The Antitrust Legacy of Justice William O. Douglas and the Curse of the Curse of Bigness

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I. Introduction

One cannot study the history of antitrust law without running headlong into the opinions of Associate Justice William O. Douglas. In his 36 years on the Supreme Court, he authored 35 majority opinions and nearly as many dissenting or concurring opinions in cases involving antitrust questions or issues. It is quite probable that Douglas authored more antitrust opinions, both for the majority and in dissent, than any Supreme Court justice in history. And since antitrust law is largely case law, it seems axiomatic that Douglas, one of the Court's leading liberals, must have had a significant influence on the development of antitrust law. The question remains, however, whether this influence was positive or negative and, given recent doctrinal changes, lasting.

In teaching the antitrust course for thirty years, I have annually been surprised by the unevenness of the Douglas antitrust opinions. One, United States v. Socony-Vacuum Oil Co., has stood the test of time and become a bed rock of antitrust law. Many more, however, are quite dated and, dare I suggest, result oriented. Certainly Douglas is thought of as one of the antitrust hawks of the Warren Court era, when the government or private plaintiff seemingly always

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1 310 U.S. 150 (1941).

Antitrust law has evolved and changed dramatically over the 27 years since Douglas finally and most reluctantly retired from the Supreme Court. One can almost imagine the good justice rolling in his grave as more and more of his opinions are discarded or simply ignored by the present day Court.

Certainly Justice Douglas' antitrust philosophy can be easily characterized. He firmly believed that “big is bad” and that the Sherman Act was designed to make illegal significant concentrations of economic power, no matter how attained. As a result, he has been characterized as an economic conservative in apparent contrast to his political liberalism. He of course believed in the expansive power of the federal government to regulate the economy and thought that the Sherman and Clayton Acts gave effect to that authority. There is also significant evidence that Justice Douglas believed that a principal aim of antitrust was to protect the viability of small businesses, even at the expense of the consumer. None of the above are exactly mainstream antitrust policy today. However, Justice Douglas did understand the havoc that

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5 This was in stark contrast to his “virtually uncompromising stand in behalf of protection for civil liberties against usurpations by federal and state governments....” G. Edward White, The American Judicial Tradition: Profiles of Leading American Judges 246 (1976)

6 See e.g. Standard Oil Co. v. United States, 337 U.S. 293, 321 (1949) (Douglas, J., dissenting) (“...we can expect that the oil companies will move to supplant [independent stations] with their own stations. There will still be competition between the oil companies. But there will be a tragic loss to the nation. The small, independent businessman will be supplanted by clerks."
competitor collaboration could wreak on a competitive economy, even if he did sometimes take
that notion too far.7

This article will attempt to further define and refine Justice Douglas’ antitrust philosophy
by examining his written opinions and writings. It will then attempt to measure that philosophy's
effect on the Supreme Court during his tenure and its contemporary impact in the context of the
rapidly shifting antitrust doctrine of the last 25 or so years.

II. Biographical Sketch

William O. Douglas was appointed to the Supreme Court from the chairmanship of the
Securities Exchange Commission in 1939 by President Franklin Delano Roosevelt. He was, at
40 years of age, the second youngest person ever appointed to our highest court.8 He would
become the longest serving justice upon his retirement in 1975.

Raised in very humble circumstances in Yakima, Washington. He lost his father at the
age of six. He then contracted polio before working his way through Whitman College in nearby
Walla Walla by holding three jobs so he could send money home. He headed east for law school
at Columbia virtually penniless where, after working his way through law school, he claimed, to
his chagrin, to have graduated only number two in his class.9 He was bitterly disappointed when

7 See e.g. United States v. Container Corp. of America, 393 U.S. 333 (1969). See also

8 Only Joseph Story, who was 32 when he joined the Court in 1811, was younger.

9 Recent biographer Bruce Allen Murphy disputes Douglas' claim about his class rank,
noting that Douglas was not named a James Kent scholar after his first or second years of law
school and was not selected to the Columbia Law Review staff until the middle of his second
year. He also managed to make a grade of "C" in his third year Constitutional Law class. See
Supreme Court Justice Harlan F. Stone, who each year selected a Columbia law graduate as his law clerk, picked the person who had finished first in the class, Al McCormack.  

While in law school he worked as a research assistant for Professor Underhill Moore who had been commissioned to write a treatise by the trade association for the cement industries, one of many trade associations under antitrust attack by the Justice Department. The work involved legal and economic research and analysis as well as travel to interview executives of cement plants in the east. 

After graduation, Douglas went to work for the Wall Street firm of Cravath, deGersdorff, Swaine, and Wood and taught Bankruptcy, Damages and Partnership law as an adjunct professor for Columbia, working himself into exhaustion and plagued by stomach problems. He left after two years to return to practice in his hometown of Yakima, but after only a few unhappy months there he returned to New York to a full-time faculty position at Columbia. Of course, the Columbia law faculty was the center of the legal realism movement which was questioning the underlying basis for judicial decision-making. Douglas resigned after only two years there in protest of University President Nicholas Murray Butler’s hiring of a law school dean, Young B. Smith, without consulting the law faculty. He was quickly recruited to the Yale law faculty by

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11In his memoirs, Douglas described Moore as having “a cutting edge [mind], sharper than any other. . . . [A] year at his feet was a prodigious experience—in the exactitude with which he dealt with minutiae; in the broad dimensions of the practical world where he framed his questions; in his concern with the roots of the law and their modern incidence.” Id. at 145.

12Butler was apparently hostile to the legal realism movement and so appointed a dean with a more traditional view of law and legal education. Id. at 161. Douglas' two years at
its boy-wonder dean, Robert Maynard Hutchins. He taught at Yale for six years, eventually declining Hutchins' invitation in 1930 to move to the University of Chicago when Hutchins became president there. To keep him, Yale appointed him to the prestigious Sterling Professorship of Law. He was but 31 years old.

Columbia have been described as “among the most famously intense and troubled in the history of American law faculties.” William W. Bratton, *Berle and Means Reconsidered at the Century's Turn*, 26 J. Corp. L. 737, 743 (2001).

13 In his autobiography, Douglas reports that Hutchins characterized him as “the most outstanding law professor” in the country when persuading the University of Chicago Board of Trustees to offer Douglas two and one-half times the then $10,000 top law school salary. William O. Douglas, *Go East Young Man: The Early Years* 163-64 (1974).
At Yale, he formed many friendships, including a close relationship with Thurman Arnold, later to become famous as an aggressive and creative Assistant Attorney General for the Antitrust Division of the Department of Justice.\textsuperscript{14} He became a recognized expert in corporate law, bankruptcy, and financial institutions and produced or helped produce seven casebooks in those areas\textsuperscript{15} as well as a bevy of law review articles.\textsuperscript{16} His scholarship “virtually defin[ed] progressive bankruptcy theory in the 1930's.”\textsuperscript{17}

\textsuperscript{14}Arnold was from Laramie, Wyoming, and thus he and Douglas “were conspicuous Westerners in an elite eastern institution.” The two also shared a “passion for the regulatory side of the law,” unlike most of their Yale colleagues whose focus continued to be the courts and the common law. Spencer Weber Waller, \textit{Thurmond Arnold, A Biography} 48 (2005). On Arnold’s impact on the Antitrust Division see, e.g., Suzanne Weaver, \textit{Decision to Prosecute: Organization and Public Policy in the Antitrust Division} 28-30, 32-36 (1977).

\textsuperscript{15}His casebook on the law of financing business institutions contained a substantial section on the law of mergers and acquisitions. See William O. Douglas & Carrol M. Shanks, \textit{Cases and Materials on the Law of Financing of Business Units} 788-844 (1931).


\textsuperscript{17}David A. Skeel, Jr., \textit{Vern Countryman and the Path of Progressive (And Populist) Bankruptcy Scholarship}, 113 Harv. L. Rev. 1075, 1079 (2000) and William W. Bratton, note 12 supra, at 744 (2001)
Douglas took a one-semester leave in 1934 to conduct a study for the newly created Securities and Exchange Commission on bankruptcy reorganizations which laid the groundwork for an extensive revision of federal bankruptcy law.\textsuperscript{18} Despite stated intentions to the contrary, he would never return to Yale. His rise to national prominence in the New Deal would be meteoric.

At the SEC Douglas worked for Joseph P. Kennedy, the commission's first chairman. They were like-minded about a no-nonsense approach to the commission's enforcement responsibilities and became life-long friends and allies.\textsuperscript{19} With Kennedy's influence, President Roosevelt appointed Douglas as an SEC commissioner in 1936 and then as chairman one year later.\textsuperscript{20} During this time, he became a member of the President's inner circle, one of his Sunday night poker companions, and an unofficial economic adviser.

During his tenure as chairman, he took the unprecedented step of taking over the New York Stock Exchange for a time after disclosures that the former exchange president had misappropriated funds. Earlier he had refused the demand of the exchange to close during a steep sell-off period. He organized the SEC into a viable regulatory agency and is generally thought to have been an excellent administrator.\textsuperscript{21}

In early 1939 the Yale Law School selected Douglas as its next dean. He expected to

\textsuperscript{18} See id. at 744-50.  


\textsuperscript{20} See, e.g., Bruce Allen Murphy, supra note 9, at 132-33.

\textsuperscript{21} See James F. Simon, supra note 19, at 165-89. See also Vern Countryman, Justice Douglas: Expositor of the Bankruptcy Law, 16 UCLA L. Rev. 773 (1969).
return to New Haven to begin his duties later that year. On February 13, however, Justice Louis Brandeis retired from his seat on the Supreme Court. President Roosevelt had earlier announced that the next Supreme Court vacancy would go to the West Coast, which had not had a Supreme Court justice appointed for 14 years. Secretary of the Interior Harold L. Ickes was a chief advocate for Douglas and, after establishing his bona fides as a westerner, Douglas got the nomination. The Senate confirmed him by a vote of 62 to 4, with the dissenters asserting that he was a reactionary who was too friendly to Wall Street. It all happened very quickly: Douglas was nominated on March 19th, he was confirmed on April 4th, and he took his seat on the Court on April 17th.22

He came close to leaving the Court in 1944 for the Democratic vice-presidential nomination. Roosevelt dropped incumbent Henry Wallace from his ticket and the choice came down to Harry Truman and Douglas. The convention chose Truman who ascended to the presidency when FDR died in 1945. Truman offered Douglas the vice-presidency on his ticket in 1948 but Douglas declined because he believed Truman would lose the election.23 That was his last dalliance with elective office.

22The speed of the confirmation process seems all the more remarkable today when one recalls that the Douglas nomination came only two years after FDR’s failed court-packing plan.

23Douglas was widely reported to have said, “I don’t want to play second fiddle to a second fiddle.” See Bruce Allen Murphy, supra note 9, at 254-55.
He became a leader of the Warren Court uprising in the 1960's and due to his long recognized expertise with corporations and business, authored many antitrust opinions during that period. In 1970, House Republican leader Gerald Ford, with the active support of President Richard Nixon, instigated a Judiciary Committee investigation of Douglas's relationship to an anti-Communist foundation, with a view toward impeachment. The inquiry was certainly a politically motivated act to rid the Court of its leading liberal and give Nixon another appointment to the Court. The committee inquiry exonerated him and the scheme otherwise backfired because although Douglas had been seriously considering retirement prior to the investigation, he would stay on the Court five more years.24

Douglas continued to serve on the Court until failing health from a debilitating stroke forced his retirement on November 12, 1975 after 36 ½ years on the Court.25 He died on January

24Douglas' private life was controversial with four marriages, with two in his 60's to women in their early 20's. After his fourth marriage an Alabama congressman called for a House investigation of his character, but nothing came of it. See New York Times, obit Jan. 20, 1980.

25 Although physically debilitated by a stroke suffered on New Year's Eve 1974, Douglas insisted that his resignation was a necessary formality but that he had not retired and was still a member, the tenth member, of the Supreme Court. He further contended, unsuccessfully, that he was still a voting member of the Court on all cases pending when he resigned, even writing and circulating an opinion in a campaign finance case. See James F. Simon, note 19, supra, at 452-54.
19, 1980 at the age of 81.

III. Douglas and Legal Realism

Douglas was a product of the legal realist movement largely emanating from Yale and Columbia in the 1920s and 1930s. Surprisingly, viewed from today when constitutional and social issues dominate the legal landscape, the early realists mostly focused on and impacted private law areas like corporate and commercial law. At least one commentator has argued that by the late 1930's, as legal realists were moving into positions of real executive and judicial influence, antitrust became the principal vehicle for economic and social reform for some, with Douglas chief among the reformers.

26 See generally Morton J. Horwitz, The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy 169-92 (1992); Laura Kalman, Legal Realism at Yale, 1927-1960 (1986); and Wilfred J. Rumble, Jr., American Legal Realism (1968). Although Douglas did not specifically refer to himself as a realist in his autobiography, he noted that “at Columbia, revolt against the traditional approach to law was underway. . . . I joined their ranks.” William O. Douglas, Go East, Young Man 159-60 (1974). As early as 1931 Karl Llewellyn, one of the leading realists, identified Douglas as one of the movements most dedicated proponents. Karl Llewellyn, Some Realism About Realism—Responding to Dean Pound, 44 Harv. L. Rev. 1222, 1227 (1931).

27 Leading realists Underhill Moore, Wesley Sturges and Karl Llewellyn were all commercial law scholars. See Kalman, note 26 supra, at 20-35 and William Twining, Karl Llewellyn and the Realist Movement 128-40 (1973) (describing Llewellyn’s transformation of sales law).

Legal Realism was in large measure a rejection of the Langdellian approach which sought to discover fixed, abstract principles from the caselaw and apply them in an ordered, predictable way to new cases.\textsuperscript{29} The Langdellian view prized accurate fact finding and the analytically precise interpretation and application of legal principles.\textsuperscript{30} To Justice Douglas the Langdell “so-called case method” was mere “library law” that “grossly oversimplifies and distorts the nature of the law” by ignoring “other psychological, political, economic, business, [and] social factors” that should influence the law and the way legal decisions are made.\textsuperscript{31}

Realists tried to close the gap between “law in books” and “law in action.”\textsuperscript{32} Douglas' principal approach was to endorse “functionalism” while debunking the more traditional “conceptualism” approach to legal reasoning. Functionalism emphasized facts over legal principles. Douglas asserted, for example, that a corporation is “not a thing. It is a method. It defies definition when removed from the background of the purpose attempted to be accomplished and the manner of accomplishing it.”\textsuperscript{33} He argued that “analysis has been so

\textsuperscript{29} See, e.g., Thomas C. Grey, \textit{Langdell's Orthodoxy}, 45 U. Pitt. L. Rev. 1, 11 (1983). The “heart” of realism has been broadly described as “an effort to define and discredit classical legal theory and practice and to offer in their place a more philosophically and politically enlightened jurisprudence.” William Fisher, Morton Horowitz, and Thomas Reed, American Legal Realism 3-4 (1993).

\textsuperscript{30} See e.g. Howard Ball & Phillip J. Cooper, Of Power and Right: Hugo Black, William O. Douglas and America's Constitutional Revolution 41 (1992).


\textsuperscript{32} See Laura Kalman, note 26, \textit{supra} at 9 quoting Roscoe Pound, \textit{Law in Books and Law in Action}, 44 American Law Review 12 (1910) (Pound described as a “nonrealist”).

\textsuperscript{33} William O. Douglas & Carroll M. Shanks, \textit{Insulation from Liability through Subsidiary Corporations}, Yale L.J. 194 (1929).
conceptualized that the attention is too frequently focused on the device used rather than the function which the device is intended to perform.\textsuperscript{34} He believed that a functional approach would increase legal certainty and thus efficiency by focusing on the law's operational effects rather than static rules.\textsuperscript{35}

Douglas believed that the functional approach depended on facts, so while an academic he conducted empirical research to collect data about business failures to set the stage for urging reform of the bankruptcy laws.\textsuperscript{36} He also applied functionalism to his courses and casebooks, focusing on the life cycle common to every business association – beginning with organizing and financing an enterprise, moving to managing it, and concluding with bankruptcy and reorganization.\textsuperscript{37} The casebooks required a complete retooling of the corporate law curriculum

\textsuperscript{34} William O. Douglas, \textit{A Functional Approach to the Law of Business Associations}, 23 Illinois L. Rev. 673, 675 (1929).


\textsuperscript{37} \textit{See} William O. Douglas & Carol M. Shanks, Cases on Business Units – Losses, Liabilities, and Assets (1932); Douglas & Shanks, Cases on Business Units – Management (1931); Douglas & Shanks, Cases on the Law of Finance of Business (1931); Douglas & Shanks, Cases and Materials on the Law of Corporate Reorganization (1931).
into a sequence of courses titled losses, management and finance. The academic world, even populated by Realists, was not ready for such a radical change. The casebooks found virtually no takers and left little legacy.

The Court Douglas joined in 1939 was controlled by New Dealers, of whom Douglas was one. The New Deal was of course populated by legal realists intent on political reform and economic recovery. It fostered the federal government's authority to regulate business as it deemed necessary, but at least early on antitrust and competition were not prominent tools utilized to combat the Depression. In fact, scholars have described the entire history of the New Deal and competition as a study in contradiction.

38 See Laura Kalman, note 26 supra, at 85-86.

39 Id. at 86-87 (1986).

40 See Barry Cushman, Rethinking the New Deal Court, 80 Va. L. Rev. 201 (1994).


43 The early New Deal emphasized the National Industrial Recovery Act (NIRA), which was intended to restrict production and raise prices, and the promulgation of industry codes typically sought to control prices, prevent price discounting, legalize open price systems, limit production, and minimize non-price competition. See Charles R. Geisst, Monopolies in America 140-43 (2000); Alan Brinkley, The End of Reform: New Deal Liberalism in Recession and War
had doubts about the value of unfettered competition.\textsuperscript{44} Only with Roosevelt's controversial appointment of Thurman Arnold in 1938 to head the Antitrust Division of the Department of Justice, did the pendulum swing and antitrust begin to be a force to be reckoned with.\textsuperscript{45}

Although Justice Douglas is often viewed as perhaps the most activist judge in our history, it would be wrong to assume that the new justice came to the Court with that predisposition. For one thing, judicial activism was precisely what President Roosevelt wished to avoid. His New Deal social legislation had frequently run headlong into the conservative activism of the existing Court, which delighted in striking down his New Deal policies on constitutional grounds. Thus, Roosevelt choose for his first nominations to the Court men who had promoted and been engaged in New Deal policies.\textsuperscript{46}

Further, the evidence suggests that early on Douglas indeed did exercise judicial


\textsuperscript{45} See Spencer Weber Waller, \textit{The Antitrust Legacy of Thurman Arnold}, 78 St. John's L. Rev. 569 (2004); Wilson D. Miscamble, \textit{supra} note 44.

\textsuperscript{46} Roosevelt's first four nominations were New Deal Senator Hugo Black (1937), Solicitor-General Stanley Reed (1938), Harvard law professor and presidential adviser Felix Frankfurter (1939) and chairman of the Securities and Exchange Commission Douglas (1939).
restraint. That restraint was surprisingly but arguably consistent with his Realist predilections. Douglas believed that judging was inescapably subjective. Therefore, restraint was necessary to prevent judges from imposing their own values and wills on democratically-elected officials. Otherwise, judges would be intruding on the responsibilities of the executive and legislative branches of government. Of course, judicial restraint is much easier when the judges in fact agree with the social and regulatory agendas of the executive and legislative branches. President Roosevelt selected New Dealers for the Court for expressly that purpose. But as the substance of the Court’s docket changed after World War II, “Douglas found the lure of judicial activism irresistible.”

True to his realist's roots, during his long tenure on the Court, Justice Douglas adapted and evolved, as the nation also changed dramatically after World War II with the first steps towards integration and then the rampant excesses of McCarthyism. He joined the Court as an expert in corporate finance and bankruptcy and was not, initially, at the frontiers of the First Amendment. He became, of course, the most ardent civil libertarian of his time and, the

47 See, e.g., Davis v. United States, 328 U.S. 582 (1946) (upholding search without a warrant); United States v. Classic, 313 U.S. 299, 336 (1941) (dissenting from majority's application of federal law to state primary election fraud); McCarroll v. Dixie Lines, 309 U.S. 176, 188-89 (1940) (dissenting from majority's declaring Arkansas state tax of gasoline unconstitutional).


49 See id. at 442.


51 See L.A. Powe, Jr., Evolution to Absolutism: Justice Douglas and the First
evidence suggests, shifted dramatically in other areas such as tax and perhaps labor law.\footnote{See Bernard Wolfman, Jonathan L.F. Silver & Marjorie A. Silver, Dissent Without Opinion: The Behavior of Justice William O. Douglas in Federal Tax Cases (1975) (suggesting a profound shift towards the taxpayer and perhaps in labor law as well).} One former Douglas law clerk and close observer has suggested that Douglas may have changed more while on the Court than any other Supreme Court justice with a lengthy tenure.\footnote{See L.A. Powe, Jr., note 51 supra, at 410.}

In contrast, however, and perhaps not surprisingly given his early academic and government work in bankruptcy and securities, there seems to be less change in those fields.\footnote{See John W. Hopkirk, \textit{William O. Douglas – His Work in Policing Bankruptcy Proceedings}, 18 Vand. L. Rev. 663, 698 (1965)(“William O. Douglas’ major contributions to the field of bankruptcy law are marked by a high degree of continuity in approach and in solutions.”). \textit{See also} Vern Countryman, \textit{Justice Douglas: Expositor of the Bankruptcy Law}, 16 UCLA L. Rev. 773 (1969) and Richard W. Jennings, \textit{Mr. Justice Douglas: His Influence on Corporate and Securities Regulation}, 73 Yale L.J. 920 (1964).} And it would appear from this study that Justice Douglas was amazingly and predictably consistent in the antitrust field, even though the quality of his opinions was uneven at best.

Douglas’ antitrust philosophy was heavily influenced by the man he replaced on the Court, Louis Brandeis. Oliver Wendell Holmes and Brandeis were Douglas’ judicial heroes, and Brandeis, Douglas claimed, was his mentor.\footnote{See Bruce Allen Murphy, \textit{supra} note 9, at 183, 188. Professor Murphy suggests that Douglas’ claimed relationship with Brandeis before Douglas succeeded him on the Court was overblown or false. \textit{Id.} at 574.} Douglas himself acknowledged that Brandeis “helped crystallize my views” on “the free enterprise system.”\footnote{William O. Douglas, Go East, Young Man 306 (1974). \textit{See also} William O. Douglas, An Almanac of Liberty 187-89 (1954).} Brandeis influential book, \textit{Other Amendment}, 74 Colum. L. Rev. 371 (1974).
People’s Money,\textsuperscript{57} became Douglas’ economic and political bible.\textsuperscript{58} In a 1936 letter written to Brandeis while Douglas was chairman of the SEC, Douglas described \textit{Other People’s Money} as a “monumental work” which “has been a guiding star and inspiration . . .”\textsuperscript{59} References to Brandeis would make their way into Douglas judicial opinions more than once.\textsuperscript{60}

Central to Brandeis’ economic philosophy was “the curse of bigness” which posited that nothing good and everything bad came from large corporations and unchecked corporate growth. To Douglas, this curse was “a blight on the industrial world.”\textsuperscript{61} His assumption was that companies gained size “not in the interest of efficiency but largely in the interest of monopoly.”\textsuperscript{62} According to Douglas, large companies cannot be run efficiently because they outgrow the competence of management to manage effectively.\textsuperscript{63}

Of course, both of those premises are the polar opposite of much of today’s Chicago School philosophy that growth and even monopoly power is often achieved through innovation, the development of new and better products, and because the dominant firm is simply more

\begin{itemize}
\item \textsuperscript{57} Louis D. Brandeis, Other People’s Money (1913).
\item \textsuperscript{58} See, e.g., Leon Epstein, \textit{Economic Predictions of Justice Douglas}, 1949 Wis. L. Rev. 531, 560
\item \textsuperscript{61} William O. Douglas, An Almanac of Liberty, \textit{supra} note 56, at 187.
\item \textsuperscript{62} \textit{Id.}
\end{itemize}
efficient than its competition. Thus, the emphasis, they assert, is that antitrust should focus on market performance rather than market structure.  

Douglas, however, thought it was just a bad idea, as a matter of policy, to permit such wealth and financial power in the hands of so few. In his view, the decisions of those few could tip the national scales towards prosperity or depression. Further, Douglas cautioned that unabated bigness threatened our capitalistic and free enterprise system because it threatened competition, individual initiative and freedom of opportunity. He believed it would transform “a nation of shopkeepers” into “a nation of clerks” which would stifle individual initiative and independence.

Even beyond that, Douglas believed that large corporations fostered dishonesty and “resulted in ruthless sacrifices of human values.” They are so impersonal and remote from their investors, Douglas argued, that management feels free to serve themselves rather than the enterprise they work for. “There can be no question that the laxity in business morals has a direct relationship to the size of business.” One can almost see him saying “I told you so” after the

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66 Id.

67 Id. See also William O. Douglas, An Almanac of Liberty, supra note 56, at 187.


69 Id. at 16.
recent Enron, WorldCom and other corporate scandals.  

Douglas was also heavily influenced by the iconoclastic economist and social critic Thorstein Veblen who viewed financial institutions and investors with great skepticism and distrust. So did Douglas, characterizing as “financial termites” those opportunists who prey on other people’s money and destroy the legitimate function of finance and investment. Among the several factors that provided hospitable conditions for the termites were the curse of bigness and the centralization of financial power.

Brandeis and Veblen undoubtedly influenced Douglas’ efforts to reform Wall Street in the 1930s, where he sought to protect legitimate investors and reduce the influence of Wall Street bankers and lawyers, as well as his views on the proper goals of the antitrust laws. And while the New Deal is famous (infamous?) for the expansion of the federal government as a cure for society’s ills, Douglas seemed to resist direct government intervention in both areas. He believed in the merits of capitalism, which was deeply rooted from his boyhood in Yakima, but

But of course, many huge corporations, even monopolists, are free from scandal and many smaller companies are not.


William O. Douglas, Democracy and Finance, supra note 31, at 1, 8, 44.

Id. at 14-15.

See, e.g., David A. Skeel, Jr., Vern Countryman and the Path of Progressive (and Populist) Bankruptcy Scholarship, 113 Harv. L. Rev. 1075, 1092 (2000) (“Douglas's vision for progressive reform meant breaking the grip of the Wall Street bankers and lawyers and protecting investors – not direct government control.”).
was suspicious of its manifestations and excesses. His belief in individual initiative and
opportunity fostered a view that the antitrust laws should protect competitors. If the antitrust
laws couldn't do the job, then he viewed government regulation as necessary to cure the curse of
bigness.

IV. Price Fixing

It is no small irony that Justice Douglas' first antitrust opinion was arguably his best and
was certainly his most influential. It came in United States v. Socony-Vacuum Oil Co. when
Douglas had been on the Court scarcely a year, and involved a significant government

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75 See, e.g., Leon Epstein, supra note 58, at 538.

76 Id. at 560.

77 See, e.g., Vern Countryman, Justice Douglas’ Contribution to the Law - Business
contribution to antitrust was his 1940 opinion in the Socony-Vacuum Oil Co. case . . . That
opinion . . .laid the foundation for the development of an effective antitrust policy for the last
three decades. . .”). See also Rudolph J. R. Peritz, supra note 42, at 173 (describing Socony-
Vacuum as “[p]erhaps the best known and most ruthless evocation of the consumer.”).

78 310 U.S. 150 (1941). Thurman Arnold, in his second year as head of the Antitrust
Division, argued the appeal himself. Arnold, of course, would become legendary as the Antitrust
Division chief who transformed the division and greatly increased government enforcement of
antitrust. See Spencer Weber Waller, The Antitrust Legacy of Thurman Arnold, 78 St. John's L.
Rev. 569 (2004). He was also Douglas's former colleague, drinking buddy and neighbor when
the two taught at Yale together in the early 1930's and remained one of Douglas's closest friends
in Washington. See Bruce Allen Murphy, supra note 9, at 81, 91-92, 507; James F. Simon, supra
note 19, at 116-19, 179 n., 229-30; William O. Douglas, Go East Young Man - The
Arnold as "a brilliant lawyer and wild and wonderful companion."

One of the ironies of Socony-Vacuum is that Douglas and Arnold, two former New
Dealers, were so instrumental in its decision which dramatically cut against the underlying
policies of the National Recovery Act and the New Deal. See Spencer Weber Waller, supra note
14, at 98.
enforcement action against eight major oil companies accused of conspiring to increase the so-called spot market price for gasoline. The defendants sold large amounts of gasoline to jobbers and in 80 percent of those transactions the price was dependent on the spot market price. An oversupply of gasoline, however, resulted in smaller independent refiners dumping surplus or distress gasoline on the market, significantly reducing the spot market price.

To remedy the situation, the defendants agreed to purchase distress gas from the independents to stop it from affecting the spot market price. Pursuant to the conspiracy, each defendant had “dancing partners,” independent oil companies assigned to the defendants for the purchase of their distress gasoline.

Justice Douglas' recitation of the complex facts was considerably more detailed, forming a substantial part of his nearly 100 page opinion. Although the law was anything but settled,

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79 The case had a long, tortured history. The original indictments were brought in late 1936 and encompassed much of the oil industry. After a number of guilty and nolo contendere pleas, 26 companies and 46 individuals went to trial. Over 100 lawyers represented the defendants. The trial court dismissed the case against ten companies and 16 individuals. The remaining defendants were found guilty by the jury, although the trial judge granted new trials to some of the defendants and dismissed the charges against some others. Socony-Vacuum Co., 310 U.S. at 165 n.1. On appeal, the Seventh Circuit granted new trials to all the remaining defendants on the grounds that informal arrangement was not illegal per se and that the trial judge had thus given improper jury instructions as well as improperly excluding much of the defendants' proffered evidence. United States v. Socony-Vacuum Oil Co., 105 F.2d 809, 832-33 (7th Cir. 1930), rev'd, 310 U.S. 150 (1940).

80 Id. at 179-80.

81 Justice Roberts, dissenting, observed that “the opinion fully and fairly sets forth the facts proved at the trial, and to its statement nothing need be added.” 310 U.S. at 255. Douglas' former colleague at Yale, Walter Hamilton, was more eloquent in his stylistic praise of the opinion:

“The Court may insist upon a clean-cut separation between “the recitation of facts” and the"conclusions of law"; and Mr. Justice Douglas may, in an elaborate opinion, which is virtually a Papal Bull to the bishops of the judicial dioceses, give a superb demonstration
Douglas boldly declared the defendant's scheme unlawful per se, reversing the Seventh Circuit Court of Appeals in a 5-2-2 opinion (Chief Justice Hughes and Justice Murphy not participating).

In doing so, Douglas made it clear that per se price fixing included any agreement or combination formed to affect prices, even if the agreement did not fix a specific or uniform price.82 Thus, a conspiracy that "tampers with the price structure" is per se unlawful.83 The defendants attempt to stabilize the spot market price by reducing oversupply in effect created a price floor which was illegal price fixing. Douglas rejected any notions of reasonableness or the elimination of so-called competitive evils, noting that to do so would open the door to a reasonableness argument in every price fixing case, thus emasculating the Sherman Act, which he regarded as Congress’ "charter of freedom."84

Although these notions are well settled today, they are so largely because of Socony-Vacuum. At that time, United States v. Trenton Potteries Co.85 was the strongest horizontal price fixing precedent extant, but had fallen short of establishing an unequivocal per se rule primarily because the defendants' collectively shared 82 per cent of the market. Although the

82 310 U.S. at 222, 223 ("Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. . . .Under the Sherman Act, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se.").

83 Id. at 224.

84 Id. at 220-21.

85 273 U.S. 392 (1927).
Trenton Potteries Court rejected defendant’s reasonable price defense, it did limit its condemnation to “those controlling in any substantial manner a trade or business.” Further, the conspiracy involved “uniform” prices (prices fixed literally and specifically), rather than the type of collective action in Socony-Vacuum which merely influenced prices by the removal of part of the market supply.

Further, at the time of Socony-Vacuum Justice Douglas had the inexplicable Appalachian Coals, Inc. v. United States case, decided only seven years earlier, to contend with. There, in an industry plagued with excess capacity, 137 coal producers accounting for 12% of the national production and up to 75% of the regional market formed an exclusive selling agent to sell their coal “at the best prices obtainable and, if all cannot be sold, to apportion orders upon a stated basis. . . .” Although the defendant apparently sought government approval before commencing operations, not surprisingly, the Antitrust Division responded by obtaining an injunction, asserting that the plan would eliminate competition among the individual coal producers and substantially affect the price of bituminous coal.

The Supreme Court, in an 8-1 opinion written by Chief Justice Hughes, reversed the

86 Id. at 397.

87 Id. at 398. See also Lawrence A. Sullivan, Handbook of the Law of Antitrust 183 (1977). Professor Sullivan also notes that while Trenton Potteries rejects reasonableness as a defense to price fixing, it does not exclude the possibility that other, non-competitive societal goals might sometimes weigh in as a defense. Id. at 184.

88 288 U.S. 344 (1933).

89 Id. at 358.

district court's injunction. It refused to concede that defendants' plan would fix prices and held that the government had failed to establish that any affect on prices would be “detrimental to fair competition.” To justify its conclusion, the Court referred to *Trenton Potteries*, where the defendants had collectively dominated the market, to distinguish the situation before it. The Court, however, did leave itself an escape clause, holding that since the case was tried in advance of implementation of defendants' scheme, the government could return to court if their actual operation proved to be an undue restraint of trade.

Thus, in writing the *Socony-Vacuum* decision, Justice Douglas was faced with the seven year-old *Appalachian Coals* decision with its clear interpretation that *Trenton Potteries* was limited to situations in which the alleged price fixers dominated the market. And while *Appalachian Coals* is today often written off as an outgrowth of the New Deal's National Recovery Act response to the Great Depression, *Socony-Vacuum* was born of the same era in a likewise fundamental fuel supply industry with an identical problem, overcapacity for the present

91 Justice McReynolds dissented but did not write an opinion. 288 U.S. at 378.

92 *Id.* at 373. The Court went on to say that “[a] cooperative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities.” *Id.* at 373-74.

93 *Id.* at 375. It also ruled that the elimination of competition among the 137 producer defendants was not sufficient to violate Section One since most of the coal that defendants produced was sold outside their region where they faced additional competition. *Id.* at 375-76.

94 *Id.* at 377-78.

Although the conspiratorial “solution” in the cases differed, both involved plans designed to collectively remove excess supply from the market.

Thus, one might assume the second youngest man ever appointed to the Supreme Court might be reluctant to draft such a sweeping opinion, given Appalachian Coals and the deference such a junior justice would seemingly give his new brethren. Of course, one making that assumption would be both naive and ignorant of New Deal politics. Much had happened in the intervening seven years between the Appalachian Coals and Socony-Vacuum decisions. The Franklin Roosevelt presidency had inherited a Supreme Court occupied by Justices Willis Van Devanter, Pierce Butler, James C. McReynolds and George Sutherland whom together would come to be known as “the Four Horsemen” for their ironclad and uniform opposition to the legislative reforms of the New Deal. Their obstinace precipitated Roosevelt's infamous Court-packing plan which went up in smoke in 1937. As it turned out, however, all was not lost as, through normal attrition, President Roosevelt was able to appoint Hugo Black in 1937 to succeed the retiring Willis Van Devanter and Felix Frankfurter and Douglas in 1939 to replace

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96 Indeed in both cases the defendants sought government assistance to develop and initiate their plans to reduce serious oversupply problems as part of the New Deal's National Recovery Act. Compare Appalachian Coals, Inc. v. United States, 288 U.S. 344, 364-65 (1933) with United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 171-73 (1940). In Socony-Vacuum Douglas flatly rejected the argument that the government's (Petroleum Administrative Board) knowledge or even acquiescence in the “dancing partner” scheme was a defense. Id. at 225-28.


Justices Cardozo and Brandeis, respectively.\textsuperscript{99} Thus, began what is widely referred to as “the Judicial Revolution.”\textsuperscript{100}

In writing the sweeping \textit{Socony-Vacuum} opinion, Douglas did have to deal with \textit{Appalachian Coals}. He did not do so very convincingly, although that is not to say anyone else could have done better in dealing with that aberrant decision. According to Douglas, the cases had little in common except for “the presence in each of so-called demoralizing or injurious practices.”\textsuperscript{101} He characterized the collective action in each as “quite divergent” since the \textit{Appalachian Coals} plan “was not designed to operate vis-a-vis the general consuming market and to fix the prices on that market.”\textsuperscript{102} He further characterized the \textit{Appalachian Coal} plan as

\begin{itemize}
\item \textsuperscript{99} One Douglas biographer observed that by the time Douglas was sworn in on April 17, 1939, “it was clear that Roosevelt had lost the Court-packing plan but won the Court.” James F. Simon, \textit{supra} note 19, at 199.
\item \textsuperscript{100} See Walter H. Hamilton and George D. Braden, note 81, \textit{supra}. Of course, most of the attention on the “new” Court concerned its expansion of civil liberties, shift in Constitutional theory, and expansion of the role of the federal government. See e.g. Vincent M. Barnett, Constitutional Interpretation and Judicial Self-Restraint, 39 Mich. L. Rev. 213 (1940); Kenneth C. Davis, Revolution in the Supreme Court, 166 Atlantic Monthly 85 (1940); Thomas R. Powell, Changing Constitutional Phases, 19 B.U. L. Rev. 509 (1939); and Frank J. Hogan, Important Shifts in Constitutional Doctrine, 25 A.B.A. J. 629 (1939). \textit{See also} Gerald T. Dunne, note 98 \textit{supra}.
\item \textsuperscript{101} \textit{Socony-Vacuum Oil Co.}, 310 U.S. at 216.
\item \textsuperscript{102} \textit{Id.} Justice Douglas’ nod to consumers in attempting to distinguish \textit{Appalachian Coals} is not without irony since he so often sought to protect competitors, particularly small inefficient ones, at the ultimate expense of consumers. \textit{See, e.g.}, Albrecht v. Herald Co., 390 U.S. 145, 154 (1967) (Douglas, J., concurring); White Motor Co. v. United States, 372 U.S. 253 (1963); Standard Oil Co. of Calif. v. United States, 337 U.S. 293, 315 (1949) (Douglas, J., dissenting); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948) and text accompany notes 485-508, \textit{infra}.
\end{itemize}
“not only incidental but also highly conjectural" because it was entirely prospective.103

Of course, these are at best make-weight distinctions. It is impossible to explain how a scheme to remove distress coal from the supply of coal to be sold to coal consumers such as public utilities differs in any meaningful way from a scheme to remove distress gasoline from the supply of gasoline sold to jobbers or middlemen. Can the effect on the “general consuming market" for gasoline somehow differ from that for coal? Further, the so-called prospective nature of the coal scheme is a distinction without a difference. Douglas was happy to apply basic economic analysis, not to mention general common sense, to the facts of Socony-Vacuum. If part of the supply is removed from a market, the price, given constant demand, will tend to increase. Application of the same fundamental truths in Appalachian Coals would have led inalterably to the same foolproof prediction.104

It is no little irony that Douglas' Socony-Vacuum opinion effectively overrules, not distinguishes Appalachian Coals.105 In reality, Justice Douglas dismantled the “excessive" competition argument accepted by the Court in Appalachian Coals.106 In doing so, he harkened back to the early cartel cases such as Trans-Missouri107 and Addyston Pipe & Steel108 in which

103 Socony-Vacuum Oil Co., 310 U.S. at 216.

104 In Appalachian Coals the whole reason for the plan was to reduce supply and eliminate "destructive competition" between 137 coal producers. 288 U.S. at 359.

105 Accord Stephen F. Ross, supra note 95, at 131.

106 Douglas noted that every cartel could proffer a ruinous competition justification and flatly rejected the notion that competition could be sufficiently “ruinous" to be against the public interest as embodied in the Sherman Act. Socony-Vacuum Oil Co., 310 U.S. at 221.

the Court had early on rejected ruinous competition defenses in favor of the free market.109 According to Douglas, if allowed, competitive abuses would be proffered as a justification for every price fixing conspiracy, in direct contradiction to the free market system underlying the philosophy of the Sherman Act.110

Justice Douglas, however, was not content to end with a reaffirmation of *Trans-Missouri* and *Addyston Pipe & Steel*. Instead, in dicta in his now famous footnote 59 he made it clear that the per se rule for price fixing did not require a showing of market power or dominance.111 With this dicta, Douglas usefully closed the door left ajar in *Trenton Potteries*.112 He did not stop there, however, but went on to say that a conspiracy that has the purpose or intent to affect prices is all that is necessary for Sherman Act condemnation, even where no “overt act” or actual affect is shown.113 Thus, a mere conspiracy to fix prices, as that term is broadly defined in the opinion, violates Section 1 even if effect is lacking.

As a result of the footnote 59 dicta, the per se rule for price fixing is both simplified and


109 *Trans-Missouri Freight Ass’n*, 166 U.S. at 332; *Addyston Pipe & Steel Co*, 85 Fed. at 283.

110 *Socony-Vacuum Oil Co.*, 310 U.S. at 220-221.

111 *Id.* at 224 n.59. *See also*, e.g., E. Thomas Sullivan & Jeffrey L. Harrison, Understanding Antitrust and Its Economic Implications 130 (4th ed. 2003).

112 *See* text and accompanying notes 93-94, *supra*.

113 “... a conspiracy to fix prices violates Sec. 1 of the Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective. ...” 310 U.S. at 224 n.59.
significantly expanded.\textsuperscript{114} Proof of market power is dispensed with and either a purpose (or intent) to fix prices or a purpose and effect on prices brings on the per se rule.\textsuperscript{115}

With the broad, sweeping dicta of footnote 59, Justice Douglas began to sow the seeds of a reputation as an activist judge. Douglas could have written the \textit{Socony-Vacuum} decision by reference to \textit{Trenton Potteries, Trans-Missouri,} and \textit{Addyston Pipe \\ & Steel} and by distinguishing \textit{Appalachian Coals}, as he unconvincingly tried to do. The only doctrinal expansion necessary to support the result in the case had to do with expanding the definition of price fixing beyond literal or actual fixed prices.

\textsuperscript{114} \textit{See, e.g.}, Spencer Weber Waller, Antitrust and American and American Business Abroad Today, 44 DePaul L. Rev. 1251, 1256 (1995) characterizing footnote 59 as “formulating the strictest possible per se condemnation of agreements between competitors affecting the pricing mechanism.”

\textsuperscript{115} That leaves so-called effect only cases, where there is no proof of purpose or intent to fix prices, as the only possible circumstances for application of the rule of reason and consideration of justifications for the restraint. \textit{See e.g.} Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979) \textit{and} National Society of Professional Engineers v. United States, 435 U.S. 679 (1978).
In subsequent decisions, Douglas reaffirmed his expansive interpretation of price fixing.\textsuperscript{116} In his view, “[p]rice fixing in any form is perhaps the most powerful of all inducements for abandonment of competition.”\textsuperscript{117}

He expressed similar sentiments in United States v. National Association of Real Estate Boards where the Court considered whether real estate commissions fixed by a real estate board were simply fees or could be considered wages and thus under the labor exemption.\textsuperscript{118} Douglas, writing for a six judge majority with two judges not participating, ruled that price fixing prohibitions applied to services as well as goods and that prices fixed by the board were fees, not wages, because real estate brokers are independent entrepreneurs, not employees.\textsuperscript{119} As a result, he rejected defendants’ assertion that the fixed commissions should fall within the statutory labor law exemption. He also took pains to characterize defendants actions as illegal price fixing, even though they were authorized by the board's “code of ethics" and were “non-mandatory" in the

\begin{itemize}
\item \textsuperscript{116} See United States v. Paramount Pictures, Inc., 334 U.S. 131, 143 (1948) (majority opinion condemning a horizontal price fixing conspiracy to fix the prices of first run movies); United States v. Masonite Corp., 318 U.S. 265 (1942) (majority opinion holding that restrictive licensing by patent holder amounted to price fixing); The Wayne Pump Co. v. United States, 317 U.S. 200, 210 (1942) (dissenting against the dismissal of a criminal price fixing complaint for insufficiency and indefiniteness).
\item \textsuperscript{117} United States v. Line Material Co., 333 U.S. 287, 320 (1947) (Douglas, J., concurring). He went on the state: “It [price fixing] offers security and stability; it eliminates much of the uncertainty of competitive practices; it promises high profits. It is therefore one of the most effective devices to regiment whole industries and exact a monopoly price from the public. The benefits of competition disappear. The prices charged by the regimented industry are determined not by representatives of the public . . . but by private parties who incline to charge all the traffic will bear.” \textit{Id.}
\item \textsuperscript{118} 339 U.S. 485 (1950).
\item \textsuperscript{119} \textit{Id.} at 490-91.
\end{itemize}
sense that defendants imposed no penalties for deviation from the prescribed fee percentage.

Douglas also again rejected any consideration of the relevance of a reasonableness defense, writing:

It is not for the courts to determine whether in particular settings price-fixing serves an honorable or worthy end. An agreement, shown either by adherence to a price schedule or by proof of consensual action, fixing the uniform or minimum price, is in itself illegal under the Sherman Act, no matter what end it was designed to serve.\(^{120}\)

Thus, he at once applied price fixing to the rendering of personal services, again shut the door to reasonableness arguments, and made it clear that exceptions were not lightly or easily to be made.\(^{121}\)

Justice Douglas took his view that the Sherman Act was “the charter of freedom” quite literally, generally refusing to allow the Sherman Act to be displaced by other legislation. For example, in Schwegmann Bros. v. Calvert Distillers Corp., Douglas, writing for a 6-3 majority, ruled that the non-signor provision in the Louisiana fair trade law, which purportedly bound all retailers to maintain retail prices fixed by a manufacturer once one retailer signed an agreement to do so, was not authorized by the federal Miller-Tydings Act, which exempted state authorized resale price agreements from the Sherman Act.\(^{122}\)

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\(^{120}\) *Id.* at 489.

\(^{121}\) *See* Note, 45 Ill. L. Rev. 115, 120 (1950).

\(^{122}\) 341 U.S. 348 (1951). The Miller-Tydings Act was passed in 1937 to amend the Sherman Act in response to wholesaler and retailer objections to the condemnation of vertical price fixing under *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911). By 1941 all but Vermont, Texas, and Missouri had enacted fair trade statutes which provided in substance that there was nothing illegal about a contract specifying the resale price of a trade-
The *Schwegmann* decision, which today because of the repeal of the Miller-Tydings Act in 1975 is of historical interest only, “was met with banner headlines, wailing, rejoicing, and some retail bedlam.”\(^{123}\) It effectively denuded the effectiveness of state fair trade price fixing since non-signers could not be bound to the established price and could thus cut prices without violating state law.\(^{124}\) *Schwegmann* was decided on May 21, 1951, and by May 28th Macy’s Department Store in New York City, a perennial non-signer, had cut prices 6% on about 6,000 consumer items. Long-time rival Gimbel’s and every other major New York department store quickly followed suit.\(^{125}\)

Congress, however, quickly acted to rehabilitate state fair trade law, passing the McGuire Act in 1952. That act sanctioned state non-signer provisions, effectively overruling *Schwegmann*.\(^{126}\) Both the McGuire Act and Miller-Tydings Act were repealed by Congress in

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1975, however, effectively sending state fair trade laws packing.127

In reaching his conclusion in *Schwegmann*, Douglas relied heavily upon the legislative history of the Miller-Tydings Act in concluding that the act did not include non-signers. That he got it wrong was made clear by the Report of the House Committee on Interstate and Foreign Commerce which accompanied the McGuire Act.128 Even his fellow Realist and former colleague at Yale John Frank, found that "as a bit of statutory construction, the case was, to put it sedately, novel. . . ."129

A close look at Douglas’s statutory construction in *Schwegmann* does reveal some judicial sleight of hand. He begins by noting that the language of the Miller-Tydings Act sanctioned only state-authorized contracts or agreements prescribing minimum prices for resale.130 The normal and customary meaning of “contracts or agreement," he asserted, does not include non-signers to state-authorized resale price maintenance schemes.131 In referring to the

127 By that time, at least 24 state supreme courts had held their state fair trade laws unconstitutional in toto or with respect to the nonsigner provision and six state legislatures had repealed at least the non-signer portion of their law. See Milton Handler, Harlan Blake, Robert Pitofsky, Harvey Goldschmid , Cases and Materials on Trade Regulation, 574-580 (1975).

128 "The primary purpose of the [McGuire] bill is to reaffirm the very same proposition which, in the committee's opinion, the Congress intended when to enact into law when it passed the Miller-Tydings Act. . . . The end result of the [Schwegmann] decision has been seriously to undermine the effectiveness of the Miller-Tydings Act and, in turn, of the fair-trade laws enacted by 45 States. HR 5767, as amended, is designed to restore the effectiveness of these acts by making it abundantly clear that Congress means to let State fair-trade laws apply in their totality; that is, with respect to non-signers as well as signers." HR Rep No. 82-1437 at 1-2 (19??). See also Hudson Distributors v. Lilly & Co., 377 U.S. 386, 391-92 (1964).

129 John P. Frank, *supra* note 123, at 175.

130 *Schwegmann Bros.*, 341 U.S. at 387-388.

131 *Id.* at 388.
legislative history, however, he notes the House Report specifically mentioned non-signers as within the ambit of the bill. He concludes, however, that the House Report should not control because the bill which the report endorsed was later amended before it became law.\textsuperscript{132}

Unfortunately, the minor language changes in the amendment had nothing to do with the non-signer coverage urged in the House Report.\textsuperscript{133} Douglas made a weak attempt to say that it did.\textsuperscript{134}

Although fair trade legislation was largely the product of small retailers who believed themselves undercut by larger rivals, particularly chain store outlets,\textsuperscript{135} Douglas's aversion to price fixing, even of the vertical variety, was stronger than his sympathy for the independent retailer. For it was the larger retailers, such as Macy's and Gimbel's, who were likely to be the non-signers. One might conclude that in fact Douglas was exhibiting a pro-consumer bias, since by protecting non-signers he left the way open for continuing price cutting.\textsuperscript{136}

\textsuperscript{132} Id. at 392-93.

\textsuperscript{133} "[O]ther conditions" was deleted from language which formerly read "nothing herein contained shall render illegal contracts or agreements prescribing minimum prices or other conditions for the resale of" specified commodities. Id. at 393.

\textsuperscript{134} See John P. Frank, \textit{supra} note 123, at 176 (noting that Douglas's argument was "weakened by the fact that the language changes had no perceptible relation to the minimum price clauses here in issue."). Justices Jackson and Minton concurred but slammed Douglas for his selective use of legislative history to support his result. 341 U.S. at 395-96. Justice Frankfurter, joined by Justices Black and Burton, vigorously dissented and attached both the House and Senate Reports to establish that Congress clearly intended non-signers to be covered. Id. at 397.


\textsuperscript{136} The decision also suggests that Douglas prefers federal over state economic regulation since his reading of the legislative history of the Miller-Tydings Act is that Congress needs to be crystal clear when delegating economic regulatory authority to the states. \textit{Schwegmann Bros.},
Justice Douglas' anathema to price fixing showed itself in patent cases as well, although his dislike of the rights flowing from patent law was perhaps even stronger. In United States v. Line Material Co., for example, he agreed with the Court that a cross-licensing agreement could not be used by a patentee to control the price of another patented article. As he made clear, however, in a concurrence joined by three other justices, he would go further and invalidate the ability of the patent holder to control the price charged by licensees.

In his view, the patent laws, through their silence on the issue, did not authorize price-fixing agreements. The Court had, by permitting the patent holder to fix prices, “saddled the economy with a vicious monopoly.” According to Douglas, when the patentee controls the price charged by licensees, “[c]ompetition tends to become impaired not by reason of the public's

341 U.S. at 395.


139 Id. at 315. They were Justices Black, Murphy and Rutledge.

140 Id. Douglas acknowledged that to do so would necessitate overruling prior decisions such as United States v. General Electric, 272 U.S. 476 (1926) and Bement v. National Harrow Co., 186 U.S. 70 (1902).

141 Line Material Co., 333 U.S. at 318.

142 Id. at 319. He went on to observe that “[b]y protecting [the patent holder] against competition from low-cost producers, it strengthens and enlarges his monopoly.” Id. at 320.
preference for the patented article but because of the preference of competitors for price fixing and for the increased profits which that method of doing business promises."\textsuperscript{143}

In his concurrence in \textit{Line Material}, Justice Douglas took pains to characterize price fixing as "perhaps the most powerful of all inducements for abandonment of competition."\textsuperscript{144} It is clear that he still felt that way twenty-one years later when he wrote for the Court in United States v. Container Corporation of America.\textsuperscript{145} That case involved a challenge to a practice in the corrugated container industry of providing price quotes to competitors when asked. The price exchanges were characterized as infrequent and irregular but Justice Douglas, writing for a 5-3-1 majority, made short work of finding a violation of Section One.\textsuperscript{146} In doing so, he managed to inject great confusion and uncertainly into the state of the law.

The main difficulty is that the opinion is so vague and conclusive that one is left guessing as to whether the Court has just articulated a new per se rule or applied the rule of reason.\textsuperscript{147}

\begin{itemize}
\item \textsuperscript{143} \textit{Id.}
\item \textsuperscript{144} \textit{Id.} at 320. \textit{See also} Justice Douglas's majority opinion in United States v. Masonite Corp., 316 U.S. 265, 281 (1942) ("control over prices of competing patented goods thus becomes an actual or potential brake on competition.").
\item \textsuperscript{145} 393 U.S. 333 (1969).
\item \textsuperscript{146} \textit{Id.} at. 335. The majority opinion is about 3 \(\frac{1}{2}\) pages long in the U.S. Reporter while Justice Marshall's dissent is more than twice that length.
\end{itemize}
First Justice Douglas characterized the case as within the per se ban of *Socony-Vacuum*.\(^{148}\) In the very next sentence he seems to reverse direction completely, writing that “[p]rice information exchanged in some markets may have no effect on a truly competitive price.”\(^ {149}\) Reading and rereading the passage, one gets the feeling of a letter that is dictated but not read. Further, his subsequent cursory analysis of the corrugated container market and finding of an effect on price leaves one wondering just when price exchanges might be allowed.

In the opinion, Douglas noted that the industry was expanding, had excess capacity, ease of entry, an inelastic demand and, not surprisingly, downward price trends.\(^ {150}\) Nonetheless, he found, seemingly without any supporting evidence, that the price exchanges had the effect of slowing the general price decline in the industry.\(^ {151}\) His antipathy to any potential interference with price competition was so strong that he was willing to assume an effect on price, even when industry conditions suggested otherwise.\(^ {152}\)

Justice Fortas concurred to attempt to clarify the majority opinion, stating that he did not read the majority as enacting a per se rule for exchanges of price information.\(^ {153}\)

\(^{148}\) His exact language is “[t]he limitation or reduction of price competition brings the case within the ban, for as we held in United States v. Socony-Vacuum Oil Co., *supra*, at 224, n.59, interference with the setting of price by free market forces is unlawful per se.” *Container Corp. of America*, 393 U.S. at 337.

\(^{149}\) *Id.*

\(^{150}\) *Id.*

\(^{151}\) *Id.* at 336.

\(^{152}\) Justice Douglas ended the brief opinion with “[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition.” *Id.* at 338.

\(^{153}\) *Id.*
Marshall, joined by Justices Harlan and Stewart, wrote a pointed, somewhat sarcastic dissent, stating that he “would prefer that a finding of anticompetitive effect be supported by ‘evidence in the record.’”

He concluded that in the corrugated container market, where total demand was increasing and entry was easy, that “it was just as logical” that competitors would try to capture market share by cutting prices as by maintaining them through occasional price exchanges.

Not surprisingly, Justice Marshall interpreted the Douglas majority as establishing a per se rule for price exchanges, spending the first four paragraphs of his dissent pointing out why the per se rule is inapplicable to price exchange agreements. He noted that the Court had historically refused to apply a per se rule to exchanges of price and market information. Justice Douglas, in contrast, had largely ignored precedent in his majority opinion, citing the earlier trade association cases sparingly, if at all.

One cannot read the Douglas majority and the Marshall dissent in Container without concluding that the dissent is by far the strongest, best reasoned opinion of the two. Justice Marshall effectively dismantled the Douglas majority opinion for reaching conclusions about the

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154 Id. at 344. Justice Marshall also did “not find the inference that the exchange of price information has had an anticompetitive effect as ‘irresistible’ as does the Court.” Id.

155 Id. at 343. Marshall pointed out that since industry demand in inelastic, price changes do not have an immediate bearing on quantities purchased. Given the uncertainty about likely effect, he would have required the government to prove an anticompetitive purpose or effect. Id.

156 Id. at 340-43.

occasional price exchanges' effect on price "in the absence of any proof whatsoever."\textsuperscript{158}

Nonetheless, \textit{Container} was now the law and it took the Supreme Court six years to clear up the confusion that Justice Douglas had wrought. In United States v. Citizens & Southern National Bank, a case involving the dissemination of interest rates and service charges by a parent bank to branch banks in which, due to Georgia law, the parent could own no more than a 5% interest, the Court stated "... the dissemination of price information is not itself a per se violation of the Sherman Act."\textsuperscript{159} To support its statement the Court cited two old trade association cases\textsuperscript{160} and Justice Fortas' concurring opinion in \textit{Container}.

The Court then concluded that the sharing of information, given the branch banking restrictions then in place, did not violate Section One of the Sherman Act.\textsuperscript{161} Not surprisingly, Justice Douglas joined in a three-judge dissent authored by Justice Brennan.\textsuperscript{162} The dissent concluded that the government had established a Section One violation flowing from the dissemination of interest and fee information. Although the dissent did not directly dispute the majority's application of the rule of reason to price sharing and exchanges, it did remark that the

\textsuperscript{158} \textit{Container Corp. of Am.}, 333 U.S. at 345-46. "... the Government admits that the price trend was down, but asks the Court to assume that the trend would have been accelerated with less informed, and hence more vigorous, price competition. In the absence of any proof whatsoever, I cannot make such an assumption. It is just as likely that price competition was furthered by the exchange as is it that it was depressed." Id.

\textsuperscript{159} 422 U.S. 86, 113-14 (1975).

\textsuperscript{160} Maple Flooring Ass'n v. United States, 268 U.S. 563 (1925); \textit{and} Cement Manufacturers Protective Ass'n v. United States, 268 U.S. 588 (1925).

\textsuperscript{161} \textit{Citizens & S. Nat'l Bank}, 422 U.S. at 113-14.

\textsuperscript{162} Id. at 130.
difficulty of applying the rule of reason “has in many cases led us to prefer per se rules.”

In spite of *Citizens & Southern National Bank*'s clarification of price exchanges as subject to the rule of reason, the fallout from *Container* nonetheless affected the next price dissemination case to reach the Supreme Court. That case, United States v. Gypsum Co., involved a criminal challenge to a practice of interseller price verification within the gypsum wallboard industry. Of course, it is almost unheard of for the Antitrust Division of the Department of Justice to criminally prosecute an offense subject to the rule of reason, thus raising the question, why did it in *Gypsum*? The answer may never be known with certainty but a good guess is that, since the *Gypsum* prosecution began well before the Court's decision in *Citizens & Southern National Bank*, the Justice Department believed it was dealing with a per se case, based on its reading of *Container*.

Unfortunately, the *Gypsum* decision itself created confusion since one of the issues before

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163 *Id.* at 142. *Citizens & Southern National Bank* is almost surely a case whose outcome can directly be traced to the change in Supreme Court personnel between 1969 and 1975 as the Warren Court was transforming into the Burger Court. Chief Justice Burger, and Justices Blackmun, Powell and Rehnquist, all new appointees, were part of Justice Stewart's six judge majority. Justice Marshall, author of the dissent in *Container* which Justice Stewart had joined, was the sixth justice in the *Citizens & Southern National Bank* majority. Further, the three dissenting justices in *Citizens & Southern National Bank*, Warren Court holdovers Douglas, Brennan and White, were all in the majority in *Container*. Thus, with the changes in the Court's makeup, Justices Marshall and Stewart had the votes to outflank Justice Douglas.


165 *See*, e.g., Suzanne Weaver, Decision to Prosecute: Organization and Public Policy in the Antitrust Division (1977).

166 In addition, the interseller price verification in *Gypsum* was much more systematic and wide-spread than were the “infrequent” price exchanges in *Container*, probably leading the Antitrust Division to believe they had a much stronger per se case than even *Container*. 

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the Court was whether proof of intent was a necessary element of a criminal antitrust violation. The Court held that it was and that the standard was a showing that the action was undertaken “with knowledge of its probable consequences.” Since the Court again took pains to point out that price exchanges among competitors fell under the rule of reason, it was uncertain whether the Gypsum’s intent standard applied to per se offenses as well. The circuit courts almost uniformly held that it did not, thus rendering that part of the Gypsum decision largely moot, since criminal prosecutions in rule of reason cases are so unusual.

The root of all this uncertainty probably lies with Justice Douglas' poorly drafted, poorly reasoned opinion in Container. The government would not likely have criminally prosecuted the Gypsum case had Container provided better guidance, and the issue of criminal intent and the litigation it spawned would have been avoided.

Justice Douglas certainly understood the anticompetitive consequences that

167 Gypsum, 438 U.S. at 444.

168 Id. at 441, n.16.


171 That is not to say that the Supreme Court would not have granted certiorari in Gypsum. That case contained a second issue, the use of the Robinson-Patman Act's meeting competition defense to justify an interseller price verification program, which alone, might have caught the Court’s attention. 438 U.S. at 426.
collaborations of competitors could have on the market and on consumers. The difficulty is that he did not consider countervailing market conditions nor did he require that the government establish a strong factual basis for its assertions of anticompetitive effect. In reality, he reduced the government's burden of proof. The Douglas approach certainly was effective in a case like *Socony-Vacuum* where intent was clear and effect irrefutable. But in a closer case such as *Container*, where intent was uncertain and competitive effect problematic, his summary disposition was based on nothing more than the effect occasional price exchanges *might* have on price levels rather than any showing of *actual* effect.

In further contrast to Douglas' careful and thorough *Socony-Vacuum* opinion, his opinion in *Container Corporation* is inexplicably vague and seemingly contradictory. While asserting that the price exchanges in *Container* bring it within the per se prohibition of *Socony-Vacuum*, he in the very next sentence acknowledges that "[p]rice information exchanged in some markets may have no effect on a truly competitive price."172 Of course, the accepted wisdom of per se rules is that a given restraint is so labeled only when it is always competitively pernicious.173 No wonder confusion reigned about what standard, if any, the *Container* decision set forth for price exchanges among competitors.174

V. Monopolization

172 *Container Corp. of Am.*, 393 U.S. at 337.
174 *See* footnotes and accompanying text, *supra* notes 145-158.
Justice Douglas stridently believed that big is bad. In his scorching dissent in United States v. Columbia Steel Co., which according to Douglas was “the most important antitrust case . . . before the Court in years,” he rather succinctly set forth his views about economic power in private hands:

We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. The Curse of Bigness shows how size can become a menace – both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace – because of its control of prices . . . . Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into so many hands that the fortunes of the people will not be dependent of the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respected and social-minded is irrelevant. That is the philosophy and the command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a government of the people should have it.176

At least, one does not have to long ponder what Justice Douglas would have thought of Microsoft and Bill Gates.

Columbia Steel turned out to be the leading and certainly most controversial merger case

176 Id. at 535-36.
of the 1940s. There the government challenged an acquisition by Columbia Steel, a wholly owned United States Steel subsidiary, of Consolidated Steel, a competitor in the fabricated steel market. Columbia, the largest steel fabricator in the country, controlled 13% of the growing western market while Consolidated had 11% of the same market. In addition, the acquisition foreclosed U.S. Steel's competitors of rolled steel, a raw material needed by steel fabricators, from selling to Consolidated.

Columbia Steel acquired the assets of Consolidated, forcing the government to sue under Sections 1 and 2 of the Sherman Act, since the less permissive Section 7 of the Clayton Act then applied only to stock purchases with horizontal competitive effects. The Court, by a narrow 5-4 majority, held that the government had not established that the acquisition amounted to an unreasonable restraint of trade177 or an attempt to monopolize the fabricated steel market.178 Douglas' dissent, joined by Justices Black, Murphy and Rutledge, focused on the vertical rather than the horizontal aspects of the merger.179 As he saw it, U.S. Steel had one-third of the country's rolled steel production and in purchasing Consolidated effectively cut off 13% of the "plates and shapes" market from competitors.180 He ended with his big is bad theme, stating "[t]he least I can say is that a company that has that tremendous leverage on our economy is big.

177 Id. at 530-31.
178 Id. at 532-34.
179 Id. at 539.
180 Id. at 538. Consolidated's purchases of rolled steel generally amounted to 3% of that market. According to Douglas, "[b]y no standard . . . can that percentage be deemed immaterial." He believed, however, that "[a] surer test of the impact of the acquisition on competition is to be determined not only by consideration of the actual markets reached by Consolidated but also by the actual purchases it makes," hence his emphasis on "plates and shapes." Id.
Public and Congressional sentiment seemed to be with Douglas and Congress soon passed the Cellar-Kefauver Act, extending Section 7 of the Clayton Act to asset acquisitions as well as vertical mergers.\textsuperscript{182}

Justice Douglas did not mellow with age with respect to his distaste for large companies and anything that could be characterized as market concentration. Twenty-five years after \textit{Columbia Steel}, near the end of his long service on the Court, he wrote a scathing concurrence in \textit{United States v. Falstaff Brewing Corp.}, a merger case involving the acquisition by the country's fourth largest brewery of the largest brewery in New England.\textsuperscript{183} Douglas again quoted Brandeis, this time for the proposition that increased business size creates not efficiencies but \textit{inefficiencies} that simply allow the owner to garner more profits by increasing volume.\textsuperscript{184}

Douglas went on to lament that the increasing concentration of economic power into large corporations was transferring local control of business “to distant cities where men on the 54th floor with only balance sheets and profit and loss statements before them decide the fate of

\textsuperscript{181} \textit{Id.} at 540. To support his statement, Douglas cited a 1940 monograph characterizing U.S. Steel as “the giant of the industry" with greater capacity than all the German producers combined and more than twice the capacity of Great Britain and France, respectively. \textit{Id.} at 540, n.6 (citing Wilcox, Competition and Monopoly in American Industry (TNEC Monograph 21, 1940) at 120). \textit{See also} William H. Page, \textit{supra} note 28, at 24-25.


\textsuperscript{183} 410 U.S. 526, 539 (1973) (Douglas, J. concurring in part).

\textsuperscript{184} \textit{Id.} at 540-41 (quoting Louis D. Brandies, Hearings on S. Res. 98 before the Senate Committee on Interstate Commerce, 62d Cong., Vol. 1, p.1155).
According to Douglas, two of the purposes of the 1950 Cellar-Kefauver Act were to retain local control over industry and protect small businesses, goals which had “been largely defeated with serious consequences.”

The result, the Justice wrote, was that local employment suffers, local payrolls are reduced, and “responsible entrepreneurs in counties and States are replaced by clerks.” He believed that “a nation of clerks is anathema to the American antitrust dream” and, if unabated, “leads predictably to socialism. . . .”

The Columbia Steel case was announced on June 7, 1948. About one month earlier on May 3, 1948, in what surely must be a record, Justice Douglas issued three Supreme Court majority antitrust opinions, all involving the motion picture industry: United States v. Griffith; Schine Chain Theatres, Inc. v. United States, and United States v. Paramount Pictures, Inc.

Griffith involved monopoly leveraging rather than a market foreclosure through acquisition and

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185 Id. at 541-42.
186 Id. at 542-43.
187 Id. at 543.
188 Id.
189 334 U.S. 100 (1948).
190 334 U.S. 110 (1948).
191 334 U.S. 131 (1948). The 1947-48 Supreme Court Term was perhaps the busiest antitrust term ever. In addition to the four cases listed above, the Court also, in opinions written by Justice Black, decided FTC v. Cement Institute, 333 U.S. 683 (1948) and FTC v. Morton Salt Co., 334 U.S. 37 (1948) as well as United States v. United States Gypsum Co., 333 U.S. 364 (1948) and United States v. Line Material Co., 333 U.S. 287 (1948), for a total of eight antitrust cases.
Douglas succeeded in attracting a 6-1 majority with Justices Murphy (who joined the dissent in 
*Columbia Steel*) and Jackson not participating and Justice Frankfurter dissenting by substantially 
endorsing the district court opinion.192

While the *Griffith* decision is of doubtful validity today and is largely ignored as 
precedent, it did provide Justice Douglas with another ample opportunity to expound on his big is 
bad theory. In doing so, Douglas provided language about exclusionary conduct by a monopolist 
that is still today considered fundamental to establishing the requisite monopolistic intent 
necessary for a Section 2 violation.193

The case involved the use by a regional movie theater chain of its power in towns in 
which it had the sole theater to obtain favorable dates from distributors for films it desired in 
towns in which it faced competition from other theaters. As a consequence, competing movie 
thearers in the so-called open towns were allegedly prevented from being able to obtain enough

192 Justices Jackson and Frankfurter were with the majority in *Columbia Steel Co.*, 334 
U.S. 495.

193 334 U.S. at 107. Supreme Court opinions sometimes are widely cited for an 
articulated legal principle even though the application of the principle to the facts before the 
Court are highly suspect. When this occurs, the case may often be cited as precedent for the 
principle articulated but ignored as precedent on the merits. An example is Brown Shoe v. 
United States, 370 U.S. 294 (1962), one of the most criticized decisions of the Warren Court era. 
*See, e.g.*, Robert H. Bork and Ward Bowman, *The Crisis in Antitrust*, 65 Colum. L. Rev. 363 
(1965) and Thomas Kauper, *The “Warren Court” and the Antitrust Law: Of Economics, 
Populism, and Cynicism*, 67 Mich. L. Rev. 325 (1968). *Brown Shoe* is often cited for its 
analytical construct for analyzing mergers under Section 7 (defining relevant product and 
geographic markets and then measuring the competitive impact of the merger within the market), 
even though the Court's assessment of the competitive impact is more than a little suspect. 
Similarly, *Griffith* is oft-cited for its articulation of exclusionary conduct as a means to establish 
intent to monopolize although its use as a legal precedent on its merits is questionable today. 
*See, e.g.*, Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 
317 (2d ed. 1999).
first or second run films to operate successfully.\footnote{Griffith, 334 U.S. at 103.}

Justice Douglas made short work of this fact pattern. He held that the use of one’s monopoly position to gain a competitive advantage was all that was necessary to violate Section 2.\footnote{Id. at 107.} The standard set was that one have the power to exclude competitors “coupled with the purpose or intent to exercise that power.”\footnote{Id. This language gives rise to the two-prong test under Section 2, which requires proof of market power plus intent to monopolize.} Douglas’ distrust of and distaste for big business, however, was apparent in the opinion and he arguably came close to establishing a no fault monopoly test when he stated that “[s]o it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under Section 2 even though it remains unexercised.”\footnote{Id. To be fair, this language came in the context of his stating that one did not have to show an independent Section 1 conspiracy to prove the unlawful intent of a monopolist, but it nevertheless does seem to eradicate any meaningful intent standard.}

Thus, apparently the exercise of monopoly power is not required under Section 2 although proof of purpose or intent to exercise it is necessary.\footnote{Douglas acknowledges that “mere size is not outlawed by Section 2.” Id. at 107 n.10. But he warned that size is “an earmark of monopoly power,” id., and “carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past.” Id. (quoting United States v. Swift & Co., 286 U.S. 106, 116 (1932).} While seemingly setting a fine line between acquiring or having monopoly power and using it, \textit{Griffith} is consistent with the price fixing test in \textit{Socony-Vacuum} where Douglas held that the purpose to fix prices, even
unaccompanied by an overt act, is all that is necessary for a per se violation of Section 1.\textsuperscript{199} But while “specific intent” is not required,\textsuperscript{200} a more general purpose or intent is, which can practically speaking only be discerned by looking to the conduct of the monopolist. Thus, Justice Douglas concluded that “the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful.”\textsuperscript{201}

Douglas did therefore require some conduct, although it is not certain if the mere acquisition of monopoly power met the standard.\textsuperscript{202} The power and purpose to exclude is what it comes to and that test has stood the test of time. \textit{Griffith}, as well as \textit{Alcoa}, are its forebearers.

\textit{Griffith} falters considerably, however, in the application of the articulated standard to the facts before it (as arguably does \textit{Alcoa}). For Douglas had no qualms about condemning the leveraging of market power in one market (the closed towns) to a second, competitive market (the open towns).\textsuperscript{203} First, it is not at all clear that the statutory language of Section 2 applies to

\textsuperscript{199} \textit{Socony-Vacuum Oil Co.}, 310 U.S. at 224 n.59. \textit{See} accompanying text, \textit{supra} notes 113-15.

\textsuperscript{200} \textit{Griffith}, 334 U.S. at 105.

\textsuperscript{201} \textit{Id.} at 107. Thus, \textit{Griffith} is seemingly in step with Judge Hand's famous opinion in United States v. Aluminum Company of America, 148 F.2d 416, 432 (2d Cir.1945) (hereinafter “\textit{Alcoa}”) (“no monopolist monopolizes unconscious of what he is doing,” quoted at 334 U.S. 105).

\textsuperscript{202} He is again true to the \textit{Alcoa} case in which Judge Hand observed that “the origin of a monopoly may be critical in determining its legality. . . .” \textit{Alcoa}, 148 F.2d at 429. \textit{Cf.} Carl Kaysen & Donald F. Turner, \textit{Antitrust Law: An Economic and Legal Analysis} 111, 265-72 (1959)(arguing that excessive market power, without more, should be illegal).

\textsuperscript{203} Douglas made a similar point, in the context of vertical integration and thus leveraging by a monopolist in United States v. Paramount Pictures, Inc., 334 U.S. 131, 174 (1948), decided the same day as \textit{Griffith}. Then, four years later Douglas and Black joined a four justice dissent in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 628 (1952)(Burton, J.,
monopoly leveraging where the second market does not result in a monopoly. Even if it does, the lower courts are currently split about the economic and legal effect of monopoly leveraging on a second non-monopolistic market, with some fearing that the application Section 2 might unduly penalize "efficient and natural" monopolies. The Supreme Court itself seems to have vacillated on the issue, although the recent *Trinko* decision casts further doubt on the unlawfulness of monopoly leveraging.


dissenting) arguing that the majority "seeks to avoid the effect of United States v. Griffith. . . ." The majority had reversed a lower court judgment for the government in a newspaper tying/monopolization case. According to the dissent, the Times-Picayune's use of its monopoly power in the morning newspaper market in New Orleans with advertisers to gain a competitive advantage over a rival newspaper in the evening newspaper market violated the Sherman Act.


205 See e.g. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 548 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992); Fineman, 980 F.2d at 205-06. See also Lantec v. Novell, 306 F.3d 1003, 1022 n.11 (10th Cir. 2002) (recognizing circuit split but refusing to decide issue); Eleven Line, Inc. v. North Texas State Soccer Ass'n, 213 F.3d 198, 206 n.16 (5th Cir. 2000) (recognizing circuit split); Virgin Atlantic Airways v. British Airways PLC, 257 F.3d 256, 272 (2d Cir. 2001) (recognizing potential leveraging claim); Covad Communications Co. v. BellSouth Corp., 299 F.3d 1272 (11th Cir. 2002) (recognizing leveraging claim); Kerasotes Michigan Theatres v. Nat'l Amusements, 854 F.2d 135 (6th Cir. 1988), *cert. dismissed*, 490 U.S. 1087 (1989) (recognizing leveraging claim); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 276 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) ("the use of monopoly power attained in one market to gain a competitive advantage in another is a violation of Section 2, even if there has not been an attempt to monopolize the second market.").

206 Cf. Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 479 n.29 (1992) ("power gained through some natural and legal advantage such as a patent, copyright, or business acumen can give rise to liability if 'a seller exploits his dominant position in one market to expand his empire into the next.'"), with Spectrum Sports v. McQuillan, 506 U.S. 447, 448 (1993)("Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.").

207 Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, 540 U.S. 398, 415
Thus, with the help of 20-20 hindsight, the *Griffith* decision appears shaky on its application of the law to its facts, although, at least as now generally interpreted, the case stands for the now fundamental proposition that one does not have to show a separate Section 1 violation to prove an intent to monopolize under of Section 2.\textsuperscript{208} In fact, Judge Wyzanski, in his influential opinion in United Stated v. United Shoe Machinery Corp., believed that Justice Douglas may have gone further in *Griffith* and, following Judge Hand in *Alcoa*,\textsuperscript{209} ruled that a monopolist “monopolizes” whenever he does business, “apparently even if there is no showing that his business involves an exclusionary practice.”\textsuperscript{210}

Justice Douglas also wrote the opinion in Schine Chain Theatres, Inc. v. United States, the companion case to *Griffith* decided the same day.\textsuperscript{211} The case is largely forgotten today although it did involve, similar to *Griffith*, the leveraging of favorable film distribution and clearances by a chain of movie theaters of 60 closed towns into 16 open or competitive towns.\textsuperscript{212} Unlike *Griffith*, however, much of defendant's conduct in *Schine Chain Theatres* seemed to be

\textsuperscript{208} See, e.g., United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953) (“A more inclusive approach was adopted by Mr. Justice Douglas in . . . *Griffith* . . . . He stated that to prove a violation of Section 2 it was not always necessary to show a violation of Section 1.”).

\textsuperscript{209} United States v. Aluminum Co. of America, 148 F.2d 416, 428 (2d Cir. 1945).

\textsuperscript{210} *United Shoe Mach. Corp.*, 110 F. Supp. at 342. The quoted language turned out to be dicta because Judge Wyzanski found ample evidence of exclusionary behavior by the defendant.

\textsuperscript{211} 334 U.S. 110 (1948). As in *Griffith*, Justices Jackson and Murphy did not participate. Justice Frankfurter, however, concurred in the result although he had dissented in *Griffith*.

\textsuperscript{212} Id. at 113.
directed toward maintaining or acquiring a monopoly as opposed to merely gaining a competitive advantage in another market.\textsuperscript{213} As such, \textit{Schine Chain Theatres} may not be as much of a pure leveraging case as its companion.

The opinion does reaffirm, in language more certain than \textit{Griffith}, that conduct otherwise lawful may, in the hands of a monopolist, establish intent to monopolize.\textsuperscript{214} Otherwise, Justice Douglas's opinion simply repeats key language from \textit{Griffith}\textsuperscript{215} and adds little to his big is bad theme. In a ruling that would certainly be in the mainstream today, he does hold that price cutting by a monopolist is not unlawful absent a "show[ing] that it was in purpose or effect employed as an instrument of monopoly power."\textsuperscript{216}

It would be many years before Justice Douglas wrote another majority opinion in a Section 2 case, due in large part to the paucity of monopolization cases to come before the Court. He did write for the Court in the 1966 decision of United States v. Grinnell Corp., which is

\textsuperscript{213} See, \textit{e.g.}, \textit{id.} at 119 ("... these agreements were additional weapons in Schine's arsenal of power through the use of which its monopoly was sought to be extended."). See also United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948), another majority opinion by Justice Douglas decided the same term. In \textit{Paramount Pictures} Douglas found that a conspiracy to monopolize the first run movie exhibition market was exclusionary in intent and effect and thus violated Section 2. \textit{Id.} at 170.

\textsuperscript{214} See, \textit{e.g.}, \textit{Schine Chain Theaters}, 334 U.S. at 119 ("Even an otherwise lawful device may be used as a weapon in restraint of trade or in an effort to monopolize a part of trade or commerce."). See also \textit{id.} at 124 ("But any clearance so obtained, though otherwise reasonable, would be unlawful, for it would be the product of the exercise of monopoly power.").

\textsuperscript{215} "The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed." \textit{Id.} at 130.

\textsuperscript{216} \textit{Id.} at 120-21. Today, of course, a monopolist's price cuts would have to meet the definition of predatory pricing to be considered unlawful conduct. See Brooke Group Ltd. v. Brown Tobacco Corp., 509 U.S. 209 (1993); Cargill, Inc. v. Montfort of Colorado, Inc., 479 U.S. 104 (1986); Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).
mostly known for its very suspect relevant market analysis.\(^{217}\) Unfortunately, his conduct analysis is not any better. In the opinion, Douglas made very short shrift of the conduct prong, relating that the defendant's actions in buying competitors, dividing services provided among the companies bought and controlled, differentiating price according to the amount of competition in a market, threatening retaliation against competitors, and the liberal use of broad covenants not to compete with officials of acquired companies "eliminated any possibility of an outbreak of competition."\(^{218}\)

It is quite certain that Justice Douglas considered the *Grinnell* defendants to be "bad actors," concluding that the conduct analysis "presents no major problem here."\(^{219}\) As a result, however, he spent only one paragraph of the opinion dealing with the issue. That paragraph is devoid of real analysis but is rather laced with conclusory statements, all of which could stand closer inspection.\(^{220}\) It pales in comparison with the careful analysis of conduct issues in at least some modern Section 2 cases to determine whether a particular practice by a monopolist has an exclusionary effect on competitors and competition.\(^{221}\)

As one commentator has noted, the *Grinnell* decision is symptomatic of the


\(^{218}\) 384 U.S. at 576.

\(^{219}\) The full quotation is "We shall see that this second ingredient presents no major problem here, as what was done in building the empire was done plainly and explicitly for a single purpose." *Id.* at 571.

\(^{220}\) For example, Douglas' condemnation of defendants meeting local competition by reducing rates would not be considered exclusionary today absent proof of predatory pricing. *Id.* at 570, 576.

\(^{221}\) *See, e.g.,* United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).
indeterminancy, vacuity, and conclusory nature of the Supreme Court's Section 2 conduct decisions which have given lower courts and businesses little guidance and left juries “to divine the metaphysical difference between” exclusionary conduct and competition on the merits.\textsuperscript{222} It also illustrates the perils of the big is bad theory run amuck. If that is the Court's normative theory, a result-oriented conduct prong is perhaps to be expected.\textsuperscript{223}

Equally problematic in \textit{Grinnell} is that Justice Douglas announced the commonly understood test for conduct, derived from \textit{Alcoa},\textsuperscript{224} and then seemed to retreat from it. That is, he defined the conduct element as “the willful acquisition or maintenance of [monopoly] power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.”\textsuperscript{225} Since willfulness can certainly attach itself to developing a superior product or using business acumen, whatever that means, to gain market share, the two concepts are not mutually exclusive.\textsuperscript{226} One plausible interpretation of the language is that development of a superior product or use of business acumen that resulted in monopoly power would spare the monopolist from a finding of exclusionary conduct. That, however, was not Douglas' reading in \textit{Grinnell}. In a footnote he found that, based on defendants' conduct, “since . . . this monopoly power was consciously acquired, we have no reason to reach” whether “the

\begin{itemize}
\item \textsuperscript{223} That is, if the emphasis is on the supposed evil of monopoly power, the standard for establishing exclusionary conduct lessens and may be almost superfluous.
\item \textsuperscript{224} United States v. Aluminum Company of America, 148 F.2d 416, 430 (2d Cir. 1945).
\item \textsuperscript{225} 384 U.S. at 570-71.
\item \textsuperscript{226} \textit{See} Einer Elhauge, supra note 222, at 261.
\end{itemize}
burden is on the defendants to show that their dominance is due to skill, acumen, and the like."\textsuperscript{227} In other words, a finding of monopoly power consciously acquired trumps any consideration of the superior product, skill or acumen defense rather than the other way round.

Not surprisingly, Douglas' attitude toward monopoly leveraging did not change in his later years on the Court. In Otter Tail v. United States, the government challenged a public utility's refusal to sell or "wheel" electric power to municipalities wishing to replace Otter Tail as their retail electricity provider.\textsuperscript{228} Otter Tail, a vertically integrated power company, produced electricity, transmitted it over its own lines, "wheeled" electricity produced by others over its lines, and sold power both at wholesale and retail in the Dakotas and Minnesota.\textsuperscript{229}

In a 4-3 opinion with Justices Blackmun and Powell not participating, Justice Douglas quickly ruled that Otter Tail had run afoul of Section 2 by using its monopoly power as the dominant electric power source in the area "to foreclose potentialentrants into the retail arena from obtaining electric power from outside sources of supply."\textsuperscript{230} Otter Tail attempted to assert that its wheeling contracts with the Bureau of Reclamation and certain electrical cooperatives relieved it of any obligation to wheel to certain municipalities. Far from a defense, however, Douglas viewed the contracts as nothing more than territorial restrictions among potential

\textsuperscript{227} 384 U.S. at 576 n.7.

\textsuperscript{228} Otter Tail Power Co. v. United States, 410 U.S. 366 (1973).

\textsuperscript{229} Otter Tail was the retail electric power supplier for 465 towns in Minnesota and North and South Dakota. \textit{Id.} at 368.

\textsuperscript{230} \textit{Id.} at 377. Otter Tail had also "sponsored" litigation to delay the efforts of four towns to establish municipal systems. \textit{Id.} at 372.
competitors.\textsuperscript{231}

Justice Stewart's dissent, joined by Chief Justice Burger and Justice Rehnquist, noted that a monopoly resulted regardless of whether Otter Tail agreed to provide wholesale power to municipalities desiring their own retail system.\textsuperscript{232} He noted that Otter Tail had invested significant resources in constructing power lines throughout the region.\textsuperscript{233} Further, he expressed serious doubt about whether the threat of losing business could never be a legitimate business justification for a monopolist's refusal to deal with a competitor, as the district court had asserted.\textsuperscript{234}

Justice Douglas' \textit{Otter Tail} opinion lacks clarity and it is difficult to determine just what the case stands for.\textsuperscript{235} It seems to require a monopolist to deal with a competitor, even if the result is that the competitor will displace the monopolist with its own monopoly. Perhaps, one

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\textsuperscript{231} \textit{Id.} at 378-79.
\textsuperscript{232} \textit{Id.} at 388-89 (Stewart, J., dissenting).
\textsuperscript{233} \textit{Id.} at 382.
\textsuperscript{234} \textit{Id.} at 389-90. Justice Stewart's principal arguments were that Otter Tail was due an implied immunity from the antitrust laws due to the extensive Congressional regulation of the power industry under the Federal Power Act of 1935 or, at a minimum, the doctrine of primary jurisdiction should have deferred the adjudication of antitrust issues to the Federal Power Commission. \textit{Id.} at 390-91.
\textsuperscript{235} For a critical view see G.E. Hale & Rosemary D. Hale, \textit{The Otter Tail Power Case: Regulation by Commission or Antitrust Laws}, 1973 S. Ct. Rev. 99. For positive view of the result in \textit{Otter Tail}, see Stephen F. Ross, \textit{supra} note 95, at 79-80. Professor Ross views \textit{Otter Tail} as a vertical integration case in which the utility's integration into retail increased its monopoly profit opportunities since it was otherwise regulated by the Federal Power Commission. Since 90\% of OtterTail's income derived from its sale of power at retail, 410 U.S. at 387 (Stewart, J. dissenting), Professor Ross may be correct. In any event, his analysis is much more detailed than the general language of Justice Douglas's opinion in \textit{Otter Tail}.
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might argue, such an extension of Section 2 should be limited to regulated industries with natural monopolies, but the *Otter Tail* Court imposed no such limits. Further, the decision seems to be quite close to a modern “essential facilities” case, although the modern Supreme Court has purposefully avoided recognizing the validity of the essential facilities doctrine.²³⁶

Although lower federal courts have struggled with the breadth of *Otter Tail*, today's Supreme Court has shown a real inclination to reel it in. In the recent Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP, decision, the Court took pains to distinguish *Otter Tail*, ruling that since the facts before it did not require that the defendant share services already marketed, *Otter Tail* did not apply.²³⁷ As a result, the defendant’s alleged reluctance to allow interconnections with its local telephone network as required by Congress did not a Section 2 allegation make. The *Trinko* Court also displayed a good deal of hostility to the essential facilities doctrine with which *Otter Tail* is often associated, finding “no need either to recognize

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²³⁷ 540 U.S. 398, 410 (2004). The *Trinko* Court's distinction of *Otter Tail* is questionable. It involved the alleged failure of Verizon, a local telephone exchange carrier, to share its local network with competitors as required by the Telecommunications Act of 1996. The Court pointed to a new “wholesale market for leasing network elements” to distinguish *Otter Tail* which “was already in the business of providing a service to certain customers . . . and refused to provide the same service to certain other customers.” *Id.* In fact, the issue in both cases was quite similar: the requirement that a monopolist cooperate with competitors to displace itself, at least partially. The purpose of the Telecommunications Act of 1996 was to provide local telephone customers with competition, not to create a wholesale leasing market.
or repudiate [the doctrine] here.\textsuperscript{238}

In the Section 2 context, Justice Douglas' "big is bad" predilections necessarily took center stage. While he reaffirmed the two prong test for proof of monopolization, his application of the conduct prong lacked content and came close to a no conduct standard. In short, the lack of economic analysis and the conclusory approach of Douglas (and the Supreme Court) tended to trivialize and minimize exclusionary conduct as a legitimate antitrust standard. The focus was on the manner in which the monopolist competed rather than on whether the monopolist's actions excluded competitors through use of its market power. Unfair tactics were presumed to be anticompetitive.\textsuperscript{239}

The pendulum has swung in recent years to a heightened standard for labeling conduct as exclusionary, largely because of a recognition that the indeterminancy of older exclusionary conduct test may have the affect of chilling desirable, pro-competitive market conduct.\textsuperscript{240} Further, there is today a recognition that it "is sometimes difficult to distinguish robust competition from conduct with long-term anticompetitive effects."\textsuperscript{241} Thus, if big is not

\textsuperscript{238} Since the 1996 Telecommunications Act granted competitors access to defendant's local exchange network, the Court thought "it unnecessary to impose a judicial doctrine of forced access." \textit{Id.} at 411.

\textsuperscript{239} \textit{Compare} Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice does not, without more, state a claim under the federal antitrust laws; those laws do not create a law of fair or unfair competition. . . ").


necessarily bad, the paradigm has shifted dramatically and the modern federal judiciary, faced with trying distinguish exclusionary from desirable, pro-competitive conduct, is without a normative model with any substantive content. Justice Douglas’ Section 2 jurisprudence, unfortunately, is largely to blame.

VI. The Patent/Antitrust Intersection

Justice Douglas was also quite distrustful of the monopoly power granted a patent holder and favored a quite restrictive view of the patent holders rights. Here, as elsewhere, his concern was with the effect on small business of the patent monopoly. Early in his tenure, Douglas was in the mainstream of the New Deal Court in limiting the scope of the patent privilege. He voted with a unanimous Court in Ethyl Gasoline Corporation v. United States\textsuperscript{242} which outlawed a scheme of patent holders fixing resale prices of their product throughout the country. Then, two years later Douglas voted with a still united Court in three patent-antitrust cases, writing the opinion in United States v. Masonite Corporation.\textsuperscript{243} There the Court found unlawful price fixing arising from a patent holder’s uniform licensing agreements to so-called \textit{del credere} agents authorized to sell the patented product. Douglas wrote that “since patents are privileges restrictive of a free economy,” the rights of patent holders “must be strictly construed.” \textsuperscript{244}

\textsuperscript{242} 309 U.S. 436 (1940). Justices McReynolds and Roberts did not participate.

\textsuperscript{243} 316 U.S. 265 (1942). \textit{See} Morton Salt v. Suppinger, 314 U.S. 488 (1942) \textit{and} B.B. Chemical Co. v. Ellis, 314 U.S. 495 (1942) where the Court struck down patent licenses under which patented machines were furnished only on the condition that the licensor’s own unpatentable product be used exclusively in them.

\textsuperscript{244} \textit{Masonite Corp.}, 316 U.S. at 280.
The post-War Court, however, did not far enough in restricting the use of patents as price fixing vehicles to suit Douglas. In dissenting in United States v. National Lead Co.,\textsuperscript{245} he took issue with the majority’s requirement that a patent holder who had engaged in an international cartel to divide and dominate the market for titanium pigment be required to grant non-exclusive licenses at uniformly reasonable rates. That was not enough for Douglas, who argued that the defendant should be required to issue licenses free of any royalty charge because “strong measures” were needed “to provide the maximum opportunity for new ventures to compete with the giants of the industry.”\textsuperscript{246} According to Justice Douglas, if National Lead, the world’s leading producer of titanium pigments, would be at a competitive disadvantage because of reasonable royalty rates, “what can be the probable fate of newcomers or existing independents of small stature?”\textsuperscript{247}

Similarly, Douglas did not believe that the majority went far enough in United States v. Line Materials Co.\textsuperscript{248} in striking down the cross-licensing of patents as a vehicle to fix prices in the sale of patented goods. Although the decision surely limited any interpretation of the

\textsuperscript{245} 332 U.S. 319, 364 (1947) (Douglas, J., dissenting in part).

\textsuperscript{246} Id. at 368. \textit{See also} Leon Epstein, \textit{supra} note 58, at 557-58.

\textsuperscript{247} \textit{National Lead Co.}, 332 U.S. at 368. Douglas expressed similar sentiments for limiting the rights of copyright holders in his majority opinion in the government’s massive case against the movie industry, United States v. Paramount Pictures, Inc., 334 U.S. 131, 157-58 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration.”). \textit{See also} his concurrence in United States v. Line Material Co., 333 U.S. 287, 315 (1948), discussed \textit{supra} at text accompanying notes 138-44.

\textsuperscript{248} 333 U.S. 287 (1948).
landmark United States v. General Electric Company decision\textsuperscript{249} which would permit patent licenses to fix competitors' resale prices,\textsuperscript{250} Douglas authored a concurring opinion, arguing that the Court should simply overrule \textit{General Electric}.\textsuperscript{251} That opinion countenanced at least some price fixing by patent holders and thus was, according to Douglas, in conflict with the Constitutional protection of inventors and Congress's “faithful” legislation of that protection.\textsuperscript{252}

Justice Douglas also took issue with the majority in Automatic Radio Manufacturing Company, Inc. v. Hazeltine Research, Inc.\textsuperscript{253} There the Court allowed a patent licensing provision requiring royalty payments of a percentage of sales of patented and unpatented goods. Douglas's dissent characterized the case as one in which the patent holder “bludgeon[s]” his way into a partnership with the licensee. “A plainer extension of a patent by unlawful means would be hard to imagine.”\textsuperscript{254} He also took issue with the majority's ruling that a patent licensee was estopped to challenge the validity of the patent, arguing that “protection of the public interest in free enterprise

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\textsuperscript{249} 272 U.S. 476 (1926).
\textsuperscript{250} See, e.g., Note, 61 Harv. L. Rev. 1427, 1434 (1948) and Note, 43 Ill. L. Rev. 400, 409 (1948).
\textsuperscript{251} \textit{Line Materials Co.}, 333 U.S. at 315-16 (Douglas, J., concurring). Justices Black, Murphy and Rutledge joined the concurring opinion.
\textsuperscript{252} \textit{Id.} at 316-21. Justice Burton, joined by Chief Justice Vinson and Justice Frankfurter, dissented. \textit{Id.} at 321 (Burton, J., dissenting). Ironically, Justice Burton argued that the scheme that the majority had outlawed was essential to the ability of small patent-holders to compete with giant patent-holders like General Electric. \textit{Id.} at 351.
\textsuperscript{253} 339 U.S. 827 (1950).
\textsuperscript{254} \textit{Id.} at 836, 838 (Douglas, J., dissenting).
Douglas did vote with the majority in the International Salt v. United States\textsuperscript{256} and United States v. Lowe's Inc.,\textsuperscript{257} cases holding that market power is presumed when a patented or copyrighted product is at issue. Quite recently, however, In Illinois Tool Works Inc. v. Independent Ink, Inc.,\textsuperscript{258} the Supreme Court reversed itself and removed the presumption of market power in tying cases involving patents. The \textit{Illinois Tool Works} decision is in keeping with the Court's evolving view that tying arrangements are generally not anticompetitive\textsuperscript{259} and in recognition of Congress' 1988 amendment to the Patent Code to remove the market power presumption from patent misuse cases.\textsuperscript{260} It also represents in large part the antithesis of Justice Douglas' views about patents and market power.

Increasingly contemporary antitrust views big as not necessarily bad, even though some competitors may be harmed. \textit{Illinois Tool Works} is in the same vein because market power must now be proved, not presumed. Justice Douglas, with his skepticism about the patent monopoly generally and distrust of anything smacking of market power, would surely disagree.

\textsuperscript{255} Id. at 839.

\textsuperscript{256} 332 U.S. 392 (1947).

\textsuperscript{257} 371 U.S. 38, 46 (1962).

\textsuperscript{258} U.S. (2006).


VII. Relevant Market Issues

Defining the relevant product and geographic market is of course a predicate to determining if a market is in fact concentrated and thus suffers from “the curse of bigness.” Justice Douglas’ approach to relevant market definition, no doubt colored by his abhorrence to any suggestion of economic power, can perhaps best be described as slippery. For example, in the *Rome Cable* case\(^\text{261}\) Justice Douglas wrote a brief majority opinion for the Court and through tortured reasoning held unlawful the acquisition by Alcoa, primarily an aluminum wire and aluminum conductor producer, of Rome Cable, which was mostly a copper wire and copper conductor manufacturer. Douglas initially held that insulated aluminum conductor was a distinct submarket from copper conductor, overturning a district court finding to the contrary.\(^\text{262}\) He then inexplicably concluded that both bare and insulated aluminum cable should be in the same submarket, since they both have the general function of carrying electricity, even though the government had not so argued.\(^\text{263}\) To justify this seeming inconsistency and respond to Justice Stewart’s dissent, Douglas lamely argued that the grouping of bare and insulated aluminum cable was “a logical extension of the District Court’s findings” that aluminum conductor and copper conductor

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\(^{262}\) *Id.* at 275-77.  

\(^{263}\) *Id.* at 276-77. *See also id.* at 286 (Stewart, J., dissenting). In the very next sentence Douglas notes that copper conductor and aluminum conductor also compete but separates the two because “each has developed distinctive end uses.” It is hard to fathom such logical inconsistency in a single paragraph in a Supreme Court opinion. *See, e.g.*, Thomas E. Kauper, *supra* note 193, at 339-40 (calling Douglas’ inclusion of bare and insulated aluminum cable in one market in *Rome Cable* “astonishing” and labeling the market analysis there as “cast[ing] doubt on the entire definitional process” and Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 587 (2000) (“the Court acted on the irrational proposition that any combination of submarkets could also constitute a relevant product market.”).
conductor generally constitute separate lines of commerce.\textsuperscript{264}

Of course, Justice Douglas' distorted market definition was arguably nothing more than “gerrymandering” to find the market or submarkets necessary to establish unlawful concentration levels.\textsuperscript{265} Since Alcoa produced no copper conductor, its inclusion in the relevant market would have diminished the market concentration to a level beyond the reach of Section 7.\textsuperscript{266} It was apparently also necessary for the Court to group insulated and bare aluminum conductor together to gain a market concentration level that could support a Section 7 violation.\textsuperscript{267}

Even with the relevant market manipulation, Rome Cable's 1.3% of the aluminum conductor market would appear to be \textit{de minimus}. Not so for Justice Douglas, however. He

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\textsuperscript{264} \textit{Alcoa}, 377 U.S. at 277 n.4. Justice Stewart characterized Douglas' grouping of the two kinds of aluminum cable as “repudiation of” the District Court's findings since the facts established that unlike copper and aluminum cable, bare and insulated aluminum cable require “different equipment and engineering skills for their manufacture and sale.” \textit{Id.} at 286 (Stewart, J., dissenting).
\end{quote}

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\textsuperscript{265} See Lawrence A. Sullivan & Warren S. Grimes, \textit{supra} note 249, at 587.
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\textsuperscript{266} That same term, the Supreme Court arguably engaged in gerrymandering another relevant market definition when it lumped glass bottles and metal cans into one market and found the acquisition of the third largest manufacturer of glass containers by the second largest manufacturer of metal containers a violation of Section 7. \textit{United States v. Continental Can Co.}, 378 U.S. 441 (1964). Justice Douglas voted with the majority in a 7-2 opinion.

It would appear that the Court could have considered both \textit{Rome Cable} and \textit{Continental Can} to be conglomerate, rather than horizontal, cases. That designation would have obviated the Court's need to manipulate the relevant product market definition and would have enabled it to apply potential competition and entrenchment theories to strike down the mergers. At the time these cases were decided, however, the Supreme Court had yet to apply those theories to Section 7 cases, with the exception of \textit{United States v. El Paso Natural Gas}, 376 U.S. 651 (1964) decided earlier the same term. \textit{El Paso} involved a geographic rather than product extension merger, \textit{see} text accompanying notes 392-401, \textit{infra}. The Court's (led by Justice Douglas) expansion of Section 7 to product extension mergers was still a few years away. \textit{See} text accompanying notes 412-33, \textit{infra}.
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\textsuperscript{267} \textit{See, e.g.}, Lawrence A. Sullivan & Warren S. Grimes, \textit{supra} note 249, at 587.
\end{quote}
believed that figure was sufficient to trigger a Section 7 violation since Alcoa with 27.8% of the gerrymandered relevant market was its leader.\textsuperscript{268} According to Douglas, Rome Cable was “the prototype of the small independent that Congress aimed to preserve by Section 7.”\textsuperscript{269}

In \textit{Rome Cable}, Justice Douglas’ distaste for anything close to market concentration took center stage\textsuperscript{270} and he took full advantage of the preventative language of the Clayton Act.\textsuperscript{271} Two months earlier, he had written for the Court and struck down the acquisition of Pacific Northwest Pipeline by the El Paso Natural Gas Company.\textsuperscript{272} El Paso was the sole out of state supplier of natural gas to California, a large, rapidly expanding market at the time.\textsuperscript{273} Although Pacific Northwest had no pipeline into California, since it “was the only other significant pipeline west of the Rocky Mountains,” Douglas believed “we would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the state.”\textsuperscript{274}

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\textsuperscript{268} 377 U.S. at 280-81.

\textsuperscript{269} \textit{Id}. at 281. He characterized Rome Cable as “an aggressive competitor” and “a pioneer in aluminum insulation” with “a special aptitude and skill insulation, and an active and efficient research and sales organization.” \textit{Id}.

\textsuperscript{270} “It would seem that the situation in the aluminum industry \textit{may} be oligopolistic.” \textit{Id}. at 280 (emphasis added).

\textsuperscript{271} For example, he quoted the legislative history of the Celler-Kefauver Act to show congressional intent to “prevent accretions of power which ‘are individually so minute as to make it difficult to use the Sherman Act test against them,” \textit{Id}. (quoting S.Rep. No. 81-1775, at 5 (1950)).


\textsuperscript{273} \textit{Id}. at 658.

\textsuperscript{274} \textit{Id}. at 658-59.
El Paso Natural Gas is thus the first occasion in which the Court focused on potential competition as opposed to requiring an impact on actual competition to invalidate a merger.\textsuperscript{275} Arguably the case is a strong one if, as Justice Douglas asserts, Pacific Northwest was the only potential competitor for the California natural gas market in an industry with very high entry barriers (the cost of natural gas pipeline construction).

More troublesome is Justice Douglas's and the Warren Court's seeming result-oriented manipulation of relevant market definitions. Among the most readily criticized is his opinion for the Court in United States v. Grinnell Corp.\textsuperscript{276} There the government sued an aggressive, Microsoft-like company (in terms of its conduct), which provided accredited central station fire and burglary protection services to businesses, under Section 2 of the Sherman Act. Douglas found that accredited central station protection services was the relevant product market because “for many customers, only central station protection will do.”\textsuperscript{277} Then, however, after focusing on the customers' needs in defining the relevant product market, he inexplicably found the geographic market to be national, ignoring the reality that consumers of protection services choose from the options available locally.\textsuperscript{278}

In economic terms, Justice Douglas shifted from demand side analysis for the product


\textsuperscript{277} Grinnell, 384 U.S. at 574.

\textsuperscript{278} Id. at 575.
market to supply side analysis for the geographic market. He adopted, according to the famous line from Justice Fortas' vigorous dissent, a “strange red-haired, bearded, one-eyed man-with-a-limp classification.”

If otherwise indefensible, Justice Douglas seems to have at least been consistent on the geographic market definition issue in the oft-criticized *Von's Grocery* decision, joining with Justice Black's majority holding that Los Angeles constituted the relevant geographic market for retail grocery stores. The major difference between *Grinnell* and *Von's Grocery* is that the latter is devoid of geographic market analysis; rather the *Von's Grocery* Court simply assumes Los Angeles to be the proper market.

On the other hand, he also voted with the majority in the infamous *Brown Shoe* decision, agreeing that the proper relevant geographic markets for retail shoe sales were each city with a population exceeding 10,000. Although *Brown Shoe* involved retail goods rather than the

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279 Id. at 591 (Fortas, J., dissenting).

280 United States v. Von's Grocery Co., 384 U.S. 270 (1966). In his dissent, Justice Stewart pointed out that the actual market foreclosure of the merger was less than 1% of the total grocery store sales in Los Angeles since the two grocery chains were located in different parts of the Los Angeles metropolitan area. Id. at 296. (Stewart, J., dissenting). See also C. Paul Rogers, *Perspectives on Corporate Mergers and the Antitrust Laws*, 12 Loy. Chi. L.J. 301, 304-06 (1981).

281 Later, in his dissent in the watershed United States v. General Dynamics Corp., 415 U.S. 486 (1974), Justice Douglas again applied a supply side analysis by focusing on the areas in which the defendant coal companies sold their coal without a mention of from whom coal buyers looked to purchase coal. Id. at 485-86 (Douglas, J., dissenting).

retail services, it is difficult to see how that makes any difference since the purchaser demand for both are decidedly local.\textsuperscript{283} In \textit{Grinnell}, Justice Douglas argued that corporate planning is on a national level and that the certification and inspection of the systems was largely done by national insurers.\textsuperscript{284} Justice Fortas' dissent forcefully dismembered that argument, noting that Supreme Court precedent and common sense required geographic markets to be defined by “where . . . a potential buyer look[s] for potential suppliers of the service . . .”\textsuperscript{285}

Justice Douglas' narrowly defined relevant product market of accredited central station protection services in \textit{Grinnell} also drew heavy fire from the separate dissents of Fortas and Harlan.\textsuperscript{286} Justice Fortas, in particular, noted that the record established that customers frequently switch from one form of security system to another and that accredited central station services

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\item[\textsuperscript{283}] In the product market part of the \textit{Grinnell} opinion, Justice Douglas makes a feeble attempt to differentiate products and services in distinguishing \textit{Brown Shoe} but provides no analytical support. \textit{Grinnell}, 384 U.S. at 572. (“First, we deal with services, not with products . . . . “). Earlier, in United States v. National Association of Real Estate Boards, 339 U.S. 485, 490-91 (1950) Douglas had ruled that the prohibition against price fixing, at least, applied to services as well as to goods. \textit{See} text accompanying notes 118-121, \textit{supra}.
\item[\textsuperscript{284}] \textit{Id.} at 575.
\item[\textsuperscript{285}] \textit{Id.} at 589 (Fortas, J., dissenting). Justice Fortas noted that “[t]he premises protected do not travel” and also that “[e]ven the central stations can provide service only within a 25-mile radius.” \textit{Id.} at 588. In general, he characterized the majority's relevant market analysis as “Procrustean--that it has tailored the market to the dimensions of the defendants.” \textit{Id.} at 590. Justice Fortas was a one-time student and former protégé of Justice Douglas at Yale and then the SEC. \textit{See}, e.g., Bruce Allen Murphy, \textit{supra} note 9, at 506-07. Although Justices Fortas and Douglas remained friends until Douglas' death in early 1980, \textit{id.}, it is interesting to speculate about whether Fortas' strident dissent in \textit{Grinnell} may have temporarily jeopardized their personal relationship. Perhaps the bond was strong enough that Justice Fortas felt free to use hyperbole in his dissent.
\item[\textsuperscript{286}] 384 U.S. at 585 (Fortas, J., dissenting) \textit{and} 384 U.S. at 583 (Harlan, J., dissenting).
\end{itemize}
\end{footnotesize}
operated at a loss in at least 20 cities where alternatives such as watchmen, local alarm systems, proprietary systems and unaccredited central stations were locally available.\textsuperscript{287} He noted the apparent inconsistency with the Court's "reasonable interchangeability of use and cross-elasticity of demand" tests of earlier cases.\textsuperscript{288}

Justice Douglas' relevant product market analysis in \textit{Grinnell} is indeed difficult, if not impossible, to square with contemporary Supreme Court precedent such as the \textit{Cellophane} case where the Court ruled that cellophane was simply part of the overall flexible wrapping materials market even though cellophane was of greater quality and two to three times more expensive than the alternatives.\textsuperscript{289} While Justice Douglas may have had some difficulty following precedent, he did maintain internal consistency in \textit{Grinnell} since he had joined Chief Justice Warren's dissent in the \textit{Cellophane} decision.\textsuperscript{290} That dissent argued stridently that cellophane should be separated from the market because it was so superior that not only did DuPont not consider other flexible wrapping materials to be competitors but neither did the producers of those materials who priced their products independently of DuPont's pricing.\textsuperscript{291}

Douglas also voted for the narrower market division in the \textit{International Boxing} case, joining the majority which determined that championship boxing matches were separate from

\textsuperscript{287} \textit{Id.} at 592.

\textsuperscript{288} \textit{Id.} at 592-93.


\textsuperscript{290} 351 U.S. at 414 (Warren, C.J., dissenting). Justice Black also joined the Warren dissent.

\textsuperscript{291} \textit{Id.} at 417-19. According to the dissent, buyers considered cellophane to be a separate product as well. \textit{Id.} at 417.
non-championship prize fights.292 Thus, he was in the three principal monopolization cases
decided by the Warren Court, at least consistent in arguing for narrower relevant markets, the
better to conclude that the defendant had the type of dominant market power needed for the
Section 2 case to proceed.293

Today Grinnell is still oft-cited for establishing the two-prong test for monopolistic
conduct294 and thus joins the group of Warren Court antitrust decisions such as Brown Shoe and
Griffith generally discredited for their holdings on the merits but well recognized for their
articulation of the applicable legal principle or analytical standard.295

Justice Douglas' majority opinion in United States v. Greater Buffalo Press, Inc. provides
interesting insight about the flexibility that he (and the Warren Court) believed that “the line of


293 The relevant market analyses of Cellophane and Grinnell are difficult at best to
reconcile, leading some to conclude that the cases are simply result-oriented. DuPont seems to
have been a relatively benign giant, obtaining their market dominance by development of a
superior product while Grinnell was the opposite, buying up competitors and closing them down.
Of course in today's more sophisticated Section 2 approach, DuPont might successfully defend
against the unlawful conduct element. In Grinnell, the government apparently did not believe it
could construct a strong Section 1 case; thus, the finding of monopoly power was necessary for
success against a “bad actor” defendant. See, e.g., Milton Handler, Harlan M. Blake, Robert
Pitofsky & Harvey J. Goldschmid, Trade Regulations – Cases and Materials 230-31 (2d ed.
1983) (suggesting that conduct evidence may influence market power analysis).

294 “The offense of monopoly . . . has two elements: (1) the possession of monopoly
power in the relevant market and (2) the willful acquisition or maintenance of that power as
distinguished from growth or development as a consequence of a superior product, business
acumen, or historic accident.” Grinnell, 384 U.S. at 571-72. See also Mark N. Berry, The
Uncertainty of Monopolistic Conduct: A Comparative Review of Three Jurisdictions, 32 Law &
Pol'y Int'l Bus. 263, 274 (2001)(“the Supreme Court in . . . Grinnell fashioned a general rule for
monopolistic conduct that prevails to the current day.”).

295 See supra text accompanying note 208. See also note 268, supra.
commerce" language of Section 7 of the Clayton Act gave the Court in defining relevant markets. 296 There the Court reversed a lower court finding that the printing of color comic supplements for newspapers which do not print their own was a separate market from the printing of color comic supplements for syndicates which sold copyrighted comic feature to newspapers. 297 Although recognizing that "submarkets within this broad market" may exist, Justice Douglas reiterated that a submarket does not mean the Court must disregard the larger market. 298

In United States v. First National Bank and Trust Co. of Lexington, Douglas wrote for the majority in holding that commercial banking was "one relevant market", 299 following the ruling in Philadelphia National Bank one year earlier that the "cluster of products . . . and services . . . denoted by the term 'commercial banking' . . . composes a distinct line of commerce." 300 Because he determined that the merger was illegal with the market so defined, he avoided deciding whether trust department services constituted another relevant market. 301

A consistent thread seems to be present in Justice Douglas' view of relevant product

297 Id. at 552.
298 Here Justice Douglas quoted from United States v. Phillipsburg National Bank & Trust Co., 399 U.S. 350, 360 (1970), which held that commercial banking was a line of commerce distinct from other types of financial institutions.
301 For a further discussion of First National Bank & Trust of Lexington see text accompanying note 365-66, infra.
issues, articulated in *Rome Cable* where he characterized price as "the single, most important, practical factor" in the insulated conductor market.302 Earlier he had joined Chief Justice Warren's dissent in the *Cellophane* case,303 which argued that the much higher price of cellophane coupled with its physical superiority created a market separate from other flexible wrapping materials.304 Three years later he joined the Court in *International Boxing Club of New York v. United States*305 which held that championship boxing matches were a distinct market from non-championship matches. That finding was based on the much higher revenue, increased television ratings and ticket prices, and greater television, radio and motion picture demand produced by championship fights.306

VIII. Divestiture

It is not surprising, given his antipathy towards monopoly power, that Justice Douglas' favored structural remedies to behavioral ones. In essence, he believed divestiture was

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304 The dissent was further troubled by the fact that 75 to 80% of all cigarettes were wrapped in with cellophane rather than other flexible wrapping materials, noting that all buyers of a product are entitled to competition. *Id.* at 424-25. Again there appears to be some consistency with Justice Douglas' relevant market definition in *Grinnell* when he notes "that for many customers, only central station protection will do." 384 U.S. at 574.


306 *Id.* at 250-51.
appropriate for any antitrust offense involving size or the accumulation of market power, whether accomplished collectively or independently. He was firm in his belief of divestiture as the antitrust remedy of choice and sought its use broadly, including cases involving vertical integration,\textsuperscript{307} conspiracies to restrain trade,\textsuperscript{308} abuse of patent rights in restraint of trade,\textsuperscript{309} monopolization,\textsuperscript{310} and mergers.\textsuperscript{311} In doing so, he made it clear that his interest was protecting competitors\textsuperscript{312} and that his fear of size overcame any thought of efficiency or consumer welfare which, for example, vertical integration might achieve.\textsuperscript{313}

Writing for the majority in United States v. Crescent Amusement Co., Justice Douglas early on employed divestiture to deprive antitrust offenders of “the fruits” of their unlawful


\textsuperscript{312} Schine Chain Theatres v. United States, 334 U.S. 110, 128 (1948).

activity.\textsuperscript{314} Thus, “[t]hose who violate the Act may not reap the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience.”\textsuperscript{315} He thought injunctive relief ineffective because it enabled defendants to “retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors.”\textsuperscript{316} Surprisingly perhaps, this offensive use of divestiture broke new ground and served as the basis for the use of divestiture as a punitive as well as remedial remedy.\textsuperscript{317}

Justice Douglas had no qualms about taking any opportunity to force a divestiture issue. In Cascade Natural Gas Corp. v. El Paso Natural Gas Co.,\textsuperscript{318} Douglas was able to persuade a five justice majority to remand and require divestiture in a case before the Court on a Rule 24(a) right of intervention question.\textsuperscript{319} The case was a continuation of the United States v. El Paso Natural

\textsuperscript{314} 323 U.S. 173, 189 (1944).

\textsuperscript{315} Id.

\textsuperscript{316} According to Douglas, injunctive relief rendered enforcement of the Sherman Act “a futile thing” unless the Justice Department “moved in at the incipient stages of the unlawful project.” Thus, divestiture or dissolution was “an essential feature” of enforcement decrees. \textit{Schine Chain Theatres}, 334 U.S. at 128.

\textsuperscript{317} \textit{See} Note, \textit{Standards Governing Relief Under Section 4 of the Sherman Act}, 97 U. Pa. L. Rev. 234, 244 (1948). According to Douglas, divestiture or dissolution served three functions: (1) terminating the combination or conspiracy when that was the violation; (2) depriving the defendants of the benefits of their conspiracy; and (3) breaking up or rendering powerless the monopoly power which the Sherman Act makes illegal. \textit{Schine Chain Theatres}, 334 U.S. at 128-29.

\textsuperscript{318} 386 U.S. 129 (1967).

\textsuperscript{319} Justices White and Fortas did not participate and Justice Stewart, joined by Justice Harlan, dissented. 386 U.S. at 143.
Gas Company litigation in which Justice Douglas, in a majority opinion for the Court, had three years before found El Paso in violation of Section 7 of the Clayton Act and directed the district court to order divestiture.\textsuperscript{320} The District Court had subsequently denied the intervention requests of the State of California and two private natural gas companies in the divestiture proceedings below. Although divestiture was not briefed or argued, as Justice Stewart's stinging dissent pointed out, that did not stop Justice Douglas from “roam[ing] at large, unconfined by anything so mundane as a factual record developed in adversary proceedings.”\textsuperscript{321}

In point of fact, Justice Douglas was very unhappy with the District Court's handling of the Court's broad divestiture order from the case's previous trip to the Supreme Court, and rather than requiring the parties to brief and argue the issue, simply undertook the issue on his own accord.\textsuperscript{322} One could characterize the Justice's reaffirming of its divestiture order as the reassertion of judicial control over a remand seemingly gone astray or as an example of the judicial activism for which Douglas and the Warren Court were so noted. His \textit{sua sponte} order that the District Court judge be replaced is certainly an illustration of appellate court pique and concomitant activism.

Today divestiture is used much more sparingly than in the Warren Court heyday as

\textsuperscript{320} 376 U.S. 651, 662 (1964). \textit{See} text accompanying notes 392-401, \textit{infra}.

\textsuperscript{321} Justice Stewart characterized the majority as having “rushed headlong into a jurisprudential quagmire . . .” 376 U.S. at 160 (Stewart, J., dissenting). Justice Douglas was unhappy that the Government had “knuckled under” to El Paso in agreeing to a proposed “settlement” of the case after remand. \textit{Id.} at 129. He responded by articulating in detail what the divestiture decree had to contain to assure that El Paso faced competition for the California natural gas market. \textit{Id.} at 136-40.

\textsuperscript{322} Douglas even took the extraordinary step of directing that a different District Judge be assigned to hear the case on this remand, \textit{id.} at 142-43, a move the dissent characterized as “not only unprecedented, but incredible,” since no one had requested his replacement at any stage. \textit{Id.} at 161 (Justice Stewart, dissenting).
skepticism about significant government intrusions into the economy has risen.\textsuperscript{323} Even in monopolization cases, structural relief is somewhat unusual as recognition of efficiencies and other consumer benefits of size has grown.\textsuperscript{324} Further, today high tech markets change so quickly and, in many cases, contain network effects necessary for consumer satisfaction, that the enforcement agencies have become leery of asking for structural relief.\textsuperscript{325} Thus, both a change in markets through technological change and a dramatic shift in antitrust thinking have rendered Justice Douglas and the Warren Court's broad use of divestiture a remnant of antitrust history.

IX. Mergers and Acquisitions

The Warren Court came into full bloom in the 1960s, at least with respect to trade regulation issues, and decided a plethora of merger and acquisition cases under Section 7 of the

\begin{footnotesize}
\textsuperscript{323} See, e.g., Richard A. Posner, Antitrust Law 102 (2d ed. 2001). Judge Posner argues that structural relief such as divestiture should be limited to the divestiture of assets recently acquired in an unlawful merger. \textit{Id.} As a practical matter, that would effectively eliminate divestiture as a remedy since under the Hart-Scott-Rodino Pre-Merger Notification Act all mergers of significant size are reviewed by the government enforcement agencies prior to consummation.

\textsuperscript{324} Judge Posner characterizes the so-called 1968 Neal Report (officially the White House Task Force Report on Antitrust Policy, reprinted in \textit{Small Business and the Robinson Patman Act, Hearings before the Special Subcommittee of Small Business and the Robinson-Patman Act of the House Select Committee on Small Business}, 91\textsuperscript{st} Cong., 1\textsuperscript{st} Sess., vol. 1, p.291 (1969)), which urged that highly concentrated markets be forcibly deconcentrated through forms of structural relief such as divestiture (as well as new legislative solutions), as today “completely off the wall” even though its principal authors were at the time largely conservative. Richard A. Posner, \textit{supra} note 309, at 117.

\end{footnotesize}
Clayton Act. In the face of contemporary criticism that “[t]he sole consistency that I can find is in litigation under Section 7, the Government always wins,” Douglas voted for the Government in every case, frequently writing the majority opinion. In fact, the government did always win.

The watershed General Dynamics decision, handed down only two years after Ford Motor and eight years after the horrific Von’s Grocery decision, vividly illustrates the impact that the Burger Court had on merger analysis and how left behind Douglas and other Warren Court holdovers were by “the New Learning” and thinking about industrial concentration. In the 1966 Von’s Grocery case, Douglas had joined his crony Justice Black in a 6-2 decision, with

326 The merger wave of the late 1950’s and early 1960s coupled with the passage of the Cellar-Kefauver Act in 1950, which expanded Section 7 coverage to asset as well as stock acquisitions are at least partly responsible for the heightened merger enforcement activity. See Cellar-Kefauver Act of December 29, 1950, ch. 1184, 64 Stat. 1125. An aggressive Department of Justice and receptive Supreme Court are certainly other factors.

327 United States v. Von’s Grocery Company, 384 U.S. 270, 301 (Stewart, J. dissenting). See also Thomas E. Kauper, supra note193, at 335-41 (examining growing cynicism of the Supreme Court in antitrust cases where the government always wins).


Justice White concurring, to strike down a merger between the third and sixth largest grocery chains in the Los Angeles area that together had a 7.5% market share, as measured in retail grocery sales.

Justice Stewart, joined only by Justice Harlan, penned a blistering dissent, noting that the majority had blocked a merger resulting in 1.4% of the grocery stores in Los Angeles with a market increase of 1.1% of the two largest chains in the market and 3.3% of the sixth largest. According to Justice Stewart, even those meager statistics were misleading because the acquired firm, Shopping Bag, was on the decline with decreasing earnings and profits. In addition, the lack of entry barriers and the ability of small grocery chains to enter and compete suggested that any increase in market share was not concomitant with an increase in market power.

The Court continued to routinely steamroll any and all mergers after Von’s Grocery until Justice Fortas did not participate. Von’s Grocery Co., 384 U.S. at 279.

Id. at 280 (Stewart, J., dissenting). In addition, Justice Stewart pointed out that the merger was really a market extension rather than horizontal acquisition because more than 50% of the acquiring and acquired firms did not compete with each other for customers. As a result, he asserted that the total market foreclosed by the merger was less than 1% of the total grocery sales in the Los Angeles area. Id. at 296.

Id. at 298.

Justice Stewart noted that the advent of buying cooperatives enabled small chains to purchase goods at prices competitive with those paid by the large chains. Id. at 298-99. Ironically, four years later the Supreme Court, in another shakey decision in which Justice Douglas voted with the majority, applied the per se rule to the market allocation rules of just such a purchasing cooperative. See United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

1974 when the Burger Court had taken firm root.\textsuperscript{336} As a result, that year in \textit{General Dynamics} Justice Stewart was able to garner a 5-4 majority in upholding a merger of a deep shaft coal producer and a strip mine coal company competing in one of the four major coal distribution areas.\textsuperscript{337} Justice Douglas dissented and was joined by Warren Court holdovers Brennan, White, and Marshall. In effect, the four Burger Court appointees joined Stewart to allow the merger in \textit{General Dynamics}, replacing three Warren Court votes to enjoin the acquisition in \textit{Von's Grocery}.\textsuperscript{338}

The majority opinion in \textit{General Dynamics} is strikingly similar to Justice Stewart's dissent in \textit{Von's Grocery} as both opinions looked beyond statistical evidence of potential market foreclosures to consider other market factors such as the relative competitive strength of the acquired company. The \textit{General Dynamics} Court noted that United, the acquired company, had

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{336}] Warren Burger had replaced Earl Warren as Chief Justice. Justices Blackmun, Powell and Rehnquist had been appointed by President Nixon to replace Justices Fortas, Black, and Harlan, respectively. Justice Marshall had joined the Warren Court as a President Johnson appointment subsequent to \textit{Von's Grocery}, replacing Justice Clark.
\item[\textsuperscript{337}] 415 U.S. 486 (1974).
\end{enumerate}
\end{footnotesize}
very limited uncommitted coal reserves with little hope for acquiring more.\textsuperscript{339} Most coal was sold under long-term supply contracts to electric utilities, who demanded assurance of future supplies. Those were contracts United could not effectively bid for. As a result, the Court found proof of United's past and present market position misleading because it did not reflect current competition for new long-term supply contracts.\textsuperscript{340}

Justice Douglas' dissent, while superior to the majority opinion he joined in \textit{Von's Grocery},\textsuperscript{341} really did not tackle the majority's assessment of market impact head on. It was quite obviously drafted as a majority opinion as it focuses mostly on the supposed errors of the district court and not on the majority opinion.\textsuperscript{342} In addressing the majority, Douglas argued the technical point that proof of United's weak reserve position constituted post-acquisition evidence not supported by the district court's time-of-acquisition findings.\textsuperscript{343} The majority disagreed, noting that Section 7 of the Clayton Act dealt with "probabilities, not certainties" and that the district court was "fully justified" in relying on evidence of weak coal reserves because it directly bore on

\textsuperscript{339} United ranked fifth among Illinois coal producers in annual production but tenth in reserve holdings, controlling less than 1% of reserve holdings in Illinois, Indiana, and Western Kentucky. United's reserves were so depleted that it had already closed several mines. \textit{General Dynamics Corp.}, 415 U.S. at 502.

\textsuperscript{340} \textit{Id.} at 501-02.

\textsuperscript{341} Of course, that is not saying much since \textit{Von's Grocery} is probably the weakest, most poorly analyzed Supreme Court antitrust opinion on record.

\textsuperscript{342} One wonders who was the swing vote. Justices Blackmun and Powell would appear to be the most likely candidates based on their later voting records.

\textsuperscript{343} \textit{Id.} at 523-24.
the question of whether a future lessening of competition was probable.\textsuperscript{344}

In addressing the merits of the majority's weak reserve argument, Justice Douglas was reduced to arguing that United might in the future develop deep-mining expertise to remain a competitive factor, even though it had not extracted deep reserves in 20 years.\textsuperscript{345} He also took issue with the district court's lack of findings of market shares at the time of acquisition of uncommitted coal reserves\textsuperscript{346} and concluded that affirming the district court's judgment could only reflect "a deep-seated judicial bias against Section 7 of the Clayton Act."

There is no little irony there since the Supreme Court had not ruled against the Justice Department in a merger case since \textit{Columbia Steel} 26 years before and then only because the case fell under Section 1 of the Sherman Act rather than Section 7 of the Clayton Act. As noted, Douglas had vigorously dissented.\textsuperscript{347} It is probably more accurate to say that Justice Douglas held a deep-seated judicial bias \textit{in favor} of Section 7 of the Clayton Act.

It is illuminating to consider \textit{General Dynamics} and Warren Court decisions like \textit{Von's Grocery} in the context of the Herfindahl-Hirschman Index the present day Department of Justice uses to assess the concentration of a given market and the likely competitive impact of a given

\textsuperscript{344} \textit{Id.} at 505.

\textsuperscript{345} \textit{Id.} at 525. The majority responded by stating that "the hypothetical possibility that United Electric might in the future acquire the expertise to mine deep reserves proves nothing—or too much" since that theoretical possibility was available to all "with the inclination and the corporate treasury to do so." \textit{Id.} at 509.

\textsuperscript{346} \textit{Id.} at 526. The majority had concluded that the Government's prima facie statistical case did not establish the likelihood of a substantial lessening of competition in any market. \textit{Id.} at 511.

\textsuperscript{347} See text accompanying notes 175-81, \textit{supra}. 82
merger to illustrate just how out of step Justice Douglas and his Warren Court brethren have become. 348 *Von’s Grocery*, for example, is not a case the government would today pursue and in fact probably would not get a second request under the Hart-Scott-Rodino Pre-Merger Notification Act. 349 The pre-merger index would likely have been under 300 with the increase from the merger at only about 40. 350 *General Dynamics* presented a similar picture, even before the lack of coal reserves was factored in. 351 Nonetheless, Justice Douglas used *Von’s Grocery* and the even smaller market foreclosure in *United States v. Pabst Brewing Co.* 352 as benchmarks in his *General Dynamics* dissent. 353 Douglas did note that those were cases involving merging “trends,” which, under Warren Court doctrine, allowed for more liberal application of Section 7. 354

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348 *See generally* Department of Justice and Federal Trade Commission Horizontal Merger Guidelines (April 8, 1997).


350 The Guidelines indicate that the government is unlikely to challenge a merger in a market with a post merger index of under 1000.

351 *See* 415 U.S. at 495, n.6 (degree of concentration in two coal markets chosen by government “roughly comparable” to those in *Von’s Grocery*).


353 The market foreclosure in *Von’s Grocery* was 7.5% and in *Pabst Brewing* 4.49%. *Pabst Brewing* was another questionable Warren Court decision, written by Justice Black. Worried about industry trends, Justice Douglas concurred, appending an Art Buchwald *Washington Post* column to his opinion which, tongue in cheek, predicted that, due to slack antitrust enforcement, the U.S. would soon be down to one company and that one company would then attempt to purchase the United States. 384 U.S. at 553.

354 Douglas also acknowledged that “uncommitted reserves or sales of previously uncommitted coal would be preferable indicia of competitive strength,” but argued that the District Court had made no such time of acquisition findings under either standard. 415 U.S. at 485.

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Consistent with his aggressive use of Section 7 to combat increased market concentration, Justice Douglas authored two opinions late in his career in which he refused to apply the so-called “failing company” defense first recognized by the Court in International Shoe Co. v. FTC. In the Citizen Publishing case, Douglas upheld a divestiture order for a joint operating agreement between the two daily newspapers in Tucson, Arizona. Although the agreement provided for the continuing independence of each paper’s news and editorial departments, it combined circulation, advertising, subscription and other business operations.

The defendant asserted the failing company defense since the Citizen had operated in the red for many years and sold 50% less advertising than its competitor, the Star. Douglas quickly ruled that neither requirement for the defense – “the grave probability of a business failure” nor proof that the Star was the only available suitor for the Citizen – was present. As a matter of policy, Justice Douglas announced that the Court was “confin[ing] the failing company doctrine to its present narrow scope.”

In dissent, Justice Stewart expressed his belief that the majority was in effect further restricting the failing company defense by requiring the defendant to affirmatively show that it

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357 394 U.S. at 133-34.

358 Id. at 136-38. Justice Harlan concurred in the result, questioning whether it was appropriate for the Court to consider the failing company defense only at the time of the original operating agreement (1940) rather than when the agreement was renewed (1953). Id. at 340 (Harlan, J., concurring in the result).

359 Id. at 139.
tried to sell to a noncompetitor.\textsuperscript{360} Justice Stewart pointed out that the district court had before it “substantial” and “convincing evidence” that no outside suitor would have considered purchasing the Citizen because of its “dire financial condition”.\textsuperscript{361} According to Stewart, that was all the law required prior to the majority’s new standard that failing company defendants “prove that they made tangible efforts, however futile, to find an outside buyer.”\textsuperscript{362}

In his majority opinion, Justice Douglas does not cite \textit{International Shoe}, and quite rightly so, for the proposition that a failing company defendant must affirmatively establish that it was the only available purchaser. Although the \textit{International Shoe} decision mentions parenthetically that the competitor purchaser should be the only “prospective purchaser,” there is no evidence in that case that the distressed company had actually sought other suitors.\textsuperscript{363} In fact, the Court there gave considerable deference to the good faith of the failing company’s “officers, stockholders, and creditors, thoroughly familiar with the factors of a critical situation and more able than commission or court to foresee future contingencies, [who] after much consideration, felt compelled to choose the later alternative.”\textsuperscript{364}

Justice Douglas did drop a “Cf.” cite to United States v. Diebold, Inc., a brief (one long paragraph) 1961 per curiam decision in which the Court reversed a lower court summary

\textsuperscript{360} \textit{Id.} at 143 (Stewart, J., dissenting).

\textsuperscript{361} \textit{Id.} at 143-45.

\textsuperscript{362} \textit{Id.} at 143.

\textsuperscript{363} \textit{Id.} at 138, \textit{citing} 280 U.S. at 300-02.

\textsuperscript{364} The Court went on to say that “[t]here is no doubt that in doing so they exercised a judgment which was both honest and well informed . . . in the familiar presumption of rightfulness which attaches to human conduct in general.” \textit{Id.} at 302.
judgment for a failing company defendant.\textsuperscript{365} According to the Court, one of the genuine issues of
material fact not resolved adequately for summary judgment was whether the defendant “was the
only bona fide prospective purchaser for HHM’s business.”\textsuperscript{366} The issue “at least in part” was “a
head-on factual controversy . . . of whether other offers for HHM’s assets or business were
actually made.”\textsuperscript{367}

Thus, Justice Douglas, who of course was part of (and probably authored) the \textit{Diebold} per curiam opinion, took the failing company doctrine down a slippery slope. Taking the doctrine as
he found it in \textit{International Shoe} where the decisions of a distressed company as to whether any
non-competing suitors existed was presumed to be in good faith and superior to a reviewing
court’s second guessing, he transformed it to an affirmative duty of the failing company defendant
to seek those suitors, even if futile. That affirmative duty extends beyond \textit{Diebold} where the
Court did not hold that evidence of other offers was a requirement but was merely probative of
whether the defendant was the only viable purchaser of the failing entity.

The year following the \textit{Citizen Publishing} decision, Congress passed the Newspaper
Preservation Act\textsuperscript{368} to validate joint newspaper operating agreements under the antitrust laws as
long as no more than one of the newspapers entering into the arrangement was “likely to remain or become a financially sound publication.” The act requires prior written consent of the Attorney

\textsuperscript{365} 369 U.S. 654 (1961).

\textsuperscript{366} \textit{Id.} at 655.

\textsuperscript{367} \textit{Id.}

Justice Douglas also made quick work of the failing company defense two years after *Citizen Publishing* in the *Greater Buffalo Press* case. 370 There he reversed a lower court's application of the defense which had allowed the merger of two color comic supplement printers, ruling that defendant had satisfied neither requirement. International Color Printing, the acquired company, had not exhibited “the grave probability of a business failure” even though its sole customer was threatening to place its business elsewhere.371 International Color Printing had also failed to meet its affirmative duty, arising from *Citizen Publishing*, to contact potential buyers beyond Greater Buffalo and King, its sole customer.372

In sum, Justice Douglas wanted it both ways with respect to Section 7. He was responsible both for expanding the reach of the Section, as further noted below, and for limiting the failing company doctrine so as to restrict its viability as a legitimate Section 7 defense. While the affirmative duty requirement imposed in *Citizen Publishing* appears to have stood the test of

369 Under the Act, the Attorney General can only give consent if it is found that all the newspapers in the joint operating arrangement but one are failing newspapers. Id. at §1803(b). For an appellate review of the Attorney General’s approval of a merger proposal between competing Detroit newspapers, see Michigan Citizens for an Indep. Press v. Thornburgh, 868 F.2d 1285 (D. C. Cir. 1989), *cert. denied*, 492 U.S. 936 (1990).


371 The customer, King Features Syndicate, had not threatened or invoked the six month cancellation clause in its contract. Further, the company had increased its profits and was planning for expansion Id. at 555.

372 Not surprisingly, Justice Douglas cited the *International Shoe* decision for the first requirement but not for the second, affirmative duty prong. For that, he cited *Citizen Publishing*. Id.
time,\textsuperscript{373} much of the Warren Court Section 7 jurisprudence, led by Justice Douglas, has not.

X. Bank Mergers

The Warren Court, with Justice Douglas playing a prominent role, decided a number of cases involving the merger of competing banks. In some ways the bank merger cases were \textit{sui generis} because they often concerned questions about the applicability of Section 7 to the banking industry. Not surprisingly, the Warren Court always found the means by which to strike down the targeted merger, although sometimes incurring the wrath of Congress.

The initial bank merger case, United States v. Philadelphia National Bank decision,\textsuperscript{374} is famous for establishing the “presumptive illegality” standard of mergers resulting in undue market concentration. First, however, the Court had to travel a tortuous path to determine whether Section 7 even applied to the merger in question. The first question was whether Section 7, as amended by the 1950 Cellar-Kefauver Amendments, covered bank asset mergers.\textsuperscript{375} The Court somewhat surprisingly held that it did.\textsuperscript{376} Second, the Court ruled that the Bank Merger Act of

\begin{itemize}
\item \textsuperscript{373} See Department of Justice and Federal Trade Commission Horizontal Merger Guidelines, §§5.0-5.2 (1997).
\item \textsuperscript{374} 374 U.S. 321 (1963).
\item \textsuperscript{375} Act of December 29, 1950, c. 1184, 64 Stat. 1125-26 (1950).
\item \textsuperscript{376} The Cellar-Kefauver Amendments plugged the “asset” loophole by extending Section 7 to asset acquisitions by a “corporation subject to the jurisdiction of the Federal Trade Commission.” 64 Stat. 1125-26 (1950). Since the FTC’s jurisdiction specifically excluded banks, 15 U.S.C. §45 (a)(6), the Cellar-Kefauver Amendments likewise appeared to exclude banks. The \textit{Philadelphia National Bank} Court ruled, however, that Congress intended to exclude from Section 7 “only assets acquisitions by [banks] when not accomplished by merger.” 374 U.S. at 342.
\end{itemize}
1960\textsuperscript{377} did not impliedly repeal the application of Section 7 to bank mergers.\textsuperscript{378} Although the Justice Department challenged the \textit{Philadelphia National Bank} merger under Section 7 of the Clayton Act, it sued to enjoin a contemporaneous merger between banks in Lexington, Kentucky under the Sherman Act because of concerns about the applicability of Section 7 to bank mergers.\textsuperscript{379} That case, the United States v. First National Bank & Trust Co. of Lexington,\textsuperscript{380} proceeded to the Supreme Court in the term following the \textit{Philadelphia National Bank} decision.\textsuperscript{381} The Court, with Justice Douglas writing for the majority, had no difficulty reversing the District Court decision and striking down the merger under Section 1 of the Sherman Act even absent the “prophylactic” language of the Clayton Act.\textsuperscript{382}

The merger involved the first and fourth largest banks in Fayette County, Kentucky which

\textsuperscript{377} 74 Stat. 129 (1960).

\textsuperscript{378} 374 U.S. at 350. The 1960 Act directed banking regulatory agencies to consider competitive factors before approving bank mergers. The Court, applying the standard maxim that implied immunity from the antitrust laws “are strongly disfavored,” ruled that the Act had no impact on the antitrust laws.

\textsuperscript{379} United States v. First National Bank and Trust Co. of Lexington, 376 U.S. 665, 673 (1964) (Harlan, J., dissenting).

\textsuperscript{380} 376 U.S. 665 (1964).

\textsuperscript{381} The Comptroller of Currency approved the Philadelphia bank merger on February 24, 1961, 374 U.S. at 333, and the Lexington bank merger three days later on February 27, 1961. 376 U.S. at 667. The Justice Department formally challenged both mergers immediately.

\textsuperscript{382} \textit{Id.} at 672-73. The Clayton Act language “may be substantially to lessen competition or to tend to create a monopoly” focuses on the probable competitive impact on the merger in the future in contrast to the Sherman Act's "restraint of trade" language which requires proof of an actual, as opposed to probable, offense. \textit{See, e.g.,} FTC v. Morton Salt Co., 334 U.S. 37, 54 (1948).
resulted in a bank controlling about 52% of the area's assets and deposits. 383 Justice Douglas relied on four 40 to 60 year old railroad cases decided under the Sherman Act in finding that the bank merger met the restraint of trade standard. 384 Faced additionally with the Columbia Steel precedent from which he had so vigorously dissented, 385 he dismissed it summarily, stating that it “must be confined to its special facts,” 386 with little explanation as to what those special facts might be. 387 Instead he included a long quote from the Columbia Steel opinion which identified factors which support an unreasonable restraint of trade finding 388 and simply concluded that “[i]n the present case all those factors clearly point the other way, as we have seen.” 389

In 1966, on the heels of the Philadelphia National Bank and Lexington Bank decisions,

383 376 U.S. at 668-69.

384 United States v. Southern Pacific Co., 259 U.S. 214 (1922); United States v. Reading Co., 253 U.S. 26 (1920); United States v. Union Pacific R. Co., 226 U.S. 61 (1912); and Northern Securities Co. v. United States, 193 U.S. 197 (1904). According to Justice Douglas “[t]he four railroad cases at least stand for the proposition that where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of Section 1 of the Sherman Act.” 376 U.S. at 672-73.


386 376 U.S. at 672.

387 In describing the Columbia Steel he noted that the Court had “observed, inter alia, that because of rate structures and the location of United States Steel's fabricating subsidiaries, the latter were unable to compete effectively in Consolidated's market.” Id.


389 Id. Justices Brennan and White concurred in the result but believed the result was dictated solely on the Columbia Steel precedent. Id. at 673. Justices Harlan and Stewart dissented, as they did with most of the merger decisions in the 1960s. Id.
Congress expressed its displeasure (as well as clarifying the applicability of the Clayton Act to bank mergers) with the Court by passing the Bank Merger Act exempting existing bank mergers, including those in pending government suits, from Section 1 of the Sherman Act and Section 7 of the Clayton Act.\textsuperscript{390} The act specified that future bank mergers were subject to the Clayton Act scrutiny unless their anticompetitive effects were "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of the community served."\textsuperscript{391}

Although the Bank Merger Act of 1966 seemingly provided a new defense to the proponents of a bank merger, the Douglas-led Court soon minimized its efficacy. In United States v. First City Bank of Houston, decided the term following the Bank Merger Act, Justice Douglas wrote for the Court and held that the burden to establish "the public interest" defense was on the banks purporting to merge.\textsuperscript{392} Further, even though the statute required the Comptroller of Currency find that the anticompetitive effects of a bank merger must be "clearly outweighed in the public interest by the probable effect of the transaction in meeting the convenience and needs of

\textsuperscript{390} 12 U.S.C. §1828(c). \textit{See} United States v. Third National Bank in Nashville, 390 U.S. 171, 177 (1968)("Congress was evidently dissatisfied with the 1960 Bank Merger Act as that Act was interpreted in United States v. Philadelphia National Bank, 374 U.S. 321 (1963) and in United States v. First National Bank & Trust Co. of Lexington, 376 U.S. 665 (1964), and wished to alter both the procedures by which the Justice Department challenges bank mergers and the legal standard which courts apply in judging those mergers.").

\textsuperscript{391} \textit{Id.} at §1828(c)(5). The act gives the Department of Justice only 30 days to challenge bank mergers following approval by the appropriate banking agencies but automatically stays any merger challenged, thus preventing the necessity and difficulty of unraveling a consummated merger. \textit{Id.} at §1828(c)(6).

\textsuperscript{392} 386 U.S. 361, 366 (1967).
the community to be served”, 393 Justice Douglas ruled that Congress intended that judicial review be *de novo*. 394 That meant, according to Douglas, an independent determination of the issues by the reviewing court. 395 Thus, Douglas rejected the argument that the judiciary must sustain the administrative agency’s decision unless it is not supported by substantial evidence. 396

One term later in United States v. Third National Bank in Nashville, the Court applied the *de novo* review specified in the *Bank of Houston* case and overturned a district court finding which had upheld the merger between the second and fourth largest banks in Nashville. 397 Although the Court stated that “the legislative history of the Bank Merger Act of 1966 leaves no doubt that the Act was passed to make substantial changes in the law applicable to bank mergers,” the Court again held that it was not bound by an administrative agency’s determination of the convenience and needs of the community. 398 According to the Court, the defending bank must establish that it could not meet the community’s convenience and necessity needs without merging

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394 386 U.S. at 367-70. The statute provided that a court in an antitrust action “shall review *de novo* the issues presented.” Justice Douglas rejected the argument that the use of the word “review” rather than “trial” indicated a more limited scope of judicial review. *Id.* at 368.

395 *Id.*

396 *Id.* at 366-67. Douglas characterized the 1966 Bank Merger Act as “the product of powerful contending forces, each of which in the aftermath claimed more of a victory than it deserved, leaving the controversy that finally abated in Congress to be finally resolved by the courts.” *Id.* at 367.

397 390 U.S. 171 (1968). The Court’s opinion by Justice White was joined by Douglas and three other justices. Justice Harlan, joined by Justice Stewart, again dissented and Justices Fortas and Marshall did not participate.

398 *Id.* at 177.
with a competitor.\footnote{Poor management was the problem for the Nashville Bank. The Court held that defendant had to show that it made reasonable efforts to solve the management problem short of merger or that any attempts would have been unlikely to succeed. Id. at 189.}

In effect, the \textit{Bank of Houston} and \textit{Third National Bank in Nashville} cases continued to apply standard Warren Court Section 7 analysis to bank mergers, undeterred by the 1966 act.\footnote{The Court had commented that the 1966 Bank Merger Act “was more clear and more specific in prescribing new procedures for testing mergers than in expounding the new standard by which they should be judged.” \textit{Id.} at 178.}

Its interpretation of the “convenience and needs” standard, placing the burden on the defendant to meet the standard and giving little or no weight to administrative determinations of the standard produced no demonstrable change to “pure” antitrust enforcement of bank mergers under Section 7, irrespective of Congressional intent.\footnote{See also William Andersen & C. Paul Rogers III, note 95, supra, at 464.}

\section*{X. Potential Competition}

In the 1960s and 70s, the Warren Court aggressively expanded the application of Section 7 to mergers which were not between direct competitors or firms in a vertical relationship but involved companies in complementary markets, whether by virtue of their products or geography. Not surprisingly, Justice Douglas was perhaps the leading expansionist of Section 7 to what became known as conglomerate mergers on that Court.\footnote{Bruce Allen Murphy, Douglas’ most recent biographer, points out that in 1962 with the appointment of Justice Goldberg to replace Justice Frankfurter, Douglas finally had a five-vote liberal majority (Chief Justice Warren, and Justices Black, Brennan, and Goldberg) with which to push his individual rights agenda. (In 1962 President Kennedy also appointed Justice White to replace Justice Whittaker but White was not the liberal that Kennedy had hoped for.)}

He wrote three of the first four
Supreme Court opinions applying potential competition theory to mergers, noted a dissent in the other, and penned the only opinion in which the Court has ever ruled that the opportunity for reciprocal dealing is sufficient to block a merger between non-competing companies.

*El Paso Natural Gas* was the first Section 7 case to directly consider the impact of potential competition on a merger. It involved the planned acquisition by El Paso Natural Gas, the sole out-of-state natural gas supplier to California, of Pacific Northwest Pipeline, the operator of pipelines throughout the west but not in or to California. At the time of the merger, Pacific Northwest had tentatively agreed with Southern California Edison, the largest industrial user of natural gas in the state, to build a pipeline into California to supply Edison with natural gas.

Bruce Allen Murphy, note 9, *supra*, at 360. It is not perhaps too much of a stretch to suggest that the same liberal majority gave Douglas somewhat of a carte blanche to push his hawkish, expansionist antitrust agenda. In any event, he produced more questionable antitrust decisions in the 1960s and early 1970s than at any other period during his long career on the Supreme Court.

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406 376 U.S. 651 (1964). The Court in the *Columbia Steel* case, which was brought under Section 1 of the Sherman Act, had briefly considered the impact of potential competition. United States v. Columbia Steel Co., 334 U.S. 495, 528-29 (1948). Justice Douglas' dissent in *Columbia Steel* did not deal with potential competition. *Id.* at 534. *See generally* text accompanying note 179, *supra*.

407 El Paso supplied more than 50% of the natural gas in the state. 376 U.S. at 652 & n.2.

408 Edison preferred that arrangement to continuing to purchase natural gas from El Paso because El Paso was only able to offer interruptible gas service through its distributors. Pacific's gas would be non-interruptible and, because no distributors would be involved, less expensive than El Paso's. *Id.* at 654-55.
While El Paso successfully opposed Pacific's plan to build a pipeline into California throughout the regulatory process, it also offered Edison much better gas prices and promises of uninterrupted deliveries.  

Justice Douglas quickly seized on the impact Pacific had on the California natural gas market as a potential, rather than actual entrant, stating that “[w]e would have to wear blinders not to see that the mere efforts of Pacific Northwest to get into the California market, though unsuccessful, had a powerful influence on El Paso's business attitudes within the State.” The fact that Pacific Northwest was effectively locked out of the California market and thus had no present market share was not relevant because, with the demand for natural gas growing by 200 million feet per day, it would have future opportunities to compete.

Justice Douglas does not articulate a test for establishing a potential competition claim, although he does suggest that the high entry barriers in the pipeline industry and Pacific Northwest’s singular position as a potential entrant are important factors. The closest he came to language that might have general application was when he wrote that “[t]he effect on competition in a particular market through acquisition of another company is determined by the nature or extent of that market and by the measure of the absorbed company to it, that company's

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409 Id. at 655.
410 Id. at 659.
411 Id. at 658.
412 Id. at 660.
413 Id. at 660-61. El Paso actually took control of Pacific Northwest in 1957. By the time the case wound its way to the Supreme Court seven years later, however, two more interstate pipelines had entered California. Id. at 661.
eagerness to enter that market, its resourcefulness, and so on.\textsuperscript{414}

Although little doctrine comes from \textit{El Paso Natural Gas}, it is hard to quibble with the result since Pacific Northwest's attempts to enter California were certainly affecting El Paso's decisions within the market. Further, the decision, the first to rest on potential competition, is an innovative one.\textsuperscript{415}

Only two months later, however, in United States v. Penn-Olin Chemical Co., the Court faced a more difficult application of the potential competition theory.\textsuperscript{416} The government had challenged a joint venture between Pennsalt Chemicals and Olin Mathieson Chemical Corporation for the purpose of producing and selling sodium chlorate in the southeast.\textsuperscript{417} The majority applied dual potential competition tests: (1) determining whether both of the two joint venturers were potential entrants to see if the joint entry foreclosed the competitive benefits of individual entry and, if not, (2) determining whether only one of the joint venturers was a potential entrant and, if so, whether the other was a potential entrant that would exert competitive influence “in the

\textsuperscript{414} Id. at 660.

\textsuperscript{415} Arguably the Warren Court would have been better advised to apply potential competition analysis to some of its earlier, questionable “horizontal” merger cases. See \textit{e.g.} United States v. Von's Grocery, 384 U.S. 270 (1966)(horizontal merger even though only 25% of grocery stores of two companies competed) \textit{and} United States v. Continental Can Co., 378 U.S. 441 (1964)(metal and glass containers treated as one market in spite of fact that there was little current end use competition between the two and Court acknowledged fact that merger involved “inter-industry” competition).

\textsuperscript{416} 378 U.S. 158 (1964).

\textsuperscript{417} Pennsalt did not produce sodium chlorate in the southeast; Olin Mathieson did not produce sodium chlorate but did market it, although not in the southeast. \textit{Id.} at 160-03.
wings" of the market.\textsuperscript{418} Since the district court had not considered the second test, the Court vacated and remanded.

\textit{Penn-Olin} represents a substantial expansion of potential competition doctrine beyond \textit{El Paso Natural Gas} because it in essence questions whether new market entry through a joint venture is as pro-competitive as individual entry might have been.\textsuperscript{419} Still, Justice Douglas did not believe that the majority had gone far enough and dissented, joined by his regular ally, Justice Black.\textsuperscript{420} In Douglas' view, the joint venture was akin to a per se market division between the two since it divided the market “fifty-fifty” and foreclosed all competition between them.\textsuperscript{421} He thought it probable\textsuperscript{422} that one of the two, if not both, joint venturers would have entered the market independently with the other on the periphery as “a potent competitive factor.”\textsuperscript{423} He saw no reason to remand a case where the joint venture “was launched at the very threshold of the


\textsuperscript{419} Accord Darren Bush & Salvatore Massa, \textit{Rethinking the Potential Competition Doctrine,} 2004 Wis. L.Rev. 1035, 1050. Pennsault had never sold directly in the southeast market targeted by the joint venture while Olin had never produced sodium chlorate, although it had for the last few years distributed the product in the southeast for Pennsault to test the demand. 378 U.S. at 161-62.

\textsuperscript{420} Id. at 177 (Douglas, J., dissenting). Justices White and Harlan also dissented; White without opinion and Harlan with a memorandum opinion.

\textsuperscript{421} Id. at 182.

\textsuperscript{422} “... Section 7 deals only with probabilities, not certainties.” \textit{Id.}

\textsuperscript{423} \textit{Id.}
Thus, Douglas took the extreme view that two firms, who had not entered a market but who might, engaged in what amounted to a per se market division by agreeing to enter the market together. Since he placed the per se tag on the activity the concentration of the market, the level of entry barriers and number of other potential competitors were apparently not relevant.  

Justice Douglas wrote for a six-justice majority in the next potential competition case to reach the Court, FTC v. Procter & Gamble Co., decided three years after *Penn-Olin*. There the Court found that Procter & Gamble had violated Section 7 by acquiring Clorox, the largest manufacturer of household bleach, because P & G was a potential entrant in that market.

Douglas noted that P & G had considered entering the liquid bleach market by internal expansion but had decided that acquiring Clorox, with its 50% market share, would quickly give it a dominant position. He concluded that the acquisition produced two likely anticompetitive effects. First, since P & G manufactured complementary products (detergent) which were marketed and advertised in the same manner as liquid bleach (through grocery stores and by mass 

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424 *Id.* To allow such a joint venture would be to avoid Section 7 “by sophisticated devices.”

425 In contrast to the majority opinion which looked to several criteria such as the structure and history of the market, the stated reason for the joint venture, actual competition between the two firms, and the level of competition in the market but for the joint venture to assess whether the joint venture has caused or was likely to cause an anticompetitive effect. *Id.* at 176-77. *See also* Darren Bush & Salvatore Massa, note 405 *supra* , at 1051.

426 386 U.S. 568 (1967). Justices Stewart and Fortas did not participate and Justice Harlan wrote a concurring opinion.

427 *Id.* at 574.
media), it influenced the liquid bleach market as a potential competitor.\textsuperscript{428} Second, the acquisition of Clorox by as large a company as P & G would serve to entrench Clorox as the industry leader, discouraging entry by others and effectively raising entry barriers.\textsuperscript{429} In addition, Douglas rejected the notion that efficiency gains resulting from a merger could ever be used as a defense to illegality,\textsuperscript{430} a point vigorously disputed by Justice Harlan in his concurrence.\textsuperscript{431}

Although the \textit{Procter & Gamble} Court reversed the Sixth Circuit's dismissal of the FTC’s complaint, Douglas believed that only a summary of the FTC’s findings was necessary since “the anticompetitive effects with which this product-extension merger is fraught can be easily seen.”\textsuperscript{432} Justice Harlan and many commentators have disagreed that the case was easy\textsuperscript{433} and perhaps more telling, have asserted that Justice Douglas improperly made assumptions and drew conclusions from the facts presented. For example, Douglas’ characterization of the liquid bleach market as “oligopolistic” and non-competitive, which formed the basis of his finding of both likely

\textsuperscript{428} \textit{Id.} at 578. The FTC had found that P & G was the most likely entrant into the liquid bleach market. \textit{Id.} at 580-81.

\textsuperscript{429} \textit{Id.} at 581.

\textsuperscript{430} \textit{Id.} at 580, citing the infamous \textit{Brown Shoe} decision. Later in United States v. First National Bank and Trust Co. of Lexington, 376 U.S. 665, 669 (1964) Justice Douglas, writing for the majority, ruled that a merger of two banks violated Section 7 because “the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition.” \textit{See} text accompanying notes 365-75, \textit{supra}. So much for the needs of consumers of trust departments in Lexington, Kentucky.

\textsuperscript{431} \textit{Id.} at 603-04.

\textsuperscript{432} \textit{Id.} at 575, 578.

\textsuperscript{433} “I consider the case difficult within its own four corners, and beyond that, it portents for future administrative and judicial application of Section 7 . . . to this kind of merger important and far-reaching.” \textit{Id.} at 581-82.
anticompetitive effects, is suspect. Further, his “entrenchment” theory, mentioned almost in passing at the end of the Procter & Gamble opinion, created a lot of attention but has found little or no favor subsequently.

Similarly Douglas's rather cavalier and summary dismissal of efficiency gains as a defense to a Section 7 action, harkening back to the misguided Brown Shoe opinion, is at odds with current thinking. Just as in Brown Shoe, the FTC paradoxically viewed the efficiencies that Procter & Gamble would gain in marketing and distributing Clorox bleach as anticompetitive.

Justice Douglas, of course, accepted the FTC's finding that those efficiencies would raise entry

434 In addition to Clorox's almost 50% market share, the top two firms controlled 65% of the market and the top six 80%. Two hundred small producers accounted for the remaining 20%. Id. at 575-76. There was no indication, however, that Clorox or the other market leaders could have priced above competitive levels or reduced output to increase price, thus rendering Procter & Gamble's influence as a potential entrant a nullity. See Robert H. Bork, The Antitrust Paradox: A Policy At War With Itself 259-60 (1978); Donald F. Turner, Conglomerate Mergers and Section 7 of the Clayton Act, 78 Harv. L. Rev. 1313, 1363 (1965).

435 The entrenchment theory can actually be traced to a vertical merger case, Reynolds Metals Co. v. FTC, 309 F.2d 223 (D.C. Cir. 1962), a case which Justice Douglas did not cite in Procter & Gamble, perhaps in keeping with his sometimes remark to friends that “I don't follow precedents, I make 'em.” Bruce Allen Murphy, note 9, supra at 340. For subsequent cases in which an entrenchment theory has failed, see e.g. FTC v. Atlantic Richfield Co., 549 F.2d 289, 298 (4th Cir. 1977); Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 865 (2d Cir. 1974). Compare Kennecott Copper Co. v. FTC, 467 F.2d 67,78 (10th Cir. 1972), cert denied, 416 U.S. 909 (1974). See also Lawrence K. Hellman, “Entrenchment” Under Section 7 of the Clayton Act: An Approach for Analyzing Conglomerate Mergers, 13 Loy Chi. L.J. 225 (1982) (arguing for use of entrenchment theory in conglomerate mergers if certain conditions are present).

436 See notes 268-69 and accompanying text, supra.


barriers without consideration of the fact that they might enhance consumer welfare.439

Justice Harlan seems to have gotten it right when he lamented that Justice Douglas's Procter & Gamble opinion “leaves the Commission, lawyers, and businessmen at large as to what is to be expected of them in future cases of this kind.”440 The decision applies the concept of potential competition without any real contours, endorses a questionable new theory, entrenchment, with little analysis and summarily trashes efficiencies as a Section 7 defense.

Not surprisingly, Justice Douglas wrote the majority opinion in the next conglomerate merger case to reach the Court, Ford Motor Co. v. United States.441 Of course, the case was made to order for Douglas since it allowed for his expansionist theories in both vertical and conglomerate contexts.442 Ford Motor's acquisition of Autolite, one of three major spark plug manufacturers that together controlled 85% of the market, was in lieu of its entering the market de

439 Justice Harlan thought that the question should be asked and that economies in advertising could benefit consumers by providing brand identification and quality assurance, although he concluded that P & G had not shown any real advertising efficiencies. 386 U.S. at 603-04. He was probably correct that advertising efficiencies were lacking. See e.g., John L. Peterman, The Clorox Case & the Television Rate Structures, 12 J.L. & Econ. 321 (1968)(asserting that Procter & Gamble did not actually have advertising cost advantages which could entrench it in the liquid bleach market). Accord Robert H. Bork, supra note 420, at 254-55. There is a substantial debate about whether conglomerate mergers ever produce real efficiencies, at least any that ultimately benefit consumers. See e.g. C. Paul Rogers, Forward: Perspectives on Corporate Mergers and the Antitrust Laws, 12 Loy. Chi. L.J. 301, 312-17 (1981); F.M. Scherer, Book Review, The Posnerian Harvest: Separating the Wheat from the Chaff, 86 Yale L.J. 974, 987-88 (1977).

440 386 U.S. at 583. Judge Bork wrote that Douglas's “murky” opinion “makes sense only when antitrust is viewed as pro-small business—and even then it does not make much sense, because small business is protected from Clorox's cost advantages only when they happen to be achieved through a merger.” Robert H. Bork, supra note 420, at 255.

441 405 U.S. 562 (1972).

442 See text accompanying notes 388-411, supra and notes 474-82, infra.
novo which it had determined would be more costly and would take up to eight years.\textsuperscript{443}

Although the main issue before the Court was whether divestiture was the appropriate remedy,\textsuperscript{444} Justice Douglas also agreed that the district court had properly found that as a potential entrant Ford exacted significant procompetitive effects on the concentrated spark plug market.\textsuperscript{445}

Ford had argued that its acquisition had actually benefitted the spark plug market since it would make Autolite, with only 15\% of the market, a more effective competitor against Champion, with almost a 50\% share, and General Motors, which controlled 30\% of the market.\textsuperscript{446} Douglas disagreed, in part because the merger would also eliminate Ford as one of the two largest purchasers of original equipment spark plugs.\textsuperscript{447}

More questionable, however, was his quotation from \textit{Philadelphia National Bank} to the effect that choosing between “economic debits and credits” is beyond “judicial competence.”\textsuperscript{448} Here Douglas is at least consistent with his quick dismissal of the relevance of efficiencies in \textit{Procter & Gamble}\textsuperscript{449} since that would require some weighing or judicial choice-making as well as

\textsuperscript{443} \textit{Id.} at 566.

\textsuperscript{444} The majority, per Justice Douglas, thought it was. \textit{Id.} at 571-78.

\textsuperscript{445} \textit{Id.} at 574.

\textsuperscript{446} \textit{Id.} at 569-70.

\textsuperscript{447} \textit{Id.} at 570-71. He also believed that Ford would gain access to the spark plug aftermarket which would help perpetuate the so-called original equipment (OE) tie, the replacement of the same brand of spark plugs as the original. \textit{Id.} at 570.


\textsuperscript{449} See text accompanying notes 416, 422-26, \textit{supra}. 

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the anti-Rule of Reason position of the Warren and early Burger Courts. Douglas, of course, favored bright line per se rules generally and in the merger arena, any showing of likely anticompetitive effect was enough to render the merger illegal.

The Douglas-led expansion of Section 7 into the potential competition arena posited that a firm sitting on the sidelines of a market exerted competitive influence on the market participants who are worried about the threat of new entry. This thinking became known as the doctrine of perceived potential competition and was the subject of further scrutiny by the Court in three decisions in 1973 and 1974. In *Falstaff* a sharply divided Court reversed a lower court ruling

*See e.g.* United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) establishing a per se rule which the Court overruled ten years later after Justices Douglas and Black had retired. *See Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36 (1977). Douglas' position in *Ford Motor* parallels that of the Court in *United States v. Topco Associates, Inc.,* 405 U.S. 596 (1972), decided that same year. There in a 4-1-1 opinion with Justices Powell and Rehnquist not participating, the majority, including Justice Douglas, applied the per se rule to horizontal non-price restraints, stating that whether they would decide the case the same way under the rule of reason “is irrelevant to the issue before us.” *Id.* at 609. According to Justice Marshall, writing for the Court, Congress could overturn per se rules if it so chooses, “leav[ing] courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.” *Id.* at 609 n.10.

*See e.g.* FTC v. Procter & Gamble Co., 386 U.S. 568, 576-77 (1967).


*See United States v. Falstaff Brewing Corp.,* 410 U.S. 526 (1973); United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974); & United States v. The Connecticut National Bank, 418 U.S. 656 (1974). The Court in those cases also discussed, without ratifying, the actual potential competition theory which attempts to predicate Section 7 liability upon a showing that the acquiring company would have entered the market de novo or by a “toehold” acquisition if not permitted to acquire the company at issue and that such an alternative entry would be procompetitive. *See, e.g., BOC International, Ltd. v. FTC,* 557 F.2d 24, 26-28 (2d Cir. 1977) and *Tenneco, Inc. v. FTC,* 689 F.2d 346 (2d Cir. 1982). *See generally* William R. Andersen & C. Paul Rogers III, note 95 *supra,* at 536-39.
that failed to consider the effect of Falstaff as a potential entrant to the New England beer market. Falstaff, the fourth largest brewer nationally and the largest brewer that did not have a presence in New England, had acquired Narragansett, a regional brewer with the largest share of the New England market.\textsuperscript{454} Although Falstaff argued, and the district court found, that it would never have entered the New England market de novo, the Court reversed and remanded, directing the lower court to consider the probable impact of Falstaff on the market as a potential competitor.\textsuperscript{455}

The majority opinion drew two strong opposing opinions, one concurring in the result by Justice Marshall and the other by Justice Rehnquist dissenting, which both argued stridently that the majority had gone too far.\textsuperscript{456} Justice Douglas, however, was moved to write a partial concurrence arguing that the majority had not gone far enough in merely reversing and remanding.\textsuperscript{457} In spite of pointed language by Justices Marshall and Rehnquist that there was no factual basis for the Court's remand order,\textsuperscript{458} Douglas asserted that the Court should have reversed

\textsuperscript{454} 410 U.S. at 528-29.

\textsuperscript{455} Id. at 537.

\textsuperscript{456} Id. at 545 (Marshall, J., concurring in the result); Id. at 572 (Rehnquist, J., dissenting, joined by Stewart, J.). Justices Marshall and Rehnquist both pointed out that the government had provided no factual basis on which a court could conclude that Falstaff was a perceived potential entrant into the New England beer market; thus the basis for the remand was not supported by the record. \textit{Id.} at 546, 574-75.

\textsuperscript{457} Id. at 538 (Douglas, J., concurring in part).

\textsuperscript{458} “Thus, our remand leaves the hapless District Judge with the unenviable task of reassessing nonexistent evidence under a theory advanced by neither of the parties.” \textit{Id.} at 546 (Marshall, J., concurring in the result). “For this Court to reverse and to remand for consideration of a possible factual basis for a theory never advanced by the plaintiff is a drastic and unwarranted departure from the most basic principles of civil litigation and appellate review.” \textit{Id.} at 574-75 (Rehnquist, J., dissenting, joined by Stewart, J.).
and rendered. After a polemic on the inherent evils of corporate growth by acquisition or merger, Douglas argued that even though Falstaff would not have entered the New England market de novo had it not been allowed to acquire Narragansett, it might sometime in the future change its mind. Further, he opined, that Falstaff was the most likely new competitor and that replacing the leading regional brewer with a beer seller “with national capabilities increased the trend toward concentration” and was sufficient to violate Section 7.

With its changing composition, the Court further reigned in the application of potential competition in two bank cases decided the term after Falstaff. Although Justice Douglas did not participate in the first decision, United States v. Marine Bancorporation, he did join Justice White's four justice dissent in the companion United States v. Connecticut National Bank, argued and then decided at the same time. That dissent took issue with the majority's narrow definition of the relevant market as the localized area in which the acquired bank operated which precluded the finding of an “in the wings” competitive effect outside of that market.

459 “The ‘rising tide’ of concentration in American business” was creating “a nation of clerks” and leading “predictably to socialism.” Id. at 540, 543.

460 Id. at 544.

461 Id. at 544-45.

462 418 U.S. 602 (1974). *Marine Bancorporation* was a 5-3 decision in which the Court held that regulatory barriers precluded both de novo entry and any “in the wings” competitive influence by the acquiring bank.


464 The dissent argued that more than one relevant market could be found as in United States v. Pabst Brewing Co., 384 U.S. 546 (1966), harkening to Section 7's “any section of the country” language. Id. at 674.
The dissenters in *Connecticut National Bank* were all Warren Court holdovers, thus illustrating that, by the narrowest of margins, the worm had turned on the extension and utilization of potential competition theories under Section 7. The two bank cases, together with the *General Dynamics* decision that same term, brought the “government always wins” heyday of Section 7 to an abrupt halt.

After its flurry of potential competition decisions in the 1960's and early 1970's, the Supreme Court has not addressed the topic since. Lower courts have found that substantial proof and certainty problems plague the use of potential competition theories. Commentators have likewise criticized the validity of potential competition generally as well as the lack of measurable standards or guidance from the Supreme Court. Although the 1984 Department of

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465 Justice White was joined by Justices Brennan and Marshall, in addition to Justice Douglas.

466 The dissenters in the companion *Marine Bancorporation* decision in which Douglas did not participate were also Justices White, Brennan and Marshall. 418 U.S. at 643.


468 In fact, the Supreme Court has not selected for review any Section 7 case since its 1974 term.


Justice Merger Guidelines do consider potential competition as the only viable theory for attacking conglomerate mergers, the government has run into a skeptical judiciary and has relatively little incentive for challenging conglomerate acquisitions.

Although the government has obtained consent decrees in a few cases involving potential competition, enforcement efforts have been sporadic and uncertain. Its future does not seem bright and, as one commentator has suggested, it may soon join “the scrap heap of defunct merger theories.”


\[\text{\textsuperscript{472}}\text{The government often proceeds under the 1992 Guidelines, arguing for a broad market definition and avoiding potential competition issues by asserting that the claim is one of actual, ongoing competition. It has had a long history of success under this approach. See United States v. Continental Can Co., 378 U.S. 441 (1964) and FTC v. Staples, Inc. 970 F. Supp. 1066 (D.D.C. 1997). See also Darren Bush & Salvatore Massa, note 405, supra, at 1070-73, 1085. The strategy does not always work, however, see, e.g., Equifax, Inc. v. FTC, 618 F.2d 63 (9th Cir. 1980).}\]

\[\text{\textsuperscript{473}}\text{See cases cited in Darren Bush & Salvatore Massa, note 405, supra, at 1085. See also John E. Kwoka, Non-Incumbent Competition: Mergers Involving Constraining and Prospective Competitors, 52 Case W. Res. L. Rev. 173, 174 (2001)(asserting that government enforcement agencies have been lax in pursuing potential competition cases).}\]

\[\text{\textsuperscript{474}}\text{Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition 570 (3\textsuperscript{rd} ed.}\]

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Justice Douglas' contributed another theory to that "scrap heap." In FTC v. Consolidated Foods Corp., he wrote for the Court and condemned a merger because it facilitated reciprocal dealing with third parties. Consolidated, which operated food processing plants as well as retail food stores, had acquired Gentry, Inc., a manufacturer of dehydrated onion and garlic commonly used in processed foods. For ten years following, Consolidated often urged its processed food suppliers to purchase their dehydrated onion and garlic from Gentry.

The Seventh Circuit had relied mostly on post-acquisition evidence and concluded that the probability of a lessening of competition was not established, pointing out that while Gentry's share of the dehydrated onion market had increased by 7%, its share of the dehydrated garlic market had decreased 12%. It also noted that reciprocal buying had been unsuccessful on a number of occasions.

Justice Douglas disagreed with the Seventh's Circuit's evaluation of the post-acquisition

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2005). See also Lawrence A. Sullivan & Warren S. Grimes, supra note 438, at 661 (potential competition doctrine "has fallen on hard times."). The so-called Actual Potential Competition theory which attempts to measure the likelihood of actual entry by the acquiring firm, was never officially embraced by the Supreme Court. Although it has had limited success in attacking mergers, see Yamaha Motors Co. v. FTC, 657 F.2d 971 (8th Cir. 1981), cert denied, 456 U.S. 915 (1982) and Mercantile Texas Corp. v. Board of Governors, 638 F.2d 1255 (5th Cir. 1981) (approving doctrine in principle), the "reasonable probability of entry in the near future" standard is one that the government has not been able to meet and has essentially abandoned. See, e.g., United States v. Siemens Corp., 621 F.2d 499 (2d Cir. 1980); FTC v. Atlantic Richfield Co., 549 F.2d 289 (4th Cir. 1977); United States v. Black & Decker Mfg. Co., 430 F. Supp. 729 (D. Md. 1976); Babcock & Wilcox Co. v. United Technologies Corp., 435 F. Supp. 1249, 1285-86 (N.D. Ohio 1977).


476 Id. at 598.

477 Id.
evidence, finding that “[r]eciprocity was tried over and over again and it sometimes worked.”\textsuperscript{478} He rejected the view, however, that post-acquisition evidence was necessary stating that “the force of Section 7 is in probabilities, not what later transpired.”\textsuperscript{479} It was enough to condemn the merger when the Federal Trade Commission found the probability of reciprocity involving an acquired company with a substantial market share.\textsuperscript{480}

Justice Stewart, concurring in the judgment, believed that Section 7 required “more than a bare potential for reciprocal buying” to bar a merger and argued that “the law requires a more closely textured economic analysis” than provided by the majority.\textsuperscript{481} He doubted that Consolidated could “strong-arm” Armour or Swift into buying dehydrated onions from Gentry but believed it could influence smaller suppliers, which led him to concur in the judgment.\textsuperscript{482}

Following \textit{Consolidated Foods}, the use of reciprocity to condemn mergers initially found some success in the lower courts.\textsuperscript{483} Later decisions, however, applying the more closely textured

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\textsuperscript{478} \textit{Id.} at 600. According to Justice Harlan in his concurrence, Consolidated was able to pressure suppliers to purchase from Gentry only seven times in a decade. \textit{Id.} at 602 (Harlan, J., concurring in the judgment).
\textsuperscript{479} \textit{Id.} at 598.
\textsuperscript{480} Gentry controlled 32\% of the combined dehydrated garlic and onion market prior to the acquisition. It and industry leader Basic Vegetable Products together controlled almost 90\% of a rapidly expanding market. \textit{Id.} at 595, 600.
\textsuperscript{481} \textit{Id.} at 603 (Stewart, J., concurring in the judgment). He would require more than evidence that attempts at reciprocity “sometimes worked.” \textit{Id.} at 604.
\textsuperscript{482} \textit{Id.} at 607.
\end{flushleft}
economic analysis urged by Justice Stewart, have rejected attempts to challenge mergers on reciprocity grounds. The more modern thinking is that the mere opportunity for reciprocity is not enough because reciprocity is not necessarily anticompetitive absent evidence of coercion or forcing and that, further, reciprocal dealing arrangements often are efficiency enhancing. It appears that no reciprocity case has succeeded in well over thirty years. Further, the 1984 Merger Guidelines do not even mention reciprocity as a basis for a merger challenge and the government has not raised a reciprocity issue in many years.

Justice Douglas also has the distinction, if that is the correct term, of writing the majority opinion in the last vertical merger case decided by the Supreme Court, Ford Motor Co. v. United States. There the Court struck down the acquisition by Ford of Autolite, one of the three leading makers of spark plugs with about 15% of the market. Since General Motors owned the AC brand of spark plugs and controlled 30% of the market, Champion was the only significant


487 See Herbert Hovenkamp, note 460, supra, at 563.

488 405 U.S. 562 (1972). Ford Motor Co. also involved potential competition issues and is also characterized as a conglomerate merger decision. See text accompanying notes 427-37, supra.
independent spark plug manufacturer remaining after Ford's acquisition of Autolite. Champion's market share had declined from just under 50% in 1960 to about 33% in 1966. In contrast, Autolite's market share had climbed from a pre-acquisition 15% to about 30%. 489

Justice Douglas characterized the remedy issue as "[t]he main controversy here" and quickly found substantively that the acquisition violated "the letter and spirit of the Celler-Kefauver Antimerger Act." 490 He readily upheld the district court's findings that the elimination of Ford both as a major customer of Champion and as a potential entrant into the sparkplug market de novo rendered the acquisition unlawful. 491 Secondly, he agreed with the district court that the merger increased entry barriers in the sparkplug industry by foreclosing Ford as a purchaser for about 10% of the spark plug market and, considering General Motors' ownership of the AC brand, would transmit to the sparkplug industry "the rigidity of the oligopolistic structure of the automobile industry." 492

In Ford Motor Justice Douglas thus succinctly displays his antipathy to vertical market foreclosure and his favor with potential competition theory, both of which have now fallen on hard times. 493 Indeed, in Ford Motor the defendant argued that the acquisition had actually

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489 Ford Motor Col, 405 U.S. at 566.

490 Id. at 571.

491 Id. at 569.

492 Id. at 567-68.

493 Id. at 568, quoting 315 F. Supp. at 375.

494 With regard to vertical mergers see e.g. Fruehauf Corp. v. FTC, 603 F.2d 345, 359 n.9 (2d Cir. 1979) where the court was "unwilling to assume that any vertical foreclosure lessens competition" and Alberta Gas Chemicals Ltd. v. E.I. Du Pont De Nemours & Co., 826 F.2d 1235
improved competition in the spark plug market because Autolite, with 15% of the market, would be a more effective rival of Champion and General Motors, each with about 30% market shares. Justice Douglas refused to see the benefit, however, summarily rejecting the argument and characterizing the acquisition as “aggravat[ing] an already oligopolistic market.” Today, of course, it is hard to imagine the same result on similar facts.

XII. Vertical Restraints

Douglas’s populist view of vertical restraints, last articulated in his 1972 Ford Motor opinion, traces at least back to 1948 when he penned his ringing dissent in Columbia Steel and wrote for the majority in United States v. Paramount Pictures, Inc. and was a close corollary to his distrust of corporate size. Indeed in Paramount Pictures he strongly hints that if it were up to him, vertical integration, at least of the production, distribution and exhibition of motion pictures, would be illegal per se. When reviewing the several restraints present in the case, he frequently

(3d Cir. 1987), cert. denied, 486 U.S. 1059 (1988)(virtually rejecting foreclosure theory in principle). See also Herbert Hovenkamp, Federal Antitrust Policy: The Law of Competition and Its Practice 386 (2d ed. 1999)(“Prevailing judicial opinion now seems to be that vertical mergers should be condemned only in the most extreme circumstances.”).

496 Id. at 570.
497 334 U.S. 131 (1948).
498 Id. at 173-74. Throughout the Paramount Pictures opinion Douglas uses the pronoun “we” when referring to the majority for whom he is writing. Only when, however, he notes that vertical integration is not per illegal does he deviate and refer to the majority by name, e.g. “But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on . . . “ Id. at 174. The message seems clear; he is acquiescing to his brethren on this point.
focused on the adverse impact on the small, independent competitor as a basis for finding illegality. ⁴⁹⁹

Even his majority opinion in White Motor Company v. United States, ⁵⁰⁰ which some might view as a moderation of his normal hard line views since he declined to impose the per se rule to vertical territorial restrictions, is rife with his populist perspective. ⁵⁰¹ Although he pointed to the Court's lack of experience in this area generally, he noted that vertical territorial restraints may be "the only practicable means a small company has for breaking into or staying in business." ⁵⁰² Thus, Justice Douglas' seeming reticence to too quickly expand the per se rule is in large part because of his fear that to do so might harm small businesses. ⁵⁰³

Douglas wrote a special concurrence five years later in Albrecht v. Herald Co., a maximum vertical price fixing case which also involved exclusive dealer territories for newspaper distributors. ⁵⁰⁴ The majority declined to rule on the exclusive territories issue since that aspect of

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⁴⁹⁹ See, e.g., id. at 154, 156, 159-60, 162("The trade victims of this conspiracy have in large measure been the small independent operators.").


⁵⁰¹ Justice Douglas also declined to impose the rule of reason. The case arose on appeal from summary judgment for the government and the majority believed a trial on the merits was required before a rule of law was "designed." Id. at 254, 261.

⁵⁰² Id. at 263.

⁵⁰³ In White Motor Justice Black joined Justice Clark's dissent, along with Chief Justice Warren. Id. at 275. It is one of the very few times Justices Douglas and Black split in an antitrust case.

the case had not gone before the jury.\textsuperscript{505} Douglas viewed the case as “therefore close” to \textit{White Motor} but noted that, in determining the legality of a newspaper distributor’s exclusive territory, one would normally consider the impact on a newspaper boy who would likely need the protection of an exclusive territory to “wage competitive warfare.”\textsuperscript{506}

That same term Justice Douglas voted with the majority in the controversial \textit{Schwinn} case, in which the Court announced a per se rule for vertical customer or territorial restrictions where title or dominion of the goods had passed to the distributor or retailer.\textsuperscript{507} The decision attempted to resurrect the common law restraint against alienation concept found in the landmark \textit{Dr. Miles} decision of 1911 which made resale price maintenance illegal.\textsuperscript{508} It is not at all surprising that Douglas found favor with the majority in \textit{Schwinn}, which seemingly embraced the right of small business to determine its own destiny by determining its price and customers free from manufacturer or supplier interference.\textsuperscript{509}

Of course, ten years later, or two years after Douglas' retirement, the Burger Court overruled \textit{Schwinn} and installed the rule of reason in vertical non-price cases in the landmark

\textsuperscript{505} \textit{Id.} at 153-54.

\textsuperscript{506} He noted that here, however, the Court had before it a “large retail enterprise,” calling into question the legality of the exclusivity. \textit{Id.} at 154-55 (Douglas, J., concurring).


\textsuperscript{508} Dr. Miles Medical Co. v. John D. Parks & Sons Co., 220 U.S. 373 (1911).

\textsuperscript{509} \textit{See} text accompanying notes 499-505, \textit{infra}.
Continental T.V. Inc. v. GTE Sylvania, Inc. decision.\textsuperscript{510} \textit{Sylvania} (and \textit{Schwinn}) had the effect of rendering \textit{White Motor} and Douglas' concurrence in \textit{Albrecht} moot,\textsuperscript{511} since the rule of reason replaced the uncertainty stemming from the lack of judicial experience with vertical non-price restraints in \textit{White Motor}. One might conclude that here Douglas was influential, or at least in the mainstream since he was reluctant to pin per se rules in this area.\textsuperscript{512} Of course, nothing could be further from reality since Douglas's leanings toward the rule of reason were based on his deference to small, independent businesses who should be given every opportunity to compete while \textit{Sylvania} and later \textit{Khan} were based on efficiency concerns and the promotion of interbrand competition.\textsuperscript{513}

Justice Douglas's loyalty to the little guy trying to make it in the business world was early on apparent in his ringing dissent in Standard Oil Co. of Calif. v. United States\textsuperscript{514} (generally known as \textit{Standard Stations}) where the Court, per Justice Frankfurter, ruled unlawful exclusive

\textsuperscript{510} 433 U.S. 36 (1977).

\textsuperscript{511} More recently the Court overturned \textit{Albrecht}, holding that vertical maximum price fixing should fall under the rule of reason. State Oil Co. v. Khan, 522 U.S. 3 (1998). In doing so, it eradicated one of the worst antitrust opinions in history. \textit{See}, e.g., William L. Reynolds and Spencer Weber Waller, \textit{Legal Process and the Past of Antitrust}, 48 SMU L. Rev. 1811, 1813, 1820 (1995) (labeling \textit{Albrecht} as “awful” and as “tortur[ing] the concept of agreement beyond common sense”).

\textsuperscript{512} His concurrence in \textit{Albrecht}, however, is quite confusing. He begins by saying \textit{Albrecht} is a rule of reason case. He then states that “[w]hether an exclusive territorial franchise is a vertical arrangement is \textit{per se} unreasonable under the antitrust laws is a much mooted question.” 390 U.S. at 154. He then notes that the majority “quite properly” refuses to say whether such a vertical restraint in the newspaper distribution business is illegal. \textit{Id.}


\textsuperscript{514} 337 U.S. 293, 315 (1949) (Douglas, J., dissenting).
supply contracts required of independent retailers by the oil company defendant. While the Court recognized that requirements contracts provide at least short-term efficiencies for the parties, it concluded that where a substantial share of the market was thereby foreclosed, the contracts violate Section 3 of the Clayton Act.\textsuperscript{515}

Although one might assume initially that Justice Douglas was happy with this seemingly anti-efficiency result, he was anything but. Of course, he cared not a whit about efficiencies and could not restrain himself from taking a couple of more jabs at the majority opinion in \textit{Columbia Steel}, even though the ink was hardly dry on his dissent there.\textsuperscript{516} More to the point, however, he viewed the Court's decision in \textit{Standard Stations} to be a formula which “promises to wipe out large segments of independent filling station operators.”\textsuperscript{517} According to Douglas, requirements contracts were necessary to protect small, independent service stations from “service station empires” by Standard Oil and other oil companies.\textsuperscript{518} He viewed the requirements contracts as the lesser of two evils and as superior to vertical integration by the major oil companies because they

\begin{footnotes}
\item[515] Id. at 306-14.
\item[516] Id. at 318 (Douglas, J., dissenting)(“Under the guise of increased efficiency big business has received approval for easy growth," \textit{citing} United States v. Columbia Steel Co., 334 U.S. 495 (1948)).
\item[517] Id. at 319. \textit{See also} United States v. Paramount Pictures, Inc., 334 U.S. 131, 154 (1948) where Justice Douglas, writing for the majority, struck down licensing agreements between motion picture distributors and theatre “circuits” because “they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit. They are, therefore, devices for stifling competition and diverting the cream of the business to the large operators.”
\item[518] 337 U.S. at 320.
\end{footnotes}
maintained the viability of the independent service stations. 519 While he recognized that
competition between the majors would remain if and when they did integrate, he viewed the
majority's holding as simply legitimizing “the growth of bigness.” 520

Although Standard Stations is certainly subject to criticism as an anti-efficiency
holding, 521 Justice Douglas' dissent does not stand the test of time. He not only ignored the
potential efficiencies to independent stations (as did the majority) but also focused on maintaining
the viability of those small independents without any expressed concern about the impact on
consumers. 522

Justice Douglas actually first showed his antipathy for exclusive dealing arrangements four
years earlier, when he specially concurred in the Associated Press v. United States case. 523

519 Douglas lamented that “[t]he small, independent business man will be supplanted by
clerks.” Id. at 321.

520 Id. at 320-21.

521 See, e.g., William Lockhart & Howard Sacks, The Relevance of Economic Factors in
Determining Whether Exclusive Arrangements Violate Section 3 of the Clayton Act, 65 Harv. L.
Rev. 913 (1952).

522 Compare Vern Countryman, Justice Douglas’s Contribution to the Law – Business
Regulation, 74 Colum. L. Rev. 366, 367 (1974), arguing that Justice Douglas’s dissent in
Standard Stations shows that Douglas was not simply a “hopeless” anti-bigness “doctrinaire
[sp].” Professor Countryman, a former Douglas law clerk, was regarded, along with Professor
Fred Rodell of Yale, as Douglas' principal academic defender and champion. See David A.
Skeel, Jr., supra note 74, at 1105-06. See also Vern Countryman, Scholarship and Common
Sense, 93 Harv. L. Rev. 1407 (1980); Vern Countryman, Search and Seizure in a Shambles?
Recasting Fourth Amendment Law in the Mold of Justice Douglas, 64 Iowa L. Rev. 435 91979);
Vern Countryman, Justice Douglas and Freedom of Expression, 1978 U. Ill. L.F. 301 (1978);
Vern Countryman, The Contribution of the Douglas Dissents, 10 Ga. L. Rev. 331 (1976) and
Vern Countryman, Justice Douglas: Expositor of the Bankruptcy Law, 16 UCLA L. Rev. 773

523 326 U.S. 1, 23 (1945) (Douglas, J., concurring).
the Court struck down as an unlawful restraint of trade the Associated Press by-laws that forbade its 1200 newspaper members from selling news to non-members and also granted each member veto power over the entry of non-members.\textsuperscript{524} Due to the collective action of the AP members through the by-laws, the majority treated the case as a concerted refusal to deal or boycott case, expressly stating that it involved more than a simple exclusive agreement between two newspapers or a reporter and a newspaper.\textsuperscript{525}

In his concurrence, Justice Douglas felt compelled to discuss “the narrow compass” of the decision “in view of the broader issues which have been injected into the discussion.”\textsuperscript{526} His was in essence a slippery slope argument. While he acknowledged that a Seattle newspaper and a New York newspaper could agree to furnish local news exclusively to each other, he noted that “such an exclusive arrangement, though innocent standing alone, might be part of a scheme which would violate the Sherman Act . . .”\textsuperscript{527} That, he asserted, was what had occurred in the case before the Court.\textsuperscript{528}

Five years after \textit{Standard Stations}, Douglas wrote for a 7-2 majority in FTC v. Motion

\textsuperscript{524} Justice Black wrote the majority opinion, one of the few times he was not on all fours with Justice Douglas in antitrust cases. \textit{Id.} at 4. \textit{See also White Motor Co.}, 373 U.S. at 275.

\textsuperscript{525} \textit{Associated Press}, 326 U.S. at 14.

\textsuperscript{526} \textit{Id.} at 23 (Douglas, J., concurring).

\textsuperscript{527} \textit{Id.}

\textsuperscript{528} In so stating, Justice Douglas seemingly downplayed the collective nature of the restraint while the majority opinion emphasized that without the collective action of the AP members, a very different case would have presented itself. \textit{Id.} at 14.
Picture Advertising Service Co., a little known and completely ignored case that is noteworthy only for being one of Douglas's worst opinions. *Motion Picture Advertising* was an exclusive dealing case brought under Section 5 of the Federal Trade Commission Act. In a decision highly suspect by contemporary exclusive dealing standards, Justice Douglas struck down the exclusive dealing contracts of an advertising motion picture producer/distributor with theaters. According to the Court, the defendant had exclusive dealing contracts with almost 40% of the theaters in its areas of operation, with the majority of the contract terms ranging from one to two years. The Court found it significant that three competing distributors, all separately sued, also did business via exclusive contracts and that collectively 75% of available outlets for the films were under exclusive distribution agreements.

Justice Frankfurter, who often was at odds with Douglas, vigorously dissented, joined

529 345 U.S. 914 (1953).


531 Advertising motion pictures were in effect advertisements that theaters ran in addition to the featured motion picture.

532 Some contracts ran for up to five years. 344 U.S. at 393.

533 Id. at 395. No conspiracy among the distributors was charged thus each had to be sued individually. Id. at 398.

only by Justice Burton.\textsuperscript{535} He characterized the Commission and the majority’s conclusion that the use of exclusive contracts constituted an unreasonable restraint of trade as “dogmatic” and took issue with Justice Douglas’ reliance upon the 75% collective market foreclosure absent a Sherman Act conspiracy or concerted action charge.\textsuperscript{536} Lamenting the lack of specificity in the record, Frankfurter noted that apparently more than one-half of the contracts ran for only one year.\textsuperscript{537} Since the Commission’s finding was directed to exclusive contracts of more than one year’s duration, he concluded that the majority’s affirmance of the Commission was really based on defendant’s “hold” over about 6% of the theaters in the country or about 10% of the theaters that accepted advertising.\textsuperscript{538}

Justice Douglas did not attempt to rely on the \textit{Standard Stations} case or any other for that matter.\textsuperscript{539} He did note that “[t]he vice of the exclusive contract in this particular field is in its tendency to restrain competition and to develop a monopoly” but provided little explanation how

\textsuperscript{535} 344 U.S. at 398 (Frankfurter, J., dissenting).

\textsuperscript{536} 344 U.S. at 399.

\textsuperscript{537} \textit{Id.} at 398.

\textsuperscript{538} Justice Douglas’ 40% market foreclosure figure was based on the area in which the defendant did business, which, of course, may or may not have been the relevant geographic market. \textit{Id.} at 393.

\textsuperscript{539} Justice Frankfurter, however, made a point of differentiating \textit{Standard Stations}, pointing out, for example, that the bargaining power of the seller \textit{vis-a-vis} the buyers in the two cases varied greatly. In \textit{Standard Stations} the retail gas stations were dependant on their supplier for gasoline. In \textit{Motion Pictures Advertising}, however, films containing advertising were not the central business of theaters and accounted for only a small portion of their revenues. It was thus unlikely that the defendant had any real bargaining power over its theater customers. \textit{Id.} at 402.
either could occur on the facts before the Court. Instead in broadly deferring to the FTC’s determination of what constitutes “unfair methods of competition” under Section 5 of the FTC Act, Douglas provided a misleading summary of the market (without attempting to define what the market was) and mischaracterized the nature and length of the exclusive contracts at issue. Indeed, if he was trying to protect some group of competitors, as was his want, it is unclear who they were – the theaters who had their choice of at least three other advertising film vendors under one year exclusive agreements and who certainly had substantial bargaining power, or perhaps other unnamed advertising film vendors seeking to break into the market. Either way, consumers, in this case movie-goers, were little impacted by which advertisements they had to sit through to see the movie of their choice.

Seven years later Justice Douglas again dissented in an exclusive dealing case, Tampa Electric Co. v. Nashville Coal Co. This time, however, he disagreed with the majority’s reversal of the lower courts’ determination that the contracts at issue were unreasonable restraints of trade. His joint dissent (with Justice Black) simply stated that they were of the opinion that the lower courts had gotten it right and thus should be affirmed.

At issue was a requirements contract in which the Nashville Coal company entered into a

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540 Id. at 397. There were, of course, no allegations of conspiracy among the four advertising film distributors. There was also a complete lack of relevant market analysis or market share statistics. In other words, Justice Douglas expected one to take it on faith that exclusive dealing contracts restrained competition and developed monopoly power.

541 Most, of course, would have preferred not to sit through any advertising films at all.


543 Id. at 335.
twenty year agreement to supply an electric utility with its coal requirements, with a stated minimum.\textsuperscript{544} The utility sought declaratory relief but the Supreme Court viewed the market foreclosure as too insignificant to run afoul of the rule of reason, even if the relevant line of commerce was bituminous coal.\textsuperscript{545} The lower courts, in contrast, had focused on coal consumption in “peninsular Florida,” 700,000 tons previously as opposed to an expected 1,000,000 tons under the requirements contract at issue, rather than the sources of supply for those needs, which numbered 700 in seven states.\textsuperscript{546} Thus, the majority viewed the market foreclosure from the suppliers' perspective rather than just focusing on the quantity of the demand.

What then were Justices Douglas and Black thinking? \textit{Tampa Electric} appears to be an easy case, viewed from 40 plus years afterwards. Most likely the justices were concerned about the foreclosure of rival coal producers from selling to Tampa Electric for the 20 year life of the contract.\textsuperscript{547} But today the case would likely be viewed as enhancing efficiency and keeping energy costs down by providing the both seller and buyer with long term market guarantees. Given the very small market foreclosure, even if coal is considered the relevant product, most antitrust lawyers would counsel against even bringing the case today.

\textsuperscript{544} \textit{Id.} at 321.

\textsuperscript{545} Since coal for consumption in Tampa, the location of the utility, came from seven states, the market foreclosure caused by the requirements contract at issue was less than 1%. \textit{Id.} at 333.

\textsuperscript{546} \textit{Id.} at 330. The Court noted that coal accounted for less than 6% of the fuel consumed in Florida (oil and natural gas predominating) but was willing to consider coal as the relevant line of commerce. \textit{Id.} at 330 & n.8.

\textsuperscript{547} At least that was the concern of the Sixth Circuit, \textit{see} 276 F.2d 766, 771 (6th Cir. 1960). That court did recognize that requirements contracts “may well be of economic advantage to buyers as well as to sellers.” \textit{Id.}
Three years after *Tampa Electric*, in *Simpson Oil Co. v. Union Oil Co.* of California Justice Douglas was again able to garner a majority to protect independent retailers, this time finding consignment sales to them unlawful. 548 In doing so, he seemingly overruled a 40-year old precedent549 and created confusion that the lower courts are still sorting out.550

Simpson was a Union Oil retail gas station lessee and sued complaining of its consignment agreement with Union whereby Union set the retail prices of gasoline consigned to it. In reversing the Court of Appeals, Douglas labeled the consignment arrangement, coupled with the station lease, “coercive” since it “depriv[ed] independent retailers of the exercise of free judgment whether to become consignees at all, remain consignees, and, in any event, to sell at competitive prices.”551 Although he recognized that consignments “perform an important function in trade and commerce,” his focus was on the “nominal ‘consignees’ who are in reality small struggling competitors seeking retail gas customers.”552

In his zeal to protect the independent retailer, Justice Douglas was not put off by the 1926 United States v. General Electric Co.553 precedent which had permitted the defendant to set prices

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551 *Simpson*, 377 U.S. at 16.

552 *Id.* at 17-21. Douglas also expressed concern that consignment “device” would result in the fixing of retail prices because of Union’s “vast” distribution system. *Id.* at 21.

553 272 U.S. 476 (1926).
on consigned goods. While acknowledging that General Electric was not limited to patented goods, Douglas nonetheless treated General Electric as if it were and held that it was “not apposite to the special facts here.” In dissent, Justice Stewart was dumfounded, calling Douglas' distinction of General Electric 'specious' and asserting that the majority had in effect overruled a doctrine that had stood unquestioned for almost 40 years. The majority had taken this drastic step, he noted, even though neither party had challenged the validity of General Electric in the briefs or oral argument.

In retrospect, one can see that the Union Oil Company stood little chance against Justice Douglas in Simpson. The facts of the case presented a double whammy for the defendant and allowed Douglas to protect the small business consignee and restrict the reach of patent-holder rights in one fell swoop. The decision in Simpson also, as Justice Stewart predicted, created a

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554 In General Electric, Chief Justice Taft had specifically held that “[t]he owner of an article, patented or otherwise, is not violating the common law, or the Anti-Trust law, by seeking to dispose of his article directly to the consumer and fixing the price by which his agents transfer the title from him directly to such consumer.” Id. at 488.

555 Simpson, 377 U.S. at 23. Specifically, Justice Douglas wrote: “The Court in the General Electric case did not restrict its ruling to patented articles; it indeed said that the use of the consignment device was available to the owners of articles ‘patented or otherwise.’ . . . But whatever may be said of the General Electric case on its special facts involving patents, it is not apposite to the special facts here.” See, e.g., Thomas E. Kauper, supra note 193, at 340 (distinction of General Electric “far too transparent”).

556 Simpson, 377 U.S. at 30 (Stewart, J., dissenting). Justice Stewart noted that the existence of a patent had no bearing on whether a consignor can control the price at which a consignee sells because the consignor's right to set the price derives solely from its ownership of the goods.

557 Id. at 29.

558 Id. at 30.
good deal of uncertainty in the law. For example, after GE’s patents had expired a federal district court later held that the General Electric consignment system was illegal per se.559

More recent decisions have focused on language in the original General Electric decision560 differentiating between consignment to a true agent or representative of the seller and what amounts to a sale of the consigned goods to the consignee at the time of the consignment.561

More recently, in Business Electronics Corp. v. Sharp Electronics Corp.562 the Supreme Court verified the so-called agency exception to vertical price fixing’s per se rule, thus giving the lower courts more ammunition with which to distinguish Simpson.563


560 United States v. General Electric Co., 272 U.S. 476, 485 (1926) (“The validity of the Electric Company’s scheme of distribution turns . . . on the question of whether the sales are by the company through its agents to the consumer, or are in fact by the company to the so-called agents at the time of consignment. The distinction in law and in fact between an agency and a sale is clear.”).

561 See e.g. Illinois Corporate Travel, Inc. v. American Airlines, 806 F.2d 722, 725 (7th Cir. 1986), after remand, 889 F.2d 751, 752-53 (7th Cir. 1989), cert. denied, 495 U.S. 919 (1990)(holding travel agents are air carriers’ agents, thus carriers’ price restrictions are lawful); Belfiore v. New York Times Co., 826 F.2d 177 (2d Cir. 1987), cert. denied, 484 U.S. 1067 (1988)(finding consignment where publisher paid newspaper distributors on a per paper sold basis and picked up unsold newspapers the following day); Kowalski v. Chicago Tribune Co., 854 F.2d 168 (7th Cir. 1988)(accord); Rydo Mfg. Co. v. Eden Services, 823 F.2d 1215 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988)(consignment found for independent distributor which sold custom made car washes); Morrison v. Murray Biscuit Co., 797 F.2d 1430 (7th Cir. 1986)(consignment “exception” should apply only manufacturer bears an unusually high proportion of the risk of nonsale).

562 485 U.S. 717, 733 (1988)(per se vertical pricing fixing rule “does not apply to restrictions on price to be charged by one who is in reality an agent of . . . the manufacturer.”).

563 Lower courts had long found that Simpson did not outlaw purported consignments in large distribution networks as long as an actual agent was utilized. See e.g. Mesirow v. Pepperidge Farm, Inc., 703 F.2d 339 (9th Cir. 1983), cert. denied, 464 U.S. 820 (1983); Hardwick v. Nu-Way Oil Co., 589 F.2d 808, 809 (5th Cir. 1979), rehearing denied, 592 F.2d
In *Simpson*, Justice Douglas did recognize the agency distinction but failed to emphasize it and obfuscated the issue by focusing on the coercive element of Union Oil's consignments to its dealers. Arguably the Justice's antipathy toward the rights of patent holders unduly influenced his dismissal of *General Electric*. Ironically, Douglas could *more easily* have avoided limiting *General Electric* to patent holders and achieved the same result in *Simpson* because *General Electric* does require a real agency for antitrust immunity, a requirement which was not present in *Simpson*.

Instead Douglas took on *General Electric* even though that decision expressly failed to limit its holding to consignments involving patents. Thus, Justice Douglas' handling of *Simpson* suggests more than bias but perhaps intellectual dishonesty. He certainly understood

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564 One who sends a rug or a painting or other work of art to a merchant or a gallery for sale at a minimum price can, of course, hold the consignee to the bargain. . . . . When, however, a 'consignment' device is used to cover a vast gasoline distribution system, fixing prices through many retail outlets, the antitrust laws prevent calling the 'consignment' an agency. 377 U.S. at 18, 21.


566 Meaning presumably, as Justice Stewart pointed out in dissent, that *General Electric* would seem to apply to consignments of non-patented goods.

567 See William F. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 Calif. L. Rev. 933, 935 (1987)(stating that the Court in *Simpson* eliminated the agency device and
that he could achieve the result he desired without limiting *General Electric* but that would eliminate the opportunity presented to take a swipe at the scope of intellectual property rights for which he had such disdain.\(^{568}\)

*Simpson* is a triumph of competition policy against both intellectual and common law property rights.\(^{569}\) Irrespective of the wisdom of that, the problem, as with most of Justice Douglas' antitrust work, is that the competition policy *Simpson* sets forth is anti-consumer and indeterminate at best and incoherent at worst.\(^{570}\)

Justice Douglas seemingly painted the Warren Court into a corner in the now overruled *Schwinn* decision, where the Court reasserted the importance of title in antitrust analysis,

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Taking the easier course in *Simpson* may have also reduced the likelihood of defections among his brethren such as occurred with Justices Stewart, Brennan and Goldberg. For a far less controversial distinction of *General Electric* by Justice Douglas see United States v. Masonite Corp., 316 U.S. 265, 276-81 (1942) (licensing agreements among patent holders which restricted price competition not protected by *General Electric*).

\(^{569}\) See Rudolph J. Peritz, *supra* note 42, at 204 (by elevating competition over the right of consignment, the Court “shook loose a cornerstone of common-law property rights secure for three hundred years.”). *See also* Rudolph Peritz, *supra* note 551, at 531-44.

\(^{570}\) See, e.g., C. Paul Rogers III, *supra* note 551, at 515.
distinguishing between bicycles consigned and sold to authorized dealers.\textsuperscript{571} The former was to be judged under the rule of reason because of the constraints of the ancient rule against alienation while the latter was judged to be inherently anticompetitive and per se illegal. But what of \textit{Simpson}, decided only three years earlier? The majority, in an opinion written by Douglas protégé Abe Fortas and joined by Douglas, virtually ignored it, citing it only for the proposition that “unreasonably restrictive” agencies or consignments violate Section 1.\textsuperscript{572}

In sum, one can only conclude that Justice Douglas' legacy in the vertical restraints area is completely negative. Judged by the state of the law of vertical restraints today, he contributed nothing of contemporary significance. Not only that, but his opinion in \textit{Simpson} remains a significant roadblock to modern antitrust analysis. And in \textit{Tampa Electric}, the one Warren Court decision in the vertical arena that retains modern vitality, he dissented.

XIII. The Robinson-Patman Act

Justice Douglas's term on the Supreme Court virtually paralleled the first 40 years of the Robinson-Patman Act, which was passed in 1936 as an amendment to the Clayton Act.\textsuperscript{573} Critics have long criticized that Act, which prohibits price discrimination in certain scenarios, as a


\textsuperscript{572} \textit{Id.} at 380. Neither opinion contained any market analysis. \textit{Schwinn} made no effort to distinguish \textit{Simpson} on its facts (e.g. the relevance of the lack of coercion) and thus \textit{Simpson} remained an indeterminate precedent. For criticism of that aspect of \textit{Schwinn}, see, e.g., Thomas E. Kauper, \textit{supra} note 193, at 340-41 (\textit{Simpson} and \textit{White Motor} “treated in an almost inexplicable manner in \textit{Schwinn}.”). \textit{See also} William H. Page, \textit{supra} note 28, at 34.

protectionist measure similar to the discarded fair trade laws.\textsuperscript{574} Even more criticism has been levied at the interpretation and enforcement of the Act, beginning with the FTC and ending with the Supreme Court.\textsuperscript{575}

Unsurprisingly, since the Act favors small, independent businesses, Justice Douglas was a strident advocate of its enforcement and always sided with the government or plaintiff. For example, Douglas voted with the majority in the heavily criticized \textit{Utah Pie} decision\textsuperscript{576} which protected a local company with a nearly dominant market share against larger companies seeking to enter the local market. In doing so, the Court equated below cost pricing with the predatory intent requisite to establish primary line, i.e. seller, injury but gave no guidance as to how one would determine “cost.”\textsuperscript{577} Earlier, Douglas was also in the majority in FTC v. Morton Salt,\textsuperscript{578} a

\textsuperscript{574} In general the Robinson-Patman Act prohibits price discriminations which often harm smaller buyers and disallows volume discounts which cannot be cost justified. As such, it tends to “protect” the small, independent purchaser of commodities against the buying power of large chain stores. \textit{See generally} William R. Andersen & C. Paul Rogers III, note 95 \textit{supra}, at 1029-32; Robert H. Bork, \textit{supra} note 420, at 382-401; Earl W. Kintner, A Robinson-Patman Primer 8-11 (2d ed.1979); Frederick M. Rowe, \textit{Price Discrimination Under the Robinson-Patman Act} 3-11 (1962) & Corwin Edwards, \textit{The Price Discrimination Law} 2-5 (1959).


\textsuperscript{576} \textit{Utah Pie Co. v. Continental Baking Co.}, 386 U.S. 685 (1967).

controversial decision in which the Court ruled that a price discrimination affecting competing buyers was in essence prima facie evidence of competitive injury to the disfavored buyer.579

Of course, the Robinson-Patman Act did provide a ready-made platform for Justice Douglas to pontificate about the rights of small business and the evils of monopoly power. For example, he vigorously dissented in Automatic Canteen Co. v. FTC,580 a case in which the majority restricted the reach of §2(f) of the Act which makes it illegal for a buyer to knowingly induce or receive an illegal price discrimination.581 The Court held that the §2(f) knowledge requirement meant that the favored buyer must know that the lower price it induced or received was not cost justified for a violation to occur.582 It further held that evidence that the favored buyer knew that its price was lower was not sufficient to shift the burden of proof to the buyer to prove the seller's cost justification or other defenses.583

578 334 U.S. 37 (1948).

579 At issue were discounts in salt given to grocery chains which purchased large quantities. The Court affirmed the FTC's finding of proof of a reasonable probability of competitive injury even though salt purchases and sales made up a very small portion of a grocery store’s business. Id. at 48-49. For more contemporary applications of the Morton Salt rule see, e.g., Coastal Fuels of Puerto Rico, Inc. v. Carribean Petroleum Corp., 79 F.3d 182, 191-93 (1st Cir. 1996); Rebel Oil Co. v. Atlantic Richfield Co., 51 F.3d 1421, 1447, n.18 (9th Cir. 1995); Stelwagon Mfg. Co. v. Tarmac Roofing Systems, Inc., 63 F.3d 1267, 1271 (3d Cir. 1995). See also Paul H. LaRue, The Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule Be Retired?, 48 SMU L. Rev. 1917 (1995).


582 Or, in Justice Frankfurter's famous double negative, “not known by him not to be within one of those defenses.” Automatic Canteen Co., 346 U.S. at 74.

583 Id. at 78-79.
Douglas emphatically disagreed both as a matter of statutory interpretation and as a matter of policy.\textsuperscript{584} In his view the majority was, in essence, catering to the ability of large buyers to coerce suppliers into granting discriminatory low prices.\textsuperscript{585} He noted that “[t]here is no doubt that the large buyers wield clubs that give them powerful advantages over the small merchants.”\textsuperscript{586} He believed that the language of \textsection 2(f) as well as the legislative history required that the “bludgeon[ing]” buyer “show that the privileges he demanded had cost justifications.” \textsuperscript{587}

Justice Douglas also published a concurring opinion in United States v. Borden Co.,\textsuperscript{588} a case in which the Court significantly narrowed the application of the cost justification defense by requiring the showing of actual cost differences to justify a price discrimination. According to Douglas, however, the majority had not gone far enough. He believed that where no centralized purchasing by a large price favored chain was involved, cost differentials could be justified only on a store-by-store basis.\textsuperscript{589} “Otherwise those with the most prestige get the largest discounts and the independent merchants are more and more forced to the wall.”\textsuperscript{590}

Justice Douglas went on to say that the purpose of the Robinson-Patman Act is “to control

\textsuperscript{584} Id. at 82 (Douglas, J., dissenting). He was joined by Justices Black and Reed.

\textsuperscript{585} Id. at 83-84.

\textsuperscript{586} Id. at 84.

\textsuperscript{587} He thought it unfair that, as mandated by the majority, that the FTC be obliged to prove the price discrimination was not cost justified as well as “what lay in the buyer's mind.” Id. at 85.

\textsuperscript{588} 370 U.S. 460 (1962).

\textsuperscript{589} Id. at 475 (Douglas, J., concurring).

\textsuperscript{590} Id.
practices that lead to a monopoly and an impoverishment of our middle class." He viewed restricting the cost justification defense as necessary to "preserve . . . as much of our traditional free enterprise as possible" because "[f]ree enterprise is not free when monopoly power is used to breed more monopoly." In his view, price discounts and price cutting led to "the aggrandizement of power by the chains and the ploughing under of the independents. The antitrust laws . . . were designed to avert such an inquest on free enterprise."593

Thus, Douglas's concurrence in Borden succinctly summarizes much of his views of antitrust. It displays his anthesis and perhaps paranoia to even the idea of monopoly power, irrespective of any market share data or any factual basis to support such a claim.594 Likewise, his zeal to protect small business overshadows any recognition that price discounts potentially benefit consumers and may simply be an indicia of vigorous price competition.595

Somewhat surprisingly, given his position in Morton Salt and later in Automatic Canteen and Borden, Justice Douglas joined the majority in the 1951 Standard Oil Co. v. FTC decision,596

591 Id.
592 Id.
593 Id. at 475-76.
594 The Borden opinion is completely devoid of any market share data for the favored or disfavored groceries. It does state that the A&P and Jewel chains have 254 stores combines while the independents number 1,322 and that the defendant's volume discounts in favor of the chains created two classes of customers. Id. at 465.
595 Of course, the Robinson-Patman Act is designed to do just that: protect small business against price competition. Lower prices are actually made illegal if the product of a price discrimination which competitively injures a disfavored buyer.
in which a divided Court ruled that the “good faith” standard of the Act's meeting competition
defense provided an absolute defense rather than merely a rebuttable presumption. The
decision broadened the defense considerably and cleared up confusion from the earlier FTC v.
A.E. Staley Mfg. Co. decision where the Court was unclear whether “good faith” was a
substantive or procedural requirement. Douglas also was with the majority in FTC v. Sun Oil
Company, however, a decision which restricts the meeting competition defense to meeting the
price of the discriminating seller's competitor.

In Nashville Milk Co. v. Carnation Co., Justice Douglas objected to what he perceived
was the narrowing of the right of private enforcement of the Robinson-Patman Act, leading a four
judge dissent over the question of whether a private right of action accrued under §§4 and 16 of
the Clayton Act for violations of §3 of the Robinson-Patman Act. The majority held that §3,
which criminalized price discriminations where “an unreasonably low price” and predatory intent

598 324 U.S. 746, 759-60 (1945). Justice Douglas was in the majority of the 7-0 decision
with Justice Jackson concurring in the result without an opinion.
599 See ABA Antitrust Section, Monograph No. 4, note 561, supra, at 119.
601 The Sun Oil Company decision held that the meeting competition defense does not
enable a seller to reduce it price to one buyer to enable that buyer to meet the lower price of one
of its competitors. Rather, the Court concluded “that §2(b) of the Act contemplates that the
lower price which must be met by one who would discriminate must be the lower price of his
own competitor.” Id. at 529.
are involved, was separate and apart from the rest of the Robinson-Patman Act, which was an
amendment to the Clayton Act.\textsuperscript{604} Since the private rights of action under §§4 and 16 accrue only
for violations of the Sherman and Clayton Acts, those sections did not apply to the stand alone §3
of the Robinson-Patman Act.\textsuperscript{605}

Douglas in dissent disagreed with the majority’s reading of the legislative history of the
Act, particularly since the type of price discrimination targeted under §3 is more onerous than that
of §2(a) for which the treble damage remedy certainly applies.\textsuperscript{606} He lamented, further, that the
Court’s decision effectively repealed §3, since the Department of Justice had never attempted to
enforce the criminal statute. He was, it turns out, pretty much correct.\textsuperscript{607}

During his long tenure, Justice Douglas also joined the majority in two cases which
assured a liberal application of Sections 2(d) and 2(f) of the Act which prohibit sellers from
discriminatorily providing buyers with advertising allowances or sales promotional services.\textsuperscript{608}

\textsuperscript{604} Nashville Milk Co., 355 U.S. at 377.

\textsuperscript{605} Id. at 378-79. Section 3 was originally the Borah-Van Nuys Bill which was introduced
by opponents of the Robinson-Patman Act in an effort to logjam its passage. The Senate tacked
the bills together and passed both, although §3 was not made part of the Clayton Act, perhaps
because it is a criminal statute and thus enforceable only by the Justice Department whereas the
DOJ and FTC otherwise have joint enforcement responsibilities for the Clayton Act. See

\textsuperscript{606} Nashville Milk Co., 355 U.S. at 383, 384 (Douglas, J., dissenting).

\textsuperscript{607} The Department of Justice did pursue one §3 case to the Supreme Court, where the
statute withstood a challenge that it was unconstitutionally vague. United States v. National
National Dairy Products, the DOJ has not attempted to enforce the criminal statute.

\textsuperscript{608} See FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968) (a supplier dealing with large
retailers and with wholesalers who in turn sell to small retailers must still treat all retailers
In FTC v. Henry Broch & Co.,\(^{609}\) however, Douglas wrote for a 5-4 majority and, perhaps to gain that slim majority, greatly narrowed Section 2(c \(^{610}\)) of the Act which outlaws the so-called "dummy" brokerage practices of large buyers who would allegedly refuse to deal through independent brokers or middlemen.\(^{610}\)

The statute was designed to deal with situations in which a seller paid a brokerage fee to an intermediary controlled by the buyer or allowed a direct buyer a discount because a broker's services were not utilized.\(^{611}\) Prior to the Henry Broch & Co. decision, the lower courts had tended to read the seemingly absolute language of § 2(c) quite literally to operate as a total ban on brokerage payments or discounts to a middleman who had any relationship with the other side of the transaction.\(^{612}\)

In a confusing and poorly drafted opinion, Justice Douglas ruled in Henry Broch & Co. that §2(c) was violated by a broker reducing its commission to secure a sale at a reduced price where a manufacturer would not otherwise agree to a buyer's price.\(^{613}\) He noted that §2(c) was available defense for §§2(d) & (e)).

\(^{609}\) 363 U.S. 166 (1960).


\(^{612}\) See, e.g., Modern Marketing Service, Inc. v. FTC, 149 F.2d 970, 978 (7th Cir. 1945); Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir.), cert denied, 326 U.S. 774 (1945); Great Atlantic & Pacific Tea Co. v. FTC, 667 (3rd Cir.), cert. denied, 308 U.S. 625 (1939); Oliver Bros., Inc. v. FTC, 102 F.2d 763 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938).

\(^{613}\) Henry Broch & Co., 363 U.S. at 171-72.
designed to prohibit large buyers from receiving allowances for cost savings in distribution because they often dealt directly with the seller and did not need brokerage services.\footnote{Id. at 176.} Even acknowledging potential cost savings, he ruled out application of the cost justification defense.\footnote{Id. at 176.} Douglas did state, however, that "we would have quite a different case" if there was evidence that the buyer had rendered actual services to the seller or to the broker to gain a reduced brokerage charge.\footnote{Id. at 173.} He also limited the holding to situations in which a seller's broker accepts a reduced commission in order to obtain a "particular" order.\footnote{Id. at 176.}

Although Justice Douglas may have won the \textit{Henry Broch & Co.} battle, in doing so he appears to have lost the §2(c) war. Intentionally or not, the case called into question earlier decisions, with the result that both the courts and the FTC have severely limited the reach of the statute.\footnote{See, e.g., Herbert R. Gibson v. FTC, , 682 F.2d 554 (5th Cir. 1982), cert. denied, 460 U.S. 1068 (1983); Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963); Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962).} and the viability of the provision as a part of the price discrimination law has been called into question.\footnote{See ABA Antitrust Section, Monograph No. 4, Vol II, supra note 597, at 34. See also James F. Rill, \textit{Brokerage Under the Robinson-Patman Act: Towards a New Certainly}, 41 Notre...}

\begin{footnotesize}
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  \item \footnote{Id. at 176.}
  \item \footnote{Id. at 176.}
  \item \footnote{Id. at 173.}
  \item \footnote{Id. at 176. The dissent would have restricted §2(c) even further and argued that a seller's broker who has agreed on a general commission rate should be able to renegotiate the rate with his principal to effect a sale that would otherwise be lost. \textit{Id. at 177.} (Whitaker, J., dissenting). \textit{See also} Earl W. Kintner, note 560, \textit{supra}, at 209. The dissent position has become the law as the courts have, post-\textit{Henry Broch & Son}, substantially narrowed §2(c). \textit{See} text accompanying notes 604-10, \textit{infra}.}
  \item \footnote{See, e.g., Herbert R. Gibson v. FTC, , 682 F.2d 554 (5th Cir. 1982), cert. denied, 460 U.S. 1068 (1983); Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963); Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962).}
  \item \footnote{See ABA Antitrust Section, Monograph No. 4, Vol II, \textit{supra} note 597, at 34. See also James F. Rill, \textit{Brokerage Under the Robinson-Patman Act: Towards a New Certainly}, 41 Notre...}
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§2(c),620 pretty much limiting the statute to situations involving so-called “dummy” brokerages621 and in a few instances, commercial bribery.622

Thus, there is more than a little irony stemming from *Henry Broch & Co.*, for it gave life to the services rendered proviso of §2(c). Arguably it also, because “its meaning was obscured by the many internal inconsistencies in the opinion,”623 provided ample interpretative fodder for the FTC and the courts seeking to limit the admittedly anti-consumer reach of §2(c). Justice Douglas ended up writing the watershed opinion for narrowing 2(c), a provision designed to protect small

Dame Lawy. 337 (1966).

620 See, e.g., Lupia v. Stella D'Oro Biscuit Co., 586 F.2d 1163 (7th Cir. 1978), cert. denied, 440 U.S. 982 (1979); Central Retailer-Owner Grocers, Inc. v. FTC, 319 F. 2d 410 (7th Cir. 1963); Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962).


622 Commercial bribery in this context generally involves payment of a secret commission to an employee of a purchaser or to a state purchasing agent. See, e.g., Harris v. Duty Free Shoppers Ltd. Partnership, 940 F.2d 1272 (9th 1991); Grace v. E.J. Kozin Co., 538 F.2d 170 (7th Cir. 1976); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966). Of course, whether commercial bribery should be part of the price discrimination law is questionable. See Keller W. Allen & Meriwether D. Williams, *Commercial Bribery, Antitrust Injury and Section 2(c) of the Robinson-Patman Anti-Discrimination Act*, 26 Gonzaga L. Rev. 167 (1990-91).

businesses against the power of large buyers, irrespective of lower prices or cost savings.\textsuperscript{624} It is probably not what he intended.

XIV. Antitrust and the Regulated Economy

The tension between antitrust law and governmental regulation of portions of the economy created real conflict for New Dealers like Douglas, who believed stridently in both the antitrust laws as the guardian of our free market economy and the ability of government regulation as a cure-all for aberrations in that economy. Congress typically refrained from granting explicit antitrust immunity from regulated sectors and gave little or no guidance about the continuing reach or role of antitrust in those areas, in effect leaving those questions to the judiciary.\textsuperscript{625}

Not surprisingly, given realist judges, little congressional direction and conflicting values, the results seem inconsistent. For example, as noted above, Justice Douglas and his brethren seemingly emasculated the Bank Merger Act of 1966, which Congress, in the wake of several controversial Supreme Court decisions involving bank mergers, passed to curtail antitrust scrutiny of bank mergers.\textsuperscript{626} In Hughes Tool Company v. Trans World Airlines, Inc, however, Justice Douglas, writing for a six justice majority, held that Toolco's agreement to acquire control of TWA was immune from antitrust scrutiny because it had been approved by the Civil

\textsuperscript{624} See ABA Antitrust Section, Monograph No. 4, Vol. II, \textit{supra} note 597, at 38.


\textsuperscript{626} See United States v. First City Bank of Houston, 386 U.S. 361 (1967) and United States v. Third National Bank in Nashville, 390 U.S. 171 (1968). See also text accompanying notes 376-87, \textit{supra}. 

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Aeronautics Board pursuant to the board's authority under the Federal Aviation Act.627

In Hughes Tool, Douglas gave deference to the CAB's determination that the acquisition was in the public interest.628 Conversely, in First City Bank of Houston case, Douglas held that judicial review of the Comptroller of Currency's finding of public interest must be de novo and, further, that the merging banks bore the burden to establish the defense.629

Douglas's general view, shared by his Warren Court brethren, was that "[i]mmunity from the antitrust laws is not lightly implied."630 In California v. Federal Power Commission, he applied that notion to dueling administrative and judicial proceedings. There, writing for a 5-2 majority,631 Justice Douglas ruled that the Federal Power Commission must stay its consideration on the merits of a merger application under the National Gas Act in deference to a pending antitrust challenge in federal court. Since the Federal Power Commission was not specifically authorized to enforce Section 7 of the Clayton Act, unlike other agencies, Douglas held it must

627 409 U.S. 363 (1973). See also Sunshine Anthracite Coal Co. v. Adkins, 310 U. S. 381, (1940) where Douglas, writing for an 8-1 majority, ruled that Congress' grant of rate-making authority to the National Bituminous Coal Commission exempted its rates from antitrust scrutiny. "Certainly what Congress has forbidden by the Sherman Act it can modify. It may do so, by placing the machinery of price-fixing in the hands of public agencies." Id. at 396.

628 409 U.S. at 382.

629 386 U.S. at 366, 367-70.


631 369 U.S. 482 (1962). Justice Harlan, joined by Justice Stewart, dissented while Justices Frankfurter and White did not participate.
defer to an antitrust suit.632

Douglas, again writing for the Court, reached the same conclusion in Otter Tail Power Company v. United States, a case involving a power company's refusal to sell power to municipal utilities.633 The defendant asserted that since the Federal Power Commission had the statutory authority to compel involuntary interconnections of power under the Federal Power Act, it should be immune from antitrust scrutiny.634 The Court, per Justice Douglas, dismissed that argument, pointing to Congress's rejection of a pervasive regulatory scheme under the act in favor of voluntary decision-making about connections with other systems.635 According to Justice Douglas, where power companies' interconnection decisions were governed initially by their own business judgments, rather than regulatory coercion, “courts must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws.”636

632 Id. at 486. He reached this conclusion even though Section 7 of the Clayton Act did provide that “Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the . . . Federal Power Commission . . . under any statutory provision vesting such power in such Commission,” since that “was plainly not a grant of power to adjudicate antitrust issues.” Not surprisingly, Justice Harlan strongly disagreed, asserting that the majority had “in effect, transfer[ed] to the Antitrust Division . . . regulatory functions entrusted to administrative agencies . . .” It did so, according to Harlan, “without adverting to any legal principle or statute to support its decision” but by “lay[ing] down a pervasive rule born by its own abstract notions of `what orderly procedure' requires.” Id. at 491 (Harlan, J., dissenting).


634 Id. at 373.

635 Id. at 374. He also noted the lack of any legislative history which would support the granting of antitrust immunity. Id. at 373-74.

636 Id. at 374.
As illustrated by *California v. Federal Power Commission* and *Otter Tail Power Company v. United States*, the Warren and early Burger Courts usually declined to defer antitrust adjudication to administrative or regulatory action, unless it found the agency's authority pervasive enough to preempt antitrust law. Justice Douglas, however, was less likely to defer to regulatory schemes than his brethren, particularly in instances in which the Court found that the regulatory control was sufficient to provide the relevant agency with primary but not exclusive jurisdiction. For example, he dissented in *Far East Conference v. United States*, a case in which the Court ordered the dismissal of a government enforcement suit brought before the Federal Maritime Board had considered the legality of steamship companies' dual system of rates.

The majority's view was that in cases requiring administrative discretion or not involving facts within the normal experience of judges "agencies created by Congress for regulating the subject matter [rates] should not be passed over." According to Justice Douglas, however, the

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638 Compare Leon Epstein, supra note 58, at 560. Writing in 1949, Epstein stated that ".. . it is not entirely impossible that Douglas's concern for anti-trust law enforcement is merely an expression of a desire to have the government regulate business in whatever way happened to be available at the moment."


640 The Far East Conference was made up of steamship companies engaged in outbound Far East shipping. They had established a dual rate system which charged shippers a lower rate if they agreed to use exclusively the bottoms of the steamships. *Id.* at 572.

641 *Id.* at 574.
government should be able to proceed on its antitrust challenge because the Federal Maritime Board had never approved the dual rate agreement, only a more general agreement that the Conference would adopt a tariff of rates.\(^642\) In his view, the Conference was “operat[ing] outside the law not only because they have failed to submit their schedule of rates to the Board but also because the rates adopted would, if approved, be illegal.”\(^643\)

In Pennsylvania Water & Power Company v. Federal Power Commission, Douglas again took issue with the majority's assessment of a regulatory agency's dispute with a regulated entity, here a public power utility.\(^644\) The case is perhaps mostly notable for being one of the very few times that Justices Douglas and Black disagreed in a case involving antitrust issues.\(^645\) It involved the FPC's order to Penn Water & Power Company to reduce its rates in response to complaints by Maryland officials that Penn Water had been gouging a purchaser utility in Maryland. Penn Water alleged that the order required it to continue performing a contract illegal under the Sherman Act.\(^646\) The Court refused to set aside the commission's order, holding that the agency was merely

\(^642\) If the Board had approved the dual rates in compliance with the Shipping Act, Douglas acknowledged that it would have exclusive jurisdiction and the rates would be immune from the Sherman Act. *Id.* at 578 (Douglas, J., dissenting).

\(^643\) The steamship companies were “therefore, flout[ing] the law as plainly as if they used rates that had been disapproved by the Board.” *Id.* at 579.

\(^644\) 343 U.S. 414 (1952).

\(^645\) Justice Black wrote the opinion for the six justice majority while Douglas was joined in dissent by Justice Reed. Justice Frankfurter was ill and did not participate. *Id.* at 424. [any other a/t cases in which Douglas and Black differed?]

\(^646\) Apparently Penn Water's contract with the Maryland public utility, Consolidated Gas Electric Light and Power Company of Baltimore, divided markets and insured that the two would not be in direct competition. *See* Pennsylvania W. & P. Co. v. Consolidated Gas, E.L. & P. Co., 184 F.2d 552 (4th Cir. 1950).
acting under its rate-making authority and was not compelling Penn Water & Power to perform contracts illegal as a matter of private contract law.\footnote{647} According to Justice Black, the plaintiff was attempting to use the Sherman Act to nullify a rate-reduction order issued under the FPC’s authorized regulatory power.\footnote{648}

Justice Douglas saw the issue quite differently, stating that “[t]here is lawless conduct that overshadows the evils of extortionate rates.”\footnote{649} The contract which eliminated competition between the two public utilities was a “greater evil” than “[t]he desire to reduce excessive rates.”\footnote{650} According to Douglas, the FPC had approved and thus sought to perpetuate an “unholy alliance” between the utilities.\footnote{651}

While the Court in Pennsylvania Water & Power thought that the FPC was doing its job in reducing excessive rates, Justice Douglas believed that the majority was missing the forest for the trees. He would have imposed on the regulatory agency not only the job of benefiting consumers by lowering rates but, presumably, also of untangling the underlying “unholy alliance” contract which divided markets.\footnote{652} His fervor for the competitive process thus extended to regulatory

\footnote{647} 343 U.S. at 421-22.

\footnote{648} \textit{Id.} at 424.

\footnote{649} \textit{Id.} (Douglas, J., dissenting).

\footnote{650} \textit{Id.} at 424-25.

\footnote{651} \textit{Id.} at 425-26.

\footnote{652} Or at a minimum Douglas believed the Commission should not act to indirectly support a private restraint of trade. He would have reversed and remanded the case to the Commission “with directions that the Commission build its rate order on the powers that it has under the Federal Power Act, not on the unholy alliance that these utilities created and that the Commission has sought to perpetuate.” \textit{Id.} at 426.
agencies whom he expected to keep the faith. It was not enough that they regulated rates; in his view they should also assure that the competition was alive and well within their regulated sphere.

Justice Douglas also dissented in Ricci v. Chicago Mercantile Exchange, a 5-4 decision in which the Court ruled that antitrust proceedings should be stayed pending the Commodity Exchange Commission's review of the respondent's allegedly unlawful conduct. He joined Justice Marshall's four justice dissent and added an additional statement of his own. Justice Marshall would have struck the balance between administrative and judicial proceedings in favor of immediate court action where a private plaintiff had uncertain access to the administrative process. Justice Douglas added that he would tip the scales even more toward judicial action, particularly where the administrative agency, as in the case at hand, has not acted to enforce the alleged wrongdoing on its own.

Much earlier in De Beers Consolidated Mines, Ltd. v. United States Douglas had objected to the Court's overturning of a preliminary injunction granted by a district court against foreign defendants charged by the Justice Department with a conspiracy to restrain trade and monopolize gem and industrial diamonds. The injunction forbade the seven corporate defendants from removing transferring or selling any assets located within the U.S. during the pendency of the litigation. The five-justice majority viewed the injunction as an unlawful sequestration of

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654 Id. at 308 & 309 (Douglas, J., dissenting & Marshall, J., dissenting).
655 Id. at 321.
656 Id. at 308-09.
657 325 U.S. 212 (1945).
defendants' property prior to the entry of a judgment.\textsuperscript{658} 

Justice Douglas, joined by Justices Black, Murphy and Rutledge, objected to the Court's hearing of what he termed an interlocutory appeal.\textsuperscript{659} He could see no extraordinary circumstances warranting the taking of the appeal, characterizing the actual hardship upon the defendants from the issuance of the injunction as "no more than the cost of procuring of a bond."\textsuperscript{660} One would doubt that Douglas would have permitted a similar injunction to stand if issued against small U.S. companies struggling to compete but nonetheless the target of an antitrust suit. It is hard to imagine that he would have then hid behind a procedural disinclination to hear interlocutory appeals where the effective sequestration of property prior to judgment was at issue. But he did not see a problem in an antitrust enforcement action against foreign defendants.

Thus, even more than the hawkish Warren Court, Justice Douglas favored generous application of the antitrust laws, whether procedurally or substantively. And while he joined the Court in finding that the Constitutionally protected right to petition the government trumped the antitrust laws and thus created antitrust immunity for certain types of collective action,\textsuperscript{661} later in

\textsuperscript{658} \textit{Id.} at 222. The Court suggested that if the preliminary injunction should stand, any plaintiff would be able to seek a similar injunction in equity which would in effect sequester any defendant's assets pending a later judgment on the merits. \textit{Id.} at 222-23.

\textsuperscript{659} \textit{Id.} at 223-24 (Douglas, J., dissenting).

\textsuperscript{660} \textit{Id.} at 224.

California Motor Transport Co. v. Trucking Unlimited\textsuperscript{662} Douglas was the architect of the so-called sham exception to what had become known as the \textit{Noerr-Pennington} doctrine.\textsuperscript{663} In \textit{California Motor Transport}, one group of motor carriers sued another, claiming that the latter had conspired to monopolize trade by filing a series of repetitive, meritless federal and state actions to contest plaintiffs' applications to acquire operating rights to transport goods.

Writing for the Court, Justice Douglas referred to dicta in \textit{Noerr} in holding that the antitrust immunity arising from the right to petition did not extend to "a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor."\textsuperscript{664} In activating the \textit{Noerr} dicta Douglas sought to distinguish between legitimate attempts to influence public officials and attempts "to bar . . . competitors from meaningful access to adjudicatory tribunals and so to usurp that decision-making process."\textsuperscript{665} Accordingly, "a pattern of baseless, repetitive claims may emerge which leads the factfinder to conclude that the administrative and judicial processes have been abused."\textsuperscript{666}

\begin{itemize}
  \item \textsuperscript{662} 404 U.S. 508 (1972).
  \item \textsuperscript{663} Justice Douglas had written a separate concurring opinion in United Mine Workers of American v. Pennington, 381 U.S. 657, 672 (1965), the second prong of the \textit{Noerr-Pennington} immunity, but on the labor exemption issue in the case. For a brief history of the \textit{Noerr-Pennington} doctrine, see C. Paul Rogers III, \textit{The State Action Immunity}, 49 U. Colo. L. Rev. 147 (1978).
  \item \textsuperscript{664} 404 U.S. at 511 \textit{quoting} 365 U.S. at 144.
  \item \textsuperscript{665} 404 U.S. at 511-12.
  \item \textsuperscript{666} \textit{Id.} at 513. Not surprisingly, the sham exception has generated a good deal of litigation as court's attempt to draw the line between legitimate access to government tribunals and abuse of the system. \textit{See e.g.} Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) and City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991).
\end{itemize}
Thus, even when confronted with a purported constitutionally protected right, Justice Douglas seemed reluctant for the antitrust laws to be supplanted. At a minimum, he wanted an appropriate balance and did not want parties hiding behind the *Noerr-Pennington* immunity while they abused the system for competitive gain. For example, writing for the Court in Otter Tail Power Company v. United States,\(^{667}\) he remanded a district court decision for the purpose of its determining whether the sham exception applied to defendant's sponsoring litigation for the purpose of delaying or stopping the establishment of competing municipal electric utility systems.\(^{668}\)

During Justice Douglas time on the Court, its view of the reach of the Commerce Clause and thus Sherman Act jurisdiction expanded significantly.\(^{669}\) Douglas was in the forefront, writing the opinion for a unanimous Court in Moore v. Mead's Fine Bread.\(^{670}\) There the plaintiff was a bakery in Santa Rosa, New Mexico competing locally with a bread company who also sold bread in Farwell, Texas, on the Texas-New Mexico border. Plaintiff alleged that defendant had


\(^{668}\) The district court had ruled that the *Noerr-Pennington* immunity could not apply to issues concerning access to the judicial branch, as opposed to the legislative and executive branches. *California Motor Transport*, decided after the district court decision in *Otter Tail*, had held otherwise but raised the specter of the sham exception. Thus, the district court may have reached the correct result but for the wrong reason. *Id.* at 379-80.


cut prices in Santa Rosa, forcing it out of business in violation of the Robinson-Patman Act. Justice Douglas held that defendant's sending of a truck to Farwell each day to sell bread was sufficient to confer jurisdiction, even though plaintiff was not itself engaged in interstate commerce. He later acknowledged that finding that “the destruction of a local competitor by purely local tactics” conferred antitrust jurisdiction was “probably as far-reaching as any decision under the Commerce Clause.

Justice Douglas's view of Sherman Act jurisdiction was ultimately even more expansive than the rest of the Court. Not surprisingly, Douglas dissented in Flood v. Kuhn, the case which upheld professional baseball's long-standing exemption from the antitrust laws. In doing so, he admittedly changed his position from almost twenty years before where he had voted to uphold baseball's judicially created antitrust exemption.

In Flood, the majority rigidly applied stare decisis to uphold the 1922 Federal Baseball decision that had ruled that organized baseball was not involved in interstate commerce. Thus, since Congress' ability to legislate was constrained by the commerce clause, the Court in Federal Baseball ruled that there could be no Sherman Act jurisdiction involving organized baseball. In

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671 Id. at 119.


the intervening fifty years, the Court's notion of interstate commerce had greatly expanded676 and the antitrust laws had been readily applied to other professional sports.677 Justice Blackmun, writing for the Flood majority,678 nonetheless held that congressional silence in the years since the Federal Baseball decision and organized baseball's long reliance on its antitrust exemption mandated that the Court “adhere” to its earlier decisions.679

676 See cases cited in footnote 655, supra.


678 Part I of Justice Blackmun's opinion, captioned “The Game,” was a panegyric to baseball, quoting Grantland Rice and George Bernard Shaw, among others. Justice Blackmun also included a long list of baseball's legendary names including Tris Speaker, Rogers Hornsby, Wahoo Sam Crawford, Amos Rusie, Three-Finger Brown, Smokey Joe Wood, Wee Willie Keeler, Lefty O'Doul, Old Hoss Radbourne, Goose Goslin, Dizzy Dean, Dazzy Vance, Iron Man McGinnity, Stuffy McInnis, Eppa Rixey, Pie Traynor, Nap Lajoie, Rabbit Maranville, Big Ed Delahanty, Honus Wagner, Christy Mathewson, Grover Cleveland Alexander, Babe Ruth, Ty Cobb, Lou Gehrig, Walter Johnson and many more. Justice Blackmun was later heard to lament that he had neglected to include Van Lingo Mungo. Interestingly, two justices, White and Burger, voted with the majority and concurred in all but Part I of Blackmun's opinion. Perhaps Justice White, a former football All-American at the University of Colorado (whose football nickname was “Whizzer” White) did not share Blackmun's view of baseball as the National Pastime.

The year before *Flood*, Justice Douglas had, as Circuit Justice for the Ninth Circuit, reinstituted an injunction which allowed Spencer Haywood, who was challenging the NBA's four year rule, to play in the NBA playoffs. In doing so, Douglas noted in passing, without citing authority, that professional basketball was not exempt from the antitrust laws. In his dissent in *Flood*, he argued, correctly it seems, that the Court, not Congress, should overturn *Federal Baseball* since the Court, not Congress, penned the decision. He also made it clear that he believed organized baseball's reserve clause, which bound a player to his team beyond the term of the contract but for the player's entire playing career, was an unreasonable restraint of trade.

In his last term, Justice Douglas dissented in two other antitrust jurisdictional decisions, arguing for a more expansive interpretation of the “in commerce” requirement of the Clayton Act. In *Gulf Oil Corporation v. Copp Paving Company* and *United States v. American Building Maintenance Industries* the Court held that the Clayton Act’s “in commerce” language must be

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681 Id. at 1205.

682 Justice Douglas characterized *Federal Baseball* as “a derelict in the stream of the law that we, its creator, should remove.” 407 U.S. at 286 (Douglas, J., dissenting).


685 422 U.S. 271 (1975).
read more narrowly than the Sherman Act's "in or affecting commerce" language, thus narrowing the jurisdictional reach of the Clayton Act to actions "in the flow" of commerce. Douglas reasoned, to the contrary, that since the Clayton Act was intended to complement the Sherman Act by curtailing anticompetitive practices in their incipiency, the Court should not "lightly assume" that Congress intended the jurisdictional reach of the Clayton Act to be narrower than the Sherman Act.\textsuperscript{686}

Not surprisingly, Justice Douglas favored allowing states to enforce the antitrust laws through Sections 4 and 16 of the Clayton Act. Writing for a narrow 5-4 majority in Georgia v. Pennsylvania Railroad Company, Douglas ruled that the State of Georgia could bring suit as \textit{parens patriae} for its citizens for injunctive relief under Section 16 of the Clayton Act against twenty railroads accused of conspiring to fix rates.\textsuperscript{687} Then, 27 years later in Hawaii v. Standard Oil of California, the Court held that a state could not recover damages for injury to its general economy in a \textit{parens patriae} suit.\textsuperscript{688} Justice Douglas vigorously dissented, characterizing the majority's approach to remedies as "miserly" and asserting that he saw "no way of distinguishing the instant case from Georgia v. Pennsylvania Railroad Company."\textsuperscript{689}

Douglas also joined Justice Brennan's lengthier dissent which pointed out that in the


\textsuperscript{687} 324 U.S. 439 (1945).

\textsuperscript{688} 405 U.S. 251, 264 (1972). The Court held that a state could recover damages for injury to its commercial interests under Section 4 of the Clayton Act. \textit{Id}.

\textsuperscript{689} \textit{Id}. at 266-68 (Douglas, J., dissenting).
earlier case Georgia was denied damages only because its recovery might have violated the *Keogh* doctrine as an illegal rebate.\textsuperscript{690} Justices Brennan and Douglas both favored allowing the State of Hawaii to recover damages as *parens patriae* for overcharges paid by its citizenry because of a oil company price fixing conspiracy.\textsuperscript{691}

In his separate dissent, Douglas acknowledged that there “are doubtless rationales that express a prejudice against a liberal construction of the antitrust laws.”\textsuperscript{692} His solution was to let the case to go to trial and to leave it to Congress to decide if states should be restricted under Section 4 of the Clayton Act to their own proprietary interests.\textsuperscript{693} In acknowledging his “liberal” construction and punting to Congress if they didn’t like it, Douglas reaffirmed his position as the leading antitrust hawk on the Court.\textsuperscript{694}

XV. Labor and Antitrust

Although Justice Douglas was most assuredly pro-labor,\textsuperscript{695} his zeal for antitrust enforcement must have caused him considerable anxiety when the two came into conflict. In fact,

\textsuperscript{690} *Id.* at 270, 272 (Brennan, J., dissenting). The contested rates in Georgia v. Pennsylvania Railroad Co. had been approved by the Interstate Commerce Commission arguably bringing it within *Keogh* v. Chicago & Northwestern Railroad Co., 260 U.S. 156 (1922).

\textsuperscript{691} 405 U.S. at 277.

\textsuperscript{692} *Id.* at 270.

\textsuperscript{693} *Id.*

\textsuperscript{694} One wonders why Douglas penned a separate dissent from Justice Brennan since they agreed on the construction of Georgia v. Pennsylvania Railroad Co. and the reach of Section 4, other than to display his independence on this issue.

his opinions in the area seem somewhat schizophrenic. He was at his contrarian best in dealing with the labor exemption, almost always dissenting, writing no majority opinions and rarely voting with the majority.\textsuperscript{696} He dissented when he thought the majority was expanding the exemption and when he believed the Court was applying it too strictly. The sole consistency seems to be that he never agreed with his brethren about where the line should be drawn.\textsuperscript{697}

He sometimes believed that the majority was interpreting the non-statutory labor exemption to allow organized labor too much intrusion into the marketplace. An example is his dissent in Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of N.A. v. Jewel Tea Co., Inc. where a divided Court had held that an agreement between a trade association of food retailers and local unions restricting the operating hours of fresh meat departments was exempt from antitrust scrutiny.\textsuperscript{698}

The plaintiff had resisted a union proposal to restrict operating hours to 9 am to 6 pm which was agreed to by a large trade association of 1,000 merchants and 300 meat dealers but had capitulated under the duress of a strike vote.\textsuperscript{699} Douglas in dissent argued that “unions can no more aid a group of businessmen to force their competitors to follow uniform store marketing standards than can a trade association.”

\begin{footnotes}

\item[697] One exception is U.S. v. National Ass'n of Real Estate Boards, 339 U.S. 485, 490-91 (1950). There writing for a 6-1 majority, with Justices Frankfurter and Clark not participating, Douglas ruled that real estate commissions fixed by a real estate board were simply fees and were not wages falling under the labor exemption. See text accompanying notes \textsuperscript{696}, supra.

\item[698] 381 U.S. 676, 691 (1965). The Court concluded that the hours of operation were "well within the realm of `wages, hours, and other terms and conditions of employment' about which employers and unions must bargain."

\item[699] 381 U.S. at 680-81.
\end{footnotes}
hours than to force them to sell at fixed prices.” As he viewed it, the unions had “induced a large group of merchants to use their collective strength to hurt others who wanted the competitive advantage of selling meat after 6 pm.” In sum, he believed that a conspiracy between a union and a large number of merchant-employers to impose competitive conditions on other merchant-employers should not be shielded from antitrust under the rubric of collective bargaining.

Justice Douglas also felt compelled to concur in United Mine Workers of America v. Pennington, decided the same day as Jewel Tea. There the Court held that the participation of a union in an industry-wide collective bargaining agreement whereby employers and the union agreed on a wage scale which forced some small employers out of business was not within the nonstatutory labor antitrust exemption. Douglas’ concurrence was motivated by the fact that the conspiracy imposed high wages to drive “the small, marginal companies” out of business. He noted that Congress is “the only architect of our economic system.” Thus, the Court is correct “in adhering to our free enterprise system as expressed in the antitrust laws . . . until the Congress delegates to big business and big labor the power to remold our economy in the manner charged

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700 Id. at 676 (Douglas, J., dissenting). He was joined by Justices Black and Clark. Justice Douglas believed that the Court had failed to follow the well established Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797 (1945), decision which had outlawed unions from combining with employers and manufacturers of goods to restrain competition in or to monopolize the marketing of the goods.

701 Id. at 676.

702 381 U.S. 657, 672 (1965) (Douglas, J. concurring). He was joined by Justices Black and Clark.

703 381 U.S. at 675.
Earlier, in Los Angeles Meat & Provision Drivers Union v. United States, Douglas had disagreed with the Court about the appropriate remedy for activity among “grease peddlers” who had fixed prices and allocated territories under the guise of union activity. While the full range of antitrust remedies were available against the defendants, Douglas disputed that the Court could expel them from the union under the Norris-LaGuardia Act for their restraint of trade activities. He was willing to interpret “labor dispute” under the act broadly so as to protect the right of small, independent contractors to maintain union membership even where the defendants were not engaged in actual collective bargaining.

He also dissented in Ramsey v. Leon Nunley Coal Co. v. United Mine Workers of America, disagreeing with the majority in a 5-4 decision about the standard of proof necessary to establish an antitrust violation by a union under Section 6 of the Norris LaGuardia Act. He argued that the statute required “clear proof” rather than a preponderance of the evidence of the union’s complicity in the illegal scheme. The union had allegedly joined with major coal producers to set wages and other conditions of employment at a level that would force smaller

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704 Id.
706 Id. at 108, 112 (Douglas, J., dissenting). The decision was 8-1.
707 401 U.S. 302 (1971)
708 Id. at 314 (Douglas, J., dissenting).
709 Id. at 315-16.
producers out of business.\textsuperscript{710} Douglas agreed that the allegations if true would subject the union to antitrust liability. He was wary of accurately differentiating, however, between the union's best efforts to increase the wage scale industry-wide, which is what a union lawfully seeks to accomplish, and its conspiring with some employers to set wages at levels that would drive some producers from the market and thus benefit the conspiring producers.\textsuperscript{711} To make that distinction, he argued, a clear proof standard was needed.\textsuperscript{712}

Douglas also disagreed with the majority in Connell Construction Co. Inc. v. Plumbers & Steamfitters Local Union No. 100,\textsuperscript{713} arguing that the Court had construed the non-statutory exemption too narrowly, in contradistinction to his earlier dissents in \emph{Jewel Tea} and \emph{Pennington}. In \emph{Connell} the Court ruled that a multi-employer collective bargaining agreement which required general contractor employers to contract only with subcontractors who also had agreements with the same union was not protected by the non-statutory exemption. Justice Douglas joined Justice Stewart's four justice dissent\textsuperscript{714} but also dissented separately.\textsuperscript{715} Justice Stewart argued that Congress did not intend for secondary boycott activities like those engaged in by the union to be subject to the antitrust laws.\textsuperscript{716} Justice Douglas agreed but noted the lack of a conspiracy

\begin{itemize}
\item \textsuperscript{710} \textit{Id.} at 304.
\item \textsuperscript{711} \textit{Id.} at 318-19.
\item \textsuperscript{712} \textit{Id.} at 319-20.
\item \textsuperscript{713} 421 U.S. 616 (1974).
\item \textsuperscript{714} \textit{Id.} at 638 (Stewart, J., dissenting).
\item \textsuperscript{715} \textit{Id.} (Douglas, J., dissenting).
\item \textsuperscript{716} \textit{Id.} at 654.
\end{itemize}
allegation between the union and union subcontractors to force nonunion subcontractors from the market which was, for him, “the determinative feature of the case.”

Thus, at the labor-antitrust juncture, Douglas was capable of asserting the antitrust laws and restricting the labor exemption if he was convinced that small competitors were being squeezed by unions in collaboration with large employers such as in *Jewel Tea* and, more particularly, *Pennington*. But he was concerned that labor unions not face antitrust liability too readily or too easily. From his pro-labor stance grease peddlers should not be expelled from a questionable union affiliation because they divided markets and fixed prices. Clear proof and specific conspiracy allegations should be required for union liability under the antitrust laws.

Justice Douglas’s antitrust philosophy, deeply rooted in populism, favored the small competitor. His labor philosophy favored the worker and his right to unionize and collectively bargain for higher wages and better working conditions. Small, independent businesses tend to pay lower wages and are not necessarily noted for their working environment. The collision of interests is inevitable and, given his strong beliefs and values, Justice Douglas’ apparent inconsistency in drawing the line between antitrust and labor is perhaps predictable.

XVI. Conclusion

So at the end of the day (and in Justice Douglas’s case it was the longest “day” ever on the Court) what kind of antitrust report card did the Justice earn? If one were to be most generous, one might label his antitrust record as mixed, given his stellar opinion in *Socony-Vacuum*. One

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717 *Id.* at 638.
good, perhaps great opinion, however, cannot counter-balance the many stinkers he produced. If one attempts to be objective, however, in light of both contemporary developments in antitrust law and the frequent confusion he generated in his own time, one must give Douglas a failing grade. Although Douglas, historically viewed, led the way in the expansion of the antitrust laws, the precedents he created have not, with the exception of price fixing, stood the test of time.

The intrinsic inconsistency of his antitrust philosophy is palpable. While Socony-Vacuum has been characterized as "[p]erhaps the best known and most ruthless evocation of the consumer,"\(^{718}\) most of his opinions are patently anti-consumer. If nothing else, his opinions demonstrate that a coherent antitrust policy cannot protect both small business and the consumer. The former reduces the Sherman Act to the protection of the opportunity to compete, rather than the protection of competition itself. The incoherency of Douglas' approach produces an antitrust law without form and with little substance.

Douglas must rate as the leading antitrust hawk in our history, and with his brethren on the Warren Court, is responsible for an unprecedented expansion of the antitrust laws. If Douglas had had his way, the expansion would have been even more dramatic. His fervor against big business and for the small businessman has not stood the test of time, at least not for a body of laws that seeks to enhance consumer welfare. There is no little irony in the fact that Justice Douglas, who was so passionate about individual civil rights and liberties, actually harmed consumers in his populist attempt to protect small business.\(^{719}\)


\(^{719}\) Another contradiction stems from the fact that despite Douglas's earned reputation as an expansive libertarian and populist who distrusted all exhibitions of power, he was by all accounts a tyrant to work for and commonly was abusive to his law clerks and secretaries. Most
Perhaps an even greater indictment is that his later years on the Court were noteworthy for
the poor quality of his opinions. Even in the areas of horizontal restraints where the law has
changed little, Justice Douglas issued opinions containing generalized, non-specific language and
the lack of any real factual analysis. They read like they were written by someone in a rush to do
something else. With that approach, he managed to muck up and create uncertainty in the law for
years to come. In merger and monopolization cases, his opinions were simply result-oriented and
the government did always win if he had anything to say about it. He and the Warren Court not
infrequently posited legal principles or standards while then proceeding to misapply those
principles to the facts before them.

One can argue that Justice Douglas's antitrust record is of a legal realist and functionalist
run amuck. Legal realism posits that judges will be influenced by their own predilections and
Douglas certainly was. The difficulty is that indeterminancy may result and precedent may be
subverted if a judge goes too far. Douglas's abhorrence of market power and domination and
concern for small business provided all too predictable results but no boundaries since he so often,
even in the days of the Warren Court, argued to extend the reach of antitrust beyond his liberal
brethren.

Douglas's functionalism was supposed to be fact dependent and lead to greater certainty
and efficiency in the law. In a superficial sense, it did since under Douglas the government

of his law clerks, for example, endured several “firings” and Douglas typically took no interest in
their personal lives or careers. See, e.g., Bruce Allen Murphy, supra note 9, at 407-15, 422-25;
James F. Simon, supra note 19, at 224-27.
always won. But as Douglas's time on the Court wore on, his antitrust opinions became less fact dependent and more and more doctrinaire. Often his fact analysis was superficial and incomplete, the precise opposite of what his functionalism preached.

Another irony of no small significance is the fact that one can make a case that, in the antitrust arena, Justice Douglas, the product of humble circumstances who literally cleaned up Wall Street during the New Deal and who lived his life with a profound distrust of accumulations of economic wealth, actually came to abuse his power on the Court in combating economic power.

While Justice Douglas' antitrust record is there for all to consider and critique, the more difficult and ultimately more speculative questions center around the underlying reasons for his flawed legacy. Initially, it is difficult to argue that the lack of sophistication in his later antitrust opinions emanated from a mediocre mind. Douglas was perhaps not a brilliant as he made himself out to be, but certainly he had a first-rate legal mind. He was also a prodigious writer and, as an academic early in his career, a “star” by any measure. He was a man in a hurry with many interests and passions and one cannot help but wonder when reading some of his poorer opinions where his mind really was that day.

One should also consider that Douglas, even with his irascible personality, had considerable political ability (and even greater political ambition). Within the confines of the Court, he certainly had influence and no doubt knew how and when to exercise it to get votes on issues important to him. It may be that compromise sometimes “made a camel out of a horse” to use an old expression.

His distrust of concentrations of economic power which so fueled his antitrust philosophy
most probably had its roots in his impoverished childhood and college years. His academic work with financial institutions and his pathbreaking role in reforming the Securities Exchange Commission in the 1930s, where he was privy to greed and manipulation by corporate insiders, must have solidified his distrust of big business. Certainly he was influenced by Brandeis whom he acknowledged “helped crystallize my views” of “the free enterprise system” and Veblen. They gave voice to his own experience dealing with the SEC. Thurman Arnold, his colleague and close friend at Yale, must have been influential as well. Both certainly left the New Deal’s ambivalence about the value of competition in their wake.

Certainly Douglas's populism caused him to focus on the small business owner as antitrust's principal beneficiary. Of course, in fairness, the disconnect between consumer welfare and small business protectionism was not as well understood during Douglas' years on the Court, although the *Brown Shoe* opinion showed that the Court could simultaneously utter totally inconsistent policies. Nor had the pro-competitive utility of efficiencies nor the primacy of interbrand over intrabrand competition yet been given their due. Wealth maximization as an antitrust goal was, for the most part, not in the lexicon. Further, the uneven antitrust terrain Douglas inherited contained the property concept of restraints against alienation as an antitrust goal and precedent like *Appalachian Coals*. But the fact remains that Douglas and his Warren Court brethren did not advance the antitrust ball in any coherent or lasting manner.

Ultimately perhaps the most telling observation of Justice Douglas' antitrust legacy is that the *Socony-Vacuum* decision, the first antitrust opinion of the longest sitting Supreme Court Justice in our history (and the Justice who authored more antitrust opinions than anyone on the high Court), is the only lasting antitrust precedent flowing from Justice Douglas' pen.
Unfortunately, it was all downhill after that.