The Gasoline Marketing Structure and Refusals to Deal with Independent Dealers: A Sherman Act Approach

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> [B]ig business has become bigger and bigger . . . . Cartels have increased their hold on the nation. The trusts wax strong. There is less and less place for the independent.[1]

Since the passage of the Sherman Antitrust Act,[2] the official economic policy in the United States has been to foster a free enterprise system of numerous entrepreneurs by emphasizing an antimonopoly policy. Yet the concentration of economic control in the hands of a few companies within an industry has become the standard pattern in American business.[3] During the 1973-74 energy crisis, this pattern of concentration in American industry was dramatically exposed in the petroleum industry. The major oil companies, either because of an actual fuel crisis or merely under its guise, apparently reduced or completely denied allocations of gasoline to many independent retailers.[4] This practice may have seriously weakened and, perhaps, even eliminated a significant number of independent dealers,[5] who in the past have played a vital role in maintaining competition at the retail level of the oil industry.[6] The federal antitrust laws, as the guardian of our free enterprise system,[7] however, may provide protection for the inde-

1. Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 315 (1949) (Douglas, J., dissenting).
2. Act of July 8, 1890, ch. 647, §§ 1-7, 26 Stat. 209 (codified at 15 U.S.C. §§ 1-7 (1970)).
3. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947).
4. *See Spotlight on Big Oil*, NEWSWEEK, Feb. 11, 1974, at 72.
5. "If the supply crisis does seriously weaken nonintegrated marketers or force any significant number of them out of business, the damage to oil industry competition will be extremely grave." *Id. See also* Coinco v. American Oil Co., Civil No. — (D. Ariz., filed Nov. 2, 1973); Giant Service Stations v. Phillips Petroleum Co., C.A. No. 73-126 (D. Ariz. March 23, 1973).
6. Testimony of Alan S. Ward, Director of the FTC Bureau of Competition, before the Senate Banking Committee, 613 BNA ANTITRUST & TRADE REG. REP. A-8 (1973).
7. Kirkpatrick, *Antitrust to the Supreme Court: The Expediting Act*, 37 GEO. WASH. L. REV. 746, 787 (1969):

pendent gasoline dealer from the economic power of the major oil companies.

This discussion will analyze the Sherman Act, particularly section 1, to determine if there is a remedy for the independent gasoline dealer who is refused supplies by one or more of the major oil companies. The discussion will first examine the structure and behavior of the gasoline marketing system. Further analysis will focus on the refusal by the major oil companies to supply oil products to independent dealers, with particular emphasis on the oppressive economic effects which may result. Of primary importance is the problem of proving that the behavior of the major companies is in contravention of the Sherman Act. Because factual proof of the existence of an oil crisis and of any collusion among the major oil companies is beyond this commentary, some of the analysis as well as the conclusions must necessarily be deemed to be merely conditional upon proof of these facts. Finally, an adequate remedy to effect the purposes of the antitrust laws as well as to alleviate the problems at issue will be discussed.

VERTICAL INTEGRATION IN THE PETROLEUM INDUSTRY

The petroleum industry generally can be characterized as a vertically integrated industry.[8] That is, there is unified control by individual firms of more than one successive stage in the production and distribution of the product.[9] Each major oil company, as a producer-refiner, has an expansive distribution network of wholesale and retail outlets that deal exclusively in the producer-refiner's gasoline.[10] A small portion of these retail outlets are actually owned and operated by major oil companies, while the majority are extensively controlled by various contractual devices.[11] Vertical movement into the

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Antitrust is basic and important as a guardian of our free enterprise system. The antitrust laws protect our economic system from the effects of restrictive action by any group pursuing its own self-interest or following its own interpretation of the national good; they protect our system from the consequences of undue concentration of economic power; and they protect the economy from acts or practices which may lead to these unwanted consequences.

8. Kessler & Stern, *Competition, Contract, and Vertical Integration*, 69 YALE L.J. 1, 25 (1959). In 1960, of the 20 leading producers of oil only the 17th and 19th ranked companies were not wholly integrated. *Hearings on Economic Concentration Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 2, at 595 (1965) (testimony of Dr. Alfred Kahn). *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166 n.4 (1940).

9. G. HALE & R. HALE, MARKET POWER 202 (1958). Vertical integration also may be defined in terms of salability. Where goods can be sold at various stages of production or distribution under the control of a single firm, vertical integration exists. *Id.* at 203.

10. Kessler & Stern, *supra* note 8, at 25.

11. "Thus each major refiner in effect establishes and controls his own retail distributive system." J. BAIN, INDUSTRIAL ORGANIZATION 246 (2d ed. 1968). Vertical integra-

retail marketing sector is practical and attractive for the major oil companies because of the normally high return on gasoline sales and the strong demand for the product.[12] Vertical integration also reduces overall costs by stabilizing the marketing operation, reducing marketing expenses, and reducing the functional costs of ascertaining the demands and needs of the consumer.[13]

Presently, however, the petroleum market structure is not wholly integrated. There are large numbers of independent retailers who compete with the outlets owned or controlled by major oil companies for the consumers' gasoline purchases.[14] The majority of these independent retailers must purchase their supplies directly from the major integrated oil companies.[15] The gasoline that is distributed under the brand names of the major oil companies is distributed through the service stations owned or contractually controlled by the majors. The so-called unbranded gasoline is distributed to the independent retailers or sold to other major oil companies.[16] The use of this distribution system by the petroleum industry is considered to be the "outstanding example" of dual distribution in American industry.[17]

The independent retailers bring a competitive dimension to the otherwise vertically integrated structure of the oil industry. The major oil companies are not generally considered to be in competition with each other as to price, but rather compete with the smaller independent retailers.[18] In a market sensitive to downward price changes, these in-

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tion can be accomplished by outright ownership through stock or asset acquisition or by contractual devices, such as requirement, output, franchise, exclusive dealing, real estate lease, and agency agreements. Kessler & Stern, *supra* note 8, at 1-2.

12. *See* Comment, *Refusals to Sell and Public Control of Competition*, 58 YALE L.J. 1121, 1122 (1959).

13. *See* Kessler & Stern, *supra* note 8, at 3.

14. Whitaker & King, *Antitrust Considerations for the Oil Industry—From the Producing Fields to the Service Station*, 24 OIL & GAS INST. 25, 77-78 (1973).

15. *Id.* For an example of a supply contract between a major oil company and an independent, see Sun Oil Co. v. Vickers Ref. Co., 414 F.2d 383 (8th Cir. 1969).

16. HOUSE SELECT COMM. ON SMALL BUSINESS, THE IMPACT UPON SMALL BUSINESS OF DUAL DISTRIBUTION AND RELATED VERTICAL INTEGRATION, H.R. REP. NO. 1943, 88th Cong., 2d Sess. 79 (1964) [hereinafter cited as HOUSE SELECT COMM. ON SMALL BUSINESS]. The chemical composition of gasoline sold by the different major oil companies, either as branded or unbranded gasoline, is very similar. *Id.* at 80-81; J. BAIN, *supra* note 11, at 245; *cf.* Comment, *Conscious Parallelism in the Pricing of Gasoline*, 32 ROCKY MT. L. REV. 206, 208 (1960).

17. HOUSE SELECT COMM. ON SMALL BUSINESS, *supra* note 16, at 79.

> "Dual distribution" exists when a vertically integrated firm operates in two successive stages of production and/or distribution of a good but also sells some of its output from the first stage to independent firms who then sell in competition with the supplying firm's second stage operations. Thus, the independent is in competition with his supplier.

Id. at 2 (testimony of Dr. Richard Holton, Ass't Sec. of Commerce for Economic Affairs). *See* Simon, *Dual Distribution*, 37 ANTITRUST L.J. 168 (1967). For an example of dual distribution in another industry, see United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945).

18. FEDERAL TRADE COMMISSION REPORT ON GASOLINE MARKETING, TRADE REG. REP. ¶ 10,373, at 18,240 (FTC 1973); J. BAIN, *supra* note 11, at 122. Differences in

dependents are able to attract additional customers by selling at a lower price.[19] This lower rate deters the major oil companies from charging indiscriminately high prices. Instead, they appear to set a compromise price just above that charged by the independent retailers.[20] Therefore, by providing the consumer with alternative outlets distributing less expensive gasoline, the independent retailer appears to act as a check on the major oil companies' ability to engage in joint-monopoly pricing.[21]

Notwithstanding the competitive dimension which the independent gasoline retailer brings to the consumer sales level of an otherwise vertically integrated industry, the power of the major oil companies over various stages of production and distribution provides them with the potential to manipulate the independent retailer.[22] The majors are able to coercively control an independent retailer by denying essential supplies or manipulating the relative supplies at any stage of the production or distribution scheme.[23] The independent service station operator can be damaged severely if alternate sources of supply are not readily available at reasonable costs.[24] This dominant economic power over the individual dealer is "inherent in the structure and economics of the petroleum distribution system."[25]

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retail prices in a given geographical region between the major oil companies do not persist. The price similarity usually occurs because the major oil companies promptly follow a price leader. *Id.* at 247.

19. J. BAIN, *supra* note 11, at 122-23, 247.

20. *Id.*; *see* Gallo, *Oligopoly and Price Fixing: Some Analytical Models*, 4 ANTITRUST L. & ECON. REV. 101, 117 (Fall 1970). For a discussion of price discrimination under the Robinson-Patman Act in gasoline marketing, see Gregory, *A Survey of the Price Discrimination Aspects of the Federal Trade Commission's Report on Gasoline Marketing*, 13 ANTITRUST BULL. 767 (1968).

21. J. BAIN, *supra* note 11, at 122-23.

Joint profit maximization can be described as coordinated adjustments of prices and outputs to the extent that it will yield the largest aggregate profit for all the firms combined. *Id.* at 317.

22. *Cf.* Adams, *Vertical Power, Dual Distribution, and the Squeeze: A Case Study in Steel*, 9 ANTITRUST BULL. 493 (1964).

23. *Id.*

24. *See* HOUSE SELECT COMM. ON SMALL BUSINESS, *supra* note 16, at 12.

25. FTC v. Texaco, Inc., 393 U.S. 223, 226 (1968). In *Texaco*, the Supreme Court also stated that: "The average dealer is a man of limited means who stands to lose much if he incurs the ill will of [a major oil company]." *Id.* at 227. *See* Shell Oil Co. v. FTC. 360 F.2d 470. 487 (5th Cir. 1966), *cert. denied*, 385 U.S. 1002 (1967).

Dual distribution has an impact on independents and other competitors at both the production and distribution levels. Competitors of the integrated firm at the production level are denied access to the captive outlets of the integrated oil companies. The independent at the retail level does not enjoy the cost, advertising, and supply advantages that his integrated competitors' outlets possess. Furthermore, an integrated firm has more than one level of operation at which it can make a profit. If the production and refining levels are not yielding a high enough return, prices at the wholesale and retail levels can be adjusted to obtain the desired profit. Conversely, the independent refiners, jobbers, and dealers. have only one level from which to ensure a profit. HOUSE SELECT COMM. ON SMALL BUSINESS, *supra* note 16, at 6. In the oil industry, the initial and continuing costs of doing business in a fully integrated manner precludes the independent from vertical expansion of his business. Because of the large amounts of capital needed, all but the well financed potential competitor is barred from entering the market and

Because of the potentially harmful effects on competition resulting from vertical integration, such a system could conceivably be held unlawful under the antitrust laws as unjustifiably limiting competition.[26] The United States Supreme Court, however, has refused to find that vertical integration is unlawful per se.[27] The legality of a vertically integrated system pursued by a given firm must be evaluated in regard to either the purpose or intent for which it was conceived or the power it actually created.[28] Thus, if "a calculated scheme to gain control over an appreciable segment of the market and to restrain or suppress competition, rather than an expansion to meet legitimate business needs" could be shown, it would be illegal.[29] Similarly, if a vertically integrated oil company were to refuse to sell to independent retailers with the purpose or intent of destroying existing independents or precluding potential competitors, such activity would be considered an illegal predatory and preclusive act in violation of the antitrust laws.[30]

A refusal to deal by major integrated oil companies thus could be devastating to a nonintegrated independent gasoline retailer since the majors constitute his normal source of supply.[31] As a former chairman of the Federal Trade Commission, Paul Rand Dixon, commented concerning vertical integration in the oil industry, "the 'independent'—including the independent refiner, the independent jobber, and the independent retailer—has, as the saying goes, one foot in the grave and the other on a banana peel."[32]

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effectively competing with the major firms. *See* Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 392 (1965); Complaint of FTC, pt. 19(a)-(c), EXXON CORP., No. 8934 (F.T.C., July 17, 1973).

26. *Cf.* Elman, *"Petrified Opinions" and Competitive Realities*, 66 COLUM. L. REV. 625, 631 (1966).

27. United States v. Columbia Steel Co., 334 U.S. 495, 525-27 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131, 173-74 (1948).

28. United States v. Paramount Pictures, Inc., 334 U.S. 131, 173-74 (1948).

29. *Id.* at 174.

30. *See* Singer, *Vertical Integration and Economic Growth*, 50 A.B.A.J. 555, 557 (1964); *cf.* United States v. Aluminum Co. of America, 148 F.2d 416, 435-38 (2d Cir. 1945).

31. *See* J. BAIN, *supra* note 11, at 360; Blake & Jones, *supra* note 25, at 393.

The market history of the steel fabrication industry demonstrates the economic effect which fully integrated firms can have on independents at a single level of production. Integrated major steel companies produce unfinished steel, as well as being involved in steel fabrication where they compete with independent steel fabricators. Just as in the classic dual distribution system, the independent fabricators must necessarily obtain their supply of unfinished steel from the major steel companies. Adams, *supra* note 22, at 494. During steel shortages, the major companies have been able to discipline the independents by denying them their required supply of unfinished steel. *Id.* at 494-95. By tying up increasing proportions of unfinished steel for their own production systems, the major steel companies have controlled the independent fabricators' pricing and distribution policies. *Id.* at 493, 495.

32. Address by Paul Rand Dixon, Annual Meeting of National Oil Jobbers Council, Inc., Nov. 9, 1963, in Wilson, *Recent Antitrust Developments Affecting Independent Businessmen in the Oil Industry*, 9 ANTITRUST BULL. 559, 562 (1964).

REFUSALS TO DEAL BY MAJOR OIL COMPANIES

Refusals to Deal by a Single Firm

Although a simple refusal to deal conceivably could be considered a restraint of trade that would come within the prohibitions of the antitrust laws, the Supreme Court held, in *United States v. Colgate & Co.*,[33] that the Sherman Act permits a unilateral refusal to deal on the ground that it is a right basic to the concept of the freedom to trade.[34] The individual businessman has a right, therefore, to exercise his independent discretion concerning the parties with whom he wishes to deal.[35] The *Colgate* doctrine does not extend, however, to situations where the purpose of the refusal to deal is to promote either the creation or maintenance of a monopoly or the formation of a combination or conspiracy which is in restraint of trade.[36]

A unilateral refusal to deal by one of the major oil companies could be challenged on antitrust grounds only if it could be shown that the oil company's purpose was to create or maintain monopoly power in contravention of section 2 of the Sherman Act.[37] To establish a violation of this section by a single firm would require showing either that the firm has acquired such substantial control of the relevant market that would constitute a monopoly or that the firm is proceeding in its activities in a manner which would indicate an intent to accomplish such monopolization.[38] The number and expansive nature of the

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33. 250 U.S. 300 (1919).
34. *Id.* at 307.
35. *Id.*
36. *Id.* The *Colgate* Court emphasized that: "The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged in trade or commerce—in a word to preserve the right of freedom to trade." *Id.* *See* United States v. Parke, Davis & Co., 362 U.S. 29, 43 (1960); Fulda, *Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 LAW & CONTEMP. PROB. 590 (1965).
37. Sherman Act § 2, 15 U.S.C. § 2 (1970), provides in part: "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 . . . ." *See* Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 862-72 (1955); Groenke, *What's New in the Antitrust Aspects of Selecting and Terminating Distributors*, 13 ANTITRUST BULL. 131, 145-46 (1968).
38. Barber, *supra* note 37, at 870-71. The principal factor inhibiting the use of section 2 in refusal to deal cases, and in all section 2 cases, is the requirements of proof. In section 2 cases, courts have required proof that: (1) the seller had a market position of monopoly or near monopoly; and, (2) the seller had refused to deal pursuant to an intent to maintain or extend the monopoly. *See* Groenke, *supra* note 37, at 146. Whether a monopoly actually exists depends on the structure of each particular market:

> The courts class as "monopolies" under Section 2 those situations where a single seller, or a group of sellers acting in concert, have control over the market price. Monopoly power over price may derive from control of a sufficiently large part of a product's available supply in a distinguishable market, or from control of some strategic aspect of the market.

REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 43 (1955).

firms in the oil industry, however, would seem to preclude any single firm from attempting, on its own, to accomplish such market control. Thus, section 2, as it presently is interpreted, probably would not be a viable enforcement instrument against the oil industry in the absence of a finding of a conspiracy to monopolize.[39] As a consequence, in order to find an illegal refusal to deal, it generally has been necessary to show that it emanated from the collusion of two or more firms in violation of section 1 of the Sherman Act.[40]

Concerted Refusals to Deal

Concerted refusals to deal are thought to have such a pernicuous and restrictive effect on competition that they are considered illegal per se, regardless of actual injury.[41] If a group boycott by the major oil companies against the independent retailers could be proven, it would be an unreasonable restraint of trade without any necessity for inquiry concerning the precise harm that had been caused by the majors or

39. The implementation of section 2, in fact, has not played an important historical role in policing the use of refusals to deal throughout the economy. An examination of the case law revealed that the following were the only cases involving refusals to deal in violation of section 2: Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); National Screen Serv. Corp. v. Poster Exch., Inc., 305 F.2d 647 (5th Cir. 1962); Campbell Distrib. Co. v. Jos. Schlitz Brewing Co., 208 F. Supp. 523 (D. Md. 1962); Banana Distrib. v. United Fruit Co., 162 F. Supp. 32, *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959); United States v. Klearflax Linen Looms, Inc., 63 F. Supp. 32 (D. Minn. 1945). *See also* Barber, *supra* note 37, at 862-72; Groenke, *supra* note 37, at 146.

Section 1, on the other hand, has been relied upon in numerous refusal to deal cases. *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); United States v. Masonite Corp., 316 U.S. 265 (1942); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

40. Sherman Act § 1, 15 U.S.C. § 1 (1970), provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ." *See* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 655-56 (1962).

The statutory scheme of section 1 in dividing unilateral and collaborative action reflects "the philosophy that exalts the liberty and initiative of the individual enterprise and looks with suspicion on collective action. The latter is inherently dangerous because it represents aggregations of power that are likely to be used in a manner detrimental to the public interest." Fulda, *supra* note 36, at 603; *cf.* Grenada Lumber Co. v. Mississippi, 217 U.S. 433, 440 (1910). Therefore, while it is true that a businessman has the right to dispose of his property to whom he pleases, he may not go beyond the exercise of this right and by contracts or combinations, express or implied, hinder the free flow of commerce. *See, e.g.*, Associated Press v. United States, 326 U.S. 1, 15 (1945); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722 (1944); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 452-53 (1922).

41. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959). The per se classification for certain restraints was initiated by the Supreme Court because it recognized that although there were agreements whose validity depended on surrounding circumstances, there were certain classes of restraints which were unduly restrictive and, thus, forbidden by both common and statutory law. Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58 (1911).

One of the major reasons for the per se rule within the antitrust philosophy of the judiciary is that courts do not consider themselves competent to determine the reason-

the business justification for its use.[42] Allegations of reasonableness, preservation of profit margins, limitations on production, or maintenance of distribution systems would not excuse a concerted refusal to deal.[43] If the major oil companies colluded in a decision to reduce the supply of gasoline to independent dealers, they apparently could not exculpate themselves from the reach of the antitrust laws by interposing the "oil crisis" or any other asserted cause as a justification.[44] A deterioration of supplies would not be a valid defense, therefore, if the decision to deny supplies to the independent retailer was made as a result of a combination or conspiracy, expressed or implied, between two or more of the major oil companies. Furthermore, the argument that unreasonable restraints are necessary in order to properly distribute a product, stabilize retail outlets, or secure more profits does not provide sufficient legal justification to warrant circumventing the prohibitions of section 1.[45] The very rationale of the per se rule as applied to antitrust law is that private industry cannot be allowed to establish its own justifications for activities deemed illegal under the antitrust laws.[46]

Economic Effects of Concerted Refusals to Deal

The effect of a group boycott is obviously most severe when a large share of the supplies and the relevant market is controlled by the combination.[47] In *Silver v. New York Stock Exchange*,[48] the Ex-

ableness of certain market practices. Such analysis would require the judiciary to make a survey of economic organization and a choice among rival economic philosophies. *See* United States v. Masonite Corp., 316 U.S. 265, 281-82 (1942).

42. *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); Northern Pac. Ry. v. United States, 356 U.S. 1, 6-7 (1958); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 467, 468 (1941).

43. *See* United States v. General Motors Corp., 384 U.S. 127, 146 (1966); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959); *cf.* American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

44. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218, 220-21 (1940). The "policy of the anti-trust laws is not qualified or conditioned by the convenience of those whose conduct is regulated." United States v. Paramount Pictures, Inc., 334 U.S. 131, 159 (1948).

45. *Cf.* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967); United States v. Masonite Corp., 316 U.S. 265, 276 (1942).

46. In Simpson v. Union Oil Co. of Cal., 377 U.S. 13 (1964), which involved a requirements contract (illegal per se under the Clayton Act, 15 U.S.C. § 14 (1970)) between a major oil company and its branded dealer, the oil company raised the defense that there was no injury to the public since a new dealer would replace the disposed dealer as an outlet for the gasoline. The Supreme Court simply stated that "Congress, not the oil distributor is the arbiter of the public interest." 377 U.S. at 17. *See* Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 613 (1914).

47. The impact of a suppliers' boycott on a buyer will depend on such market circumstances as: (1) how essential the supplied product is to the victim's operations, including its availability and the cost of reasonable alternatives; (2) what share of the market the victim usually buys; and, (3) what share of the relevant market the combination already controls. Bird, *Sherman Act Limitations on Noncommercial Concerted Refusals to Deal*, 1970 DUKE L.J. 247, 254; *cf.* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 137 (1955).

48. 373 U.S. 341 (1963).

change had, without explanation, denied an over-the-counter broker-dealer access to a direct ticker tape machine. The Supreme Court, in finding this denial a per se violation of section 1 of the Sherman Act, emphasized that the machine was necessary for the dealer to effectively compete in his particular market. The denial of the service resulted in a complete lack of accessibility to the market for both the individual dealer and his customers.[49] Similarly, when the major oil companies distribute their supplies solely to their own branded dealers, the supplies of petroleum needed by the independent dealers are then unavailable. The independents are effectively denied the opportunity to compete and their economic collapse is thereby ensured.[50]

If an independent retailer is denied his necessary supply of gasoline by a combination of major oil companies, this obviously will preclude him from being a vigorous competitor.[51] In a concentrated industry like petroleum, the injury to competition is especially detrimental when the price-cutting independent retailers are denied their ability to compete.[52] A combination that withholds needed supplies and thus denies an independent retailer the freedom to purchase the product and eliminates him from the business also denies sellers throughout the industry the freedom to sell to the eliminated retailer.[53] The mobility of entrepreneurs throughout the market in arranging and distributing their resources to meet the free play of supply and demand will be impeded by a group boycott.[54] A concerted refusal to deal by major integrated oil companies with independent retailers will, most importantly, have a tendency to suppress competition at the retail level,[55] thus, directly affecting the prices and outlets available to the gasoline consumer.[56] Improperly exercised, this concentration of eco-

49. *Id.* at 347-48. Groenke, *supra* note 37, at 136-39, suggests that *Silver* changes the per se analysis of group boycotts. The author asserts that after *Silver* groups of suppliers involved in a boycott may validly use the defense of a reasonable business purpose if such a purpose is not adverse to the antitrust laws nor a handicap to or an exclusion of the victims.

50. *Cf.* United States v. Arnold, Schwinn & Co., 388 U.S. 365, 376 (1967); A.C. Becken Co. v. Gemex Corp., 272 F.2d 1, 3-4 (7th Cir. 1959).

51. *See* Bird, *supra* note 47, at 255.

52. *See id.* at 255-56; *cf.* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 355 (1967).

53. *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612-13 (1914).

54. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 220 (1940); Blake & Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 COLUM. L. REV. 422, 438 (1965).

55. *See* Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465 (1941). The practice of refusing to deal with potential buyers also acts as the primary policing device over both integrated and nonintegrated retailers. Comment, *supra* note 12, at 1123.

56. *See generally* Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. LAW & ECON. 7, 47 (1966). Professor Bork determined that the framers of the Act intended that the courts should consider consumer welfare as the primary factor in interpreting business conduct and structures allegedly in violation of antitrust law. *Id.*

nomic power limits the individual consumers' ability to freely determine what goods and services they desire.[57]

Regardless of how economically reprehensible refusals to deal may be considered, there nevertheless must be legal proof that a contract, combination, or conspiracy in restraint of trade was the cause of the denial of petroleum to independent retailers.[58] Establishing concerted action, however, may be the major obstacle in finding the major oil companies in violation of the Sherman Act.

CONCERTED REFUSALS TO DEAL AND PROBLEMS OF PROOF

Explicit and Tacit Collusion

The imposition of liability in an antitrust action often depends on whether a conspiracy can be proven.[59] Although proof of cooperative interaction by a group of major oil companies through explicit communication would eliminate any problems of proof, express communication between parties can seldom be established in antitrust actions.[60] Such proof is not, however, a necessary element of an illegal conspiracy. Under certain circumstances, *behavior* can create an inference of acknowledgments communicated among competitors.[61] This so-called tacit collusion may be analogized to offer and acceptance in contract law. Seller *A* communicates his "offer" by restricting supplies; the offer of reducing supplies is "accepted" by the affirmative action of *B* and *C*, *A*'s rivals, by also restricting their output.[62] If the circumstances would warrant a finding that a group of sellers, through tacit agreement, "had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement," a conspiracy in violation of the Sherman Act would be established.[63] If refusals to deal with certain buyers emanated from a working arrangement, understanding, or acquiesence of two or more firms, there would be a combination in restraint of trade as condemned by the Sherman

57. *Cf.* Bork & Bowman, *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 365 (1965).

58. Sherman Act §§ 1, 2, 15 U.S.C. §§ 1, 2 (1970).

59. "A conspiracy is a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful means." United States v. Addyston Pipe & Steel Co., 85 F. 271, 293 (6th Cir. 1898).

60. *See* Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914).

61. *See* Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914); Turner, *supra* note 40, at 665.

62. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1576 (1969). This offer-acceptance mechanism inherent in oligopoly markets also has been referred to as "implicit bargaining." J. BAIN, *supra* note 11, at 315.

63. American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946).

Act.[64] The economic effects of tacit collusion can be identical to those caused by explicit collusion. Since the purpose of section 1 of the Sherman Act is to deter collusion among business entities, the punishment of the tacit colluder also should be administered in an identical fashion to that of the explicit colluder.[65]

Concerted Action Within an Oligopoly

Concerted action is normally difficult to achieve in industries with numerous sellers without some visible signs of cooperation. Oligopolistic industries,[66] however, are the perfect setting for successfully engaging in either explicit or tacit collusion to fix prices, restrict output, and eliminate competition.[67] The limited number of firms in an oligopolistic market simplifies overt collusion because the smaller number of firms facilitates communication without observation.[68] The small number of firms also aids tacit collusion because it can be carried on in a more subtle and informal manner which renders detection very difficult.[69]

Oligopolistic industries exhibit an inherent collusion phenomena which is called mutual interdependency or conscious parallelism.[70] Because each seller in an oligopoly supplies a large share of the output of the total industry, his individual output and price adjustments influence the market price as well as the general output.[71] If seller *A*

64. *See* United States v. Container Corp. of America, 393 U.S. 333, 335 (1969); United States v. Paramount Pictures, Inc., 334 U.S. 131, 151 (1948); United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 722-23 (1944); United States v. Masonite Corp., 316 U.S. 265, 276 (1942); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939); *cf.* United States v. Parke, Davis & Co., 362 U.S. 29, 45 (1960).

Because such activity is deemed to be a restraint on the flow of commerce, it "gathers no imumnity because of its subtlety." United States v. Paramount Pictures, Inc., 334 U.S. 131, 151 (1948).

65. *See* Posner, *supra* note 62, at 1575.

66. An oligopolistic industry or market can be defined as one containing a small number of large sellers supplying a large part of the output. *See* C. KAYSEN & D. TURNER, ANTITRUST POLICY 25 (1959).

67. Posner, *supra* note 62, at 1571. That oil companies or any other economic firms would collude is not unpredictable. "From a sociological perspective, firms can be viewed as organizations which interact with one another much as do other social groups. Not only do firms compete with one another, but, like other social groups, they conflict and cooperate as well." Stern, *Antitrust Implications of a Sociological Interpretation of Competition, Conflict, and Cooperation in the Marketplace*, 16 ANTITRUST BULL. 509, 510 (1971).

68. Brodley, *supra* note 52, at 297; *see* Posner, *supra* note 62, at 1571, 1574.

69. Einhorn & Smith, *Introduction*, in ECONOMIC ASPECTS OF ANTITRUST 13 (H. Einhorn & W. Smith eds. 1968); *cf.* Brodley, *supra* note 52, at 291-92.

70. *See generally* Posner, *supra* note 62; Turner, *supra* note 40.

71. In an atomistic market, one which contains many sellers, one seller's decision on pricing and output affects the market only slightly; he can sell all he desires at the market price but nothing above it. In a market of few sellers, however, a price reduction by one seller will cause the other sellers to react to meet the reduction so that the price-cutting seller will not obtain too large a share of the market. Since they will all react with near precision, they will nullify each others market gain and at the same time receive a lower price then before the actions of the price-cutting seller. J. BAIN, *supra* note 11, at 114; Posner, *supra* note 62, at 1563-64.

reduces output with the expectation that seller *B* will do likewise and *B* does in fact reduce output with a reciprocal expectation that sellers *C* and *D* will do likewise, the oligopoly market activity literally constitutes a mutual understanding among the sellers without any overt communication.[72] Although a market leader is not necessary to the functioning of mutual interdependency, a market leader can, by setting prices or output, facilitate the mutual interdependency phenomena.[73]

In the oligopolistic oil industry, the functioning of mutual interdependency can readily achieve uniform results. One major oil company acting as a market leader may initiate a mass refusal to deal with independent retailers by his single act of denying supplies to such retailers. If the other major companies follow his lead, it could be argued that this mass refusal to deal constituted some evidence of a group acquiescence in a general scheme in violation of the conspiracy prohibitions of section 1. Of course, the major oil companies may be able to sufficiently rebut the inference by attributing their activities to independent profit maximization.

The Supreme Court, however, has specifically held that proof of parallel business behavior in an oligopoly does not conclusively establish a conspiracy. Such proof is merely circumstantial evidence with some probative value toward showing positive and legal conspiracy.[74] Since mere mutual interdependence of market activities is not conspiratorial, something more must be shown.[75] In *Interstate Circuit, Inc. v. United States*,[76] the Court found that where a suggested scheme was adhered to by the parties, it was sufficient evidence of conspiracy under

72. Posner, *supra* note 62, at 1567-68. In an oligopoly each seller has two conflicting desires: (1) the desire to act cooperatively with rivals to establish the industry price and output to yield maximum joint profit; and, (2) the individual desire of each seller to increase his own market share and profits at the expense of his rivals. Whether a seller pursues joint profit maximization or individual profit policies will depend on the relative strengths of the two desires based on present and past market conditions. J. BAIN, *supra* note 11, at 118-19. *See* Asch, *Collusive Oligopoly: An Antitrust Quandry*, 2 ANTITRUST L. & ECON. REV. 53, 54 (Spring 1969).

73. Brodley, *supra* note 52, at 290.

74. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954). The Court attempted to clarify the evidentiary use of conscious parallelism by stating that: "[T]his Court has never held that proof of parallel business behavior conclusively establishes . . . a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." *Id.* *See* REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 39 (1955).

75. In determining whether a conspiracy or combination occurred, it is the parties' activities not their words that are to be judged. United States v. Parke, Davis & Co., 362 U.S. 29, 44 (1960). It is enough that a concert of action was contemplated and that the parties conformed to the arrangement. United States v. Paramount Pictures, Inc., 334 U.S. 131, 142 (1948). To the argument that the parties did not intend to join a conspiracy, the Court has responded by stating that the parties are held to have intended the necessary and direct consequences of their acts. United States v. Masonite Corp., 316 U.S. 258, 275 (1942).

76. 306 U.S. 208 (1939).

the antitrust laws. It was determined that the participants accepted the scheme with full knowledge that concerted action was contemplated and invited by the initiating market leader.[77] In *United States v. Masonite Corp.*,[78] which involved a combination to fix prices, the Court found that each competitor originally had acted independently. The parties became aware, as the arrangement continued, of its general scope and purpose. When it was then effectuated by all participants, a conspiracy under the antitrust laws was considered by the Court to have been established.[79]

The reasoning that holds conscious acquiescence to a general scheme to be a violation of section 1 seems equally applicable to the market behavior of the major oil companies. The original action of refusing to deal with independent dealers may have been initiated by the independent action of one or more of the major oil firms with the intention of reducing price competition at the retail level. Following the statements of the Court in *Masonite Corp.*, it could be argued that if other major oil companies, knowing of the prior action by the other firms, began to deny supplies to independent retailers, each participant would be adhering to the scheme knowing of the scope and purpose of the arrangement. Apparently, this adherence coupled with the knowledge of the purpose of the scheme, if adequately proven, might be sufficient to establish conspiracy in restraint of trade, even though no express communication among the oil companies would have been involved.

One commentator has suggested that certain actions, when performed by one or more competitors, may suggest by their very nature that the action could not have occurred merely by interdependence, but involved a meeting of the minds in common purpose and intent.[80] For example, there may be an inference of collusion whenever there is irregular action within an industry—a sudden change in price or output by one or a few firms—that is followed by identical action by additional firms.[81] In *American Tobacco Co. v. United States*,[82] the three largest

77. *Id.* at 226. The government, in presenting its case, had no direct testimony of any agreement among the defendants. The agreement was found by drawing inferences from the course of conduct of the parties. *Id.* at 221.

78. 316 U.S. 265 (1942).

79. *Id.* at 275. Although it was not clear when the isolated transactions combined as parts of the larger arrangement, "it is clear that, as the arrangement continued, each [competitor] became familiar with its purpose and scope." *Id.*

80. *See* Turner, *supra* note 40, at 672. Competitors can show that their economic decisions were not conspiratorial by demonstrating that "each would have made the same decision for himself even though his competitors decided otherwise." *Id.* at 663.

81. *Id.* at 660, 672-73.

82. 328 U.S. 781 (1946). Although the actions of the tobacco companies were more unusual and inconsistent with legitimate business purpose than the alleged refusals to deal by the major oil companies, the *American Tobacco Co.* Court's analysis seems applicable to the issue under discussion.

tobacco companies contemporaneously purchased large supplies of inexpensive tobacco, which were never used in manufacturing their cigarettes. The inexpensive tobacco, however, was the basic tobacco used by their lower-priced competitors, who had cut into the major tobacco companies' sales during the Depression. The unlikelihood of the purchase of unneeded supplies of tobacco by all three major firms suggested some form of mutual understanding.[83] Thus, where rivals in an industry withhold needed supplies and subsequently drive the independents out of business, such power in a nonmonopoly market structure cannot, consistently with the Sherman Act or with practical knowledge, be attributed to individual enterprise. Rather, such mass action may infer the presence of some collusive power among the rivals.[84]

In order to determine whether mutual understanding has occurred, each industry must be analyzed independently. In the oil industry, sophisticated advance planning by the major firms concerning marketing, resources, and production capabilities is necessary for survival. Therefore, it seems highly suspect, in both a legal and practical sense, that many of the major oil companies would contemporaneously suffer drastic reductions in the supply of petroleum, followed by the uniform denial of gasoline to independent nonbranded retailers[85] without some form of communication, acknowledgement, or acquiescence among those major firms.[86] While the foregoing may give rise to an inference of collusion, an actual and proven shortage of oil supplies would provide a basis for the major oil companies to validly deny sup-

83. *Id.* at 803-04, 809; *see* Turner, *supra* note 40, at 677. In *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939), the trial court had drawn an inference of agreement from the proposals made by Interstate as a market leader, the manner in which they were made, and the near unanimity of action that followed by competitors. The Supreme Court agreed with this inference. *Id.* at 221.

84. Associated Press v. United States, 326 U.S. 1, 15 (1945). The Court stressed the legal and practical views of determining conspiracy by stating that:

> The Sherman Act was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. *Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to individual "enterprise and sagacity;"* such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination. (Emphasis added.)

For cases where agreement was implied from course of dealings and other pertinent facts, see Frey & Son, Inc. v. Cudahy Packing Co., 256 U.S. 208, 210 (1921); United States v. A. Schrader's Son, Inc., 252 U.S. 85, 99-100 (1920).

85. *See generally* Coinco v. American Oil Co., No. ——— (D. Ariz., filed Nov. 2, 1973); Giant Service Stations v. Phillips Petroleum Co., C.A. No. 73-126 (D. Ariz., March 23, 1973); Exxon Corp., No. 8934 (F.T.C., filed July 17, 1973).

86. The homogeneity of petroleum—the perfect substitutability of the product among sellers over which consumers have no preference—lends itself to collusive activities. Apparent collusive activity can be explained by the uniformity of the product and consistency of demand. *Cf.* Gallo, *supra* note 20, at 103. In reality, even a standardized product like gasoline will have differences in production and marketing costs; uniform action thus would require some cooperation. *See* Turner, *supra* note 40, at 664.

plies to the independents without imposition of Sherman Act sanctions. Nevertheless, if the majors while acting in concert refused petroleum supplies to the independent dealers, they would be in violation of section 1 of the Sherman Act, in spite of any energy crisis.

When consciously parallel decisions result in conduct that restricts the free flow of commerce and is intended to maintain or extend market power rather than merely maximizing profits, the conduct would seem to be invalid on its face.[87] In *American Tobacco Co.*, the Court found that the purchase of inexpensive but unneeded tobacco by the three largest tobacco companies was motivated by a desire to drive the lower-priced competitors out of the industry and to increase the major companies' monopolistic power.[88] In order for all of the individual major oil companies to consistently discriminate in supplying petroleum to the independents, monopoly power would seem to be necessary. In the gasoline market, which is characterized by more than one seller, collusion, either tacit or explicit, would thus appear to be necessary to exercise this monopolistic economic power.[89] In enacting section 1 of the Sherman Act, the framers intended to prevent the banding together of rivals, in cartels or trusts, to gain monopoly profits by agreeing to end competition and to charge shared monopoly prices. Tacit collusion by the oligopolistic oil companies, if it were for the purpose of driving the independent retailer out of the industry, should be considered to be in the same vein—a concert of firms for the purpose of charging monopoly prices and obtaining monopoly profits.[90] However, since the enforcement of the antitrust laws has emphasized a search for express communications between colluders,[91] the effect of tacit col-

87. *See* Turner, *supra* note 40, at 681; *cf.* United States v. Paramount Pictures, Inc., 334 U.S. 131, 170 (1948) (where the purpose of the conspiracy was to drive independent film exhibitors out of the business by increasing the major film distributor's hold on the exhibition field).

88. American Tobacco Co. v. United States, 328 U.S. 781 (1946); *see* Turner, *supra* note 40, at 677-78.

There have been recent accusations by independent oil drillers that the major oil companies have been buying up and hoarding large quantities of steel pipe that is necessary for the drilling of wells. According to government figures, the majors do not have any need for the large amounts of pipe they have acquired. All the major oil firms were involved in this alleged excessive buying. *The Oil Pipe Shortage*, Arizona Daily Star, Feb. 10, 1974, § H, at 4, col. 1.

89. *See* Posner, *supra* note 62, at 1578-79.

90. *See id.* at 1578. Individual monopoly and shared monopoly power among oligopolists are analogous circumstances. Both economic structures result in an absence of vigorous price competition, wider price-to-cost margin than under competition, protection of inefficient firms, and misallocation of economic resources. *See* Schwartz, *New Approaches to the Control of Oligopoly*, 109 U. PA. L. REV. 31, 32 (1960); Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1225-26 (1969).

91. The "problem with our anticollusion policy is that, while we are quite firm in our attitude toward such overt collusion, we show no interest when the same economic *results* are effected by more tacit means . . . ." Asch, *Antitrust and the Policymaking Problem: The Law-Economics Dichotomy*, 5 ANTITRUST L. & ECON. REV. 45, 52 (Spring 1972). See Mason, *The Current Status of the Monopoly Problem in the United States*, 62 HARV. L. REV. 1265, 1277 (1949), where the author suggests that it may be

lusion in restraint of trade has not been fully developed nor adequately remedied.

While a finding of mere conscious parallelism is not sufficient evidence to find a violation of the Sherman Act, it is circumstantial evidence from which an agreement may be inferred by the factfinder.[92] Circumstantial evidence sustaining an inference of concerted action in an antitrust case may shift the burden of proof to the defendants; they then would be required to explain or contradict the inference.[93] If sufficient evidence is presented by the accused parties to show that market conditions necessitated their parallel conduct, the question of the existence of a conspiracy would then be for the trier of fact.[94] Finding elements of conscious parallelism from the activity of the major oil firms would merely start the mechanism of factfinding toward ascertaining the existence of conspiracy to refuse to deal. If more information could not be discovered to establish a more conclusive case, finding the major oil companies in violation of section 1 of the Sherman Act would be virtually impossible.

ANTITRUST POLICIES, REMEDIES, AND PROPOSALS: THE PETROLEUM INDUSTRY

Economic, Social, and Political Policies of Antitrust Law

In seeking a proper remedy for the major oil companies' concerted refusals to deal, the general purposes and policies of the antitrust laws must be emphasized. Of course, the foremost aspect of the policy has been faith in the economic value of competition.[95] The argument for competition is founded on the premise that an economy composed of competitively structured industries will be efficient in production, equitable in distributing goods and services, and progressive in the introduction of new technology.[96]

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more appropriate to look at market behavior, rather than conspiracy, in order to determine illegality.

92. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541 (1954). Proof of parallel conduct is a good starting point for presenting a prima facie case on an allegation of conspiracy under the antitrust laws. *See* Keane, *Section 1 of of the Sherman Act*, 37 ANTITRUST L.J. 632, 634 (1968).

93. United States v. Paramount Pictures, Inc., 334 U.S. 131, 148 (1948); Interstate Circuit, Inc. v. United States, 306 U.S. 208, 225-26 (1939); *see* Massel, *Legal and Economic Aspects of Competition*, 1960 DUKE L.J. 157, 184-86.

94. Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp., 346 U.S. 537, 541-42 (1954).

95. "The heart of our national economic policy long has been faith in the value of competition." Standard Oil Co. of Ind. v. FTC, 340 U.S. 231, 248 (1951).

96. Dixon, *Antitrust Policy: Some "Legal" and "Economic" Considerations*, 14 U.C.L.A.L. REV. 979, 987 (1967). Discussing the antitrust laws and the concentration of the market in the hands of a few, Judge Wyzanski has stated that: "Industrial advance may indeed be in inverse proportion to economic power; for creativity in business as in other areas, is best nourished by multiple centers of activity, each following its

Competition, as the national economic policy, offers the only alternative to either cartelization or extensive government intervention.[97] Although some shortrun efficiency may be sacrificed, it is believed that a free-market economy will be more efficient in the long run than an economy operated under extensive government regulation or cartelization.[98] Governmental supervision normally is disfavored because it requires placing free enterprise in the hands of government and would necessitate an abundance of political and bureaucratic machinery.[99] However, if a choice must be made between concentrations of unregulated monopoly power or governmental intervention, limited governmental intrusion seems more desirable.[100] The problem with private concentrations of economic power is that despite any shortrun appearance of benefit or efficiency, they remain inherently dangerous and undesirable. Oligopoly markets such as gasoline, where control is concentrated in the hands of a few firms, carry with them the "seeds of anticompetitive behavior."[101] There is no doubt that, if left unregulated, the ability of these firms to completely control supplies could result in the power to control both the pricing and distribution of goods and services without any checks and balances from other competing forces.[102] Whether the major oil companies actually would exercise that power is an unanswered question, but it would seem that in the interest of preserving competition in the petroleum industry some sort of governmental intervention into the power of the major oil companies would be warranted.

The economic performance of the oil industry in providing goods and services to the consumer, however, should be evaluated in order

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unique pattern and developing its own esprit de corps to respond to the challenge of competition." United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. (1953).

Ideally, competition provides society with the maximum output that can be achieved at any given time with available resources. Competition, coupled with the desire for profit, theoretically should produce the best products in the greatest volume at the cheapest prices. *See* Bork & Bowman, *supra* note 57, at 365; Hansen, *The Antitrust Laws in a Changing Economy*, 6 U.C.L.A.L. REV. 183 (1959).

97. United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 372 (1963); *cf.* Blake & Jones, *supra* note 25, at 383.

98. Blake & Jones, *supra* note 54, at 436.

99. Blake & Jones, *supra* note 25, at 383. Judicial intrusion in the economy is disfavored by the courts because it would involve them in the complex affairs of business and economics which they are not equipped to properly analyze. *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 161-63 (1948). This philosophy of the undesirability of governmental intrusion into complex economic issues, however, probably has hampered the attack on existing private concentrations of market control, even though continuing the concentrations may mean poorer economic performances and additional costs. Asch, *supra* note 91, at 50.

100. *See* Hart, *The Legislative Horizon*, 24 ABA ANTITRUST SECT. 54, 57 (1964).

101. Brodley, *supra* note 52, at 291, 338.

102. American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946); United States v. Aluminum Corp. of America, 148 F.2d 416, 428 (2d Cir. 1945); United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 347 (D. Mass. 1953). *See* Schwartz, *supra* note 90, at 36-37.

to determine what may be the most effective antitrust policy to impose.[103] Evaluating the performance of the major oil companies in order to determine their efficiency in meeting the economic needs of society is difficult because the major firms possess the needed information and control its release.[104] As a consequence, the major oil companies can argue that their concentration of power and their continued vertical integration promote efficiency, and there is little information in existence outside the industry to rebut their arguments.

What is known, however, is that the only economic competition presently existing in the petroleum industry is at the retail level; this comes from the independent dealers who fall outside the vertically integrated structure of the major oil companies.[105] The fact that the major social and political goal of the antitrust policies is the retention of individual liberty further supports the necessity for maintaining the independent retailers as a viable force in the petroleum industry.[106] The concept of individual liberty, in an economic sense, requires a market structure which fosters the existence of viable, small, locally-owned businesses.[107] The Supreme Court consistently has refused to tolerate concerted impairments of trade, even though the victim's business was so small that its destruction made little difference to the economy.[108]

103. Edwards, *Control of the Single Firm: Its Place in Antitrust Policy*, 30 LAW & CONTEMP. PROB. 465, 470 (1965).

When evaluating an economic policy, four major economic goals of society should be emphasized: (1) efficiency in production and distribution; (2) full employment with price stability; (3) high rates of progress in technology and productivity; and, (4) equity in distribution of income. Dixon, *supra* note 96, at 986.

104. *See* Edwards, *supra* note 103, at 471. Determining economic efficiency in a given industry is further complicated by the fact that legal precedent in this area is meager. Courts have tended to focus their case-to-case analysis on the conduct of the firms or the structure within the industry, rather than the industry's and the firm's performance—high prices, high costs, or retarded innovation. Smith, *Antitrust and the Monopoly Problem: Toward a More Relevant Legal Analysis*, 2 ANTITRUST L. & ECON. REV. 19, 41 (Summer 1969).

105. The FTC, after a lengthy study over the last 2 years based on information furnished by the petroleum industry, found that the eight largest oil firms (Exxon, Texaco, Gulf, Mobil, Standard Oil of California, Standard Oil of Indiana, Shell, and Atlantic Richfield) behaved like a "classical monopolist." 632 BNA ANTITRUST & TRADE REG. REP. A-18 (1973).

106. Blake & Jones, *supra* note 25, at 382-84.

107. Judge Learned Hand, discussing the position of the small business in antitrust policy, stated: "Throughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." United States v. Aluminum Co. of America, 148 F.2d 416, 429 (2d Cir. 1945).

In Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962), while discussing section 7 of the amended Clayton Act, the Supreme Court stated: "But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization." *See generally* United States v. Von's Grocery Co., 384 U.S. 270, 277 (1966); Simpson v. Union Oil Co. of Cal., 377 U.S. 13, 16, 21 (1964); United States v. Paramount Pictures, Inc., 334 U.S. 131, 153-55 (1948); *cf.* United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

108. Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660

Obviously, a monopoly can be initiated and propelled by the elimination of small businessmen one at a time just as it can be by destroying them in large groups.[109]

The protection of small businessmen for their sake and in spite of costs, however, has been criticized as establishing a haven for the inefficient.[110] Such criticism is valid if the small businessmen cannot compete merely because of their relative inefficiency in size.[111] If the small businessmen lose business as well as fail to provide adequate consumer choices concerning price and product as a result of their size, the antitrust laws should not provide them with privileged-class protection. But where small entrepreneurs, like the independent gasoline retailers, cannot compete because of the economic oppression of the major firms, and not because of their own inefficiency, the antitrust laws should be invoked.[112] The preservation of the small competitor is imperative in concentrated industries, like petroleum, in order to ensure competition in some form.[113]

In *Standard Oil Co. of California v. United States*,[114] Justice Douglas foresaw the elimination of independent retailers and the advancement of the large oil companies into the retail market. He described this vertical movement as a "tragic loss to the nation."[115] He also saw the elimination of small, local businessmen as a loss to the community and to the individuals' integrity.[116] Still, 25 years later, protection for

(1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959).

109. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 (1959). *See* Dixon, *supra* note 96, at 985.

110. *See* Bork & Bowman, *supra* note 57, at 369; *cf.* Blake & Jones, *supra* note 54, at 439.

111. Blake & Jones, *supra* note 54, at 439.

112. Blake & Jones, *supra* note 25, at 384, 398.

The only value other than consumer welfare that the framers of the Sherman Act apparently emphasized was protection of small businessmen. That value was given a complementary role to consumer welfare. *See* Bork, *supra* note 56, at 10.

The emphasis of the Supreme Court, particularly the Warren Court, on the survival of the small businessman has been compared to its concern with civil rights. The Court has stressed economic minority rights—"the right of every man to make his own decisions and to go as far as his talents will take him." Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 MICH. L. REV. 325, 334 (1968); *see also* Alioto & Blecher, *Antitrust in Galbraith's New Industrial State*, 13 ANTITRUST BULL. 215, 220 (1968).

113. Dewey, *The Economic Theory of Antitrust: Science or Religion?*, 50 VA. L. REV. 413, 423 (1964).

114. 337 U.S. 293 (1949).

115. *Id.* at 320-21 (Douglas, J., dissenting). The case involved the legality of the requirements contracts used between Chevron and its branded dealers. The majority held that the contracts lessened competition as prohibited by section 3 of the Clayton Act. Justice Douglas, although apparently agreeing that the contract may have been in violation of the antitrust laws, perceived the majority's holding as having a pernicuous effect on the existence of individually-owned filling stations. He reasoned that the major oil companies would no longer use loose contractual devices, but would instead move toward outright ownership of their retail outlets and, thus, eliminate the small businessman from oil marketing.

116. Justice Douglas emphasized that:

[B]eyond all that there is the effect on the community when independents

the individual, as a consumer and as a businessman, remains an evasive goal.

Refusal to Deal—Remedies and Proposals

Where an illegal refusal to deal has been found in a private action, the normal remedy has been an injunction to compel the seller to deal with the buyers in question.[117] Although it has occasionally been argued that ordering compulsory dealing is beyond the equity power of the courts,[118] it is a recognized remedy upon proof of antitrust violations.[119] As previously discussed, however, proof of some form of collusive activity is a major hurdle for an independent petroleum retailer to overcome. In order to circumvent the problems of proof of illegal activity and actual conspiracy, certain statutory amendments to the antitrust laws have been proposed.[120] Basically, these proposals would compel dealing between buyers and sellers in varied situations.[121] Violations of these legislative proposals would be based on unilateral conduct by business firms and would not be hampered by the Sherman Act requirement of finding a combination of two or more firms.

> are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss of citizenship. Local leadership is diluted. He who was a leader in the village becomes dependent on outsiders for his action and policy. Clerks responsible to a superior in a distant place take the place of resident proprietors beholden to no one. These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry.

Id. at 318-19.

117. *See* Beverage Distrib., Inc. v. Olympia Brewing Co., 395 F.2d 850 (9th Cir. 1968); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711 (S.D.N.Y. 1969); McKesson & Robbins, Inc. v. Charles Pfizer & Co., 235 F. Supp. 743 (E.D. Pa. 1964).

118. *Cf.* United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 729 (1944); Turner, *supra* note 40, at 704.

119. *See* Besser Mfg. Co. v. United States, 343 U.S. 444, 447 (1952) (compulsory sales is a recognized remedy). In *Besser*, the Court emphasized that: "In framing relief in antitrust cases, a range of discretion rests with the trial judge." *Id.* at 449.

120. The original bill for the Clayton Act passed the House of Representatives with a provision (section 3) that imposed a duty upon owners and transporters of the products of any mines, oil or gas wells, refineries, or hydro-electric plants to sell to a responsible person or firm. H.R. 15657, 63d Cong., 2d Sess. § 3 (1914). The Senate, however, eliminated this provision because the committee said it would "project us into a field of legislation at once untried, complicated and dangerous." S. REP. No. 698, 63d Cong., 2d Sess. 44 (1914).

121. A bill proposed by Senator Frank Moss (D-Utah), S. 2589, 93d Cong., 1st Sess. (1973), provided, in part, that when a sufficient supply of petroleum is not available there should be an equitable distribution among all dealers on a pro rata basis. Another bill proposed by Senator Moss, S. 1694, 93d Cong., 1st Sess. (1973), would prevent major oil companies from reducing the supply of petroleum to independent dealers below the percentage sold to them between July 1, 1971 and June 30, 1972. An earlier proposal, S. 1107, 88th Cong., 1st Sess. (1963), would have amended the Clayton Act to prohibit a vertically integrated company from engaging in discriminatory pricing or services practices against independent customers and also would have required a vertically integrated company to maintain records of transactions within and without the company's structure. Similarly, S. 1108, 88th Cong., 1st Sess. (1963), provided that companies engaged in dual distribution publish annual reports of sales to independent firms and their own establishments. *See generally* Kessler & Stern, *supra* note 8, at 115.

This simplistic approach toward the immediate conduct of the firms within an industry is a continuation of the same rearguard action that the antitrust laws have taken in the past.[122] As enforced, the Sherman Act, while reducing the availability of efficient methods of collusion, has had only a very modest effect on reducing the ever-mushrooming concentrations of economic power.[123] Merely imposing a limited remedy for refusals to deal by the major oil companies will not alleviate the inherent coercive power they hold over the independent retailers.[124] In seeking a remedy against conspiratorial activity occurring within an oligopoly structure, it must be assumed that the firms can be compelled to act independently. The functioning of the oligopoly structure, however, will not evaporate and become competitive.[125] The petroleum industry, being both oligopolistic and vertically integrated, remains conducive to anticompetitive behavior.[126] Therefore, because the industry is concentrated and highly anticompetitive, it is unlikely that indirect measures would permanently alleviate the undesirable consequences of oligopolistic behavior.[127]

The most effective means of dealing with the vertically integrated power of the major oil companies would be to cause divestiture of one or more of the vertical levels of production and distribution.[128] The oligopolistic control possessed by the major companies at the producer-refiner level, coupled with the vertical control of the channels of distribution, may necessitate completely disengaging the two levels. The Federal Trade Commission has reportedly contemplated seeking divestiture of either the refineries or the marketing outlets of the major oil companies.[129] Such a policy would strike at the heart of the problem, rather than tolerating the existing concentration and attempting to con-

122. The continued growth of oligopolies is a result of the schizophrenic approach that courts take towards the economy: they deny mergers that would cause an increase in existing market shares, but remain reluctant to disturb existing concentrations, except for remedying occasional abuses of market power. *See* Alioto & Blecher, *supra* note 112, at 217; *cf.* Brodley, *supra* note 52, at 339; Levi, *supra* note 3, at 181; Schwartz, *supra* note 90, at 42; Walden, *Antitrust in the Positive State*, 41 TEXAS L. REV. 741, 752-54 (1963).

123. Stigler, *The Economic Effects of the Antitrust Laws*, 9 J. LAW & ECON. 225, 236 (1966). Former Senator Harris of Oklahoma described the record of the antitrust laws as "[e]ight decades of failure to honor the key promise of economic democracy." Harris, *The "New Populism" and Industrial Reform: The Case for a New Antitrust Law*, 4 ANTITRUST L. & ECON. REV. 9, 39 (Summer 1971).

124. *See* text & notes 6-30 *supra.*

125. *See* Mason, *supra* note 91, at 1280; Schwartz, *supra* note 90, at 41.

126. Brodley, *supra* note 52, at 339.

127. *See* Turner, *supra* note 90, at 1225.

128. *See* Adams, *supra* note 22, at 507-08.

For cases involving divestiture of different levels of a vertically integrated structure, see United States v. Paramount Pictures, Inc., 334 U.S. 131, 152-53, 172 (1948); United States v. Pullman Co., 50 F. Supp. 123, 137 (E.D. Pa. 1943). *See also* HOUSE SELECT COMM. ON SMALL BUSINESS, *supra* note 16, at 13.

129. 613 BNA ANTITRUST TRADE & REG. REP. A-8 (1973).

struct makeshift remedies.[130] Although the economic and political costs of divestiture could be significant,[131] these costs would seem to be far outweighed by the longrun gains resulting from vigorous competition and economic efficiency.[132]

Although divestiture of one level of the major oil companies' vertical scheme is a viable alternative, it is unclear whether such a remedy is within the scope of the present antitrust laws. Congress, by phrasing the Sherman Act in the broadest of terms and definitions, has placed upon the courts the burden of ensuring the Act's basic ideal of competition.[133] The broad language of the Act, similar to the general wording of constitutional provisions, allows courts, especially the Supreme Court, to interprete the essence of the Sherman Act and fashion appropriate remedies.[134] Although there is a divergence of opinion, the present antitrust laws on their face, seem to be sufficient instruments for administering the necessary economic policies against the major oil companies, including divestiture.[135] The Sherman Act, however, was formulated during the age of monopoly when the concepts of oligopoly and imperfectly competitive markets were only economic theories. Although courts have broadened the scope of the Act to meet some activities of the oligopolies, many practices of the most powerful oligopolies have been left unremedied.[136] Furthermore, the courts have been reluctant to chart a legal course for the competitive forces of business.[137] If an industry of such economic and political importance as petroleum is to be denied entrance to and maintenance of different stages of production, such a determination may have to come from Congress.[138]

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130. *See* Turner, *supra* note 90, at 1214.

131. Rather than applying divestiture to the important concentrated industries like petroleum, one author proposes that more economic freedom be given to the independent, nonoligopoly firms, which should, in theory, provide an indirect incentive toward deconcentration. Brodley, *supra* note 52, at 345.

Reducing the size and increasing the number of firms in the oil industry may be the best way to restore price competition. However, political considerations and industry transitional costs may dampen the desire for economic growth. Edwards, *supra* note 103, at 470-71.

132. Turner, *supra* note 90, at 1215.

133. United States v. Columbia Steel Co., 334 U.S. 446, 526 (1948). *See generally* Bork, *supra* note 56, at 48; Hansen, *supra* note 96, at 204.

134. An oft-quoted statement of Chief Justice Hughes proclaims that: "As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purpose by providing loopholes for escape." Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

135. Markham, *Antitrust Policy: Challenge and Defense*, 28 WASH. & LEE L. REV. 287, 305 (1971); *see* Levi, *supra* note 3, at 182-83.

136. Edwards, *supra* note 103, at 466-67.

137. United States v. Columbia Steel Co., 334 U.S. 446, 526 (1948).

138. *See id.*; *cf.* Blake & Jones, *supra* note 54, at 426.

With the expanding role of the FTC, the commission may be able to bear more of an enforcement burden in significant industries without further congressional authoriza-

There have been a number of recent legislative proposals to break up concentration throughout the economy. These proposals are either based on a strict structural approach[139] or on presumptive tests of anticompetitiveness by oligopolistic firms.[140] Furthermore, there recently has been a proposal dealing specifically with the petroleum industry and its vertically integrated structure.[141] Whatever judicial or legislative remedial route is pursued, it should maintain the underlying concern of the Sherman Act in fostering competition—the welfare of the consumer.

CONCLUSION

The recent energy crisis in the United States emphasized the extensive economic power of the major oil companies. In the past, at least one segment of the industry has been able to limit the oligopolistic power of the major oil companies—the independent service station dealer. The competitive effectiveness of the independent dealer, however, was hindered during the energy crisis by the major oil companies' ability to deny needed petroleum supplies. The Sherman Act may be a limiting factor upon the power of the major oil companies. Section 1 of the Act specifically prohibits concerted actions, such as group boycotts, which are designed to restrain trade. The major barrier to finding section 1 violations for refusing to deal with the independents is proof of some form of concerted action between the majors. This, however, may be impossible based on the limited information of the activities of the major oil companies.

If our free enterprise system of small businessmen is to continue in the petroleum industry, some antitrust action may be necessary. Although price and technological competition is the central theme of our economic system, the oil industry's energies seem to be directed toward

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tion. The enforcement power of the FTC recently was clarified in FTC v. Sperry & Hutchinson Co., 405 U.S. 233 (1972). The Supreme Court found that section 5 of the FTC Act, 15 U.S.C. § 45 (1970), empowered the commission to define and proscribe an unfair competitive practice, even though the practice did not infringe on either the letter or the spirit of the antitrust laws. This interpretation of the Act's language could free the FTC to move against vertical integration, since it need not be concerned with proof of contract, combination, or conspiracy. *See* HOUSE SELECT COMM. ON SMALL BUSINESS, *supra* note 16, at 14; Kessler & Stern, *supra* note 8, at 63; Comment, *supra* note 16, at 221. The FTC, in fact, issued a complaint on July 7, 1973, against the eight largest oil companies (Exxon, Texaco, Gulf, Mobil, Standard Oil of California, Standard Oil of Indiana, Shell, and Atlantic Richfield). Exxon Corp., No. 8934 (F.T.C. filed July 17, 1973).

139. Concentrated Industries Act, S. 2614, 92d Cong., 1st Sess. (1971), promulgated by the REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY (Neal Report) (1968); *see* Schwartz, *supra* note 90, at 47. *But cf.* REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION (Stigler Report) (1969).

140. Industrial Reorganization Act, S. 3832, 92d Cong., 2d Sess. (1972).

141. The Petroleum Marketing Divorcement Act of 1973, S. 2082, 93d Cong., 1st Sess. (1973).

limiting the effectiveness of the independent dealers. Compelling the major oil companies to deal with independent dealers, however, may provide merely a short term remedy. Additionally, the government should take positive action to restore competition and free enterprise. Such positive action, though, must be accomplished without the government assuming control of the oil industry, which could be equally detrimental to the concepts of competition and free trade upon which our economy is based.