrue from size. For example:

But our distrust of size is as much an emotional reaction as it is a reasoned conclusion. Size carries with it a potential for great good as well as evil. It is big business which in large part has enabled

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29 *ibid.*, p. 181.

us to make the technological advances which have made this country the envy of the world.\textsuperscript{31}

Bigness in business has been defended with equal vigor in Congressional hearings and before the courts. Reactions have varied from substantial agreement to righteous indignation. The Columbia Steel\textsuperscript{32} case offers a study in contrasts of judicial opinion regarding business size. Mr. Justice Reed speaking for the majority of the Court stated:

\begin{quote}
It is not for the courts to determine the course of the Nation's economic development . . . . The evils and dangers of monopoly and attempts to monopolize that grow out of size . . . , have caused Congress and the Executive to regulate commerce and trade in many respects. But no direction has appeared of a public policy which forbids, per se, an extension of facilities of an existing company to meet the needs of new markets of a community . . . .\textsuperscript{33}
\end{quote}

In his dissenting opinion in which three other Justices joined, Mr. Justice Douglas displayed a very hostile attitude toward big business:

\begin{quote}
We have here the problem of bigness . . . . It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace -- because of its control of prices . . . . The philosophy of the Sherman Act is that it should not exist . . . . Industrial power should be decentralized.\textsuperscript{34}
\end{quote}


\textsuperscript{32}\textit{United States v. Columbia Steel Co.}, 334 U.S. 495 (1948).

\textsuperscript{33}Ibid., p. 526. See also \textit{United States v. United States Steel Corporation}, 251 U.S. 417, 451 (1920), in which it was held that the Sherman Act "did not make mere size an offense."

\textsuperscript{34}334 U.S. 535-536.
In a similar mood, Judge Learned Hand in his *Alcoa* opinion went very far in the direction of condemning big business which is possessed with substantial market power. His interpretation of the Sherman Act implied that Congress was acting primarily out of social and moral motives in condemning restraints of trade. Thus the Sherman Act was "based on the belief that great industrial consolidations are inherently undesirable," even in spite of superior economic results.

Judge Hand concluded that the trend in public policy was directed toward preserving small, independent producers, "each dependent for his success upon his own skill and character..." rather than perpetuating a system in which the mass of producers simply follow the lead of a few large industrial consolidations. This dicta seems to imply that big business is an evil in itself; the legitimate means by which it is accomplished and its superior economic results are of little import when compared to its antisocial effects.

35United States v. Aluminum Company of America, 148 F. 2nd 416 (2nd Cir. 1945).

36Ibid., pp. 428-429.

37The legal question in the *Alcoa* case was phrased as follows: "The only question is whether it (Alcoa's conduct) falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market. It seems to us that that question scarcely survives its statement." Ibid., p. 430. The Attorney General's National Committee concluded that this statement did not imply that business size becomes illegal monopolization when such firms are merely active, enterprising and dynamic. *Alcoa"s action constituted monopolization because it attempted to prevent entry into the market and not because it was progressive. The Attorney General's National Committee, p. 60.
If nothing more, these conflicting views illustrate the absence of any consensus of opinion as to which form of business organization best facilitates the objective of market-controlled competition. Whether there is more big business and less small business than there should be will continue in all likelihood to be a thorn in the flesh of policymakers. The result thus far appears to be a curious assortment of policies based on incomplete empirical data.

In short, the American experience with antitrust law as a legal device to aid in the maintenance of an effectively competitive economy has resulted from a composite of political and economic objectives. From an economic standpoint, antitrust law serves as the principal bulwark against the use of excessive market power which is the product of collusion, the unfair exclusion of competitors or which is exerted to undermine competitive efficiency. Generally speaking, monopoly has long been thought to produce at a minimum the following results: (1) inadequate consumer protection against exorbitant pricing practices; (2) restrictions on economic opportunity and the misallocation of resources; (3) the unnecessary

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forestalling of technological advancement; (4) a disproportionate distribution of income. These charges are based on incomplete empirical verification, and in fact, there is much evidence to the contrary. Yet, antitrust law remains committed to the proposition that "there is probably no single force for economic expansion more powerful than the stimulus of competition."  

Furthermore, antitrust law is grounded in a political tradition which tends to view concentrations of power as suspect; the longstanding institutions of federalism, functional separation of powers and separation of church and state testify to this fear. Corwin Edwards has summarized the political objectives of antitrust law quite well:

The standards of the antitrust laws are not based solely upon a desire for abundance. They have much to do with our basic political beliefs in equality and human freedom and with related beliefs as to the proper scope of Government in business affairs. The political roots of antitrust are older and deeper than its economic roots.

It is now in order to briefly examine the role of the courts in the interpretation and enforcement of antitrust law. The familiar adage that laws are no better than their enforcement certainly applies in this instance. The judicial process

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has been severely tested and found wanting in many respects in the handling of antitrust litigation.

The Role of the Judiciary

The role of the judiciary in the interpretation and enforcement of antitrust legislation is particularly important. The Supreme Court and the lower federal courts have been granted a large measure of discretion in the antitrust field; especially in the interpretation of the broad requirements of the basic statutes. Martin Shapiro has noted that "It is particularly unfortunate that the antitrust field is so frequently omitted from assessments of the role of the Supreme Court because this area is peculiarly policy-oriented and provides exceptional opportunities for judicial policy-making."43

Much of the discretionary power of the courts can be traced to the common law background of "monopolization" and "restraint of trade." Prior to the enactment of the Sherman Act, competitive relations and behavior were subject to a body of rules at common law which were found in judicial opinions. Much of the American common law was inherited from the British, although some scholars have cast doubts on the significance and coherency of the Anglo-American conception of

common law with respect to business behavior. In any case, the discretionary power of the judiciary in this area of law originated in the pre-statutory, common law period.

With the passage of the Sherman Act in 1890, the task of protecting the public from the evils of undue limitations on competitive conditions became a federal matter. It is often assumed that the Act was built on the general framework of unlawful restraints at common law. Yet vast differences are apparent in the scope and effectiveness of the statutory design as opposed to the common law approach. However, the congressional framers of the Sherman Act were content to frame the statute in such a way as to leave much of the actual policy-making and implementation of the Act to the courts. From a realistic point of view, one can agree with Clare Griffin that, "A strong merit of the law which reflects the wisdom of the Congress of 1890 is the generality of its prohibitions.

44. Thorelli, The Federal Antitrust Policy, pp. 50-53. Thorelli concludes that the common law in this field is confusing and hazy and never proved very effective in fostering competition. Finally, "with regard to the wide variations in the political and economic thinking and organization in the last five hundred years, to expect to find anything but a very vaguely expressed general outlook in the common law relating to restrictions on trade would be to expect too much." Ibid., p. 51.

45. Andreas G. Papandreou and John T. Wheeler, Competition and Its Regulation (New York, 1954), p. 224. Unlawfulness at common law implied that contracts in restraint of trade were void and unenforceable; whereas the Sherman Act makes such contracts criminally unlawful if affecting interstate commerce.
which could then, under our case system of law, be adapted by
the courts to new conditions as they arose."\textsuperscript{46}

The significant opinions of the Supreme Court in the period
immediately after the passage of the Act reflect concern over
the intent of Congress with respect to the permissible degree
of judicial discretion in interpreting the Act. In 1899, Chief
Justice Taft expressed the view that Congress had intended and
the common law supported the banning of all non-ancillary re-
straints of trade.\textsuperscript{47} Taft summarized this contention by stating
that: "Where the sole object of both parties in making the
contract . . . is merely to restrain competition, . . . it
would seem that there was nothing to justify or excuse the re-
straint, that it would necessarily have a tendency to monopoly
and therefore be void."\textsuperscript{48} Thus under this interpretation there
was little room for judicial discretion in the case of direct,
non-ancillary restraints.

The modern conception of the intent of the Sherman Act
began with Chief Justice White's opinion in \textit{Standard Oil Co.
of New Jersey v. United States.}\textsuperscript{49} The terms "restraint of

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\textsuperscript{46}Clarke E. Griffin, \textit{A Study of the Antitrust Laws}. The
Subcommittee on Antitrust and Monopoly of the Committee on

\textsuperscript{47}\textit{Addyston Pipe & Steel Company v. United States}, 175 U.S.
211 (1899).

\textsuperscript{48}Ibid.

\textsuperscript{49}\textit{Standard Oil Company of New Jersey v. United States},
221 U.S. 1 (1911).
\end{flushright}
trade" and "monopolization" found in Sections 1 and 2 respectively of the Act were analyzed according to the economic conditions of the times and the pre-existing common law. After summarizing the broad nature of common law regarding restraints of trade, White concluded that the fear of unnecessary limitations on competition led to a public policy directed toward "the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions." In this light, the Act is somewhat flexible in that it prohibits only "undue" restraints on competition in the form of monopolization or partial restraints of trade.

The guideline for the interpretation of the provisions of the Act became the famous "rule of reason." Chief Justice White construed the provision that "every contract, . . . in restraint of trade . . . is hereby declared to be illegal" to mean that the courts were to decide whether conduct in restraint of trade was reasonable or not. Thus not all restraints of trade were illegal; rather only those which were found by the courts to be unreasonably destructive of competition. This construction implies that the courts exercise discretionary power within the confines of a broad public policy conducive to competition and against monopoly.

50 Ibid., p. 58.

51 The Attorney General's National Committee, p. 8.
In accordance with prior decisions, White held that certain types of behavior were "conclusively presumed to be illegal, by reason of their nature or their necessary effect." Once it is established that a contract or agreement falls within this classification, it is condemned by the Act without further inquiry under the rule of reason. The so-called per se doctrine has been applied to price-fixing agreements, territorial market division, and collective boycotts.52

The rule of reason continues to play an important role in antitrust litigation. It has not been conducive to certainty nor has it eased the burden of the enforcement agencies. But it has infused the necessary element of flexibility to meet changing conditions which has been so essential in American constitutional law. Chief Justice Hughes made this point when he stated that:

As a charter of freedom, the act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purposes by providing loopholes for escape . . . . Its general phrases, interpreted to attain its fundamental objects, set up the essential standard of reasonableness.53

The tremendous responsibility which the rule of reason places on the courts has prompted Judge Wyzanski to conclude that, "In the antitrust field the courts have been accorded,

52Ibid., p. 11.
53Appalachian Coals, Inc. v. United States, 288 U.S. 344 (1933).
by common consent, an authority they have in no other branch of enacted law." It is then in order to proceed to a brief analysis of the adequacy of the courts to live up to this responsibility.

The Adequacy of the Judicial Process

If the proposition is correct that judges will continue to be called upon to interpret the broad terms of the antitrust acts, it is imperative that Congress and the public have a general understanding of the strengths and especially the weaknesses of the judicial process in maintaining a competitive system. Matters of judicial competence in the antitrust field have been debated in Congressional circles, the academic world and among the members of the judiciary themselves for quite some time, and the resulting conclusions are by no means clear. The suggestions which have been volunteered for improvement of the law have been countered by strong arguments in opposition, most of which stress the successes which have been achieved under the present system and the difficulties which are inherent in any substantial change. Yet, there is little doubt that changes are in order provided they will be capable of doing more good than harm.

Antitrust cases present singularly difficult problems for the Judiciary. Much of the evidence revolves around

complex economic data and unsolved economic problems. The
judge is called upon to decipher complex issues of fact and
to apply them to equally difficult questions of law. This
process takes place in an atmosphere which was designed to
deal with much simpler, non-technical issues. The inevitable
result of the present trial procedure is very long, tedious
trials. For example, the trial against Aluminum Company of
America lasted for more than two years. The judge considered
58,000 pages of testimony taken from 153 witnesses, and
15,000 pages of documentary evidence. In the United Shoe
Machinery case, the government introduced a trial brief
covering 634 pages for the summary of facts, eighty-seven
pages for the law involved and 6,224 pages of excerpts from
documentary evidence. In the Investment Bankers case, the
government alone introduced 10,640 documents.

55 Breck P. McAlister, "The Big Case: Procedural Problems
in Antitrust Litigation," Harvard Law Review, LXIV (November,
1950), 27-61.

56 Ibid., p. 32.

57 United States v. United Shoe Machinery Corp., 110 F.

58 McAlister, "The Big Case," p. 44.

59 United States v. Henry S. Morgan, 118 F. Supp. 621
(S.D.N.Y., 1953). Judge Harold Medina stated that, "Unless
some way be found to confine within reasonable bounds the
material to be read and studied by the Court, the determination
of the issues by the ordinary process of absorption and
ratiocination will be a physical impossibility." Quoted in
It seems to be inevitable that as the enforcement of antitrust law becomes more complex, judicial responsibility will become more burdensome and less conducive to adequate solutions to basic economic problems. If Congress is content to call upon the courts for antitrust interpretation and enforcement, the necessity for lightening the judge's load is apparent. Breck P. McAllister concludes that:

Procedures must be developed that will permit the orderly handling of the masses of factual material which are to be gleaned from thousands of documents and the testimony of a multitude of witnesses. This material must be presented, ordered and stated so that it may be grasped and understood by the trial court, and it must be recorded in such a manner as will be of greatest aid to both the trial and reviewing courts. If we do not recognize the problem and make a determined effort to deal with it, the processes of antitrust litigation may break down of their own weight.

In an attempt to find answers to the above-mentioned problem, the Senate Subcommittee on Antitrust and Monopoly sent questionnaires to federal judges to ascertain their views on some of the proposed solutions. The answers reflect a great deal of inconsistency in judicial views. With respect to the possibility of Congressional guidance in the form of additional legislation, one judge replied that, "Congress

60 McAllister, "The Big Case," p. 28.


62 The individual judges were assured that they would not be named in the report. The justices of the Supreme Court thought it inappropriate to reply to the questionnaire.
is the creator of the policies of Government and legislation, and I know of no reason why it should not establish standards or criteria as guides for the courts in interpreting the laws."  

The reactions of the judges in regard to the responsibility of the courts in dealing with highly technical economic issues varied from complete agreement with the status quo to greatly qualified answers.  

One judge expressed the view that "Responsibility for resolving economic issues is a matter for the legislative branch of the Government." Although it was generally agreed that judges are often inadequately trained to deal with economic issues, and they have very little independent expert assistance, several judges doubted whether a non-judicial body could resolve these issues as well as does the judiciary.  

In other words, the weaknesses of the system were commonly known, but the proposed

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63Burns, A Study of the Antitrust Laws, p. 12. Several judges were opposed to any attempt by Congress to be more specific because of the fear that the elasticity of the law would be destroyed. The character of the evils which Congress sought to prohibit was not conducive to specific statutory definition. Also, it was feared that substantial changes would entail a multiplicity of new litigation to determine the meaning of what are now relatively settled points of law. Ibid., p. 22.

64Of the fifty-one replies, twenty-two judges considered it desirable for the courts to resolve economic issues in antitrust cases, while nineteen considered it undesirable. The ten remaining replies were qualified. Ibid., p. 11.

65Ibid.

66Ibid., p. 21.
suggestions were met with substantial opposition as far as improved adjudication of economic issues was concerned.

In all likelihood, the courts will continue to play a key role in the enforcement of competitive policies. The faults of antitrust litigation should continue to be subjected to independent appraisal in an attempt to find fresh solutions to old and difficult problems. Many partial solutions have been put forward ranging from the establishment of an administrative agency to hear Sherman Act offenses to the creation of specialized courts for antitrust purposes. Although these solutions have not been given overwhelming support, they might conceivably be made to work in the future.

From a practical standpoint, the weaknesses of the judicial process can best be attacked by developing methods to utilize the inherent advantages of litigation to the greatest extent possible. To do this would require greater use of economic data, giving the courts specialized assistance, improvements in pre-trial negotiations, and in general an emphasis on the qualities that have always been conducive to public support for the courts and the law.68

67In 1958, Justice Black recommended the expansion of definitive rules of the per se classification in order to avoid "incredibly complicated and prolonged economic investigation." Northern Pacific Railway Company v. United States, 356 U.S. 1, 5 (1958).

The purpose of this brief inquiry has been to focus on the goals of American antitrust policy with respect to the complex and sometimes conflicting events which contribute to its formation and execution. In the final analysis, Americans are primarily interested in maintaining a democratic society in which maximum personal freedom and economic security flourish. An overall policy of market competition is thought to come closer to that objective than any other. Yet, the solutions to individual problems in which equally valid conflicting interests are involved require the most sophisticated analysis and policy formulation that can be had. Simple maxims based on partial understanding of the various goals are ineffective and often harmful.

Politics in general and antitrust policy in particular are based ultimately on composite value judgments. Those value judgments which are based on emotional responses or personal hunches are no longer adequate to meet the needs of a highly industrialized nation. Therefore, it is imperative that a firm analytical base be established upon which reasoned judgments can be made to facilitate the accomplishment of ultimate objectives. Mark S. Massel emphasizes the need for a better understanding of such objectives as follows:

First, we can develop a clearer understanding of the complex of objectives -- an appreciation of the fact that most public policy issues in this area cannot be guided by a single national goal but must take several into consideration. Second, we can clarify the role of competition in meeting some of the goals. We can
establish basic premises through field research regarding the influence of competition on efficiency, growth, stability, and international trade. While such premises may not have the same application in all industries, we might for policy purposes rely on the effects that obtain from competition in the bulk of markets. 76

As a member of the United States Supreme Court, Mr. Justice Clark has been instrumental in the formulation of antitrust policy. During his sixteen years on the Court, Justice Clark has written opinions in almost every phase of antitrust proceedings. A substantial number of these opinions represent the Court's first attempt to establish legal guidelines in the enforcement of the statutory framework. The remainder of the thesis will focus on Mr. Justice Clark's work, beginning with his opinions under the Sherman Act of 1890.

76 Massel, Competition and Monopoly, pp. 40-41.
CHAPTER III

THE SHERMAN ANTITRUST ACT

The backbone of American antitrust law is the Sherman Act of 1890.¹ The Act is a relatively brief document phrased in very general terminology, but its statutory content has remained almost untouched for well over seventy years. Its principal significance is that it provides a set of socio-economic guidelines for a large segment of the American economy. Of course, the Act is encompassed within a legal framework in which limitations are naturally imposed; the guidelines take on meaning only as they are spelled out in judicial proceedings. Consequently, a large body of case law has developed through the years to give meaning to the statutory standard.

Recognition must also be given to the fact that the Sherman Act was not designed positively to create competitive relationships. As previously noted, it is assumed that competition is desirable because of the results that are thought to follow from it.² Thus, the Sherman Act has become an institutionalized medium to prohibit certain predatory business practices. It

¹U. S. Statutes at Large, XXVI, 209 (1890).

²It must again be emphasized that this assumption has not been empirically verified to the satisfaction of all economists or legal experts. See the discussion of recent literature on this subject in Edward S. Mason, Economic Concentration and the Monopoly Problem (Cambridge, 1957), pp. 16-43.
does not take into account the need for constant supervision, but rather temporarily focuses on those unwanted deviations from the established norm which are supposedly to be corrected in a court of law.

Section 1 of the Sherman Act deals with restraints of trade arising from agreements or conspiracies affecting interstate commerce. The alleged restraint is tested against a standard of reasonableness in order to gauge its effect on existing competition. Judicial decisions have provided that some restraints of trade are conclusively presumed to be anti-competitive by their very nature and are banned per se at such time as they are found to exist. Because the Sherman Act is also a criminal statute, restraints of trade are adjudicated in accordance with the basic rules of criminal procedure. These loosely defined and here oversimplified standards serve as the basis of interpretation and enforcement under Section 1.

Section 2 of the Act is aimed at monopolization of any appreciable part of interstate commerce. Monopolizing becomes illegal if it is accompanied by conduct which is prohibited under Section 1, provided it is "deliberately" obtained and

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3Section 1 reads in part as follows: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ."

4Section 2 reads in part as follows: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."
preserved. Of course, not all restraints of trade constitute monopolization; the rule of reason plays a much more important role under Section 2. Monopolization which is accompanied by the intent and purpose to exclude competitors or to secure and use dominant market power is condemned. In sum, the legal responsibility of the courts under Section 2 is to apply the rule of reason to the motivations of firms which achieve substantial market control.5

It is now in order to proceed to an analysis of the Sherman Act in those areas in which Mr. Justice Clark has written opinions. Of necessity, the narrative will not flow in a logical pattern, nor will any attempt be made to analyze the entire body of case law under the Sherman Act. Instead, only those areas in which Mr. Justice Clark has worked will be analyzed, even though the result is a partial treatment of antitrust law.

The Concept of the Relevant Market

The determination of whether a violation of the Sherman Act has taken place depends to a large degree on the definition of the relevant market in which the particular business operates. The basic antitrust statutes make no mention of "markets" at all; the task of defining the area of effective competition was wisely left to the courts within the confines of the

5See Mr. Justice White's opinion in Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911).
individual case and controversy. As such, there is no standard or universal definition of the relevant market. The courts are required to tailor the definition of the market to the specific situation at hand.6

The economic conception of the market has greatly influenced its practical application in antitrust proceedings. In economic analysis, the market is classified as "the sphere of competitive rivalry within which the crucial transfer of buyers' patronage from one supplier of goods and services to another can take place freely."7 As an economic relationship between buyers and sellers, the relevant market is determined by many factors. Although the number of criteria in the individual instance varies, some of the more important ones are geographic area, product classifications, cross-elasticity of demand, price, brand names, potential competition and business behavior.8

The duty of the courts is to examine the facts so as to locate the "area of effective competition"9 or the lack of it, and on the basis of that market definition to proceed to the enforcement of the statute. Of necessity, judicial definitions vary considerably. In some instances, the courts have been

6See Massel, Competition and Monopoly, pp. 259-260.

7The Attorney General's National Committee, p. 322.


content to consider quite dissimilar products within the same market, while in other instances, only small differences have been enough to persuade the courts that two products were not in the same market.

Mr. Justice Clark has been somewhat of a pioneer in setting appropriate standards for market analysis. His opinion in *Times-Picayune Publishing Company v. United States* has been a benchmark for a large number of later cases requiring market definition. In analyzing the local New Orleans newspaper industry, Justice Clark was content to exclude other forms of mass media from the relevant market even though these forms surely offered some competition to the local newspaper industry. In so doing, Clark stated:

> For every product, substitutes exist. But a relevant market cannot meaningfully encompass that indefinite range. The circle must be drawn narrowly to exclude any other product to which, within reasonable variations in price, only a limited number of buyers will turn; in technical terms, products whose "cross-elasticities of demand" are small.

The concept of "cross-elasticity of demand" was employed by Justice Clark to test the degree of customer sensitivity in the local advertising market. The fact that other media of

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advertising were excluded from the advertising market indicated that Clark was content to narrowly define cross-elasticity for relevant market purposes. This is consistent with Judge Hand’s approach in the *Alcoa* case of 1945. The precedent value of the *Times-Picayune* case became somewhat questionable after the *du Pont* decision of 1956, in which the Court shifted to a broad definition of the relevant market as applied to *du Pont*’s control over the cellophane industry. Nevertheless, in 1959, Justice Clark’s narrow definition prevailed in the *International Boxing* case.

The Government had contended that because of the dominance of the *Times-Picayune* in the morning newspaper market in New Orleans, it was separate and distinct from the affiliated evening newspaper. In rejecting this contention, Justice Clark stated that "the whole and not part of a relevant market must be assigned controlling weight." Accordingly, the relevant market was found to be the entire newspaper advertising market in New Orleans. The findings of the trial court placed the

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13 *United States v. Aluminum Company of America*, 148 F. 2nd 416 (2nd Cir. 1945). Judge Hand held that only virgin aluminum ingots, and not secondary or scrap aluminum, were in the relevant market.

14 *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956). The relevant market was defined as flexible wrapping materials and not just cellophane. Justice Clark did not participate in the decision.


16 345 U.S. 611.
Times-Picayune's percentage of that market at forty percent. This was not considered to be market "dominance," although Justice Clark realized that "Obviously no magic inheres in numbers, 'the relative effect of percentage command of a market varies with the setting in which that factor is placed.'" 1

In *International Boxing Club v. United States,*18 Justice Clark was again called upon to apply his skill to the art of market definition. The *International Boxing Club* was engaged in the promotion of both championship and non-championship boxing contests on an interstate basis. The Government brought suit in Federal District Court charging the I.B.C. with violations of Sections 1 and 2 of the Sherman Act because of a series of agreements which allowed the I.B.C. to gain virtual control over the promotion of championship boxing contests. The District Court sustained the charges and entered both divestiture and dissolution orders. The Supreme Court affirmed.

In the first portion of his opinion, Mr. Justice Clark dealt with the appellant's vigorous attack on the trial court's finding that the relevant market was the promotion of "championship" professional boxing bouts as opposed to all boxing

17*Ibid.*, p. 612. In quoting from *United States v. Columbia Steel Co.*, 334 U.S. 495, 528 (1948), Justice Clark apparently put little stock in Judge Learned Hand's famous remark in the *Alcoa* case that ninety percent of market supply "is enough to constitute a monopoly; it is doubtful whether 60 or 64 percent would be enough; and certainly 33 percent is not." *United States v. Aluminum Company of America*, 148 F. 2d 416, 424 (2nd Cir. 1945).

contests. The I.B.C. placed heavy reliance on United States v. E. I. du Pont De Nemours & Co., 19 which involved an alleged monopoly in the cellophane market. The Court there held that the relevant market was not cellophane alone but the entire field of flexible wrapping materials. The I.B.C. contended that there was no physical difference in championship and non-championship boxing contests and that they should be classified together in the definition of the relevant market.

In rejecting this line of argument, Justice Clark restated the benchmark established in the du Pont case of 1956. 20 However, the concept of "reasonable interchangeability" did not apply in this instance because the delineation of the relevant market "involves distinctions in degree as well as distinctions in kind." 21 As such, "championship boxing is the 'cream' of the boxing business, and, as shown above, is a sufficiently separate part of the trade or commerce to constitute the relevant market for Sherman Act purposes." 22 Thus, the Court apparently returned to the narrow concept of the relevant market in Sherman Act proceedings.

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20"The market . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced -- price, use, and qualities considered." Ibid., p. 404.

21358 U.S. 251.

22Ibid., p. 252.
The obvious conclusion which can be drawn from the preceding analysis is that the Court exercises a tremendous amount of discretion in locating the boundaries of the market for trial purposes. Justice Clark exhibits a consistent view of the market as being narrowly circumscribed both in terms of products and geography. The final result is that the enforcement agencies are better able to attack undue concentrations of market power.

The Scope of the Sherman Act

By definition, the provisions of the Sherman Act apply only to restraints of trade in interstate commerce. Hence, two questions are appropriate: (1) What is to be included within the broad term "interstate commerce?" and (2) How far did Congress intend for the courts to go in enforcing the Sherman Act? The answers to these questions are by no means settled. The Supreme Court has been called upon to decide the issue in the areas of professional sports, the theatre industry and the insurance business. This inquiry will be confined to the Court's rulings with respect to professional sports. The opinion of Mr. Justice Clark in Badovich v. National Football League will serve as the focal point.

In the Badovich case, a professional football player brought suit against the National Football League alleging violations of Sections 1 and 2 of the Sherman Act. He contended

that the N.F.L. had "blacklisted" him because of a violation of his standard player contract which prohibits any player from signing with another professional club without the permission of the club holding his contract. Radovich claimed that the blacklisting effectively prevented his employment in organized football and was directly the result of an organized conspiracy by the National Football League to monopolize interstate commerce in professional football.

The District Court and the Court of Appeals dismissed the suit for want of jurisdiction because of the general rule established in the Federal Baseball and Toolson cases. It was there held that the volume of interstate business was incidental to and not an essential part of professional baseball. In accordance with this finding baseball was not held to be subject to the antitrust laws.

The Supreme Court, per Mr. Justice Clark, reversed the decisions of the lower courts and expressly held that "the volume of interstate business involved in organized professional football places it within the provisions of the Act." In his opinion, Justice Clark rejected the defendant's contention

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25 Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). In a per curiam opinion, the Court reaffirmed the exemption of professional baseball from the antitrust laws because of the long-standing ruling in Federal Baseball and the absence of legislation by Congress to overrule that decision.

26 352 U.S. 452.
that *stare decisis* compelled the application of the *Federal Baseball* rule to professional football. It was pointed out that the protection afforded baseball in *Federal Baseball* was continued in *Toolson* only because a retroactive overruling of the former decision would be more harmful than upholding a rule "which at best was of dubious validity." Justice Clark demonstrated the limited scope of the above case by pointing to the opinions in the *Subert* and *International Boxing* cases in which it was held that both theatrical productions and professional boxing were covered by the antitrust laws. In the instant case, it was specifically held that *Federal Baseball* was limited to the facts of that case, i.e., the business of professional baseball.

Justice Clark dispelled any notion that this decision was premised on a distinction between professional football and baseball. Both businesses are based on the performance of local exhibitions, and the degree of interstate activity in both is substantial; the amount of radio and television transmission directly connected with the businesses would be enough

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29*United States v. International Boxing Club*, 348 U.S. 236 (1955). It was contended in this instance that only exhibitions of an athletic nature were exempted from the antitrust laws. The Court rejected any distinction between athletic and nonathletic entertainment.
to satisfy the requirements of the Sherman Act. Yet, the Court was unwilling to act in the case of baseball because of the longstanding precedent and the absence of Congressional legislation to the contrary. Justice Clark made this point by stating that:

If this ruling is unrealistic, inconsistent, or illogical, it is sufficient to answer . . . that were we considering the question of baseball for the first time upon a clean slate we would have no doubts. But Federal Baseball held the business of baseball outside the scope of the Act . . . . We, therefore, conclude that the orderly way to eliminate error or discrimination . . . is by legislation and not by court decision.30

In other words, the Court was willing to abide by the rule of stare decisis in the matter of baseball even in the face of logic and the established facts. This was so because Congressional change would avoid the harsh fact of retroactivity and the injustice that would occur during the period of transition.

In turning to the sufficiency of the complaint, Justice Clark again alluded to the controlling factor stated in International Boxing, i. e., the degree of interstate commerce involved in the business. It was found to be substantial and that "alone is sufficient to meet the commerce requirements of the Act."31 Thus, professional football joined theatrical productions and professional boxing with respect to the coverage of the antitrust laws.

30 352 U.S. 452. 31 Ibid., 453.
Mr. Justice Frankfurter dissented on the matter of *stare decisis*. Although he agreed with the logic of the Court's decision to extend antitrust coverage to professional football, he could see no legitimate reason to distinguish between the businesses of football and baseball. To Frankfurter, *stare decisis* limited the Court's discretionary power to apply different standards to similar businesses. Accordingly, he would have applied the rule of *Federal Baseball.*

Mr. Justice Clark's opinion is consistent with the trend of cases which had previously been decided by the Court. With the exception of professional baseball, the Court has extended the coverage of the antitrust laws to most major sporting activities. The matter of baseball was left to Congress in the hope that action would be taken so as to avoid the harshness of judicial change. Yet there seemed to be little doubt in Justice Clark's mind that the facts would not support a distinction between baseball and other sports.

With respect to the matter of *stare decisis* which plagued the dissenters, it seems that Justice Clark is on less stable ground. The chief underlying social justification for the doctrine is the recognition that the ability to make reasonable

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33 See *Wickard v. Filburn*, 317 U.S. 111 (1942). The Court has interpreted the commerce requirement of the Act in a liberal manner.
judgments based on established legal rules must be preserved.\textsuperscript{34} Justice Clark relied on \textit{stare decisis} in the case of baseball, but it is not readily apparent why the same procedure was not followed in the case of professional football. Reliance on the \textit{Shubert} and \textit{International Boxing} cases is of little help in furnishing a guide for the defendants since those cases were handed down after the instant suit was filed. The problems of retroactive injustice and lack of consistency which were of such concern to Justice Clark in his discussion of the exemption of baseball, did not appear to be of much significance in the instance of football. Of course, the same criticism can just as easily be leveled at the Court's decisions in \textit{Shubert} and \textit{International Boxing}.

An alternative solution to the dilemma of retroactive injustice which confronted the Court in this case might well be the greater use of "prospective" overruling of prior precedents.\textsuperscript{35} Had Justice Clark adhered in the instant case to the rulings in the baseball decisions, but prospectively overruled them as controlling in future cases, the dilemma might have been at least partially resolved. If nothing else, this procedure might well have spurred Congress into taking the long-awaited action to clarify the relationship of the antitrust laws to the business of professional sports. At the same

\textsuperscript{34}\textit{Helvering v. Hallock}, 309 U.S. 106 (1940).

time, retroactive injustice to either baseball or football would have been avoided and the law would have been rid of the apparently undesirable precedent of Federal Baseball for future litigation.

Assuming that competition is desirable in the sports industry, Justice Clark's application of the antitrust laws to professional football is sound. By its nature, the business of professional sports is highly oligopolistic and often tends toward monopoly. The status of the National Football League as the sole professional contender for the public dollar was only recently challenged by the creation of the rival American Football League. The element of competition from other professional sports is minimized by the seasonal nature of each sport. Thus, the important role which professional football plays in the recreational life of the American public is reason enough to remove its exemption from the antitrust laws. Although the Court did not pass judgment on the element of monopolization in this instance, it was correct in providing an avenue of access to the courtroom.

The Subcommittee on Study of Monopoly Power of the Committee on the Judiciary (House of Representatives) summed up the matter appropriately in its analysis of legislation to exempt professional sports from the antitrust laws by stating:

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The requested exemption would extend to all professional sports enterprises and to all acts in the conduct of such enterprises. The law would no longer require competition in any facet of business activity of any sport enterprise. Such a broad exemption could not be granted without substantially repealing the antitrust laws.

The Law of Conspiracy

Although many conspiracies to restrain trade are easily adjudicated because of tangible evidence of collusion, there are occasions when disputed questions of fact and law make the law of conspiracy extremely complicated. In some major industries, there are sound commercial reasons for similarity of action -- the motion picture industry is a good example. Because of costly initial investments and the lack of any guarantee of a profitable return, the large film producers and distributors make it a practice to display their films in established theaters with greater "pulling power." The usual practice is to choose prestigious theaters for the "first-run" showing of a big motion picture in particular areas; the public will then pay higher prices to see it while it is new. After the motion picture has lost its initial public attraction, it is released to less expensive theaters to be shown as a "subsequent-run." The period between the first run and subsequent run showings is usually protected by a clearance contract.

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The structure of the motion picture industry and the adoption of these exhibition practices easily lend themselves to exclusionary tactics and collusion. The task of the courts is to distinguish between collusion and similar but independent action; needless to say, this is not an easy undertaking. The general term which has been applied to joint action among business competitors is "conscious parallelism." This inquiry will explore the law of conspiracy from the standpoint of conscious parallelism with the major emphasis on the motion picture industry and Mr. Justice Clark's important opinion in *Theatre Enterprises, Inc. v. Paramount Film Distributing Corporation.* 39

Justice Clark's opinion in the *Theatre Enterprises* case is the last instance in which the Supreme Court has commented on the relationship between conscious parallelism and illegal conspiracy under the Sherman Act. In this case, the owner of a suburban Baltimore theatre brought a private antitrust suit against several motion picture distributors, charging them with a conspiracy to restrict the sale of "first-run" movies to downtown theaters. Hence, the suburban theatre owner was left with only subsequent-runs with rather high clearances.

It was uncontested that each distributor refused to grant the plaintiff any first-run films and that each was aware of

the refusals of the others. Although there was some evidence from which inferences of agreement could be drawn, there was admittedly no tangible evidence of illegal agreement among the distributors. Each defendant distributor testified to the effect that the refusal to sell first-runs to the plaintiff was based purely on economic factors which all shared in common and not upon collusive agreements.

Mr. Justice Clark stated the basis upon which conscious parallelism of action would be judged as follows:

The crucial question is whether respondents' conduct toward petitioner stemmed from independent decision or from an agreement, tacit or express. To be sure, business behavior is admissible circumstantial evidence from which the fact finder may infer agreement . . . . But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.40

Thus, an illegal conspiracy is not automatically established at such time as circumstantial evidence indicates a course of parallel action. Of course, conscious parallelism may be used as admissible evidence in conspiracy cases, but Mr. Justice Clark made it clear that other evidence of collusive behavior must be present before Section 1 is violated.

40Ibid., pp. 540-541.
It is also quite clearly inferred that in this instance conscious parallelism consisted of wholly independent decisions in which each defendant found it to his own best interest to refuse to sell first-runs to the suburban theatre owner. Identical but unrelated responses based on similar economic factors do not constitute an illegal conspiracy. 41

Justice Clark's opinion marked somewhat of a change in the trend of earlier opinions dealing with Sherman Act conspiracies. For example, in 1914 the Court stated that "conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done." 42 In this instance, the Court found conspiracy when evidence indicated that a Lumber Dealers Association had circulated among its members the names of wholesalers who reportedly sold directly to consumers. It was also found that member retailers, after receiving the lists of names, refused in large numbers to deal with the reported wholesalers.

In 1939, the Court again found conspiracy to be present without direct proof of collusion among the alleged conspirators. In the Interstate Circuit case, 43 it was established

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42 Eastern States Retail Lumber Dealers Association v. United States, 234 U.S. 600 (1914).

that the owners of two large motion picture companies had
conspired to set minimum admission prices for subsequent-runs
which had been released to competing exhibitors after having
previously been shown as first-runs. The only tangible evi-
dence was a managerial letter which had been sent to all of
the affiliated distributors stating the above policy. From
the existing evidence, the Court was able to infer a conspiracy
in that, "Acceptance by competitors, without previous agree-
ment of an invitation to participate in a plan, the necessary
consequences of which if carried out, is restraint of inter-
state commerce, is sufficient to establish an unlawful
conspiracy under the Sherman Act."\(^44\)

The Court again applied the same evidential rule in the
**Cement Institute** case of 1948.\(^45\) In affirming the findings
of the Federal Trade Commission that an industry-wide basing
point system had been adopted by virtue of a conspiracy, the
Court held that it was sufficient to warrant a finding of
conspiracy under the Sherman Act "if there is evidence that
persons with knowledge that concerted action was contemplated
and invited, give adherence to and then participate in a
scheme.\(^46\)


\(^{45}\) *Federal Trade Commission v. Cement Institute*, 333 U.S.
683 (1948).

Following this decision, the Federal Trade Commission announced that it would consider parallel action in pricing to be the same as overt collusion. It came to be assumed in many quarters that conscious parallelism was synonymous with unlawful conspiracy so long as each participant was aware of what the others were doing.\footnote{See The Attorney General's National Committee, p. 38.} One major exception to this line of argument occurred in 1951.\footnote{Fanchon & Marco v. Paramount Pictures, Inc., 100 F. Supp. 84 (S. D. Cal., 1951).} Judge Yankwich refused to uphold a complaint involving the denial of first-runs to a suburban theatre in the Los Angeles area. It was noted that preference of distribution for one theatre over another was an inescapable feature of the motion picture industry.

In 1953, the stage was set for an authoritative restatement of the Court's position in the matter of conscious parallelism. As previously stated, Mr. Justice Clark rejected the contention that conscious parallelism, in and of itself, is a violation of the Sherman Act. After alluding to the fact that circumstantial evidence "may have made heavy inroads into the traditional judicial attitude toward conspiracy," Clark reestablished the element of genuine agreement as the essential benchmark for unlawful conspiracy under Section 1.

Justice Clark did not, however, foreclose the possibility that parallel business behavior may be of substantial value...
in determining the existence of concerted action. The Theatre Enterprises opinion did not overrule or seriously dilute Interstate Circuit or Cement Institute. In spite of the dicta of these opinions, there was additional evidence to infer that conspiracy had in fact existed. Even though the element of uniformity may vary with every business setting in which it occurs, it may prove to be rather conclusive evidence in those situations in which parallelism has persisted for long durations and sound justifications to the contrary are lacking.\footnote{See \textit{American Tobacco Co. v. United States}, 328 U.S. 781 (1946), and \textit{United States v. Paramount Pictures}, Inc., 334 U.S. 131 (1958). These cases are thoroughly discussed in \textit{The Attorney General's National Committee}, pp. 40-42.}

In its cogent analysis of conscious parallelism the Attorney General's National Committee found itself in "full accord" with Justice Clark's reasoning in the Theatre Enterprises. The Committee went ahead to state that:

"Conscious Parallelism" is not a blanket equivalent of conspiracy. Its probative value in establishing the ultimate fact of conspiracy will vary case by case. Proof of agreement, express or implied, is still indispensable to the establishment of a conspiracy under the antitrust laws.\footnote{\textit{The Attorney General's National Committee}, p. 39.}

In 1963, two lower court decisions\footnote{\textit{Winchester Theatre Co. v. Paramount Film Distributing Corp.}, 324 F. 2d 652 (1st Cir., 1963); \textit{Independent Iron Works, Inc. v. United States Steel Corp.}, 322 F. 2d 656 (9th Cir., 1963).} reaffirmed the Theatre Enterprises ruling. It was unequivocally held that conscious parallelism alone was insufficient evidence of conspiracy to
warrant submission of the cases to the jury. In the *Winchester Theatre Company* case, it was not only held that additional evidence of collusion was needed, but that if conscious parallelism "is compelled by competition . . ., we find it difficult to say that such action warrants a finding of an illicit agreement."52

**Tying Contracts**

Tying contracts usually take the form of sales agreements or policies which provide that the purchaser of a dominant product must also purchase another less important and often unwanted product. If a firm has a great amount of market power in one of its products, it can force the sale of other items by such an agreement. This is an especially effective method of eliminating or seriously weakening competition in the market for the tied product.

Not only the Sherman Act, but also Section 3 of the Clayton Act and Section 5 of the Federal Trade Commission Act outlaw tying contracts. The major difference in the proceedings under these statutory standards is the amount of proof needed to establish a violation. The Sherman Act requires a much heavier burden of proof. However, the Sherman Act is at present the only statute which is utilized to attack tying contracts in the area of services as opposed to commodities.

52 324 F. 2d 653.
Mr. Justice Clark’s opinion in *Times-Picayune Publishing Company v. United States* is an interesting study of the use of tying contracts in a local market. The case is important for at least two reasons: (1) Justice Clark does an excellent job of summarizing the judicial history of tying contracts, and (2) the decision marks somewhat of a change in the Court’s approach to tying contracts under the Sherman Act.

In *Times-Picayune*, the Government brought suit against the Times-Picayune Publishing Company, charging it with violations of Sections 1 and 2 of the Sherman Act. The Times-Picayune Company was the leading newspaper publisher in New Orleans; it published both morning and evening newspapers, which were the *Times-Picayune* and *The States* respectively. The only other active competitor was an independent evening newspaper, *The Item*. The Times-Picayune Company adopted a so-called "unit plan" in which classified and general display advertisers were forced to take space in both the morning and evening newspapers or not at all. The Government alleged that the use of the unit plan constituted an unreasonable restraint of trade in violation of Section 1 and provided the means to accomplish unlawful monopolization banned by Section 2. The District Court sustained both charges.

In overruling the decision of the District Court, the Supreme Court, speaking through Mr. Justice Clark, found no

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53345 U.S. 594 (1953).
violation of the Sherman Act and consequently upheld the use of the unit plan of selling advertising space. The District Court had found that the Times-Picayune, the only morning paper and the dominant newspaper in New Orleans, had used its monopoly position in the morning market to injure its competitive rival in the evening market. The use of the unit plan was viewed as a tying contract because of the ability of the Times-Picayune Company to tie the sale of its monopoly product to the affiliated evening paper which was in competition with The Item. The case was brought under the Sherman Act instead of Section 3 of the Clayton Act because of the fear that Section 3 did not cover non-material goods such as newspaper advertising.

In analyzing tying contracts in general, Justice Clark noted that such agreements have been virtually condemned under the Sherman and Clayton Acts. Because they "serve hardly any purpose beyond the suppression of competition," the courts have often been disposed to treat them as per se violations of the antitrust laws. This has been due to the fact that the "tied" product is insulated from the competitiveness of the market and competitors are foreclosed before they can offer their goods and services. In regard to the newspaper unit plan as a tying device, it was found that the

54 Standard Oil Company of California v. United States, 337 U.S. 293, 305 (1949);
newcomer in the daily newspaper business could count on no more than an eleven percent chance of survival.\textsuperscript{55}

After restating the rule governing tying contracts under Section 3 of the Clayton Act, Justice Clark proceeded to the instant case and the standards of illegality under the Sherman Act with respect to tying contracts. The Court's decision in \textit{International Salt Co. v. United States}\textsuperscript{56} established a dual standard for judgment under Section 1: (1) The volume of interstate commerce affected by the "tied" product must be substantial. (2) The seller must enjoy a monopolistic position in the market of the "tying" product. On the basis of the record, Justice Clark assumed that the volume of interstate commerce was substantial in accordance with the first test, and thus the measure of market dominance of the \textit{Times-Picayune} became critical to the case.

Before market dominance can be determined, there must be a definition of the relevant market. Justice Clark defined the market as the entire newspaper "advertising" market in New Orleans.\textsuperscript{57} The combined morning and evening advertising

\textsuperscript{55}345 U.S. 604.

\textsuperscript{56}332 U.S. 392 (1947). In this case, the leases of patented machines for dispensing salt were conditioned on the lessees' purchase of International's salt. The Court found that the patents conferred monopolistic market control, and the volume of interstate commerce affected by the sale was not "insignificant or insubstantial." \textit{Ibid.}, p. 396.

\textsuperscript{57}The advertising market and not the general "readership" market was chosen because the \textit{Times-Picayune} was accused of tying sales only to its buyers of general and classified advertising space in its papers.
market was given controlling weight because "the essence of illegality in tying agreements is the wielding of monopolistic leverage." In order to test the lever, the entire relevant market must be measured as opposed to only a specific segment.

The record of comparative market data indicated that the Times-Picayune's sales of advertising lineage over the years was consistently around forty percent of the relevant market. Justice Clark noted that if each of the three newspapers had shared the advertising market equally, the result would have been quite similar. Because of the absence of market devices such as patents and copyrights and the lack of market control, Justice Clark concluded that: "We do not think that the Times-Picayune occupied a 'dominant' position in the newspaper advertising market in New Orleans."

The Justice also distinguished the instant case from other tying cases by overturning the District Court's finding that the Times-Picayune and the affiliated evening paper, The States, were separate and distinct newspapers. In explaining his position on this issue, Justice Clark stated:

58 345 U.S. 611.
59 Ibid., p. 612.
60 Ibid., p. 611.
61 The District Court found that readers consciously distinguished between the morning and evening papers and as a result advertisers would not patronize both papers unless compelled to do so by the unit rule. Thus, the existence of separate markets was established.
The common core of the adjudicated unlawful tying arrangements is the forced purchase of a second distinct commodity with the desired purchase of a dominant "tying" product, resulting in economic harm to competition in the "tied" market. Here, however, two newspapers under single ownership at the same place, time, and terms sell indistinguishable products to advertisers; no dominant "tying" product exists . . .; no leverage in one market excludes sellers in the second, because for present purposes the products are identical and the market the same.62

Thus, the two newspapers were lumped together into one market to negate the claim that an inferior product had been tied to a superior one which enjoyed monopoly control in its own sphere, i.e., the morning newspaper market.

After disposing of the standard tests in connection with International Salt, Justice Clark took up the matter of the "reasonableness" of the tying contract. If it was found that the contract was the result of an intent to unreasonably monopolize the industry, it could yet be condemned under Section 2 of the Sherman Act. Citing the Columbia Steel case,63 Justice Clark directed this inquiry toward "the percentage of business controlled, the strength of the remaining competition and whether the action springs from business requirements or purpose to monopolize."64

62 345 U.S. 614.


64 Ibid., p. 527.
After a complete reexamination of the factual record, it was found that none of the prohibited features of the Sherman Act had been accomplished by Times Picayune Company. It had been motivated by legitimate business aims and no deleterious effects on competition were inferred. Likewise, the competing newspaper, The Item, continued to prosper in the face of the unit plan of Times-Picayune.

The Times-Picayune opinion has been subjected to a great deal of analysis, most of which is designed to gauge its effect on the general assumption that tying contracts are illegal per se under the antitrust laws. When compared to the other tying cases, the Times-Picayune decision illustrates the injection of a certain amount of the "rule of reason" into the judicial handling of non-patented tying contracts. For instance, the Court by way of dicta stated in International Salt that it is "unreasonable, per se, to foreclose competitors from any substantial market . . ."65 In short, International Salt made the tying of unpatented materials to a patented product or process illegal, per se, if the dollar amount of commerce affected was not insubstantial.66

65332 U.S. 396.

66This is not a per se ruling in the strict sense, but it comes very close. Donald F. Turner suggests that the element of market dominance may not have been necessary in International Salt to find a violation of the Sherman Act. See Turner, "The Validity of Tying Arrangements Under the Antitrust Laws," Harvard Law Review, LXXII (November, 1958), 54.
In *Times-Picayune*, the Court seemed to stop short of this position and raised some doubt as to per se nature of tying contracts. In spite of the dicta, Justice Clark demanded that both conditions — market dominance and a not insubstantial amount of interstate commerce — be present for a Sherman Act violation. In defining the relevant market and handling the factual data, he placed the *Times-Picayune* in the most favorable light so as to fortify its claim of innocence under Section 1. This had not been done in the other tying cases. Thus, actual proof of economic "dominance" became a reality as far as the Sherman Act violations were concerned.

In 1958, the Supreme Court handed down its decision in *Northern Pacific Railway Company v. United States*. The Court again dealt very harshly with tying contracts under the Sherman Act. The similarities between this case and the *Times-Picayune* case are: (1) The tying products were unpatented. (2) The products were of the non-commodity type which prevented the cases from being tried under Section 3 of the Clayton Act.

In *Northern Pacific*, the Court, *per* Mr. Justice Black, declared

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67Justice Clark demonstrated concern for the economic welfare of the newspaper industry. After alluding to the importance of the press in American society, he pointed out that the number of daily newspapers is currently at its lowest point since the turn of the century. 345 U.S. 602-603.


the tying arrangement70 to be in violation of the Sherman Act and affirmed the District Court's decision to enter summary judgment for the Government.

In citing the Times-Picayune opinion, Justice Black negated the element of "dominance" which set that case off from the other tying cases. Justice Black continued as follows:

While there is some language in the Times-Picayune opinion which speaks of "monopoly power" or "dominance" over the tying product as a necessary precondition for application of the rule of per se unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product . . . .71

Thus, on the basis of the District Court's meager findings, the tying clauses of Northern Pacific were declared to be illegal per se. This case apparently marks a return to the assumption that tying contracts are illegal per se at such time as they are found to exist. The only possible justifications might be that the amount of interstate commerce affected is not substantial or that no appreciable restraint of trade existed because of a lack of sufficient economic power in the tying product.

Vertical Territorial Arrangements

As in the case of tying contracts, the horizontal division of territory among competitors has had a long history of per

70 The railroad inserted "preferential routing" clauses into the contracts for the lease or sale of its land.
71 356 U.S. 11.
se unreasonableness under the Sherman Act. This has been so because of the fact that market division among competitors effectively eliminates competition even more completely than price-fixing agreements. Those firms possessing a substantial amount of market power are often able to control the markets for their goods if they can agree to a suitable division of territory among them. However, exclusive territorial dealerships have fared better under the Sherman Act. Per se illegality is not imposed on a manufacturer who agrees with his dealers not to locate or commission another dealer in a prescribed territory. Of course, these arrangements are judged under the rule of reason and may be viewed as restraints of trade on the basis of the facts in the individual case.

The following inquiry will be directed at the heretofore untested subject of "vertical" territorial arrangements between a manufacturer and his dealers. The case of White Motor Company v. United States is the only attempt by the Supreme Court to establish guidelines in this area. Mr. Justice Clark is cast in the unfamiliar role as the writer of the dissenting opinion. In no uncertain terms, the Justice makes it clear that he would condemn vertical territorial arrangements as per se illegal. It is interesting to note the contrast


of this view with that expressed in his *Times-Picayune* and *Theatre Enterprises* opinions.

The *White Motor* case was a civil suit brought by the Government to test the validity under the Sherman Act of certain vertical territorial arrangements between White Motor Company and its dealers. White, a large manufacturer of trucks and truck parts, entered into contracts with its distributors and dealers, providing that each dealer would have the exclusive right to sell the manufacturer's trucks in a specified geographical territory. The dealer in turn agreed to develop the territory to White's satisfaction and not to sell any trucks or parts except in accordance with the contracts. The dealer also agreed not to sell to any government agency or to any other large buyer without written permission.

The Government took the position that these contracts were by their nature *per se* violations of Sections 1 and 3 of the Sherman Act. The Court was asked to extend the holding in *Timken Roller Bearing Co. v. United States*, which held horizontal market division to be a *per se* violation, to vertical territorial arrangements between a manufacturer and its dealers. The District Court affirmed this view and rendered summary judgment in favor of the Government.

After reviewing the judicial history of *per se* violations of Section 1, Mr. Justice Douglas, speaking for four members
of the Court, reversed the summary judgment of the District Court and remanded the case for trial. This was primarily due to the fact that: "This is the first case involving a territorial restriction in a vertical arrangement; and we know too little of the actual impact of both that restriction and the one respecting customers to reach a conclusion on the bare bones of the documentary evidence before us." Thus the Court reserved its judgment on the matter of per se illegality pending a trial on the merits. As such, White was given the opportunity to prove the reasonableness of its vertical arrangements.

Mr. Justice Clark, in a vigorous dissent, chastised the Court for its timidity in declaring vertical agreements illegal per se. In Clark's view, the record lays bare "one of the most brazen violations of the Sherman Act that I have experienced in a quarter of a century." After searching the record "diligently," Clark was unable "to find an allegation ... that raises an issue of fact." Instead, the arguments of White Motor Company which convinced the majority that a trial on the merits was necessary, "are economic arguments or business necessities none of which have any bearing on the legal issue."  

75372 U.S. 261.
76Ibid., p. 276.
77Ibid., p. 279. 78Ibid., p. 279.
Justice Clark was not only unconvinced by the contention that vertical agreements might possibly serve a constructive purpose, but he went further to condemn them as being the same, if not more destructive than, price-fixing agreements which have long been treated as per se violations of the Sherman Act. Justice Clark continued as follows: "This is true because price-fixing agreements, being more easily breached, must be continually policed by those forming the combination, while contracts for the division of territory, being easily detected, are practically self-enforcing."80

In the same vein, the Justice was unable to make a logical distinction between horizontal division of territory which was condemned in the Interstate Circuit81 and Timken Roller Bearing82 cases and the instant case in which the manufacturer himself was responsible for the division. To Clark, it makes little practical difference "who initiates the plan,"83 the final result is the same.

The similarities between vertical territorial division and the Court's longstanding position on uniform resale price

80372 U.S. 279-280.
83372 U.S. 230.
schemes were also noted. In Dr. Miles Medical Co. v. John D. Park & Son's Co., the Court prohibited the imposition of such a scheme by the company on its retailers, holding that a manufacturer could not restrict the freedom of trade of its dealers who owned what they sold. The justification put forth by the company that the contracts were necessary for the distribution of its secret formula patent medicines was rejected because "the public is entitled to whatever advantage may be derived from competition in the subsequent traffic." 85

In Clark's mind, the Dr. Miles case was ruinous to White's major argument that its dealer contracts were necessary to allow it to compete with the larger truck manufacturers. Business necessity has seldom been an accepted defense against restraint of trade. Clark noted that these contracts may be good for White Motor, "but they are disastrous for free competitive enterprise and, if permitted, will destroy the effectiveness of the Sherman Act." 86

With respect to the possible "reasonableness" of the contracts, Clark concluded that: "In my view appellant cannot plead nor prove an issue upon which a successful defense of its contracts can be predicated." 87 Thus, the rule of reason

84220 U.S. 373 (1911).
85Ibid., p. 409.
86372 U.S. 278.
87372 U.S. 282.
is inapplicable to an agreement made solely for the elimination of competition, and in Clark's view, "The Court does a futile act in remanding this case for trial." 88

Mr. Justice Clark's White Motor dissent stands in marked contrast to his earlier opinions in the Sherman Act sphere of cases. In the Times-Picayune case, the Justice, speaking for a bare majority of five, upheld the use of a tying contract in spite of the long judicial history of per se illegality regarding such arrangements. The requirement of actual market "dominance" in the tying product accords more closely with a rule of reason approach to the adjudication of tying contracts. The Theatre Enterprises opinion also reversed a perceptible trend toward the demise of the Sherman Act's requirement of conspiracy with respect to uniform business behavior. By requiring additional proof of illegal conspiracy, Justice Clark negated the possibility that the Court would reduce conscious parallelism itself to a Sherman Act offense. Yet, some nine years later the Justice handed down a vigorous dissent protesting the Court's refusal to apply a per se ruling to the untested subject of vertical territorial arrangements. The White Motor opinion indicates a shift in Justice Clark's thinking toward the greater use of per se rulings and, in general, a more vigorous program of antitrust enforcement.

Mr. Justice Clark's work under the Clayton Act presents a study in contrasts as to the judicial handling of the Act's ban on anticompetitive devices. The following chapter is an analysis of the Justice's opinions in several of the more controversial and unsettled areas of law under the Clayton Act.
CHAPTER IV
THE CLAYTON ACT

The Clayton Act of 1914 was enacted to supplement the statutory provisions of the Sherman Act. The legendary abuses of the "great trusts" at the turn of the century lent support to the feeling that legislation should be enacted to stop the trend toward concentration in its incipiency; hence, the Clayton Act was passed into law. The Act lists specific business practices which are prohibited, although their legality is tested under the Act's dual standards -- a substantial lessening of competition or a tendency toward monopoly.

The original Section 2 of the Clayton Act was substantially altered by the passage of the Robinson-Patman Act of 1936. Amended Section 2 as the statutory prohibition against price discrimination will be given separate consideration in the following chapter. This inquiry will focus on Justice Clark's opinions and voting record under three of the more important sections of the Clayton Act. Section 3 outlaws such exclusive practices as exclusive-dealing and tying contracts while amended Section 6 exempts both labor and agricultural cooperatives from full coverage under the antitrust laws.
Finally, amended Section 7 prohibits stock and asset acquisitions in the form of mergers or joint ventures.

**Exclusive Dealing Arrangements**

Section 3 of the Clayton Act\(^1\) prohibits various types of exclusive arrangements -- exclusive dealing contracts, requirements contracts, and tying contracts -- which have the effect of lessening competition or tending to create a monopoly. The nature and actual effect of these arrangements is a virtually unexplored field, but enough is known to allow the courts and the Federal Trade Commission to form at least provisional opinions as to their legality. As in the case of the statutory provisions of the Sherman Act, Section 3 is phrased in very general terms so as to give the enforcement agencies little actual guidance. Consequently, the qualifying clauses of "substantially lessen competition" and "tend to create a monopoly" leave to the courts a great deal of discretion in the interpretation of Section 3. The result is that a similar rule of reason applies in the adjudication of the borderline areas of fact which are so frequently at issue in court cases.

\(^1\)U.S. Statutes at Large, XXXVIII, 720 (1914). Section 3 reads in part as follows: "It shall be unlawful for any person engaged in commerce, . . . to lease or make a sale . . . of goods, . . . or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States . . . or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, . . . of a competitor or competitors of such lessor or seller, where the effect of such lease, sale, or contract for sale . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce."
This analysis will be directed at Mr. Justice Clark's role in the interpretation of Section 3 both in the areas of exclusive-dealing contracts and tying contracts. Justice Clark's opinion in the Tampa Electric\(^2\) case is especially important because he sketched a new approach to the handling of exclusive-dealing arrangements. Mention will also be made in passing of Justice Clark's opinion in the Times-Picayune\(^3\) case because of the excellent summary of the case law in regard to tying contracts.

**Exclusive Dealing Contracts**

Section 3 forbids arrangements which are based on the condition that a purchaser or lessee of commodities will refuse to handle the products of any competing supplier, provided the arrangements have a tendency to lessen competition or create a monopoly. They are commonly described as "exclusive-dealing" contracts.\(^4\) The assumption underlying the prohibition of such contracts is that as more and more distributors and retail outlets become bound to a single manufacturer, competitors will find it harder to market their goods and new entrants will be discouraged from entering the field. The task of the enforcement agencies is to judge the actual effect of the


\(^3\)345 U.S. 594 (1953).

\(^4\)For present purposes, requirements contracts will be included within exclusive-dealing contracts.
contract in question to determine whether it has produced the
above-mentioned results.

The early judicial history of exclusive-dealing contracts
is one of confusion and uncertainty. The Federal Trade Com-
mission set about the job of declaring them automatically
illegal, but the courts refused to follow this lead.\(^5\) In the
decade of the 1940's a perceptible change took place in the
attitudes of the courts and Section 3 was expanded so as to
become a much more effective device for dealing with exclusive-
dealing contracts.

In 1949, the Court handed down the first authoritative
interpretation of Section 3 in \textit{Standard Oil of California and
Standard Stations v. United States}.\(^6\) The Court, speaking
through Mr. Justice Frankfurter, framed the ultimate question
under Section 3 as follows:

The issue before us, therefore, is whether the re-
quirement of showing that the effect of the agreements
"may be to substantially lessen competition" may be
met simply by proof that a substantial portion of
commerce is affected or whether it must also be de-
monstrated that competitive activity has actually
diminished or probably will diminish.\(^7\)

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\(^5\) See \textit{Standard Fashion Co. v. Magrane-Houston Co.}, 258
U.S. 346 (1922).

\(^6\) 337 U.S. 292 (1949). Hereafter referred to as \textit{Standard
Stations}. Standard Oil Company had entered into contracts with
independent dealers, providing that the dealer would purchase
all of his requirements from the products marketed by the com-
pany. The contracts involved about 6.7 percent of the business
in the seven western states in which the company operated.

\(^7\) \textit{Ibid.}, p. 299.
After conceding that the more ambitious standard was "most ill-suited for ascertainment by courts," Justice Frankfurter concluded "that the qualifying clause of Section 3 is satisfied by proof that competition has been foreclosed in a substantial share of the line of commerce affected." 8

The Court refused to allow itself to be drawn into an extended analysis of the economic factors which might possibly have justified Standard Oil's contracts. Rather, the Court was satisfied to find a violation of Section 3 at such time as it could be established that exclusive-dealing contracts affected a substantial amount of commerce. The critics of the opinion vigorously insisted that a mechanical formula would undermine the legitimate objectives which such contracts might serve. 9 In dissent, Mr. Justice Douglas feared that the removal of the rule of reason from this field would cause the big producers to vertically integrate to the detriment of independent distributors. 10 More importantly, in the Maico case of 1953 the Federal Trade Commission refused to confine

8Ibid., pp. 310, 314.

9See William B. Lockhart and Howard R. Sacks, "The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act," Harvard Law Review, LXV (April, 1952), 913-954. It is here suggested that the Federal Trade Commission and the reviewing courts should take into consideration at least nine additional factors in deciding exclusive-dealing cases.

10337 U.S. 319-320.
itself to the evidential rule of Standard Stations, but went ahead to consider all relevant competitive factors.\textsuperscript{11}

In 1961, the Court surrendered to its critics. The Tampa Electric case\textsuperscript{12} was brought to test the validity of an exclusive dealing contract between the Tampa Electric Company, a public utility company serving metropolitan Tampa, Florida, and the Nashville Coal Company. Tampa had agreed to purchase all of its coal requirements for a new generating plant from Nashville Coal for a period of twenty years. Just before the first shipment of coal was to be delivered, Nashville Coal informed the utility that the contract was in violation of Section 3 and that it would not be performed. After managing to secure coal on a temporary basis from other suppliers, Tampa Electric brought suit in District Court for a declaration that its contract with Nashville Coal was valid and for enforcement accordingly. The District Court rendered summary judgment on the ground that the contract violated Section 3. The Court of Appeals affirmed.

Speaking for seven members of the Court, Mr. Justice Clark set out the guidelines established in earlier opinions to judge exclusive-dealing arrangements. First, the line of commerce must be determined on the basis of the facts in the individual instance. Second, the relevant market within the

\textsuperscript{11}56 FTC 485 (1953).

\textsuperscript{12}365 U.S. 320 (1961).
appropriate line of commerce must be identified because "the threatened foreclosure of competition must be in relation to the market affected." And thirdly, the amount of competition which is foreclosed must be a substantial part of the relevant market.

Justice Clark assumed for purposes of the case that the contract was an exclusive-dealing arrangement within Section 3 and that bituminous coal was the appropriate line of commerce. However, the District Court's finding that the relevant market was peninsular Florida was declared to be in error. According to Clark, the Court did not believe "that the pie will slice so thinly." Instead, it was found that the area of effective competition was the Appalachian region which included an eight-state area. As such, at least 700 other coal producers could ship their coal into Florida. Given the market as defined here, "it clearly appears that the proportionate volume of the total relevant coal product... is, conservatively speaking, quite insubstantial." The amount of commerce so affected would be 0.77 percent of that market.

13Ibid., p. 327.

14Ibid., p. 331.

15The Court's overturning of the trial court's definition of the relevant market is somewhat of a change in technique. The market was apparently defined on the basis of the area in which the producers compete and not the producer's own marketing area. In Standard Stations the market was defined as the area in which Standard marketed its products.

16Ibid., p. 333.
Although it is obvious that even the "quantitative substantiality" test of Standard Stations had not been met, Justice Clark went ahead to expand the meaning of substantiality in exclusive-dealing cases:

To determine substantiality in a given case, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account the relative strength of the parties, the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein. 17

Justice Clark considered it highly relevant that a public utility must have an adequate and dependable source of fuel at a fair price in order to supply the public with a constant supply of power. Consequently, the stipulation that the contract would extend for twenty years was not given controlling weight. After weighing all of these criteria which had previously been deemed irrelevant, the Court could not infer a substantial lessening of competition within the meaning of the Clayton Act. 18

Justice Clark's opinion was hailed as a return to the original meaning of Section 3 which had been misread by the Court in Standard Stations. 19 An examination of the legislative

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17 Ibid., p. 329.
18 Ibid., pp. 334-335.
history of Section 3 reveals that the House of Representatives passed a bill which flatly prohibited all exclusive-dealing arrangements. The Senate refused to cooperate because such arrangements might possibly serve useful economic purposes. The ensuing compromise adopted the House version with the addition of the qualifying "competitive impact" clause. On the basis of this record, Justice Clark could have found substantial justification for going beyond the Standard Stations test. Yet, he was quite correct in confining the interpretation to the contemporary scene.

Derek C. Bok, in his illuminating analysis of the Tampa Electric case, summarizes the ultimate value of the opinion as follows:

What is important to grasp is the fundamental strength and weakness of the opinion. Its strength lies in the creation of a doctrinal basis that is sufficiently flexible to enable the Court to avoid the uncompromising prohibition of Standard Stations. Its great weakness lies in its vagueness as a prescription for future cases.

It cannot be doubted that the Tampa Electric case marked a distinct change in the interpretation of Section 3.

Exclusive-dealing arrangements were freed from the shackles

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20 See Lockhart and Saeks, "The Relevance of Economic Factors . . ." pp. 934-935 and Handler, "Recent Antitrust Developments," pp. 86-87. Handler thinks that "what Justice Clark . . . did to Standard Stations is as neat a piece of judicial surgery as has been seen in some time." Ibid., p. 82.

of Standard Stations in order that they might be evaluated in the context of all relevant economic factors. However, this does not reduce the need for fixed standards upon which to measure the effects of the arrangements. Justice Clark's opinion is found wanting in this respect. In determining the "substantiality" of an alleged violation, such vague guidelines as "the relative strength of the parties," or "the proportionate volume of commerce," and finally the "immediate and future effects" are of little value. Yet to expect more from one opinion may be asking too much.

Although it is quite risky to speculate on the reasons for the Court's change in attitude, several observations are in order. The decision in Tampa Electric may have come as a result of the Court's desire to distinguish between tying contracts and exclusive-dealing arrangements. In Standard Stations the Court lumped them together under the same quantitative substantiality rule. Although tying contracts seem to have no redeeming value, exclusive-dealing arrangements do possess a potential for economic good. Justice Clark was apparently saying that the infusion of economic data to test the arrangement is quite proper.

It is also quite possible that the Court was willing to except public utilities from the rigorous, almost per se


The tone of Justice Clark's opinion indicates that he viewed the contract as simply an honest attempt by a public utility to better serve the needs of its customers. The element of "dirty dealing" was lacking. Thus a per se approach, which virtually admits that the courts are unable to detect undercover practices, does not fit this particular instance, especially in view of the fact that no overall reduction in competition occurred.

The legal future of exclusive-dealing contracts under the Tampa Electric interpretation will ultimately have to be appraised from the standpoint of further judicial elaboration based on the actual workings of the business community. Derek Bok admonishes the Court and the enforcement agencies to "develop a rational methodology" because "clear legal standards are particularly useful in this field." This is an admirable goal which will not be easily attained.

Tying Contracts

Section 3 of the Clayton Act also prohibits tying contracts which substantially lessen competition or tend toward monopoly. It will be remembered that tying contracts are generally utilized by a supplier to tie the sale of a less

\[24\text{Ibid., p. 301.}\]
\[25\text{Bok, Supreme Court Review, pp. 290, 316.}\]
\[26\text{For the discussion of tying contracts under the Sherman Act, see Supra, Chapter III, pp. 58-66.}\]
desirable product to another which is in demand. The result may well be that competitors are foreclosed or put at an appreciable disadvantage in the market for the tied product. For this reason, tying contracts have generally been treated as illegal per se under both the Sherman and Clayton Acts.

For fear of belaboring to death Justice Clark's opinion in *Times Picayune Publishing Co. v. United States*, only brief mention will be made of Clark's recapitulation of the legal state of tying contracts under Section 3. After analyzing the opinions in the *International Salt* and *Standard Stations* cases, Justice Clark summarized the case law as follows:

From the "tying" cases a perceptible pattern of illegality emerges: When the seller enjoys a monopolistic position in the market for the "tying" product, or if a substantial volume of commerce in the "tied" product is restrained, a tying arrangement violates the narrower standards expressed in Section 3 of the Clayton Act because from either factor the requisite potential lessening of competition is inferred.

On this basis tying contracts are banned under Section 3 if "either" condition can be legitimately inferred from the evidence examined in the individual case. From this vantage point, a prognosis of the future seems to indicate that

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27345 U.S. 594 (1953).
28332 U.S. 392 (1947).
29337 U.S. 293 (1949).
30345 U.S. 608.
tying contracts will not be redeemed to legitimacy any time soon. However, in the case of exclusive-dealing contracts, the Tampa Electric opinion makes it quite clear that a middle course will be taken in the enforcement of Section 3. While Tampa Electric did not technically overrule the Standard Stations doctrine, Justice Clark's data opens up the field to a more thorough analysis of mitigating economic data. On both counts, Justice Clark is on sound footing.

Agricultural Cooperatives

The legitimate activities of agricultural cooperatives have long been exempted from the statutory provisions of the antitrust laws. Section 6 of the Clayton Act31 exempted only those agricultural associations "not having capital stock," but in 1922 this limitation was removed by the passage of the Capper-Volstead Act, which authorized agricultural producers to "act together in associations, . . . with or without stock, in collectively processing, preparing for market, handling, and marketing" their products.32 In spite of the various statutory exemptions covering the activities of cooperatives,

31 Section 6 reads in part as follows: "Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of . . . agricultural, or horticultural organizations, instituted for purposes of mutual help, and not having capital stock or conducted for profit . . . nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

32 U. S. Statutes at Large, XLII, Part I, 388 (1922).
a number of borderline situations have emerged which require judicial determination. One such question is the extent of immunity given to local federated cooperative associations from the conspiracy provisions of the Sherman Act.

In *Sunkist Growers, Inc. v. Winokler & Smith*, 33 a parent agricultural cooperative organization and two federated processing cooperatives were sued because of an alleged conspiracy to monopolize the sale of citrus fruits and by-products in violation of the Sherman Act. The cooperatives were made up of citrus fruit growers in California and Arizona who had organized for the purpose of marketing their fruit through the agency of the area-wide marketing cooperative. On the strength of earlier opinions, the trial judge's instructions permitted the jury to base its verdict upon a finding of illegal conspiracy between Sunkist (including its wholly-owned subsidiary) and a federated cooperative of lemon growers.

The Supreme Court, speaking through Mr. Justice Clark, firmly erased any doubt as to the immunity of such federated cooperatives under Section 6 of the Clayton Act and the Capper-Volstead Act. Justice Clark stressed the fact that there was little doubt as to the applicability of Section 6 to a single organization. Accordingly, the same rule was applied to federated organizations:

With all due respect to the contrary opinions of the Court of Appeals and the District Court, we

feel that the 12,000 growers here involved are in practical effect one "organization" or "association" even though they have formally organized themselves into three separate entities.  

This opinion arrested a noticeable trend toward narrowing the scope of immunity for agricultural cooperatives under Section 6. In the Borden Company case of 1939, the Court held that cooperatives were not immune from prosecution under the Sherman Act at such time as they conspired with persons outside the producer cooperative. This decision terminated the defense that Section 6 and the Capper-Volstead Act granted absolute immunity from the antitrust laws.

In 1960, the Supreme Court had occasion to rule on the applicability of both Sections 2 and 3 of the Sherman Act and Section 7 of the Clayton Act to the activities of an agricultural cooperative marketing association. In Maryland and Virginia Milk Producers Association v. United States, Justice Black, speaking for a unanimous Court, rejected the cooperative's claim to antitrust immunity in the face of illegitimate activities with outside groups. Justice Black did not attempt to destroy the cooperative exemption, but it was held that the

34 370 U.S. 29.

35 It must be here emphasized that immunity may be claimed only if a cooperative is in full compliance with all of the statutory requirements, including membership and voting rights. This fact is not at issue in these cases.


exemption applied only to the "legitimate objects" of agricultural organizations and not to empower "cooperatives with unrestrained power to restrain trade or to achieve monopoly by preying on independent producers . . . ."38

In short, the Court formulated a "legitimate objects" test to limit the exemption to those activities which Congress sought to protect in passing the above-mentioned legislation. The Sunkist case seemed ideal to continue the narrowing process by removing the statutory exemption from federated cooperatives. As noted, Justice Clark and the majority of the Court would have none of it; Section 6 was interpreted to grant immunity to the various cooperatives as if they were one. In justification Justice Clark stated, "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect to these growers who have banded together for processing and marketing purposes . . . ."39

Considered as a whole, the three leading Supreme Court decisions in the area of cooperative exemption from the antitrust laws lead to the conclusion that in the case of conspiracies between a qualified cooperative and an "outside" group, the exemption does not apply and the cooperative is subject

38 Ibid., p. 467.
39 370 U.S. 29.
to the same antitrust prohibitions as any other business. However, in those instances where the cooperative has a legitimate business relationship with other cooperatives or with its subsidiaries, the exemption will be allowed. Justice Clark's opinion in the Sunkist case went no further than holding that the activities of federated cooperatives were not in and of themselves subject to the antitrust laws. It is logical to assume that the "legitimate objects" test of *Maryland and Virginia* still applies in the case of predatory activities. The courts will continue to examine the intent of the cooperative on a case-by-case basis to determine its immunity status under Section 6 of the Clayton Act and Sections 1 and 2 of the Capper-Volstead Act. If it is safe to assume that agricultural cooperatives should enjoy privileged status under the antitrust laws, then Justice Clark's opinion is beyond reproof.

**Corporate Mergers**

During the decade of the 1960's, the most significant development in the antitrust field has been in the area of

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40 Justice Clark carefully noted that the Sunkist decision did not overrule the *Borden* and *Maryland and Virginia* decisions.


42 See *The Attorney General's National Committee*, pp. 311-313. The Committee saw no basic conflict between the cooperative exemption and the antitrust laws.
corporate mergers and their relationship to Section 7 of the Clayton Act. Only in the last two years the Supreme Court has handed down a number of extremely important opinions designed to provide an authoritative interpretation of Section 7 in its amended form. While the case law remains in somewhat of a state of flux, a perceptible trend seems to be emerging by virtue of these recent decisions. After a brief look at the history of Section 7, this inquiry will be oriented toward Mr. Justice Clark's position as revealed by his opinions and voting record in the corporate merger field.

The original Section 7 of the Clayton Act was envisioned as a means to prohibit corporate concentration by the acquisition of the stock of competing companies. In the course of time it became obvious that Section 7 would remain ineffective so long as the acquisition of the physical assets of competing companies was exempted. In 1950, Congress passed the Celler-Kefauver Act as an amendment to Section 7 to "plug the

43For an authoritative work on both the original and amended versions of Section 7, see David Dale Martin, Mergers and the Clayton Act (Los Angeles, 1959).

44U. S. Statutes at Large, LXIV, Part I, 1125 (1950). The amended Section 7 reads in part as follows: "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."
loophole" of assets accumulation.⁴⁵ In addition, Section 2 was amended so as to authorize the Federal Trade Commission to order the divestment of assets, as well as stock, acquired in violation of the Act.

Upon an examination of Section 7 it is obvious that it is no exception to its companion provisions in the Clayton Act; its broad requirements have little meaning by themselves. As in Section 3, the qualifying provisions -- a substantial lessening of competition and a tendency toward monopoly -- are present. As before, the Federal Trade Commission is given primary responsibility for the enforcement of Section 7, subject to appeal to the courts.

The long-awaited interpretation of Section 7 by the Supreme Court did not come until some twelve years after its enactment. Chief Justice Warren assumed the responsibility for writing the majority opinion in Brown Shoe Company v. United States⁴⁶—Justice Clark wrote a separate concurring opinion in which he expressed slightly different views on the Court's definition of the relevant market. In Brown Shoe, the Government brought suit to enjoin the consummation of a merger involving a large shoe manufacturing and retailing firm, the Brown Shoe Company, and the retailing firm of G. R. Kinney. The Brown Company was

⁴⁵Martin, Mergers and the Clayton Act, p. 252. Of course, mergers based on assets accumulation were subject to the provisions of the Sherman Act. See United States v. Columbia Steel Co., 334 U.S. 495 (1948).

the fourth largest manufacturer of men's, women's and children's shoes and the third largest retailer of shoes by dollar volume. The Kinney Company also manufactured shoes, but it was primarily engaged in retailing, being the largest family shoe retailer in the nation. The merger had both horizontal and vertical aspects in that both companies owned and operated manufacturing and retailing facilities.

The Supreme Court affirmed the District Court's finding that the merger substantially lessened competition in violation of Section 7. In analyzing the structure of the shoe industry the Court found a definite trend toward vertical concentration. The Court stated, "The shoe industry is being subjected to just such a cumulative series of vertical mergers, which, if left unchecked, will be likely 'substantially to lessen competition.'" In spite of the extensive amount of competition which remained in the shoe industry, the Court was apparently more concerned with the competition which was lost. As such, "remaining vigor cannot immunize a merger if the trend in that industry is toward oligopoly." The obvious conclusion is

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47 Because of the fragmented nature of the shoe industry, these figures are somewhat misleading. Brown's share of the national manufacturing market was about 4 percent in 1955, while Kinney, as the largest retailer, accounted for approximately 1.2 percent of national retail shoe sales by dollar volume. 370 U.S. 303.

48 370 U.S. 334.

49 Ibid., p. 333.
that against a background of increasing centralization, a merger becomes especially suspect regardless of the competitive state of the industry.\textsuperscript{50}

Because the \textit{Brown Shoe} case was the first interpretation of amended Section 7, the Court's consideration of the relevant market was exceedingly important. The statutory command of Section 7 was directed at anticompetitive mergers "in any line of commerce in any section of the country." In general, the Chief Justice rejected the temptation to apply a mechanical formula to all mergers; the Act implied that the merger must be viewed functionally with the setting of its particular industry.\textsuperscript{51} Accordingly, the outer limits of the market were determined by the conventional tests of "reasonable interchangeability" and "cross elasticity of demand," subject to the condition that within the broad market there may exist distinct "submarkets," which constitute product markets in themselves.\textsuperscript{52} On this basis the Court accepted the District

\textsuperscript{50}See Chief Justice Warren's discussion of the legislative history of the Clayton Act in which he concludes: "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy."

\textsuperscript{51}\textit{Ibid.}, p. 322. The companies had urged the adoption of the quantitative substantiality test of \textit{Standard Stations}, 337 U.S. 293 (1949).

Court's determination of the relevant product market as men's, women's and children's shoes and the geographic market as the entire nation. In rejecting the Brown Company's plea to place its medium-priced shoes in a different market than the lower-priced shoes of Kinney, the Court said, "But the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists."  

Justice Clark departed from the majority opinion on this point because the facts indicated to him that the relevant product market should have been defined as "shoes of all types." Justice Clark saw no legitimate reason for reducing the market definition to submarkets which had the effect of "splintering the product line."  

Before Brown Shoe, the reasonable interchangeability theory of du Pont had generally been thought to be too imprecise to measure the competitive relationship  

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53 This market definition applies to the vertical aspect of the merger. From a horizontal standpoint, the relevant geographic market was found to be cities of 10,000 or more and their environs in which both corporations had retail outlets. Ibid., pp. 336-339.  

54 Ibid., p. 326.  

55 Ibid., p. 356.  

56 Ibid.  

between similar or substitute products. In adopting this line of argument, Justice Clark put little stock in the Court's concept of 'submarkets' as a tool of measuring the area of effective competition. This is consistent with the Government's position in that a broad market definition was essential to maximize the competition between Brown and Kinney.

The guidelines for future litigation which were established in Brown Shoe are: (1) Section 7 was not compressed into a tight per se category similar to that in Standard Stations; mergers would be examined in the light of a rule of reason approach, taking into consideration relevant economic data. (2) The Court did not confine itself to a measurement of existing competition but went ahead to assess industry trends and the future of potential competition. (3) Vertical mergers as well as horizontal mergers were brought within the scope of Section 7. (4) The intent of Congress in passing the

58 Lewyn and Mann, "Some Thoughts on Policy and Enforcement of Section 7" p. 155.

59 See Milton Handler and Stanley D. Robinson, "A Decade of Administration of the Celler-Kefauver Antimerger Act," Columbia Law Review LXI (April, 1961), 635. This article is an excellent account of the lower court's opinion.


Celler-Kefauver amendments was to stem the tide of concentration in the industrial sector of the economy. The Court apparently took this as a mandate to arrest the trend toward concentration because "we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses." This is graphically illustrated in the instant case because of the lack of concentration in the fragmented shoe industry. It is reasonable to conclude that Justice Clark was in agreement with these standards, in view of his statement:

On this record but one conclusion can follow, i.e., that the acquisition by Brown of the 400 Kinney stores for the purposes of integrating their operation into its manufacturing activity created a "reasonable probability" that competition in the manufacture and sale of shoes on a national basis might be substantially lessened.

It is also somewhat revealing to examine Justice Clark's voting record in the merger cases which have been decided after the Brown Shoe case. In 1964, the Court handed down at least five extremely important decisions involving mergers, all of which were won by the Government. In every instance, Justice Clark voted with the majority in reversing the lower court.

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63 370 U.S. 344.

64 Ibid., p. 357.

court decision and applying Section 7 or the Sherman Act to the merger. Hence, the revitalization of Section 7 as an effective anti-merger device seems to have the full support of Mr. Justice Clark.

Corporate Joint Ventures

The dynamic nature of the Clayton Act is well illustrated by the Supreme Court's recent application of Section 7 to corporate joint ventures. The creation by two or more established firms of a new subsidiary company to engage in commercial activities is commonly termed a joint venture. It has heretofore been assumed that Section 7 was inapplicable to this particular business technique, although it had never been tested in the courts. However, in United States v. Penn-Olin Chemical Company, the Court dispelled any doubt as to its applicability.

In 1960, the Pennsalt Chemical Corporation entered into an agreement with the Olin Mathieson Company to form the Penn-Olin Chemical Company. The new company was formed to produce and sell sodium chlorate in the southeastern part of the United States -- a market which was dominated by two other

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large producers. For about a decade prior to the formation of Penn-Olin, both parent companies had been seriously considering independent entry into this market, but instead the joint venture company was formed. After the filing of the Government's complaint charging the parent companies with violations of the Clayton and Sherman Acts, the trial court dismissed the complaint on the ground that the evidence failed to show a lessening of competition or a tendency toward monopoly. Hence, the District Court did not rule on the applicability of Section 7 to a jointly owned subsidiary.

Mr. Justice Clark, speaking for a majority of five, reversed and remanded the decision on the ground that the trial court failed to make a finding as to "the reasonable probability that either one of the corporations would have entered the market by building a plant, while the other would have remained a significant potential competitor." In so doing, Justice Clark found no reason to hesitate in applying Section 7 to the joint venture. In this respect he was "plowing new ground."

Noting the anticompetitive potential of the joint venture, Justice Clark alluded to the fact that a lessening

68 Prior to 1960, more than 90 percent of the sodium chlorate production for the Southeast was controlled by Hooker Chemical Corporation and American Potash & Chemical Company.

69 378 U.S. 175-176. 70 Ibid., p. 169.

of competition between the parent companies was inevitable because "the parents would not compete with their progeny." 72 Hence, in spite of substantial differences in the joint venture and the merger, 73 the same rule was applied to both because the Court was obligated to give weight to "a national policy enunciated by Congress to preserve and promote a free competitive economy." 74 The test of Section 7 is nothing short of the "effect of the acquisition." 75

The Penn-Olin case is of special interest because of Justice Clark's application of the elusive concept of "potential competition." 76 Potential competition is the threat of market entry by one or more corporations which exerts a competitive force on existing producers. Given the trial court's finding that either of the parent companies could have entered the market profitably, Justice Clark found the joint venture an undesirable substitute for independent entry by at least one parent company. The creation of Penn-Olin foreclosed the possibility of either independent entry or the remaining threat of the potential competition and, as such, it was

72 378 U.S. 168.

73 A merger eliminates at least one corporation from the market while a joint venture creates a new one.

74 378 U.S. 170. 75 Ibid., 168.

considered anticompetitive, in spite of the fact that "actual" competition had been increased.77

As to the matter of proof in assessing the loss of potential competition, Justice Clark was somewhat vague. After admitting that competitive potential "cannot be put to a subjective test," the Justice stated:

Unless we are going to require subjective evidence, this array of probability certainly reaches the prima facie stage. As we have indicated, to require more would be to read the statutory requirement of reasonable probability into a requirement of certainty. This we will not do.78

In remanding the case Justice Clark implied that if the trial court had found that neither company would have entered the market alone, then the joint venture would have been legal. On the other hand, if both companies would have entered save for the joint venture, the statute would most certainly have been violated. Since neither of these situations was found to exist, the Court focused on the likelihood that either one of the parent companies would have entered the market, while the other would have "remained at the edge of the market, continually threatening to enter."79

Justice Clark's opinion is again evidence of a change in the Court's thinking with respect to Section 7.80 Because of

78378 U.S. 175. 79378 U.S. 173.
the fear that an already oligopolistic market would lose either an actual or potential competitor, the Court gave controlling weight to the concept of potential competition. Assuming that both companies would have eventually entered the market independently, the Court accomplished its purpose. However, potential competition is a virtually unexplored field and its use did little to clarify the law in regard to joint ventures — especially in assessing the boundaries of potential competition.

Donald F. Turner counsels the Court to move slowly in any attempt "to campaign against 'superconcentration' in the absence of any evidence of harm to competition." If potential competition is to be a positive force in testing the legality of the joint venture, Justice Clark has acted wisely in refusing to pass judgment in a hasty manner. In his instructions to the trial court, Justice Clark listed at least twelve criteria which might be helpful in assessing the probability of a significant lessening of competition. Likewise, because of the elusiveness of potential competition the Court has an obligation to establish fair and equitable standards of administration.

82 See Mr. Justice Douglas' dissent in which he calls for immediate reversal without remanding to the trial court.
83 370 U.S. 177.
84 Hale and Hale, Supreme Court Review, p. 189.
By way of summary, some tentative observations are now in order as to Mr. Justice Clark's overall views on Section 7 of the Clayton Act. The revival of merger litigation since the Brown Shoe decision of 1962 apparently has the whole-hearted support of Justice Clark. His voting record, including his written opinions, is not marred by ambivalent views which change in accordance with minor factual deviations. The Brown Shoe concurring opinion was fraught with some overtones of "anti-bigness" in regard to the protection of small manufacturers who would have presumably been foreclosed if Kenney's retailing facilities had been merged with Brown. In Penn-Olin, Justice Clark also appeared to be quite fearful of the elimination of possible competitors in an already concentrated industry. In spite of the temptation, Clark has consistently refused to apply simple formulas to complex economic issues so as to shortcut the adjudicative process. In both opinions, he has weighed the proposed merger from the standpoint of relevant economic data.
CHAPTER V

THE ROBINSON-PATMAN AND FEDERAL TRADE COMMISSION ACTS

The Robinson-Patman Act\(^1\)

In the 1920's a revolutionary change in marketing technique took place with the rise of mass marketing enterprises. The tremendous growth of chain stores and mail-order merchandisers soon threatened to replace the conventional independent wholesaler and retailer in a number of extremely important markets. By the use of large accumulations of capital and manpower, the mass marketing firms were able to integrate the wholesaling and retailing functions under common control and thus offer the consumer lower prices and added convenience. Likewise, the combination of operational efficiency and volume sales with the power to exact price concessions from manufacturers gave the mass distributor a distinct advantage over his smaller rivals.

The retaliatory attempts of independent businessmen failed to stem the tide of mass distribution. Attention was then directed toward Congress to provide legislative relief by

revitalizing Section 2 of the Clayton Act. Originally, Section 2 prohibited discriminatory pricing in the form of selective price cuts in particularly sensitive local markets. It had been addressed to the task of preventing large, integrated suppliers from driving smaller competitors out of local markets in order to enhance monopolistic control.

In 1926 the Federal Trade Commission was instructed to conduct a comprehensive investigation into the operation of chain store organizations. In its final report of 1935, the Commission confirmed the widely held belief that chain organizations were consistently able to undersell independents and that the trend was toward chain store dominance in distribution. The Commission recommended that Section 2 of the Clayton Act be substantially altered to facilitate more comprehensive federal regulation of discriminatory pricing practices. In 1936, Congress enacted into law the Robinson-Patman amendments.

The general effect of the Robinson-Patman Act was to superimpose upon Section 2 a more elaborate set of restrictions on pricing procedures. The thrust of the Act was directed toward the powerful distributor who by agreement or pressure was able to secure a distinct competitive advantage over rival independent merchants. The implementation of the Act was

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3U. S. Statutes at Large, XLIX, Part I, 1526 (1936).

4For a discussion of the legislative history of the Act, see Rowe, Price Discrimination Under the Robinson-Patman Act, pp. 3-23.
indirect in that the manufacturer was prohibited from unjustly discriminating among his customers whether large or small, integrated or independent. Hence, the original purpose of Section 2 -- the prevention of large suppliers from employing localized price-cutting tactics to destroy competitors -- was supplemented with the desire to protect small businessmen who found themselves unable to compete effectively with the mass distributor.\(^5\)

The Robinson-Patman Act contains four jurisdictional requirements and five basic prohibitions, some of which are subject to three very important justification clauses. In regard to the jurisdictional requirements, Section 2 is applicable only if there are (1) sales, (2) of commodities, (3) of like grade and quality, (4) in commerce.\(^6\) Of the five prohibitions, only three will be examined: Section 2(a) makes unlawful direct or indirect discriminations in price if the effect of the discrimination is to substantially lessen competition or tend to create a monopoly. The discrimination

\(^5\)Frederick M. Rowe, one of the most respected authorities on the Robinson-Patman Act, described it as "an NRA - inspired anti-chain store bill, sponsored by the organized grocery wholesalers to protect traditional channels of distribution from the onslaught of new forms of mass marketing ... ." Frederick M. Rowe, "The Federal Trade Commission's Administration of the Anti-Discrimination Law," Columbia Law Review, LXIV (March, 1964), 416.

\(^6\)See Daniel Jay Baum, The Robinson-Patman Act (Syracuse, 1964), pp. 6-13. At such time as an alleged discrimination can be shown to meet the jurisdictional requirements, a prima facie case is established.
may be justified if it can be established that the differential makes only "due allowance" for the cost of manufacture, sale or delivery. Price discriminations may also be justified under Section 2(b) if it can be shown that the price was quoted in "good faith" to meet a competitor's equally low price. Sections 2(c) and (d) prohibit discriminatory allowances or services unless they are made available to all prospective customers on proportionally equal terms. And finally, Section 3 of the Act outlaws sales at unreasonably low prices for the purpose of eliminating competition.

Mr. Justice Clark has written very significant opinions in each of these areas. Specifically, his major efforts have been directed toward the establishment of acceptable standards in the utilization of the justification clauses of Sections 2(a) and 2(b). Also, Justice Clark has been equally influential in his attempts to define the powers of the Federal Trade Commission in whose hands the enforcement of the Act is vested. Finally, Justice Clark's recent opinion upholding the little-used provisions of Section 3 of the Robinson-Patman Act has apparently given new life to what many considered to be a dead letter.

Cost Justification

As previously noted, Section 2(a) forbids price differentials which are thought to result in a lessening of competition or a tendency toward monopoly. The proviso is qualified to
allow a *prima facie* violation to be exonerated if the discriminating supplier can show that the differential is directly related to the costs of doing business with respective customers.7 Accordingly, a supplier may legitimately utilize cost economies in his pricing practices. Yet the judicial history of the cost justification proviso reflects a great deal of uncertainty as to the proper procedures for testing its applicability in the individual instance. The courts and the Federal Trade Commission have provided few secure guidelines in the adjudication of numerous attempts to use the proviso for justification purposes.8 Justice Clark's opinion in the *Borden Company* case of 19629 is one of the more recent attempts of the Court to formulate acceptable standards.

In 1951, the Government brought suit against the Borden and Bowman Dairy Companies charging them with violations of Section 2(a) of the Clayton Act because of their pricing policies in the sale of fluid milk.10 The Borden Company consciously discriminated between grocery store chains and independently

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7The cost justification proviso reads as follows: "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."


10Alleged violations of Sections 1 and 2 of the Sherman Act were subsequently dismissed.
owned grocery stores by granting the chains flat discounts without reference to the volume of sales. The District Court found this policy to be a *prima facie* violation of Section 2(a), but the Borden Company was able to persuade the trial court that the violations were justified under the cost justification proviso.

Speaking for a majority of six, Mr. Justice Clark reversed the trial court's decision with respect to the applicability of the cost justification proviso to Borden's classification system. The Borden Company had submitted into evidence a voluminous collection of cost studies which were designed to demonstrate the differences in volume sales and costs of delivery between the independents and the chain stores. Because Borden served both independents and chains, it had informally classified the two groups separately for accounting purposes. The independents were granted percentage discounts off the list price which increased with the volume of sales; however, the chain organizations received flat discounts regardless of the volume of sales. The result of the scheme was that the chain stores were able to purchase milk at substantially lower prices than the rival independents.

In reference to the cost justification provision itself, Justice Clark readily admitted that it "is literally susceptible of a construction which would require any discrepancy in price . . . to be individually justified . . . ." Yet to do

11370 U.S. 468.
so would be "to eliminate the cost justification proviso as to sellers having a large number of purchasers. . . ."\textsuperscript{12}

Because of the practical difficulties of assembling adequate cost data, the courts have been quite willing to uphold the practice of classifying similar groups of customers with total costs averaged among the group. But Justice Clark made it clear that the Court would not sanction arbitrary classifications which lacked the quality of "selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium . . . ."\textsuperscript{13}

In turning to the instant case, Justice Clark found that Borden's classification system created artificial disparities which arbitrarily favored the chain stores over the larger independents. This was so because a number of the independents had equaled the purchasing volume of the chains but could not qualify for the larger discounts. Likewise, many independents were charged with certain costs which were not actually incurred. To Justice Clark, the result was somewhat similar to an attempt to average "one horse and one rabbit."\textsuperscript{14}

Thus, the benchmark of "sufficient homogeneity" was added to the list of criteria which must be met under the defendants' burden of proof in cost justification proceedings.\textsuperscript{15}

\begin{flushleft}
\textsuperscript{12}\textit{Ibid.}.
\textsuperscript{13}\textit{Ibid.}, p. 469.
\textsuperscript{14}\textit{Ibid.}, p. 470.
\textsuperscript{15}\textit{Ibid.}, p. 469.
\end{flushleft}
The Borden case is somewhat typical of the difficulties which are seemingly inherent in the use of cost justification as a defense. The most serious defect is the lack of conceptual standards to guide the business community in legal proceedings. Also, in his extensive case study of cost justification, Herbert Taggart found that:

With rare exceptions the cost defense has proven expensive and time-consuming. Hundreds of thousands of dollars have been spent by several respondents to no avail . . . . Most respondents simply cannot afford the lavish expenditures which have been made by some, or at least are unwilling to spend the money on a project so questionable in its prospective results.

Justice Clark's opinion can best be analyzed in terms of the following criteria: (1) the burden of proof in cost justification cases, (2) the use of "average price" as a means to simplify the use of cost data, and (3) the classification of customers for cost analysis purposes. All of these criteria have been quite important in the judicial history of Section 2(a)'s cost justification proviso.

The Borden case follows very closely the Court's pronouncement in the Morton Salt case that the burden of proving cost justification rests with the seller and not with the enforcement.

16 The Attorney General's National Committee, p. 171.
17 Herbert F. Taggart, Cost Justification (Ann Arbor, 1959) p. 546.
18 These criteria are thoroughly analyzed in Rowe, Price Discrimination Under the Robinson-Patman Act, pp. 273-296.
agency. In 1953, however, the Court held that the Federal Trade Commission was more qualified to conduct investigations as to the availability of the cost justification defense under Section 2(f).  

The purchaser was partially relieved of the responsibility of proving that his receipt of the seller's differential prices was cost justified. Justice Clark dispelled any notion that the Automatic Canteen rule under Section 2(f) would be liberalized to require the Federal Trade Commission to share in the burden of proof in Section 2(a) proceedings.

Justice Clark demonstrated his understanding of the practical difficulties involved in cost justification proceedings by holding that the averaging of costs among the classified groups was sufficient to meet the statutory requirements of Section 2(a). The obvious effect of this technique is to make cost justification easier for the seller who quotes different prices to different groups of customers. Thus, Justice Clark voided the possibility that the seller would be burdened with the responsibility of individually justifying his differential prices to every customer. To do so would mean the death of the cost justification proviso.  

In regard to the grouping of customers for cost justification purposes, the Borden case is somewhat original. Justice


21 370 U.S. 468.
Clark and the majority of the Court were unable to uphold Borden's customer classifications because of the absence of "sufficient homogeneity" among the various groups. The Court issued a clear warning that customer classifications must not be so broad as to create injustice for a large number of customers within the particular group. Rather, such classifications are valid only where there is a "self-sameness" of the members in the group so as to make the averaging of costs among them a reasonably accurate indicator. As Justice Clark put it: "High on the list of 'musts' in the use of the average cost of customer groupings under the proviso of § 2(a) is a close resemblance of the individual members of each group on the essential point or points which determine the cost considered."22

The Simplicity Pattern case of 195923 is also germane to the issue of cost justification under Section 2(a). The Federal Trade Commission found that a large dress pattern manufacturer, Simplicity Pattern Company, had discriminated in favor of its larger customers by providing them with services and facilities not given to smaller competing customers on proportionally equal terms. Accordingly, the Commission held that Simplicity's discriminatory conduct constituted a prima facie violation of Section 2(e) of the amended Clayton

22Ibid., p. 469.
The Commission also rejected Simplicity's attempt to justify the violation under Section 2(a)'s cost justification proviso, holding that neither the presence of cost justification nor the absence of competitive injury constituted an acceptable defense in Section 2(e) proceedings. The Court of Appeals reversed the Commission's ruling on the matter of cost justification.25

The Simplicity Pattern case was the Court's first ruling on the availability of the cost justification defense under Section 2(e). Mr. Justice Clark, speaking for a unanimous Court, clearly distinguished between the price discrimination provisions of Sections 2(a) and 2(f) and the services and facilities requirements of Sections 2(c), (d), (e). In the name of efficiency, Congress studiously provided several statutory defenses to a prima facie violation of Section 2(a). However, the services and facilities subsections "unqualifiedly make unlawful certain business practices other than price discriminations."26 On the basis of this interpretation of

Section 2(e) reads in part as follows: "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser . . . of a commodity . . . by contracting to furnish or furnishing . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms."

For a critical analysis of the Court of Appeal's decision, see "The Simplicity Pattern Case: Robinson-Patman Confounded," Yale Law Journal, LXVIII (March, 1959), 808-825.

360 U.S. 65.
legislative intent, Justice Clark viewed Section 2(e) as an absolute ban which in no case could be exonerated under the cost justification proviso. Thus, "the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the § 2(b) proviso. We cannot supply what Congress has studiously omitted." 27

In justification for the Court's decision, Justice Clark alluded to the legislative history of the Robinson-Patman amendments. According to Clark, the rationale behind Congress' decision to treat the services and facilities subsections differently from the price discrimination provisions may well have been the desire to force sellers to confine their discriminatory activities to price differentials, so that detection would be easier and cost analysis would be less difficult. 28 Furthermore, the basic purpose of the Robinson-Patman amendments was to close the gap between large, integrated buyers and the smaller independents who were at a hopeless disadvantage. 29 In view of this overriding legislative intent, the

27Ibid., p. 67. Section 2(b) allows a seller to meet an equally low price of a competitor.

28Ibid., p. 68.

29Ibid., p. 69.
Court held that "cost justification" could not under any circumstances be used as a defense under Section 2(e). 30

The Simplicity Pattern Company did not directly take issue with the Commission's findings as to the prima facie violation of Section 2(e), but argued that the denial of the cost justification defense would generally be undesirable from the standpoint of both law and economics. The Attorney General's National Committee also argued that the application of dual standards to discriminatory conduct was illogical and confusing. To apply an almost per se rule to the subsections dealing with services and facilities while at the same time permitting price differentials to be justified frustrates "the Commission's legitimate enforcement objectives and businessmen's good faith attempts to comply." 31 Hence, the Committee recommended a reconciliation of the subsections with "broader antitrust objectives;" judicial reform was preferred over corrective legislation. 32

The Simplicity Pattern case indicates that the Court has no immediate intention of abandoning its very strict interpretation of Section 2(e) as it applies to the cost justification defense.


31 The Attorney General's National Committee, p. 192.

32 Ibid., p. 193. See Kaysen and Turner, Antitrust Policy, p. 187, in which it is recommended that the cost justification defense be given a wider scope.
proviso. In the event a change is desired, it will apparently have to come from Congress. Mr. Justice Clark appears to be in full accord with the Court's strict interpretation of the cost justification defense. Although his opinions demonstrate a thorough understanding of the inherent difficulties in utilizing the proviso, he gives no indication that the Court is ready to moderate its views.

Meeting Competition in Good Faith

In addition to the cost justification defense, Section 2(b) of the amended Clayton Act provides that discriminatory prices may be saved from condemnation if the seller can prove that the lower prices were made in good faith to meet a competitor's equally low price. The leading case under Section 2(b) is Standard Oil Co. v. Federal Trade Commission, in which the Court held that the "meeting competition" proviso was an absolute defense in price discrimination cases. The opinion of the Court was delivered by Mr. Justice Reed with Mr. Justice Clark voting with the majority. As is so often


34 Section 2(b) reads in part as follows: "... that nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price or the furnishing of services and facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

35 40 U.S. 231 (1951).
the case in antitrust proceedings, the original *Standard Oil* case was remanded to the Federal Trade Commission in order to implement the Court's decision. In 1957, the case was again brought before the Court to test the validity of the subsequent findings of the Commission. Mr. Justice Clark was called upon to write the majority opinion in *Federal Trade Commission v. Standard Oil Company.*

By way of background, the original *Standard Oil* ruling reversed a trend initiated by the Federal Trade Commission to narrow the scope of the meeting competition defense to those instances where the evidence indicated that the price differential did not adversely affect competition. The Commission had contended that the defense could not be invoked at such time as it could be affirmatively shown that competition had been injured. After reviewing the legislative history of the Robinson-Patman amendments, the Court set aside the Commission's interpretation and held that "Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor." Thus the "absolute" nature of the defense was restored.

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38 340 U.S. 249.
Upon remand of the case to the Federal Trade Commission, Standard's "meeting competition" defense was again rejected on the ground that the lower prices were made pursuant to a price system and not in "good faith." The Commission drew extensively on the Court's opinions in the Staley, 39 Cement Institute, 40 and National Lead 41 cases, all of which forbade the use of the meeting competition defense because of the illegality of the competitor's prices. Upon review, the Court of Appeals again reversed the Commission's ruling.

Seventeen years after the Standard Oil case was begun, the Supreme Court upheld the Company's differential prices as being justified by the meeting competition defense of Section 2(b). Speaking for a bare majority of five, Mr. Justice Clark limited the Court's consideration to the single issue of whether the price differentials were the result of a pricing system or a good faith attempt to meet individual competitive situations. 42 It was agreed that the meeting competition defense was precluded upon a finding of the former. Justice Clark was very much concerned about the fact that the Commission had made no finding as to the legality of the competitive


42355 U.S. 407.
prices which were met by Standard. In the absence of such a finding it was strongly intimated that a competitive price could not be declared illegal until it was actually found to be so.\textsuperscript{43} Likewise, the Court was impressed with the extensive amount of cutthroat competition between Standard and its competitors. Standard faced the very real possibility that it would lose a substantial number of its customers if it refused to lower its prices.\textsuperscript{44} This was viewed as "a setting most unlikely to lend itself to general pricing policies."\textsuperscript{45}

In any case, the Court affirmed the Court of Appeal's decision to accept Standard's defense. It was carefully noted that the Court had no intention of disturbing the Staley, Cement Institute, and National Lead opinions; the Standard Oil case stopped short of the illegal pricing schemes upon which those cases turned.\textsuperscript{46} Frederick M. Rowe has summarized the case law under Section 2(b) as follows:

If the seller's lower price was given because of lower prices by a competitor, it is cognizable under the Section 2(b) proviso; if, on the other hand, the seller's lower price was quoted because of a preconceived pricing scale which is operative regardless of variations in competitor's prices, as

\textsuperscript{43}\textit{Ibid.}, p. 402.

\textsuperscript{44}\textit{Ibid.}, p. 402-403. Standard did in fact lose three of its customers due to lower competitive prices.

\textsuperscript{45}\textit{Ibid.}, p. 403.

\textsuperscript{46}See The Attorney General's National Committee, pp. 181-183. Justice Clark's opinion is in fundamental agreement with the Committee's recommendations.
in the "basing-point" cases, his price was not genuinely made to meet a competitor's lower price and Section 2(b) cannot apply.\textsuperscript{47}

Justice Clark has been very consistent in his dealings with the "justification" provisions of Section 2(a) and 2(b). He has been hard on sellers who attempt to invoke the cost justification defense. At the same time, Clark has resisted any move toward closing the door to the seller who would justify his price differentials on the basis of lower competitive prices.

**Administration and Enforcement**

The Federal Trade Commission has been delegated the primary responsibility for the administration and enforcement of the Robinson-Patman and Federal Trade Commission Acts. Congress has armed the Commission with various investigatory powers and the very important function of issuing cease and desist orders to secure compliance with the Acts. These broad powers were vested in the Commission's hands in the hope that it could better utilize the qualities of administrative expertise, constant supervision, and judicial impartiality.\textsuperscript{48} The actions of the administrative agency are subject to review by the courts and ultimately by the Supreme Court, but the Court can

\textsuperscript{47}Rowe, *Price Discrimination Under the Robinson-Patman Act*, p. 234.

do little more than sketch broad guidelines. This discussion will deal mainly with the positions taken by Mr. Justice Clark as to the nature and scope of the Commission's cease and desist orders. It will be seen that Clark has generally favored the issuance of very broad orders which are capable of encompassing a wide spectrum of activities. As such, the discretionary power of the Commission is considerable.

Justice Clark's views on the enforcement powers of the Commission were first evidenced in **Federal Trade Commission v. Rubberoid Co.**[^49] The Rubberoid Company, a large manufacturer of roofing materials was found by the Commission to have discriminated in price among its various customers. The Commission held that the differential prices were in violation of Section 2(a) of the Robinson-Patman Act and ordered the Company to cease and desist from selling "products of like grade and quality to any purchaser at prices lower than those granted other purchasers who in fact compete with the favored purchaser in the resale or distribution of such products."[^50]

The Court of Appeals affirmed the decision but refused enforcement of the order.

Mr. Justice Clark's majority opinion carefully sketched a design of the powers of the Commission in the issuance of cease and desist orders under the Robinson-Patman Act. In

[^49]: 343 U.S. 470 (1952).
[^50]: 343 U.S. 472.
an oft-quoted passage, Justice Clark explained the Court's views:

Orders of the Federal Trade Commission are not intended to impose criminal punishment or exact compensatory damages for past acts, but to prevent illegal practices in the future. In carrying out this function the Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past. If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its roadblock to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads to the prohibited goal, so that its order may not be by-passed with impunity.\textsuperscript{51}

Justice Clark shows great deference to special competence of the Commission to formulate appropriate orders in individual situations. Thus, the Court adhered to the rule set out in the Jacob Siegel case\textsuperscript{52} that "the courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist."\textsuperscript{53}

According to the Court's interpretation of Section 10 of the Act, an enforcement decree could be entered by the Court of Appeals only when it could be shown that a violation of the original order had occurred or was imminent. The result was that three separate violations were necessary -- a violation leading to a cease and desist order, a violation of the order leading to a decree of enforcement, and finally a violation of

\textsuperscript{51}Ibid., p. 473.

\textsuperscript{52}Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608 (1946).

\textsuperscript{53}Ibid., p. 613.
the enforcement decree. Thad G. Long has colorfully described the ruling as follows:

The upshot of the Rubberoid case was that vague and general orders could be issued by the Commission, but that it took three violations before a seller would suffer. Thus, the stage was set for inevitable cat-and-mouse play between the Commission and industry. The cat was evasive as to the ground rules, but the mouse could get caught twice without injury -- it appeared the odds were just about even.

The Rubberoid case has been given a great deal of attention because of Mr. Justice Jackson's dissenting opinion in which he gave the Court a stern lecture on the administrative process. While admitting that the Act was complicated and vague, Justice Jackson saw no legitimate reason why the Commission's orders should be. The Commission was created as an independent body with quasi-legislative powers in order to give precision and concreteness to an "unfinished law." Congress itself was unable to determine the most satisfactory method of regulating price discrimination and thus turned over the task to the Commission. To Justice Jackson, the Commission loses its reason for being if it "does nothing but promulgate as its own decision the generalities of its statutory charter . . . ." Justice Jackson feared that the Rubberoid


55343 U.S. 480-494.

56Ibid., p. 485.  
57Ibid., p. 489.
approach would have at least two deleterious results. (1) The Federal Trade Commission would eventually lose its independent status. (2) The courts would be unable to use effectively the contempt power to check repeated violators. Nevertheless, Mr. Justice Jackson's views did not prevail on the Court.

Nor was the criticism of the **Rubberoid** opinion confined to the dissenting members of the Court. The Attorney General's National Committee found that "Commission orders indiscriminately proscribing all differentials regardless of amount necessarily impede desirable flexibility in pricing." 58 Hence, the Committee recommended that "the Commission devote serious effort to vindicating its expert administrative status through precision in the mandates its orders impose." 59

Other criticisms were even more unkind:

The clamor aroused by the substantive views of the price discrimination decisions was heightened by an unfortunate administrative incompetence of the Federal Trade Commission. Its findings were often of little help in interpreting the facts . . . . Its orders frequently did little more than restate the vague language of the Act, thus providing defendants with no more certain guide to future action than they had enjoyed in the past. 60

In 1957, Justice Clark again had occasion to review an order of the Commission in **Federal Trade Commission v. National**

58 The Attorney General's National Committee, p. 168.

59 Ibid., p. 169.

60 Dirlam and Kahn, Fair Competition, p. 123. This passage was footnoted with the Rubberoid case.
Load Company. The Commission issued a general cease and desist order against National Lead's use of a zone delivered pricing system. The Company did not take issue with the Commission's *prima facie* case, but strenuously objected to the provisions of the order which forbad it to quote prices pursuant to a delivered price system for the purpose of matching the prices of other sellers "thereby preventing purchasers from finding any advantage in price in dealing with one or more sellers as against another." Although the order is somewhat more specific than the Rubberoid order, it does not mark a departure from the general rule. Justice Clark reiterated the case law much the same as was done in the Rubberoid case — the *Jacob Siegel* and *Cement Institute* cases were again cited. In reference to National Lead's contention that the order effectively banned legal as well as illegal prices, Justice Clark was content to dismiss the argument because "decrees often suppress a lawful device when it is used to carry out an unlawful purpose." In other words, "those caught violating the Act must expect some fencing in."

61 352 U.S. 419 (1957). This case was brought under Section 5 of the Federal Trade Commission Act, but the Commission's powers to issue orders are substantially the same as those under Section 11 of the Robinson-Patman Act.

62 352 U.S. 423.


On this record, it is fair to assume that Justice Clark did not heed the warnings of the Rubberoid critics. The Commission was again reassured that it had the support of the Court in the issuance of broad cease and desist orders.

In 1959, Congress amended Section 11 of the Act to make the Commission's cease and desist orders final and subject to sanctions for violation sixty days after their issuance unless submitted for judicial review. With this amendment, Congress put teeth into the Commission's orders and caused the Court to have second thoughts about the Rubberoid rule. In the Brooch case, the Court issued a stern warning to the Commission:

We do not wish to be understood, however, as holding that the generalized language of paragraph (11) would necessarily withstand scrutiny under the 1959 amendments. The severity of possible penalties prescribed by the amendments for violations of orders which have become final underlines the necessity for fashioning orders which are, at the outset sufficiently clear and precise to avoid raising serious questions as to their meaning and application.

The Brooch case marked the turning point in the Commission's issuance of broad orders under the Rubberoid rule. In a number of recent opinions, the Commission has given a great deal of


68 Ibid., p. 367-368. Justice Clark voted with the majority of the Court. The dissenters would have affirmed the decision of the Court of Appeals to limit the order to transactions in past violations.
attention to the appropriate scope of its orders, although
the transition is far from complete.\textsuperscript{69} If the present trend
continues, it seems that Justice Clark's approach in \textit{Rubberoid}
and National Lead is doomed to defeat. The Court is yet to
speak on these recent developments, but in light of the \textit{Brønd}
warning it is fair to assume that the Court will not inter-
fere. There is also no indication as to how Justice Clark
himself views the Commission's new emphasis on the fashioning
of specific orders. Yet, the \textit{Rubberoid} rule has been adequately
rebuffed.\textsuperscript{70}

\textbf{Criminal Sanctions}

In addition to the substantive changes in the discrimina-
tory pricing provisions of Section 2 of the Clayton Act, the
Robinson-Patman amendments also added a criminal prohibition
designed to impose harsh penalties on sellers "for particularly
obnoxious pricing practices feared by Congress in 1936 . . . ."\textsuperscript{71}
Section 3 of the Act makes it a crime to sell goods at "un-
reasonably low prices for the purpose of destroying competition

\textsuperscript{69}Long, "The Administrative Process," pp. 679-690. The
recent opinions of the Commission are carefully described and
analyzed.

\textsuperscript{70}See Friendly, "The Federal Administrative Agencies,"
p. 874. It is suggested that administrative orders must afford
"a fair degree of predictability of decision in the great
majority of cases and of intelligibility in all."

\textsuperscript{71}Howe, \textit{Price Discrimination Under the Robinson-Patman
Act}, p. 452.
or eliminating a competitor.\textsuperscript{72} Since its enactment, Section 3 has been invoked very sporadically; most cases have been initiated by private parties. However, in 1958 the Court ruled that Section 3 was not redressable through private damage suits by injured parties.\textsuperscript{73} Thus, the future of Section 3 depended on the Government's inclination to use it, provided the Court would uphold its constitutionality against a charge of vagueness.

In 1963, the Court had occasion to rule on Section 3's constitutionality in \textit{United States v. National Dairy Products Corporation}.\textsuperscript{74} The Government charged National Dairy with destroying competition by utilizing its superior resources to maintain a price war against local competitors by selling milk at prices below its own cost. The District Court dismissed the indictments involving Section 3 on the ground that it was unconstitutionally vague and indefinite.

On direct appeal, the Supreme Court reversed the decision, holding that Section 3 was sufficiently clear and precise to meet the test of constitutionality. Writing for the majority of the Court, Mr. Justice Clark examined the statute in terms of the Court's long-established practice of attaching

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\begin{itemize}
  \item \textit{U. S. Statutes at Large}, XLIX, Part I, 1528 (1936). Violations of Section 3 are punishable by fines up to $5,000 and imprisonment not to exceed one year.
  \item \textit{Nashville Milk Co. v. Carnation Co.}, 355 U.S. 373 (1958).
  \item 372 U.S. 29 (1963).
\end{itemize}
presumptive validity to an Act of Congress. Hence, the Court has held many times that "statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." In spite of this general rule, Justice Clark was inclined to add that the Court would not go out of its way to validate "a blunderbuss statute" which could not be reasonably understood.

In the case of Section 3, Justice Clark applied a dual standard to its enforcement: (1) the act of selling goods at unreasonably low prices, (2) with the predatory "intent" to eliminate competition. Within this setting the Court was persuaded that National Dairy could reasonably understand and was adequately forewarned of the prohibited conduct. To Justice Clark, this conclusion was strengthened by the legislative history and subsequent case law of the Act. The overriding purpose of the Robinson-Patman Act was to bar the interstate producer from pricing his local competitor out of the market. One of the primary weapons which Congress sought to eliminate was the sale of goods at unreasonably low prices,

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76 Ibid., p. 33.

77 Ibid., p. 35. Justice Clark compared the instant case with the Court's ruling in Screws v. United States, 325 U.S. 91 (1945), where the matter of "intent" was controlling.
or more specifically at "below cost." This fact was recognized by the Court in Moore v. Mead's Fine Bread Co. which was based in part on Section 3.

The Court quickly disposed of National Dairy's contention that the approach to "vagueness" under the First Amendment was controlling in this case. Justice Clark pointed out that statutes were interpreted on their face under the First Amendment because vagueness may threaten socially desirable conduct. However, such is not the case "where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable." Justice Clark well illustrates the Court's inclination toward "self-restraint" in testing the constitutionality of statutes regulating questionable business conduct.

In remanding the case for trial, it was made clear that the Court's ruling was limited to a prima facie case in which sales below cost are accompanied by the predatory intent to eliminate competitors. Justice Clark left the door open for such sales to be justified by proving that the practice was prompted by legitimate business exigencies.

The future effect of the National Dairy case is yet to be seen; much will depend upon its reception in the lower

78 372 U.S. 33-34.
80 372 U.S. 36.
courts. It is quite possible that Section 3 may be expanded by additional legislation or judicial interpretation into an effective criminal sanction. Certainly, Justice Clark's opinion is evidence of the Court's confidence in Section 3 as an adequate framework for future litigation. Yet, there is potential danger in using Section 3 overzealously. The Attorney General's National Committee recommended repeal of Section 3 viewing it as "dangerous surplusage" and a "harsh criminal law." Likewise, Frederick M. Howe views Section 3 as a "legal derelict deserving merciful demise." Although Justice Clark and the Court upheld Section 3 in the face of these rather strong criticisms, the opinion reflects a note of caution as to the future.

The Federal Trade Commission Act

Although the Federal Trade Commission Act is not entirely an antitrust statute, it does declare unlawful certain business practices which are thought to produce deleterious competitive effects. The most important antitrust provision is Section 5 of the Act which prohibits "unfair methods of competition and unfair or deceptive acts or practices" in

82 Attorney General's National Committee, p. 201.
83 Rowe, Price Discrimination Under the Robinson-Patman Act, p. 474.
84 U. S. Statutes at Large, XXXVIII, Part I, 717 (1914).
interstate commerce. It is readily apparent that the language of Section 5 is as broad as that of the Sherman Act; thus, restraints of trade or monopolizing may also be prosecuted by the Federal Trade Commission under Section 5. The basic distinction between the Acts is that the Commission has been given the authority under Section 5 to proceed against violations in their incipiency before they reach the magnitude of a Sherman Act offense. The following will be a brief analysis of Justice Clark's only opinion under Section 5 of the Act.

**Unfair Methods of Competition**

Section 5 of the Federal Trade Commission Act has been before the courts mainly in connection with the use of various types of delivered price systems. Such systems are classified differently according to the methods and expense of delivery; the most common are basing point systems, freight equalization systems and zone delivered price systems. During the first part of the nineteenth century, the delivery system of the economy generally operated on an F.O.B. mill basis — the buyer paid his own freight expenses. However, with the development of highly sophisticated forms of transportation, the several delivered price systems came into being.\(^\text{85}\)

From the famous basing point cases, dealing with the use of single and multiple basing point formulas, a perceptible pattern of illegality has emerged. Upon a finding of conspiracy among the competitors of an industry to employ a unified pricing system, the Commission and the reviewing courts have generally invoked Section 5's ban on unfair methods of competition and Section 2 of the Clayton Act which prohibits discriminatory pricing. 86

The Supreme Court's first ruling on zone delivered price systems came in Federal Trade Commission v. National Lead Company. 87 Several leading manufacturers of lead pigments used in paints were found by the Commission to have eliminated price competition among themselves in violation of Section 5 of the Federal Trade Commission Act. On appeal, the respondents did not contest the finding that the adoption of the zone delivered price system was the result of collusion, but strongly protested the Commission's order which prohibited the individual use of the system.

Justice Clark affirmed the Commission's ruling and upheld the Commission's cease and desist order in its entirety. The Justice carefully outlined the history of the respondent's pricing policies to demonstrate the strong evidence of collusion which surrounded the use of the zoning system. The evidence

87 352 U.S. 419 (1957).
indicated that the zones were "highly artificial" and that the respective competitors in the industry "not only agreed to sell at the same zone delivered prices in identical geographical zones but also adopted uniform discounts, terms of sale and differentials with respect to certain of their products." On the basis of this record, Justice Clark found the selective remedy to be adequate for the restoration of competition in the industry. The reasonableness of the order was defended as follows:

First, the simplicity of operation of the plan lends itself to unlawful manipulation; second, it has been used in the industry for almost a quarter of a century; and, third, its originator and chief beneficiary had been previously adjudged a violator of the antitrust laws.

In spite of the ban on both concerted and individual use of the system, Justice Clark pointed out the limitations on the order. In the first place, the order was temporary so as to provide a "breathing spell" during the restoration of competition. Also, the order prohibited only the use of a zone delivered price system and no other. And finally the Court interpreted the order as not declaring zone delivered pricing illegal per se in the absence of collusive behavior.

88 Ibid., p. 422.
Hence, Justice Clark did not venture beyond the facts of the case at hand.\textsuperscript{90}

Justice Clark again displayed a cautious attitude in proceeding into a new area of business activity. It is fair to assume that the Court would have modified the Commission's order had it prohibited the use of all forms of zone delivered pricing. Yet the decision did provide an effective road block against its use when accompanied by collusion and intent to eliminate competition.

\textsuperscript{90}See the recommendations of \textit{The Attorney General's National Committee}, pp. 214-217.
A careful reading of Mr. Justice Clark's opinions in the field of antitrust law reveals his intensely practical approach to the judicial process. The Justice's opinions do not fit into any logically consistent pattern of interpretation, although this cannot automatically be treated as a shortcoming in Clark's handling of antitrust cases. For several decades there has been an increasing recognition of the complexity of the problems inherent in channelling private interests in ways which are conducive to the public good. This has been a period in which there has been much change and experimentation in the control of business organizations. The huge body of case law which has developed in the antitrust field has generally been resistant to dogmatic solutions to dynamic problems. Hence, judges rarely pretend to know beyond a doubt what kind of economic performance Americans want from their industries, nor are they ignorant of the constantly changing nature of the American economy. In recognition of this fact, Justice Clark has stated:

The great genius of American political life seems to have been its pragmatic character -- by which I mean the flair for making progress through what Karl Popper calls "piecemeal social engineering"
as opposed to "Utopian planning." The idea has been to solve individual problems rather than to build vast ideological systems.

While the economic conception of business behavior has evolved toward the greater use of "effective" competition and "mixed" enterprise, there appears to be no discernible relaxation in the Supreme Court's support of the existing framework of antitrust law. Mr. Justice Clark's work is indicative of his firm commitment to the workability of the antitrust concept. In a recent article praising the application of antitrust doctrines in the European Common Market, Clark has documented his fundamental agreement with the statutory purpose of the antitrust laws. That purpose "is simply to promote competition, this being taken as a good thing per se." To Justice Clark, antitrust law is not merely an exercise in economic analysis, but "reflects a growth in national consciousness nurtured by many springs." Thus, it is representative of a "mingling of values -- social and political, as well as economic." Although Clark's opinions rarely say so, it is safe to assume that noneconomic factors are certainly accorded much weight in his decisions in individual cases.


3 Ibid., p. 839.  
4 Ibid.
Justice Clark's longevity on the Court has enabled him to participate in a large number of antitrust cases, and he has written a significantly large number of opinions on a wide range of antitrust issues. Because antitrust law encompasses a host of complex points of law, a due amount of caution must be observed in generalizing about the cases. Yet, in the decade of the 1960's, Clark's work indicates that he shares the Court's hostility toward the tide of increasing economic concentration. Taken as a whole, his opinions leave the impression that the Justice is somewhat resolved to preserve small businessmen and traditional marketing methods in spite of the probable loss of a certain amount of economic efficiency and progress. For example, in Clark's recent Penn-Olin opinion, he found no reason to hesitate in the application of the Clayton Act's ban on mergers to corporate joint ventures. Overlooking the procedural difficulties in such a course of action, Justice Clark was primarily concerned with implementing "a national policy enunciated by Congress to preserve and promote a free competitive economy." The Justice was not impressed with the legitimate business objectives which may lead to the creation of a jointly owned subsidiary, nor did he accord controlling weight to the fact that the formation of Penn-Olin created an actual competitor in the industry.

5378 U.S. 170.

Similarly, Justice Clark's brief concurring opinion in the *Brown Shoe* case evidences somewhat of a bias in favor of small business. In his review of the findings of fact, Clark seemed impressed with the possibility "that the acquisition would have a direct effect on the small manufacturers who previously enjoyed the Kinney requirements market." Because of his silence on the matter, it can be logically inferred that Justice Clark was in agreement with the Chief Justice's interpretation of the legislative history of the Celler-Kefauver amendments to Section 7 of the Clayton Act -- the fear of a rising tide of economic centralization in the economy.

Two distinguished antitrust scholars, Milton Handler and Stanley Robinson, have recently chastised the Court because of its current approach to the merger issue. The Court's recent opinions are viewed with alarm because of the fact "that a majority of the Supreme Court seems bent on preserving the possibility of eventual deconcentration of American industry." The authors are convinced that the Court has divorced itself

7370 U.S. 356.

8Ibid., p. 315.

9Milton Handler and Stanley D. Robinson, "The Supreme Court vs. Corporate Mergers," *Fortune* (January, 1965), 178. See also S. Chesterfield Oppenheim, "Antitrust Booms and Boomerangs," *Northwestern University Law Review*, LIx (March-April, 1964), 33-48. Oppenheim takes the position that "oligopoly competition can be viable as in markets where a large number of firms struggle for customers. Antitrust cannot set as its goal all of the competition that is logically possible."
from the economic realities of the times by assuming in the absence of supporting proof that oligopoly is undesirable. On the strength of the Court's dicta in its merger opinions, it appears that mergers in already highly concentrated industries are being viewed more and more as inherently anti-competitive regardless of possible redeeming virtues. Justice Clark's voting record is in full accord with the Court's view.

Although the cases heretofore discussed have been limited to Section 7 of the Clayton Act, many of the same implications can be drawn from Justice Clark's opinions in the National Dairy, Borden and Sunkist cases. In National Dairy, the Court sanctioned the application of the rather vague criminal provisions of Section 3 of the Robinson-Patman Act to the pricing policies of a large, integrated supplier of fluid milk. The Court attached to National Dairy's sales "below cost" an intent to drive its small, local competitors out of business by the use of its superior resources. In regard to the constitutionality of Section 3, Justice Clark and the majority of the Court made it clear that a charge of vagueness would not stand in the way "where the statute is directed only at conduct designed to destroy competition, activity which is neither constitutionally protected nor socially desirable."\(^\text{10}\)

Justice Clark's opinion in the Borden case illustrates his handling of Borden's attempt to justify its price differentials

\(^{10}\text{372 U.S. 36.}\)
between large chains and independents under the cost justification proviso of the Robinson Patman Act. The history of the proviso foretells that its use is limited to companies which are sufficiently large to bear the financial burdens involved. Yet, Clark's opinion indicates that the Court has no intention of liberalizing its stringent requirements to make the proviso more readily available for justification purposes. Likewise, in his Simplicity Pattern opinion, Justice Clark barred the door completely against the proviso's use under Sections 2(c), (d) and (e) of the Robinson-Patman Act.\(^{11}\)

In the Sunkist case, however, the Court halted a trend toward narrowing the exemption of cooperative organizations from the antitrust laws. Again, Justice Clark seemed quite fearful for the welfare of the small, independent growers who had banded together in an attempt to market their products successfully. In contrast, the Justice was not alarmed by the federated cooperative's accumulation of a substantial amount of market power.

In the present decade, Mr. Justice Clark's opinions testify to his faith in the antitrust concept as a legal device to aid in the maintenance of competition in the industrial sector of the economy. The Court has often chosen to accomplish this goal by protecting smaller competitors from the

\(^{11}\)See Milton Handler, "What is Wrong With the Antitrust Laws," Antitrust Bulletin, VIII (July-August, 1963), 557-569. Handler concludes that the Act's statutory defenses "are practically a dead letter."
consequences of competition. Donald Dewey has summed up the matter as follows:

The heart of antitrust is the resolve that oligopoly shall not evolve, or degenerate, into monopoly and that, if possible, it shall be pushed in the direction of workable competition by strictly controlling mergers and by placing handicaps on larger firms. The foregoing analysis leads to the general conclusion that Justice Clark views the primary goal of antitrust law as the limitation of undue market power and the protection of socially desirable forms of business organization. However, the observation must be tempered in accordance with several of Clark's opinions which portray him in a somewhat different light.

Justice Clark's work in the area of exclusive-dealing arrangements is in marked contrast to his open hostility toward the use of anticompetitive devices. Beginning with his Times-Picayune opinion, the Justice infused a measure of the "rule of reason" into the adjudication of tying contracts under the Sherman Act. In general, the Court has adopted the per se approach to tying contracts, viewing them as inherently anticompetitive. The per se category of offenses is not open to economic inquiry because the intent to exert undue market power is implied in their use. Clark shunned this approach in favor of an extended analysis into the Times-Picayune Company's use of a "unit plan" in the sale of newspaper advertising space.

In his more recent *Tampa Electric* opinion, Clark upheld the use of a twenty-year exclusive dealing contract between a large supplier of coal and a public utility company. In circumventing the "quantitative substantiality" test of *Standard Stations*, the Justice clearly let it be known that the Court would henceforth consider relevant economic data in judging the contracts. Thus, the *Tampa Electric* case may be the beginning of a doctrinal change in the interpretation of Section 3 of the Clayton Act. Justice Clark moved away from a mechanical approach to an area of law which is at best complex and at worst resistant to enduring legal standards.

Clark's pragmatic approach to antitrust issues is further illustrated by his handling of "conscious parallelism" under the conspiracy provisions of the Sherman Act. Prior to the *Theatre Enterprises* case, the case law has steadily moved in the direction of relaxing the enforcement agencies' burden of proof to facilitate an expanded attack on oligopoly situations where uniform business behavior is common. Justice Clark laid to rest the notion that conscious parallelism was a blanket equivalent to conspiracy. The interpretation still stands as the legal definition of conscious parallelism.

Given the many imponderables in the antitrust field, Mr. Justice Clark's work is illustrative of the dangers which inhere in the use of uncompromising descriptive terms. In

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13Interestingly enough, the Court had never approved of an exclusive-dealing contract in excess of one year.
several areas of antitrust law, Justice Clark's opinions and voting record have been rather consistent. Such is the case with respect to the Clayton Act's prohibition of anticompetitive mergers and the Robinson-Patman Act's ban on discriminatory pricing practices. At the same time, the Justice has been extremely cautious in outlawing the use of business techniques which lead directly to social and economic betterment. Although such an approach lacks logical consistency, it does exemplify the pragmatic nature of the modern judicial process.
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