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THE ECONOMICS OF THE JOINT ANTITRUST DISSENTS OF JUSTICES HARLAN AND STEWART

Ray O. Werner*

> A dissent in a court of last resort is an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed.[1]

This oft-quoted observation of Chief Justice Hughes focuses on the invaluable function generally performed by the dissenting opinion. Certainly it indicates why special attention to dissents of United States Supreme Court justices is not only justified but often compelled. Not only can dissenting opinions reveal the not-so-still, not-so-small voice of conscience "pitched to a key that will carry through the years,"[2] but they also can point to a rationale that may eventually direct the Court's deliberations.

In the field of antitrust law, Justices John M. Harlan and Potter Stewart together were active dissenters; since the death of Justice Harlan in 1972, however, Justice Stewart has lacked vigorous reinforcement from a dynamic dissenting colleague. From the time of Justice Stewart's appointment to the Court in 1958, the two joined in frequent dissents to decisions involving regulation of the competitive contours of our economic society. Even if their strong dissents are not soon embraced by other Justices, they inevitably compelled the majority to give increased attention both to the consequences and to the economic facts and theories underlying the logic of the Court's decisions. This article is a study of the economic rationale which underlies the antitrust dissents of Justices Harlan and Stewart. The study reveals the evolution of a definite minority economic rationale for governmental regulation of business.

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1. C. HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1928).
2. Cardozo, *Law and Literature*, 14 YALE REVIEW 699 (1925).

I. ECONOMIC CRITERIA OF ANALYSIS

Procedural questions, while important, were not the major element in the dissents of Justices Harlan and Stewart. Central to their joint dissents were the much more fundamental issues of the structure, the conduct, and the performance of industry. Early in their respective careers, each realized that the contours of the nation's economic system were being altered by the decisions of the Court.[3] They were willing to try their hands at creating and modifying that system.

Although the interrelations between industry structure, conduct, and performance are important, these three concepts may be separated for analytical purposes.[4] Economists have long debated the exact meaning to be assigned to each of these concepts. Certain basic supply and demand conditions constitute the parameters of the system. Thus, supply factors such as raw materials, technology, product characteristics (durability, value, and weight), business attitudes, and unionization and demand factors such as price elasticity, rate of growth, marketing type, purchase method, and seasonal and cyclical variables are crucial.[5] Arising from these basic conditions, the *market structure* embraces the number of sellers and buyers, barriers to entry, product differentiation, cost structures, vertical integration, and "conglomerateness."[6] *Conduct* is revealed in pricing behavior, product strategy,

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3. This early recognition is best revealed in the dissents examined later in this paper. Early recognition by Justice Harlan is revealed in *McKesson & Robbins*, discussed in text accompanying note 13 *infra;* that of Justice Stewart is evident in *Alcoa*, discussed in text accompanying note 30 *infra*.

4. The content of each of the concepts examined at length here is based on the brief but exceptionally lucid exposition of F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 3-7 (1970). In a fine review of theories of workable competition, Sosnick delineates the different market characteristics thus:

> *"Structure"* refers to characteristics which constitute a market's patterns, status, composition. *"Conduct"* refers to characteristics which are enterprises' actions, dealing, or tactics. *"Performance"* refers to dimensions which represent the realization of normatively significant "economic" results. Conduct and performance together are sometimes called "behavior."

Sosnick, *A Critique of Concepts of Workable Competition*, 72 QUARTERLY J. OF ECON. 380, 386 (1958) (emphasis added). *See also* E. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM ch. 18 (1957); H. LIEBHAFSKY, AMERICAN GOVERNMENT AND BUSINESS 236-62 (1971); P. ASCH, ECONOMIC THEORY AND THE ANTITRUST DILEMMA 118-24 (1970), for further ramifications of the controversy. These works contain extensive citations to related studies in the professional literature.

5. F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970).

6. *Id.* at 5.

research and innovation, advertising, and legal tactics.[7] *Performance* attributes include productive and allocative efficiency, progress, full employment, and equity,[8] although efficiency probably is foremost when performance criteria are applied.

Interrelationships and overlaps are likely in both theoretical discussions and applications of these concepts. Reconciliation attempts abound.[9] Moreover, even if a performance criterion such as "progress" is adopted, its application remains as subjective as the criterion is vague. Yet to indicate all the problems economic theoreticians face resolves nothing—the fact remains that lawyers and judges, when confronted by an actual case, must adopt, either explicitly or implicitly, *some* criteria by which to assess the economic conflict facing them.[10]

In the final analysis, if the performance of an industry be adjudged efficient, adherents of a *performance* criterion would ask no more. They reason that if the economic results are desirable, then the methods of conduct or the structure of the industry are not relevant. Proponents of the *conduct* criterion of industry evaluation contend that the economic action and tactics employed by business are either defensible or indefensible—price fixing agreements, for example, are likely to be deemed indefensible under this criterion. However, conduct adherents often advance the corollary argument that if the conduct is dubious, the performance is doubtful. Finally, the *structuralists* look at the organization of industry. If they find a competitive market structure, they assume that the results will be favorable; if monopoly exists, a misallocation of resources and inefficiency in production are assumed to result. Although structuralists *assume* a tie between industry structure and performance, the focus of their regulatory or corrective measures is on structure. If a noncompetitive structure ex-

7. *Id.*
8. *Id.*
9. A classic attempt at reconciliation is Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265 (1949).
10. Markham, *An Alternative Approach to the Concept of Workable Competition*, 40 AM. ECON. REV. 349, 361 (1950), presents an argument for what almost constitutes another criterion, although not a frequently cited one. Markham, in the most pragmatic of all approaches, states:

> An industry may be judged to be workably competitive when, after the structural characteristics of its market and the dynamic forces that shaped them have been thoroughly examined, there is not clearly indicated change that can be effected through public policy measure that would result in greater social gains than social losses.

ists, they would attempt to remedy the situation without analysis of the performance of the industry. However, most conduct and structure advocates ultimately agree that if their focal criteria are not satisfied, the resulting performance is suspect.[11] Nevertheless, structure and conduct may be satisfactory and yet, because of unacceptable use of managerial discretion or social irresponsibility, the enterprise may perform unsatisfactorily.[12] It must be remembered that these criteria overlap; they are not divisions into which business characteristics can be neatly compartmentalized. However, as analytical concepts, they are useful in understanding the rationale that governs decisions in specific cases.

A chronological analysis of the dissents of Justices Harlan and Stewart reveals an evolving pattern of conscious recognition of the three dimensions of market characteristics. The two justices were not merely consummate pragmatists meeting each case without a developed and consistent rationale. Although individual cases do demonstrate some of the artificiality that characterizes the trichotomous classification economists employ, a study of the dissents reveals a willingness of Justices Harlan and Stewart to emphasize the performance of an industry, while not ignoring conduct or structural variables.

II. PIONEERING DISSENTS OF JUSTICE HARLAN

In the brief years between Justice Harlan's appointment to the Court in 1955 and the appointment of Justice Stewart in 1958, Justice Harlan participated in a number of cases presaging the eventual position the two would take. In *United States v. McKesson & Robbins*[13] Justice Harlan launched the first in his long series of antitrust dissents. McKesson & Robbins, the largest drug wholesaler in the nation, sold its brand-name drugs to both retailers and independent wholesalers. The company adopted a resale price maintenance policy in its dealings with the independent wholesalers, believing that such a policy was immune from attack under section 1 of the Sherman Antitrust Act[14]

11. Sosnick, *supra* note 4, at 386.
12. *Id.* at 381.
13. 351 U.S. 305 (1956).
14. Section 1 of the Sherman Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal . . . ." 15 U.S.C. § 1 (1970).

by provisions of the Miller-Tydings Act[15] and the McGuire-Keogh Act[16] which legalized certain price-fixing arrangements. The majority, speaking through Justice Warren, did not agree, holding that McKesson & Robbins' resale price maintenance policy was not exempt from the prohibition of the Sherman Act. The Court concluded that a manufacturer whose direct sales to retail outlets competed with independent wholesalers to whom it also sold under resale price maintenance agreements was engaged in illegal price-fixing.[17]

Quoting from *United States v. Bausch & Lomb Optical Co.*,[18] the Court noted:[19]

> A distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings Act.

Having found as a matter of fact that McKesson & Robbins, at least to the extent of its wholesale activities, was in direct horizontal competition with the independent wholesalers to whom it sold, the Court's holding was compelled by its reliance upon the proviso of the Miller-Tydings Act. The Court stated:[20]

> [E]xemptions of certain resale price maintenance contracts from the prohibition of the antitrust laws "shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices or on any commodity herein involved between . . . wholesalers . . . or corporations in competition with each other."

15. Section 1 of the Miller-Tydings Act, an amendment to the Sherman Act, provides that in those states permitting such contracts to be made, contracts between manufacturers and retailers to fix resale prices would not be in violation of the Sherman Act. 15 U.S.C. § 1 (1970).

16. Section 2 of the McGuire-Keogh Act amended section 5 of the Federal Trade Commission Act and extended the exemption of resale price maintenance contracts to nonsigners of such contracts in states legalizing such contracts, permitting recalcitrant nonsigning retailers to be proceeded against by manufacturers who utilize resale price maintenance contracts. 15 U.S.C. § 45A (1970). The nonsigners provision was passed by Congress in response to the Supreme Court's decision in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951), which held that the Miller-Tydings Act did not extend the exemption from the Sherman Act to parties who had not signed a resale price maintenance contract with the producer.

17. 351 U.S. at 313. McKesson & Robbins used two techniques in dealing directly with retailers: direct sales to important retailers from its manufacturing operations, and sales to other retailers through its own wholesale divisions.

18. 321 U.S. 707, 721 (1944).

19. 351 U.S. at 310.

20. *Id.* at 311.

The majority's decision ultimately turned upon its assessment of the structure of industry and the firm. The majority reasoned that Congress plainly intended to prohibit such conduct as effectuates " 'horizontal' price fixing by those in competition with each other at the same functional level."[21] Perceiving no ambiguity in the language of the Acts, the majority, after noting that statutory limitations circumscribed the Court's analysis, added: "[W]e are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy."[22]

Differing with the majority's conduct orientation and preferring the performance criterion, Justice Harlan argued at length that the majority's "artificial construction" and lack of sympathy for the congressional acts led it to a position contrary to the policy that Congress had adopted. In an extensive analysis of the purpose of the fair trade laws upon which McKesson & Robbins had relied for exemption from the Sherman Act, Justice Harlan argued:[23]

> The purpose of the state fair-trade laws is to allow the manufacturer of a brand-named product to protect the goodwill his name enjoys by controlling the prices at which his branded products are resold. . . . The necessary result—indeed the very object—is to permit the elimination of price competition in the branded product among those who sell it. Congress has sanctioned those laws in the Miller-Tydings and McGuire Acts, considering them not to be offensive to federal antitrust policy. Sufficient protection to the public interest was deemed to be afforded by the competition among different brands, a safeguard made express by the provision of the Miller-Tydings and McGuire Acts denying fair-trade contracts exemption from the antitrust laws unless the fair-traded product is "in free and open competition with commodities of the same general class." In short, the very purpose of the Acts is to permit a manufacturer to set the resale price for his own products while preserving competition between brands—that is, between the fair-traded item and similar items produced by other manufacturers.

21. *Id.* at 313, *quoting* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 389 (1951). The Court had previously held that price-fixing agreements are illegal per se without regard to the wisdom or reasonableness of the prices set. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

22. 351 U.S. at 316.

23. *Id.* at 317.

He then continued his argument, adding:[24]

> If we accept the legislative judgment implicit in the Acts that resale price maintenance is necessary and desirable to protect the goodwill attached to a brand name, there is no meaningful distinction between the fair-trade contracts of integrated and non-integrated manufacturers. Certainly the integrated manufacturer has as strong a claim to protection of his goodwill as a non-integrated manufacturer, and the economic effect of the contracts is the same. In both cases price competition in the resale of the branded product is eliminated, and in neither case does the price fixing extend beyond the manufacturer's own product. While the Government concedes the right of a non-integrated manufacturer to eliminate price competition in his products between wholesalers, it finds a vice not contemplated by the Acts when one of the "wholesalers" is also the manufacturer, for then the contracts eliminate competition between the very parties to the contracts. But, in either case, all price competition is eliminated, and I am inable to see what difference it makes between whom the eliminated competition would have existed had it not been eliminated. The other bases of distinction suggested by the Government are equally tenuous and reflect a subtlety of analysis for which there is no support in either the Acts or their history.

The central element in Justice Harlan's rationale was his conviction that satisfactory performance of the economy could be preserved adequately by inter-brand competition. Justice Harlan contended that the conduct which he believed Congress had legitimized—that of resale price agreements—extended to the elimination of intra-brand competition of an integrated producer such as McKesson & Robbins. If the behavior of a manufacturer was consistent with protection of its own goodwill, Justice Harlan would not restrict the behavior. He apparently believed that the resulting economic performance would be reasonably good, if not salutary, and interpreted congressional intent in enacting the Miller-Tydings and the McGuire Acts accordingly.

Justice Harlan's second major antitrust dissent prior to Justice Stewart's membership on the Court, *Northern Pacific Railway Co. v. United States*,[25] involved a tying contract in the form of preferential routing agreements for agricultural produce. Northern Pacific

24. *Id.* at 317-18.
25. 365 U.S. 1 (1957). Justices Frankfurter and Whittaker joined in Justice Harlan's dissent.

Railway allegedly imposed these agreements upon persons who leased or purchased from Northern Pacific land which initially had been donated to the railroad to facilitate its construction.

Resolution of the case, according to Justice Harlan, depended on whether Northern Pacific maintained a dominant position in the tying market so that the preferential agreement could be effectively tied to the land sales or leases.[26] Justice Harlan criticized the majority for permitting what he "deem[ed] to be a serious abuse of the summary judgment procedure."[27] Faced with "a record barren of facts to support a finding"[28] that the percentage of land controlled by Northern Pacific, the uniqueness of its location, or the land's inherent quality was sufficient to give the railroad dominance in the tying market, Justice Harlan would have remanded "for a trial and findings on the issue of 'dominance.' "[29] Thus, Justice Harlan rejected the majority's focus on conduct which led it to hold tying contracts illegal per se. Justice Harlan's emphasis on the question of "dominance" seemingly was founded upon a structural evaluation of the relevant market.

III. THE EARLY JOINT DISSENTS: SEARCH FOR A CRITERION

In *United States v. Aluminum Co. of America*,[30] the focus of the Court was clearly upon the structure of the industry. The issue was whether Alcoa's acquisition of the stock and assets of Rome Cable Corporation violated section 7 of the Clayton Act, which proscribed stock or asset acquisitions "where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly . . . ."[31]

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26. The essence of the majority's opinion, written by Justice Black, was that Northern Pacific Railway had imposed "preferential routing" clauses in its leases of railroad land which its predecessor had been granted by Congress in 1864 and 1870. These leases, requiring lessees of railroad land to ship via Northern Pacific unless a competing carrier offered better rates or service, involved a restraint on free competition and were held to be illegal per se. *Id.* at 7.

27. *Id.* at 19.

28. *Id.* at 20.

29. *Id.*

30. 377 U.S. 271 (1964).

31. 15 U.S.C. § 18 (1970). Section 7 of the Clayton Act (the Celler-Kefauver amendment) provides:

No corporation engaged in commerce shall acquire, directly or indirectly, the

In the dissent authored by Justice Stewart,[32] there was no dispute with the majority about the facts of the case. Rome's production was primarily insulated copper cable; Alcoa produced no copper cable but did produce 32.5% of the bare aluminum conductor market and 11.6% of the insulated conductor market. Rome's share of the insulated aluminum conductor market was 4.7%, of the bare aluminum conductor market it was 0.3%, and of the combined market it was 1.3%.[33] If Rome's share of the *bare aluminum* conductor market was combined with Alcoa's share, the impact on Alcoa's market share would be slight. Similarily, there would not be a significant impact on the market if Rome's total conductor production (both aluminum and copper) was combined with Alcoa's total production. If, however, Rome's *total* aluminum conductor production was added to Alcoa's production, Alcoa's dominance of the market would increase sharply. The district court, holding that bare and insulated aluminum conductor did not constitute a separate line of commerce,[34] was unable to find that Alcoa had violated section 7. The Supreme Court reversed, holding that bare and insulated aluminum conductor did constitute one line of commerce.[35] Although Alcoa's share of the relevant market rose by only 1.3%, the majority concluded that the acquisition of Rome, an "aggressive competitor," might result in a substantial reduction of competition.[36] Thus the merger was deemed a violation of section 7 of the Clayton Act.

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whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Id.

32. Along with Justice Harlan, Justice Goldberg joined in the dissent.
33. 377 U.S. at 274. Alcoa produced no copper cable whereas Rome primarily produced insulated copper cable. Thus, the merger also involved product extension by Alcoa.
34. United States v. Aluminum Co. of America, 214 F. Supp. 501 (N.D.N.Y. 1963).
35. 377 U.S. at 276-77.
36. *Id* at 280. Emphasizing the language of section 7, "where . . . the effect '. . . *may be* to substantially lessen competition,' " the court noted that the committee report at the time of the Celler-Kefauver amendments to the Clayton Act in 1950 focused on the objective of preventing "accretions of power which 'are individually so minute as to make it difficult to use the Sherman Act' test against them." *Id.* In addition, the Court discussed a standard with some of the characteristics of "perfect competition," noting that competition is most vital when there are many sellers, none of which has any significant market share.

Justice Stewart's dissent argued that the Government had failed to prove its "line of commerce" claim. Citing the Court's earlier decision in *Brown Shoe Co. v. United States,*[37] he indicated: "A line of commerce is an 'area of effective competition,' to be determined in accordance with the principles laid down in our prior decisions."[38]
He continued:[39]

> The Court in that case [*Brown Shoe*] did not attempt to formulate any rigid standard for determining submarket boundaries, but indicated that a broad-ranging pragmatic evaluation of market realities was required. The Federal trial courts were admonished to examine "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors." . . . These "practical indicia" to be considered in determining submarket boundaries express in practical terms the basic economic concept that markets are to be defined in terms of the close substitutability of either product (demand) or production facilities (supply), since it is ultimately the degree of substitutability that limits the exercise of market power, and it is only by delimiting the area of effective competition that an acqusition's competitive effects can be ascertained.

Having outlined the basis upon which he would proceed, Justice Stewart applied his theory to the facts, concluding that the district court was correct in finding that insulated and bare aluminum conductors did not constitute a separate line of commerce. Justice Stewart determined that all "conductor wire and cable (both bare and insulated, aluminum and copper)" constituted one line of commerce[40] and that "insulated conductor (both aluminum and copper)" constituted another line of commerce, noting "that Alcoa's and Rome's

37. 370 U.S. 294 (1962).
38. 371 U.S. at 283.
39. *Id.*
40. Stewart apparently did not accept the majority's conclusion that the cross-elasticity of demand is so low that copper wire is not within the relevant market—though he does not provide proof for this position. In response to the majority's conclusion that copper conductors should be excluded from the relevant market because of the great price disparity between copper and aluminum, Justice Stewart relied upon the district court's finding that this price difference did not foreclose actual competition and contended that under the majority's holding "important competitive copper elements would be improperly and arbitrarily excluded." *Id.* at 284.

market shares in these broad product markets were insufficient to support a finding of requisite anticompetitive effect."[41]

Justice Stewart and his fellow dissenters concluded that since the *structure* of the industry was competitive, no remedial action was required to restructure it. Industry structure was the only consideration necessary; conduct and performance criteria were not applied. Yet is it not clear that the majority seriously disagreed with the proposition that structure was a dominant consideration—their reference to many relatively small sellers is indicative of their concern about structure. If this be true, then the only disputed issue was a factual one of the relevant market and its related structure.

In *United States v. Philadelphia National Bank*,[42] the two principal problems examined were the applicability of section 7 of the Clayton Act to banking[43] and the relation between section 7 and the Bank Merger Act of 1960.[44] Speaking for the majority, Justice Brennan held that section 7 was intended to apply to banking mergers as well as mergers in other industries and that the Bank Merger Act of 1960 was not intended to immunize mergers approved by the banking agencies from the operation of the federal antitrust laws.[45]

The lengthy dissent of Justices Harlan and Stewart challenged both the central propositions of the majority, contending that the holding of the Court serves "to frustrate the objectives of the Bank Merger Act [and] finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute."[46] Although the Bank Merger Act does require that competitive effects be considered

41. *Id.* at 282-83.

42. 374 U.S. 321 (1963).

43. Noting that the Celler-Kefauver amendments to section 7 of the Clayton Act foreclosed the "asset acquisition loophole" to all corporations subject to the jurisdiction of the FTC (which does not include banks), the Court held that an exchange of stock of one bank for the assets of another was a stock acquisition under section 7 from which banks were not excluded. The Court would find an asset acquisition only in those cases where no exchange or transfer of stock is involved. *See* 374 U.S. at 346.

44. 12 U.S.C. § 1828 (1970).

45. 374 U.S. at 354. The Court noted that "[a]lthough the Comptroller was required to consider the effect upon competition in passing upon appellee's merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision." *Id.* at 351. The Court further noted that there was no express section 7 exemption for banks in the Bank Merger Act and that federal banking regulation was neither all-pervasive nor primarily concerned with antitrust issues. *Id.* at 352.

46. *Id.* at 374.

prior to merger approval, the dissent proceeded from the premise that in the field of deposit banking "considerations other than simply the preservation of competition are relevant."[47] The relevant considerations—notably "safety and soundness" of banking practices[48]—were clearly *performance* criteria, in sharp contrast to the rationale of Justice Stewart's dissent in *Aluminum Co. of America,* where structural considerations were predominant. The dissenters largely relied upon the legislative history of the relevant acts to support their position that section 7 of the Clayton Act was not intended to apply to the deposit banking industry. Convinced that the Bank Merger Act of 1960 was intended exclusively to govern the special problem of bank mergers, they stated:[49]

> For 10 years everyone—the department responsible for antitrust law enforcement, the banking industry, the Congress, and the bar—proceeded on the assumption that the 1950 amendment of the Clayton Act did not affect bank mergers. This assumption provided a major impetus to the enactment of remedial legislation, and Congress, when it finally settled on what it thought was the solution to the problem at hand, emphatically rejected the remedy now brought to life by the Court.

Granting *arguendo* that section 7 is inapplicable, the dissenters' case is persuasive; the legislative history, relating to bank mergers grounded on an acceptable performance-oriented analysis, does not support the premise that any structural modification of the banking industry which might tend to limit competition is prohibited.[50] The relevant bank regulatory agency—the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Federal Reserve Board— should weigh the "convenience and needs of the community to be served"[51] against the possible anticompetitive effects of the proposed merger and should render its decision accordingly.

Less than one year later the banking industry was again before the Supreme Court in *United States v. First National Bank & Trust Co. of*

47. *Id.* at 375. The dissenters noted that the congressional purpose was "that effect on competition was *not to be the controlling factor* in determining whether to approve a bank merger, that a merger could be approved as being in the public interest even though it would cause a substantial lessening of competition." *Id.* at 382 (emphasis added).
48. *Id.*
49. *Id.* at 384.
50. *Id.*
51. *See* note 46 *supra.*

Lexington.[52] The issue was whether the consolidation of the largest and the fourth largest of six commercial banks in Fayette County, Kentucky, violated sections 1 and 2 of the Sherman Act.[53] The two banks controlled approximately ninety percent of the commercial banking in the county. In both *Lexington* and *Philadelphia National Bank*, the bank regulatory agencies had found that the mergers would adversely effect competition among commercial banks in the area.[54] Nevertheless, in both cases the Comptroller of the Currency had approved the consolidation under his interpretation of the Bank Merger Act of 1960. The *Philadelphia* Court determined that even if valid under the Bank Merger Act, the merger might be enjoined under section 7 of the Clayton Act; in *Lexington* the question was whether a similar consolidation would contravene the provisions of the Sherman Act. The court answered in the affirmative;[55] Justice Harlan, with whom Justice Stewart concurred, again dissented.[56]

The dissent began by noting that this decision was unnecessary and indeed pernicious since the *Philadelphia* decision a year earlier had provided a rationale for future cases involving bank mergers.[57] Justice Harlan's argument addressed two major points: did the merger create a firm that was more than simply a "big" one, and was the motive for the merger anticompetitive?

52. 376 U.S. 665 (1964). The date of this decision was April 6; *Philadelphia Nat'l Bank* was decided June 17, 1963.

53. *See* note 14 *supra*. Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1970).

54. *Lexington*, 376 U.S. at 665; *Philadelphia Nat'l Bank*, 374 U.S. at 321.

55. *Lexington*, 376 U.S. at 666-73. The majority, after deciding that the relevant market was commercial banking in Fayette County, noted: "[T]he 'image' of 'bigness' is a powerful attraction to customers, an advantage that increases progressively with disparity in size; and thus the multiplicity of extra services in the trust field which the new company could offer tends to foreclose competition there." *Id*. at 669. The majority concluded: "We think it clear that the elimination of significant competition between First National and Security Trust constitutes an unreasonable restraint of trade in violation of § 1 of the Sherman Act." *Id*. at 669-70.

56. *See* Justice Stewart's dissent, *id*. at 673. The majority, having decided that the merger was in violation of section 1 of the Sherman Act, did not reach the question of whether section 2 had been violated.

57. *Id*.

On the first point Justices Harlan and Stewart admitted that structurally the banking industry in Fayette County would experience the development of a merged bank with a large dollar volume and a large percentage of the business in the market,[58] but this was considered to be of limited significance because "the strength of the remaining competition" remained viable and effective.[59] Moreover, the dissenters concluded that there was "no evidence at all in the record of an anti-competitive motive behind the consolidation."[60] Based upon these findings, the dissent felt that the Court misapplied the precedent upon which it relied. The dissenters repeated the majority's quotation from *United States v. Columbia Steel Co.*:[61]

> In determining what constitutes unreasonable restraint, we do not think dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands and other characteristics of the market.

Selectively adopting two of these explicit criteria, the strength of remaining competition and the purpose of the business action, Justices Harlan and Stewart found both the resulting industry structure and the conduct of the banks above reproach. The dissent strongly criticized the majority for looking solely to market structure and relying solely upon size—"bigness"—as a criterion for determining that section 1 had been violated.[62]

Just over two months after *Lexington* was decided under the Sherman Act, another case involving the application of section 7 of the Clayton Act was decided by the Court. This time, however, it was not the banking industry but manufacturing that was involved. In *United States v. Continental Can Co.*[63] the Government had attacked the asset acquisition by Continental Can, the producer of thirty-three percent of the nation's metal containers and second largest such producer in the nation, of Hazel-Atlas Glass Company, the nation's third

58. *Id.* at 676.
59. *Id.* at 677.
60. *Id.* at 678.
61. 334 U.S. 495, 527 (1948).
62. 376 U.S. at 678-80.
63. 378 U.S. 441 (1964) (decided June 22). *Lexington* was decided April 6, 1964.

largest producer of glass containers with 9.6 percent of the shipment of that product.[64] The majority overturned the district court's[65] determination of the relevant product market within which to measure the effect upon competition.[66] The district court found that metal and glass containers did compete but held they were separate lines of commerce; the majority of the Supreme Court concluded that although the inter-industry overlap between metal and glass containers was not total, the competitive overlap was great enough to justify treating them together as a relevant product market.[67] Once the two products were combined into a relevant market, it was a relatively simple matter for the majority to decide that the merger was "inherently suspect."[68] Further evidence was not required by the majority, who reasoned that "where concentration is already great," even slight increases in the industry's concentration should be stopped.[69]

In a dissent written by Justice Harlan in which Justice Stewart joined, the existence of the majority's relevant product market was seriously questioned. The dissent accepted the conclusion of the district court that the merger would not "adversely affect competition in the metal container industry, in the glass container industry, or between the metal container industry and the glass container industry."[70]

64. 378 U.S. at 443.

65. 217 F. Supp. 761 (S.D.N.Y. 1963).

66. 378 U.S. at 457-58. The Court rejected the district court's opinion insofar as it limited the competition protected by section 7 to intra-industry competition. The Court stated: "Though the 'outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it,' there may be 'within this broad market, well-defined submarkets . . . which, in themselves, constitute product markets for antitrust purposes.' " *Id.* at 449.

67. The majority found that "there is and has been a rather general confrontation between metal and glass containers and competition between them for the same end uses which is insistent, continuous, effective and quality-wise very substantial." *Id.* at 453. The Court then held: "[T]he interindustry competition between glass and metal containers is sufficient to warrant treating as a relevant product market the combined glass and metal container industries and *all end uses* for which they compete." *Id.* at 457 (emphasis added).

68. *Id.* at 458. The Court went on to point out that the "resulting percentage of the combined firms approaches that held presumptively bad in United States v. Philadelphia National Bank . . . ." *Id.* at 461.

69. *Id.* at 461-62. The Court's holding followed from its analytical approach: "The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future." *Id.* at 458.

70. *Id.* at 467. The dissenters accepted the arguments that neither the glass container industry's willingness to compete with metal containers nor the metal container industry's willingness to compete with glass containers would be reduced, agreeing with the district court that there was no evidence in either the record or competitive realities that innovation in either product line would be impaired. *Id.* at 474-75.

Concluding that the two industries did not constitute a single line of commerce threatened by the merger, Justice Harlan pointed out in support of the acquisition:[71]

> [T]he Government did not even suggest that such a line of commerce existed until it got to this Court. And it does not seriously suggest even now that such a line of commerce exists. The truth is that "glass and metal containers" form a distinct line of commerce only in the minds of this Court.

He added:[72]

> Brown Shoe, *supra,* on which the Court relies for this travesty of economics . . . spoke of *"well-defined* submarkets" within a broader market, and said that the boundaries of such a submarket were to be determined by "practical indicia". . . .

Since they perceived no well-defined submarkets, Harlan and Stewart felt compelled to criticize the majority for applying a market-share analysis to competition between two separate industries.[73]

Justices Harlan and Stewart did not deny that mergers—including conglomerate mergers[74]—could be proscribed when the facts warranted application of section 7 of the Clayton Act to the merger. They would, however, first require an appropriate determination as to whether one line or more than one line of commerce is involved.[75] If one line of commerce is involved, the dissenters indicate they might not oppose use of the structural market share approach to analyze the anticompetitive impact of the merger.[76] If, however, the court finds

71. *Id.* at 470-71.

72. *Id.* at 472.

73. *Id.* at 475. The dissent noted:

> The test which the Government advocates is that it "can satisfy its burden of showing that the merger may have the effect of substantially lessening competition by proving (a) the existence of substantial competition between two industries; (b) a high degree of concentration in either or both of the competing industries; and (c) the dominant position of each of the merging companies in its respective industry." (Brief, p. 22). This approach, which has at the least the virtue of facing up to its own logic, frankly disavows attention to a "line of commerce."

Id. at 471 n.6.

74. *Id.* at 473.

75. The question of the measurement of cross-elasticity of demand as a means to resolve this kind of factual dispute will be examined later. *See* text accompanying note 170 *infra.*

76. 378 U.S. at 475.

two or more lines of commerce exist, then at least in this situation the court must make "an inquiry into the competitive effects in the actual lines of commerce which are involved."[77] By emphasizing "effects," this approach envisages a performance criterion of evaluation.

IV. ABERRATION: THE PERFORMANCE CRITERION MINIMIZED

Atlantic Refining Co. v. FTC[78] was significant in that Justice Stewart's dissent focused upon *conduct* as the determinative criterion. The majority, too, relied on the conduct criterion as the basis of its decision; the crux of the disagreement was the extent to which specific business practices fell within the prohibition of section 5 of the Federal Trade Commission Act.[79]

The FTC found that Atlantic used both coercion and persuasion to induce its dealers to sponsor the sale of the tires, batteries and accessories of the Goodyear Tire and Rubber Company. Atlantic received a commission on all sales made by Goodyear to Atlantic's wholesalers and dealers. Finding that the use of coercion and the use of the sales-commission plan violated section 5, the FTC enjoined them both.[80] More specifically, the FTC refused even to consider the business justification of the sales-commission plan in view of the destructive effect widespread use of the plan had on commerce.[81] The Court upheld the FTC's power to prohibit the offending plan in its entirety.[82]

Justices Harlan and Stewart agreed with the majority in upholding the FTC's power to prohibit Atlantic's use of coercive power to promote exclusive handling of Goodyear's products by the oil company's dealers.[83] The key element in their dissent is summarized as follows:[84]

77. *Id.*
78. 381 U.S. 357 (1965).
79. 15 U.S.C. § 41 (1970), *as amended,* provides that "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful." This provision intuitively seems to focus upon the *conduct* of the alleged offenders rather than the market structure or performance criteria.
80. 381 U.S. at 359-66.
81. *Id.* at 371.
82. *Id.* at 372-73.
83. *Id.* at 377-79.
84. *Id.* at 378-79 (emphasis added).

> [G] ranting that the Commission validly found that the petitioners had engaged in coercive practices amounting to a violation of § 5 of the Act does not lead me to conclude that its order enjoining the use of *any* sales-commission plan of distribution is supportable . . . . [T]o the extent that the Commission's order is based on the premise that the sales-commission plan confers upon Atlantic some distinctive capacity to coerce its dealers into handling sponsored products, and thereby exclude competing suppliers, it is without foundation.

The sales-commission plan was considered by the dissenters to be an efficient business practice in that it enabled Atlantic to dispense with its own storage and distribution facilities which it had been required to provide under its earlier purchase-resale plan. As viewed by the dissenters, the sales-commission plan was not the device which gave Atlantic its power to treat its dealers unfairly; coercion of the dealers could have occurred "as easily under the sale-commission plan, the purchase-resale plan, or any plan of distribution which gave it [Atlantic] a financial interest in the sale of any particular line of tires, batteries, and accessories."[85] This conclusion led the dissenters to consider the unique element which gave Atlantic its coercive power: the disparity of economic power between Atlantic and its distributors which inevitably resulted from the market structure within which they found themselves.[86] Refusing to believe that section 5 "was intended to block the expansion of an enterprise into the marketing of . . . complementary items,[87] the dissenters summarized their position as follows:[88]

> All concede that the continuing exclusionary pressure, to the extent that it exists, derives from the imbalance of economic power between the two parties, rather than from any unfair feature of the sales-commission plan. To use an unfair practice charge to punish an enterprise for consequences inevitably flowing from its position in the structure of commerce is a grave distortion of the statute, imposing a massive and unjustifiable restraint on entrepreneurial action . . . .

85. *Id.* at 379.
86. The Court had stated: "The disparity in size and financial strength, the short term of the prevailing leases, the dire financial consequences attendant upon lease cancellation, and the established market preference for certain brands of gasoline—all contribute to give Atlantic a leverage over its dealers and a corresponding power to effect some exclusion of competition." *Id.* at 380.
87. *Id.* at 381.
88. *Id.*

Justices Harlan and Stewart found the order prohibiting Goodyear's use of the sales-commission plan especially offensive, observing that if oil companies who had never coerced their distributors wished to adopt a sales-commission arrangement with Goodyear, the Court's decision unwisely precluded the conduct. The dissenters considered this to be a dubious exercise of the FTC's power.[89]

The *Atlantic* case is notable in that, while the two dissenting Justices found the abusive business practices rooted in the structure of the industry (the disparity in economic power of the major oil distributor vis-a-vis its retailers and wholesalers), the limited remedy they espoused—prohibiting conduct and reprisals—is directed against the *conduct* of the offender, rather than the economic situation which facilitated the abuse of power.[90]

V. THE ASCENDANCY OF THE PERFORMANCE CRITERION

In *FTC v. Colgate-Palmolive Co.*[91] the Court again considered section 5 of the Federal Trade Commission Act. At issue was the alleged misrepresentation and deceptive practice resulting from the undisclosed use of television mock-ups in a television commercial which allegedly demonstrated the ability of Colgate's "Rapid Shave" shaving cream to soften sandpaper for shaving. In fact, a plexiglass model with a sand coating was softened and shaved in the actual commercial. The majority held that a material deceptive practice existed if television viewers were led to believe they were seeing an actual demonstration when, in fact, the undisclosed use of mock-ups rendered the viewer's belief untrue.[92] Moreover, the majority held that any such material

89. *Id.* at 382. Justice Harlan in FTC v. Texaco, 393 U.S. 223, 231 (1968), recanted on his position, saying: "To the extent that my action in joining today's opinion is inconsistent with my action in joining my Brother Stewart's dissent in Atlantic Refining Co. v. FTC . . . , candor compels me to say that further reflection has convinced me that the portions of the Commission's order which the Court today sustains were within the authority granted to the Commission under Section 5 of the Federal Trade Commission Act." The *Texaco* case involved facts nearly identical to *Atlantic* except that the arrangement between Texaco and B. F. Goodrich did not evidence overt coercion. Nonetheless, the FTC order prohibiting the suspect sales-commission plan was reinstated, and the plan was held to be "inherently coercive." *Id.* at 229.

90. 381 U.S. at 379.

91. 380 U.S. 374 (1965).

92. *Id.* at 390-92.

deception, if it induces consumer purchases, can be prohibited under section 5 "even though the misstatement in no way affects the qualities of the product."[93]

Justice Harlan joined by Justice Stewart took a position not totally dissimilar to that which they adopted in the *Atlantic* case. The dissent reached the crux of its argument quickly, declaring:[94]

> The only question here is what techniques the advertiser may use to convey essential truth to the television viewer. *If the claim is true and valid, then the technique for projecting that claim, within broad boundaries, falls purely within the advertiser's art.* The warrant to the Federal Trade Commission is to police the verity of the claim itself.

The Colgate mock-up, according to this analysis, was not considered to be deceptive "because what the viewer sees *is* an accurate image" of the objective proof.[95] The use of the plexiglass covered with sand was no more deceptive "than the use of mashed potatoes to convey the glamorous qualities of a particular ice cream."[96] Finally, the dissent objected to the breadth of the FTC's order "banning the use of all mockups"[97] in view of the wide discretion the agency has to create appropriate remedies. Contending that "the same risk of inaccurate reproduction inheres in all commercials,"[98] the dissenters did not believe that such a complete prohibition, absent evidence of a pattern of abuses, could be justified upon the FTC's policing authority.[99]

The issue in *Colgate* was simply how far an individual business could go in pursuing a specific line of conduct. No structural issues were apparent, nor was the question of the resulting economic performance considered. The extent to which television advertisers may go in simulating actual conditions is limited by the inherent comparability of the simulation and actuality, not the potential of the simulation to cause economic inefficiency.

93. *Id.* at 388.
94. *Id.* at 395 (emphasis added).
95. *Id.* at 397.
96. *Id.*
97. *Id.* at 399.
98. *Id.*
99. Justice Harlan stated: "If the Commission should find that a *pattern of misrepresentations* by respondents creates a substantial risk that they will not accurately portray experiments if permitted to continue using mock-ups, the Commission's present order might well be justified." *Id.* (emphasis added). The dissenters would have vacated the judgment and remanded to permit such fact findings.

The next joint dissent of Justices Harlan and Stewart (authored by the latter) arose in *FTC v. Borden Co.*,[100] a case requiring interpretation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.[101] The crucial question that confronted the Court was whether Borden's label was sufficient to differentiate its evaporated milk from the same milk sold under private brand labels, transforming the same basic commodity into products of unlike grade and quality. If labels could accomplish this differentiation, otherwise identical milk might be sold to both private-label purchasers and branded-product purchasers at different prices without violating section 2(a) of the Robinson-Patman Act.[102]

Justice White presented the majority's opinion that the long-standing FTC interpretation of like grade and quality[103] should be respected. The FTC's position was that while the economic realities of the marketplace should not be ignored,[104] nevertheless "economic factors inherent in brand names and national advertising should not be considered in the jurisdictional inquiry under the statutory 'like grade and quality' test."[105] Since Borden admitted that the milk it packed for private label sellers did not differ physically or chemically from its own milk, the Court found the two products to be of like grade and quality. As a result, section 2(a) of the Act con-

100. 383 U.S. 637 (1966).

101. 15 U.S.C. § 13(a) (1970). The relevant portion of section 2 provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, *to discriminate in price between purchasers of commodities of like grade and quality,* where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and *where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly* in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

Id. (emphasis added).

102. 383 U.S. at 643-44.

103. *Id.* at 640. *See, e.g.,* Whitaker Cable Corp., 51 F.T.C. 958 (1955); Page Dairy Co., 50 F.T.C. 395 (1953); United States Rubber Co., 46 F.T.C. 998 (1950); United States Rubber Co., 28 F.T.C. 1489 (1939); Hansen Inoculator Co., 26 F.T.C. 303 (1938); Goodyear Tire and Rubber Co., 22 F.T.C. 232 (1936). The Court found the position taken in these FTC cases deserved respect on the basis of FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959).

104. 383 U.S. at 645.

105. *Id.* at 646.

trolled unless section 2(b) could be successfully invoked by the discriminator to rebut the prima facie case of price discrimination.[106]

Justices Harlan and Stewart refused to accept the majority's view that likeness of grade and quality was simply a matter of physical and chemical identity. Their view is concisely presented as follows:[107]

> There is nothing intrinsic to the concepts of grade and quality that requires exclusion of the commercial attributes of a product from their definition. The product purchased by a consumer includes not only the chemical components that any competent laboratory can itemize, but also a host of commercial intangibles that distinguish the product in the marketplace. . . . [R]etail purchasers who bought the premium brand did so with the specific expectation of acquiring a product of premium quality.

Emphasizing the consumer's willingness to pay a premium for what he believed to be a premium quality product, the dissenters noted: "Borden took extensive precautions to insure that a flawed product did not reach the consumer. None of these precautions was taken for the private brand milk packed by Borden."[108] Consequently, the minority concluded that the two products in dispute were not of like grade and quality, warning that the majority's interpretation would induce Borden to incorporate minor chemical or physical differences in its milk to place its product outside the pale of section 2(a).[109]

Finally, the dissenters emphasized the commendable results that flowed from Borden's willingness to pack private label milk. They observed:[110]

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106. Section 2(b) of the Robinson-Patman Act provides:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the *prima-facie* case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* that nothing herein contained shall prevent a seller rebutting the *prima-facie* case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b) (1970).

107. 383 U.S. at 649-50 (footnotes omitted).

108. *Id.* at 651 (footnotes omitted).

109. *Id.* at 657.

110. *Id.* at 660.

> Borden's extensive distribution of its private label brands has introduced significant low-cost competition for Borden's own premium product. Thus, the large retail chains and cooperative buyer organizations that are Borden's chief private label customers represent a significant source of countervailing power to the oligopoly pattern of evaporated milk production.

Quoting *Automatic Canteen Co. v. FTC,*[111] the dissent warned "against construction of the Robinson-Patman Act in a manner that might 'give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.' "[112]

This dissent of Justices Harlan and Stewart, unlike those involving section 5 of the Federal Trade Commission Act, did not focus solely on business conduct. By emphasizing the salutary effects of competition between Borden and its private-label buyers and the results of consumer reliance on Borden's carefully maintained product quality, the dissent extolled the *performance* of the competitive price system. In the final analysis it is this performance criterion which prompted Justices Harlan and Stewart to defend the legality of Borden's practice under section 2(a).

United States v. Von's Grocery Co.[113] stimulated one of the longest dissents of Justices Harlan and Stewart. Announced by Justice Stewart, the dissent undertook an extensive analysis of the majority's application of section 7 of the Clayton Act to prohibit a merger of two large Los Angeles retail grocery companies. Pointing to a steady decline of small individual retail groceries in the market and the oligopolizing of the market through mergers of market leaders, the majority held that Von's merger with Shopping Bag Food Stores represented an indefensible and continuing challenge to many smaller sellers and thus violated section 7.[114]

111. 346 U.S. 61 (1953).
112. 383 U.S. at 662, *quoting Automatic Canteen,* 346 U.S. at 63.
113. 384 U.S. 270 (1966).
114. *Id.* at 276-78. The majority relied for its analysis of the structure of the market on figures showing the concentration of both Von's and Shopping Bag, and the decline of small single owner stores. From 1948 to 1958 Von's increased its stores in the Los Angeles area from fourteen to twenty-seven, and during the same period, Shopping Bag increased from fifteen to thirty-four. *Id.* at 272. The accompanying jumps in shares of the market were double for Von's and triple for Shopping Bag. Combined, the two-store

Two standards were cited by the dissent as governing application of section 7 to the Von's-Shopping Bag merger: "the contemporary economic context of the industry" and "the purpose of Section 7 to protect competition, not to protect competitors . . . ."[115] Turning first to the contemporary economic milieu of the merger, Justices Harlan and Stewart faulted the majority's analysis as a "simple exercise in sums" which enhanced "the theory that the degree of competition is invariably proportional to the number of competitors."[116] While the dissenters did not contest the twenty-nine percent decline in single-store grocery firms in an eleven-year period, they did not find vigorous local competition to have declined as a result.[117] The dissent attributed the decline in small competitors to "transcending social and technological changes," caused by forces other than the present merger.[118]

Analyzing the trend toward concentration in the market, the dissent noted that turnover among the top twenty firms in the Los Angeles market was very high[119] and that entry of new multistore firms had been common.[120] The fantastic growth of chain stores from successful one-store operations resulted in great competition among the chains,

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chain represented the second largest market share in the Los Angeles area. However, that combined market share was only 7.5%. *Id.*

The number of owners operating single grocery stores in the Los Angeles area had fallen from 5,635 in 1950 to 3,818 in 1961; and by 1963, to 3,590—after three years of activity by the combined forces. *Id.* at 273.

The majority further relied on figures showing increased oligopolization of the market. For example, from 1949 to 1958, nine of the top twenty firms acquired 126 stores from their smaller competitors. *Id.*

115. *Id.* at 282. To buttress its view on the protection of competition, the dissent quoted Brown Shoe Co. v. United States, 270 U.S. 294, 320 (1962): "Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition,* not *competitors,* and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."

116. 384 U.S. at 282.

117. *Id.* at 286-87.

118. *Id.* at 288. Justices Harlan and Stewart observed:

> Section 7 was never intended by Congress as a charter to roll back the supermarket revolution. Yet the Court's opinion is hardly more than a requiem for the so called "Mom and Pop" grocery stores . . . that are now obsolete in many parts of the country. No action by this Court can resurrect the old single-line Los Angeles food stores that have been run over by the automobile or obliterated by the freeway.

Id.

119. *Id.* at 290. For a discussion of the significance of turnover among oligopolistic firms *see* Shepherd, *On Appraising Evidence About Market Power,* 12 ANTITRUST BULL. 65 (1967); Gort, *Analysis of Stability and Change in Market Shares,* 71 J. OF POL. ECON. 51-61 (1963).

120. During the period from 1953-1962, 173 new chain stores appeared in the market area, and during the same period 119 chain stores went out of business. 384 U.S. at 291.

so that even accepting the decline in individual grocery stores, competition in the market as a whole increased.

Further, the dissent argued that this was really a market-extension merger, a rather innocuous type of merger, based on both geographical dispersion between the stores of Von's and Shopping Bag and the shopping habits of buyers. Normal marketing practices suggested that a major portion (over one-half) of the merged stores were geographically noncompetitive. Since it found the merger was "three parts market extension and only one part horizontal,"[121] the dissenters concluded that the elimination of Shopping Bag as an independent competitor foreclosed only one percent of the total sales in the market,[122] a minimal increment in market share not considered to constitute a significant increase in market power. Not only did competition result from the growth of chain stores, but substantial competition from single-store firms existed as well. Despite the decrease in the number of small firms, the growth of cooperative buying organizations gave these small firms a greater basis for competition with the chains. Summation of these factors led the dissent to reject the majority's condemnation of the merger. The dissent substantiated its theory by observing that although the merged entity had been functioning for four years, "the District Court found not a shred of evidence that competition had been in any way impaired by the merger."[123]

Thus Justices Harlan and Stewart applied a combined structure-performance criteria to the unique aspects of the Los Angeles grocery industry, primarily emphasizing performance. Practically no emphasis was placed on conduct of the new firm. Recognizing the obvious continuing competition in the market despite the merger, the dissenters bitterly concluded that "in litigation under Section 7, the Government always wins."[124]

In 1967, *United States v. Arnold, Schwinn & Co.*[125] evoked a partial dissent and concurrence by Justices Harlan and Stewart.[126] At

121. *Id.* at 296.
122. The figure of one percent was arrived at by multiplying the overlap (25%) by the market share possessed by Shopping Bag before the merger (4.2%).
123. 384 U.S. at 299-301.
124. *Id.* at 301.
125. 388 U.S. 365 (1967).
126. Justice Stewart authored the dissent. In a companion case, United States v. Sealy, 388 U.S. 350 (1967), Justice Harlan alone dissented.

issue in *Schwinn* was whether Schwinn's bicycle distribution plan constituted an unreasonable restraint of trade prohibited by section 1 of the Sherman Act. Schwinn's sales were basically of three types: (1) sales directly to franchised distributors, (2) sales to franchised dealers under agency or consignment arrangements, and (3) sales under the so-called Schwinn plan. Under the Schwinn plan, Schwinn shipped merchandise directly to franchised dealers, while extending credit to the retailer and paying him a commission on sales. In states allowing fair-trade pricing, Schwinn fair-traded its bicycles.[127]

By agreement with its franchised distributors and retailers, Schwinn imposed a series of restrictions that stimulated the government challenge. Distributors and retailers alike were restricted both to sales in a fixed territory (so called vertical territorial restrictions) and to sales to specific classes of customers—distributors could sell only to the franchised retailers, and the retailers in turn could sell only to consumers (not to unfranchised retailers). The Government attacked all of these restrictions as "restraints of trade."

Although the District Court held only that the territorial restrictions on distributors were illegal, the majority extended this conclusion by holding that all the restrictions were illegal if imposed in connection with an absolute sale by Schwinn. However, the majority further concluded that the agency and consignment plan as well as the Schwinn plan were not unreasonable restraints of trade, holding that as long as Schwinn retained "title, dominion, and risk"[128] and the dealers were *de facto* agents or salesmen, Schwinn's franchising arrangements did not violate section 1 of the Sherman Act.[129]

To the extent that the majority upheld Schwinn's agency, consignment, and Schwinn-plan arrangement, Justices Harlan and Stewart agreed. But they did not agree that the part of the distribution arrangement involving absolute sales was a violation of section 1 of the Sherman Act.[130]

True to form, Justices Harlan and Stewart were concerned with the underlying social and economic functioning of the franchise system employed by Schwinn. Noting that the reasons for Schwinn's shift to

127. 388 U.S. at 369-70.
128. *Id.* at 380.
129. *Id.* at 381.
130. *Id.* at 382.

the distribution method in question were to eliminate wastefulness caused by a huge excess of retailers and to ensure that the ultimate sales to the public would be made to the public by qualified retailers, the dissent observed that the franchise system effectively placed the small business franchisee in an exclusive and favorable position, thus stimulating increased competition and preventing the balance of distribution from becoming too vertical.[131] Relying upon these social and economic justifications, the dissent approved the distribution plan in its entirety.

The dissent disagreed with the majority's holding regarding the absolute sales distribution plan on two legal grounds: (1) such a result runs directly contrary to the prior case law,[132] and (2) the ancient rule prohibiting restraints on alienation is outmoded in light of today's market structure. The dissent stated that the distinction between sales and agency-consignment arrangements was one of form, not of substance, concluding that the majority had created "a bluntly indiscriminate and destructive weapon which can be used to dismantle a vast variety of distributional systems—competitive and anticompetitive, reasonable and unreasonable."[133] Rather than focusing on this purely formal distinction, the majority should have been more concerned with the basic structure of Schwinn's program.

Consistent with the position they adopted in their earlier dissents, Justices Harlan and Stewart reasoned that in contemporary circumstances it was important to allow business to adopt practices which would facilitate competition because salutary social and economic effects flow from a competitive structure. In short, if competitive results were assumed to be beneficial, those structural arrangements which facilitated competition should not be too casually struck down.

Albrecht v. Herald Co., d.b.a. Democrat Publishing Co.[134] produced a dissent by both Justices Harlan and Stewart.[135] At issue was the Globe-Democrat's distribution policy of restricting its wholesalers to a specified exclusive territory and fixing the maximum price for resale by the wholesalers. Albrecht, the petitioner, was one of the

131. *Id.* at 384-85.
132. *See* White Motor Co. v. United States, 372 U.S. 253 (1963).
133. 388 U.S. at 394.
134. 390 U.S. 145 (1968).
135. Justice Harlan also concurred in Justice Stewart's dissent.

wholesalers. Since he refused to sell the papers for prices within the fixed maximum, the Globe-Democrat after repeated warnings to him, undertook delivery of the paper to customers in Albrecht's territory at the lower prescribed price. After securing approximately twenty-five percent of Albrecht's circulation by solicitations made in part through a sales agency, the paper granted a dealership to another distributor who adhered to the fixed price. When the Globe-Democrat made Albrecht an offer to return the route conditioned upon his adhering to the fixed price, Albrecht refused and instituted a treble damage complaint alleging violation of section 1 of the Sherman Act.[136]

Basing its opinion on *United States v. Parke, Davis & Co.*,[137] the majority held that the Globe-Democrat's suggested maximum pricing was not merely a unilateral act but rather was a combination between the Globe-Democrat, the sales agency and the new distributor within the meaning of the Sherman Act.[138] After reaching this conclusion, the majority proceeded to equate fixing of maximum prices with fixing of minimum prices, and hence condemned the price-fixing scheme as a per se violation of the Sherman Act.[139]

The joint dissent of Justices Harlan and Stewart contended that the purpose of the Globe-Democrat's maximum price "was in furtherance of . . . the purpose of the antitrust laws."[140] Since in the dissenter's

136. 390 U.S. at 147-48.

137. 362 U.S. 90 (1960).

138. In *Parke, Davis,* that company had set suggested resale prices for both wholesale distributors and dealers. The *Albrecht* Court analyzed *Parke, Davis* as finding that forced compliance of both wholesalers and dealers amounted to a combination; a combination with the retailers existed because their acquiescence in the suggested prices was forced by threats, and a combination with wholesalers was found because they cooperated in terminating price-cutting retailers. Observing that even this forced union constituted a combination, the Court in *Albrecht* argued that the association between the Globe-Democrat, the sales agency, and the new distributor was much more voluntary and thus a more certain combination.

139. 390 U.S. at 151-53. The majority placed heavy reliance on Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951), which struck down a maximum pricing agreement as violative of the Sherman Act. Justice Harlan in his separate dissent took issue with the majority's use of the *Kiefer-Stewart* decision, arguing that *Kiefer-Stewart* was not a blanket holding that suggested retail prices by a manufacturer always produce a *combination* in restraint of trade, but rather was a case involving an agreement by two manufacturers to impose on retailers "a condition of doing business which they might not have been able to demand individually." 390 U.S. at 164-65. Justice Harlan further stated that even if a combination were found, the fixing of maximum prices simply should not invoke the per se theory, since the technique can be a reasonable method of preventing unscrupulous retailers from driving up the prices in their exclusive territories. *Id.* at 165-68.

140. *Id.* at 168.

eyes Albrecht was a monopolist in his exclusive territory, the regulated maximum price protected the consumer from monopoly pricing. This conclusion was summarized succinctly: "To the extent that [the Globe-Democrat] prevented [Albrecht] from raising his price above that which would have prevailed in a competitive market, [the Globe-Democrat's] actions were fully compatible with the antitrust laws."[141] According to the dissent, the majority's decision caused a system which assured a competitive price to be stricken under a statute supposedly protective of competition. Believing the antitrust law's purpose to be greatly subverted, the dissent summarily remarked: "The Court in this case does more, I think, than simply depart from the rule of reason. . . . The Court today stands the Sherman Act on its head."[142]

In *Albrecht* the result-oriented performance criterion clearly dominated the concern of the two dissenters.[143] Although the conduct of the business was closely allied with the resulting performance, it was the desirable protection of the consumer from potentially noncompetitive prices which, in the eyes of Justices Harlan and Stewart, immunized the behavior of the Globe-Democrat from the Sherman Act attack launched by Albrecht.

The Robinson-Patman Act elicited another brief but pointed dissent in *Utah Pie Co. v. Continental Baking Co*,[144] a case involving the intensely competitive frozen pie industry in and around the Salt Lake City area. To counterbalance the natural location advantage and consequent lower sales price of Utah Pie, its competitors drastically slashed prices on their products in the Salt Lake area,[145] while at the same time maintaining higher prices for sales of the same product elsewhere. This action forced Utah Pie to lower its prices to a drastically low level. However, there was evidence that in spite of the reduction Utah Pie's sales volume and profits increased during the period of the price war.

141. *Id.* at 169 (footnote omitted).
142. *Id.* at 170 (footnotes omitted).
143. *See Albrecht,* 390 U.S. at 156-57 (Justice Harlan dissenting). The central thesis of his analysis reinforces Justice Stewart's position—the basic underlying economic considerations arising from fixing price maxima are unlike those of fixing price minima. If economic facts *ever* justify price maxima, Justice Harlan felt that this case presented such a situation.
144. 386 U.S. 685 (1967).
145. *Id.* at 689-91.

Utah Pie brought suit against its competitors alleging a violation of section 2(a) of the Robinson-Patman Act, which prohibits price discrimination the effect of which is: "substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who eithers grants or knowingly receives the benefit of such discrimination."[146] The majority first held that setting different prices for the same product was price discrimination,[147] and then reversed the district court's holding that the price discrimination did not lessen competition, finding it was a jury question whether: (1) Utah Pie's performance was potentially impaired because it was forced to reduce its prices drastically to meet the declining market price; and whether (2) other, smaller competitors sustained injury as a result of the price war.[148]

The brief dissent of Justices Harlan and Stewart, authored by Justice Stewart, challenged the majority on the one essential point of whether the price discrimination substantially lessened competition. One factor convinced them that competition had been preserved—the near monopoly share (66.5%) of Utah had been reduced to 45.3%. As a result, the dissenters concluded that the market as of 1961 had to be even more competitive than before—the price discrimination actually had a beneficial effect on the market, because lower prices, said the dissent, are the hallmark of intensified competition.[149]

As in other cases, Justices Harlan and Stewart relied on the performance emanating from a structure they found workably competitive. If competitive results were forthcoming, legal intervention was not requred under the statute as the two Justices interpreted it.

VI. THE NATURAL GAS CASES

The last antitrust dissents the two Justices fashioned prior to Justice Harlan's resignation on September 23, 1971, arose in the second and third of the three cases involving the El Paso Natural Gas Com-

146. For section 2(a) of the Robinson-Patman Act, *see* note 101 *supra*.
147. 386 U.S. at 702.
148. The majority noted in this context that in 1960 there were nine other competitors in the market who maintained 12.7% of the market, while in 1961 there were only eight other sellers who maintained 8.2% of the market. *Id.* at 700.
149. *Id.* at 706.

pany.[150] The controversy originated when El Paso Natural Gas Co. acquired the stock and assets of Pacific Northwest Pipeline Corp. The majority found that the acquisition constituted a violation of section 7 of the Clayton Act and ordered divestiture. Justices Harlan and Stewart agreed with the majority that the acquisition was a violation, but Justice Harlan believed the Court should allow the district court to draft a remedy.

Three years later during the divestiture of Pacific Northwest by El Paso, concerned parties (the State of California, Southern California Edison Company, and Cascade Natural Gas) attempted to intervene in the proceedings.[151] Alleging that they might be adversely affected by the disposition proposed, the appellants unsuccessfully argued for the right to intervene in district court divestiture proceedings which ultimately required El Paso to create a new company to receive the assets of Pacific Northwest. The companies contended that the lower court divestiture decree failed to create a competitive pipeline in accordance with the Supreme Court's earlier mandate and appealed the district court's denial of the right to intervene.[152] The Supreme Court reversed the district court and allowed the three companies to intervene,[153] ordering a reopening of the case on its merits.[154] It then presented guidelines for the decree[155] and ordered that on remand a district judge "different from the one who heard the case before" be assigned.[156]

150. Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464 (1969); Cascade Natural Gas Co. v. El Paso Natural Gas Co., 386 U.S. 129 (1967); United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).

151. The interest of the State of California was to ensure that competition would be restored in California. Previously, Pacific Northwest had been a substantial figure in the market. Southern California Edison was a large industrial user of natural gas which purchased large quantities of gas from El Paso in California and desired to preserve the competition in California. Cascade Natural Gas was an Oregon distributor whose prime source of gas was Pacific Northwest before the merger. Since Cascade would be supplied by New Company after divestiture, Cascade was interested in ensuring that New Company was a strong competitor. 386 U.S. at 132-33.

152. 376 U.S. at 664.

153. 386 U.S. at 133. The Court relied on the provision in Rule 24(a) of the Federal Rules of Civil Procedure which allowed intervention as a matter of right when: "the applicant is so situated as to be adversely affected by . . . disposition of property in the custody of the court or an officer thereof." FED. R. CIV. P. 24(a)(3) (1966). The Court held that this section allowed both the State of California and Southern California Edison to intervene.

154. 386 U.S. at 135-36.

155. *Id.* at 136-42.

156. *Id.* at 142-43.

The basic argument of Justices Harlan and Stewart (who authored the dissent) is that no right to intervene existed. After an historical analysis of the type of interest that could support intervention, the dissent stated:[157]

> These general and indefinite interests do not even remotely resemble the direct and concrete stake in litigation required for intervention of right. The Court's decision not only overturns established general principles of intervention, but . . . also repudiates a large and long-established body of decisions specifically, and correctly, denying intervention in government antitrust litigation.

The dissenters reasoned that to allow intervention would prolong and confuse an already protracted case and would allow a private party to press suit with the government when a separate procedure had been established for private suits. Further, Stewart contended that the United States should be the only party allowed to assert the "public interest" in antitrust litigation. For these reasons, the dissent believed that the tactical decision of the Department of Justice in accepting the divestiture decree of the lower court should be supported. The extent of judicial interference and the creation of new legal rights simply overwhelmed the two Justices; their own predilections would not allow the activist reconstruction of the structure of the natural gas market that the majority proposed.

The script became more hectic when the State of Utah questioned whether the new decree of the district court[158] conformed to the guidelines mandated by the Supreme Court in *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, the second case. Although the district court's decree provided that Colorado Interstate Gas Corporation should assist New Company in becoming an effective competitor, an extensive corporate interlock between El Paso and New Company would remain. Subsequently Utah, along with twenty-one other parties, moved to dismiss their own proposed appeal.[159]

157. *Id.* at 147. Two of the decisions in which the courts have denied intervention are: Illinois v. Commonwealth Edison Co., 375 U.S. 834 (1963); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963). *See also* cases cited in *Cascade*, 386 U.S. at 148 n.11.

158. United States v. El Paso Natural Gas Co. & Pac. N.W. Pipeline Corp., 291 F. Supp. 3 (D. Utah 1968).

159. Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co., 395 U.S. 464, 466-69 (1969).

The majority, however, decided that even though the appellants had moved to dismiss their appeal, the Court could retain jurisdiction to determine whether its guidelines governing the divestiture had been complied with.[160] The Court decided that the divestiture did not comply,[161] both because the distribution of gas reserves was unsatisfactory[162] and because all financial and managerial interconnections between El Paso and New Company had not been effectively severed.[163]

The dissent of Justice Harlan in which Justice Stewart joined was almost predictable. It stated first that the Court's decision was "precipitate" because there had been no oral argument and no "full" briefs filed on the question. Then it argued that on a procedural basis, the appellant had an absolute right to dismiss its own appeal. Finally, the dissent believed that the controls on El Paso allowed sufficient separation of the two companies and that the allocation of all reserves was sufficient for establishing New Company.[164] As a parting consideration, the dissent noted that what the Court had done did not "even promise to further the interests of California's gas consumers."[165] Justices Harlan and Stewart thought it unwise to reform the structure of the industry when performance was not likely to improve as a result of the structural change.

160. *Id.* at 466-69.

161. *Id.* at 469.

162. *Id.* at 464-71. The majority held that the district court erred in giving New Company only 21.8% of the San Juan Basin reserves, concluding that the decree should have specified enough reserves so that New Company could meet the Pacific Northwest's existing requirements.

163. *Id.* at 471-72. El Paso was allowed to retain five million shares of New Company's nonvoting preferred stock. This resulted in a relationship that was contrary to the majority's order of complete divestiture.

164. The dissent noted the controls that had been adopted to remedy the defects the majority had found in *Cascade.* The dissent summarized the decree as follows:

> No members of the immediate family of any officer, director, or owner of one-half of one percent of El Paso shares may convert their non-voting preference shares into voting common shares at any time. Moreover, any person who acts in concert with any director, officer, or substantial owner of El Paso is included within the ban. In addition, these same individuals are not permitted to obtain control of significant proportions of CIG stock, thereby achieving control over the New Company indirectly. Officers, directors, and their associates are barred from owning more than one-tenth of one percent of CIG stock during the next 10 years and substantial owners of El Paso may not own more than 5% of the outstanding common stock of CIG.

Id. at 483-84.

165. *Id.* at 485.

SUMMARY AND CONCLUSIONS

What does this review of selected antitrust dissents of Justices Harlan and Stewart reveal? Is there an important rationale underlying their nay-saying that provides insights on future directions the Court may take? If so, will the contours of the American economy reflect these directions?

Basic to an appreciation of what these two Justices have attempted to do is a recognition of their general acceptance of a central economic orientation. They have quite clearly embraced two evaluative concepts. First is their ready and nearly uniform reliance on a criterion of *performance*, albeit not completely divorced from structural considerations, in determining what business may or may not legally do. This reliance, most clearly revealed in *Von's, Utah Pie* and *Continental Can,* implicitly accepts the main features of the competitive economic model—the destruction of inefficient firms under the pressure of social and economic technology providing lower prices to the consumer, and the maintenance of innovation which it is assumed also redounds to the consumer's benefit while not significantly increasing oligopolization of the economy. Second, the Justices' attitude toward structural change is a nonactivist one. Thus, the two seem to oppose Court action designed to change the concentration patterns emerging from acquisitions and mergers so long as the results delivered to the consumers are not considered to be deteriorating. Clearly revealing this pattern are the dissents in *Philadelphia, Alcoa-Rome Cable, Von's* and *Albrecht*. Seldom—"never" is too strong, as indicated by *Colgate-Palmolive*—does business conduct become the central evaluative criterion. Even in a rare case such as *Atlantic* where conduct is given serious consideration by Justices Harlan and Stewart, they formulate the criterion in terms of asking not whether the conduct is illegal per se, but whether the consumer benefits or is injured as a result of the conduct.

A basic philosophical conflict underlies the essentially nonactivist stance taken by the dissenters. Their view is in marked contrast to the activist position taken by consumer interest advocates such as Ralph Nader's study team[166] and former Senator Fred Harris, whose pro-

166. *See* M. Green, B. Moore, Jr. & B. Wasserstein, The Closed Enterprise System (1972).

posal for a "Concentrated Industries Act,"[167] asserts that satisfactory economic performance can be realized only if the structure of the American economy is fundamentally reconstituted. Justices Harlan and Stewart opt for a retention of the structure that emerges from the day-to-day operations of the system. It is a system that could be considered "workably competitive" in the sense in which Professor John M. Clark developed that term.[168] Professor Clark recognized that in the application of the antitrust laws, the highly theoretical prerequisite of a perfect atomistic competitive structure with product homogeneity could not exist. Instead he opted for a kind of competition which he described as:[169]

> rivalry in selling goods, in which each selling unit normally seeks maximum net revenue, under conditions such that the price or prices each seller can charge are effectively limited by the free option of the buyer to buy from a rival seller or sellers of what we think of as "the same" product, necessitating an effort by each seller to equal or exceed the attractiveness of the others' offerings to a sufficient number of sellers [*sic*] to accomplish the end in view.

Generally a particular structure is not illegal per se to adherents of this position; the test is whether or not the performance of the structure is salutary.

The bases upon which the two dissenters acted are often as shaky as the foundation which they ascribe to the majority. Thus, in cases arising under section 7 of the Clayton Act (*e.g., Alcoa-Rome* and *Continental Can*), they argue against the market boundaries adopted by the majority in finding concentration which threatens competition. Yet no matter how incisive their insistence that the majority creates new industrial lines, their own analysis is essentially impressionistic. Economic theory suggests that measures of cross-elasticity of demand, no matter how burdensome the practical difficulties of computation, might be revealing of industry boundaries.[170] Measures of cross-elas-

167. S. 2614, 92d Cong., 1st Sess. (1971).

168. Clark, *Toward a Concept of Workable Competition,* 30 AM. ECON. REV. 241 (1940) and Sosnick, *A Critique of Concepts of Workable Competition,* 72 QUARTERLY J. OF ECON. 380 (1958).

169. Clark, *supra* note 168, at 234. Obviously the author meant "buyers" instead of "sellers" in the closing words of this quote. *See also* Sosnick, *supra* note 168.

170. For a discussion of the application of cross-elasticity of demand in this context, *see* G. STIGLER, THE THEORY OF PRICE 88-90, 219-21, 280-85 (1947).

ticity may provide a basis upon which future analysis may proceed to render arguments less impressionistic.

There is another dimension to the dissents of Justices Harlan and Stewart: their strict constructionist conservatism. In interpreting statutes and applying them to specific cases, the two Justices adopt literal interpretations of the language of the act and the intent of the Congress. Indicative of this view are the decisions involving bank acquisitions and mergers under section 7 of the Clayton Act and the Bank Merger Act of 1960 as revealed in *Philadelphia*. The strict constructionist compass of their decisions is also disclosed by the reiteration of their position that under the Robinson-Patman Act protection of competitors and protection of competition may not be consistent. Economic theory accepts the basic premise that competition as a process requires the demise of individual competitors who cannot remain operationally viable. If this premise is accepted and if "workable competition" as defined by Clark[171] is adopted as a goal, it is logical to interpret the antitrust statutes conservatively, thereby tolerating structural rigidities and behavior that might otherwise be condemned.

In a similar vein it may be noted that Justices Harlan and Stewart appear to be judicial strict constructionists. Hence they can speak comfortably of adherence to centuries of tradition and to past judicial construction of the rules of intervention in the *El Paso Natural Gas* cases. Whether the issue is statutory or judicial construction, Justices Harlan and Stewart emerge generally conservative in their approach.

Why does all this matter? The answer is that if, as seems probable, the appointments of Justices Burger, Blackmun, Powell and Rehnquist foreshadow a reorientation of the Court toward a more conservative position, the orientation of antitrust policies may follow the contours traced by the dissents examined here. The position of Justice Stewart as a senior member of the Court may reinforce this possibility. In that likely event, the Court's antitrust policies may become less and less structurally directed and progressively more inclined to emphasize the economic performance of the industry. If these projections prove tenable, credence will be given to the famous words of Justice Cardozo:[172]

171. *See* text accompanying note 169 *supra*.
172. Cardozo, *Law and Literature*, 14 YALE REVIEW 699 (1925).

The spokesman of the Court is cautious, timid, fearful of the vivid word, the heightened phrase. He dreams of an unworthy brook of scions, the spawn of careless *dicta,* disowned by the *ratio decidendi.* . . . The result is to cramp and paralyze. One fears to say anything when the peril of misunderstanding puts a warning finger to the lips. Not so, however, the dissenter. . . . Deep conviction and warm feeling are saying their last say with knowledge that the cause is lost. . . . The dissenter speaks to the future, and his voice is pitched to a key that will carry through the years.