ILLINOIS LAW REVIEW
Northwestern University

Jan.-Feb., 1949 ILLINOIS LAW REVIEW Vol. 43—No. 6

Monopoly Under the Sherman Act: Power or Purpose?

Eugene V. Rostow*

"I will now tell you what I do not like [in the Constitution]. First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies, the eternal and unremitting force of the habeas corpus laws, and trials by jury in all matters of fact triable by the laws of the land, and not by the laws of nations."

Thomas Jefferson to James Madison, Paris, December 20, 1787[1]

THE recent cases have radically altered the scope of the idea of monopoly—or, more precisely, of "monopolizing," since the statute uses the verb—the activity condemned by Section 2 of the Sherman Act.[2] The legal redefinition of monopoly opens new perspectives, new doubts, and new possibilities of action under the Sherman Act. It is not too much to say that the current revision of Section 2 presents the central issue of doctrine in the entire field of anti-trust law—the concept of market control, which has increasingly become the chief, and often the only issue in anti-trust

* Professor of Law and Member of the Graduate Faculty of Economics, Yale University. This paper was the basis of the author's participation in a symposium on antitrust problems at the Northwestern University School of Law, Nov. 29, 1948, under the auspices of the Charles Clarence Linthicum Foundation.

[1] Thomas Jefferson, Life and Selected Writings (Modern Library Edition, 1944) 437.

[2] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Schine Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v. Griffith, 334 U.S. 100 (1948); Mandeville Island Farms v. American Crystal Sugar Co., 334 U.S. 219 (1948); FTC v. Cement Institute, 333 U.S. 683 (1948); United States v. Columbia Steel Co., 334 U.S. 495 (1948). See Harbeson, A New Phase of the Antitrust Law (1947) 45 Mich. L. Rev. 977; Levi, The Antitrust Laws and Monopoly (1947) 14 U. of Chi. L. Rev. 153; Zlinkoff and Barnard, Basing Points and Quantity Discounts (1948) 48 Col. L. Rev. 985. In his interesting and useful article, Effective Competition and the Antitrust Laws (1948) 61 Harv. L. Rev. 1289, Prof. Adelman comments critically on several points advanced in my paper, The New Sherman Act: A Positive Instrument of Progress (1947) 14 U. of Chi. L. Rev. 567, although I do not understand his argument to differ fundamentally from mine, either on the economic or the legal aspects of the problem of defining the present scope of the Act. On the collateral but important issue of the relation of size to efficiency, raised by Prof. Adelman, a fuller statement of my views is scheduled to appear in the February, 1949, number of the Journal of Political Economy.

HeinOnline -- 43 Ill. L. Rev. 745 1948-1949

litigation. The problems arising under Section 2 are closely linked to those of Section 1, and the way in which Section 2 of the Sherman Act develops will inevitably affect the handling of many other categories of controversy under different sections of the statutes. For the propositions of policy which define the scope of Section 1 and Section 2 of the Sherman Act are the animating and decisive ideas of the whole body of law which has grown to such massive proportions during the last twenty-five years of anti-trust administration. That process of growth has helped to eliminate much that was extraneous to the broad purposes of the anti-trust laws, and to reformulate their chief propositions in ways which are not only more consistent and coherent than in the past, but as well more directly responsive to the underlying policy of the statute.

Strictly speaking, the potentialities of the Supreme Court's recent views are not really new. They go back in part to the theory of the Sherman Act expounded by Chief Justice White in his fundamental opinions on the rule of reason,[3] and they have many prototypes among the decisions of the period which ended with *United States v. United States Steel Corporation.*[4] Like much of our present day law, the newer Sherman Act cases seem to reject the basic attitudes which prevailed during the 'twenties, and derive in considerable part from the philosophy of an older generation. The newer decisions are incompatible with the reasoning and spirit of the *United States Steel* case and a few of its companion pieces, but they rest quite securely on an earlier tradition of construing the statute. Psychiatrists tell us that much of the impulse for change in life comes from the need of children to become independent of their parents, and especially their fathers: a melancholy thought for parents, law teachers, and other elders of the community. Perhaps this drive is a clue to the endless cycle of opposites we see in the history of philosophy, politics, literature, and law, where classic follows romantic, mysticism succeeds realism, and the "New Look" sweeps away the old, but invariably restores the older. Whatever the subconscious source, the fact remains that in interpreting the Sherman Act, the Supreme Court seems to have discarded one set of its ancestors in favor of another.

---

[3] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911); United States v. American Tobacco Co., 221 U.S. 106 (1911). See also Northern Securities Co. v. United States, 193 U.S. 197 (1904); United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); United States v. Joint Traffic Association, 171 U.S. 505 (1898); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899), affirming 85 Fed. 271 (C.C.A. 6th, 1898); Jones, The Trust Problem in the United States (1921); Stevens, Industrial Combinations and Trusts (1913); Walker, History of the Sherman Law (1910); Watkins, Industrial Combinations and Public Policy (1927); Young, The Sherman Act and the New Anti-Trust Legislation (1915) 23 J. of Polit. Econ. 201, 305, 417; Edmunds, The Interstate Trust and Commerce Act of 1890 (1911) 194 No. Amer. Rev. 801.

[4] 251 U.S. 417 (1920).

HeinOnline -- 43 Ill. L. Rev. 746 1948-1949

I.

IN THE interests of perspective, it may be useful to start with some elementary history. For the development of Sherman Act doctrine, and the will to use the Sherman Act, have always moved with the deep tides of our social and political life.

The Sherman Act, passed in 1890, was one of the important expressions of the populist revolt against the age of titans in business. The new organizations of labor, farm groups, the Populist Party, and leaders of opinion as different as Henry George and Grover Cleveland had prepared the ground.[5] The Act was a response, Justice Harlan said later, to "a deep feeling of unrest . . . among the people generally," a universal conviction that although human slavery had been abolished, "the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessaries of life."[6]

In the first decade of its life, the Sherman Act was little used. The government won two important cases against the railroads, condemning as illegal the practices of forming rate bureaus to fix freight charges on a non-competitive basis, and the *Addyston Pipe* case.[7] While the lower courts applied the statute to trade unions, with some enthusiasm, the Supreme Court in *United States v. E. C. Knight Co.*[8] apparently exempted all manufacturing industry from the anti-trust laws, on the ground that manufacturing was not interstate commerce. After this defeat, both the Cleveland and the McKinley administrations were content to rest, and little was done in the field of industry until Theodore Roosevelt came into office.

Public opinion was once more actively alarmed about big business, and critical of the results achieved with the Sherman Act.[9] President Roosevelt established the Bureau of Corporations, whose factual reports on a variety of industries—like some of the later Federal Trade Commission studies, and the recent work of the Temporary National Economic Committee — proved important

---

5 See Jones, *op cit. supra* note 3, ch. 14; Hamilton and Till, Antitrust in Action, T.N.E.C. Monograph No. 16 (1940) 3-11.

6 Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 83 (1911).

7 United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897); United States v. Joint Traffic Association, 171 U.S. 505 (1898); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899). See generally, tables in Hamilton and Till, *op. cit. supra* note 5, 121 *ff.*

8 156 U.S. 1 (1895).

9 Thayer, Theodore Roosevelt (1919) ch. 12, 15; Pringle, Theodore Roosevelt (1931) Book 2, ch. 2, 3, 11; 2 Morison and Commager, The Growth of the American Republic (1942) 388-394.

HeinOnline -- 43 Ill. L. Rev. 747 1948-1949

preparation for a new series of anti-trust cases. To the accompaniment of a considerable volume of popular agitation and debate, the Roosevelt administration launched proceedings against the Northern Securities Company, Standard Oil of New Jersey, the American Tobacco Company, and other powerful, respectable and well-known symbols of the authority of business. The momentum of Theodore Roosevelt's program was if any thing increased by the Taft administration, during which several of the earlier cases reached the Supreme Court, and was accentuated again during Wilson's first term, both in litigation, and in the passage of the Clayton Act and the Federal Trade Commission Act. It is a striking fact that the government did not lose an anti-trust case of major industrial importance before the Supreme Court, with the single exception of the *Knight* case, until 1918.[10] Many consent decrees were entered, and, most important of all, many decrees, including consent decrees, were based on the principle of divestment, or in some cases, the division of a corporation into separate units.[11]

With the decision in the *Shoe Machinery*[12] case and especially the *United States Steel* case, however, the tide turned. The paradox, of course, is that these cases were decided 4 - 3, with Justices Brandeis and McReynolds, two quite certain votes for the government, unable to participate. It is academic, one supposes, to speculate whether the course of events in the era of Coolidge and Hoover would have been different, if the bull market mood had been somewhat restrained by a continuance of the Sherman Act policy declared in the *Southern Pacific, Union Pacific, Reading* and other cases of the classic decades of anti-trust enforcement.[13] The *Steel* case was decided, however, announcing the celebrated dictum that "size" was not an offense under the Act, and a new current entered the law, and public thinking about it.

There was some slackening of development under the anti-trust laws during the 'twenties. The government lost a good many im-

---

10 See Hamilton and Till, *op. cit. supra* note 5, 130-134.

11 Apart from the cases listed in notes 3 and 13, see United States v. E. I. Du Pont de Nemours & Co., 188 Fed. 127 (C.C. Del. 1911); United States v. Corn Products Refining Co., 234 Fed. 964 (S.D.N.Y. 1916); United States v. American Thread Co. (D.C.N.J. 1914); Shale, Decrees and Judgments in Federal Anti-Trust Cases (1918) 449, 451-453; United States v. Lake Shore & Michigan Southern Ry. Co., 203 Fed. 295 (S.D. Ohio 1914), Shale, *op. cit.*, 289; United States v. Eastman Kodak Co., 226 Fed. 62 (W.D.N.Y. 1915), 230 Fed. 522 (W.D.N.Y. 1916), Shale, *op. cit.*, 477; United States v. National Cash Register Co. (S.D. Ohio 1916), Shale, *op. cit.*, 320 (defendant forbidden to acquire control of competitor's business); Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size (1940) 40 Col. L. Rev. 615.

12 United States v. United Shoe Machinery Co. of New Jersey, 247 U.S. 32 (1918).

13 United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912); United States v. Union Pacific Ry. Co., 226 U.S. 61 (1912); United States v. Reading Co., 226 U.S. 324 (1912), 253 U.S. 26 (1920); United States v. Southern Pacific Co., 259 U.S. 214 (1922).

HeinOnline -- 43 Ill. L. Rev. 748 1948-1949

portant cases. Nonetheless institutions of anti-trust enforcement continued to grow. The Federal Trade Commission explored the implications of its new powers, and the Anti-Trust Division of the Department of Justice, after the fashion of government agencies, added to its staff. And most important, case after case was decided by the courts, discussing the bearing of anti-trust policy on all sorts of commercial and industrial arrangements and practices—price fixing, tying clauses, trade association activities, mergers, patent licenses, and so on. Like an enzyme, the idea of the Sherman Act was penetrating into every part of the business world, raising questions which had never been asked before. While prevailing opinion, both in the country and on the Court, was decidedly unsympathetic to the earlier view of the statute, as many proceedings were begun by the government during the 'twenties as were launched during the preceding 30 years of Sherman Act enforcement.[14]

The process of relative decline continued during the early years of President Franklin D. Roosevelt's tenure. Conditions of business depression make anti-trust enforcement psychologically difficult for judges to accept. The Congress passed the Miller-Tydings Act and the Robinson-Patman Act, both of which operate fundamentally to restrict rather than to encourage competition. And above all, anti-trust development was hampered by N. R. A., which proved the most powerful stimulus towards collective organization American business had ever received.

With the end of N. R. A. in 1935, however, the Roosevelt administration turned to the Anti-Trust laws with great energy, with results which are conspicuous in doctrine at least, if not yet in the realm of economic organization.

The development of the Anti-Trust laws has been greatly influenced by the broader flow of economic events and political opinion in the process of American social development. This is not to say for a moment, however, that on such matters the Court or the executive departments simply follow the election returns. The law of the Sherman Act has a curious autonomy of its own. The positions taken by the Supreme Court, as they have become more clear-cut and tangible in many situations, have exerted a profound and cumulative influence on business practice. Many forms of collective action on the part of business which are a matter of course in Europe do not exist in the United States. It is true that the *Steel* case, coupled with the Supreme Court's view of Section 7 of the Clayton Act, gave full scope to corporate growth by merger, perhaps the most important single force in the modern concentration of economic power. On the other hand, the Court's opinions have

[14] Hamilton and Till, *op. cit. supra* note 5, 135-143.

HeinOnline -- 43 Ill. L. Rev. 749 1948-1949

almost certainly limited some of the restrictive practices of trade associations, and other forms of combinations, notably direct price fixing, and the division of markets; resale price maintenance; non-competitive distribution; and latterly the abuse of patents. As the Machinery and Allied Products Institute has said:

> "It has become fashionable in some quarters to disparage the influence of the anti-trust laws in the United States, or even to write them off as completely ineffectual. In our judgment this is a grievous error, as the experience of Britain without such legislation strongly attests. It is true that the interpretation and enforcement of anti-trust policy has been halting and inadequate. It is true that unfair application or administration of anti-trust laws is possible. It is true also that many fish escape the net. Yet no one familiar with the climate of American business can fail to sense the pervasive influence of anti-trust policy, which floats—to quote a phrase of the late Justice Holmes—like 'a brooding omnipresence in the sky.' Whatever its defects, it has helped to save American industry, by and large, from the gross and rampant restrictionism now afflicting Great Britain, certainly no mean achievement."[15]

The influence of the Sherman Act extends beyond the area of economic organization. The accumulation of decisions under the Sherman Act, for all their inconsistencies and ambiguities, has had an impact on public opinion which cannot be ignored. The social and economic policy of the Act, drawn from a long historical experience, and colored by hundreds of decisions, is now infinitely more tangible, and more powerful, than it was in 1890, when the Act was merely a tentative, abstract and experimental effort to translate political feelings and social fears into law. Popular support for the statute is more firmly rooted today than at any time since it was passed. No political party would dare to propose its repeal. One can measure the strength which the idea of the Sherman Act has developed by noting that Great Britain has recently adopted an Act based on our anti-trust experience,[16] and like policies have been attempted in the occupation of Germany and Japan.[17]

II.

THE basic problem of defining monopoly power was considered in the first big controversy to emerge under the Act—the debate over the "rule of reason." The rule of reason was persistently advanced in dissent by Justice White for more than a decade, and finally became the prevailing view in 1911, after changes in the

---

15 Yelverton and Terborgh, Technological Stagnation in Great Britain (1948) 65.
16 Monopoly and Restrictive Practices (Inquiry and Control) Act, 1948 (11 & 12 Geo. 6, c. 66).
17 Hadley, Trust Busting in Japan, 26 Harv. Bus. Rev. 4-25 (1948).

HeinOnline -- 43 Ill. L. Rev. 750 1948-1949

personnel of the Court gave him the opportunity to prevail. What is usually said about the controversy is misleadingly simple: White's victory eliminated the doctrine, supported by Taft, Peckham and Harlan, that the Act dealt with all the classes of arrangements which had been known to the common law, or which might be recognized in the common law process of adjudication, as restraints of trade or monopolies. For this concept of an all-inclusive Sherman Act, qualified only by its limitation to restraints which bore "directly" rather than "indirectly" on the national commerce, the Court substituted the rule that the courts should hold illegal under the Act only such restraints as were "unreasonable," in the Court's view of the circumstances.

The first opinions on the rule of reason, however, go far beyond the abstraction of their major premise. In the first place, White's view of the Act rested on the vitally important proposition that the Sherman Act did much more than enact the common law of restraint of trade for the federal area. The common law and its history, he said, constituted a background for the terms of the Act. But the language and scope of the Act were not limited by the history of the common law. The words were used in their practical and popular sense, and not as rigid legal terms of art; they were to be interpreted in the light of the overriding public policy of the Act, as "an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation."[18] Here White differed sharply and significantly with Holmes, who had argued with considerable force that the Act had nothing to do with competition, but that its purpose was to prevent the ruthless and exclusionary tactics of robber barons, whose behavior threatened the right of individuals to enter or to continue in callings of their choice.[19] In White's view, therefore, the rule of reason did not give the judges unfettered discretion to limit the Act to behavior they thought unreasonable. What

[18] 221 U.S. 1, 59-60 (1911). And, at p. 58: "[T]he dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, *either from the nature or character of the contract or act,* or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." (italics added).

[19] Northern Securities Co. v. United States, 193 U.S. 197, 403 (1904). ("The act says nothing about competition"). See Young, *op. cit. supra* note 3, at 202-216.

HeinOnline -- 43 Ill. L. Rev. 751 1948-1949

was "reasonable", and hence legal under the rule of reason, was to be judged primarily in the light of the purpose of the Act. And the purpose of the Act, he emphasized, was to protect the public broadly against any "acts which, although they did not constitute a monopoly, were thought to produce some of its baneful effects."[20]

Secondly, White's practical view of the problem of statutory interpretation presented by the Sherman Act led him to assimilate Sections 1 and 2 in a way whose implications are only lately becoming evident.

> "[A] consideration of the text of the second section serves to establish that it was intended to supplement the first and to make sure that by no possible guise could the public policy embodied in the first section be frustrated or evaded. . . .
>
> "Undoubtedly, the words 'to monopolize' and 'monopolize' as used in the section reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the first section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the second section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the first section."[21]

Against the background of these propositions, the Chief Justice plunged into the *Standard Oil* case.

The facts showed, he concluded, that the guiding spirits of the Standard Oil group had combined a large number of separate corporations and partnerships into the Standard Oil Company of Ohio, and later enlarged the scope of the combination through a trust agreement which unified the management policies of all the participating entities. This agreement was held illegal by the Supreme Court of Ohio in 1892, and in 1897 contempt proceedings in Ohio were begun on the ground that the defendants had failed in

---

[20] 221 U.S. 1, 54 (1911).

[21] *Id.*, 60-61 (1911). See also United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224-226, n. 59 (1940) (power to fix prices necessary where the offense is actual monopolizing, under Section 2, rather than illegal restraint under Section 1, or, presumably, attempt to monopolize, under Section 2).

HeinOnline -- 43 Ill. L. Rev. 752 1948-1949

good faith to comply with the decision of 1892. The Standard Oil Company of New Jersey was thereafter reorganized as a holding company, and stock in the participating corporations of the Standard Oil combination was transferred to it. In addition to its allegations of growth to great size through combination and merger, the government had "set forth various means by which . . . in addition to the effect occasioned by the combination of alleged previously independent concerns, the monopoly and restraint complained of were continued." This latter class of averments deal with

> "rebates, preferences and other discriminatory practices in favor of the combination by railroad companies; restraint and monopolization by control of pipe lines, and unfair practices against competing pipe lines; contracts with competitors in restraint of trade; unfair methods of competition, such as local price cutting at the points where necessary to suppress competition; espionage of the business of competitors, the operation of bogus independent companies, and payment of rebates on oil, with the like intent; the division of the United States into districts and the limiting of the operations of the various subsidiary corporations as to such districts so that competition in the sale of petroleum products between such corporations had been entirely eliminated and destroyed; and finally reference was made to what was alleged to be the 'enormous and unreasonable profits' earned by the Standard Oil Trust and the Standard Oil Company as a result of the alleged monopoly; which presumably was averred as a means of reflexly inferring the scope and power acquired by the alleged combination."[22]

These allegations, the Court concluded, had been substantially proved.

There is in the opinion a marked distinction between the fact that a gigantic corporation had been created to dominate the entire industry, and the various trade practices which the Court considered coercive, oppressive, or unduly restrictive. The judgment below was affirmed, the Court said, for two reasons:

> "a. Because the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations, aggregating so vast a capital, gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination which were resorted to in order that greater power might be added than would otherwise have arisen had normal methods been followed, the whole with the

[22] 221 U.S. 1, 42-43 (1911).

HeinOnline -- 43 Ill. L. Rev. 753 1948-1949

purpose of excluding others from the trade and thus centralizing in the combination a perpetual control of the movements of petroleum and its products in the channels of interstate commerce.

"b. Because the *prima facie* presumption of intent to restrain trade, to monopolize and to bring about monopolization resulting from the act of expanding the stock of the New Jersey corporation and vesting it with such vast control of the oil industry, is made conclusive by considering, 1, the conduct of the persons or corporations who were mainly instrumental in bringing about the extension of power in the New Jersey corporation before the consummation of that result and prior to the formation of the trust agreements of 1879 and 1882; 2, by considering the proof as to what was done under those agreements and the acts which immediately preceded the vesting of power in the New Jersey corporation as well as by weighing the modes in which the power vested in that corporation has been exerted and the results which have arisen from it."[23]

These disapproved acts, which helped to confirm the *prima facie* case based mainly on size, were viewed, the Chief Justice said, "solely as an aid for discovering intent and purpose."[24] This purpose he defines later as one "to exclude others . . . frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which, on the contrary, necessarily involved the intent to drive others from the field and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view."[25]

There is a duality in the reasoning of the *Standard Oil* and similar opinions, in the light of present day cases. On the one hand there is a recurring emphasis on intent and purpose to violate the act by gaining "economic mastery," evidenced by trade practices which the Court calls "new," "oppressive," "predatory," or "not normal" or "usual" means of growth. Neverthless there is equally a recognition that "economic mastery" once achieved, and by whatever means achieved, "gives rise, in and of itself, in the absence of countervailing circumstances, to say the least, to the *prima facie* presumption of intent and purpose to maintain the dominancy over" the industry in question. Thus the early cases sharply distinguish the Sherman Act problem where a prohibited degree of market power has been achieved from those in which there is no more than an attempt to gain what is loosely called market domination. The application of the Act to the first class of cases is aided by what White had called "a prima facie presumption, to say the

[23] *Id.*, at 75. See also note 18 *supra.*
[24] *Id.*, at 76.
[25] *Ibid.*

HeinOnline -- 43 Ill. L. Rev. 754 1948-1949

least," whereas in the second class far-reaching evidence of "intent" to achieve market control is required. While there were few cases which explored the nature of Chief Justice White's presumption in detail, his own reference to the earlier *Freight Association* and *Joint Traffic* decisions makes clear the implications of his view. In disaffirming the general theory of those cases, he strongly supported their holdings, in language which became the doctrinal basis of the line of decisions from the *Trenton Potteries* case to *United States v. Socony-Vacuum Co.*, and the entire conception that certain practices or arrangements could be held illegal per se under the Act without further enquiry into their reasonableness.[26] The early railroad cases, it will be recalled, involved the association of independent railroads in a combination, through which their management policies were coordinated in many particulars, notably as to freight rates.

> "[I]n the cases relied upon it having been found that the acts complained of were within the statute and operated to produce the injuries which the statute forbade, . . . resort to reason was not permissible in order to allow that to be done which the statute prohibited. This being true, the rulings in the cases relied upon when rightly appreciated were therefore this and nothing more: that as considering the contracts or agreements, their necessary effect and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute, they could not be taken out of that category by indulging in general reasoning as to the expediency or non-expediency of having made the contracts or the wisdom or want of wisdom of the statute which prohibited their being made. That is to say, the cases but decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made."[27]

Thus the "prima facie presumption, to say the least," of the *Standard Oil* case becomes a "conclusive presumption" where a certain degree of control over price and other market policies is achieved, without reference to the "normality," "coerciveness" or the "predatory" character of the steps through which the forbidden quantum of market power is secured. Arrangements for fixing prices or

---

[26] United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony Vacuum Oil Co., Inc., 310 U.S. 150 (1940); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. U. S. Gypsum Co., 333 U.S. 364 (1948); FTC v. Cement Institute, 333 U.S. 683 (1948); United States v. Paramount Pictures, Inc., 334 U.S. 131, 141-144 (1948).

[27] 221 U.S. 1, 65 (1911). The degree of economic power seemingly within the prohibition of this policy is discussed in Part IV, *infra*, pp. 778-785.

HeinOnline -- 43 Ill. L. Rev. 755 1948-1949

dividing markets were in themselves unreasonable restraints of trade, for what they did, not what they were "intended" to do.

Certainly in the period before the *Steel* case, it was prevailingly held and understood that the acquisition of a certain degree of economic power was itself a violation of Section 2 and of Section 1, without particular evidence of how the power had been acquired or exercised. Considerations of "intent" became relevant when market power had not been achieved, and the problem for the court was to determine whether ambiguous conduct was part of a concerted plan designed to achieve monopoly power in a market. Thus a man could speculate in grain futures without violating the Sherman Act, but not if his purchases and sales were steps in running a corner. It is true that in many but not all of these cases there was evidence of the kind of business behavior discussed in the *Standard Oil* case as helping to substantiate the prima facie case of illegality:—on the one hand, methods of growth, which seemed novel and abnormal when compared with expansion from within, and on the other, practices which offended the sensibilities of the Court, like espionage, secret rebates, and the like. But these were the formative years of the Sherman Act, and the government could not afford the risk of a test case resting on a particular theory. Thus Judge Learned Hand, in his opinion in *United States v. Corn Products Refining Co.*,[28] decided in 1916, discusses the state of the law in terms which match the latest decisions of the Supreme Court. While the opinions of the Supreme Court, he said, left room for argument, the development of the cases seemed to support the view that the test of legality was "power only and not the manner of its exercise."

> "If the decisions of the Supreme Court are to be so understood, it is the mere possession of an economic power, acquired by some form of combination, and capable, by its own variation in production, of changing and controlling price, which is illegal. . . . Under such an interpretation of the Act, Corn Products Refining Company is certainly a combination in restraint of trade, and its excuse is irrelevant, if it were true, that it has had a beneficent effect upon the industry. If the statute condemns an industrial integration of producing units sufficient to fix prices, so long as the total producing capacity remains unchanged, that policy must be respected and enforced, whether it is a good one or a bad."

On the other hand, Judge Hand points out, there are situations where the condemned degree of power may not exist, or where the exercise of power is considered relevant—for example, in applying

[28] 234 Fed. 964 (S.D.N.Y. 1916).

HeinOnline -- 43 Ill. L. Rev. 756 1948-1949

the theory that it is the exercise and not the existence of the power which is decisive under the Act:

> "Under that theory the injuries to the public are shown by the means which the combination has employed in its efforts either to gain or to maintain its position. . . . While the statute under this theory relies upon competition as a proper stimulus to the maintenance of industrial advance and as the chief protection to the consumer, it takes a long view, not a short. It recognizes that with the customer in the end must lie the decision between producers, and that those who fail to secure the market by the quality and cost of their service must pass out of the field; but it does not identify permanent capacity with the inability to endure a transitory or local appeal to customers. Its presupposition is that there may well be competitors capable in the end of giving a service which will serve the public as well as their neighbors, who may yet succumb to concerted competition apparently more serviceable, but only because it is temporary, and is put forward with no purpose of universal application. Possibly it would be hazardous to attempt an absolutely general statement, but it would yet be true to say that nearly all the devices condemned by the courts contain this sporadic element, either of time or place; that is to say, that they cover only a competition which was not intended to be permanent, and which the combination knew was only for the temporary purpose of extirpating a competitor who had at least some chance in the long run of establishing a service which would be as acceptable as any within the power of the combination itself.
>
> "It is on this account that the intent of the combination so often appears in the cases as the determinating factor in illegality. It is not because unfair competition is a crime, but only because a monopolistic intent is the clearest evidence that the competition attempted is shown to be temporary and local, and that there is on this account a reasonable expectation that it will be succeeded by competition which the newcomer might well be able to meet, had his development been all the while left unimpeded. If that temporary or local competition were not coupled with such an intent, if there were honest grounds for supposing that it would or could remain to the permanent advantage of the consumer, the public would have no ground to complain, so long as the organization of industry remains on a competitive basis. The intent is the touchstone, not because we are concerned with moral delinquency, but with a test of the probable persistence of the combination's course of conduct."[29]

Judge Hand's distinction between situations where a prohibited degree of economic power exists, and those in which it is sought, appears sharply in several of the major decisions of that era, notably the *Union Pacific* and *Southern Pacific* cases, where dissolution was decreed, and the *St. Louis Terminal* case, where the court

[29] *Id.*, at 1012-1014.

HeinOnline -- 43 Ill. L. Rev. 757 1948-1949

ordered the unified terminal company for St. Louis to offer its facilities to non-participating roads, or be dissolved. There was no evidence in these cases of the kind of trade tactics discussed in *Standard Oil Co. v. United States,* or the first *Tobacco* case. They were sober and direct combinations, accomplished without melodrama. They were deemed illegal because in each case the scope of the combination created the power, in the Court's view, "to suppress or stifle competition or to create monopoly,"[30] in substantial if local segments of the economy. There was little or no mention of intent as a separate problem. The principle of these cases, the court said, is not simply that the combination might eliminate existing competition between the companies being brought together.

> "Such combinations, not the result of normal and natural growth and development, but springing from the formation of holding companies, or stock purchases, resulting in the unified control of different roads or systems, naturally competitive, constitute 'a menace to, and a restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected.' *Northern Securities Co. v. United States,* 193 U. S. 197, 327 . . .
>
> "These cases, collectively, establish that one system of railroad transportation cannot acquire another, nor a substantial and vital part thereof, when the effect of such acquisition is to suppress or materially reduce the free and normal flow of competition in the channels of interstate trade."[31]

The two principal cases usually regarded as incompatible with this tradition of interpreting Section 1 and 2 are *United States v. United States Steel Co.,*[32] and *United States v. International Harvester Co.*[33] And certainly the philosophy of decision in the majority opinions of those cases is quite markedly different from that in some, and perhaps all of the earlier cases. The court said, and doubtless meant, that "the law does not make mere size an offense, or the existence of unexerted power an offense." The government's position is pilloried:

> "The Government, therefore, is reduced to the assertion that the size of the Corporation, the power it may have, not the exertion of the power, is an abhorrence to the law, or as the Government says, 'the combination embodied in the Corporation unduly restrains competition by its *necessary effect,* [the italics are the emphasis of the Government] and therefore is unlawful regardless of purpose.' 'A wrongful purpose,' the Government adds, is 'matter of aggravation.' The illegality is statical, purpose or movement of any kind only its emphasis. To assent to that, to what extremes should we be

30 United States v. Union Pacific R. R. Co., 226 U.S. 61, 88 (1912).
31 United States v. Southern Pacific Co., 259 U.S. 214, 230-231 (1922).
32 251 U.S. 417 (1920).
33 274 U.S. 693 (1927).

HeinOnline -- 43 Ill. L. Rev. 758 1948-1949

led? Competition consists of business activities and ability—they make its life; but there may be fatalities in it. Are the activities to be encouraged when militant, and suppressed or regulated when triumphant because of the dominance attained? To such paternalism the Government's contention, which regards power rather than its use the determining consideration, seems to conduct. Certainly conducts we may say, for it is the inevitable logic of the Government's contention that competition must not only be free, but that it must not be pressed to the ascendency of a competitor, for in ascendency there is the menace of monopoly.

". . . The regression is extreme, but short of it the Government cannot stop. The fallacy it conveys is manifest."[34]

Nonetheless, the decisions themselves, whatever their effect on public and legal opinion, do not support their doctrine. In cases of this order, technical distinctions are not of primary importance. But they have a place. And in the *Steel* case the determinative fact, the court said, was that the company had not in its opinion achieved monopoly power, having only 50% of capacity, and had given up the attempt to achieve monopoly power in view of the forces of resistance it met in the market. Although the Supreme Court agreed with two of the judges below that the United States Steel Company had been built by "illegal" tactics—i.e., by predatory and coercive acts designed to achieve a monopoly position, it felt that the Company's illegal purpose had been abandoned.

Similarly, in the *Harvester* case, the issue before the court was a limited one. The International Harvester Company had been formed in 1902 by combining 5 separate companies, comprising 85% of the national output of harvesting machinery, other competing companies being purchased thereafter. An anti-trust decree in 1914 ordered a dissolution of the company into three substantially equal and independent corporations. This decree was modified to provide that the business and assets be divided "in such manner and into such number of parts of separate and distinct ownership as may be necessary to restore competitive conditions and bring about a new situation in harmony with law." After several years of negotiation a consent decree was entered, in 1918, requiring the International Harvester Co. to limit itself to one agent in any city or town; to undertake to sell certain harvester plants; and to sell three of its harvesting machine lines to responsible manufacturers of agricultural implements who were unable to make harvesting machines. In 1923, the government moved to reopen the case, and to restore the original provision requiring a partition of the assets into three companies. Meanwhile, International's share of the harvesting machine market had dropped

[34] 251 U.S. at 450-451.

HeinOnline -- 43 Ill. L. Rev. 759 1948-1949

from 85% to 64% or less; independent companies had forged ahead, several testifying that the provision of the decree limiting International to one agent in each town had worked wonders; and the trial court found (one judge dissenting) that International lacked the power to dominate the market, to control prices or to exclude competition. The Supreme Court emphasized the fact that International had complied with and relied upon the consent decree of 1918, which gave the United States the right to further relief only in the event that competitive conditions had not been restored within 18 months after the end of the war. Here the case was brought more than 18 months after the end of the war. In any event, the Court concluded, International had lost both the power and the purpose to dominate the market. It was at this point in the development of its argument that the Court remarked that neither size nor unexerted power is an offense under the Act, and that price leadership does not alone "establish any suppression of competition or show any sinister domination."[35]

The impact of the dicta in the *Steel* and *Harvester* cases was weakened by the language of *United States v. Swift & Co.*,[36] where the meat packing companies sought to reopen a ten year old consent decree. That judgment, entered in 1920, kept the meat packers out of the business of dealing in dairy products or groceries, and of selling meat at retail, as well as the ownership or operation of stockyards or terminal railroad facilities. The sole issue for the Court, Justice Cardozo said, was "whether anything had happened that will justify us now in changing the decree."[37] The court held that if the original decree was rational, so was its continuance, since no change of conditions was shown sufficient to impeach it.

> "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly (*United States v. United States Steel Corp.*, 251 U. S. 417; *United States v. International Harvester Co.*, 274 U. S. 693, 708), but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past. The original decree at all events was framed upon that theory. It was framed upon the theory that even after the combination among the packers had been broken up and the monopoly dissolved, the individual units would be so huge that the capacity to engage in other forms of business as adjuncts to the sale of meats should be taken from them altogether . . . We do not turn aside to inquire whether some of these restraints upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition.

[35] 274 U.S. at 709.
[36] 286 U.S. 106 (1932).
[37] *Id.*, at 119.

HeinOnline -- 43 Ill. L. Rev. 760 1948-1949

> Instead, they chose to consent, and the injunction, right or wrong, became the judgment of the court."[38]

The court gives evidence at several points in its opinion that it did in fact support the theory of the original decree.

While these developments were occuring as to the significance of size under the Sherman Act, the Court was enlarging and expanding the doctrine of the *Trenton Potteries* case, that the power of a combination to fix price in a market was itself a violation of Section 1 of the Act, and perhaps of Section 2 as well. In *United States v. Socony-Vacuum, Inc.*,[39] the court held that the illegal power need not be one to fix, or even to raise prices, but merely to influence them, or to prevent them from falling: "the placing of a floor under the spot markets obviously reduced the play of the forces of supply and demand . . . the thrust of the rule [of the *Trenton Potteries* case] is deeper and reaches more than monopoly power. Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price fixing groups were in no position to control the market, to the extent that they raised, lowered or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference."[40] The factual situation in the *Socony-Vacuum* case illustrates how far the Court is willing to take the ban against arrangements effecting price—"the central nervous system of the economy." The combination involved in the case was temporary and informal. It carried out a policy which had been advocated by some government officers before the demise of N. R. A., and perhaps even afterwards. Yet no evidence as to the government's attitude was relevant, against the contention that combinations influencing price were illegal per se. In its recent development, the doctrine of the *Socony-Vacuum* case threatens to engulf large segments of the earlier law under Section 1. The cement industry basing point decision, *Federal Trade Commission v. Cement Institute*,[41] applies the theory of the *Socony-Vacuum* case on both its counts. It almost certainly marks the end of the *Maple Flooring* case and other landmarks in the law of loose combinations.[42]

---

[38] *Id.*, at 116-117.
[39] 310 U.S. 150 (1940).
[40] *Id.*, at 220-221.
[41] Note 26 *supra.*
[42] Maple Flooring Manufacturers' Ass'n v. United States, 268 U.S. 563 (1925). The Stone-Brandeis philosophy of "more intelligent competition" through trade association or other cooperative devices seems to have disappeared without trace in recent opinions. They rest on a predominantly economic analysis of the significance to price policy of various trade practices, and apply the *Trenton Potteries* principle where there has been a limitation or restriction of price competition, through con-

HeinOnline -- 43 Ill. L. Rev. 761 1948-1949

In the *Alcoa* case, Judge Learned Hand placed considerable reliance on this line of decisions.[43] There the problem was whether the Aluminum Company of America, manufacturing (in Judge Hand's view) 90% of all the virgin aluminum produced in the United States, had violated Section 2 of the Act. If

> "all contracts fixing prices are unconditionally prohibited," he contended, "the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies."[44]

The power over prices inherent in the size of Alcoa, in relation to the market as a whole, constituted a sufficient basis for the conclusion that it was violating the Act. Thus one part of dictum of the *Steel* case necessarily falls: the decision in *Alcoa* means that *size* alone can be an offense under the Sherman Act, where size carries with it the degree of market power condemned by the Act. While presumably the Act, as a criminal statute, is inapplicable where such a degree of market power exists by inadvertence, an intent to keep the power will be freely inferred from its continued existence under normal commercial circumstances. A specific showing of intent to acquire monopoly power is required, Judge Hand said, only where monopoly power does not in fact exist; such cases, unlike the *Alcoa* case, are directed to nipping in the bud a course of conduct which has "the dangerous probability" of resulting in an injury to competition.

This analysis of the problem was approved by the Supreme Court in *American Tobacco Co. v. United States*,[45] where the second part of the dicta of the *Steel* and *Harvester* cases was expressly repudiated. As a technical matter, the *Tobacco* case decided that a charge to the jury under Section 2 was not improper which de-

---

tracts, or through concerted action in the pattern of a basing-point, or presumably any comparable plan of price quotation.

[43] United States v. Aluminum Company of America, 148 F. (2d) 416 (C.C.A. 2d, 1945).

[44] *Id.*, at 427-428.

[45] American Tobacco Co. v. United States, 328 U.S. 781 (1946).

HeinOnline -- 43 Ill. L. Rev. 762 1948-1949

scribed the offense in part as the possession by the three big tobacco companies of "the power to control and dominate interstate trade and commerce in a commodity to such an extent that they are able, as a group, to exclude actual or potential competitors from the field, accompanied with the intention and purpose to exercise such power."[46] Evidence of the actual exclusion of competitors was not necessary. In short, it is the existence and not the exertion of power which the act condemns when the forbidden degree of power is coupled with an intent to use it. And the Court redefined monopoly power in the course of its opinion as the power "to raise prices or to exclude competition when it is desired to do so."[47]

Without undertaking to repeat what I have said at length elsewhere about these two cases,[48] I conclude that they stand for three broad propositions:

(1) Where a person or a group of persons acting together has the power substantially to influence the price of a commodity moving in interstate commerce, the existence of the power is illegal under Section 2, unless the defendant can show that the power has not been obtained or maintained deliberately—that is, for the purpose of enjoying and preserving the advantage of market position.

(2) The combination of several persons into a monopolistic group can be inferred from a course of dealings, and from their parallel action in response to the stimuli of the market, as well as from other evidence of their concert.

(3) An economic analysis of the position of defendants in their particular market settings is the key to measuring the degree of their control over price and output. In making such a determination, the courts will consider the extent to which market control may be the consequence of size alone, as in the *Aluminum* case; or the control of strategic factors in the market structure—like transportation facilities in the oil or the anthracite industries, or first run theatres in the movie industry; or the business position of the defendants in relation to existing or prospective competitors.

III.

THIS view of the *Alcoa* and *Tobacco* decisions is confirmed, I should contend, by the three motion picture cases decided at the last term of the Supreme Court. Together they add a good deal of particularity to the law of the Sherman Act, in helping to identify the degree of market power the existence of which is deemed illegal; in clarifying the role of non-economic, or subjective in-

46 *Id.*, at 785.
47 *Id.*, at 811.
48 See Rostow, *loc. cit. supra* note 2.

HeinOnline -- 43 Ill. L. Rev. 763 1948-1949

gredients in defining the offense under Section 2; and, above all, in asserting that where the offense is the acquisition of a forbidden degree of market power, not through loose association, but by reason of the size of business units, the normal anti-trust remedy is to reduce their size.

The most complex of these cases is *United States v. Paramount Pictures*,[49] an equity proceeding against eight major companies, five of which produce, distribute and exhibit motion pictures, two being producers and distributors only, and one, United Artists, being exclusively a distributor. The complaint made distinct charges. The first was that the defendants as a group had attempted to monopolize and had monopolized motion picture production. On this issue, the trial court found for the defense, and the finding was not attacked on appeal. Secondly, the defendants were charged with conspiring to restrain and to monopolize the trade, and with restraining and monopolizing it, by together employing certain trade practices. These restrictive practices are considered under six sub-headings in the first part of the opinion, called "Restraint of Trade." There was a distinct charge of conspiring to restrain and monopolize, and of actually restraining and monopolizing, the exhibition of motion pictures in most of the larger cities of the country. The problem presented by this allegation is further considered by the Court in the third part of its opinion, headed "Monopoly, Expansion of Theatre Holdings, Divestiture." A further allegation was directed at vertical integrations as such, and another at the relations between the distributor defendants and exhibitors.

The main issue in the case, and in the motion picture business, the Court stated, is the exhibition of films in first-run theatres, particularly in larger cities. First-run showings are highly profitable—"the cream of the exhibition business,"[50] the Supreme Court said. The relative profitability of first-run exhibition, however, is the result of systematic policy, not technological imperative. A theatre after all is a first-run theatre only by the decision of the industry. A variety of trade practices give the larger theatres first-run privileges, and make such privileges valuable by preventing other theatres both from getting the same films for a specified time interval, and from showing them at less than a specified minimum price. By keeping the price in second-run theatres at or above a given point, it is possible to set the price in first-run theatres at a (higher) level, which takes full account of peoples' desire to see new films sooner rather than later.

---

[49] United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

[50] *Id.*, at 172-173.

HeinOnline -- 43 Ill. L. Rev. 764 1948-1949

These two interrelated trade practices—the establishment of minimum admission prices for runs subsequent to the first run, and the system of clearance, or time interval, arrangements—the District Court found to be unreasonable restraints of trade. Minimum admission price contracts were illegal on two grounds. First, the District Court inferred from the parallel behavior of the defendants that they had agreed upon a common policy towards admission price differentials between first and subsequent run theatres. This horizontal "conspiracy" to fix prices was held illegal on the analogy of *United States v. Masonite Corp.* and *United States v. United States Gypsum Co.*, as a plan to "regiment an entire industry," and thus unjustifiable even in the exploitation of valid copyrights. The distinction between the legitimate enjoyment of a patent monopoly, and the illegal regimentation of an entire industry through patent licenses, latterly much emphasized by the Supreme Court, does not bear analysis in many situations where the patent itself may be of commanding industrial importance. The weakness of the distinction, however, does not arise in the case of the movie industry, since the plan of distribution involved the combination of many independent copyrights, and the elimination or restriction of price competition between them.[51]

Nor were the vertical price agreements between each major company and its licensee-exhibitors on a better footing. The precedent of the *General Electric* case[52] did not authorize separate vertical price fixing licenses which together constituted a system for eliminating price competition among exhibitors, and, more broadly, among copyrighted films.

Clearance arrangements which dealt with the timing of exhibition, though not admission prices, were considered on a different basis. The government had contended in the District Court that such provisions are illegal per se, like direct price-fixing clauses, since without them the first-run theatres would not be first-run theatres at all, and hence would not have the short period of monopoly which affords the movie industry the bulk of its revenue. The District Court did not agree, despite its conclusion that clearance arrangements did substantially affect admission prices. The holding below was (1) that the existing system of uniform clearances was illegal as a conspiracy in restraint of trade, the conspiratorial element being inferred either from participation in

---

[51] One should note the failure of the Court to consider the status in the movie industry of existing copyrights, used for years as part of a plan of continued restraint of trade. On the analogy of Hartford-Empire Co. v. United States, 323 U.S. 386 (1945) and United States v. National Lead Co., 332 U.S. 319 (1947), they might well have been released, perhaps at a reasonable royalty, both to the movie and especially to the television industries.

[52] United States v. General Electric Co., 272 U.S. 476 (1926).

HeinOnline -- 43 Ill. L. Rev. 765 1948-1949

evolving the system, or acquiescence in it; but (2) that clearances reasonably restricted as to time and area, and limited to theatres in substantial competition with each other, would be permissible techniques for making money from the exhibition of a copyrighted film. The government did not challenge the District Court's conclusion, and the Supreme Court therefore refused to reopen the issue whether clearances were illegal per se, although it upheld the District Court's views against the defendants' challenge. In the light of the *Socony-Vacuum* case, and the Courts' general suspicion of the movie industry, the point is at least doubtful.

There were other trade practices, the Court found, which unreasonably narrowed the area of competition among films, and among theatres. Joint management of otherwise competitive theatres, and joint ownership of theatres by one or another of the defendants, together with an independent interest, were considered at some length. Joint management was condemned outright. The discussion of joint ownership plans throws a good deal of light on the detailed meaning of the Court's theory of monopoly, for on this issue the District Court's ruling was reversed. So long as theatre ownership by the major companies is not totally forbidden, the Court said, (anticipating a later section of its opinion) the major companies should be required to sell to independents their interests in jointly owned theatres:

(1) Where the acquisition was the product of one or another of the industry's numerous violations of the Sherman Act;

(2) Where the interest was "innocently" acquired, but had been used to further the ends of the industry's general "conspiracy" against competition;

(3) Where the other party to the joint ownership would be an operator in the absence of joint ownership, since otherwise joint ownership would "afford opportunity to perpetuate the effects of the restraints of trade which the exhibitor-defendants have inflicted on the industry";[53]

(4) Where, in the absence of any one of the conditions listed above, the joint ownership arrangement *results* in monopoly.

If the Court finds that neither monopoly nor unreasonable restraint of trade exist as a result of the ownership arrangements, the defendants might even be given permission to purchase the interest of their independent partners. The fourth proviso in this part of the opinion is a clear application of the Court's view that where monopoly, in the sense of economic power alone, exists in any appreciable part of the economy, it is illegal quite apart from

[53] *Id.*, at 153.

HeinOnline -- 43 Ill. L. Rev. 766 1948-1949

its exercise, or any specific investigation of the purpose behind its acquisition or retention.

Block-booking was totally outlawed, as a device to use the demand for one copyrighted film as leverage to improve the market position of another. Such tying arrangements are as illegal between patents as in the cases where the right to use a patent is conditioned on the purchase from the patentee of an unpatented commodity or service. And certain contractual arrangements between major companies and independent exhibitors were held to be illegal discriminations in favor of the larger chains, and an illegal use of monopoly power, for reasons developed more fully in the *Griffith* and *Schine* cases.

The District Court's theory of the Sherman Act was based on the *United States Steel* case, and similar decisions, not on the reasoning of the *Alcoa* and *Tobacco* cases. Judge Augustus Hand started with the premise that the defendants could not be "treated collectively so as to establish claims of general monopolization in exhibition," because there was "no substantial proof that any of the corporate defendants was organized or has been maintained for the purpose of achieving national monopoly."[54] In any event, considering the number of theatres owned or controlled by the defendants as a fraction of the total number of theatres in the United States, the District Court concluded that even taken collectively the defendants lacked monopoly power, and that their only attempts to gain monopoly power centered in the use of certain trade practices—price-fixing, unreasonable clearances, block booking and the like. The root of the case being in the District Court's view the illegality of these trade practices, as restraints of trade under Section 1, and as steps in an unsuccessful attempt to monopolize, under Section 2, its decree was naturally directed at their extirpation, rather than at the elimination of economic power "created by size," in Justice Douglas' phrase, and deemed illegal of itself.

The District Court, however, was not quite convinced by its own logic. It recognized that the industry's ingrained habits, and the structure which had emerged as the result of many years' indulgence in restraints of trade, created special problems for which an ordinary injunctive command to sin no more might not be a sufficient remedy. It therefore proposed to limit any further expansion of the major company's theatre holdings, and to establish a system of competitive bidding in the distribution of films to exhibitors *other than the major companies' subsidiaries or affiliates.*

This plan, the "central arch" of the decree below, in the Supreme Court's view, was overruled. The Supreme Court indicated that its

[54] United States v. Paramount Pictures, 66 F. Supp. 323, 354 (S.D.N.Y. 1946).

HeinOnline -- 43 Ill. L. Rev. 767 1948-1949

difficulties with the program of competitive bidding arose out of disagreement with the District Court "on the nature of the violations," and because in its judgment the plan promised "little in the way of relief against the real evils of the conspiracy."[55] Without reducing the massed power of the major companies, competitive bidding might well increase the advantages which the major companies now have as a consequence of theatre ownership, and thus further the degree of concentration in the industry. Moreover, it would involve the courts in difficult, detailed and endless supervision of the industry, like that of a perpetual receivership.

The fundamental weakness of the competitive bidding plan, in the Supreme Court's view, was not administrative, but substantive. It derived from the District Court's error in defining the offense under Section 2 of the Sherman Act. That error in conception led the District Court to a mistaken analysis of the factual situation, and hence of the remedy.

The starting point of the case, the Court said, was a conspiracy to effect a monopoly through restraints of trade. It was therefore relevant in determining the need for divestiture, "to determine what the results of the conspiracy were even if they fell short of monopoly."[56] However, the Court found, the key issue on the monopoly phase of the case was not the achievement of actual monopoly in all theatres (which the District Court had deemed to be its only problem under Section 2), but the degree of control by defendants in the first-run theatres. On this point there is no specific finding by the Court below, either for all first-run theatres, for first-run theatres in the 92 largest cities of the country, or for first-run theatres in separate localities.

The error of the Court below went deeper. The Court had found that the defendants lacked the purpose of achieving a national monopoly.

> "Second, we pointed out in United States v. Griffith, 334 U. S. ___, 68 S. Ct. 941, that 'specific intent' is not necessary to establish a 'purpose or intent' to create a monopoly but that the requisite 'purpose or intent' to create a monopoly is present if monopoly results as a necessary consequence of what was done. The findings of the District Court on this phase of the cases are not clear, though we take them to mean by the absence of 'purpose' the absence of a specific intent. So construed they are inconclusive. In any event they are ambiguous and must be recast on remand of the cases. Third, monopoly power, whether lawfully or unlawfully acquired, may violate §2 of the Sherman Act though it remains unexercised (United States v. Griffith, 334 U. S. ___, 68 S. Ct. 941), for as we stated in Ameri-

55 334 U.S. at 165.
56 *Id.*, at 171.

HeinOnline -- 43 Ill. L. Rev. 768 1948-1949

can Tobacco Co. v. United States, 328 U. S. 781, 809, 811, 66 S. Ct. 1125, 1140, 90 L. Ed. 1575, the existence of power 'to exclude competition when it is desired to do so' is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power. The District Court, being primarily concerned with the number and extent of the theatre holdings of defendants, did not address itself to this phase of the monopoly problem. Here also, parity of treatment as between independents and the five majors as theatre owners, who were tied into the same general conspiracy necessitates consideration of this question.

"Exploration of these phases of the cases would not be necessary if, as the Department of Justice argues, vertical integration of producing, distributing and exhibiting motion pictures is illegal *per se*. But the majority of the Court does not take that view. In the opinion of the majority the legality of vertical integration under the Sherman Act turns on (1) the purpose or intent with which it was conceived, or (2) the power it creates and the attendant purpose or intent. First, it runs afoul of the Sherman Act if it was 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. United States v. Reading Co., 253 U. S. 26, 57, 40 S. Ct. 425, 432, 64 L. Ed. 760; United States v. Lehigh Valley R. Co., 254 U. S. 255, 269, 270, 41 S. Ct. 104, 108, 109, 65 L. Ed. 253. Second, a vertically integrated enterprise, like other aggregations of business units (United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416), will constitute monopoly which, though unexercised, violates the Sherman Act provided a power to exclude competition is coupled with a purpose or intent to do so. As we pointed out in United States v. Griffith, 334 U. S. ___, n. 10, 68 S. Ct. 941, size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse. And the fact that the power created by size was utilized in the past to crush or prevent competition is potent evidence that the requisite purpose or intent attends the presence of monopoly power. See United States v. Swift & Co., 286 U. S. 106, 116, 52 S. Ct. 460, 463, 76 L. Ed. 999; United States v. Aluminum Co. of America, supra, 148 F. 2d at page 430. Likewise bearing on the question whether monopoly power is created by the vertical integration, is the nature of the market to be served (United States v. Aluminum Co. of America, supra, 148 F. 2d at page 430), and the leverage on the market which the particular vertical integration creates or makes possible.

"These matters were not considered by the District Court. For that reason, as well as the others we have mentioned, the findings on monopoly and divestiture which we have discussed in this part of the opinion will be set aside. There is an independent reason for doing that. As we have seen, the District Court considered competitive bidding as an alternative to divestiture in the sense that it concluded that further consideration of divestiture should not be had until competitive

HeinOnline -- 43 Ill. L. Rev. 769 1948-1949

> bidding had been tried and found wanting. Since we eliminate from the decree the provisions for competitive bidding, it is necessary to set aside the findings on divestiture so that a new start on this phase of the cases may be made on their remand."[57]

This crucial passage brings out the limits of the present status of the concept of intent or purpose under the Sherman Act. For the reasons indicated in the *Alcoa* case, among others, the Court is concerned to guard against the remote possibility of holding persons guilty of monopolizing under Section 2, especially in criminal cases, where their monopoly power exists by accident. For example, it would be extreme to prosecute under Section 2 the day after a valuable industrial patent expired, where the holder of the patent was the sole person to manufacture under it. And it seems similarly unlikely that a criminal statute would be invoked where all competition in a given line fell away through death, or bankruptcy, or fire. Curiously enough, there seems to be little corresponding feeling in equity cases under Section 1 that the offenses under Section 1, though equally criminal, must be accompanied by elements of intent. Price-fixing, tying clauses added to patents, arrangements for dividing the market, boycotts, resale price arrangements and the other common restraints under Section 1 are all considered without extended inquiry into intent. However, there is a distinct tradition to the effect that there must be some element of purposiveness about conduct violating Section 2 of the Sherman Act. But there are two distinct categories of intent: (1) the intent inferred from the existence of a forbidden share of economic power, however gained, on the familiar principle that people intend the consequences of what they do; and (2) a more deliberate and specific purpose to acquire a prohibited degree of economic power, relevant where such power is sought but not yet acquired. Intent in this sense is often inferred from systematic recourse to business tactics which themselves constitute illegal restraints of trade or are disapproved by the judges for unstated ethical reasons of their own. In the first case, where monopoly power is deemed to exist, the burden is basically on the defendants to rebut the presumption of a statutory purpose. Only in the second class of cases under Section 2 does it become pertinent to examine the defendants' conduct for evidence that they were engaged in a criminal attempt.

How "intent" became so vital a part of the literature of Section 2 of the Sherman Act is something of a mystery. It is clearly important where monopoly power is sought, but does not exist, for there the attempt is the offense. Where monopoly power in the

[57] *Id.*, at 173-174.

HeinOnline -- 43 Ill. L. Rev. 770 1948-1949

sense of power over price actually exists, by reason of the size of a single corporation, or the pooling for price purposes of the power of several dominant corporations, the policy of the *Socony-Vacuum* case doctrine seems to apply *a fortiori*. The existence of permanent arrangements creating such power over price come within the policy which condemned the temporary combinations in the *Trenton Potteries* case, and like situations, as illegal per se. Of course the proposition that at law intent is objective, not subjective, is at least as old as Mr. Justice Holmes. And the formula that the necessary degree of intent will be inferred from the existence of the power is orthodox. Complete verbal consistency is achieved by Chief Justice White, in his assertion that in cases of price fixing or the equivalent, intent is to be "conclusively presumed," i.e., is quite irrelevant. Thus with monopoly power defined as power over price, White's "conclusive presumption" of intent could finally assimilate the *Trenton Potteries* case doctrine with the problem of realized monopoly power under Section 2, and restrict the issue of intent to attempted monopolies, and to the remote situation of monopoly power "thrust upon" the monopolist.

Actually it is misleading and metaphorical to talk of either a "specific" or an "implied" intent to violate the Act, and the evidence commonly considered to show such intent has little to do with the problem. The Sherman Act largely concerns the behavior of business men, and their plans for making as much money as possible under the circumstances of their market position. Their desire to make money is hardly illegal—on the contrary, it is Adam Smith's "unseen hand," building economic efforts in the broadest social interest. The premise of our law and economics is that the response of business men to the possibility of profit assures society the best possible use of its resources, and the most rapid possible rate of economic progress. Where business men confront situations in which they can make money by organizing to eliminate competition, it is normal for them to do so unless restrained by law. There always appears to be larger and safer profits in monopoly—and more order, stability, dignity, power and peace, as well—than under the violent pressures of active competition. That the combination of business men into monopolistic patterns may be accomplished by "novel" or "abnormal" methods rather than by "normal" growth, has long since ceased to be important. The merger and the holding company are commonplace, as they were not when the *Standard Oil* case was decided. In *Appalachian Coals, Inc. v. United States,* Chief Justice Hughes pointed out that such distinctions were "artificial" and without substance.[58] It should be

[58] 288 U.S. 344, 377 (1933).

HeinOnline -- 43 Ill. L. Rev. 771 1948-1949

equally irrelevant that the business program of combination might include steps otherwise illegal, like a boycott or a price fixing plan, or behavior regarded as brutal and tyrannous under the judges' private code of decorum in business.[59] Business is not always a sport for gentlemen, and there is no reason for visiting the penalties of the Sherman Act on defendants merely because the judges would blackball them as candidates for a club. From the point of view of the purpose of the Sherman Act, the essential question is whether business men are taking advantage of their opportunities to combine, or of the structural character of their market, to gain monopoly profit. It is that result, or the quest for it, which is condemned by Section 2, just as Section 1 may outlaw some of the steps used on the way. The proof should be oriented, therefore, to the question whether a certain degree of economic power has been sought or achieved, not to the "normality" or "propriety" or "legality" of the means incidentally employed. A conspiracy, we are told, is a partnership in illegal purposes.[60] The end sought—monopoly power—being illegal, any further evidence of illegality in the means used is redundant. The absence of oppressive, coercive or illegal behavior in the program of a business group cannot help to prove that the group lacks the intent to monopolize, whether "generally" or "specifically." As we have recently been reminded, the Act does not condemn "bad" trusts, and condone "good" ones.[61]

That this is a fair reading of the *Paramount* case seems to be confirmed by the *Schine*[62] and particularly the *Griffith* decisions.[63]

They were both equity cases brought by the United States against independently owned regional theatre chains, on the general charge that because of their bargaining power, and by reason of their close association with the major companies as a group, they were enjoying illegal advantages in their competition with smaller independents. In both cases the defendant chains had grown rapidly during the thirties, and included non-competing theatres scattered through many towns. In a majority of instances, the defendants owned or controlled either the only theatre, or all the theatres, in the community. In both cases, the defendants negotiated with the major companies for master agreements providing films for their chains as units, combining the buying power of their open and closed towns to obtain opportunities not available to their competitors, thus depriving competitors of films, putting them in unfavorable clearance categories, and the like. In the *Schine* case the de-

[59] United States v. United States Steel Corp., 251 U.S. 417, 440 (1920).
[60] United States v. Kissel, 218 U.S. 601, 608 (1910).
[61] United States v. Aluminum Company of America, 148 F. (2d) 416, 427 (C.C.A. 2d, 1945).
[62] Schine Chain Theatres v. United States, 334 U.S. 110 (1948).
[63] United States v. Griffith, 334 U. S. 100 (1948).

HeinOnline -- 43 Ill. L. Rev. 772 1948-1949

fendants were charged with forcing sales of theatres by threatening to build competing theatres, "dictating terms" to distributors, exacting long term covenants not to compete from those who sold them theatres, and otherwise misbehaving. In the *Griffith* case, there was no such evidence, and the District Court found no purpose to use chain buying power for the purpose of eliminating competition and acquiring a monopoly of theatres in the competitive towns. Unlike the defendants in *United States v. Crescent Amusement Company*,[64] the District Court found, the defendants had not even used the leverage of their position to insist on monopoly rights in towns where they had competition, by threatening to give a distributor no business in their closed towns.

The District Court was, however, reversed:

"It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements. . . . To require a greater showing would cripple the Act. As stated in United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416, 432, 'no monopolist monopolizes unconscious of what he is doing.' Specific intent in the sense in which the common law used the term is necessary only where the acts fall short of the results condemned by the Act. The classical statement is that of Mr. Justice Holmes speaking for the Court in Swift & Co. v. United States, 196 U. S. 375, 396:

'Where acts are not sufficient in themselves to produce a result which the law seeks to prevent—for instance, the monopoly—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. Commonwealth v. Peaslee, 177 Mass. 267, 272, 59 N. E. 55. But when that intent and the consequent dangerous probability exist, this statute, like many others, and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.' And see United States v. Aluminum Co. of America, supra, 148 F. 2d, pages 431, 432. And so, even if we accept the District Court's findings that appellees had no intent or purpose unreasonably to restrain trade or to monopolize, we are left with the question whether a necessary and direct result of the master agreements was the restraining or monopolizing of trade within the meaning of the Sherman Act.

"Anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense. But he usually does not violate §2 of the Sherman Act unless he has acquired or maintained his strategic position, or sought to expand his monopoly, or

[64] 323 U.S. 173 (1944).

HeinOnline -- 43 Ill. L. Rev. 773 1948-1949

expanded it by means of those restraints of trade which are cognizable under §1. For those things which are condemned by §2 are in large measure merely the end products of conduct which violates §1. Standard Oil Co. of New Jersey v. United States, 221 U. S. 1, 61. But that is not always true. Section 1 covers contracts, combinations, or conspiracies in restraint of trade. Section 2 is not restricted to conspiracies or combinations to monopolize but also makes it a crime for any person to monopolize or to attempt to monopolize any part of interstate or foreign trade or commerce. So it is that monopoly power, whether lawfully or unlawfully acquired, may itself constitute an evil and stand condemned under §2 even though it remains unexercised. For §2 of the Act is aimed, inter alia, at the acquisition or retention of effective market control. See United States v. Aluminum Co. of America, 2 Cir., 148 F. 2d 416, 428, 429. Hence the existence of power 'to exclude competition when it is desired to do so' is itself a violation of §2, provided it is coupled with the purpose or intent to exercise that power. American Tobacco Co. v. United States, 328 U. S. 781, 809, 811, 814. It is indeed 'unreasonable, per se, to foreclose competitors from any substantial market.' International Salt Co. v. United States, 332 U. S. 392, 396. The anti-trust laws are as much violated by the prevention of competition as by its destruction. United States v. Aluminum Co. of America, supra. It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition to gain a competitive advantage, or to destroy a competitor, is unlawful.

"A man with a monopoly of theatres in any one town commands the entrance for all films into that area. If he uses that strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places.[65] He need not be as crass as the exhibitors in United States v. Crescent Amusement Co., supra, in order to make his monopoly power effective in his competitive situations. Though he makes no threat to withhold the business of his closed or monopoly towns unless the distributors give him the exclusive film rights in the towns where he has competitors, the effect is likely to be the same where the two are joined. When the buying power of the entire circuit is used to negotiate films for his competitive as well as his closed towns, he is using monopoly power to expand his empire. And even if we assume that a specific intent to accomplish that result is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did. . . .

[65] Mr. Justice Douglas' footnote at this point is as follows: "It was said in United States v. United States Steel Corp., 251 U.S. 417, 451, that mere size is not outlawed by §2. But size is of course an earmark of monopoly power . . ." Rarely has the phrase "of course" been used more blandly in the art of overruling cases.

HeinOnline -- 43 Ill. L. Rev. 774 1948-1949

"The consequence of such a use of monopoly power is that films are licensed on a non-competitive basis in what would otherwise be competitive situations. That is the effect whether one exhibitor makes the bargain with the distributor or whether two or more exhibitors lump together their buying power, as appellees did here. It is in either case a misuse of monopoly power under the Sherman Act. If monopoly power can be used to beget monopoly, the Act becomes a feeble instrument indeed. Large-scale buying is not, of course, unlawful per se. It may yield price or other lawful advantages to the buyer. It may not, however, be used to monopolize or to attempt to monopolize interstate trade or commerce. Nor, as we hold in United States v. Paramount Pictures, Inc., 334 U. S. 131, may it be used to stifle competition by denying competitors less favorably situated access to the market."[66]

Having found that monopoly power existed in both these cases, the Supreme Court sent the cases back with directions that the District Court draft new decrees based on the principle of divestiture. Far from being an extreme and punitive anti-trust remedy, the Court declared that in cases of monopoly a direct reduction in the size of the offending unit is the normal starting point in the decree:

"In this type of case we start from the premise that an injunction against future violations is not adequate to protect the public interest. If all that was done was to forbid a repetition of the illegal conduct, those who had unlawfully built their empires could preserve them intact. They could retain the full dividends of their monopolistic practices and profit from the unlawful restraints of trade which they had inflicted on competitors. Such a course would make enforcement of the Act a futile thing unless perchance the United States moved in at the incipient stages of the unlawful project. For these reasons divestiture or dissolution is an essential feature of these decrees. . . .

"To require divestiture of theatres unlawfully acquired is not to add to the penalties that Congress has provided in the anti-trust laws. Like restitution it merely deprives a defendant of the gains from his wrongful conduct. It is an equitable remedy designed in the public interest to undo what could have been prevented had the defendants not outdistanced the government in their unlawful project."[67]

The problem goes beyond forcing the sale of theatres "obtained by practices which violate the anti-trust acts."

"For it may be that even after appellants are deprived of the fruits of their conspiracy, the Schine circuit might still constitute a monopoly power of the kind which the Act condemns . . ., in spite of the restrictive provisions of the decree. Monopoly power is not condemned by the Act only when it was

[66] 334 U.S. at 104-108.
[67] *Id.*, at 128.

HeinOnline -- 43 Ill. L. Rev. 775 1948-1949

> unlawfully obtained. The mere existence of the power to monopolize, together with the purpose or intent to do so, constitutes an evil at which the Act is aimed."[68]

Decided by a safe majority of the Court, these three cases make clear both the character and the surprising scope of the new orthodoxy under Section 2.

In the first place, it is indisputable after these cases that the existence of what the Court will classify as monopoly power, coupled with a perfunctory and implied intent to use it, is illegal without reference to the techniques by which it was obtained. In the rare cases where the Court might condone the continued existence of such power, it is for the defense to prove that its blessings were thrust upon it.

As a matter of principle, it is difficult to come to another conclusion. The purpose of the Sherman Act is the broad public interest in protecting society and its members by preventing monopoly, and increasing the degree of competition in the structure of industry and commerce. The theory of the law is that competition promotes economic welfare and technological progress; provides the widest possible range of opportunities for individuals to become independent business men; and therefore constitutes the safest foundation for the class structure of society, maintaining a large and mobile middle class, within which economic power is widely dispersed rather than concentrated. If the economic result of monopoly power is achieved, why should the application of the Act depend upon the extrinsic circumstances that in gaining their power the monopolists may have violated a state statute, as in the *Northern Securities* case; or defied an order of a state court, as in the *Standard Oil* case; or extracted rebates, engaged in espionage or induced breaches of contract; or employed "novel" and "unusual" legal means of growth, such as holding companies, mergers, or trusts; or incidentally committed torts, like deliberately driving competitors out of business, through predatory price cutting or violations of other parts of the anti-trust laws, such as Section 1 of the Sherman Act, or the prohibition against price discrimination in the Clayton Act; or merely engaged in forms of business behavior the Court regards as "brutalities or tyrannies"? Such violations of law carry their own penalties. The second section of the Sherman Act should provide its distinct and independent measure of the offense it defines. The enforcement of Section 2 has often involved the serious remedy of directly reducing the size of large business units, and other far-reaching, even drastic steps. Such remedies should be imposed when the broad public purposes of the

[68] *Id.*, at 129-130.

HeinOnline -- 43 Ill. L. Rev. 776 1948-1949

law require them. Their incidence can hardly depend upon a showing that the defendant company or companies have not only achieved what the court will regard as monopoly power, but have also engaged in a variety of practices—to an unspecified degree of importance—which can be classified as illegal, by virtue of laws other than Section 2 itself, or simply as ruthless or predatory by even vaguer and more subjective standards. The remedies under Section 2 should be employed when Section 2 has been violated, and not because the defendants may also have engaged in conduct made illegal by other laws, or regarded as improper for other reasons.

Perhaps more novel than the character of the doctrine in these cases is the range of its application. The Court has lately been emphasizing the availability of Sherman Act considerations in small segments and subdivisions of the economy. When the Court talks of "monopoly power," it seems to mean a rather limited degree of economic control in highly particularized markets. The definition of the commodity being monopolized in the *Alcoa* case was one of the most original parts of Judge Learned Hand's opinion. The market supply of which Alcoa produced 90% consisted of all the virgin aluminum produced and sold as ingots, plus the virgin aluminum fabricated by Alcoa, but not secondary and scrap aluminum used as an alternative source of ingots. The supply of secondary aluminum, the Court said, was within Alcoa's control over a period of years, if it consulted its self-interest.[69] In the movie cases the markets being illegally dominated were sharply limited—the first run theatres of the large cities, or of any particular cities; the theatres of 76 towns in 6 states, in the *Schine* case, or of 85 towns in 3 states, in the *Griffith* case. *American Tobacco Co. v. United States* was concerned with monopoly in the national market for standard sized cigarettes, but not other forms of tobacco. In the *Columbia Steel* case the relevant markets were highly particularized, both geographically and in terms of the kinds of steel products being traded.[70] *Mandeville Island Farms v. American Crystal Sugar Co.* dealt with the market for sugar beets in a small area of northern California.[71] The *Yellow Cab* case concerned restraints in a small fraction of the national market for taxicabs, which itself is an insignificant part of the national market for automobiles.[72] When coupled with the scope which the *Mandeville* decision gives to the Commerce Clause in Sherman Act situations, these cases bring the anti-trust laws into every

[69] United States v. Aluminum Co. of America, 148 F. (2d) 416, 425 (C.C.A. 2d, 1945). See Adelman, *op. cit. supra* note 2, 1308-1311.
[70] United States v. Columbia Steel Co., 334 U.S. 495, 507-534 (1948).
[71] 334 U.S. 219 (1948).
[72] United States v. Yellow Cab Co., 332 U.S. 218 (1947).

HeinOnline -- 43 Ill. L. Rev. 777 1948-1949

corner of the economy, and make it as much a problem of small as of big business.

IV.

IF "the" market is to be defined for purposes of Sherman Act proceedings as the zone of immediate competition for the product of the defendant, what degree of economic control is necessary to constitute "monopolizing"? Under any theory of Section 2, monopolizing, after all, involves power as well as purpose, at least in cases which go beyond the stage of attempts. Indeed, where the requisite power exists, it is far more important than subjective evidence of purpose. What is the character of the economic power condemned by the Supreme Court as a violation of Section 2?

General statements are of little help. In the *Griffith* case, it is said that Section 2 "is aimed, *inter alia*, at the acquisition or retention of effective market control;"[73] monopoly is called "the power to raise prices or to exclude competition," in *American Tobacco Co. v. United States*;[74] "such power . . . that a few persons acting together can control the prices of a commodity moving in interstate commerce,"[75] in a District Court opinion quoted with approval in the *Tobacco* case. It is more practical to define the problem, after the immemorial habit of lawyers, by going to the cases.

In the *Alcoa* case, Judge Learned Hand was widely understood to correlate market power pretty much with capacity, despite the warning of the *United States Steel* case, and of the *Standard Oil* and *Pipe Line* decisions.[76] In measuring Alcoa's share of the market, he remarked that 90% "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not."[77] Actually, his conclusion that Alcoa had 90% of the market capacity relevant to the legal issue of measuring market power rested on a non-arithmetic market analysis. Judge Hand's argument was that Alcoa should be considered to have 90% of capacity because it controlled the market; it was not that it controlled the market because it had 90% of capacity. His evaluation of the market significance of secondary aluminum, and of ingots fabricated by Alcoa, and hence his finding of 90% capacity, can only derive from a prior conclusion that taking the market as a dynamic whole, Alcoa had every

[73] 334 U.S. at 107.
[74] 328 U.S. at 811.
[75] United States v. Patten, 187 Fed. 664, 672 (S.D.N.Y. 1911).
[76] United States v. United States Steel Corp., 251 U.S. 417, 445 (1920); Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 77 (1911); The Pipe Line Cases, 234 U.S. 548, 559 (1914). See also United States v. Reading Co., 226 U.S. 324, 355-370 (1912).
[77] 148 F. (2d) at 424.

HeinOnline -- 43 Ill. L. Rev. 778 1948-1949

weapon of permanent economic power—size, the drive to seize new opportunities as they emerged, and a dominant relationship to existing or potential competitors.

The *Columbia* case supports this view of Judge Hand's analysis. The problem for the Court, the *Columbia* case asserts, does not end with a figure representing the defendant's fractional share of market capacity. The court must decide which part of the market is relevant to the charge—in the *Columbia* case the market in issue was defined both geographically and by product,—and then examine its workings in detail to ascertain how decisions as to price and output are made. In this way the factors whose control gives leverage over the market are isolated, and a judgment becomes possible as to whether or not the defendants possess the degree of influence over price, and over the entry of competitors, which brings them within the policy of the Act. "The relative effect of percentage command of a market varies with the setting in which that factor is placed."[78] In making such a judgment, the Court will consider the probable development of the market, the strength of remaining competition, and other factors of market position.

[78] 334 U.S. at 528. Prof. Adelman asks (*op. cit. supra* note 2, 1343, n. 221) whether I should care to reconsider my opinion that this economic approach to Sherman Act problems promises to shorten and simplify anti-trust trials. It is his view that the presentation of an industry's operation considered as a whole is more likely than not to lengthen anti-trust proceedings. "Such operation does not consist of a few overt, palpable actions, but of a complex of custom and deed. In order to support a simple statement, the attorney or consultant in an antitrust action must resemble a Navajo Indian medicine man, who stands for hours dropping individual grains of variously colored sand over a narrow surface until as if by some magic an intricate pattern appears. There is, indeed, little beauty in the volumes on, say, cement; but we shall see more such cases."

Judge Learned Hand remarked that "by far the greatest part of the fabulous record piled up" in the *Alcoa* case was concerned with proving "intent" (148 F. (2d) at 432). I have not tried to divide the economic from the non-economic parts of the *Cement* case record, but there is no doubt that a very substantial segment of it is devoted to evidence of conspiracy, enforcement practices, punitive basing points and so on. The temptation to remain interested in such facts will remain at least until the bar and the courts have fully accepted the apparent doctrine of the recent cases. That will take time. Beyond that, good advocates will be loath to forego the psychological impact of the occasional scrap of colorful evidence, often more convincing than a volume of tables. See, for example, the "dancing-partner" theme in the *Socony-Vacuum* case, 310 U.S. 150, 179 (1940). Moreover, if, as has been suggested, the Federal Trade Commission proposes to win its cases by making records so big that few judges would dare to conclude that no substantial evidence lurked in the mountain of transcript to support its conclusions, the life of the anti-trust lawyer will be dreary—if prosperous—until the judges revolt. And revolt they almost surely will, under such pressure. On the other hand, the spreading doctrine of illegality *per se* permits some anti-trust cases to be settled on a motion for summary judgment. International Salt Co. v. United States, 332 U.S. 392 (1947). And with increasing emphasis in the Supreme Court on the market factors in anti-trust cases, one can hope that some trial judges will force litigants to concentrate on the economic problems of market control. I am still of the view that a thorough economic study of an industrial market can be made, even by the question-and-answer process, in far less time than is required to traverse the economic-cum-emotional issues of the typical current anti-trust case. The economic factors have been present in all the cases from the beginning. The elimination of the additional element of "specific intent" can hardly lengthen trials, unless we move into a non-Euclidean universe.

HeinOnline -- 43 Ill. L. Rev. 779 1948-1949

The issue is sharply focused in the current stage of the *Alcoa* case. There the government is seeking to divide the Aluminum Company into a number of separate corporations. Alcoa's present capacity is in the neighborhood of 50%, by most criteria of measurement, as a result of the government's refusal to sell or lease war plants to Alcoa. Nonetheless, the government asserts, Alcoa remains the dominant force in the aluminum market, by reason of its superior strength, location, and the circumstance that its competitors do not own their plants, but lease them from the government on terms which permit cancellation, or operation at low levels of capacity without penalty. Under the circumstances, the government contends, a competitive market based on private ownership does not exist, nor can private funds be expected to enter the field until the size of Alcoa is reduced.[79] Since there are in any event only three companies in the aluminum field, the situation raises a broader issue: can a major industry consisting of three sellers satisfy the standards of the Sherman Act? In view of the special history of the aluminum industry, however, perhaps the question of dividing Alcoa into separate companies is economically the most realistic and promising way to present the broader problem.

In the *Tobacco* case, the conclusion that a forbidden degree of monopoly power existed was based on the market influence of three major tobacco companies which together produced between 70% and 90% of the standard sized cigarettes. These companies followed the policy of price leadership which would be expected in a market so organized, both in their relations with the numerous sellers of tobacco and with the numerous wholesalers and retailers of cigarettes. It is true that in the *Tobacco* case the jury inferred from the conduct of the defendants that there was a conspiracy to monopolize a part of the tobacco industry—a conspiracy "to fix and control prices and other material conditions relating to the purchase of raw material in the form of leaf tobacco for use in the manufacture of cigarettes. It also appears to have been one to fix and control prices and other material conditions relating to the distribution and sale of the product of such tobacco in the form of cigarettes."[80] The evidence, however, on which this inference of combination was based, was almost exclusively that each of the Big Three companies, entirely aware of their common stake in concerted action, moved in parallel lines. It was the kind of market behavior to be predicted analytically in any market organized in this pattern. And it is the kind of market behavior commonly found in such situations.

[79] United States v. Aluminum Company of America (Equity No. 85-73, S.D.N.Y. 1948) (petition of the United States for divestiture and other relief).
[80] American Tobacco Co. v. United States, 328 U.S. 781, 798 (1946).

HeinOnline -- 43 Ill. L. Rev. 780 1948-1949

Doubt has been expressed whether the emphasis on this phase of the element of conspiracy in the *Tobacco* case would not lead to an injunction against further conspiracy, rather than a decree of dissolution addressed to size and market power as such.[81] If the prohibited degree of monopoly power exists only by reason of the combination of defendants, the argument goes, it can be dispelled by forbidding them to act "collectively," in the phrase of the *Paramount* case. Such doubts should have been reduced by the three movie cases of the last term, and particularly by the *Paramount* case. The *Paramount* case decides that as many as eight companies can together constitute a monopoly under Section 2, their combination being shown by their similar behavior, and their "acquiescence" in many practices. And the *Paramount* case strongly implies, if it doesn't flatly say, that a divestiture of theatre ownership by the major companies is the crucial provision of an adequate decree. That reading of the case has been accepted by one of the defendants, at any rate, as the basis of an agreed settlement. Any other interpretation would be difficult to square with the emphatic language in the opinions on the significance of size as an element in market power, and on divestiture specifically as the remedy indicated, if on remand it is found that the defendants possess monopoly power in first-run theatres, or any substantial part of the first-run market.

One might contend that in the *Paramount* case the defendants were linked into a monopolistic group through what the Court repeatedly calls a conspiracy to restrain and monopolize, involving persistent recourse to illegal means of doing business. Actually, at many specific points, the conclusion of combination was reached as an inference from behavior. "It is not necessary to find an express agreement in order to find a conspiracy. It is enough that a concert of action is contemplated, and that the defendants conformed to the arrangement."[82] The remaining question, however, under circumstances where such traditional elements of illegality are lacking, is how closely defendants have to be connected in order to constitute a collective monopoly? Will the courts conclude that sellers are "conspiring," or at least combining, when they "are (almost) unaware of the facts"?[83]

The legal problem of proof should be framed by the economic realities of the market situation. In many markets a large share of supply is produced and marketed by one firm or a small group

[81] Rahl, Book Review (1948) 43 Ill. L. Rev. 421, 425.
[82] 334 U.S. at 142.
[83] Adelman, *op. cit. supra* note 2, at 1322. And, at 1343 "there has clearly been a shift of attention from literal collusion to what might be called the collusive effect of independent actions taken in mutual awareness."

HeinOnline -- 43 Ill. L. Rev. 781 1948-1949

of firms conspicuously larger than their competitors. In such markets customs or practices often exist which eliminate or severely restrict price competition. However such practices originated, their survival does not ordinarily depend on agreement, but on the common interest of the dominant sellers in avoiding price competition. Each seller has an equal interest in a policy of "live and let live," an equal distaste for "cutthroat competition." The dominant firm may announce its price, and others usually respond. Each seller understands that no one would change his share of the market in the event of a general price cut, and that a price change will normally be met by the major competitors. Thus the function of guessing what prices will clear the market tends to be delegated to a price leader, or occasionally to several market leaders, rather than left to the market itself. Often there are practices designed to eliminate uncertainty as to the expected response of others, as by way of exchange of information. Price quoting procedures may develop as methods for preventing price competition (or "spoiling the market," as it seems to the dominant sellers), sometimes (e.g., in the case of basing point practices) to elaborate lengths which dramatize for each seller the futility of any effort on his part to alter his share of the market by price-cutting. The effect of such practices is to substitute an administered price for a market price, with far-reaching consequences to output, and perhaps also to the rate of technological progress. Arrangements of this kind exist in great variety. Detail apart, however, they all represent an assumption by sellers (or buyers, in the case of markets dominated by a few large buyers) of the authority to make decisions about the level of prices and hence of output; these are peculiarly and notably the functions which the law expects to be performed by markets or by the government and not by individuals.

A recent instance will illustrate the point. At the Hearings of a Sub-committee of the Senate Committee on Interstate and Foreign Commerce, on the impact of the basing point decisions, Senator O'Mahoney discussed the extent of market dominance possessed by the few big companies in many industries, as follows:

> "Now, the fact is that if you take into consideration all of the primary industries of the United States, you will find the same patent fact: three or four or five or eight of the largest companies control the bulk of the business.
>
> "That is true, for example, in steel. We have had many instances of it. In steel, the United States Steel Co., which is the largest, with seven other large companies, controls about 79 percent of all the steel ingot producing capacity of the United States. It means, of course, that the people of this country, who need the steel, are dependent upon the decision of the managers of these groups for how much they can get

HeinOnline -- 43 Ill. L. Rev. 782 1948-1949

and, incidentally, for the price that they must pay for it.

"Early this year, the Joint Committee on the Economic Report, of which Senator Taft is chairman, after the steel companies had announced in February a sudden increase in price of certain products, called together in a public hearing the heads of the United States Steel Co. and Bethlehem, and others. And there the curious statement was made by Mr. Homer, the president of the Bethlehem Steel Co., in response to a question which I asked him, that Bethlehem raised the price 'in order to be competitive.'

"I asked Mr. Homer whether the Bethlehem Steel Co. had conferred with United States Steel before this price was raised. Of course, I knew his answer would be 'No.' He did not confer; there was no understanding; there was no concerted effort.

" 'Well,' I said, 'then, Mr. Homer, why did the Bethlehem Co. increase the price of steel?'

"His answer was, 'Well, one of our salesmen learned that the United States Steel Co. had increased the price, and so, to be competitive, we increased it also'."[84]

Where an industry is organized in this general way, price, output, and opportunities to enter the business are akin to those which would obtain under conditions of monopoly. The economic results, the social results, and the political results of the market structure are those which are condemned in principle by the Sherman Act. That is to say, the necessary consequence of the economic organization of the industry is that the large and dominant sellers, if they have a decent regard for their own interests, will act as if they had "combined," in the sense of the *Tobacco* and *Paramount* cases, although their officers may never have talked to each other, even on the phone or the golf course. The market power of the dominant firms is used "collectively," in the phrase of the *Paramount* case. Under such circumstances, why shouldn't the courts infer the required degree of combination from the fact that the economic power of the separate companies has been effectively combined for purposes of price policy, very much as the courts infer "statutory intent" to maintain a monopoly from the fact that monopoly power exists? And isn't such a process of inference close to being accepted practice today?

The effective economic pooling of market power should support the legal conclusion that the result was intended. In the *Cement* case, for example, evidence of monopolistic price uniformity was a powerful factor in supporting the Federal Trade Commission's infer-

84 United States Senate, Subcommittee of the Committee on Interstate and Foreign Commerce, 80th Cong., 2nd Sess., Hearings on S. Res. 241, Study of Methods of Competition in Commerce (June 2 and 4, 1948) 45. See also United States Congress, Joint Committee on the Economic Report, 80th Cong., 2nd Sess., Hearings pursuant to §5(A) of P.L. 304, Increases in Steel Prices (1948) 65-72. For a realistic study of price behavior in a situation of precarious monopolistic competition, see Learned, Pricing of Gasoline: A Case Study (1948) 26 Harv. Bus. Rev. 723.

HeinOnline -- 43 Ill. L. Rev. 783 1948-1949

ence of an agreement to maintain a basing point system, individual acquiescence in the plan being enough to show individual participation. True, in that case there was a trade association, and some evidence of action to police the plan. But the Supreme Court gave emphatic consideration to the nature of the price quoting plan, as a device for restricting price competition, and to the fact of price uniformity; and it quoted with approval a remark of the Seventh Circuit, to the effect that in the light of price uniformity itself, any conclusion other than that of a price fixing agreement "would do violence to common sense and the realities of the situation."[85] Where the legal problem is to prove that economic power has been pooled, the best evidence should be an economic demonstration that such a pooling has occurred, for price purposes, rather than testimony as to coercive or illegal trade tactics supposed to prove "conspiracy."

The principal evidence relied upon in the *Tobacco, Paramount* and other recent cases to support an inference of combination would be equally available in many situations of central economic importance, where a few companies acting in parallel ways have a substantial degree of control over price in the market by reason of their size, and the fact that for purposes of price policy—"the central nervous system of the economy"—their economic power has been effectively pooled, with or without actual agreement. On the analogy of the *Paramount* case, their offense, viewed collectively, would be the possession and inevitable pooling of a forbidden degree of market power; and the basic remedy proposed by that case would be a direct reduction of the illegal market power by procedures of reorganization under judicial control.

The movie cases, then, seem to confirm and carry forward the doctrine of *Alcoa* and *Tobacco* decisions, to this effect:

1. The existence of a prohibited degree of economic power is illegal, whatever the circumstances of its origin or development, if it is accompanied by an intent to use it. This intent may be "conclusively presumed," if the analogy of the *Trenton Potteries* doctrine is accepted, or freely inferred from the existence of the power, as in the *Alcoa, Griffith* and other decisions;

---

85 United States Maltsters Associations v. FTC, 152 F. 2d 161, 164 (C.C.A. 7th, 1945). The *Maltsters* case involved a trade association similar in many ways to those scrutinized in the *Maple Flooring* decision and in The Sugar Institute v. United States, 297 U.S. 553 (1936). There was a plan for exchanging information, announcing prices, and holding frequent meetings as well as a basing point plan. By treating the issue as one of "price-fixing," however, the Court avoided much of the inquiry into surrounding circumstance which helped to make the earlier cases unpredictable. On the *Cement* case generally, see Zlinkoff and Barnard and Adelman, *loc. cit. supra* note 2; a forthcoming comment in the Yale Law Journal; Head, *The Basing Point* Cases (1948) 26 Harv. Bus. Rev. 641.

HeinOnline -- 43 Ill. L. Rev. 784 1948-1949

2. In markets dominated by a few large sellers, their economic power will be viewed collectively, and the legal conclusion of combination will be inferred largely from the economic fact that a pooling of such power for price purposes has in fact taken place;

3. The normal remedy in cases of realized monopoly power is to reduce the size of the business units, so as to restore conditions of workable competition in the market.

V.

IT has been suggested that the opinion and the result in *United States v. Columbia Steel Co.* are inconsistent with such an analysis of the recent cases under Section 2.[86] On the contrary, the *Columbia* case tries to use the developing "market power" test of legality under Section 2 in the setting of a problem to which it is inapplicable, with paradoxical results.

In the *Columbia* case the government sought to enjoin the United States Steel Corporation, an enterprise with $1,500,000,000 in assets, from purchasing the assets of Consolidated Steel Corporation, the purchase price being about $8,000,000. Consolidated was the largest independent fabricator of certain steel products on the West Coast. It purchased its raw material, rolled steel, on the market. United States Steel had no West Coast fabricating facilities duplicating those of Consolidated. Before the war steel on the West Coast was priced from eastern basing points. Bethlehem had West Coast fabricating facilities, however, and United States Steel had made plans before the war to erect a fabricating plant in California. During the war the Government built large steel rolling plants in the West, notably a $200,000,000 plant at Geneva, Utah. Western steel using industry has made rapid advances. And the geography of the steel business had begun to change even before the basing point system was substantially outlawed by the Supreme Court at the last term, by reason of the rise in freight rates and the abolition of land grant rates.

In 1946, the Government persuaded United Steel to reconsider its refusal to bid for the Geneva plant, and finally arranged its sale to United States Steel for $47,500,000, on condition that the Company spend at least an additional $43,000,000 of its own funds, to erect additional facilities both at Geneva and at Pittsburg, California, for further processing the basic products of the Geneva plant. United States Steel's bid stipulated that Geneva products would be sold with Geneva as a basing point, which promised to reduce the price of semi-processed steel on the West Coast. As a step in the

[86] 334 U.S. 495 (1948). See Rahl, Book Review (1948) 43 Ill. L. Rev. 421, 423 (n. 10); Comment (1948) 43 Ill. L. Rev. 523.

HeinOnline -- 43 Ill. L. Rev. 785 1948-1949

sale of the Geneva plant, the Attorney General issued an opinion to the effect that the transaction was not barred by the anti-trust laws. The President of Consolidated had had conversations looking to a sale of the Consolidated business with representatives of Bethlehem, Kaiser and United States Steel before the Geneva plant was bought by United States Steel. Thereafter, the sale under attack in the *Columbia Steel* case was arranged, the Steel Company's experts reporting that equivalent facilities would have cost at least $14,000,000 to build. Consolidated representatives had testified that their purpose in promoting the sale was to get their equity out of the steel business at a time of favorable prices.

The theory of the Government's case was that the acquisition of Consolidated would constitute an unreasonable restraint of trade in three markets—(1) the rolled steel market, in that Consolidated would henceforth buy only from United States Steel, thus diminishing competition among manufacturers of rolled steel products for Consolidated's business; (2) the market for structural fabricated products and (3) for pipe, where competition between Consolidated and United States Steel subsidiaries would be eliminated by the merger. The Government also contended that the purchase of Consolidated was a step in a concerted plan for growth to monopoly power on the part of United States Steel.

The Court stated at the outset of its opinion that although this was not an amalgamation by stock purchase, the public policy announced in Section 7 of the Clayton Act was to be taken into consideration, as a matter of necessity and not of discretion, in "determining whether acquisition of assets of Consolidated by United States Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints."[87] Section 7 of the Clayton Act prohibits such combinations where the effect of the acquisition may be (1) to substantially lessen competition of the two merging corporations or (2) to restrain such commerce in any section or community, or (3) tend to create a monopoly of any line of commerce. Section 7 has had a checkered history before the Supreme Court, and perhaps the Court was reluctant to reverse a construction which Congress had not changed by legislation. Nonetheless, both old and recent cases under this and cognate parts of the Clayton Act have made it clear that the word "may" in Section 7 is designed to nip monopoly in the bud, and to prevent transactions as potential restraints even though they would not be illegal as actual restraints under Section 1 of the Sherman Act. Furthermore the first proviso of

[87] 334 U.S. at 507 (n. 7).

HeinOnline -- 43 Ill. L. Rev. 786 1948-1949

Section 7—that the acquisition is illegal where it "might substantially lessen competition" between the two competing corporations, would seem to apply wherever the combined units competed to any extent, since the adverb "substantially" clearly modifies the word "lessen" and not the noun "competition." However, there is some case law which confuses the effect of these provisos.[88] And in the *Columbia* case the government for some reason failed to base its case on Section 7. The Court, having started with the proposition that the policy of Section 7 would be taken into consideration, thereafter ignored it.

The issues to be determined, the Court held, were (1) whether the transaction *resulted* in an unreasonable restraint of trade in the relevant sub-markets for steel products, and (2) whether it constituted part of a plan for gaining monopoly control of the steel market. Declining to hold that all steps towards vertical or horizontal integration were illegal per se, at least when accomplished by merger rather than by the direct construction of new facilities, the Court painstakingly examined the economic evidence to measure the extent to which the combination would actually eliminate preexisting competition (and to lesser extent potential competition) in rolled steel, in certain fabricated products made by Consolidated, and in pipe. Its conclusion in each instance was that even in the market areas where Consolidated did business, and as to the particular steel products it used or made, the effect of the combination would be insubstantial—3% in the Western part of the rolled steel market the Supreme Court regarded as relevant, and negligible in eliminating actual or potential competition between Consolidated and subsidiaries of United States Steel either for structural steel or for pipe.

On the basis of these facts, the Court might well have upheld the purchase of Consolidated's assets even under the policy of Section 7 of the Clayton Act. The addition of facilities costing $8,000,000 to an enterprise with assets of $1,500,000,000 could hardly be considered to result in the "probability," or even the "substantial possibility,"[89] that competition would be materially lessened, especially where the government had just succeeded in persuading United States Steel, by buying and enlarging the Geneva plant, to spend about $90,000,000 for increased capacity on the West Coast; and

---

[88] International Shoe Co. v. FTC, 280 U.S. 291 (1930). Comment (1948) 57 Yale L. J. 613, 618-619.

[89] Compare the interpretation given cognate provisions of other parts of the Clayton Act, as amended, in FTC v. Morton Salt Co., 334 U.S. 37, 44-51 (1948), with Standard Fashion Co. v. Magrane-Houston Co., 258 U.S. 346 (1922); United Shoe Machinery Corp. v. United States, 258 U.S. 451 (1922); Corn Products Company v. FTC, 324 U.S. 726 (1945).

HeinOnline -- 43 Ill. L. Rev. 787 1948-1949

where the actual competition between the two companies was found to be insubstantial.

The Court considered the issue, however, under the supposed tests of the *Paramount* and *Yellow Cab* cases, both of which for these purposes rest on Section 2 rather than Section 1. The Court does not indicate the degree of control resulting from a combination which in its view would invalidate a merger, nor the standard to be applied. If the acquisition "results in or is aimed at unreasonable restraint,"[90] then it is illegal, after a full analysis of the particular market which the transaction affects, the number and prospects of remaining competitors, and the actual market leverage created by the transaction. Its statement of the elements to be analyzed for purposes of the Sherman Act in evaluating the degree of control in different market situations is perhaps the most important part of the *Columbia* case. It puts the legal issue on a broad and realistic economic foundation.

However, the test in judging the legality of mergers has never been the achievement of full market control.[91] The Court's analysis, nevertheless, seems to imply that the governing test for the legality of an acquisition of assets is the test of realized monopoly power. It is hard to imagine that the Court intended to go so far, in view of the strength which it has given in other situations to the preventive and prophylactic purpose of the Clayton Act.[92] And the basic railroad cases had held combinations illegal, even before the Clayton Act, where the business combined was substantial, although the results hardly constituted even regional monopolies, and the competition actually eliminated was negligible. The *Columbia Steel* case could hardly be cited to authorize the United States Steel Company to purchase the assets of Inland or Republic, for example. Nonetheless, a distinct ambiguity survives the *Columbia* case as to the nature of the test it employs. That it was decided 5-4, despite the extremely weak character of the government's argument, from the point of view of gastronomic jurisprudence, would indicate that it does not give the merger movement as much new impetus as is sometimes supposed. Although in the *Columbia* case the Court invoked cases of realized monopoly power, one may reasonably expect the test for mergers to develop as one of probable and sub-

[90] 324 U.S. at 527. The Court distinguishes trade practices regarded as illegal *per se,* without reference to the degree of market restraint involved, 522-523, such as price-fixing, boycotts, and tying clauses in patent cases. As to the latter, it might be more accurate to say that under Section 3 of the Clayton Act the degree of market control required is different. See Note (1948) 57 Yale L. J. 1298.

[91] Northern Securities Co. v. United States, 193 U.S. 197 (1904), and cases cited in note 13 *supra.*

[92] *E.g.,* International Salt Co. v. United States, 332 U.S. 392 (1947).

HeinOnline -- 43 Ill. L. Rev. 788 1948-1949

stantial narrowing or limitation of competition, not of full blown monopoly. After all, as the Court has pointed out, all monopolies are also restraints of trade, but all restraints of trade are not monoplies.[93]

The government's case was equally weak on the monopoly issue of the *Columbia* case. Since the original decision in the *Steel* case, United States Steel's share of steel production has dropped steadily—from over 50% to less than 35%. It has undertaken only a few sporadic steps of growth by merger. An important phase of its policy has been to avoid growth to a relative position in the market which might invite renewed anti-trust attack. It could hardly have been seriously contended that the purchase of an $8,000,000 company, at a time when the government was pressing United States Steel to spend $90,000,000 on other West Coast steel facilities, proved an intent to monopolize either the West Coast or the national steel business.

Nonetheless, four justices dissented with great force. Their view was that the existing size of the United States Steel Corporation carried with it such consequences of economic power in the steel market that its further growth should be watched with jealous concern for the larger purposes of the Sherman Act. Whether the dissenters would apply this restriction to further growth accomplished by the investment of profits or reserves does not appear. Justice Douglas accepted the majority's premise that the test of legality under the circumstances of the *Columbia* case is whether the acquisition *actually results* in a substantial diminution of competition. He does not rely upon the policy of Section 7 of the Clayton Act, but seems to contend that under Section 1 of the Sherman Act acquisition should be forbidden on the analogy of *International Salt Co. v. United States*—a case drawing strength from the "may substantially lessen competition" language of Section 3 of the Clayton Act.

The view of the dissenters would have been more persuasive if they rested more clearly on the policy of Section 7 of the Clayton Act, or if they had been addressed to a general anti-trust suit against the major steel companies as a collective monopoly, like the industry-wide *Paramount* case. The present structure of the steel industry raises difficult questions under Section 2, after the *Tobacco* and *Paramount* cases, as a monopolistic pooling of market power. Such considerations, however, scarcely apply against the United States Steel Company alone, in its purchase of an $8,000,000 local manufacturing facility.

[93] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226 (n. 59) (1940).

HeinOnline -- 43 Ill. L. Rev. 789 1948-1949

Conclusion

SOME of the justices of the Court, and other students of the development of the anti-trust laws, have expressed concern lest the Court, in dealing with the legality of modern forms of big business organization, undertake legislative decisions more properly within the discretion of the Congress. A historical view of the purpose and growth of the anti-trust laws should help to allay such doubts.

The Sherman Act has broad and simple goals. Congress contemplated that the Act prevent the social evil of monopolistic concentration of economic power, and affirmatively assure society the advantages of widely dispersed economic authority and opportunity. The procedure adopted, as Justice Reed has recently pointed out, was to delegate to the courts wide responsibility for applying the Act to changing economic conditions.[94] The far-reaching extent of judicial power under the anti-trust laws is part of the historical pattern of our constitutional practice, in which the judiciary has always exercised extraordinary authority. The statute itself "as a charter of freedom . . . has a generality and adaptability comparable to that found to be desirable in constitutional provisions."[95] It was designed to deal not only with the forms of monopoly which existed at the time it was passed, but with all the circumstances in which the problem of monopoly and restraint of trade might subsequently arise. In Chief Justice White's phrase, the Act was drawn to reach arrangements, whatever their form, which might be thought to produce "some of the baneful effects" of monopoly. Around the turn of the century, the dominant types of monopoly organization were trusts, mergers or other combinations which in many industries embraced all or almost all existing capacity. In oil, tobacco, whiskey, sugar, steel and other vital areas, a single combine made 90% or more of market supply. Moreover, in many cases, the dominant combination had reached its market position along a trail of rough and tumble tactics which have now become relatively rare. Since the middle twenties, increasingly, a totally new pattern of industrial organization has emerged in many industries. 60% to 80% of supply is produced by 2 or 3, or sometimes as many as 10 or 15 firms. Overt agreements among them are of diminishing importance, when compared with the heyday of trade association activities during the late 'twenties and early 'thirties. Ruthless and oppressive trade tactics are less common than in the past. The problem of prevailing importance in the most important sector of the economy is to formulate a policy towards the economic organi-

94 United States v. Columbia Steel Co., 334 U.S. 495, 526 (1948).
95 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360 (1933).

HeinOnline -- 43 Ill. L. Rev. 790 1948-1949

zation of markets, where, for purposes of price and output, the economic power of a few dominant firms is in fact pooled, in large part by the separate and parallel response of the big firms to their own interests, with results which approximate those which would obtain under monopoly.

In the last few years the Supreme Court has worked out a doctrinal basis for effective action to secure the great ends of the Sherman Act in cases of this kind. It has directed attention to the necessity for a full analysis of actual market situations, in all their variety and complexity, to determine whether in fact private groups have acquired or maintained monopoly power over price. That power, the Court has said repeatedly, can be exercised either by a competitive market or by the government, never by private groups. Where such power is held by a single firm, its existence is illegal. Where it is achieved by direct combination, it is illegal per se, and intent to violate the statute is conclusively presumed. Where such market power is informally shared by a small group whose influence is in fact used in common to avoid price competition, their combination for purposes of the Sherman Act has been inferred largely from their market behavior. In these cases the pooling of the market power of the large sellers or buyers, with the result of monopolistic pricing, depends not on their actual agreement, but on the parallelism of their response to market forces, in view of their size and market position. It follows that the appropriate remedy, as in cases of monopoly achieved by a single firm, is not merely to forbid their association, but to reduce their size. The goal of such proceedings is to reorganize the industry into efficient smaller units, sufficiently numerous and independent so that the results of workable competition can reasonably be expected from the operation of market forces.[96]

The purposes of the Sherman Act have not been fully realized in our economic life. Its history is one of futility and half-measures, of gallant attempts, occasional victories, frequent retreats, of false starts and missed opportunities. Above all, it is a history marked by the absence of any planned and systematic effort to gain the basic strategic ends of the statute. Cases are brought piecemeal, in response to the pressure of complaints, or the political winds. During the last few months, for example, we have witnessed a well-publicized anti-trust attack on inflationary price rises, especially in the most competitively organized sectors of the economy. It would be hard to imagine a more complete misunderstanding of the prob-

[96] As to the possibility of efficient operations under such circumstances, see note 2 *supra*.

HeinOnline -- 43 Ill. L. Rev. 791 1948-1949

lem of inflation, or a more complete waste of the time and energy of the Department of Justice and the Courts.

Not even the most optimistic and single-minded trust buster could expect the Sherman Act to become a revolutionary instrument. The existing structure of industry and commerce has enormous historical momentum. It contains many elements of monopoly, some protected by law. At the same time, there is still a good deal of scope for innovation and enterprise. New men and new ideas keep bursting through the neat fences of existing interests, either with new firms or new techniques. The problem is not one of choice between perfect competition and perfect monopoly. The issue for government and society is whether to invest considerable effort against vigorous resistance in order to alter the balance in favor of the competitive drives of economic and social life. The implications of the recent cases in the Supreme Court, if applied to some of the most important of our industries, could materially reduce the degree of concentration of economic power in society, and tend cumulatively to influence the development of industry in more competitive forms. One can readily see the vitality of anti-trust policy in various parts of the economy. The process of railroad consolidation was stopped before Hill or Harriman took over the entire railroad network of the United States. In the steel industry, Big Steel won its anti-trust case, but embarked on a policy of caution in growth, out of respect for the weapon which just missed being applied to it. And perhaps most striking of all, Alcoa's share of the aluminum market has dropped from 90% to 50% in a few years, as a result of a government policy for the disposal of war plants which was rooted in the tradition of the anti-trust cases. Much more can be done to increase the competitive character of the economy, by applying the newer conception of the Sherman Act to the principal industries and markets of the economy.

To guide the evolution of industry and commerce in a more competitive direction is one of the vital jobs of American democracy. It cannot be done without the support of the courts. But it cannot be done by the courts alone. Our chances of materially increasing the degree of competition in the economy at large depend on the ability of the Department of Justice and the Federal Trade Commission to conceive and carry out a program comparable in imagination to those of our strategic bombing operations during the war. Commodities, concentrations of power and market practices should be selected for litigation in order of their priority, on the basis of a dynamic analysis of the way in which the economy actually works. We can expect worth-while results from our investment in the

HeinOnline -- 43 Ill. L. Rev. 792 1948-1949

anti-trust laws only if they are directed against targets of general importance to the economy as a whole.[97]

Our society depends on unregulated markets as its main institutions for allocating resources and income. If we wish to remain a democratic community, we have a large stake in keeping this function one for the market, rather than for government agencies, undertaking to direct the detail of business transactions throughout the economy. The transfer to government of general responsibility for allocating resources and fixing prices would seriously disturb the balance of social power among business, labor and the state, and materially reduce our expectations of continuing as a free society. The market, however, can do an effective and satisfactory job only if it is reasonably competitive. Our best hope of remaining a free society is to reorient our economic growth in a clearly competitive direction through the vigorous application of the anti-trust laws to our main current problem of monopoly—the structure of our major industries, led in many cases by a few dominantly large units.

There is one further caveat to be entered. If we continue to inflate the money supply more rapidly than the supply of goods and services can be increased, the entire market mechanism will have to be abandoned, in favor of allocations, price controls, and governmentally administered priorities.[98] Competitive markets can function satisfactorily if, but only if, we first achieve some stability in the flow of money payments. Unless our legal institutions for the control of fiscal and monetary policy are effectively used to stabilize the level of national income in money, we shall have to cope with inflation by the infinitely more cumbersome, restrictive and expensive technique of direct price control. In that setting, there will be little point in thinking about the larger social purposes of the anti-trust laws. Price controls and priorities, as our war time experience demonstrated anew, are far easier to apply and enforce in well organized monopoly industries than in scattered, diffused and undisciplined competitive markets.

[97] See Ise, The Futility of Trust-Busting, 38 Am. Ec. Rev. Supp. 488, 493-494 (1948). For another view, resting on a premature judgment of legal potentialities, see Galbraith, Monopoly and the Concentration of Economic Power in Ellis, Ed., Survey of Contemporary Economics (1948) 99, 115-120.

[98] See Rostow, Inflation Can Be Stopped (1948) 24 Va. Q. Rev. 368.

HeinOnline -- 43 Ill. L. Rev. 793 1948-1949