The Supreme Court and Tying Arrangments: Antitrust as History

Victor H. Kramer

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/2465
The Supreme Court and Tying Arrangements: Antitrust as History

Victor H. Kramer*

Policy about industrial structure and conduct must be placed in its historical context in order to be fully understood.\textsuperscript{1}

The current debate between two schools of thought concerning the legitimate objectives of antitrust law rivals some of the debates about the world's great religions. One group, frequently dubbed the "Chicago School,"\textsuperscript{2} asserts that the exclusive goal of antitrust law should be to achieve "allocative efficiency," broadly defined as the production of the greatest amount of goods at the lowest cost.\textsuperscript{3} This group favors selective application of the antitrust laws,\textsuperscript{4} arguing that competitors in a

\* Law Alumni Professor, University of Minnesota Law School. The author wishes to thank Patricia Dobberstein, J.D. 1985, University of Minnesota, and Solveig Kramer, M.S.L.S. 1973, Catholic University, for their invaluable editorial and research assistance; Abe Krash, Esq. and the law firm of Arnold & Porter for making their Washington, D.C., facilities available in the preparation of this Article; and Merrick Garland and Professor Leo Raskind for reading drafts and making helpful suggestions. I also wish to thank Professor Richard Craswell for his inciteful observations in a letter to me about the Supreme Court's opinions in \textit{Jefferson Parish Hospital Dist. No. 2 v. Hyde}.  
2. The label derives from the group's identification with the University of Chicago. For example, Seventh Circuit Judge Richard A. Posner, one of the foremost members of this group, is a former professor at the law school of the University of Chicago.  
4. On the one hand, many members of the group would interpret antitrust laws to outlaw cartels engaging in price fixing or allocation of markets and would permit restructuring of businesses in the relatively rare cases of genuine monopolization. \textit{See, e.g.,} R. BORK, \textit{supra} note 3, at 69-71; R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 22 (1976) ("Fortunately, since few economists believe that collusive pricing generates significant economic gains, when a practice has been correctly identified as a form of collusion we can generally suppress it without misgivings."). \textit{See generally} D. ARMENTANO,
free market invariably choose the most efficient way of doing business.\(^5\) In contrast, opponents of the Chicago School contend that the goal of antitrust law should be to prevent excessive concentrations of economic and political power in large capital combinations.\(^6\) This group therefore asserts that antitrust laws should be applied to maintain and encourage the creation of relatively small business units by preserving competitors, even if such preservation produces no demonstrable benefit for consumers.\(^7\)

Despite the fervor of the debate, its intellectual foundations are not new. The roots of today's conflicting ideologies were evident in the Supreme Court's early antitrust opinions,\(^8\) as well as in the writings of distinguished economists of the nineteenth century.\(^9\) This Article traces the debate through an...

\(^5\) See, e.g., D. Armentano, supra note 4, at 29-30; R. Bork, supra note 3, at 20-21; see also Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135, 165 (1984) ("The most reasonable interpretation of a persistent practice is that the practice is persistently beneficial to consumers."). It can be assumed that Judge Easterbrook did not intend to include the "persistent practice" of price fixing within his generalization. See supra note 4. See generally Rowe, supra note 3, at 1548 (describing how the assumption that free markets benefit consumers by ensuring an efficient allocation of resources leads the Chicago School to conclude that concentrated industries, vertical integration, mergers, conglomerations, and sometimes even price fixing are efficient and therefore should be permitted).


\(^7\) See generally H. Hovenkamp, supra note 3, at 40-49; L. Sullivan, supra note 1, § 1, at 4-5.

\(^8\) See infra notes 59-119 and accompanying text.

\(^9\) Many of the present themes of the Chicago School, for example, were voiced by influential economists of the late 1880's in opposition to § 1 of the
examination of the Supreme Court's application of antitrust laws to tying arrangements.10 Part I discusses the early judicial history of tying arrangements and the legislative response that ultimately resulted in section 3 of the Clayton Act.11 Part II examines antitrust challenges to tying arrangements that have

Sherman Act, ch. 647, § 1, 26 Stat. 209, 209 (1890) (codified as amended at 15 U.S.C. § 1 (1982)), then under consideration by Congress. Professor Arthur T. Hadley, later President of Yale, wrote in 1887:

[Competition ends in combination. [Competition] cannot exist indefinitely without ruin to the investor. . . . [T]he chance for the small independent business man is less. If the competition does not crush him down, the combination swallows him up.

This monopoly, due to the advantages of large organizations of capital, is characteristic of the present day.

. . . . [In those lines of industry which involve large capital, under concentrated management, the old theory of free competition is as untenable as it was in the case of railroads. That a great deal of our productive industry is thus monopolized hardly admits of doubt.

Hadley, Private Monopolies and Public Rights, 1 Q.J. Econ. 28, 40-41 (1886).

Writing in the same year, Professor Edwin R.A. Seligman of Columbia said: "However the railways start out, they are sure to end in combination. . . . In no business are the effects of spasmodic competition more pernicious." Seligman, Railway Tariffs and the Interstate Commerce Law, 2 Pol. Sci. Q. 365, 375 (1887).

George Gunton wrote the following year that "[d]uring the last ten years [Standard Oil] has had practically no competitor. Still the price of oil has steadily tended downwards." Gunton, The Economic and Social Aspect of Trusts, 3 Pol. Sci. Q. 385, 403 n.1 (1888). Gunton insisted that the trusts have "a direct interest in keeping prices at least sufficiently low not to invite the organization of counter enterprises which may destroy their existing profits." See id. at 403. Gunton also predicted that the charge that trusts "are obtaining an increasing control over the government, and are thereby tending to become . . . political dictators . . . will also prove to be unfounded." See id. at 403.

By 1901, John Bates Clark, the dean of United States economists, wrote that "the trusts . . . are here to stay and we know it.” See J. CLARK, THE CONTROL OF TRUSTS 18 (1901).

Some of the themes of today's opponents to the Chicago School can also be found in economic studies of the late nineteenth century. But cf. F. Scherer, supra note 6, at 424 (“About the only group in America other than big businessmen outspokenly uncorrected about the trust problem were the professional economists. . . . They saw the growth of big business as a natural evolutionary response consistent with economies of scale, or when scale economies were patent absent from mergers, as a step necessary to eliminate cutthroat competition.”). See generally W. Levin, LAW AND ECONOMIC POLICY IN AMERICA 71-77 (1965) (surveying the views of economists of the late nineteenth century).

10. A tying arrangement exists, for example, when a seller conditions the sale of one commodity, or "tying" product, on the purchase of another commodity, or "tied product." Such tying arrangements can also be achieved through leases, rather than sales, and the tying or tied products can be services, rather than commodities.

been presented to the Supreme Court and explores the possible reasons for the shifting theoretical bases of the decisions. Part III reviews the Supreme Court's most recent decision on tying arrangements, Jefferson Parish Hospital District No. 2 v. Hyde,12 notes the sharp ideological differences between the majority and concurring opinions, and discusses the conceptual and analytical flaws of both.

I. THE EARLY HISTORY OF TYING ARRANGEMENTS, 1896-1914

The principal tool of antitrust enforcement is, of course, section 1 of the Sherman Act, which declares that "[e]very 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."13 Section 1 has rarely been read as broadly as its "every contract" language would suggest.14 In the last decade of the nineteenth and the first decade of the twentieth centuries, the language was not thought adequate to prevent even those tying arrangements in which patentees sought to expand their legal monopolies by tying the patented products to nonpatented goods or services. In the germinal case of Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.,15 the Sixth Circuit held in an opinion by Judge Horace Lurton that a patent carried with it the right to condition sale of the patented machine on the purchaser's agreement to use only the patentee's nonpatented goods with the machine.16 Although Judge Lurton recognized that the patentee's right to limit the use of the patented product was, like all property rights, subject to the general law of the land,17 the court never specified what such constraining laws might be and, significantly, never mentioned the six-year-old Sherman Act.

14. Strictly construed, § 1 could be interpreted to invalidate all contracts because all contracts "restrain" trade to a certain extent. Although enforcing the "plain meaning" of the statute received some early judicial support, see United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 327-28 (1897), the Sherman Act has never been extended as far as its language would conceivably allow.
15. 77 F. 288 (6th Cir. 1896).
16. See id. at 292. Coincidentally, the machine in question was used to fasten buttons to shoes. See id. at 295-96.
17. See id. at 293.
nority overcame its "reluctance to dissent" to "make it clear that if evils arise their continuance will not be caused by the interpretation now given to the statute, but will result from the inaction of the legislative department in failing to amend the statute so as to avoid such evils."

Concern about the Sherman Act's apparent inability to reach tying arrangements was augmented by a general dissatisfaction about Supreme Court applications of the Act in other contexts. The 1912 National Platform of the Democratic Party stated: "We regret that the Sherman Anti-Trust Law has received a judicial construction depriving it of much of its efficiency, and we favor the enactment of legislation which will restore to the statute the strength of which it has been deprived by such interpretations." In the same year, the Democrats succeeded in having their candidate, Woodrow Wilson, elected President of the United States.

On January 20, 1914, President Wilson urged a joint session of Congress to adopt additional antitrust legislation. Wilson

26. See id. at 49 (White, C.J., joined by Hughes and Lamar, JJ., dissenting).
27. See id. at 50 (White, C.J., joined by Hughes and Lamar, JJ., dissenting).

In United States v. Winslow, 227 U.S. 202 (1913), another pre-Clayton Act case, three separate groups of individuals, each controlling a different group of patented machines used in making shoes, formed into a combination, the United Shoe Machinery Co., that controlled between 70 and 80% of the market for their machines. Id. at 203 (argument for the United States); id. at 215-16 (opinion of the Court). The defendants then leased their machines on the condition that shoe manufacturers use only machines furnished by the combination. Id. at 216 (opinion of the Court). The defendants were charged with a criminal violation of the Sherman Act, see id., and the Supreme Court, in an opinion by Justice Holmes, held that the combination was not unlawful, see id. at 216-17. Although the validity of the tying arrangements was not directly before the Court, Justice Holmes observed in passing that "[t]he machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, . . . and it may be assumed that the success of the several groups was due to their patents having been the best." See id. at 216 (citation omitted). The Court did not cite A.B. Dick or Button-Fastener.


sought the establishment of a "trade commission" that would give "advice, . . . definite guidance and information" to businesses,\(^3\) as well as the enactment of a statute designed to "explicitly" forbid, "item by item . . . in such terms as will practically eliminate uncertainty,"\(^3\) specified monopolistic practices not clearly unlawful under the Sherman Act.\(^3\)

Within nine months of the address, Congress enacted both the Federal Trade Commission Act and the Clayton Act.\(^3\) Section 3 of the Clayton Act specifically applies to tying arrangements, stating:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, 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, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.\(^3\)

Section 3 represented a late compromise between the opposing views of the Senate and the House of Representatives. As originally adopted by the House, section 4 of the bill criminalized all exclusive dealing, including tying arrangements, involving goods (as distinguished from services).\(^3\) The Senate, however, struck section 4 from the bill.\(^3\) The legisla-

---

31. See id. at 1963.
32. See id.
33. President Wilson's message outlined a number of provisions for inclusion in the statute, such as the prohibition of interlocking directorates, penalties for corporate officers who were responsible for antitrust law violations of their corporations, prohibition of holding companies, and tolling of the statute of limitations for the benefit of private antitrust plaintiffs. See id. at 1963-64. The President did not mention either exclusive dealing or tying arrangements.
37. See 51 Cong. Rec. 13,849 (1914) (deleting § 4); id. at 14,271-73 (amended version of § 4 deleted); H.R. 15,675, 63d Cong., 2d Sess. (1914) (as
tive history of the Clayton Act indicates that many senators objected to the section as unnecessary, apparently believing that the newly established Federal Trade Commission could better determine which exclusive dealing arrangements should be unlawful and could respond accordingly under section 5 of the Federal Trade Commission Act's broad prohibition of "unfair methods of competition." Other senators objected to the breadth of the bill. For example, during the debates, Senator Cummins remarked:

If this section prohibited only the tying in of articles, I would be warmly and heartily for it, but it prohibits other transactions [as well].

... The manufacturer of Quaker Oats has acquired a great dominance in the trade. . . . The small competitor comes into the field desiring to introduce exactly the same thing . . . and calls it Rolled Oats. The only way in which he can make progress against his competitor is to secure a dealer . . . [to whom] he says, "If you will take my product, Rolled Oats, and agree not to sell the Quaker Oats . . . you shall have the exclusive privilege of selling it in this community, and you can make . . . a campaign for its introduction." I say that that transaction is not only an innocent one, but I think it is necessary in order to preserve competition among the manufacturers of the product.

As indicated by Senator Cummins, some senators agreed with the House that certain tying arrangements should be prohibited outright and not left to the Trade Commission's discretion. The tying arrangements employed by the United Shoe Machinery Company received particular congressional condemnation. United Shoe leased its patented shoe machinery on the condition that the lessee could not use the machinery to make shoes on which other work had been performed by a

amended and passed by the Senate), reprinted in 3 LEGISLATIVE HISTORY, supra note 36, at 2424-25.
39. Id. at 719; see Lockhart & Sacks, The Relevance of Economic Factors in Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 HARV. L. REV. 913, 934 (1952); McAllister, Where the Effect May Be to Substantially Lessen Competition or Tend to Create a Monopoly, 2 A.B.A. SEC. ANTITRUST L. 124, 125-26 (1953).
40. 51 CONG. REc. 14,253 (1914) (statement of Sen. Cummins).
41. Reference to the tying arrangements of United Shoe Machinery during the congressional debates on the Clayton Act are extensive. See, e.g., H.R. REP. NO. 627, 63d Cong., 2d Sess. 13 (1914), reprinted in 2 LEGISLATIVE HISTORY, supra note 36, at 1089, 1094; 51 CONG. REc. 15,990-91 (1914) (statement of Sen. Weeks); id. at 14,096-97 (statement of Sen. Reed); id. at 9408 (statement of Rep. Webb).
In December 1911, the government had filed a Sherman Act suit attacking these lease provisions. Barely three months later, the Supreme Court handed down its holding in *A.B. Dick*. Fear of *A.B. Dick*'s impact led some senators to urge reinstatement of the House provision outlawing tying arrangements. Senator Reed, for example, contended that *A.B. Dick* would "deprive the purchasing public of the advantages of . . . free use" of patented articles if not legislatively overruled. He asserted that Chief Justice White's dissenting opinion in *A.B. Dick* was "a direct challenge to Congress to remedy this evil" and that unless Congress acted, "it will be but a short time" until "every kind of restraint of trade will be protected by a [tying] clause."

On August 26, 1914, the Senate agreed to an amendment prohibiting tying clauses in connection with patented products, thus overruling the *A.B. Dick* decision. Nevertheless, the legislation went to the conference committee with a wide difference of opinion between the House and the Senate on all other aspects of exclusive dealing. For nearly three weeks, the various factions battled over the section. Finally, a compro-

44. 224 U.S. 1 (1912); see supra notes 18-27 and accompanying text.
46. See id. at 14,092 (statement of Sen. Reed).
47. See id. at 14,095 (statement of Sen. Reed).
48. See id. at 14,273-76. Section 4, as adopted by the Senate, provided, in part:

That it shall not be lawful to insert a condition in any contract relating to the sale or lease of or license to use any article or process protected by a patent or patents the effect of which will be to prohibit or restrict the purchaser, lessee, or licensee from using any article or class of articles, whether patented or not, or any patented process, supplied or owned by any person other than the seller, lessor, or licensor, or his nominees, or the effect of which will be to require the purchaser, lessee, or licensee to acquire from the seller, lessor, or licensor, or his nominees any article or class of articles not protected by the patent; and any such conditions, whether heretofore or hereafter made, shall be null and void, as being in restraint of trade and contrary to public policy. . . .

Id. at 14,275.
49. See Lockhart & Sacks, supra note 39, at 934 n.63.
mise was reached, and both the Senate and the House adopted the new section 3, which made exclusive dealing arrangements unlawful when their effect "may be to substantially lessen competition."\textsuperscript{51} The criminal sanctions were dropped entirely.\textsuperscript{52}

In one respect, the congressional intent underlying section 3 seems reasonably clear: to condemn tying arrangements in which the tying product is patented.\textsuperscript{53} Thus, section 3 was designed to ensure that United Shoe's tying arrangements would be unlawful under the Clayton Act regardless of the outcome of the pending Sherman Act challenge.\textsuperscript{54} In other contexts, however, the compromise between the House and the Senate did not clarify the law of tying arrangements, but instead dumped on the courts the responsibility for determining which arrangements were lawful and which were to be condemned because they "may . . . substantially lessen competition."\textsuperscript{55}

\textsuperscript{51} See H.R. Rep. No. 1168, 63d Cong., 2d Sess. 2 (1914), reprinted in 3 Legislative History, supra note 36, at 2456, 2457.

\textsuperscript{52} See id.; supra text accompanying note 35.

\textsuperscript{53} See supra notes 48-49 and accompanying text; cf. Jefferson Parish Hospital Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1557 (1984) ("In enacting Section 3 of the Clayton Act, . . . Congress expressed great concern about the anticompetitive character of tying arrangements.") (citing H.R. Rep. No. 627, 63d Cong., 2d Sess. 10-13 (1914); Sen. Rep. No. 698, 63d Cong., 2d Sess. 6-9 (1914)). The accompanying footnote in Hyde contains numerous citations to the congressional debates in support of this proposition. See Hyde, 104 S. Ct. at 1557 n.15; see also Lockhart & Sacks, supra note 39, at 934-35 (describing the competitive impact clause that was adopted by the conference committee as "undoubtedly the expression of the necessary compromise between the House and the Senate. This compromise was made necessary by the conviction of the majority of the Senate that not all exclusive arrangements adversely affect competition, and some should be permitted or even encouraged as helpful to competition. In the compromise, the Senate abandoned its insistence that only the FTC should exercise jurisdiction over exclusive arrangements, but by the competitive impact clause gained its point that discretion should be exercised by both the courts and the Commission in applying the Act.") (footnote omitted).

\textsuperscript{54} See McAllister, supra note 39, at 131-32 ("It is evident from the committee reports and debates on the floor that Congress was aiming this blow at the employment of exclusive dealing by established firms whose strength already verged on monopoly and not at smaller firms using it to cut down entrenched competitors.") (footnote omitted); supra notes 41-44 and accompanying text.

\textsuperscript{55} Clayton Act § 3, 15 U.S.C. § 14 (1982). As one commentator observed:

From this legislative history, it seems clear that the competitive impact clause compromise was also designed to prescribe the standard—difficult to apply though it be—for the courts to use in exercising that discretion. That standard is to appraise whether the effect "may" be to substantially lessen competition. The foregoing economic analysis demonstrates that the quantity or share of commerce affected
II. SUPREME COURT CASES ON TYING ARRANGEMENTS, 1917-1977

Statutes cannot be applied without interpretation of their language, and legislators rarely draft a statute with perfect clarity. Statutory phrases such as "may . . . substantially lessen competition" and legislators' use of words such as "great and powerful" or "independent" must be translated into more concrete concepts before they can be applied with any precision. It has essentially been through this process of translation that the Supreme Court has developed the antitrust law of tying arrangements. The various translations adopted by the Court since the adoption of the Clayton Act reflect the shifting judicial attitudes regarding the boundaries of legitimate antitrust enforcement.

The initial tying cases to reach the Supreme Court after the passage of section 3 reveal that the attitudes of the Court's members on antitrust enforcement were divided much like those of the participants in the current debate about antitrust goals. The first post-Clayton Act case heard by the Supreme Court was the 1917 case of Motion Picture Patents Co. v. Universal Film Manufacturing Co., the facts of which were similar to those in Henry v. A.B. Dick Co. In Motion Picture Patents, the plaintiff held a patent conferring a legal monopoly on the sale of motion-picture projectors. By attaching a notice to the projectors, plaintiff required that only its affiliates' films could be used with the projectors. The suit arose as an in-
fringement action against three defendants for using or supplying for use film not made by the plaintiff. The court of appeals found that the plaintiff's restrictions violated section 3 of the Clayton Act and were therefore unenforceable. The Supreme Court affirmed but based its decision on public policy grounds rather than on section 3.

The opinion in *Motion Picture Patents* was written by Justice Clarke; Justices McKenna, Holmes, and Van Devanter dissented. Justice Clarke was an ardent Wilsonian Democrat and an idealist. His opinions reveal a populist's objections to big business. Thus, in describing the effect of the tying

62. See *Motion Picture Patents*, 243 U.S. at 505.
63. Judge Augustus Hand wrote: "If the prohibitions of the Clayton Act mean anything at all, this case falls within them, and the restrictions . . . are therefore void. Indeed, the report of the judiciary committee of the House concerning the Clayton Act shows that its purpose is to reach the film monopoly." *Motion Picture Patents* Co. v. Universal Film Mfg. Co., 235 F. 398, 400-01 (2d Cir. 1916) (referring to H.R. Rep. No. 627, 63d Cong., 2d Sess. 13 (1914)), aff'd, 243 U.S. 502 (1917).
64. Justice Clarke was appointed to the Supreme Court by President Wilson in 1916. Burner, *John H. Clarke*, in 3 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1789-1969: THEIR LIVES AND MAJOR OPINIONS 2077, 2081 (L. Friedman & F. Israel eds. 1969) [hereinafter cited as JUSTICES]. (Volume 5 of JUSTICES was published in 1978 and was edited by Leon Friedman.) According to one biography of Justice Brandeis, "It seems not unlikely that Brandeis may have suggested Clarke's name to President Wilson." A. MASON, BRANDEIS: A FREE MAN'S LIFE 513 n.† (1946).
65. Justice Clarke is the only Supreme Court Justice to resign in order to pursue a crusade: promoting the entrance of the United States into the League of Nations. At the time of Justice Clarke's resignation, he wrote to Louis Brandeis:

> I should die happier . . . if I should do all that is possible to promote the entrance of our government into the League of Nations than if I continued to devote my time to determining whether a drunken Indian had been deprived of his land before he died or whether the digging of a ditch in Iowa was constitutional or not.

Letter from John H. Clarke to Louis Brandeis (Sept. 13, 1922), quoted in A. MASON, supra note 64, at 536. A biographer of Clarke adds dryly that Clarke "apparently underestimated his importance on the Court as much as he overestimated the political chances of the League." Burner, *John H. Clarke*, in 3 JUSTICES, supra note 64, at 2077, 2085. Indeed, Justice Clarke's resignation was a monumental miscalculation because President Harding replaced Clarke with Senator George Sutherland, a conservative Republican. See Burner, *George Sutherland*, in 3 JUSTICES, supra note 64, at 2133, 2135-37. If Clarke had remained on the bench (he lived until 1945), a whole series of important five-to-four decisions might have gone the other way. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936); *Railroad Retirement Bd. v. Alton R.R. Co.*, 295 U.S. 330 (1935); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (5-3 decision; Brandeis, J., did not participate).
66. Justice Clarke wrote the opinions for the Court in *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. Lehigh Valley R.R. Co.*, 254
clauses in *Motion Picture Patents*, he stated:

The perfect instrument of favoritism and oppression which such a system of doing business, if valid, would put into the control of the owner of such a patent should make courts astute, if need be, to defeat its operation. If these restrictions were sustained plainly the plaintiff might, for its own profit or that of its favorites, by the obviously simple expedient of varying its royalty charge, ruin anyone unfortunate enough to be dependent upon its confessedly important improvements for the doing of business.67

The majority thus affirmed dismissal of the infringement suit and explicitly overruled *A.B. Dick*.68

The government's appeal of its Sherman Act civil suit against the United Shoe Machinery Company was scheduled to be argued one month after the Court's decision in *Motion Picture Patents*. The pendency of this suit explains the Court's specific reference to the Clayton Act in *Motion Picture Patents*:

> Our conclusion renders it unnecessary to make the application of [the Clayton Act] to the case at bar which the Circuit Court of Appeals made of it but it must be accepted by us as a most persuasive expression of the public policy of our country with respect to the question before us.69

This reference appears to be a deliberate effort by Justice Clarke to anticipate one issue arising in the appeal against

---

U.S. 255 (1920); and American Column & Lumber Co. v. United States, 257 U.S. 377 (1921). In each of these cases, the Court upheld the government's position. The *Reading* and *Lehigh Valley* cases involved corporate combinations alleged to be in violation of §1 of the Sherman Act. The *American Column* case involved an exchange among competitors of statistical information by a trade association, the effect of which, the government asserted, was to limit competition in violation of §1 of the Sherman Act.

It is interesting to note that Justice Oliver Wendall Holmes, in a personal letter, described Clarke's dissent in United Zinc & Chem. Co. v. Britt, 258 U.S. 268 (1922), as "sentiment and rhetoric." *See Letter from Oliver Wendall Holmes to Harold J. Laski (Mar. 26, 1922), reprinted in 1 HOLMES-LASKI LETTERS 413 (M. Howe ed. 1953); see also Letter from Oliver Wendall Holmes to Sir Frederick Pollock (Mar. 29, 1922) ("My brother Clarke uttered a larmoyant dissent [in Britt] that seemed to me more sentiment and rhetoric than reasoning . . ."), reprinted in 2 HOLMES-POLLOCK LETTERS 92 (M. Howe 2d ed. 1961). In *Britt*, the Court reversed the lower courts, which had found for plaintiff, in a case brought on behalf of two children, ages 8 and 11, who had entered a pool of water on private property near a "travelled way" that looked pure but was poisoned with abandoned chemicals. The Court held that a landowner owes no duty to keep the land safe for young children unless the landowner has invited them onto the land. *See Britt*, 258 U.S. at 275-76.


69. *See Motion Picture Patents*, 243 U.S. at 517-18.
United Shoe Machinery—a decision in which two of the five justices joining the majority opinion in *Motion Picture Patents* would be forced to disqualify themselves.\(^7\)

Justice Clarke’s attempt to predetermine the outcome of the decision in *United States v. United Shoe Machinery Co.* (*United Shoe I*) failed, however. In a four-to-three decision, the Court upheld the leases’ now-infamous tying clauses, with Justice McKenna, who had dissented in *Motion Picture Patents*, writing for the controlling plurality.\(^7\) In contrast to the judicial philosophy reflected in Justice Clarke’s opinions, Justice McKenna’s opinion indicates a belief that government should leave markets alone, even markets showing strong tendencies toward monopoly, in order to maintain efficiency.\(^2\) His

---

70. Justice Brandeis not only had been counsel for the defendant, he subsequently had opposed the defendant’s practices and worked toward the passage of the Clayton Act. See A. Mason, *supra* note 64, at 214-29, 407-08. Justice McReynolds had been President Wilson’s attorney general for part of the time the case was pending in the courts. McReynolds was attorney general from March 1913 to October 1914. See 230 U.S. iii (1913); 235 U.S. iii (1914). *United Shoe Machinery* was commenced on December 12, 1911. See *supra* note 43 and accompanying text.

71. 247 U.S. 32 (1918). Chief Justice White, who had been in the majority in *Motion Picture Patents*, switched his vote in *United Shoe I* and voted with the plurality, thus changing the result.

72. Justice McKenna was appointed to the Supreme Court at the age of 54 by Republican President McKinley in 1897, and he joined the Court in early 1898. During his 27-year tenure, Justice McKenna wrote four opinions for the Court and one dissenting opinion in government antitrust cases. See Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912); United States v. Pacific & Arctic Ry. & Navigation Co., 228 U.S. 87 (1913); United States v. United Shoe Mach. Co., 247 U.S. 32 (1918); United States v. United States Steel Corp., 251 U.S. 417 (1920); United States v. Southern Pac. Co., 259 U.S. 214, 242 (1922) (McKenna, J., dissenting). In United States v. United States Steel Corp., 251 U.S. 417 (1920), brought under the Sherman Act, the government charged that the corporation had created a combination in restraint of trade by acquiring competing steel producers that together produced more than half of the iron and steel in the country. See *id.* at 438-39. The government also alleged that the steel corporation had entered into agreements with its remaining competitors to fix market prices. The Court, split four-to-three with Justice McKenna writing the opinion of the Court, held that the combination was not illegal and that the alleged cartel agreement was based on stale facts because the so-called Gary dinners, at which prices were discussed, had been abandoned before the case reached the courts.

Justice McKenna’s only dissenting opinion in a government antitrust case came in United States v. Southern Pac. Co., 259 U.S. 214 (1922), in which he was the lone dissenter. The case involved control over the Central Pacific by the Southern Pacific, which the government attacked as a combination in restraint of trade under § 1 of the Sherman Act. The Court upheld the government’s position. McKenna’s dissent was strong, almost bitter, arguing that the combination contributed to “efficiency.” See Southern Pac., 259 U.S. at 245
opinion largely ignored the policy reasons cited in Motion Picture Patents and instead distinguished the decision as one involving a sale in which the patentee attempted to "grant the title [to the patented good] and retain the incidents of it." United Shoe Machinery, however, merely leased the patented article and thus could condition the right of others to use it. The Court's conclusion validated United Shoe's status and conduct through "efficiency" arguments and evoked nineteenth-century laissez faire economics. Justice McKenna wrote: "The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained." Justice McKenna asserted that not every restraint of trade violated the Sherman Act: "Of course, there is restraint in a patent. . . . This strength is the compensation which the law grants for the exercise of invention." Instead, any harmful effect of the tying clauses was bargained for by the lessees:

We must assume [the tying clauses] were entered into by the lessees upon a calculation of their value—the efficiency of the machines balanced against the restrictions upon and conditions of their use. The lessees had the alternative of the choice of other machines . . . .

. . . . [T]he leases are simply bargains, not different from others, moved upon calculated considerations, and, whether provident or improvident, are entitled nevertheless to the sanctions of the law.

The rule of United Shoe I, therefore, was that tying arrangements were lawful under the Sherman Act.

Justices Clarke and Day both wrote separate dissents in


73. See United Shoe I, 247 U.S. at 58 (citations omitted); cf. L. Sullivan, supra note 1, § 152, at 434-35 ("Motion Picture Patents was in a technical sense a narrow holding. It went no further than to rule that use in violation of the noticed condition was not infringement; it left open the question whether the restriction could be achieved by exacting a covenant from the user . . . .").
74. See United Shoe I, 247 U.S. at 58.
75. Id. at 56.
76. Id. at 57.
77. Id. at 65-66.
which the other concurred, with Justice Pitney concurring in both. Justice Day's dissent reveals that he, like Justice Clarke, was a strong advocate of vigorous application of the antitrust laws.\(^7\) His dissent rejected the plurality's attempt to distinguish *Motion Picture Patents*\(^7\) and cited the conclusions of the House Judiciary Committee Report on the Clayton Act regarding the lease clauses' detrimental effect on competition.\(^8\) Four years later, Justice Day would write the majority opinion in the Supreme Court's first tying case brought under section 3 of the Clayton Act—the government suit against United Shoe filed in 1915 and decided in 1922.\(^8\)

In *United States v. United Shoe Machinery Co. (United Shoe II)*,\(^8\) the Supreme Court found that United Shoe's tying arrangements were unlawful under section 3. Justice Day, writing for the majority, criticized counsel for creating a record of thirty-one volumes, "[m]uch" of which had "but little bearing on the real issues,"\(^3\) and foreshadowed future Supreme Court attempts to avoid having district courts engage in lengthy trials to determine whether the challenged tying arrangement substantially lessened competition.\(^8\) The Court dismissed the

---

\(^7\) *See* Watts, William R. Day, in 3 JUSTICES, *supra* note 64, at 1773, 1787 (observing that Justice Day's "legal philosophy and perhaps his personal inclinations led him to favor a vigorous use of the federal police power against the great financial and industrial combinations").

\(^8\) *See United Shoe I*, 247 U.S. at 71-72 (Day, C.J., joined by Pitney and Clarke, JJ., dissenting).

\(^9\) *See id.* at 70 n.1 (Day, C.J., joined by Pitney and Clarke, JJ., dissenting). Today it is difficult to understand why the majority in *United Shoe I* did not conclude that Congress would not have adopted a new antitrust law specifically dealing with tying arrangements had it not considered tying clauses exempt from condemnation under the Sherman Act. Circuit Judge Putnam, a member of the three-judge panel that heard *United Shoe I* in the district court, said: "[W]e... have come to no conclusions... in regard to the effect on the pending case of the legislation of Congress enacted since this case was submitted to us... ." *United States v. United Shoe Mach. Co.* 222 F. 349, 361 (D. Mass. 1915); *cf.* International Business Machs. Corp. v. United States, 298 U.S. 131, 137 (1936) ("When Congress had before it the bill which became § 3 of the Clayton Act, it was familiar with the decision of this Court in *Henry v. A.B. Dick Co.*... and with the contentions made in *United States v. United Shoe Machinery Co.*... then pending before this Court—cases in which it was held that a tying clause could lawfully be extended to unpatented supplies for a leased patented machine... . One purpose of § 3 undoubtedly was to prevent such use of the tying clause. . . '" (citations omitted).


\(^8\) *See id.* at 454.

\(^8\) *See infra* text accompanying notes 120-88.
“efficiency” arguments advanced by United Shoe as irrelevant, stating: “No matter how good the machines of the United Company may be, or how efficient its service, it is not at liberty to lease its machines upon conditions prohibited by a valid law of the United States.”

Therefore, many of the factors that led the Court in United Shoe I to find that the clauses were lawful under the Sherman Act had no place in an analysis of their legality under the Clayton Act. The Court concluded that it was “apparent” that United Shoe’s tying agreements violated section 3 by necessarily lessening competition and tending to create a monopoly. In support of this conclusion, the Court noted:

When it is considered that the United Company occupies a dominating position in supplying shoe machinery of the classes involved, these covenants signed by the lessee and binding upon him effectually prevent him from acquiring the machinery of a competitor of the lessor except at the risk of forfeiting the right to use the machines furnished by the United Company which may be absolutely essential to the prosecution and success of his business.

Justice McKenna dissented from United Shoe II without opinion.

The Supreme Court’s next tying decision came a year later in FTC v. Sinclair Refining Co., a suit brought by the FTC as part of a series of proceedings against many gasoline refiners. Sinclair leased unpatented gasoline storage tanks and pumps to service stations on the condition that the stations would use the products only with Sinclair’s gasoline. The Court distinguished this tying arrangement from that in United Shoe II, 88

85. United Shoe II, 258 U.S. at 462.
86. See id. at 459-62. The Court was explicit in its determination that it was not bound by United Shoe I in this Clayton Act challenge, stating that “[t]he Sherman Act and the Clayton Act provide different tests of liability.” See id. at 459. Justice Day also explained:

That the leases were attacked . . . as violative of the Sherman Act is true, but they were sustained as valid and binding agreements within the rights of holders of patents. The Clayton Act specifically applies to goods, wares, machinery, etc., whether “patented or unpatented.” This provision was inserted in the Clayton Act with the express purpose of preventing rights granted by letters patent from securing immunity from the inhibitions of the act.

87. See id. at 457.
88. Id. at 457-58 (emphasis added).
89. 261 U.S. 463 (1923).
90. The FTC had ordered at least 30 refiners and wholesalers to stop using leases of the sort adopted by Sinclair. Four courts of appeal had found the FTC orders invalid. Id. at 464-65.
91. See id.
emphasizing that Sinclair’s provisions did not prevent the lessee service stations from purchasing gasoline from any other refiner.\textsuperscript{92} Under a strict reading of the contract,

\begin{quote}
[t]here is no covenant . . . which obligates the lessee not to sell the goods of another; and its language cannot be so construed . . . .
\end{quote}

Many competitors seek to sell excellent brands of gasoline and no one of them is essential to the retail business. The lessee is free to buy wherever he chooses; he may freely accept and use as many pumps as he wishes and may discontinue any or all of them. He may carry on business as his judgment dictates and his means permit, save only that he cannot use the lessor's equipment for dispensing another's brand. By investing a comparatively small sum, he can buy an outfit and use it without hindrance. He can have [Sinclair's] gasoline, with the pump or without the pump, and many competitors seek to supply his needs.\textsuperscript{93}

The Court also held that the tying clauses were not an "unfair practice" under section 5 of the Federal Trade Commission Act, finding that the arrangement was a "practical method" for Sinclair to prevent "passing off"\textsuperscript{94} and to ensure that its gasoline was being properly handled.\textsuperscript{95} Finally, the Court, apparently convinced that Sinclair's practices would foster the development of roadside service stations, found no monopolistic or anticompetitive purpose underlying the leases.\textsuperscript{96} The Court

\textsuperscript{92} As the Court explained:

\begin{quote}
[Sinclair's] written contract does not undertake to limit the lessee's right to use or deal in the goods of a competitor of the lessor, but leaves him free to follow his own judgment . . . . But counsel for the Commission insist that inasmuch as lessees generally . . . will not encumber themselves with more than one equipment, the practical effect of the restrictive covenant is to confine most dealers to the products of their lessors; and we are asked to hold that, read in the light of these facts, the contract falls within the condemnation of the [Clayton Act].
\end{quote}

\textit{Id.} at 473.

\textsuperscript{93} \textit{Id.} at 474. The Court ignored the FTC's findings that only a few of Sinclair's lessees needed more than one pump or handled Sinclair's competitors. \textit{See id.} at 466. Such a finding, of course, rendered the lessee's theoretical freedom to install other pumps irrelevant.

\textsuperscript{94} \textit{See id.} at 475 ("Some dealers regard it as the best practical method of preserving the integrity of their brands and securing wide distribution . . . . [The dealer] is also vitally interested in putting his brand within easy reach of consumers with ample assurance of its genuineness."). Passing off would occur if gasoline dealers could sell gasoline refined by someone other than Sinclair from a pump prominently marked as one of Sinclair's. Passing off is itself an unfair method of competition. \textit{See L. Sullivan, supra} note 1, § 156, at 453 n.17.

\textsuperscript{95} \textit{See Sinclair Refining}, 261 U.S. at 475 ("The [gasoline] is highly inflammable and the method of handling it is important to the refiner.").

\textsuperscript{96} \textit{See id.} ("No purpose or power to acquire unlawful monopoly has been disclosed, and the record does not show that the probable effect of the practice
MINNESOTA LAW REVIEW

concluded its opinion by rebuking the FTC for bringing the action, emphasizing policies similar to those now emphasized by the Chicago School:

The great purpose of the [Clayton Act and the Federal Trade Commission Act] was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs.\(^9\)

The "open and wide ranging inquiry into potential harms and benefits"\(^9\) employed in *Sinclair* stands in vivid contrast to the indications in *United Shoe II* that only a limited inquiry into the defendant's market position was necessary. The *Sinclair* decision came down during twelve straight years of Republican rule, years in which President Coolidge's catchy assertion that "the business of America is business"\(^9\) summed up the prevalent attitude of the American public. Indeed, from *United Shoe I* in 1918,\(^10\) followed by the government's disastrous defeat in the *United States Steel* case in 1920,\(^11\) until Thurman Arnold's rejuvenation of antitrust in 1938,\(^12\) the Court and, arguably, public opinion were hostile to tough, innovative applications of the antitrust laws.\(^13\)

The decline of the antitrust laws is evident in *Pick Manufacturing Co. v. General Motors Corp.*\(^14\) the next Supreme

will be unduly to lessen competition. Upon the contrary, it appears to have promoted the public convenience by inducing many small dealers to enter the business and put gasoline on sale at the crossroads.

97. Id. at 476.

98. L. SULLIVAN, supra note 1, § 152, at 435.


100. 247 U.S. 32 (1918); see supra notes 71-80 and accompanying text.


103. See Kramer, supra note 102, at 439-41 (observing that the period from 1916 to 1933 was "the least successful . . . for the Government in the Supreme Court"). The period commencing in the mid-1970's was even more hostile to antitrust enforcement than was this earlier period.

104. 299 U.S. 3 (1936) (per curiam), affg 80 F.2d 641 (7th Cir. 1935). Although *Pick* was decided while Franklin D. Roosevelt was President, it arose before he instituted vigorous antitrust enforcement as the prevailing
Court case on tying arrangements, decided in 1936. *Pick*, the first private action attacking a tying arrangement under section 3 to reach the Court, involved provisions in GM's dealer agreements that required the dealers to use only parts approved by GM in GM automobiles.\textsuperscript{105} The Seventh Circuit Court of Appeals, relying on *United Shoe II* and *Sinclair*, concluded that the restrictions were reasonable because the dealers were still free to repair any other make of car and, when doing so, were not obligated to use GM parts.\textsuperscript{106} In addition, the court of appeals stressed that GM had a strong interest in ensuring that defective or otherwise improper parts were not used in repairing GM cars.\textsuperscript{107} Finally, the court found that the provisions had not actually reduced competition.\textsuperscript{108} The court, however, did

---

\textsuperscript{105} See *Pick*, 299 U.S. at 3-4.

\textsuperscript{106} See *Pick Mfg. Co. v. General Motors Corp.*, 80 F.2d 641, 643-44 (7th Cir. 1935) ("These dealers may repair any make of automobile, and in doing so they may employ parts manufactured by [GM] or any other independent manufacturer, provided the car being repaired is not [GM's] product. The restriction is applicable only to [GM] cars.").

\textsuperscript{107} The court explained:

> In the present case, [GM is] not licensing or selling to competing manufacturers. [It is] selling automobiles to [its] designated dealers, making to the purchasers from such dealers certain warranties, and endeavoring to preserve the good will of the buying public.

> ... In the minds of the owners, the cars are identified and associated with the manufacturer. If defective or inefficient repairs or replacements should be made, and the cars, as a result, should operate unsatisfactorily, the owners' recollections will naturally and inevitably revert to the specific name and manufacturer thereof. Defective parts, preventing efficient operation of cars, bring dissatisfaction with the automobiles themselves. The natural result is blame of the manufacturer and consequent loss of sales.

> The automobile is a complicated mechanism, the refined product of scientific engineering after long investigation, close competition, experiment, and practical experience. Replacement and repair parts must be of accurate measurement, appropriate, satisfactory material, and proper mechanical construction. Otherwise, disaster may result. [GM] insist[s] with [its] dealers, therefore, that the latter shall not repair [GM's] product with used or second-hand parts or with parts other than those manufactured by [GM], or for [it] under [its] specifications, for the express purpose of replacing parts in or repairing [its] product. ... Clearly this protects [GM] against the otherwise possible use of defective parts in repairing or making replacements in [its] products. The preservation of the good will of the public is directly involved.

\textsuperscript{108} See *id.* at 644 ("[T]he record shows that competition in the sale of replacement parts for automobiles instead of growing less has substantially increased through the period during which the provisions complained of have...")
not discuss whether GM held a dominant market position. Instead, the Supreme Court affirmed in a brief per curiam opinion, stating only that no clear error was shown in the findings.\textsuperscript{109}

In that same year, however, the Court dismissed a defense in \textit{International Business Machines Corp. v. United States}\textsuperscript{110} that was similar to one that the Seventh Circuit had found persuasive in \textit{Pick}. IBM required lessees of its patented tabulating machines to use only cards manufactured by IBM with the machines.\textsuperscript{111} Challenged under section 3 of the Clayton Act, IBM defended on the ground that the purpose and effect of the tying arrangements was to protect its goodwill by preventing the use of unsuitable cards with IBM machines.\textsuperscript{112} In a unanimous opinion, the Court rejected this argument, stating that IBM could have achieved the same protective end by simply conditioning its leases on the use of conforming cards without specifying that the cards be manufactured by IBM.\textsuperscript{113}

In determining whether IBM's tying agreements had an adverse effect on competition, the Court stressed that IBM controlled eighty-one per cent of the market for the tabulating

\begin{footnotesize}
\begin{enumerate}
\item[110.] 298 U.S. 131 (1936).
\item[111.] See id. at 134.
\item[112.] See id.
\end{enumerate}
\end{footnotesize}
TYING ARRANGEMENTS

cards, it earned a "substantial" profit from the cards' sales, and its annual gross receipts for the machines and cards averaged almost thirteen million dollars.\(^{114}\) The Court consequently condemned the agreements under section 3, holding that "'[t]hese facts . . . can leave no doubt that the effect of the condition in [IBM's] leases 'may be to substantially lessen competition,' and that it tends to create monopoly."\(^{115}\)

Thus, within twenty years, the Court handed down four opinions on tying agreements under section 3: United Shoe II and IBM condemning the tying agreements and Sinclair and Pick upholding them. The results, if not the reasoning, can be reconciled through the cases' factual differences. One significant factor distinguishing United Shoe II and IBM from Sinclair and Pick is the market share held by the respective defendants. Both United Shoe and IBM held an overwhelming share of the market in the tied and the tying products.\(^{116}\) Neither Sinclair nor GM held comparable market shares in their products.\(^{117}\) Moreover, the tying products in both IBM and United Shoe II were patented; those in Sinclair and Pick apparently were not.\(^{118}\) At the time of the IBM decision, there-

--

\(^{114}\) See IBM, 298 U.S. at 136.

\(^{115}\) See id. The Court relied heavily on the congressional purpose underlying § 3 of the Clayton Act, noting that the section had been passed to preclude the outcome in United Shoe II. See id. at 137-38.

\(^{116}\) United Shoe Machinery controlled 95% of the market for shoe machinery, the tied and tying products. See United Shoe II, 258 U.S. 451, 455 (1922). IBM controlled well over 80% of the market for mechanical tabulating machines using perforated cards. See Brief for the United States at 7 n.3, International Business Machs. Corp. v. United States, 298 U.S. 131 (1936); see also International Business Machs. Corp. v. United States, 298 U.S. 131, 133 (1936) (noting that IBM and one competitor were the only sellers of mechanical tabulating machines). IBM also controlled 81% of the market for tabulating cards, the tied product. See IBM, 298 U.S. at 136.

\(^{117}\) See supra note 108.

\(^{118}\) Sinclair's tying product, gasoline pumps, was unpatented but was trademarked. Both GM's automobiles and its replacement parts were also trademarked. Indeed, GM had sued Standard Products Manufacturing Co., whose major stockholder was the president and manager of Pick Manufacturing Corp., for unfair competition and trademark infringement in 1928, charging Standard Products with "wilfully, fraudulently and deceptively marketing and selling spurious hub caps, bearing plaintiff's trade marks." See Record at 20, Pick Mfg. Co. v. General Motors Corp., 299 U.S. 3 (1936) (reproduction of GM's answer). A permanent injunction was issued in 1930. Id. at 21. In 1930, GM instituted another action on the same grounds, this time against Pick Manufacturing, its president Carl Pick, and Standard Products Manufacturing Co. Id. GM obtained a preliminary injunction. Id. at 22. While an appeal was pending on that order, Pick filed suit against GM under § 3 of the Clayton Act. See id.
fore, the Court had yet to find a tying arrangement unlawful under section 3 of the Clayton Act in which the defendant did not have either an overwhelming share of the market or a patent on the tying product. Furthermore, the Court had clearly held that such clauses were not illegal under the Sherman Act.119

Then came the 1947 opinion in *International Salt Co. v. United States.*120 The Antitrust Division of the Justice Department, whose staff was still dominated by attorneys recruited by the great trustbuster, Thurman Arnold, brought suit against International Salt under both section 1 of the Sherman Act and section 3 of the Clayton Act.121 International Salt admitted that it leased patented salt-dispensing machines on the condition that the machines would be used to dispense only its salt products122 and that its 1944 sales of machine-dispensed salt were approximately $500,000.123 Based on these facts, the government moved for summary judgment. No other evidence was in the record regarding International Salt's market share in either the tying or the tied products,124 nor was there any evidence bearing on International Salt's justifications for the restraint.125 The district court granted the government's motion on both the Sherman Act and the Clayton Act claims, and the Supreme Court unanimously affirmed, stating:

We think the admitted facts left no genuine issue [as to whether the

---

119. *See supra* text accompanying notes 71-77.
120. 332 U.S. 392 (1947).
121. *See id.* at 393.
122. *See id.* The contract for one type of machine provided that salt could be purchased from other sources if it was available at a lower price than that of International Salt. *Id.* at 396.
123. *Id.* at 395.
124. The Court did suggest that salt-dispensing machines were available from other sources. *See id.* at 399; *cf.* D. Armentano, *supra* note 4, at 205 ("Thus, the extent and degree of competition in the tying good [in *International Salt*] remained an unexamined—and as far as the Supreme Court was concerned, irrelevant—issue."). The Court did not examine International Salt's market share of salt, the tied product. *See D. Armentano, supra* note 4, at 205 ("The Court never asked, nor was it revealed, whether competition in the market for salt was significantly affected by the tying arrangement between International and its machine customers."); *cf.* R. Bork, *supra* note 3, at 367 ("It is inconceivable that anybody could hope to get a monopoly, or anything remotely resembling a monopoly, in a product like salt by foreclosing the utterly insignificant fraction of the market represented by the salt passing through these leased machines. Whatever International Salt thought it was accomplishing with these tying requirements, it was not monopoly.").
restraint was unreasonable or substantially lessened competition]. . . . [I]t is unreasonable, per se, to foreclose competitors from any substantial market. . . . The volume of business affected by these contracts cannot be said to be insignificant or insubstantial and the tendency of the arrangement to accomplishment of monopoly seems obvious.126

International Salt thus prevented defendants who tied patented products to unpatented products from introducing evidence showing that the tying arrangements had not substantially lessened competition.

International Salt's contracts were far less onerous to the lessee and far less pervasive in the industry than were the tying contracts of United Shoe Machinery, which the Court had held not to violate the Sherman Act thirty years earlier.127 Thus, in subjecting International Salt's tying arrangements to Sherman Act restrictions, International Salt silently overruled United Shoe I. This overruling has had a significant impact on the law of tying arrangements. Although section 3 of the Clayton Act is confined to the tying of "commodities,"128 the Sherman Act applies to any subject of commerce, whether tangible or intangible, commodity or service.129 Indeed, all of the tying arrangements reviewed in opinions of the Court since International Salt have involved Sherman Act challenges and, with one possible exception,130 a tying or tied product that was an intangible such as credit or a service such as advertising, transportation, or hospital care.131

The next case in which the Supreme Court had an opportunity to discuss tying clauses came two years later in Standard Oil Co. v. United States (Standard Stations).132 It did not in-

126. International Salt, 332 U.S. at 396 (citations omitted).
128. See supra text accompanying note 35.
129. See supra text accompanying note 13.
130. The reels of film that were tied in United States v. Loew's Inc., 371 U.S. 38 (1962), arguably were "goods" within the meaning of § 3 of the Clayton Act.
volve tying but rather involved full requirements contracts between Standard Oil and its independent service-station dealers. The suit was brought by the government under section 1 of the Sherman Act and section 3 of the Clayton Act, with the only issue in controversy being the contracts' effect on competition. The district court held that the government met its burden under both the Sherman and the Clayton Acts simply by demonstrating that the contracts covered "a substantial number of outlets and a substantial amount of products, whether considered comparatively or not."

The Supreme Court affirmed this "quantitative substantiality" test under the Clayton Act but declined to address the Sherman Act issue. In a stimulating and challenging opinion by Justice Frankfurter, the Court noted that Standard Stations's basic facts were indistinguishable from those in International Salt "unless a distinction is to be drawn . . . between requirements contracts and contracts tying the sale of a nonpatented to a patented product." In discussing arguments supporting a less condemnatory rule for requirements contracts, Justice Frankfurter crafted one of the most important statements on tying agreements in the modern antitrust jargon: "Tying agreements serve hardly any purpose beyond the suppression of competition."

133. See id. at 295-96.
134. Id. at 294.
135. See id. at 297-98.
138. The Court stated that "§ 3 of the Clayton Act was directed to prohibiting specific practices even though not covered by the broad terms of the Sherman Act," see id. at 297 (footnote omitted) and, therefore, it was "appropriate to consider first whether the enjoined contracts fall within the prohibition of the narrower Act," id. Upon holding that the requirements contracts violated § 3, the Court found it unnecessary to consider their validity under the Sherman Act. See id. at 314.
139. See id. at 305. The Court reasoned that "the showing that Standard's requirements contracts affected a gross business of $58,000,000 comprising 6.7% of the total in the area goes far toward supporting the inference that competition has been or probably will be substantially lessened." See id. (footnote omitted).
140. Id. at 305-06. Justice Frankfurter forcefully rejected the argument that had been successful in Pick:

The justification most often advanced in their defense—the protection of the good will of the manufacturer of the tying device—falls in the usual situation because specification of the type and quality of the product to be used in connection with the tying device is protection enough. If the manufacturer's brand of the tied product is in fact su-
ments contracts "may well be of economic advantage to buyers[,] ... sellers, and ... the consuming public."\textsuperscript{141} Although the balance of the argument apparently favored requirements contracts,\textsuperscript{142} the Court promulgated a test for challenging requirements contracts under the Clayton Act that was as easy for a plaintiff to meet as was the \textit{International Salt} test for challenging a tie: the plaintiff need only show that the requirements contract applied to "a substantial share of the line of commerce affected."\textsuperscript{143}

perior to that of competitors, the buyer will presumably choose it anyway. The only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practically be supplied. In the usual case only the prospect of reducing competition would persuade the seller to adopt such a contract and only his control of the supply of the tying device ... could induce a buyer to enter one.

\textit{Id.} at 306 (citations omitted).

\textsuperscript{141} See \textit{id.} at 306.

\textsuperscript{142} The Court invalidated the requirements contracts because "serious difficulties" would result from any attempt to measure the contracts' actual effect on competition, see \textit{id.} at 308, and because the legislative history of \textsection 3 of the Clayton Act revealed Congress's intent not to require "the same tests of detriment to the public interest" as did the Sherman Act, see \textit{id.} at 312-13. This last point, however, was not only partially based on a mistaken summary of \textsection 3's legislative history, see Lockhart & Sacks, \textit{supra} note 39, at 933-37, it also ignores the vital fact that \textit{International Salt Co. v. United States}, 332 U.S. 392 (1947), had "rejected the necessity of demonstrating economic consequences" of the tying arrangements, see \textit{Standard Stations}, 337 U.S. at 304, in challenges under \textsection 3 of the Clayton Act and under \textsection 1 of the Sherman Act, see \textit{supra} text accompanying notes 120-31.

\textsuperscript{143} See \textit{Standard Stations}, 337 U.S. at 314. Justice Douglas wrote a separate opinion, without describing it as a dissent or a concurrence, in which he accused the majority of consciously encouraging monopolies in the oil industry by invalidating requirements contracts beneficial to the independent gasoline dealers. \textit{See id.} at 320-21 (Douglas, J., separate opinion).

Justice Jackson, the author of the \textit{International Salt} opinion less than two years before, dissented in an opinion in which Chief Justice Vinson and Justice Burton joined. He stated: "I cannot agree that the requirements contract is \textit{per se} an illegal one under the antitrust law . . . . I am not convinced that the requirements contract as here used is a device for suppressing competition instead of a device for waging competition." \textit{Id.} at 323 (Jackson, J., joined by Vinson, C.J., and Burton, J., dissenting). Clearly, at least the three dissenters thought that there was a distinction between requirements contracts and tying arrangements that required the effects of the former to be explored judicially before being condemned under the Clayton or Sherman Acts.

It is likely that Justice Jackson's opinion for the Court in \textit{International Salt} and his dissent in \textit{Standard Stations} will stand the test of time better than will Justice Frankfurter's opinion for the Court in \textit{Standard Stations}; yet the fact remains that the Court has not as yet, after 36 years, explicitly modified its strict \textit{Standard Stations} rule condemning most requirements contracts. \textit{But cf.} Jefferson Parish Hospital Dist. No. 2 v. Hyde, 104 S. Ct. 1551, 1568 n.51
Standard Stations's dictum that tying agreements "serve hardly any purpose beyond the suppression of competition" produced two very different results. First, it supplied the Court in future tying cases with a definitive statement supporting a per se rule. Second, it indirectly prompted law journal articles dealing with the economics of tying arrangements. These articles criticized Standard Stations's dictum, outlining various purposes for tying arrangements that were economically defensible and sometimes beneficial. Despite some indications that lower courts heeded the articles' demand for a more searching economic analysis in antitrust decisions, a majority of the Supreme Court seemingly ignored the criticism for two decades, at least in the context of tying arrangements. The articles, however, were instrumental in adding fuel to the ongoing debate between the proponents of an efficiency-based model of antitrust laws and those who saw the laws as an in-

(1984) ("Like any exclusive requirements contract, this contract could be unlawful if it foreclosed so much of the market from penetration by Roux's competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services. . . . However, respondent has not attempted to make this showing.") (citations omitted); id. at 1576 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring) ("Exclusive dealing is an unreasonable restraint on trade only when a significant fraction of buyers or sellers are frozen out of a market by the exclusive deal.") (citing Standard Stations); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (holding that franchise agreements between manufacturers and retailers barring the retailers from selling the franchised product from locations other than those specified in the agreement should be judged by the rule of reason).

144. See infra text accompanying notes 149-88.


146. See Bowman, supra note 145, at 20 ("Analysis of the situations in which sellers find tie-ins useful casts doubt upon the validity of the statement that the only purpose of tie-ins is monopolistic exploitation."); Turner, supra note 145, at 65-73 (suggesting that some tying arrangements promote competition and should not be judged under a per se rule).

147. District Judge Charles Wyzanski, for example, appointed an economist, Professor Carl Kaysen, as his law clerk following the Court's opinion in Standard Stations. Kaysen served as clerk during the trial in the early 1950's of United Shoe Mach. Corp. v. United States (United Shoe III), 110 F. Supp. 295 (D. Mass. 1953), aff'd, 347 U.S. 521 (1954) (per curiam).
strum for promoting a multiplicity of competitors, and thus political democracy.\textsuperscript{148}

The next tying case to reach the Supreme Court, \textit{Times-Picayune Publishing Co. v. United States},\textsuperscript{149} decided in 1953, involved a requirement by New Orleans's leading newspaper publisher that any national and classified advertisers who advertised in its morning \textit{Times-Picayune} had to place the same ad in its afternoon \textit{States}.\textsuperscript{150} Although there were no other morning newspapers of general circulation in New Orleans, the afternoon \textit{States} was locked in a competitive struggle with the New Orleans \textit{Item}.\textsuperscript{151} The government challenged this so-called "forced combination"\textsuperscript{152} advertising under section 1 of the Sherman Act.\textsuperscript{153} In a five-to-four decision, however, the Supreme Court upheld the practice and fashioned a new rule to govern tying arrangements under section 1 of the Sherman Act and section 3 of the Clayton Act.

Attempting to reconcile its previous opinions on tying arrangements, the Court stated that a tying arrangement violates section 3 of the Clayton Act "[w]hen 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, . . . because from either factor the requisite potential lessening of competition is inferred."\textsuperscript{154} This rule relies heavily on the reasoning of the \textit{Standard Stations} opinion.\textsuperscript{155} If requirements contracts, whether serving good or bad purposes,\textsuperscript{156} are illegal under section 3 if they merely "foreclose" competition "in a substantial share of the line of commerce affected,"\textsuperscript{157} then tying arrangements, "serv[ing] hardly any purpose beyond the

\textsuperscript{148} For a recent article from the Chicago School arguing that there should be no presumption against tying arrangements under the antitrust laws, see Easterbrook, \textit{supra} note 5, at 143-46; see also id. at 146 n.24 (listing other sources).

\textsuperscript{149} 345 U.S. 594 (1953). The author was senior trial counsel for the United States and was on the brief for the United States in the Supreme Court in the \textit{Times-Picayune} case.

\textsuperscript{150} See id. at 598-600.

\textsuperscript{151} See id. at 616-20.

\textsuperscript{152} Id. at 597.

\textsuperscript{153} See id. at 596-97.

\textsuperscript{154} See id. at 608-09 (emphasis in original).

\textsuperscript{155} See \textit{supra} notes 132-43 and accompanying text.

\textsuperscript{156} See \textit{Standard Stations}, 337 U.S. 293, 305-06 (1949); \textit{supra} notes 141-42 and accompanying text.

\textsuperscript{157} See \textit{Standard Stations}, 337 U.S. at 314; \textit{supra} text accompanying note 143.
suppression of competition\textsuperscript{158} should command at least as strict a test. Tying arrangements, therefore, are illegal under the Clayton Act if they foreclose competition in a substantial share of the market.

The Court, however, adopted a different rule for judging tying arrangements under the Sherman Act. Distinguishing the "narrower standards" of section 3 of the Clayton Act,\textsuperscript{159} the Court required that tying arrangements must meet \textit{both} strands of its Clayton Act test in order to violate section 1 of the Sherman Act.\textsuperscript{160} Thus, the plaintiff must establish that the defendant "enjoys a monopolistic position" in the tying product's market \textit{and} that the arrangement restrains a "substantial volume of commerce" in the tied product. The Court held that the government's Sherman Act challenge in \textit{Times-Picayune} failed this test: even if the publisher's advertising practice could accurately be termed a tying arrangement, it did not violate the Sherman Act because \textit{Times-Picayune} did not occupy a "dominant position" in the newspaper-advertising market of New Orleans.\textsuperscript{161}

\textit{Times-Picayune} solidified the trend in the Supreme Court's tying cases toward establishing firm "rules" to predict the probable effects of tying contracts without engaging in a detailed investigation of their actual impact. Thus, the Court did not address whether the tying agreements restrained trade or lessened competition in fact, but rather examined whether such a result was so likely as not to require that plaintiff be put to its proofs on the question.\textsuperscript{162} The Court's focus eased both the plaintiff's burden of producing complicated proofs tracking the arrangement's effects and the trial court's burden of engaging in lengthy trials judging the proofs.

The next tying case to reach the Court, \textit{Northern Pacific Railway Co. v. United States},\textsuperscript{163} decided in 1958, went even further in reducing the proofs necessary to establish that the tying arrangements were unlawful. Northern Pacific required purchasers and lessees of its land to ship on Northern Pacific lines

\textsuperscript{158} See \textit{Standard Stations}, 337 U.S. at 305-06; \textit{supra text accompanying note} 140.

\textsuperscript{159} See \textit{Times-Picayune}, 345 U.S. at 608-09.

\textsuperscript{160} See \textit{id.} at 609.

\textsuperscript{161} See \textit{id.} at 610-13.

\textsuperscript{162} For example, the Court referred to "the requisite potential lessening of competition." See \textit{id.} at 609 (emphasis added).

\textsuperscript{163} 356 U.S. 1 (1958), affg 142 F. Supp. 679 (W.D. Wash. 1956). The author was on the brief for the United States in the district court.
all commodities produced or manufactured on that land unless its competitors offered better rates. The government brought suit against Northern Pacific under only the Sherman Act presumably because transportation was a service, not a commodity. In the district court, the government successfully adopted the same trial tactic that had proved so effective in *International Salt*: a motion for summary judgment preventing the railroad from introducing evidence to justify its arrangements on any grounds, including their reasonableness or lack of a substantial effect on competition.

In the Supreme Court, Northern Pacific argued that the government had failed to show that it held a "monopolistic position" in the tying product—land. Attempting to bring the arrangements within the *International Salt* holding, the government argued that each parcel of land was as unique as a patented product and, therefore, each parcel had "sufficiently peculiar characteristics so that [it] can serve as a basis for wielding monopolistic control." Consequently, Northern Pacific's extensive land holdings gave it the "monopolistic leverage" by which a purchaser or lessee desiring a particular tract of land "could be coerced into also agreeing to ship the produce of that land over the Northern Pacific's lines."

Justice Black's majority opinion, however, did not rely on this patent analogy, but instead delicately rewrote the *Times-Picayune* rule by finding its requirement satisfied when the defendant has "sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a 'not insubstantial' amount of in-

164. *Id.* at 3.
165. See *id.* at 3-4.
166. See *id.* at 7-10; supra text accompanying note 126.
167. On appeal, Northern Pacific argued that its "dominant position" must be measured by a showing that it owned a monopoly of "available lands of a particular type" in the area. Because this control was a question of fact not decided by the lower court, Northern Pacific asked that the summary judgment for the government be reversed. See Brief for Appellants at 31-33, Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).
terstate commerce is affected)."170 Noting that there was no "real doubt that a 'not insubstantial' amount of interstate commerce was . . . affected,"171 Justice Black found sufficient "economic power" in Northern Pacific's extensive landholdings which it used as leverage to induce large numbers of purchasers and lessees to give it preference, to the exclusion of its competitors, in carrying goods or produce from the land transferred to them. . . . The very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints.172

Thus, the Court found that Northern Pacific's tying arrangements violated section 1 of the Sherman Act, even though the arrangements did not involve a patented product and even though the district court had made no findings that Northern Pacific "had a 'dominant position' or . . . 'sufficient economic power' . . . in the relevant land market."173

The Court continued to apply Northern Pacific's less stringent standard of proof in subsequent tying cases. Thus, in 1962, the Court held unanimously in United States v. Loew's Inc.,174 that block-booking of copyrighted feature motion pictures for television violated section 1 of the Sherman Act.175 Justice Goldberg, writing for the Court, stated:

170. See Northern Pac., 356 U.S. at 11.
171. See id. at 7.
172. Id. at 7-8.
173. See id. at 14 (Harlan, J., joined by Frankfurter and Whittaker, JJ., dissenting). Justice Harlan was keenly aware of the extension of the law of tying arrangements that the Court was crafting through Justice Black's opinion, and he was prophetic in stating that the Court's opinion, "taken in conjunction with its approval of the summary disposition of this case, will leave courts and lawyers in confusion as to what the proper standards now are for judging tying clauses under the Sherman Act." See id. at 19 (Harlan, J., joined by Frankfurter and Whittaker, JJ., dissenting).
175. See Loew's, 371 U.S. at 39.
TYING ARRANGEMENTS

[Tying arrangements] are an object of antitrust concern for two reasons—they may force buyers into giving up the purchase of substitutes for the tied product, . . . and they may destroy the free access of competing suppliers of the tied product to the consuming market . . . . A tie-in contract may have one or both of these undesirable effects when the seller, by virtue of his position in the market for the tying product, has economic leverage sufficient to induce his customers to take the tied product along with the tying item. The standard of illegality is that the seller must have "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" . . . . Market dominance—some power to control price and to exclude competition—is by no means the only test of whether the seller has the requisite economic power. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from uniqueness in its attributes.176

In a footnote, the Court extended the established per se condemnation of tying arrangements involving a patented tying product to encompass copyrighted tying products: "[W]hen the tying product is patented or copyrighted, . . . sufficiency of economic power is presumed."177

After Loew's, one commentator noted that "[t]he next logical step appeared to be the de facto elimination of the market power criterion by a holding that the very success of a tying arrangement was proof of the seller's power."178 The Court approached, but did not reach, this point in Fortner Enterprises, Inc. v. United States Steel Corp. (Fortner 1),179 an opinion that marked the zenith of the Court's attempt to reduce the plaintiff's burden of proof on market power. Fortner, a real estate developer, obtained credit from United States Steel Homes Credit Corporation, a wholly owned subsidiary of United States Steel, to purchase and develop land for erecting prefabricated houses.180 The credit terms were exceptionally favorable; no

176. Id. at 44-45 (citations and footnote omitted). The Court reiterated its desire to avoid extensive trials:

Since the requisite economic power may be found on the basis of either uniqueness or consumer appeal, and since market dominance in the present context does not necessitate a demonstration of market power in the sense of § 2 of the Sherman Act, it should seldom be necessary in a tie-in sale case to embark upon a full-scale factual inquiry into the scope of the relevant market for the tying product and into the corollary problem of the seller's percentage share in that market.

Id. at 45 n.4.

177. Id. at 45 n.4.


180. See id. at 496-97.
other source would have extended credit on comparable terms.\textsuperscript{181} As a condition of the loans, however, Fortner was required to purchase its prefabricated houses only from United States Steel.\textsuperscript{182} Fortner brought suit in 1962 under the Sherman Act for treble damages and an injunction. After pretrial proceedings, the district court entered a summary judgment in favor of the defendants, finding that Fortner failed to raise any question of fact in support of an antitrust violation.\textsuperscript{183}

In 1969, the Court reversed the summary judgment in a five-to-four decision.\textsuperscript{184} Justice Black, writing for the majority, found that defendants' sale arrangements unquestionably affected a "not insubstantial" amount of interstate commerce; Fortner's annual purchases of the prefabricated houses amounted to almost $200,000, and the value of the sales foreclosed by the tying clauses was between two and four million dollars annually.\textsuperscript{185} Justice Black further stated that Fortner would prevail if it could demonstrate that United States Steel had "sufficient economic power to impose an appreciable restraint on free competition,"\textsuperscript{186} either because defendants' unique financing terms manifested "a substantial competitive advantage" or because of "the possibility of market power over borrowers in the credit market."\textsuperscript{187} The Court therefore remanded the case for a trial on the issue of United States Steel's market power.\textsuperscript{188}

After a month-long trial on remand, the district court directed a verdict for Fortner on the issue of liability and submitted the issue of damages to the jury. The court of appeals reversed the directed verdict and remanded for a trial on the issue of liability.\textsuperscript{189} The parties agreed to waive a jury, instead submitting the issue to the court for determination on the record. The district court held once again for Fortner, and the

\textsuperscript{181} Id. at 504-05.
\textsuperscript{182} Id. at 497.
\textsuperscript{184} Justice White dissented in an opinion in which Justice Harlan joined, and Justice Fortas dissented in an opinion joined by Justice Stewart.
\textsuperscript{185} See id. at 501-02.
\textsuperscript{186} Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 11 (1958); see supra text accompanying note 170.
\textsuperscript{187} See Fortner I, 394 U.S. at 505-06.
\textsuperscript{188} See id. at 510.
\textsuperscript{189} See Fortner Enters., Inc. v. United States Steel Corp., 452 F.2d 1095, 1103 (6th Cir. 1971), cert. denied, 406 U.S. 919 (1972).
court of appeals affirmed. The Supreme Court granted United States Steel’s petition for certiorari—almost fifteen years after Fortner had filed suit, after three successive judgments had been entered by the district court and, no doubt, after both sides had spent millions of dollars in legal fees and costs.

The Court’s composition had changed drastically by the time the case reappeared before it in 1976. Justice Black, author of the Northern Pacific and Fortner I opinions, and leader of the activist block favoring extension of the antitrust laws, had died in 1971, little more than two years after Fortner I and six years before the case reappeared. In addition, two other members of the majority in Fortner I, Chief Justice Warren and Justice Douglas, were no longer sitting on the Court; neither were two dissenters, Justices Harlan and Fortas. The Court’s decision in Fortner II portended the drastic effect that these changes in the Court would have on the law of tying arrangements.

In United States Steel Corp. v. Fortner Enterprises, Inc. (Fortner II), the Supreme Court unanimously reversed the

190. See Fortner Enters., Inc. v. United States Steel Corp., 523 F.2d 951, 964, 967 (6th Cir. 1975).
192. 356 U.S. 1 (1958); see supra notes 163-73 and accompanying text.
193. 394 U.S. 495 (1969); see supra notes 179-88 and accompanying text.
197. See United States Steel Corp. v. Fortner Enters., Inc. (Fortner II), 429 U.S. 610 (1977).
district court's judgment for Fortner in an opinion by Justice Stevens, who had succeeded Justice Douglas.\textsuperscript{201} Justice Stevens defined the question at issue as being "whether the seller has some advantage not shared by his competitors in the market for the tying product."\textsuperscript{202} The district court had apparently found that Fortner had met at least an equivalent of this test, concluding that United States Steel's tying product, its credit terms, was "unique."\textsuperscript{203} The district court consequently held that the defendant necessarily had "significant economic power" because it could not otherwise have offered Fortner such uniquely favorable terms.\textsuperscript{204}

Justice Stevens conceded that the "unique character of the tying product has provided critical support for the finding of illegality in prior cases."\textsuperscript{205} He qualified this statement, however, by asserting that this unique character must be supplemented by a showing that "the seller has the power . . . to raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market."\textsuperscript{206} Because the record did not reveal that United States Steel's competitors were "unable to offer comparable financing,"\textsuperscript{207} the record proved "nothing more than a willingness to provide cheap financing in order to sell expensive homes."\textsuperscript{208}

It is difficult to imagine a tie between credit and a commodity that could meet Fortner II's test of illegality. The insurmountable burden imposed by the Court, as well as its unpersuasive attempt to distinguish cases such as Northern Pac.\textsuperscript{209} appears to be an effort by the Court to obscure its be-

\begin{flushleft}
\textsuperscript{201} See Orland, John Paul Stevens, in 5 JUSTICES, supra note 64, at 149, 149.
\textsuperscript{202} See Fortner II, 429 U.S. at 620.
\textsuperscript{203} See id. at 614-16.
\textsuperscript{204} See id. at 616-17.
\textsuperscript{205} See id. at 619.
\textsuperscript{206} See id. at 620 (footnote omitted).
\textsuperscript{207} See id. at 622 n.15.
\textsuperscript{208} See id. at 622 (footnote omitted).
\textsuperscript{209} 356 U.S. 1 (1958); see supra notes 163-73 and accompanying text. Justice Stevens made valiant efforts to distinguish Fortner's case against United States Steel from the government's case against Northern Pacific. Justice Stevens first said that the tie-in in Fortner "can be explained as a form of price competition" in prefabricated homes, whereas that explanation would not work in Northern Pac. because the railroad had not lowered its transportation costs for its land lessees. See Fortner II, 429 U.S. at 619 n.10. Justice Stevens then quoted the language in Northern Pac. that "common sense" as well as "testimony" made it "evident" that the railroad's "extensive landholdings"
lie that it should have affirmed the summary judgment for the defendants in Fortner I. The changed result was not caused by any facts not appearing in the record during the prior appeal. Rather, it can be traced to the Court's new members and their perception that the plaintiff had no case unless all tying arrangements involving a substantial amount of interstate commerce were unlawful per se and that this step was one that should not be taken. This perception has been manifested in the most recent Supreme Court case on tying arrangements, a case that changes the face of the law.

III. THE PRESENT LAW OF TYING ARRANGEMENTS: JEFFERSON PARISH HOSPITAL DISTRICT NO. 2 V. HYDE

The latest Supreme Court decision on tying arrangements, Jefferson Parish Hospital District No. 2 v. Hyde, generates numerous perplexing questions about its meaning and reach. One of the few certainties garnered from the Court's opinion is that the Court has retreated from the expansive interpretation of the antitrust laws in Northern Pacific and Fortner I to the position taken in 1947 in International Salt. But if the views of the four justices who filed a concurring opinion in Hyde become the majority view, antitrust treatment of tying arrangements will likely return to its 1918 status, when the Court decided United Shoe.

In Hyde, East Jefferson Hospital, located in the Jefferson Parish district of New Orleans, was a party to a contract with a firm of anesthesiologists, Roux & Associates, that specified that Roux would provide all of the hospital's anesthesiological services. Dr. Edwin G. Hyde applied for admission to the hosp-
tal staff as an anesthesiologist, but his application was denied because of the Roux contract. Dr. Hyde sued, seeking a declaratory judgment that the contract was unlawful under the Sherman Act and an injunction requiring that he be appointed to the East Jefferson staff.

The district court found that Dr. Hyde did not prove that the hospital dominated the market in the tying product, "hospital services," because the contract affected only one of at least twenty hospitals in the New Orleans area. Therefore, the court held that the tying arrangement did not violate the Sherman Act. The court of appeals reversed, agreeing that the contract between the hospital and Roux was a tying contract but defining the relevant geographic market for determining the hospital's market power as the East Bank of Jefferson Parish. The court held that the hospital possessed "sufficient market power in th[is] tying market to coerce purchasers of the tied product." The Supreme Court unanimously reversed the court of appeals. Only five of the nine justices found that the contract was a tying agreement, but all nine concluded that the contract should be judged by the rule of reason and that the restraint was reasonable.

The majority and concurring opinions reveal that the Supreme Court is sharply divided on the appropriate standard for judging whether tying arrangements are lawful under the antitrust laws. Justice Stevens, writing for the five-member majority, flatly stated that "[i]t is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable 'per se.'" The majority opinion primarily focused on identifying the "certain" tying arrangements that are subject to the per se rule. In contrast, Justice O'Connor, writing for the four concurring justices, asserted that "[t]he time has . . . come to abandon the 'per se' label and refocus the inquiry on the adverse economic effects, 

217. Id. at 1554.
218. Id.
222. See Hyde, 104 S. Ct. at 1556 (emphasis added) (footnote omitted).
and the potential economic benefits, that the tie may have."\textsuperscript{223}

The concurrence concentrated on justifying its accusation that
the per se doctrine is merely a "label" and on attacking application
of even the semblance of a per se rule.\textsuperscript{224} Neither the ma-
majority nor the concurrence, however, was entirely successful in
its attempt to establish a coherent test for judging the legality
of tying arrangements.

The majority began its attempt at clarification by noting:

Our cases have concluded that the essential characteristic of an
invalid tying arrangement lies in the seller's exploitation of its control
over the tying product to force the buyer into the purchase of a tied
product that the buyer either did not want at all, or might have pre-
ferred to purchase elsewhere on different terms.\textsuperscript{225}

The buyer is thus forced to act differently from a buyer in a
competitive market, and competition is correspondingly re-
strained.\textsuperscript{226} Only when "forcing is probable," stated the Court,

\textsuperscript{223} See \textit{id.} at 1570 (O'Connor, J., joined by Burger, C.J., Powell and Rehn-
quist, JJ, concurring).

\textsuperscript{224} Justice O'Connor summarized her view of the law of tying
agreements:

The "per se" doctrine in tying cases has thus always required an
elaborate inquiry into the economic effects of the tying arrangement.
As a result, tying doctrine incurs the costs of a rule of reason ap-
proach without achieving its benefits: the doctrine calls for the exten-
sive and time-consuming economic analysis characteristic of the rule
of reason, but then may be interpreted to prohibit arrangements that
economic analysis would show to be beneficial. Moreover, the \textit{per se}
label in the tying context has generated more confusion than coherent
law because it appears to invite lower courts to omit the analysis of
economic circumstances of the tie that has always been an necessary
element of tying analysis.

\textit{id.} (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ.,
concurring).

\textsuperscript{225} 104 S. Ct. at 1558. The majority restated this point in various ways. It
noted that the Court has "condemned tying arrangements when the seller has
some special ability—usually called 'market power'—to force a purchaser to do
something that he would not do in a competitive market. ... When 'forcing'
ocurs, our cases have found the tying arrangement to be unlawful." \textit{See id.} at
1559. The Court explained that its use of the term "forcing" is synonymous
with the term "leverage." \textit{See id.} at 1559 n.20. "Leverage" was defined as "'a
supplier's ability [sic] to induce his customer for one product to buy a second
product from him that would not otherwise be purchased solely on the merit
of that second product.'” \textit{id.} (quoting \textit{5 P. AREEDA & D. TURNER, ANTITRUST
LAW § 1134a, at 202 (1980))}.

\textsuperscript{226} As the Court explained: "And from the standpoint of the consumer—
whose interests the statute was especially intended to serve—the freedom to
select the best bargains in the second market is impaired by his need to
purchase the tying product, and perhaps by an inability to evaluate the true
cost of either product when they are available only as a package." \textit{id.} at 1559-
60 (footnote omitted). Professor Richard Craswell elaborated:

It also is possible, however, for information imperfections to lead to
is "[p]er se condemnation . . . appropriate." To illustrate such a situation, the Court gave the classic example of a seller who ties a product that is covered by a patent or similar monopoly to another product. In this situation, the seller is presumed to have the market power necessary to force the buyer to undesirable outcomes even when buyers know beforehand exactly what they are getting. This seemingly paradoxical result arises because, for a market to work efficiently, buyers must be informed about more than just the offer of the seller they ultimately choose. They must also be adequately informed about the offers of competing sellers, so that they can properly compare the two.

... [For example, i]t is by now fairly well-known that sellers tend to engage in less price competition where buyers have difficulty making price comparisons. If it is difficult to observe and compare the prices of competing sellers, a reduction in price will not attract as many buyers—nor will an increase drive as many away—as where comparative price information is widely available. Each seller thus will face a downward-sloping demand curve, and the equilibrium price will be above the competitive level even in an unconcentrated market.

... A similar problem can arise where buyers can easily compare competitors' prices, but have difficulty comparing the quality of the product.

This analysis applies to tying arrangements as well. Indeed, the number and nature of tying requirements that a seller insists on can be viewed as a dimension of the quality of that seller's offer. If consumers are not fully sensitive to the expected costs or quality of different tying arrangements, then the seller who insists on additional or more burdensome requirements will not lose as much business as ideally he should, while the seller who reduces the number of burdensome requirements will not gain as much business. This distortion will eventually lead to an equilibrium in which all sellers offer an excessive number of costly tying requirements. Competition over price may still keep any seller from earning monopolistic profits, but there will be no similar competition to eliminate the tying requirements themselves.


227. See Hyde, 104 S. Ct. at 1560 (footnote omitted). The Court subsequently stated, however, in the very same paragraph:

Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify per se condemnation. If only a single purchaser were "forced" with respect to the purchase of a tied item, the resultant impact on competition would not be sufficient to warrant the concern of antitrust law. It is for this reason that we have refused to condemn tying arrangements unless a substantial volume of commerce is foreclosed thereby. . . . Similarly, when a purchaser is "forced" to buy a product he would not have otherwise bought even from another in the tied product market, there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed.

Id. (citations omitted) (emphasis added).
purchase both products because the tying product is not available elsewhere. Thus, forcing is likely, and the tying agreement is unlawful per se.\textsuperscript{228}

The Court's examples, however, were not all so straightforward. The Court went on to observe that a seller's "high" market share or its "unique" tying product also invokes the per se rule.\textsuperscript{229} The opinion did not explain why the seller of a "unique" product does not necessarily also have a "high" market share, thus implying that the two conditions refer to different market conditions. That these qualities are distinct is clarified by the Court's concluding sentence in its attempt to rationalize the law of tying arrangements:

When, however, the seller does not have \textit{either the degree or the kind} of market power that enables him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.\textsuperscript{230}

The Court, therefore, identified at least three situations in which a tying arrangement is unlawful per se: when the tying product is patented or protected by some other legal monopoly; when the seller has a "high" share of the market in the tying product; and when the tying product is "unique."

The majority then attempted to apply these rules to the case at hand. It first considered whether the defendant was selling two separate products that could be tied together rather than, as the hospital contended, "a functionally integrated package of services."\textsuperscript{231} The Court observed that the test "turns not on the functional relationship between" the two products "but rather on the character of the demand" for them.\textsuperscript{232} Because consumers purchased anesthesiological serv-

\textsuperscript{228} See id.
\textsuperscript{229} See id. at 1560-61.
\textsuperscript{230} Id. at 1561 (emphasis added) (citations omitted).
\textsuperscript{231} See id. at 1561-62 (footnote omitted).
\textsuperscript{232} See id. at 1562. As the Court explained:

"[Our] cases make it clear that a tying arrangement cannot exist unless two separate product markets have been linked.

The requirement that two distinguishable product markets be involved follows from the underlying rationale of the rule against tying... The answer to the question whether [East Jefferson] has utilized a tying arrangement must be based on whether there is a possibility that the economic effect of the arrangement is that condemned by the rule against tying—that [East Jefferson] has foreclosed competition on the merits in a product market distinct from the market for the tying item. Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services..."
ices separately from hospital services, the Court found that East Jefferson's contract with Roux & Associates was a tying arrangement.\textsuperscript{233}

The Court's next step was to determine whether the hospital "forced" unwanted anesthesiology services on its patients. Hyde argued that the Jefferson Parish residents' preference for East Jefferson, the closest hospital, demonstrated the hospital's dominance in the tying product.\textsuperscript{234} The Court noted, however, that seventy percent of these residents entered other hospitals and that East Jefferson's control of the Jefferson Parish market therefore did not "establish the kind of dominant market position that obviates the need for further inquiry into actual competitive conditions."\textsuperscript{235} The Court concluded that "[t]ying arrangements need only be condemned if they restrain competition on the merits by forcing purchases that would not otherwise be made. . . . It is safe to assume that every patient undergoing a surgical operation needs the services of an anesthesiologist; at least this record contains no evidence that the hospital 'forced' any such services on unwilling patients."\textsuperscript{236}

Because it was unable to find evidence of forcing, the Court found the per se rule inapplicable to East Jefferson's tying contract.\textsuperscript{237} It therefore proceeded to analyze the arrangement under the "rule of reason" to discover whether Dr. Hyde had met his burden of proving that the tie had any actual adverse effect on competition.\textsuperscript{238} Finding no evidence that "any patient

\begin{itemize}
  \item to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.
  \item Id. at 1562-63 (footnotes omitted).
  \item See id. at 1564-65.
  \item See id. at 1566.
  \item See id.
  \item See id. at 1566-67 (footnote omitted). The Court rejected the contention that the "market imperfections" that allowed East Jefferson to charge noncompetitive prices constituted "forcing." Justice Stevens explained:
  \begin{quote}
  A lack of price or quality competition does not create this type of forcing [warranting per se treatment]. If consumers lack price consciousness, that fact will not force them to take an anesthesiologist whose services they do not want—their indifference to price will have no impact on their willingness or ability to go to another hospital where they can utilize the services of the anesthesiologist of their choice. Similarly, if consumers cannot evaluate the quality of anesthesiological services, it follows that they are indifferent between certified anesthesiologists even in the absence of a tying arrangement—such an arrangement cannot be said to have foreclosed a choice that would have otherwise been made "on the merits."
  \end{quote}
  \item Id. at 1566.
  \item See id. at 1567.
  \item See id.
\end{itemize}
... was not... able to go to a hospital that would provide him with the anesthesiologist of his choice,"239 the Court concluded that no showing of such an adverse effect had been made.240 Although the Court conceded in a footnote that competition at East Jefferson Hospital was eliminated by the contract,241 it stated that this elimination, "[l]ike any exclusive requirements contract," was "unlawful if it foreclosed so much of the market... as to unreasonably restrain competition in... the market for anesthesiological services... [R]espondent has not attempted to make this showing."242

The majority opinion in Hyde raises a host of unanswered questions about the factors needed to invoke the per se rule.243 First, the Court stated that the hospital's market power or "dominance" is "far from overwhelming" because seventy percent of the patients residing near it chose to go to other hospitals.244 In antitrust jargon, this could mean that the defendant's share of the relevant geographic market in the tying product was only thirty percent. Read in conjunction with the Court's earlier discussion of the "tests" for applying the per se doctrine,245 this holding might indicate that a larger percentage would have met the Court's definition of a "high" market share and therefore would have triggered per se treatment of the contract. The question then becomes, of course, how much larger than thirty percent is "high."

An additional uncertainty in the Court's apparent attempt to identify what is not a "high" market share can be illustrated by considering a situation in which there are ten hospitals within the relevant geographic market, each of which provides approximately ten percent of the hospital services in the market. Further suppose that each hospital has an exclusive arrangement with an organization of anesthesiologists like that

239. See id. at 1568 (footnote omitted).
240. See id.
241. See id. at 1568 n.51.
242. See id.
243. For example, it is difficult to reconcile Justice Stevens's assertion that tying arrangements must be condemned because they force consumers to buy products they did not want, see supra text accompanying note 225, with his statement three paragraphs later that "when a purchaser is 'forced' to buy a product he would not have otherwise bought... there can be no adverse impact on competition because no portion of the market which would otherwise have been available to other sellers has been foreclosed," see Hyde, 104 S. Ct. at 1560; supra note 227.
244. See Hyde, 104 S. Ct. at 1566; supra text accompanying note 235.
245. See supra notes 225-30 and accompanying text.
which East Jefferson had with Roux. A qualified anesthesiologist consequently cannot practice within the market unless invited to join one of the ten groups holding an exclusive arrangement with a hospital. Although the market is therefore closed to independents, the agreements could arguably escape per se condemnation under *Hyde* because each hospital falls below *Hyde*'s thirty percent benchmark and thus does not have a "high" market share. If so, the agreements would be lawful under *Hyde* unless the plaintiff anesthesiologist can prove that they are unreasonable. The question then becomes what evidence is necessary to prove that they are unreasonable.\textsuperscript{246}

The opinion can also be read as holding that consumers of hospital surgical services—patients—are rarely, if ever, "forced" to accept the services of anesthesiologists because they are ignorant and indifferent as to the services’ quality.\textsuperscript{247} According to this interpretation of the opinion, the per se doctrine would arguably be inapplicable no matter how high the hospital’s market share because forcing is unlikely to occur even when one hospital controls the entire market. The Court, however, acknowledged that surgeons can and do evaluate anesthesiologists,\textsuperscript{248} and no reasoning supports the assumption that every surgeon who operated at East Jefferson wanted Roux anesthesiologists and no others.\textsuperscript{249} Yet surgeons were required to use Roux unless the patient was moved to another hospital. It appears almost certain that some surgeons were "forced" to use Roux & Associates, at least when no other hospital was conve-

\textsuperscript{246} Presumably, if one hospital in the relevant geographic market has over 50% of that market and has an exclusive arrangement with a group of anesthesiologists like East Jefferson Hospital’s arrangement with Roux, the majority of five would hold this arrangement to be per se unlawful because the hospital is dominant or has a monopoly. \textit{Cf.} McMorris v. Williamsport Hospital, 597 F. Supp. 899, 913 (M.D. Pa. 1984) (refusing to grant the hospital’s motion for summary judgment on a Sherman Act challenge to its exclusive contract with a provider of nuclear medicine because of evidence that "The Williamsport Hospital possessed a 55-60% of the market share with respect to diagnostic nuclear medicine procedures[,] . . . certain procedures are performed only at the Williamsport Hospital, . . . and . . . the hospital’s share in the market for therapeutic procedures has increased from 47.4% to 100%") (citations omitted).

\textsuperscript{247} \textit{See} *Hyde*, 104 S. Ct. at 1566-67; \textit{supra} note 236.

\textsuperscript{248} \textit{Cf.} *Hyde*, 104 S. Ct. at 1568 n.52 ("Moreover, the self interest of the hospital, as well as the ethical and professional norms under which it operates, presumably protect the quality of anesthesiological services.") (citation omitted).

\textsuperscript{249} \textit{Cf. id.} at 1567-68 ("The evidence indicates that some surgeons and patients preferred [Dr. Hyde’s] services to those of Roux . . . .").
In these circumstances, some "forcing" within the terms of the majority opinion must have occurred, unless "forcing" requires physical coercion.

A further difficulty with the opinion's articulation of the per se rule in tying arrangements is the meaning the Court gave to the term "unique." The majority seemed to indicate that the railroad's land holdings in Northern Pacific were "unique," stating that the land "gave the railroad a unique kind of bargaining power that enabled it to tie the sales of that land to exclusive, long term commitments that fenced out competition in the transportation market over a protracted period." Applying this analysis to the facts in Hyde, many of East Jefferson Hospital's patients used the hospital that was nearest their homes for the same reason that the farmers in Northern Pacific bought or leased the railroad's adjoining lands—necessity. One could conclude, therefore, that East Jefferson's hospital services had a "unique" quality for these patients that was similar to the unique attributes the railroad's land had for the neighboring farmers. The majority, however, never discussed whether the hospital's services might be considered "unique," thus leaving its definition of the term unknown.

The majority's discussion of the rule of reason as applied to Dr. Hyde's case also raises issues similar to those generated by its discussion of the per se rule. The opinion indicates that a plaintiff bringing a tying case under the rule of reason must define the market and demonstrate "the actual effect of the ex-

---

250. Cf. id. at 1568 n.50 ("If, as is likely, it is the patient's doctor and not the patient who selects an anesthesiologist, the doctor can simply take the patient elsewhere if he is dissatisfied with Roux. The District Court found that most doctors in the area have staff privileges at more than one hospital.") (citation omitted) (emphasis added).

251. See supra text accompanying notes 228-30.

252. 356 U.S. 1 (1958); see supra notes 163-73 and accompanying text.

253. See Hyde, 104 S. Ct. at 1561 (footnote omitted).

254. See Northern Pac., 356 U.S. at 7; see also id. at 18 n.4 ("[S]ertain landholdings of [Northern Pacific], particularly grazing lands, were in a checkerboard pattern among private holdings, thereby giving [Northern Pacific] a strategic position with respect to those lands since the private landholders often found it necessary to acquire [Northern Pacific's] lands to fill gaps in existing ranges.") (Harlan, J., joined by Frankfurter and Whittaker, JJ., dissenting).

255. See Hyde, 104 S. Ct. at 1555-56, 1566.
exclusive contract on competition among" sellers of the tied products. The opinion then cites "generally" Standard Oil Co. v. United States (Standard Stations) and Tampa Electric Co v. Nashville Coal Co.

Standard Stations, decided in 1949, held that any exclusive dealing arrangement that forecloses a substantial percentage of the market is illegal per se. Although the 1961 opinion in Tampa Electric did not purport to overrule Standard Stations, it did suggest that more than proof of foreclosure of a substantial percentage of the market may be required to establish the illegality of the arrangement:

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.

The Hyde majority may be indicating that similar evidence must be introduced to measure the actual effect of tying arrangements not meeting the Court’s current per se rule.

Curiously, the Hyde opinion also stated in a footnote that the Roux “contract could be unlawful if it foreclosed so much of the market from penetration by Roux’s competitors as to unreasonably restrain competition in the affected market, the market for anesthesiological services.” The Court apparently meant that Hyde had only to define the affected geographical market and show that the hospital controlled a certain percentage of anesthesiological services in that market to prevail under

---

256. See id. at 1567; see also id. at 1568 n.51.
257. See id. at 1568 n.51.
258. 337 U.S. 293 (1949); see supra notes 132-43 and accompanying text.
260. See supra text accompanying note 143.
262. See Hyde, 104 S. Ct. at 1568 n.51 (citations omitted) (emphasis added). Unlawful foreclosure of competitors may be proved without any proof that price or quality have been adversely affected, in other words, without proof that consumers have been hurt. Cf. International Salt Co. v. United States, 332 U.S. 392, 396-97 (1947) (holding International Salt’s lease provisions to be invalid even though consumers were not adversely affected); supra note 122. Adherents to the Chicago School criticize cases emphasizing “the welfare of competitors rather than consumers” because of “the consumer-oriented view of antitrust that prevails today.” See Marrese v. American Academy of Orthopaedic Surgeons, 706 F.2d 1488, 1495 (7th Cir. 1983), aff’d on other grounds, 726 F.2d 1150 (7th Cir. 1984) (en banc), rev’d on other grounds, 105 S. Ct. 1327 (1985).
the rule of reason. This test appears to be more like the per se rule applied in Standard Stations than it is like the test advanced by Tampa Electric. The majority's test, however, raises a question similar to that suggested by the Court's conclusion that the seller's "high" market share in the tying product invokes the per se doctrine: how large a market share must the seller have in the tied product for the arrangement to be held unlawful under the rule of reason or, in other words, how much is "so much"?

The concurrence in Hyde disagreed with almost everything important in the Court's opinion except the result. It characterized the majority's "per se" analysis as no per se doctrine at all, but rather a disguised rule of reason requiring an "elaborate inquiry into . . . economic effects." It then described the majority's conclusion that patents, a "high" market share, and a "unique" product all demonstrate market power as a "common misconception." Considering the facts in Hyde, the concurring opinion asserted that the Roux contract was not a tying arrangement at all. Even assuming a tying arrangement existed, the opinion stated, it was not unlawful because the ar-

\[263. \text{See supra text accompanying notes 243-46.}\]
\[264. \text{See Hyde, 104 S. Ct. at 1570 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J.J., concurring); supra note 224.}\]
\[\text{While each of these three factors might help to give market power to a seller; it is also possible that a seller in these situations will have no market power: for example, a patent holder has no market power in any relevant sense if there are close substitutes for the patented product. Similarly, a high market share indicates market power only if the market is properly defined to include all reasonable substitutes for the product.}\]
\[\text{Id. (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J.J., concurring) (citation omitted).}\]
\[266. \text{The concurring opinion asserted:}\]
\[\text{[T]here is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services, so the Hospital can acquire no additional market power by selling the two services together. Accordingly, the link between the Hospital's Services and anesthesia administered by Roux will affect neither the amount of anesthesia provided nor the combined price of anesthesia and surgery for those who choose to become the Hospital's patients. In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes.}\]
\[\text{Id. at 1574-75 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J.J., concurring); see also Id. at 1572-73 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, J.J., dissenting).}\]
rangement had "little potential to harm the patients." The four concurring justices further argued for a balancing test in which a tying arrangement could be condemned "only when its anticompetitive impact outweighs its contribution to efficiency."

Like the majority opinion, the concurrence has its perplexities. The concurring opinion concluded that the Roux contract was not a tying arrangement because "[t]here is no sound economic reason for treating surgery and anesthesia as separate services." Even if the arrangement is a tie, stated the concurrence, it is unlikely to injure patients because "very few patients will choose to undergo surgery without receiving anesthesia." Regardless of whether this observation refers to economic or physical harm, however, it has no relevance in an examination of the validity of the Roux contract under the antitrust laws. In enacting section 3 of the Clayton Act, Congress condemned tying arrangements that might "lessen competition." It made no mention of their effect on consumers. Instead, Congress assumed that consumers would benefit by the preservation of competition. Thus, in *International Business Machines Corp. v. United States*, the Supreme Court was not deterred from invalidating IBM's requirement that only IBM tabulating cards be used with its tabulating machines by the fact that no one would have used the machines without some make of tabulating cards. In *Hyde*, the patients undoubtedly required anesthesia before surgery, but this observation is irrelevant in an analysis of whether East Jefferson could require that Roux anesthesiologists be used.

The concurring opinion also stated that the rule of reason requires a decision as to whether the "anticompetitive impact" of the tying arrangement "outweighs its contribution to effi-


271. *See supra* text accompanying notes 30-55.

272. 298 U.S. 131 (1936); *see supra* notes 110-15 and accompanying text.
The method by which this weighing process is to be conducted is a mystery not clarified by the opinion. As an example of the confusion generated by this balancing approach, suppose that the evidence in *Hyde* had shown that the Roux contract lowered total hospital costs by one percent and surgical costs by a larger percentage. It simply is impossible to "weigh" this hypothetical evidence against hypothetical proof that, for example, Roux had used no new anesthesia in obstetrics cases for two years despite use of such innovations by anesthesiologists in other hospitals. This balancing is analogous to deciding whether a particular rose smells as sweet as a specified ripe peach tastes and, therefore, as then-Professor Frank H. Easterbrook persuasively argued, leaves the rule of reason without any content.

The concurring opinion's balancing test further ignores both the Court's strong line of precedent invalidating tying ar-

---

273. See *Hyde*, 104 S. Ct. at 1574 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring); supra text accompanying note 268.

274. See Easterbrook, supra note 5, at 153-57 (discussing the impossibility of applying an open-ended weighing formula).

Justice O'Connor also stated that the contract between East Jefferson and Roux was "unquestionably" an "exclusive dealing" contract. See *Hyde*, 104 S. Ct. at 1575 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring). Here the opinion abruptly shifted to the effect of the arrangement on competition rather than on consumers: "Dr. Hyde . . . and other hospitals in the area . . . may have grounds to complain that the exclusive contract stifles horizontal competition and therefore has an adverse, albeit indirect, impact on consumer welfare even if it is not a tie." *Id.* (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring). Nevertheless, the concurers concluded, because the exclusive dealing arrangement "forecloses only a small fraction of the market in which anesthesiologists may sell their services, and a still smaller fraction of the market in which hospitals may secure anesthesiological services[,] the contract therefore survives scrutiny under the Rule of Reason." *Id.* at 1576 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring). As far as exclusive dealing is concerned, the four concurring justices apparently agree with the majority of five, see 104 S. Ct. at 1568 n.51; supra text accompanying notes 241-42, and rely on a doctrine many had regarded as outmoded—that of "quantitative substantiality," enunciated over 35 years ago in *Standard Stations*, 337 U.S. 293 (1949). See supra text accompanying notes 132-43; cf. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 394 (7th Cir. 1984) ("[A] plaintiff must prove two things to show that an exclusive-dealing agreement is unreasonable. First, he must prove that it is likely to keep at least one significant competitor of the defendant from doing business in a relevant market. If there is no exclusion of a significant competitor, the agreement cannot possibly harm competition. Second, he must prove that the probable (not certain) effect of the exclusion will be to raise prices above (and therefore reduce output below) the competitive level, or otherwise injure competition; he must show in other words that the anticompetitive effects (if any) of the exclusion outweigh any benefits to competition from it.").
rangements that have an adverse effect on competition and the congressional intent expressed in the 1914 debates leading to the adoption of section 3 of the Clayton Act. As Hyde's majority opinion stated:

[The proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable "per se"... was first enunciated in International Salt Co. v. United States, ... and has been endorsed by this Court [nine] times since. The rule also reflects congressional policies underlying the antitrust laws. In enacting § 3 of the Clayton Act, ... Congress expressed great concern about the anticompetitive character of tying arrangements. ... While this case does not arise under the Clayton Act, the congressional finding ... concerning the competitive consequences of tying ... must be respected.275]

The concurrence, however, was not persuaded by this showing of precedents and congressional policy. By urging that a tying arrangement's "contribution to efficiency" can outweigh its "anticompetitive impact," the concurrence seeks instead to resurrect the law of tying arrangements existing in 1918, when Justice McKenna stated in United Shoe I276 that the lessees entered into shoe machinery leases containing tying clauses "upon a calculation of their value—the efficiency of the machines balanced against the restrictions upon and conditions of their use. The lessees had the alternative of the choice of other machines ... ."277 It should not be forgotten, however, that the majority in Hyde was also guilty of ignoring precedent. The opinion abandoned Standard Station's278 dictum279 and silently overruled Northern Pacific,280 both of which came close to stating that all tying arrangements are unlawful if they affect a not insubstantial amount of interstate commerce.281

275. Hyde, 104 S. Ct. at 1556-58 (citations and footnotes omitted).
276. 247 U.S. 32 (1918); see supra notes 71-81 and accompanying text.
277. See United Shoe I, 247 U.S. at 65; supra text accompanying note 77.
278. 337 U.S. 293 (1949); see supra notes 132-43 and accompanying text.
279. See Standard Stations, 337 U.S. at 305-06; supra text accompanying note 140.
280. 356 U.S. 1 (1958); see supra notes 163-73 and accompanying text.
281. Hyde's reinterpretation of precedent has, of course, changed the law of tying arrangements. The precise impact of Hyde, however, is as yet uncertain. Compare Digidyne Corp. v. Data Gen. Corp., 734 F.2d 1336, 1340-41 (9th Cir.) ("In [Hyde] the Supreme Court again made it clear that a tying arrangement is illegal per se if the seller of the tying product has the capacity to force some buyers to purchase a tied product they do not want or would have preferred to purchase elsewhere."); petition for cert. filed, 53 U.S.L.W. 3406 (U.S. Nov. 27, 1984) with Jack Walters & Sons Corp. v. Morton Bldg., Inc., 737 F.2d 698, 702 (7th Cir.) ("The Supreme Court's most recent tying decision requires the plaintiff to [show that the defendant has market power] in order to prove that
Thus, in *Hyde* the Supreme Court has taken another swing in judicial attitude on the validity of tying arrangements.\(^{282}\) Several reasons can be advanced to explain this change in attitude, the most obvious of which is the change in the Court's composition over the last decade and a half. Only three of the justices sitting when *Fortner I* was decided remain on the Court.\(^{283}\) New members have brought different ideas on the legitimate objectives of antitrust law.\(^{284}\) As early as 1974, the

\(^{282}\) A tying arrangement is unlawful, even though tying still is referred to as a per se offense.\(^{\text{a}}\) (citing *Hyde*), *cert. denied*, 105 S. Ct. 432 (1984).

\(^{283}\) This tidal, or ebb and flow, phenomenon has been most clear, not to say dramatic, in the development of the per se rule against price fixing. The literal approach of the Court's early Sherman Act opinion in which it was written that the Act's "plain language" condemning "every conspiracy" in restraint of trade" meant what it said, see *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327 (1897); *supra* note 14, gave way in 1911 to the rule of reason enunciated in Chief Justice White's opinion in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The rule of reason was further refined and applied by Justice Brandeis in his opinion for the Court in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). In the 1928 *Trenton Potteries* opinion, however, the rule of reason gave way to the per se doctrine in which some restraints (in that case, price fixing) were said to be unreasonable per se, to be condemned without judicial inquiry into their benefits and detriments. *See United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). Six years after *Trenton Potteries* came Chief Justice Hughes's opinion in *Appalachian Coals* in which the per se doctrine was ignored, and a price-fixing scheme by a group of coal sellers was upheld as reasonable under the Sherman Act, which the Court described as having a "generality and adaptability comparable to that found to be desirable in constitutional provisions." *See Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 360 (1933). Seven years later, in 1940, Justice Douglas, writing for the Court, applied a rigorous per se approach to something less than direct price fixing in the petroleum business. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). In 1978, the doctrine was reexamined again in *Professional Engineers* and reaffirmed in an opinion by Justice Stevens, *see National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978), only to be thrown in doubt again by the Court's opinion in *Broadcast Music* a year later when the rule of reason was applied to a scheme that the court of appeals said involved "price fixing in the literal sense," *see Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 8 (1979). Justice Stevens vigorously dissented.

\(^{284}\) Members of the Court have occasionally recognized that the opinions of their colleagues in antitrust cases have been influenced by policy views, predilections, preconceptions, and biases, not to say prejudices. *See, e.g.*, *United States v. Marine Bancorporation*, 418 U.S. 602, 653 (1974) (White, J., joined by Brennan and Marshall, JJ., dissenting) ("In the last analysis, one's view of this case, and this rule one devises for assessing whether this merger should be barred, turns on the policy of § 7 of the Clayton Act to bar mergers which may contribute to further concentration in the structure of American business.") (citations omitted); *United States v. General Dynamics Corp.*, 415 U.S. 486, 527 (1974) (Douglas, J., joined by Brennan, White, and Marshall, JJ.,
Nixon appointees, Chief Justice Burger and Justices Powell, Blackmun, and Rehnquist, joined by Justice Stewart, had comprised a new majority that essentially reversed the law relating to horizontal mergers, invalidating Justice Stewart's famous generalization that the "sole consistency" in merger cases is that "the Government always wins." In 1977, the same majority expressly overruled a prior antitrust case for the first time in the Court's history, holding that restrictions on distribution should usually be judged by the rule of reason rather than by per se rules. Judge Posner is the preeminent advocate of the doctrine that there is but one valid antitrust goal: the promotion of allocative efficiency.

In the law of tying arrangements, however, Justice Stevens has, to some extent, assumed the leadership position vacated by

---


287. See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 58 (1977), overruling United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); see also Copperweld Corp. v. Independence Tube Corp., 104 S. Ct. 2731, 2745 (1984) (Stevens, J., dissenting). Henry v. A.B. Dick Co., 224 U.S. 1 (1912), which was overruled by Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 518 (1917), was not an antitrust case. See supra notes 59-70 and accompanying text. Part of the reason that Supreme Court majorities are so reluctant to expressly overrule previous opinions may be that they wish to avoid foreclosing an opposite result in the future.

288. See GTE Sylvania, 433 U.S. at 48 n.13; id. at 51 n.18; id. at 53 n.21; id. at 55; id. at 56; id. at 56 n.24 (citing Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 COLUM. L. REV. 282 (1975)).

Justice Black in 1971. Justice Stevens's two tying opinions, *Fortner II* and *Hyde*, have gone far toward undoing Justice Black's extension of the law of tying. Nevertheless, Justice Stevens refused to join the four Republican appointees concurring in *Hyde*, who would have had the Court return to the rule of reason as the sole test to be used in any case involving tying arrangements. Moreover, Justice Stevens thus far has been able to command a majority for his more moderate position. In light of his prior involvement in antitrust law, Justice Stevens's commitment to fairly vigorous antitrust enforcement is not apt to diminish significantly in the future.

The changes in the Court's perceptions, however, should not be attributed solely to changes in the composition of the Court. There are more subtle influences at work. The public, for example, appears to perceive that the legal underpinnings of antitrust have moved too far away from current economic thought and too close to a doctrine that promotes economic inefficiency in the name of political democracy. Such percep-

290. See supra notes 192-97 and accompanying text.

Justice Stevens is usually described as independent or unconventional, and he is not seen as aligned with either of the two conventional groupings of justices on the so-called Burger Court. He was appointed by President Gerald Ford in late 1975 to succeed Justice Douglas, after having served for five years on the Seventh Circuit in Chicago. See Orland, *John Paul Stevens*, in 5 Jusi-

291. 429 U.S. 610 (1977); see supra notes 200-08 and accompanying text.

292. 104 U.S. 1551 (1984); see supra notes 211-81 and accompanying text.

293. See *Hyde*, 104 S. Ct. at 1570 (O'Connor, J., joined by Burger, C.J., Powell and Rehnquist, JJ., concurring); supra text accompanying note 223.

294. Justice Stevens did antitrust work for the government in 1951. He also served on Attorney General Brownell's National Committee to Study the Antitrust Laws during the mid-1950's and engaged in the private practice of antitrust law in Chicago. See Orland, *John Paul Stevens*, in 5 Jusi-

295. This perhaps results primarily from the growth in private treble damage actions which, for the last 20 years or more, have comprised the dominant antitrust enforcement mechanism. Although lawyers for private antitrust plaintiffs have been dubbed by sympathetic justices as "private attorneys general," see, e.g., Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 147 (1968) (Fortas, J., concurring), others view these lawyers as generals leading private armies dedicated not to principled antitrust enforcement, but rather to maximization of damages and hence of their legal fees, see Cofee,
tions can determine the outcome of presidential elections, and it is presidents who appoint Supreme Court justices.

The shift in the judicial sentiment can also be traced to the perceptions of scholars and the manner in which they are expressed. The increasing number of footnotes devoted to citing scholarly writings indicates that the justices at least think that they are influenced by these works. Nor is it surprising that the views of those scholars who believe that the promotion of allocative efficiency is the only legitimate goal of antitrust law are gaining increasing dominance in public, scholarly, and judicial thought. These views have not only been widely publicized, they have been expressed with great clarity and with a force that has matched the writings of great religious thinkers.

Thus, as Professor Lawrence A. Sullivan has written, "Changes and developments in ways of thinking about [antitrust] will be correlated with other developments in national life, as well as with developments in the intellectual universes of economists and others who may contribute to policy development." In this ever-changing world, the debate over the appropriate enforcement of antitrust laws is unlikely to abate; nor are the changes in the law of tying arrangements.

IV. CONCLUSION

The history of the law of tying arrangements has been one of changing tests reflecting changing theories of legitimate application of the antitrust laws. The law has evolved through shifting judicial attitudes, attitudes that sometimes emphasize the contribution of tying arrangements to efficiency and other

Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working, 42 MD. L. REV. 215 (1983); see also L. SULLIVAN, supra note 1, § 249, at 781-82 ("Lawyers drawn from the establishment culture represent corporate America. Plaintiffs' class action lawyers are drawn in substantial numbers, if not predominantly, from the bar's maverick culture.").

296. Compare, for example, the lack of articles cited in Northern Pac., 356 U.S. 1 (1958), to the overabundance in Hyde, 104 S. Ct. 1551 (1984).

297. The respect in which economic analysis is held today is remarkable when one considers that the views of economists historically have been widely disregarded by both Congress and the courts. Thus, while the Sherman Act was under consideration in the late 1880's, most influential economists were of the view that attempts to criminalize and abolish "every . . . combination in the form of trust or otherwise" were either unnecessary, futile, or both. See supra note 9.

298. L. SULLIVAN, supra note 1, § 2, at 12.
times insist that other values, such as preservation of competition, control. It cannot be denied that the Supreme Court opinions developing antitrust law have been principled; the difficulty is that two sets of principles, each at war with the other, exist at any given moment. The law pronounced by the Court depends on which principle reaches the result that, to the majority, seems most just, fair, reasonable, or workable.

In its most recent resolution of a tying case, Jefferson Parish Hospital District No. 2 v. Hyde, the Supreme Court shifted the direction of the law of tying arrangements. This direction, however, is not new to the Court but instead was the law in 1947 when the Court decided International Salt Co. v. United States. Nor is the direction urged by the concurrence in Hyde new; it was the law in 1918 when the Court decided United Shoe I.

Today's debate between advocates of allocative efficiency and those who insist that other factors must enter into the equation reflects arguments that have been voiced in the Supreme Court throughout the history of tying arrangements. This debate has also entered into other branches of antitrust law. For example, in Dr. Miles Medical Co. v. John D. Park & Sons Co., the Court declared resale price-fixing contracts void as against public policy. Justice Holmes stated in dissent:

[T]he most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear. . . . I think that we greatly exaggerate the value and importance to the public of competition in the production or distribution of an article . . . , as fixing a fair price. What really fixes that is the competition of conflicting desires. . . . As soon as the price of something that we want goes above the point at which we are willing to give up other things to have that, we cease to buy it and buy something else. . . . [T]he point of the most profitable returns marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The Dr. Miles Medical Company knows better than we do what will enable it to do the best business. . . . I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get.

299. 104 S. Ct. 1551 (1984); see supra Part III.
300. 332 U.S. 392 (1947); see supra notes 120-26, 212-14, 278-81, and accompanying text.
301. 247 U.S. 32 (1918); see supra notes 71-80, 215, 276-77, and accompanying text.
302. 220 U.S. 373 (1911).
303. Id. at 411-12 (Holmes, J., dissenting). Efficiency arguments run
Justice Holmes's arguments, now almost seventy-five years old, include some of the same points being made by members of the Chicago School in favor of abolishing the per se rule against vertical price fixing. The arguments made today by those opposing the Chicago School were also voiced in early Supreme

throughout Justice Holmes's opinions. Thus, in his dissent in American Column & Lumber Co. v. United States, 257 U.S. 377 (1921), Justice Holmes stressed the advantages in having competitors exchange price information, arguing:

[T]he Sherman Act did not set itself against knowledge—did not aim at a transitory cheapness unprofitable to the community as a whole because not corresponding to the actual conditions of the country. I should have thought that the ideal of commerce was an intelligent interchange made with full knowledge of the facts as a basis for a forecast of the future on both sides.

Id. at 412 (Holmes, J., dissenting). Almost 60 years later, then-Professor Posner put his stamp of approval on Justice Holmes's dissent in American Column & Lumber, assuring students of antitrust that Holmes had "grasped" the economics of competitors' exchanges of price and information. See Posner, Information and Antitrust: Reflections on the Gypsum and Engineers Decisions, 67 GEO. L.J. 1187, 1196 (1979). Professor Posner concluded with the following suggestion:

Consider the exchange of information to be a lawful practice under section 1 of the Sherman Act regardless of the level of concentration or other factors; but, when appropriate, allow the trier of fact to consider exchanges of information, other communications among the parties to an alleged conspiracy, and such other relevant circumstances as the effect on the price level as distinct from the change in the dispersion of prices, as circumstantial evidence of alleged price fixing.

Id. at 1203.

Similarly, in Northern Sec. Co. v. United States, 193 U.S. 197 (1904), Justice Holmes wrote:

There is a natural feeling that somehow or other the [Sherman Act] meant to strike at combinations great enough to cause just anxiety on the part of those who love their country more than money, while it viewed . . . little ones . . . with just indifference. This notion, it may be said, somehow breathes from the pores of the act, although it seems to be contradicted in every way by the words in detail. . . . But . . . [i]n the first place size in the case of railroads is an inevitable incident . . . . In the next place in the case of railroads it is evident that the size of the combination is reached for other ends than those which would make them monopolies. The combinations are not formed for the purpose of excluding others from the field. Finally, even a small railroad will have the same tendency to exclude others from its narrow area that great ones have to exclude others from a greater one, and the statute attacks the small monopolies as well as the great.

Id. at 407-08 (Holmes, J., joined by Fuller, C.J., White and Peckham, JJ., dissenting).

304. In a recent article, then-Professor Easterbrook virtually parroted Justice Holmes's argument:

I want to dispatch a line of argument one hears too often in political discourse. It is that restricted dealing, and especially resale price
Court opinions. For example, in his opinion in United States v. Trans-Missouri Freight Association,\(^{305}\) Justice Peckham stated:

>[I]t is not material that the price of an article be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation for selling the commodities which he once manufactured or dealt in, having no voice in shaping the business policy of the company and bound to obey orders issued by others.\(^{306}\)

maintenance, is bad because it enables manufacturers to jack up the retail price of its products. So it does. . . .

So what? If Russell Stoever wants its chocolates to sell for $20 per pound, it can achieve this easily enough. It may raise the wholesale prices. . . . Every manufacturer may sell what it wants and charge what the traffic will bear. Other manufacturers, perhaps using less chocolate per pound or employing more efficient manufacturing, may sell different goods and charge less. This is competition. Consumers will choose. The question is whether restricted dealing affects price in an anticompetitive way. If manufacturers may affect retail prices by changing wholesale prices or quality, why may they not affect prices through restricted dealing?

Easterbrook, supra note 5, at 141 (emphasis in original); see also R. BORK, supra note 3, at 297 ("[V]ertical price fixing [is] beneficial to consumers and should for that reason be completely lawful. Basic economic theory tells us that the manufacturer who imposes such restraints cannot intend to restrict output and must . . . intend to create efficiency. The most common efficiency is the inducement or purchase by the manufacturer of extra reseller sales, service, or promotional effort"); R. POSNER, supra note 4, at 148-51 (suggesting that vertical price fixing may induce dealers to provide an optimum level of presale services).

305. 166 U.S. 290 (1897).

306. Id. at 324. Similarly, the first Justice Harlan, writing the opinion of the Court in Northern Sec. Co. v. United States, 193 U.S. 197 (1904), refuted a charge that is still heard today. He wrote:

Disaster to business and wide-spread financial ruin, it has been intimated, will follow the execution of [the Sherman Act's] provisions. Such predictions were made in all the cases heretofore arising under that act. But they have not been verified. It is the history of monopolies in this country and in England that predictions of ruin are habitually made by them when it is attempted, by legislation, to restrain their operations and to protect the public against their exactions. . . . In this, as in former cases, they seek shelter behind . . . the constitutional guaranty of liberty of contract. But this court has heretofore adjudged that . . . liberty of contract did not involve a right to deprive the public of the advantages of free competition in trade and commerce.

Id. at 351.
Thus, much of the ideological support for recent changes in the law of tying arrangements and in other areas of antitrust law are not new but instead were considered—sometimes accepted, and sometimes rejected—by Supreme Court majorities in the past. Moreover, it is perhaps more important that these ideas were also considered by the congresses that enacted the antitrust laws. Evidently, Santayana was wrong in his famous aphorism, because the Court, having studied the past, nevertheless seems determined to repeat it, at least in the law of tying arrangements.307

307. See G. SANTAYANA, Reason in Common Sense, in 1 THE LIFE OF REASON 284 (1905) ("Those who cannot remember the past are condemned to repeat it.").