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TEMPORARY NATIONAL ECONOMIC COMMITTEE

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MONOGRAPH No. 38

A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS

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Temporary National Economic Committee

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Monograph No. 38

A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS

BY

MILTON HANDLER

ACKNOWLEDGMENT

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The Temporary National Economic Committee is greatly indebted to this author for his contribution to the literature of the subject under review.

The status of the materials in the volume is precisely the same as that of other carefully prepared testimony when given by individual witnesses; it is information submitted for Committee deliberation. No matter what the official capacity of the witness or author may be, the publication of his testimony, report, or monograph by the Committee in no way signifies nor implies assent to, or approval of, any of the facts, opinion, or recommendations, nor acceptance thereof in whole or in part by the members of the Temporary National Economic Committee, individually or collectively. Sole and undivided responsibility for every statement in such testimony, reports, or monographs rests entirely upon the respective authors.

(Signed) JOSEPH C. O'MAHONEY,
Chairman, Temporary National Economic Committee.

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LETTER OF TRANSMITTAL

Hon. Joseph C. O'Mahoney,
Chairman, Temporary National Economic Committee,
Washington, D. C.

My Dear Senator: I have the honor to submit for the record a study of the construction and enforcement of the Federal antitrust laws, prepared in the Treasury Department for the Temporary National Economic Committee.

You will recall that when the Committee first began its work Herman Oliphant, then the General Counsel for the Treasury Department, was the Treasury representative on the Committee. Because he was a recognized authority in the field of trade regulation, to this Department was assigned the preparation of a survey of the statutes and decisions under the antitrust laws. The work was begun under Mr. Oliphant's direction and with Milton Handler, associate professor of law, Columbia University school of law, and Special Assistant to the General Counsel of this Department, in immediate charge of the work. Since the unfortunate and untimely death of Mr. Oliphant on January 11, 1939, the work has been continued and brought to a conclusion by Mr. Handler, under the general supervision of the writer as the Treasury representative on the Committee.

In the collection of the material which forms the basis for the study Mr. Handler had the benefit of workers both within and without the Department. However, the legal conclusions reached in the report, as well as the views expressed therein as to the desirability of certain changes in the laws relating to monopoly, restraint of trade, and unfair competition, are those of Mr. Handler and not of the Department, which does not express any view as regards any of the subjects under discussion in the report. However, the writer has no hestitancy in saying that he is personally in accord with the views expressed and believes that they merit the careful consideration of the Committee.

Sincerely yours,

Joseph J. O'Connell, Jr.,
Special Assistant to the General Counsel, Department of the Treasury.

February 1, 1941.

INTRODUCTION[1]

A half century has elapsed since Congress gave expression in legislation to the American faith in free competition as a system of economic organization and control. By this legislation, it sought to preserve competition from the extinction which threatened it. These 50 years have witnessed many changes in the American way of life and in the structure and operation of our business system. The dreaded trusts of the past century are but pygmies in comparison with our present day industrial giants. Activities subversive of competition are today conducted on a scale and under forms beyond the conception of the framers of the legislation of 1890. Competition still exists, but it has been compromised by organizations, arrangements, and practices which are alien to its spirit and which impede its proper functioning.

Those who have lost faith in competitive institutions attribute this failure to the allegedly mistaken purpose of the Sherman Law. To them, competition has been tried and found wanting; they indict it as inefficient, wasteful, and obsolete; it is an archaic system, contrived for the needs of petty trade but utterly unsuited for the highly organized and war-strained economy of the twentieth century. Others profess agreement with the objectives of the legislation which they characterize as laudable but unattainable; the Sherman Act, to their way of thinking, like national prohibition, is incapable of enforcement.

Under these viewpoints the Sherman law is beyond redemption and must give way to new legislation based upon different conceptions and pointed toward different objectives.

The failure of a statute, however, may result not from a misconceived policy but from faulty draftsmanship or from frustrating judicial construction; the objectives of a law may remain unachieved not because they are unattainable but because they have not been earnestly pursued by vigorous, impartial, and effective enforcement. Laws to a large extent are only as effective as the men who enforce them. The procedural and substantive limitations of a statute may be overcome by the resourcefulness and energy of enforcement agencies, but laws, no matter how perfect, are never self-executing, and without sufficient manpower, remain a pious aspiration untranslated from the realm of words to that of action. A law which has never been truly enforced cannot be said to be unenforceable.

The wisdom of the economic philosophy underlying the Sherman Act has been considered from various angles by the Temporary National Economic Committee in its extensive hearings and has been the subject of study, direct and indirect, on the part of many of the other agencies associated in this investigation. The Treasury's part in the general diagnosis has been the examination of (1) the substantive and

[1] Grateful acknowledgment is made to Lawrence Eno, Esq., of the New York Bar, for his valuable assistance in the preparation of that part of this report dealing with the application of the antitrust laws to loose-knit confederations and to Sidney Barrows for assisting with the proofs.

procedural provisions of the antitrust laws, (2) the court decisions construing such laws, and (3) the agencies and methods of enforcement, to ascertain whether shortcomings of statute, judicial decision, or machinery of enforcement may fairly be held accountable, in whole or in part, for this failure of our antitrust legislation. This report embodies the results of the various studies conducted by the Treasury, stated as succinctly and summarily as is possible.

SUBSTANTIVE LAW

The conduct condemned by the Sherman Act falls into two general categories, (1) restraint of trade, and (2) monopoly. What is a restraint of trade and what constitutes a monopoly are left undefined by the statute. The legal repression of restraint of trade and monopoly long antedated this legislation, both terms having a common law significance. The case-law development of the concept of restraint of trade had been extensive, the courts over a long period of years having passed upon the legality of a wide variety of agreements and concerted arrangements. The statute, read in the light of this body of authority, possessed a concreteness of meaning not otherwise apparent on its face. Less helpful, however, were the common law precedents dealing with monopoly since they treated of situations factually and conceptually different from those arising after 1890.

Enforcement officials were called upon to apply the statute to two types of combines, (1) loose-knit confederations and (2) close-knit integrations. The loose-knit combinations involved the elimination of competition among independent business enterprises either by voluntary accord through the fixation of prices, allotment of customers, division of territories, and curtailment of production or to the involuntary exclusion of competitors through boycotts and similar restrictive practices. The close-knit integrations related to the combination of companies by trust, holding company, merger, or consolidation.

What criterion was to be applied by the courts in determining the legality of such concerted action on the part of business men? Was every arrangement between competitors by which prices were directly fixed or indirectly affected unlawful, whether or not the parties to the combine were in substantial control of the trade or industry and in a position to dictate the market price? Did the statute condemn agreements setting reasonable prices? Could business men resort to price arrangements as a corrective to a competition which no matter how benevolent in theory was ruinous in practice? Was every acquisition of the corporate stock or physical assets of a competitor—even the formation of a partnership—interdicted by the law? If some integration was permissible, at what point did the combination of companies become unlawful?

What guidance did the legislation itself provide to the solution of these perplexing problems? The statute in section 1 condemned every contract, combination, or conspiracy, in the form of a trust or otherwise, in restraint of trade or commerce among the several States. Did this mean that every agreement between two or more competitors constituting a technical restraint was prohibited? Was every purchase of a competing business, no matter how extenuating the circumstances, forbidden?

The broad inclusiveness and uncompromising severity of the statutory language seemed to permit of but one answer. A literal reading of the law would have condemned every arrangement deemed a restraint of trade at common law, including the familiar covenants not to compete ancillary to the sale and purchase of a going business or appurtenant to a contract of employment. It was to avoid the absurdities of such a construction that the rule of reason was adopted.

In view of the widespread misconception of the rule of reason, a few words concerning its genesis and scope may not be inappropriate.

RULE OF REASON

The concept of reasonableness is not unfamiliar to our law. A standard of reason is employed in many branches of law to measure the legality of human conduct. In some fields the standard rises barely above the unanalyzed subjective reaction of those entrusted with its application. In other fields, the rule of reason is a term of art with a history and a logic of its own. As the term "reasonableness" itself invites a looseness of analysis, and in view of the numerous clusters of meaning that envelope its use in the law, it is particularly important that its precise meaning in the field of restraint of trade be clearly outlined.

Reason as the test of legality of a restraint of trade was first applied in the classic case of *Mitchel* v. *Reynolds*.[1] Its use was initially confined to the field of ancillary restraints [2] such as covenants by sellers not to compete with their purchasers or agreements not to compete on the part of employees, purchasers, lessors, lessees, and partners. The reasonableness of an ancillary restraint was determined in general by the needs of the convenantee (i. e., the person in whose favor the covenant was given), the consequences of the restraint upon the covenantor, and the effect of the restriction on the public. Primary emphasis was given to the spatial and temporal scope of the restriction, and agreements were generally upheld if no broader in area and no longer in time than the needs of the covenantee required. A vast body of learning has developed in respect of the reasonableness of ancillary agreements not to compete and numerous and minute distinctions have been drawn, none of which is material to the present inquiry. A convenient summary of the present law on the subject is to be found in the Restatement of the Law of Contracts, prepared and published under the auspices of the American Law Institute, the

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[1] 1 P. Wms. 181, 24 Eng. Rep. 347 (1711).

[2] By an ancillary restraint is meant an agreement which, though restrictive of competition, is an integral part of a larger, lawful transaction. The historic examples of such ancillary restrictions are the agreement of a seller of a business as part of the contract of sale not to compete with his purchaser, the agreement of an employee not to compete with his employer after the conclusion of his employment, an agreement by partners not to compete with the partnership, an agreement by a purchaser not to use the article purchased in competition with the seller and restrictions in leases in respect of the use of the leased premises or of other premises owned by the landlord. See Handler, Restraint of Trade (1924), 13 Encyc. Soc. Sciences 339. For the leading cases and selected bibliography, see Handler, Cases on Trade Regulation (1937) c. 3.

pertinent declaration of which is set forth in a footnote.[3] For present purposes it is sufficient to note that the genesis and principal field of application of the rule of reason has been in relation to the familiar ancillary restraints of trade.

Scholars and courts have been greatly exercised as to whether the common law applied the rule of reason to restraints of competition which were not ancillary to some major transaction.[4] The evidence is conflicting and has given rise to divergent interpretations. The failure to recognize that the "common law" is but a metaphorical expression and that there are as many common laws as there are independent judicial systems has been the principal cause of confusion. The fact is that the English and some American courts regarded the rule of reason as applicable to horizontal arrangements between competitors, which curbed, controlled, or eliminated competition, and which were not ancillary to any major transaction. Many American courts, on the contrary, either explicitly regarded the rule of reason as inapplicable to such arrangements, or, without mention of the rule, branded the activities under consideration as unlawful. Thus, there were at least three discernible trends in the authorities prior to 1890. Under what was probably the prevailing view, all agreements among persons engaged in the same trade, industry, or line of commerce, whereby competition was eliminated or reduced either through the fixation of prices, the control of output, the pooling of profits, the division of markets or other devices inconsistent with competitive institutions, were unlawful, whether or not the prices or other market conditions noncompetitively established were reasonable, whether or not the arrangement was designed to halt a ruinous competition and whether or not the formation of the combination was inspired by good motives. Under another view, agreements by minority groups without control of the market were upheld if competition in the market itself remained unaffected, despite the fact that competition among the parties themselves was either eliminated or controlled. The rule of reason under this view meant in essence the absence of monopoly power. Under a third view, legality was not

[3] §513. Definition of a Bargain in Restraint of Trade. A bargain is in restraint of trade when its performance would limit competition in any business or restrict a promisor in the exercise of a gainful occupation.

§514. When a Bargain in Restraint of Trade is Illegal. A bargain in restraint of trade is illegal if the restraint is unreasonable.

§515. When a Restraint of Trade is Unreasonable. A restraint of trade is unreasonable, in the absence of statutory authorization or dominant social or economic justification, if it—

(a) is greater than is required for the protection of the person for whose benefit the restraint is imposed; or

(b) imposes undue hardship upon the person restricted, or

(c) tends to create, or has for its purpose to create, a monopoly, or to control prices or to limit production artificially, or

(d) unreasonably restricts the alienation or use of anything that is a subject of property, or

(e) is based on a promise to refrain from competition and is not ancillary either to a contract for the transfer of good-will or other subject of property or to an existing employment or contract of employment.

§516. Instances of Reasonable Restraints. The following bargains do not impose unreasonable restraints of trade unless effecting, or forming part of a plan to effect, a monopoly:

(a) A bargain by the transferor of property or of a business not to compete with the buyer in such a way as to injure the value of the property or business sold;

(b) A bargain by the buyer or lessee of property or of a business not to use it in competition with or to the injury of the seller or lessor;

(c) A bargain to enter into partnership with an actual or possible competitor;

(d) A bargain by a partner not to interfere by competition or otherwise with the business of the partnership while it continues, or subject to reasonable limitations after his retirement;

(e) A bargain to deal exclusively with another;

(f) A bargain by an assistant, servant, or agent not to compete with his employer, or principal, during the term of the employment or agency, or thereafter, within such territory and during such time as may be reasonably necessary for the protection of the employer or principal, without imposing undue hardship on the employee or agent.

[4] All restrictions on competition which are not part of some larger lawful transaction are deemed nonancillary. Examples are naked agreements not to compete, agreements sharing markets, dividing territories, controlling output, and fixing prices.

limited to the activities of minority groups but extended to arrangements by those with monopoly power provided their monopoly position was not abused. Even price-fixing agreements might be upheld under this view if the prices established were reasonable and the objects of the combine were not the exploitation of the public but the rectification of intolerable industrial conditions.[5]

To speak of a common law in light of such divergences of ruling is to court confusion.

The Supreme Court, as is commonly known, originally rejected the rule of reason, holding it inapplicable to proceedings under the Sherman Act.[6] Primacy was given to the word "every" in section 1 of the statute. It was felt that there was no room under the wording of the statute for the adoption of common law views of legality, assuming the common law countenanced horizontal, non-ancillary restrictions of competition. The pith of this ruling appears in the following excerpts from the opinion of Mr. Justice Peckham in *United States* v. *Trans-Missouri Freight Assn.:*[7]

* * * The next question to be discussed is as to what is the true construction of the statute, assuming that it applies to common carriers by railroad * * *. Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and and in terms covers, all contracts of that nature? * * *

It is now with much amplification of argument urged that the statute, in declaring illegal every combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce, does not mean what the language used therein plainly imports, but that it only means to declare illegal any such contract which is in *unreasonable* restraint of trade, while leaving all others unaffected by the provisions of the act; that the common law meaning of the term "contract in restraint of trade" includes only such contracts as are in *unreasonable* restraint of trade, and when that term is used in the Federal statute it is not intended to include all contracts in restraint of trade, but only those which are in unreasonable restraint thereof.

The term is not of such limited signification. Contracts in restraint of trade have been known and spoken of for hundreds of years both in England and in this country, and the term includes all kinds of those contracts which in fact restrain or may restrain trade. Some of such contracts have been held void and unenforceable in the courts by reason of their restraint being unreasonable, while others have been held valid because they were not of that nature. A contract may be in restraint of trade and still be valid at common law. Although valid, it is nevertheless a contract in restraint of trade, and would be so described either at common law or elsewhere. By the simple use of the term "contract in restraint of trade," all contracts of that nature, whether valid or otherwise, would be included, and not alone that kind of contract which was invalid and unenforceable as being in unreasonable restraint of trade. When, therefore, the body of an act pronounces as illegal every contract or combination in restraint of trade or commerce among the several States, etc., the plain and ordinary meaning of such language is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exception or limitation can be added without placing in the act that which has been omitted by Congress * * *.

The plaintiffs are, however, under no obligation in order to maintain this action to show that by the common law all agreements among competing railroad companies to keep up rates to such as are reasonable were void as in restraint of trade or commerce. There are many cases which look in that direction if they do not precisely decide that point * * *. But assuming that agreements of this nature are not void at common law and that the various cases cited by the learned courts below show it, the answer to the statement of their validity now is to be found in the terms of the statute under consideration * * *.

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[5] (1932) 32 Col. L. Rev. 291, 297; Peppin, Price-Fixing Agreements Under the Sherman Anti-Trust Law, (1940) 28 Calif. L. Rev. 297.

[6] *United States* v. *Trans-Missouri Freight Assn.* (1897) 166 U. S. 290; *United States* v. *Joint Traffic Assn.* (1898), 171 U. S. 505; *Addyston Pipe and Steel Co.* v. *United States* (1899), 175 U. S. 211.

[7] (1897) 166 U. S. 290, 327, 334.

The approach of Judge Taft in his celebrated and oft-quoted opinion in the *Addyston Pipe case* [8] was quite different. The basis of his rejection of the rule of reason was not the presence of the word "every" in section 1 but the fact that the common law restricted the application of the rule of reason to the ancillary restraints and condemned all nonancillary restrictions on competition. Hence, even were it assumed that the statute codified the common law, there would be no room for the application of the rule of reason to combinations in restraint of trade. His conclusions from a thorough examination of the common-law precedents were as follows:

For the reasons given, then, covenants in partial restraint of trade are generally upheld as valid when they are agreements (1) by the seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold; (2) by a retiring partner not to compete with the firm; (3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm; (4) by the buyer of property not to use the same in competition with the business retained by the seller; and (5) by an assistant, servant, or agent not to compete with his master or employer after the expiration of his time of service. Before such agreements are upheld, however, the court must find that the restraints attempted thereby are reasonably necessary (1, 2, and 3) to the enjoyment by the buyer of the property, goodwill, or interest in the partnership bought; or (4) to the legitimate ends of the existing partnership; or (5) to the prevention of possible injury to the business of the seller from use by the buyer of the thing sold; or (6) to protection from the danger of loss to the employer's business caused by the unjust use on the part of the employee of the confidential knowledge acquired in such business * * *.

It would be stating it too strongly to say that these five classes of covenants in restraint of trade include all of those upheld as valid at the common law; but it would certainly seem to follow from the tests laid down for determining the validity of such an agreement that no conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract, or to protect him from the dangers of an unjust use of those fruits by the other party * * *.

This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. In such a case, if the restraint exceeds the necessity presented by the main purpose of the contract, it is void for two reasons: First, because it oppresses the covenantor, without any corresponding benefit to the covenantee; and, second, because it tends to a monopoly. But where the sole object of both parties in making the contract as expressed therein is merely to restrain competition, and enhance or maintain prices, it would seem that there was nothing to justify or excuse the restraint, that it would necessarily have a tendency to monopoly, and therefore would be void. In such a case there is no measure of what is necessary to the protection of either party, except the vague and varying opinion of judges as to how much, on principles of political economy, men ought to be allowed to restrain competition. There is in such contracts no main lawful purpose, to subserve which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster * * *.

* * * It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.

[8] (1898) 85 Fed. 271, 281.

The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it * * *.[9]

Like Judge Taft, Chief Justice White assumed that the statute codified the common law, but he derived a totally different set of conclusions from this initial premise. His examination of the common law satisfied him that the standard of reason was applied to all restraints, ancillary and nonancillary, and that the term restraint of trade was used at common law to signify an unreasonable restriction of competition. A reasonable restraint of trade was to him a contradiction in terms—if the restriction was reasonable it was not a restraint of trade; if a restraint of trade, it was by definition unreasonable. By ascribing this artificial meaning to "restraint of trade," he avoided the embarrassment of the word "every" and imported the rule of reason into the statute. His thesis is expounded at considerable length in *Standard Oil Co. of New Jersey* v. *United States*,[10] but is more succinctly expressed in *United States* v. *American Tobacco Co.*[11] as follows:

> Applying the rule of reason to the construction of the statute, it was held in the *Standard Oil case* that as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the Antitrust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance * * *. In other words, it was held, not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret which inevitably arose from the general character of the term restraint of trade required that the words restraint of trade should be given a meaning which would not destroy the individual right to contract and render difficult if not impossible any movement of trade in the channels of interstate commerce—the free movement of which it was the purpose of the statute to protect.

The rule of reason thus became part of our antitrust jurisprudence more than 20 years after the enactment of the Sherman law.

The explanation for the divergent conclusions of these jurists is not difficult to discover. The weight of available evidence supports the view that the words of the statute were used by the Congress in their common-law sense.[12] But Judge Taft and Chief Justice White had different conceptions of the common law. This is not surprising in light of the lack of uniformity in the juristic doctrines of restraint of trade prior to 1890. While there was no real support for Chief Justice White's unorthodox definition of restraint of trade, the English precedents were in accord with his general conclusion that the validity of all restraints, ancillary and nonancillary, was measured by the standard of reason. If the English precedents and the few American authorities following them constituted the "common law," then Chief Justice White's conclusion was correct despite the essential unsoundness of his analysis. If the prevailing view of the American courts which Judge Taft followed constituted the "common law," then Judge Taft's conclusions were correct. The truth of the matter, as we have seen, was that there was more than one common law view and it was

[9] For a different elaboration of the rule of reason, see the Special Message of President Taft to Congress on the Anti-Trust Statute, December 5, 1911.
[10] (1911) 221 U. S. 1.
[11] (1911) 221 U. S. 106, 179.
[12] *Apex Hosiery Co.* v. *Leader* (1940), 310 U. S. 469, 494.

not sufficient to assert that the Congress intended to codify the common law without attempting to ascertain which of the common law views the legislators had in mind. To the extent that the congressional purpose was obscure, the responsibility of selection devolved upon the courts. Whichever view was adopted, violence necessarily was done to the word "every" in the statute, since under both constructions some restraints were permissible.

Under the view which prevailed before 1911, all non-ancillary restrictions of competition such as combinations to fix prices, pool profits, share markets, and control output were unlawful restraints prohibited by the statute. As the reasonableness of the restriction was legally immaterial, the restraint could not be justified by proof of good motives, by the fact that the combine lacked control of the market, by the reasonableness of the prices fixed, or by other extenuating circumstances. After 1911, agreements fixing prices, dividing territories, and controlling production continued to be unlawful, but now they were denominated "unreasonable restraints of trade." No greater tolerance of the attempted justification of such restraints after the adoption of the rule of reason was exhibited by the courts than during the period of its rejection. In the main and subject to minor exceptions, conduct which prior to 1911 was condemned as an illegal restraint was held unreasonable *per se* thereafter and hence unlawful.[13] The adoption of the rule of reason effected more of a change in theory than in actual doctrine, insofar as loose-knit combinations were concerned. Greater effect is to be discerned in the field of close-knit combinations, and even in the case of the loose-knits, there have been occasional rulings that would be inexplicable save for the rule of reason. Reference to these rulings shall be made hereinafter.[14]

There has been a tendency to regard the rule of reason as opening the door to the validation of any scheme or device for the curtailment of competition which may be justified on grounds of business expediency. Reasonable in this context means rational, and if an arrangement is not irrational, having regard for the circumstances of its formation and operation, it should be free from censure. Though occasional official utterances and isolated passages in judicial opinions may point in this direction, the decisions of the Supreme Court in the past 30 years, viewed in their entirety, clearly reject this construction of the rule of reason.

Candor compels the admission that the rulings of the Supreme Court have not always followed a consistent course. The rule of reason has meant different things to the different Justices. Despite the oscillations of the Court, the great majority of its rulings do appear, however, to follow a fairly constant pattern.

The Court has recognized that the Sherman Law was intended to preserve for the public the protection and advantages of free competition. Any device which diminishes this protection and reduces these advantages is at war with the manifest statutory purpose. Whether or not such devices may further the public good to a greater extent than free competition is an inquiry which is not open since the statute accepts competition as the *summum bonum* of our society. Consequently the reasonableness of a horizontal agreement among competitors must be determined in the light of its compatibility with the ends

[13] (1932) 32 Col. L. Rev. 291, 303.

[14] See discussion of these cases in sections on collection and dissemination of trade statistics (p. 18) and degree of market control (p. 29).

to which our antitrust laws are directed. The statute sets the framework for the inquiry into the reasonableness of particular practices. To differentiate between reasonable and unreasonable price agreements or between the suppression of competition by those with good motives and those with bad would be to sustain arrangements which are essentially antagonistic to the competitive institutions which the statute seeks to preserve. The rule of reason if so extended would be dependent upon considerations of policy and business expediency unrelated to the purposes of the statute. The standard of reason though related to the statutory objectives is still vague and indefinite. This is, however, inherent in the very nature of the standard. What is and what is not consistent with the maintenance of competition is not easy of determination. Integrating the rule of reason into the purposes of the legislation does not eliminate the element of discretion. It does, however, establish the metes and bounds of such discretion and precludes the voyage upon the chartless sea of doubt which was so greatly feared by Judge Taft.

In short, then, the rule of reason has introduced flexibility into our laws regulating business competition without effecting substantial changes in the principle of such regulation.[14a]

It is our conclusion from a study of the decisions construing and applying the statute that the failures of enforcement cannot be fairly attributed to the adoption by the Supreme Court of the rule of reason. By this we do not imply that there have not been rulings which have frustrated the statutory purpose. In our judgment, such a rule, properly understood and correctly applied, can be a source of strength rather than of weakness. Some rule of reason was inevitable. A law which strait-jacketed business enterprise would fall of its own weight.

We turn now to a consideration of the application of the statute to specific acts and practices of trade groups, from which a fuller understanding of the meaning of the rule of reason can be derived.

DIRECT PRICE-FIXING

(A) ANALYSIS OF PRACTICE

The elimination of price competition in any industry, trade, or line of commerce by the fixation of the market price may be accomplished directly by agreement or understanding among competitors or indirectly by various devices, methods, and practices. We shall deal at this point with direct price-fixing by agreement or understanding.

A distinction must be drawn between the fixation of the market price by agreement among competitors and the elimination of price competition among the members of a minority group not having the power to determine the market price. The market price can be established by agreement only where sellers or buyers controlling a substantial part of the industry, trade, or line of commerce, participate in the combination. Price-fixing arrangements eliminating the competition among the parties thereto, however, are frequently made by minority groups which are not in control of the market. Such agreements may well affect the market price even though they do not control it.

[14a] See *United States* v. *Socony-Vacuum Oil Co.* (1940), 310 U. S. 150, 213, 218.

Price-fixing agreements may relate to the establishment of uniform selling prices, bids, or offers, to the maintenance of existing price levels, to the uniform movement, either up or down, of the prices of competitors, or to the establishment of various mechanisms by which the prices of the parties to the agreement are determined. An agreement relating to the movement of prices is nonetheless a price agreement though it may contemplate the uniform reduction rather than the increase of prices.

(B) EFFECTS OF PRACTICE

The price-fixing agreement is the least costly and most effective of the devices by which competition may be suppressed. It involves none of the difficulties of the merger and consolidation and yet may be virtually as efficacious in the elimination of competition. An agreement fixing market prices introduces rigidity into that portion of the price structure which the commodities in question comprise and prevents the flexible adjustment of such prices to fluctuations in supply and demand.

Whether the prices fixed are reasonable or unreasonable, the valuable and essential quality of flexibility and the advantages of competition are destroyed by such agreements. With the accelerated tempo of modern economic change, prices, though originally reasonable, must be constantly revised if they are to continue to be entirely fair. Who is to determine the fairness of the prices of the multitudinous commodities that swell the currents of interstate commerce? The public obviously cannot rely on the self-restraint of the participants in the price-fixing agreement. Judicial supervision of the reasonableness of prices can be but sporadic, dependent as it is upon the uncertain and fortuitous course of litigation. A court ruling approving of prices today is no warrant that the prices a month hence will be satisfactory, and only by new litigation that may endure for years can a supplemental determination be obtained. Apart from the inherent difficulties of determining the elusive issue of reasonableness, the very laxity of judicial supervision would impel more pervasive regulation. Private price-fixing, therefore, would inevitably lead to governmental price-fixing.

(C) SUMMARY OF AUTHORITIES

Both in its early and its recent pronouncements, the Supreme Court has consistently condemned direct price-fixing as an unlawful and unreasonable restraint of trade.[15] Notwithstanding its categorical condemnation of the practice during the first decade of the statute's existence,[16] further rulings on the legality of direct price fixing have

[15] *United States* v. *Socony-Vacuum Oil Co.* (1940), 310 U. S. 150; *United States* v. *Trenton Potteries Co.* (1927), 273 U. S. 392; *United States* v. *Trans-Missouri Freight Assn.* (1897), 166 U. S. 290; *United States* v. *Joint Traffic Assn.* (1898), 171 U. S. 505; *Addyston Pipe and Steel Co.* v. *United States* (1899), 175 U. S. 211; *Swift & Co.* v. *United States* (1905), 196 U. S. 375; *Standard Sanitary Mfg. Co.* v. *United States* (1912), 226 U. S. 20; *F. T. C.* v *Pacific States Paper Trade Assn.* (1927), 273 U. S. 52.

Bibliography: Jaffe & Tobriner, The Legality of Price-Fixing Agreements (1932) 45 Harv. L. Rev. 1164; Peppin, Price Fixing Agreements Under the Anti-Trust Law (1940) 28 Calif. L. Rev. 297; The Rule of Reason in Loose-Knit Combinations (1932), 32 Col. L. Rev. 291; Goodnow, Trade Combinations at Common Law (1912) 12 Pol. Sci. Quar. 212; Allen, Criminal Conspiracies in Restraint of Trade at Common Law (1910) 23 Harv. L. Rev. 531; Pope, The Legal Aspect of Monopoly (1907) 20 Harv. L. Rev 167; Watkins, The Change in Trust Policy (1922) 35 Harv. L. Rev. 815, 926; Naujoks, Monopoly and Restraint of Trade Under the Sherman Act (1928) 4 Wis. L. Rev. 387 (1928), 5 id. at 1; Handler, Trade Association Activities Forbidden by the Federal Trade Commission, C. C. H. Trade Regulation Comments No. 2, July 1938; Esch. Summaries of Federal Trade Commission Cases in Restraint of Trade (1938).

[16] *United States* v. *Trans-Missouri Freight Assn.* (1897), 166 U. S. 290.

been sought in almost every subsequent decade. The subject received elaborate consideration in 1927 in *United States* v. *Trenton Potteries Co.*[17] where a price-fixing agreement made by persons manufacturing and distributing 82 percent of the vitreous pottery bathroom fixtures produced in this country was declared unlawful. In submitting the case to the jury, the trial court charged that if it found that the agreement alleged in the indictment had been made by the defendants, it might return a verdict of guilty without regard to the reasonableness of the prices fixed and irrespective of whether prices were actually lowered or raised, since a price-fixing agreement in and of itself was an unreasonable restraint of trade. It refused to charge the jury, as requested by the defendants, that a price-fixing agreement was invalid only if the prices fixed were unreasonable. The pertinent passage from the charge is as follows:

> * * * the law is clear that an agreement on the part of the members of a combination controlling a substantial part of an industry, upon the prices which the members are to charge for their commodity, is in itself an undue and unreasonable restraint of trade and commerce; * * *.[18]

In sustaining this charge, the Supreme Court said:

> * * * But it does not follow that agreements to fix or maintain prices are reasonable restraints and therefore permitted by the statute, merely because the prices themselves are reasonable. Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself. Whether this type of restraint is reasonable or not must be judged in part at least in the light of its effect on competition, for whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition. * * *.[19]

After a full review of its prior rulings holding direct price fixing to be invalid *per se*, it stated its conclusions as follows:

> The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed. Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the Government in enforcing the Sherman Law the burden of ascertaining from day to day whether it has become unreasonable through the mere variation of economic conditions. Moreover, in the absence of express legislation requiring it, we should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations depend upon so uncertain a test as whether prices are reasonable—a determination which can be satisfactorily made only after a complete survey of our economic organization and a choice between rival philosophies.[20]

The Court in the recent case of *United States* v. *Socony-Vacuum Oil Co.*,[21] has had occasion recently to reexamine the basis of its

[17] (1927) 273 U. S. 392. Discussedin (1927) 7 B. U. L. Rev. 322; (1927) 11 Marq. L. Rev. 163.
[18] (1927) 273 U. S. 392, 396.
[19] *Id.* at 396.
[20] *Id.* at 397.
[21] (1940) 310 U. S. 150.

decision in the *Trenton Potteries* and kindred cases. Not only has it reaffirmed the *Trenton Potteries* ruling, but it has earnestly endeavored to plug every hole that may have existed or that might be driven through the doctrine of that case. The Court restates the rule, after a careful analysis of the precedents, as follows:

> Thus for over 40 years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.[22]

It disposes of the attempted justifications of the defendants' acts in the following unambiguous terms:

> Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended. * * *
>
> Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy, or destructive. It has not permitted the age-old cry of ruinous competition and competitive evils to be a defense to price-fixing conspiracies. It has no more allowed genuine or fancied competitive abuses as a legal justification for such schemes than it has the good intentions of the members of the combination. If such a shift is to be made, it must be done by the Congress. Certainly Congress has not left us with any such choice. Nor has the act created or authorized the creation of any special exception in favor of the oil industry. Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike.[23]

The ambit of the *Trenton Potteries* [24] rule is thus defined:

> Nor is it important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible. Price-fixing as used in the *Trenton Potteries case* has no such limited meaning. An agreement to pay or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. * * * Hence, prices are fixed within the meaning of the *Trenton Potteries case* if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon.[25]

In order to avoid any misconception of its holding, the Court repeats its conclusions as follows:

> Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*.[26]

Not only is direct price-fixing a violation of the Sherman law; it is an unfair method of competition prohibited by the Federal Trade Commission Act.[27] The Federal Trade Commission has issued numerous orders forbidding price-fixing by competitors.[28]

The reiterated assertion by the Court in decisions rendered after the *Trenton Potteries* and before the *Socony-Vacuum cases* that there

[22] *Id.* at 218.
[23] *Id.* at 221.
[24] (1927) 273 U. S. 392.
[25] *United States* v. *Socony Vacuum Oil Co.* (1940), 310 U. S. 150, 222.
[26] *Id.* at 223.
[27] *F. T. C.* v. *Pacific States Paper Trade Assn.* (1927), 273 U. S. 52.
[28] See *supra* n. 15.

must in every case be "a definite factual showing of illegality" [29] created some doubt as to whether such factual proof might be necessary in litigation concerning price-fixing. All such doubts were dispelled by the *Socony-Vacuum* decision which repeatedly states that the practice is unlawful *per se* and that facts purporting to justify it are of no avail.

It is thus possible, in light of these unequivocal pronouncements, to state without qualification the present doctrine in respect of price-fixing. Any agreement, arrangement, or understanding among competitors, in or affecting interstate commerce, fixing the market price of the goods which they sell or purchase, is unlawful under the anti-trust laws. It matters not whether the prices are set by combinations of sellers or buyers, whether prices are raised, lowered, or maintained at existing levels, whether the prices are reasonable or unreasonable, whether the agreement fixes minimum or maximum prices, or whether price structures are tampered with by direct agreement or by any other means. Nor are the motives or intentions of the members of the combination material. It is of no moment that they may in good faith have regarded such an agreement as essential to their economic salvation. Nor would evidence be admissible, if such could ever be produced, that in practice the agreement resulted in demonstrable social and economic benefits to all those in or dependent upon the industry in which the combination operates. The fact that the agreement fixes or maintains prices is conclusive of its illegality. [30]

While the court in the *Trenton Potteries case* stressed the fact that the defendants controlled 82 percent of their industry and stated the rule in terms of price-fixing "by those controlling in any substantial manner a trade or business," it had no occasion to and it did not draw any distinction between price-fixing by majority and minority groups. Though it is clear that a minority combination whose aim is to control the market price is unlawful, doubt has arisen when its purpose is not to fix the market price but merely to eliminate price competition among the members of the combination. In earlier decisions, the degree of market control was not deemed a material factor in determining the legality of any arrangement restrictive of competition.[31] In *Appalachian Coals, Inc.*, v. *United States*,[32] however, the Court upheld an exclusive sales agency which had been formed to market 54.21 percent of the coal mined in the Appalachian area, notwithstanding the fact that the arrangement eliminated competition among the parties thereto. The Court emphasized the fact that the combination was subject to effective competition in all the markets in which its products were disposed and that the defendants, consequently, were unable to control the market price of their coal.

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[29] *Standard Oil Co. (Indiana)* v. *U. S.* (1931), 283 U. S. 163, 179, discussed in 40 Yale L. J. 1297, 31 Col. L. Rev. 1049; *Appalachian Coals, Inc.*, v. *United States* (1933), 288 U. S. 344, 377, discussed in Eldridge, *The Appalachian Coals Case and the Rule of Reason* (1933), 1 Geo. Wash. L. Rev. 507 (1933), 31 Mich. L. Rev. 837 (1933), 28 Ill. L. Rev. 265 (1933), 19 Va. L. Rev. 851 (1933), 81 U. of Pa. L. Rev. 1006.

[30] For recent consent decrees prohibiting price-fixing, see: *United States* v. *National Assn. of Commission Lumber Salesmen*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,414 (E. D. La. 1940); *United States* v. *Engineering Survey and Audit Co., Inc.*, *id.* par. 25,415 (E. D. La. 1940); *United States* v. *Pittsburgh Tile and Mantel Contractors' Assn.*, *id.* par. 25,417 (W. D. Pa. 1940); *United States* v. *Employing Plasterers' Assn. of Allegheny County*, *id.* par. 25,429 (W. D. Pa. 1940); *United States* v. *Underwood Elliott Fisher Company*, *id.* par. 25,433 (S. D. N. Y. 1940); *United States* v. *National Container Assn.*, *id.* par. 25,434 (S. D. N. Y. 1940); *United States* v. *American Potash and Chemical Corp.*, *id.* par. 25,461 (S. D. N. Y. 1940); *United States* v. *The Tile Contractors' Assn. of America*, *id.* par. 25,469 (N. D. Ill. 1940); *United States* v. *Long Island Sand and Gravel Producers' Assn.*, *id.* par. 25,475 (S. D. N. Y. 1940); *United States* v. *Bausch & Lomb Optical Co.*, *id.* par. 25,487 (S. D. N. Y. 1940); *United States* v. *The Borden Co.*, *id.* par. 25,526 (N. D. Ill. 1940); *United States* v. *Southern California Marble Assn.*, *id.* par. 25,607 (S. D. Calif. 1940); *United States* v. *Electrical Solderless Service Connector Institute*, *id.* par. 25,585 (S. D. N. Y. 1941).

[31] *Addyston Pipe & Steel Co.* v. *United States* (1899), 175 U. S. 211; *American Column & Lumber Co.* v. *United States* (1921), 257 U. S. 377.

[32] (1933) 288 U. S. 344.

Further support for the view that the Court might permit price-fixing by minority, nonmonopoly groups, was afforded in *Standard Oil Co.* (*Indiana*) v. *United States*.[33] There the fixation of royalty rates as part of a cross-licensing arrangement of competing patents was sustained on the ground that the gasoline produced by the patented cracking process competed with the gasoline made by unpatented methods and that the proportion of cracked gas sold was too slight to have any effect on the ultimate price of gasoline to consumers.

However, in the recent *Socony-Vacuum*[34] *case*, the Court in a strong dictum declared price-fixing by groups without the power to control the market to be unlawful as constituting a "threat to the central nervous system of the economy".[35] It would thus appear that the contrary intimations of the *Appalachian*[36] and the *Cracking*[37] *cases* have been definitely rejected and that under the present construction of the statute no price agreements between two or more competitors will be tolerated.

The degree of market control possessed by a combination is an element of such importance in antitrust litigation that we shall return, in a later section of this study, to a more detailed consideration of this factor.

CONTROL OF OUTPUT

(A) ANALYSIS OF PRACTICE

The regulation of output is almost as effective an instrument for the suppression of competition as direct price-fixing and may in fact be one of the methods by which prices are regulated. Such control may be exerted by formal agreement or by mere informal understanding. In equating supply with probable demand, hours of plant operation may be limited, complete shut-downs may be ordered or business allocated among producers on the basis of some predetermined quota.

Output control sometimes has for its object not the regulation of prices but the solution of problems created by excess capacity. Whatever its object, the private control of production definitely tends to eliminate and restrict competition.

The regulation of output does not necessarily imply its curtailment. Production may be maintained at an agreed level or actually increased. The true test is not whether output is in fact reduced, but whether it is determined by the concerted and cooperative action of competitors rather than by the normal operation of competitive forces.

(B) STATE OF THE AUTHORITIES

There are not as many reported cases involving the control of production as there are involving direct price-fixing.[38] It is indeed

[33] (1931) 283 U. S. 163.
[34] (1940) 310 U. S. 150.
[35] *Id.* at 224, n. 59.
[36] (1933) 288 U. S. 344.
[37] (1931) 283 U. S. 163.
[38] See *American Column & Lumber Co.* v. *United States* (1921), 257 U. S. 377; *Gibbs* v. *McNeeley* (C. C. A. 9th, 1902), 118 Fed. 120; *United States* v. *National Assn. of Window Glass Mfrs.* (1923), 263 U. S. 403; *Continental Wall Paper Co.* v. *Lewis Voight & Sons Co.* (C. C. A. 6th, 1906), 148 Fed. 939, 947, affirmed (1909), 212 U. S. 227; *Cravens* v. *Carter-Crume Co.* (C. C. A. 6th, 1899), 92 Fed. 479, 481, 485. For a recent consent decree prohibiting the limitation of output see *United States* v. *National Container Assn.*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,434 (S. D. N. Y. 1940).

Bibliography: The Rule of Reason in Loose-Knit Combinations (1932), 32 Col. L. Rev. 291, 305; Handler, The Sugar Institute Case and the Present Status of the Anti-Trust Laws (1936), 36 Col. L. Rev. 1, 21; Handler, Trade Association Activities Forbidden by the Federal Trade Commission, C. C. H. Trade Regulation Comments No. 2, July 1938; Burns, The Decline of Competition (1936), 64, 154.

curious that on a problem of such paramount importance there should be such a paucity of authoritative rulings. Such decisions as there are indicate quite clearly that any concerted effort to regulate production contravenes the antitrust laws. In *American Column & Lumber Co.* v. *United States*,[39] an association of hardwood manufacturers, whose members were responsible for about one-third of the national output, sought by an elaborate program of trade statistics and the suggestions and exhortations of its statistical manager to limit production. The Supreme Court declared the activities of the association to be unlawful, emphasizing the illegal nature of the manager's efforts to discourage a threatened "overproduction" in the industry. This ruling was preceded by the decision of the circuit court of appeals in *Gibbs* v. *McNeeley*[40] in which a combination of manufacturers and wholesalers of red-cedar shingles agreed to fix prices and to shut down their mills or take other necessary steps to curtail output whenever supply exceeded demand. The Court stated:

> The combination in the case before the court is more than a combination to regulate prices; it is a combination to control the production of a manufactured article more than four-fifths of which is made for interstate trade, and to diminish competition in its production, as well as to advance its price. These features, we think, determine its object, and bring it under the condemnation of the law.[41]

In *National Assn. of Window Glass Mfrs.* v. *United States*[42] the Supreme Court upheld an arrangement whereby the available labor supply in the handblown window-glass industry was divided among all manufacturers in such manner as to permit each producer to operate his plant at full capacity during a part of the year and to shut down his mill the remainder of the year. Workers were shifted from one group of plants to the other at the end of each period. The effect of the agreement was to reduce overhead costs and to provide continuity of employment for workers in the industry. The handblown product was marketed in competition with machine-made glass and comprised but a minor part of the output of the window-glass industry.

The import of this decision is not that limitation of production may be justified under special conditions or that minority groups in an industry are privileged to regulate their output. The Court apparently agreed with the defendant's assertion that the arrangement did not lessen output. Thus, it states:

> From the view that we take we think it unnecessary to * * * do more than advert to the defendants' contention that with the means available the production is increased.[43]

The basis of decision was that the limited labor supply did not permit all plants to be fully manned during the entire year. A factory operating at full capacity for part of the year, the Court felt, would produce approximately the same as one operating at partial capacity for the entire year. The case dealt with a dying industry and an abnormal industrial situation. The decision has been strictly limited to its facts and has not been regarded as an authoritative precedent on the question of production limitation. As the combination condemned in the *Column & Lumber*[44] case was a minority non-

[39] (1921) 257 U. S. 377.
[40] (C. C. A. 9th, 1902) 118 Fed. 120.
[41] *Id.* at 127.
[42] (1923) 263 U. S. 403.
[43] *Id.* at 413.
[44] (1921) 257 U. S. 377.

monopolistic group, the *Window Glass* [45] case can hardly be construed as upholding output curbs by minority groups.[46]

The Federal Trade Commission has dealt with agreements to control output involving the use of a quota system and compulsory shutdowns. In accord with the rulings of the Supreme Court, the Commission has held such arrangements unlawful.[47] Consent decrees have been entered forbidding arrangements designed to control the output of various industries.[48]

There does not appear to be any clear authority involving concerted increases or other regulations of production. The decided cases have all involved curtailments. There is, however, nothing in the decisions which would support the view that only arrangements which limit output are forbidden by the antitrust laws. Under the *ratio decidendi* of the price-fixing cases, it would appear that any interference with the equation of supply and demand by the normal operation of competitive forces would be condemned.

(C) SUGGESTIONS

Private output control is inconsistent with the maintenance of competition and, like price-fixing, cannot be tolerated in any economy dedicated to free competition. The economic effects of private regulation of output are the same as price-fixing. The same objections, economic and administrative, apply to both, and as they have been fully expressed in the section on direct price-fixing, they need not be here repeated.

That excess capacity and the tendency of many industries to overproduce raise serious economic problems cannot be denied. But a solution of such problems is not to be found in any industrial policy which destroys competition and vests dictatorial control of vital industrial processes in the hands of a limited number of business managers. A statistical program, which will educate and enlighten the industrial producer and the coordination and analysis of statistics by a proper agency of government, will aid business in avoiding the accumulation of unassimilable surpluses and uneconomic fluctuations in the volume of production. Adjustment of supply to demand through competitive forces, guided by wise governmental suggestion and advice and informed by accurate trade data, is to be preferred to private and unsupervised control of the vital policies of industrial output.

In view of the above considerations, all agreements among competitors relating to the control of production should be held unlawful, regardless of the purpose of such agreements and regardless of the degree of market control possessed by the members of the combination.

SHARING MARKETS

(A) ANALYSIS OF PRACTICE

Competitors, fearful of the consequences of unrestricted price competition and eager to establish competitive stability, may seek to accomplish their purpose by sharing markets rather than by resorting

[45] (1923) 263 U. S. 403.
[46] See also *Chesapeake & Ohio Fuel Co.* v. *United States* (C. C. A. 6th, 1902), 115 Fed. 610.
[47] See *California Rice Industry*, 106 C. C. H. 1938 Trade Reg. Serv., par. 9431; *Tarpon Springs Sponge Exchange, Inc.*, 106 C. C. H. 1938 Trade Reg. Serv., par. 9309.
[48] *United States* v. *Maine Cooperative Sardine Co.* (D. Me., May 16, 1927); see *Donovan & McAllister, Consent Decrees in the Enforcement of Federal Anti-Trust Laws* (1933) 46 Harv. L. Rev. 885, 926.

to direct price-fixing. Sharing the market may consist in allocating fixed percentages of the available business to each producer, dividing sales territory on a geographical basis or allotting customers to each seller. By restrictions upon the hours of plant operation, markets may be shared on the basis of productive capacity. Business may also be distributed through a common sales agency which ordinarily has the power either to impose production quotas on its members or apportion orders among them.

When products are not homogeneous or when each producer manufactures a variety of products, price control may not be a feasible method of regulation and market division may be the only practicable means of controlling competition. Each competitor will then receive his share of the business and no more. The policy is essentially one of "live and let live." The effect of any agreement for sharing the markets is manifestly to eliminate competition.

Prices, under such circumstances, tend to be uniform except as products differ or are marketed under conditions permitting differences in price without disturbing the desired allocation of business. If there is not complete uniformity of price, the prices of different producers must nevertheless maintain the same relative position to each other that they had when the markets were first divided. Flexibility and freedom in the response of prices to economic changes are lost. Markets may be shared at any level of prices and the tendency is for prices to be higher than when competition is left unrestrained.

Any distribution of business necessarily limits output, increases costs, and constricts firms capable of expansion. The least efficient producers are protected and the advantages of a less costly method of distribution and production are lost to the public.

(B) SUMMARY OF AUTHORITIES

Recognizing the dangers implicit in these arrangements, the Supreme Court has held that agreements and arrangements for sharing markets are illegal under the Sherman Act.[49] The rule of the *Addyston Pipe* [50] *case* has been consistently followed by the lower Federal courts.[51] The Federal Trade Commission has adhered to these court rulings and has condemned sharing the market either by division of territories or the allocation of customers.[52]

In view of the hostility manifested toward the cognate devices of price-fixing and production control, there is no prospect of the courts' countenancing the sharing of markets by agreement or understanding. There is thus no need for any legislative change in this regard.

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[49] *Addyston Pipe & Steel Co.* v. *United States* (1899), 175 U. S. 211.

[50] *Ibid.*

[51] *United States* v. *MacAndrews & Forbes Co.* (C. C. S. D. N. Y. 1906), 149 Fed. 823; *Lee Line Steamers, Inc.*, v. *Memphis, H. & R. Packet Co.* (C. C. A. 6th, 1922), 277 Fed. 5; *Butchart* v. *United States* (C. C. A. 9th, 1924), 295 Fed. 577. For recent consent decrees prohibiting the sharing of markets see: *United States* v. *National Container Assn.*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,434 (S. D. N. Y. 1940); *United States* v. *Long Island Sand & Gravel Producers' Assn.*, *id.* par. 25,475 (S. D. N. Y. 1940); *United States* v. *Bausch & Lomb Optical Co.*, *id.* par. 25,487 (S. D. N. Y. 1940); *United States* v. *Southern California Marble Assn.*, *id.* par. 25,607 (S. D. Calif. 1940).

Bibliography: (1932) 32 Col. L. Rev. 291, 305; Matthews and Adler, Covenants in Restraint of Trade (2d ed. 1907), 126–131; Sanderson, Restraint of Trade in English Law (1926), 64–67; Peppin, Price-Fixing Agreements Under the Sherman Anti-Trust Law (1940), 28 Calif. L. Rev. 297, 300.

[52] *Washington Cereal Assn.*, 11 F. T. C. D. 396 (1937); *West Coast Theatres, Inc.*, 12 F. T. C. D. 383 (1929); *Lindsay Light Co.*, 18 F. T. C. D. 240 (1934); *Albany Billiard Ball Co*, 13 F. T. C. D. 291 (1930); *Fyr-Fyter Co.*, 21 F. T. C. D. 257 (1935); *Linen Supply Assn.*, 21 F. T. C. D. 666 (1935).

COLLECTION AND DISSEMINATION OF TRADE STATISTICS AND OPEN PRICE SYSTEMS

(A) DESCRIPTION OF PRACTICE

The collection and dissemination of trade statistics is one of the important activities of many modern trade associations. The information which is gathered varies in accordance with the purposes and needs of the association. The principal topics on which information is systematically collected are prices, plant capacity, volume of production, cost of production, inventories, transportation costs, shipments, deliveries, sales, unfilled orders, goods in transit, terms and conditions of sale, and other data of a similar nature.

The price information which is collected by an association may relate to past, current, or future prices. In some instances, the price lists of each member of the group may be filed with the association, immediate notice being given of all changes. Some associations merely require members to make weekly or monthly reports of their past prices. Under other plans members are obliged to communicate by telephone the full details of each sale as soon as it is concluded. The filing of current or future prices may involve certain collateral requirements on the part of the members of the combination. These supplementary matters may include any or all of the following: (1) Agreements by members to adhere to the filed prices for a certain period of time; (2) agreements by members not to deviate from the filed prices until the combination is apprised of a change; (3) a waiting period before the announced price change becomes effective.

There are similar diversities with regard to the nature and extent of the information assembled on production, sales, inventories, deliveries, and the like. The data may vary from detailed reports of each transaction to general weekly or monthly summaries.

There is no uniformity of practice with regard to the information disseminated by an association. Some associations circulate the reports filed by members without change or comment; others distribute general summaries, which, however, are sufficiently detailed to reveal the price, production, and business policies of each reporting member; still others content themselves with the distribution of abstract statistical summaries which give no clue to the individual activities, practices, and policies of members.

The information which is disseminated may be restricted to members of the combination or it may be made available to the purchasing trade or to the public generally. It may be accompanied by interpretative comments or suggestions with regard to the use of the material or by exhortations to follow a recommended course of action.

The program may be supplemented by periodic meetings of members at which discussions may vary from minute consideration of the price and production policies of individual members to general observations concerning the status and problems of the industry. The plan may be implemented by penalties for nonobservance of its requirements.

There are manifold permutations of trade association statistical programs. As some features are added or modified and others subtracted, the legal status of the combination's program may change. The competitive texture of the industry and prior industrial practice, the effects of the program on competition, the economic results achieved through the exchange of information, are all matters of importance in determining the validity of a particular plan. Here we can merely enumerate the general outlines of a statistical program; legality, however, depends upon the specific contents of an individual plan and its potential and actual effects upon competition.

(B) SUMMARY OF AUTHORITIES

Apart from the cases dealing with direct price-fixing, there are only five decisions [53] of the Supreme Court passing upon the legality of the statistical activities of trade associations. The programs involved in these cases were very elaborate, as appears. Three of the plans were held to constitute unlawful restraints of trade and two were upheld. The Court has not purported in these cases to pass upon the validity of the component elements of these programs by themselves and apart from the plan as a whole. Its decisions have been limited to the legality of the arrangements in their entirety although there are occasional references to the illegality of the several features of a complex plan.

The component parts of the plan have been treated as evidentiary of ultimate purposes and effects. The entire plan has been scrutinized to determine whether it has resulted or is likely to result in the elimination of competition. The ultimate question in every case has been whether it can fairly be said that implicit in the plan is an agreement or understanding with regard to the price or production policy to be pursued by the members of the combination, or whether there is an agreement or understanding otherwise restrictive of competition. The fact that uniformity of prices has resulted from the operation of the plan has not been deemed conclusive of illegality. Nor has the Court given much weight to proof that the motives of the members of the combination have been beneficent, that there has been no sinister purpose or abuse of economic power, or that the objectives of the plan may have been economically justifiable.

The generality of these decisions, the primacy given to the facts, and the studied refusal of the Court to formulate any generalizations applicable to other states of facts, have limited their practical value to those interested in discovering the permissive limits of the statistical activities of trade associations. Uncertainty is not removed by a doctrine which makes each case a law unto itself.

The Federal Trade Commission in numerous proceedings has scrutinized the statistical activities of trade associations. The many orders are patterned after the rulings of the Supreme Court and hence need not be reviewed here.[53a]

(C) ENUMERATION OF IMPORTANT FEATURES OF STATISTICAL PROGRAMS

Notwithstanding the difficulty and danger involved in the formulation of any generalization with regard to the legality of the component elements of any statistical program, it is essential that this be done, if any sound basis for prediction is to be established.

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[53] *American Column & Lumber Co.* v. *United States*, (1921) 257 U. S. 377, discussed in (1922) 22 Col. L Rev. 377, (1922) 31 Yale L. J. 643, (1922) 10 Calif. L. Rev. 350, (1922) 20 Mich. L. Rev. 901; *United States* v. *American Linseed Oil Co.*, (1923) 262 U. S. 371, discussed in (1924) 9 St. Louis L. Rev. 67; *Maple Flooring Mfrs. Assn.* v. *United States*, (1925) 268 U. S. 563, discussed in (1926) 20 Ill. L. Rev. 505, (1925) 10 Minn. L. Rev. 71, (1925) 11 Corn. L. Q. 123, (1925) 11 A. B. A. J. 422; *Cement Mfrs. Protective Assn.* v. *United States*, (1925) 268 U. S. 588, discussed in (1925) 11 A. B. A. J. 422, (1926) 24 Mich. L. Rev. 316, (1926) 20 Ill. L. Rev. 505; *Sugar Institute, Inc.*, v. *United States*, (1936) 297 U. S. 553, discussed in (1934) 43 Yale L. J., 1295, (1936) 31 Ill. L. Rev. 118, (1936) 34 Mich. L. Rev. 1016.

[53a] Handler, Trade Association Activities forbidden by the Federal Trade Commission, C. C. H. Trade Regulation Comments No. 2, July 1938.

The principal features of a statistical program which may affect its legality are—

(*a*) Availability to purchasers and the public generally, as well as to members of the association, of the information collected and disseminated;
(*b*) The collection and dissemination of information relating to closed and past transactions;
(*c*) The collection and dissemination of information relating to current and future prices;
(*d*) Agreement by members to adhere to filed prices for a period of time or not to deviate therefrom without prior notice;
(*e*) A waiting period before the announced price change becomes effective;
(*f*) Full disclosure of the price, production, and other trade policies of each member;
(*g*) Circulation of interpretative comments by the association;
(*h*) Discussion of the price and production policies of the members of the combination;
(*i*) Recommendations to, persuasion of, or pressure upon a member of the combination concerning his price or production policies;
(*j*) Penalties for the nonobservance of the requirements of the program.

We shall consider the effect of each of these factors on competition and seek to appraise the weight to be accorded their presence or absence in determining the legality of a statistical program. A consideration of the possible economic desirability of those features that are incompatible with a competitive regime falls outside the scope of this inquiry.

(D) APPRAISAL OF THE LEGALITY OF THE PRINCIPAL FEATURES OF STATISTICAL PROGRAMS [54]

(1) *Nonavailability to purchasers and the public of the information collected and disseminated.*—The fact that an association confines the circulation of the information collected by it to its members, without making it available to purchasers or giving it any general publicity, may render its entire statistical program unlawful. In both *American Column & Lumber Co.* v. *United States* [55] and *United States* v. *American Linseed Oil Co.*,[56] the Court stressed the absence of such publicity, although the decisions were not placed on this ground. In *Maple Flooring Mfrs. Assn.* v. *United States*,[57] the Court emphasized the fact that the statistical data had been given wide publicity, but it

[54] Bibliography: Oliphant, Trade Associations and the Law (1926) 26 Col. L. Rev. 381; Handler, The Sugar Institute Case and the Present Status of the Anti-Trust Laws (1936) 36 Col. L. Rev. 1; Handler, Trade Association Activities Forbidden by Federal Trade Commission, C. C. H. Trade Regulation Comments No. 2, July 1938; Fly, Observations on the Anti-Trust Laws, Economic Theory and the Sugar Institute Decisions (1936) 45 Yale L. J. 1339, 46 *id.* 228; Donovan, The Effect of the Decision in the Sugar Institute Case upon Trade Association Activities (1936) 84 U. of Pa. L. Rev. 929; Holbrook, Price Reporting as a Trade Association Activity, 1925 to 1935 (1935) 35 Col. L. Rev. 1053; Sharfman, The Trade Association Movement (1926) 16 Am. Econ. Rev. Supp. 203; Henderson, Statistical Activities of Trade Associations (1926) *id.* 219; Chaplin, The Collection and Distribution of Statistical Information by Trade Associations (1922) 7 St. Louis L. Rev. 16; Federal Trade Commission, Open-Price Trade Associations (1929), containing suggestions and recommendations; Esch, Summaries of Federal Trade Commission Cases in Restraint of Trade (1938); N. R. A. Office Memo. No. 228 (June 8, 1934); N. R. A. Release No. 11056 (April 24, 1935); Kirsh, Trade Associations in Law and Business (1938); Lyon & Abramson, The Economics of Open Price Systems (1936).

[55] (1921) 257 U. S. 377, 411.

[56] (1923) 262 U. S. 371, 380.

[57] (1925) 268 U. S. 563, 573.

did not predicate its ruling on this fact alone. The opinion in *Cement Mfrs. Protective Assn.* v. *United States*[58] does not disclose the extent of the publicity, if any, accorded the association's statistics.

United States v. *Sugar Institute, Inc.*,[59] is the first case in which an attempt was made to indicate the precise legal effect of the absence of publicity. The lower court,[60] in forbidding the dissemination of any information unless it was made available to the purchasing and distributing trade, indicated that the restriction of the information to the members of the combine was in itself an unreasonable restraint of trade. The Supreme Court modified the decree so far as it required the disclosure of confidential material, stating: "Information may be received in relation to the affairs of refiners which may rightly be treated as having a confidential character and in which distributors and purchasers have no proper interest."[61] The Court did not specifically indicate whether it approved the assertion of the lower court that the failure to make the information public is, in and of itself, a restraint of trade, although it affirmed that part of the decree forbidding the dissemination of any information unless it was made public to the purchasing and distributing trade.

The exception formulated by the Supreme Court in favor of confidential communications opens the door to evasion and subterfuge. There is no reason why the same statistics of price, production, shipments, inventories, etc., which are distributed to sellers should not be made available to buyers. There may be some information which cannot be widely disseminated, such as credit information, the circulation of which under the laws of libel is privileged only if limited. However, while such information may properly be withheld from general circulation, it should always be available to inspection by a proper regulatory agency as a safeguard against its improper use, as, for example, in blacklisting customers.

Except for such unusual situations, there is no reason why all information circulated should not be made available to purchasers and the public. Disparity of knowledge may produce a disparity of bargaining power. The effect of publicity is to promote fair competition and safeguard the program against abuse. The validity of statistical programs should be expressly conditioned, in any statutory revision, on the full disclosure to purchasers and the public of all information distributed to members, with narrow exceptions covering certain kinds of information which may properly be withheld from general circulation. This would have the effect of making unlawful any program, no matter what its form or scope, in which information is not made available to purchasers and the public. Despite such publicity, however, statistical programs may be illegal or presumptively unlawful for other reasons set forth below.

(2) *Closed and past transactions.*—In *Maple Flooring Mfrs. Assn.* v. *United States*[62] the Court upheld a plan involving the reporting of detailed information in past and closed transactions and the circulation of abstract statistical summaries that did not disclose the details of individual transactions or identify the policies of members. The reporting and distribution of information concerning past prices,

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[58] (1925) 268 U. S. 588.
[59] (1936) 297 U. S. 553, 597, 604.
[60] (S. D. N. Y. 1934) 15 F. Supp. 817, 899.
[61] (1936) 297 U. S. 553, 604.
[62] (1925) 268 U. S. 563.

and other data dealing with closed transactions, contribute materially to a knowledge of market conditions, to better business judgments and to a better adjustment of supply to market demand. There can be no objection to a program of reporting and disseminating information dealing with past activities that is given wide publicity unless the system is perverted and used as a cloak for a price-fixing agreement. The danger of such abuse is so slight in comparison with the economic advantages of widespread and accurate knowledge of market conditions that the rule of the *Maple Flooring* [63] *case* regarding past reporting should not be touched in any legislative revision of the antitrust laws.

(3) *Filing of current and future prices.*—Prior to the decision in *Sugar Institute, Inc.*, v. *United States*,[64] it was generally believed that any program involving the filing and dissemination of current and future prices violated the Sherman law.[65] In the *Sugar Institute* [66] *case*, the Supreme Court modified the decree of the lower court, which forbade the dissemination of current and future price statistics. The collection and distribution of such statistics were sanctioned by the Court because it had been the historic practice in the sugar industry for the announcement of any advance in price to be widely circulated, but the Court was careful to make explicit its prohibition against any requirement that there be adherence to these prices by members of the industry. The Court was careful to limit its decision in this regard to the facts of the case before it. Nevertheless, some commentators have interpreted the decision as laying down a rule of general application, which would permit the interchange of current and future price information in all industries regardless of the prior trade practice.[67] Although it is reasonably clear that the Court did not intend to lay down any rule of general application, it must be admitted that its decision is somewhat ambiguous. In view of this uncertainty, the question of the extent to which current and future price-reporting should be permitted must be faced in any program of statutory revision. If the prices of each seller are disclosed in identifiable form, future price-reporting can easily become a device by which price leadership is facilitated. Concealed price arrangements, which are incapable of detection, are thus fostered.

Even if the disclosures of individual prices were forbidden, the propriety of permitting the collection and dissemination of current and future prices under any circumstances would still have to be determined. It cannot be said that such reporting, in and of itself, will eliminate price competition under all circumstances. It is conceivable that a properly formulated and carefully administered plan in highly competitive industries might make competition more intelligent and effective and less wasteful. On the other hand, it is undeniable that the practice may induce the making of concealed price arrangements and thus be used for improper purposes.

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[63] *Ibid.* For recent consent decrees permitting the disclosure of closed and past transactions see *United States* v. *National Containers Assn.*, C. C. H. Trade Reg. Serv. (8th ed.), par. 25,434 (S. D. N. Y. 1940); *United States* v. *Long Island Sand & Gravel Producers' Assn.*, *id.* par. 25,475 (S. D. N. Y. 1940).

[64] (1936) 297 U. S. 553.

[65] See *United States* v. *American Linseed Oil Co.* (1923) 262 U. S. 371.

[66] (1936) 297 U. S. 553.

[67] Donovan, The Effect of the Decision in the Sugar Institute Case upon Trade Association Activities (1936) 84 U. of Pa. L. Rev. 929; see Kirsh, Trade Associations in Law and Business (1938) 63 *et seq.* For a recent consent decree forbidding the dissemination of current and future price statistics see *United States* v. *Southern California Marble Assn.*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,607 (S. D. Calif. 1940).

It would be unwise, therefore, to sanction current and future price reporting as a legitimate trade association activity under all conditions. Absolute prohibition could only be justified by reason of the close proximity of the practice to direct price-fixing and the likelihood of abuse. An intermediate position is possible. The practice may be made presumptively unlawful, the burden being shifted to those engaged in the practice to establish that it has not been employed to accomplish ends forbidden by the statute and that its operation has not resulted in the elimination or impairment of competition. The practice is to be presumptively unlawful notwithstanding the full publicity accorded the information. In the absence of such publicity, the dissemination of current and future price data should be absolutely unlawful.

(4) *Agreement to adhere to filed prices for a fixed period of time or not to deviate therefrom without prior notice.*—In the *Sugar Institute* [68] *case*, the Court went further in condemning the agreement to adhere to and not to deviate from filed prices, and in indicating that this phase of the program was in itself unlawful, than it has with regard to any other feature. It can therefore be stated categorically that current or future price reporting coupled with such an agreement is unlawful.[69]

The agreement to adhere to the filed price or other conditions of sale for a fixed period of time or not to deviate therefrom without prior notice apprises competitors, assuming a complete disclosure to them, of the exact terms on which the sales by their rivals will be made. It facilitates price leadership and concealed price understandings. Even without such disclosure, it introduces rigidities into the price structure which is thereby made less sensitive and responsive to economic change. The higgling between buyer and seller, which tends in part to determine prices in a competitive regime, is obviously circumscribed so long as the seller is required to adhere to his prices or to notify the combine of which he is a member, of any proposed change before it can become effective. Such requirements inevitably impair the freedom of action of the individual tradesman and enable him to resist the efforts of buyers to obtain better terms. Such agreements are manifestly inconsistent with the maintenance of competition, and the rule of the *Sugar Institute case* [70] in this should not be disturbed in any statutory revision.

(5) *Waiting period.*—An agreement to wait for a period of time after the announcement of a proposed change in any price, term, or condition of sale before the change from a previously announced price, term, or condition can become effective is subject to the same legal and practical objections as the agreement to adhere. It prevents businessmen from giving immediate effect to their judgment of current market conditions and retards the adjustment of price and production to demand. It also encourages *sub rosa* efforts by the combination and by business rivals to induce the withdrawal of a proposed reduction of price. Where there is a waiting period, tendencies toward coercive price maintenance are more likely to be effective than where a producer can give immediate effect to a price change. The seller or producer should retain the right to set his own prices and to change

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[68] (1936) 297 U. S. 553.

[69] *Id.* at 601; *United States* v. *American Linseed Oil Co.* (1923). 262 U. S. 371.

[70] (1936) 297 U. S. 553. For recent consent decrees prohibiting agreements to adhere see *United States* v. *Southern Calif. Marble Assn.*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,607 (S. D. Calif. 1940); *United States* v. *Underwood Elliott Fisher Co.*, *id.* par. 25,433 (S. D. N. Y. 1940).

prices, terms, or conditions of sale at any time whatsoever and at his own discretion. The waiting period should be specifically outlawed.

(6) *Disclosure of individual price and production data.*—The socially desirable function of supplying helpful information of the fundamental conditions affecting an industry can often be performed without a disclosure of the policies of individual businessmen concerning prices, production, shipments, inventories, terms and conditions of sale, and other similar matters. Disclosure of the specific facts of each sale does not necessarily add to the value of the statistics, and the use of proper cost-accounting methods and the proper breakdown of statistical data falling short of complete identification is usually sufficient to make a statistical service useful in the efficient conduct of a business. This fact has received judicial recognition.[71]

There are occasions, however, when some disclosure of individual policies is necessary to make statistical data useful. One such instance would be to prevent over-reaching by buyers whose purpose it is to force prices down by misrepresenting the quotations of other sellers, or who deal unfairly with sellers in other ways. Disclosure of individual policies on such occasions has been held to be lawful.[72] Over-reaching by buyers may result in one buyer receiving a lower price as contrasted with other buyers, or a disproportionate share of available supplies of merchandise. Both results are socially harmful. There are other times when price information to be meaningful must be capable of identification, as where the products of an industry are unstandardized. The dangers in permitting such disclosures must be recognized. Such revelations invite coercion and reprisal, are conducive to price leadership, price uniformity and other price arrangements, and may in the case of production data lead to a restriction of output.

There are some intimations in the cases that the identification of information concerning prices, terms, and conditions of sale is generally improper, but there are no such intimations with respect to the identification of information concerning production, inventories, etc. While the revelation of individual policies concerning such matters as plant capacity may not be fraught with danger, the same cannot always be said for full disclosures concerning the volume or cost of production, shipments, inventories, and similar matters.

It is our conclusion that decisions do not adequately protect against the evasion of the statutory purposes by the improper use of identifiable data. With regard to information concerning prices and current production, it would appear that legislative correction through the creation of a statutory presumption of illegality would be preferable to an unqualified prohibition since, as stated, some disclosures may be socially desirable. Whether a similar presumption should be invoked on the occasion of the disclosure of other data in identifiable form, is a question that should be left open until our knowledge of the effects of such disclosures is enlarged.

Here again, whatever information is permitted to be disclosed to the members of the association must be accessible to purchasers and the public, with appropriate exceptions to cover information which is incapable of wide circulation. Any information that is not pub-

[71] See *United States* v. *American Linseed Oil Co.* (1923), 262 U. S. 371, 389, 390; *Maple Flooring Mfrs. Assn.* v. *United States* (1925), 268 U. S. 563, 573, 582.

[72] *Cement Mfrs. Protective Assn.* v. *United States* (1925), 268 U. S. 588.

lished should be open to the inspection of an appropriate governmental agency.

(7) *Interpretative comments.*—Although the Court has frowned upon the circulation of interpretative comments, advice, or suggestions by trade associations concerning the data disseminated by them, it has not held that such comments are *per se* illegal.[73] The skilled interpretation of the published reports may clearly indicate to the members that "harmony of action" is "likely to prove profitable in proportion as it is unitedly pursued." [74] Interpretative comments thus may induce uniformity of price and the arbitrary curtailment of production. Price rigidity is undesirable whether the result of agreement or the "voluntary" response to a "pregnant" suggestion. Devices which engender a pernicious result, whether they consist of an agreement or something that falls short of an agreement, should be prevented so far as is practicable. As regards interpretative comments, a choice must be made between an outright legislative prohibition and the creation of a statutory presumption. Although interpretative comments have been employed in the past as a means of evading the statute, a complete prohibition would outlaw the circulation of comments which conceivably might be socially desirable. The wiser choice, therefore, would appear to be to formulate a statutory presumption, imposing a heavy burden on those employing the device to show that its use is consistent with the precepts of a competitive order, and requiring all such comments to be accessible to the public.

(8) *Meetings and discussions.*—While the cases do not condemn meetings of competitors to discuss general trade conditions or topics of mutual interest, they do indicate that meetings at which prices, prospects of the market, production, or terms and conditions of sale are discussed may be outside the pale of legality.[75] To permit discussion of prices, for example, clears the path for implied understandings, gentlemen's agreements, or unlawful concerted action of some form, even in the absence of a definite contract. The full disclosure of prices and other terms of sale leads to the imposition of pressure upon price laggards. It both facilitates the making of hidden understandings and aids in their enforcement once made. It is well known that many associations have paper plans of undoubted validity, but seek to evade the prohibitions of the law by discussions at meetings or otherwise. One of the ways to strengthen the statute is to require full stenographic records of all meetings, which should always be available for examination by an appropriate regulatory agency, and to make taboo the discussion of certain topics which are apt to result in some form of collusive restraint.

(9) *Recommendations, persuasion, or pressure concerning price or production policies.*—The recommendation to or persuasion of a member of an association to pursue a suggested program concerning prices or production is closely allied to the circulation of interpretative comments and the discussion by members of prices, production, or

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[73] See *American Column & Lumber Co.* v. *United States* (1921), 257 U. S. 377, 407, 411.

[74] *Id.* at 411.

[75] See *American Column & Lumber Co.* v. *United States* (1921), 257 U. S. 377, 399, 405, 407; *United States* v. *American Linseed Oil Co.* (1923), 262 U. S. 371, 389; *Maple Flooring Mfrs. Assn.* v. *United States* (1925), 268 U. S. 563, 574, 586; *Cement Mfrs. Protective Assn.* v. *United States* (1925), 268 U. S. 588, 601. For recent consent decrees prohibiting the discussion of data at association meetings relating to production or conditions of sale see *United States* v. *National Containers Assn.*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,434 (S. D. N. Y. 1940); *United States* v. *Southern Calif. Marble Assn.*, *id.* par. 25,607 (S. D. Calif. 1940).

terms and conditions of sale. Unlike the interpretative comment, which merely purports to explain the meaning of the accompanying data, recommendations, persuasion, and pressure urge or compel the adoption of a stated course of action. The pressure to observe or maintain the suggested program is usually applied through an active official of the association who polices the industry, investigates the manner in which members conduct their business, makes recommendations to price laggards and in other ways exhorts them to conform their policies with those of the other members of the association. Although no decision specifically holds that the practice in and of itself is either lawful or unlawful, it may be a significant fact from which an agreement to fix prices or limit production may be inferred.[76] The practice, which is inconsistent with the maintenance of competition, should be expressly prohibited in any statutory codification.

(10) *Penalties.*—Penalties for violation of the provisions of an association argument were imposed in one of the plans condemned by the Supreme Court [77] and were absent in all of the plans that have received judicial approval.[78] It is nevertheless highly questionable whether the mere implementation of a plan, otherwise valid, with penalties, will vitiate its legality. When used to compel adherence to filed prices or for other improper purposes, their use accentuates the illegality of the arrangement. Placing the power to impose penalties in private hands is an extremely dangerous practice. It may, however, be desirable to assist an association in its efforts to stamp out dishonest or fraudulent activities and raise the level of trade practice by permitting it to impose penalties under narrowly restricted circumstances provided suitable safeguards to prevent abuse are provided.

(11) *Miscellaneous factors that may affect the legality of statistical programs*—(*a*) *Competitive texture of the industry.*—There is a distinction between the role of business information in industries where there are few sellers and its function under conditions of more active competition. Where an industry is monopolistic, the dissemination of information may tend to reduce the little competition that might otherwise prevail and may facilitate tacit arrangements of a restrictive nature.

(*b*) *Demoralized state of the industry.*—One of the factors considered by the Court in the *Sugar Institute case* [79] in determining the validity of the program there in issue was the depressed condition of the sugar industry when the program took effect. The earlier case of *Appalachian Coals, Inc.*, v. *United States*,[80] also indicated that industrial programs designed to rehabilitate a demoralized industry and to eliminate unfair trade practices might be accorded greater latitude than similar programs operating in a healthy industry. Although the state of the industry should be a factor to be considered with all the other circumstances in determining the legality of a plan, there should be no blanket exemption on this basis without strict administrative supervision by a governmental agency.

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[76] See *American Column & Lumber Co.* v. *United States* (1921), 257 U. S. 377, 402. For a recent consent decree prohibiting the uso of pressure or persnasion concerning price or production policies see *United States* v. *Southern Calif. Marble Assn.*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,607 (S. D. Calif. 1940).

[77] *United States* v. *American Linseed Oil Co.* (1923), 262 U. S. 371. For a recent consent decree prohibiting the imposition of a penalty on a member of a trade association see *United States* v. *Tile Contractors' Assn. of America*, C. C. H. Trade Reg. Serv. (8th ed.) par. 25,469 (N. D. Ill. 1940).

[78] *Maple Flooring Mfrs. Assn.* v. *United States* (1925), 268 U. S. 563; *Cement Mfrs. Protective Assn.* v. *United States* (1925), 268 U. S. 588; see *Sugar Institute, Inc.*, v. *United States* (1936), 297 U. S. 553.

[79] (1936) 297 U. S. 553.

[80] (1933) 288 U. S. 344.

(*c*) *Effect on prices.*—Although the actual effect of a statistical program upon prices is evidentiary of its compatibility with competition, it is not conclusive as to whether it may in the future result in the elimination of competition. If the program greatly facilitates the making of unlawful price arrangements, it should not be given approval merely because it has not yet affected prices adversely.

(*d*) *Regulatory agency.*—In all the decided cases, information was collected and disseminated by unsupervised trade associations or agencies subject to the control of the association in question. The lack of supervision opens the door to the improper use of the information by the association and to favoritism. These dangers may be avoided in various ways. First, trade associations might be subjected to governmental registration and supervision with suitable standards imposed to govern the conduct of their statistical activities. Second, a governmental agency might collect and disseminate all statistical data. The collection and dissemination by a governmental agency of the vast amount of statistical information now distributed by individual trade associations would in all probability impose a burden which no governmental body should be expected to carry. Third, the collection and dissemination might be done by private, impartial agencies independent of the associations and licensed by the Federal Government. This was suggested by the N. R. A.[81] This would be desirable in the absence of any regulation of the associations; if associations are required to be registered, it might be unnecessary to set up any separate instrumentalities for this purpose. The first alternative is considered to be the most feasible.

It is vital that the information which is collected and disseminated should be available to the Government to satisfy its urgent need for comprehensive and adequate statistics. All information should be filed with an appropriate governmental department or agency, and should be available for public examination. To coordinate industrial statistics obtained from numerous trades and industries it may be necessary to obtain special reports from trade associations. It is essential therefore that the department or agency charged with such coordination be empowered to request such additional reports as may be necessary and advisable.

(E) SUGGESTIONS

Because the different features that may be included in any program to disseminate trade statistics vary in their effect upon the price structure and in the extent to which they may be used to cloak unlawful arrangements concerning prices, it is unwise to treat them all in the same manner, or even to divide them categorically into the lawful and the unlawful. Some features, in and of themselves, so closely approximate price-fixing or agreements concerning production or may be so easily perverted to accomplish these purposes, that they should be unqualifiedly prohibited in any statutory revision.

Other features, while potentially harmful, since they may, under some circumstances, result in understandings concerning prices, production, or terms and conditions of sale, may perform socially desirable functions if they are not abused. They should neither be

[81] N. R. A. Office Memo. 228, June 8, 1934; see Lyon & Abramson, The Economics of Open Price Systems (1936), 115 *et seq.*

unqualifiedly prohibited nor unqualifiedly permitted. The restrictions on these features should be cast in terms of a rebuttable presumption of illegality. The effect of such a presumption will be to discourage the adoption of programs which include these features, to restrict them to socially useful channels when adopted, and to facilitate the enforcement of the statute by the Government, since the burden of justification will rest upon those engaging in the activities.

As regards still other features of programs for disseminating statistical information, their susceptibility to abuse is so slight when compared with the social advantages to be derived from their use, that they should be unqualifiedly permitted. By so doing, much uncertainty will be lifted from this branch of the law.

It is not enough to divide the features of statistical programs into these three categories. Full consideration must be given to the potency of publicity in the correction of the evils arising out of the collection and dissemination of statistics. There should be a definite requirement of publicity as a condition to the legality of any statistical program. Despite publicity, some features should still be presumptively unlawful and some unqualifiedly unlawful.

Trade associations have a distinct service to perform in modern industrial society. Many, indeed most, of the activities in which they engage are perfectly consistent with the maintenance of price competition and go a long way in raising the standards of competitive relations. Regulation of unfair and deceptive competitive practices, the arbitration of commercial disputes, the standardization of identity and quality of products, the improvement of conditions of labor, the registration of trade-marks and original styles and designs, the conservation of natural resources, the elimination of wasteful practices, and the promotion of efficiencies in production and distribution are only a few of the fields in which trade associations perform a distinct social service.

The criticisms of the trade associations' activities considered in this section are not to be taken as condemnations of the trade association movement as such, nor are the suggestions that have been made for legislative correction intended to limit the capacity of trade associations to render a real public service to industry and the community.

(F) CONCLUSIONS

A. Whether or not full publicity is accorded any statistical program and whether or not the information is filed with a governmental department or agency, the following features of such programs should be unqualifiedly prohibited:

(1) Any agreement to adhere for any period of time to any price, term, or condition of sale previously fixed, announced, or filed;

(2) Any agreement not to make any change in any price, term, or condition of sale without giving prior notice of such change;

(3) Any agreement to observe a waiting period before an announced change from a previously fixed, announced, or filed price can become effective;

(4) All discussions by competitors which result or are likely to result in uniformity of action concerning price or production policies;

(5) All recommendations to, persuasion of, or pressure upon, any member to follow, observe, or maintain any suggested program concerning prices or production.

B. Whether or not full publicity is accorded any statistical program and whether or not the information is filed with a governmental department or agency, the following features of such programs should be presumptively unlawful:

(1) The filing and communication, collection, or dissemination of any information concerning current or future prices, terms, or conditions of sale;
(2) The disclosure to competitors of any information concerning the prices or volume of production of individual members of the association;
(3) The communication or circulation of interpretative comments which result or are likely to result in uniformity of action in respect of prices or production.

C. The following type of statistical program should be permitted: The communication, collection, and dissemination of information concerning prices, terms, and conditions of sale and production policies that relate to closed and past transactions, subject, however, to the following conditions:

(*a*) There must be no disclosure of individual price and production policies, except when necessary to prevent overreaching by buyers;
(*b*) The information concerning prices, production, inventories, etc., must be disclosed to anyone on request and filed with a governmental department or agency;
(*c*) The information must be complete, accurate, and truthful;
(*d*) The information must be collected and disseminated by a registered association in accordance with the rules and regulations prescribed by an appropriate regulatory agency.

DEGREE OF MARKET CONTROL

(A) DEFINITION OF TERMS

As most associations embrace a majority of the persons in their industries, it is not generally appreciated that arrangements eliminating competition are frequently made by minority groups lacking control of the market in which they operate. Although unable completely to suppress competition in their markets, the activities of such groups do affect general competitive conditions and may place their members in position of advantage in their relations with competitors or purchasers.

Any distinction between minority and majority groups involves numerous definitional difficulties. To determine the degree of market control of any group, it is necessary to define the industry of which the group is a part and the market in which it does business. In the window-glass industry, for example, handblown competes with machine-made glass. A combination of manufacturers of handblown glass may be deemed a monopolistic group if handblown glass is regarded as a separate industry, while in relation to the entire window-glass industry, it may be but a minor factor. On a nationwide basis, a group may be almost infinitesimal, while in the areas in which its products are sold, it may enjoy a position of dominance.

Nor is it easy, once the preliminary difficulties in defining the industry and market are overcome, to determine the point at which the degree of control can be said to be monopolistic. It seems reasonably clear that monopoly is something less than complete domination, but how much less the decisions do not reveal with any clarity. For present purposes, the distinction lies in the ability to set the market price. A group sufficiently powerful to dictate the market price is monopolistic; a combination lacking such power is denominated a minority group.

(B) SUMMARY OF AUTHORITIES

In the early decisions, the degree of market control was not deemed a material factor in determining the legality of an arrangement restrictive of competition.[82] The classic enunciation of this view is to be found in the monumental opinion of Judge Taft in *Addyston Pipe & Steel Co.* v. *United States*.[83] Although the defendants in the *Addyston case* claimed that their output did not exceed 30 percent of the national production of cast-iron pipe, their power in the markets in which they disposed of their products was extensive. Nevertheless, Judge Taft, for the purposes of decision, treated the combine as a nonmonopolistic group and specifically held that price-fixing is unlawful whether practiced by majority or minority groups.

> Upon this review of the law and the authorities, we can have no doubt that the association of the defendants, however reasonable the prices they fixed, *however great the competition they had to encounter*, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition, was void at common law, because in restraint of trade, and tending to a monopoly. * * * Now, the restraint [the defendants] thus imposed on themselves was only partial. It did not cover the United States. There was not a complete monopoly. It was tempered by the fear of competition, and it affected only a part of the price. But this certainly does not take the contract of association out of the annulling effect of the rule against monopolies.[84]

In *Chesapeake & Ohio Fuel Co.* v. *United States*[85] the court held illegal an exclusive sales agency which had been formed to market about 30 percent of the coal and about 45 percent of the coke which was produced in the Kanawha district of West Virginia. The coal of the combine was less than 1 percent of that sold in the same markets in which it competed and the coke sold met "severe" competition in all markets. The sales agency was given the power to fix the prices and to control the production of the members of the groups. Although the combination was subject to effective competition in all markets, it was held illegal since it deprived the public of the benefits of competition within the group. "The law reaches combinations which may fall short of complete control of a trade or business, and does not await the consolidation of many small combinations into the huge 'trust' which shall control the production and sale of a commodity."[86]

[82] *Addyston Pipe and Steel Co.* v. *United States* (C. C. A. 6th, 1898) 85 Fed. 271, *aff'd* (1899), 175 U. S. 211; *Chesapeake and Ohio Fuel Co.* v. *United States* (C. C. A. 6th, 1902), 115 Fed. 610.
[83] (C. C. A. 6th, 1898) 85 Fed. 271, *aff'd* (1899) 175 U. S. 211.
[84] (C. C. A. 6th, 1898) 85 Fed. 271, *aff'd* (1899) 175 U. S. 211.
[85] (C. C. A. 6th, 1902) 115 Fed. 610.
[86] *Id.* at 624.

Thus the law stood until the decision in *Standard Oil Co. of New Jersey* v. *United States*,[87] in which Chief Justice White, in the formulation of the rule of reason, fused the dual concepts of restraint of trade and monopoly:

> The ambiguity [in the act], 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 results 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.[88]

The Court's discussion is rather obscure and it is difficult to determine whether it intended to differentiate between minority and majority groups, holding only the activities of the latter unlawful, or whether its purpose was to promulgate a rule of reason applicable to all the activities of both minority and majority combinations.

Most of the combinations invalidated both before and after 1911 possessed monopoly power. Thus, in *United States* v. *Joint Traffic Assn.*[89] the combination embraced "most (but not all)" of the carriers operating between Chicago and the Atlantic coast; "a very large part" of the linseed products business was done by the defendants in *United States* v. *American Linseed Oil Co.*;[90] the buyers of livestock who agreed not to bid against each other and to fix prices in *Swift & Co.* v. *United States*[91] controlled about 60 percent of the national commerce in fresh meats. But in *American Column & Lumber Co.* v. *United States*[92] a combination which produced only one-third of the total national output of hardwood was condemned. Although its control in particular markets is not disclosed, the minority opinion assumes that the combine was subjected to effective outside competition. Despite this fact, the adverse effect upon the general price level engendered by the defendants' activities indicates that the combination possessed considerable power. The tenor of the Court's opinion, however, especially when read in the light of the dissent, is that production and price control by any group of competitors, no matter what its size, is interdicted by the Sherman law.

There are four decisions which, while not purporting to overturn the clear-cut rule of the *Addyston case*,[93] give considerable weight to the combine's lack of monopoly power. In *Board of Trade of the City of Chicago* v. *United States*[94] a restriction of an organized exchange against grain purchases after closing hours at prices in excess of the final bid in the open market was sustained. The exchange's regulation did not eliminate but merely regularized competition for only a small part of the working day in a situation far different from that obtaining in the ordinary industrial market. The case dealt with a special situation and the tendency of the Court has been to limit it to its facts.[95] The language of the opinion, however, leans toward the view that arrangements which have but a partial and not a controlling effect on the market price may be permissible.

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[87] (1911) 221 U. S. 1.
[88] *Id.* at 61.
[89] (1898) 171 U. S. 505.
[90] (1923) 262 U. S. 371.
[91] (1906) 196 U. S. 375.
[92] (1921) 257 U. S. 377.
[93] (C. C. A. 6th, 1898) 85 Fed. 271, *aff'd* (1899), 175 U. S. 211.
[94] (1918) 246 U. S. 231.
[95] *United States* v. *Trenton Potteries Company* (1927), 273 U. S. 392, 401; *United States* v. *Socony-Vacuum Oil Co.* (1940), 310 U. S. 150, 217.

In *National Assn. of Window Glass Manufacturers* v. *United States*,[1] the Supreme Court validated an agreement between an association of all the manufacturers of handblown window glass and a labor union controlling the labor supply of this branch of the window-glass industry. The number of skilled laborers was insufficient to keep all plants operating at full capacity during the entire year. The agreement provided that the manufacturers were to be divided into two groups, each to have a full labor complement for a part of the year. This was deemed preferable to each working at partial capacity during the entire year. Handblown glass competes with the machine-made product and comprises but a minor part of the total national output of window glass. It is apparent from the opinion of the Court, which is quite ambiguous, that some weight was attached to the small proportion of window glass produced by members of the combination. The Court was struck by the fact that the arrangement was an effort by a rapidly dying industry to prevent or at least retard its extinction. The case dealt with a unique situation, has rarely been cited, and has had little generative effect as a precedent.

That the Court might permit a minority group under some circumstances to eliminate competition among its members is more strongly indicated by *Standard Oi' Co. (Indiana)* v. *United States* [2] (Cracking case). There the fixation of royalty rates as part of a cross-licensing arrangement of competing patents was sustained on the ground that the gasoline produced by the patented cracking process competed with gasoline sold by unpatented methods and that the proportion of cracked gas sold was too slight to have any effect on the ultimate price of gasoline to consumers. The defendants controlled 55 percent of the productive capacity of cracked gas, and the Government estimated that they were responsible for 81 percent of the actual production. Cracked gas, however, constituted about 26 percent of the total output of gasoline. The Court indicated that the fixation of royalty rates would be unlawful if the position and capacity of defendants effectively enabled them to dominate the industry, but that they could agree on the price or royalty to be charged licensees so long as they did not control the market. Though the implications of the opinion on the question under consideration are quite clear, the case is one of doubtful value as a precedent since it was primarily concerned with the intricacies of patent pools and cross-licensing agreements.

In *Appalachian Coals, Inc.*, v. *United States* [3] the Court upheld an exclusive sales agency formed to market and fix the price of 54.21 percent of the coal mined in the Appalachian area; it emphasized the fact that the defendants were subject to effective outside competition in all the markets in which their product was sold and were consequently unable to control the market price of coal. The language of the Court, when contrasted with that used in *Chesapeake & Ohio Fuel Co.* v. *United States*,[4] illustrates how great has been the change in attitude toward minority combinations:

> The mere fact that the parties to an agreement eliminate competition between themselves is not enough to condemn it. * * * The more serious question relates to the effect of the plan upon competition between defendants and other producers. * * * While conditions are more favorable to the position of

[1] (1923) 263 U. S. 403.
[2] (1931) 283 U. S. 163.
[3] (1933) 288 U. S. 344.
[4] (C. C. A. 6th, 1902) 115 Fed. 610.

defendants' group in some markets than in others, we think that the proof clearly shows that, wherever their selling agency operates, it will find itself confronted by effective competition backed by virtually inexhaustible sources of supply, and will also be compelled to cope with the organized buying power of large consumers. The plan cannot be said either to contemplate or involve the fixing of market prices.[5]

While the case gives strong support to the legality of agreements eliminating competition among the members of a minority group, it loses some value as a precedent by the fact that the program concerned itself with efforts to mitigate the hardships of producers in a hopelessly disorganized and depressed industry during a period of general depression and by the fact that it was submitted to the court before it was put into operation. The case, moreover, dealt with a defensive combine seeking to equalize the bargaining power between weak sellers pitted against mammoth industrial buyers. Nevertheless, the language in the opinion undoubtedly favors the legality of minority combinations whose restraints do not eliminate competition from the market itself.

Two further factors should be noted. The Court in the *Appalachian Coals* [6] *case* indicated that the test of legality is the same in both merger and loose-knit combination cases. The element of market control is of undoubted importance in determining the legality of mergers and consolidations under the anti-trust laws.[7] But the decisions in the merger field cannot be reconciled in terms of percentages, and the merger experience teaches how unstable a criterion is the element of size or market control.[8] Secondly, the Court ordered the lower court to retain jurisdiction of the cause, so as to enable the Government to institute further proceedings if the plan in operation led to any abuse. The retention of jurisdiction in itself indicates that no rule of universal application in respect of the activities of minority groups was being adopted.

While these decisions appear to support the view that agreements eliminating competition among the members of a minority group which is subject to effective outside competition may conceivably be valid, each of the cases is limited by the special facts and circumstances already noted.

The degree of market control as a factor in antitrust litigation has recently been reexamined by the Supreme Court. Although unnecessary to the decision, the Court in the *Socony-Vacuum case* [9] unequivocally condemned price-fixing by minority groups as follows:

> The group making those agreements may or may not have power to control the market. But the fact that the group cannot control the market prices does not necessarily mean that the agreement as to prices has no utility to the members of the combination. The effectiveness of price-fixing agreements is dependent on many factors, such as competitive tactics, position in the industry, the formula underlying price policies. Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy.

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[5] *Appalachian Coals, Inc.*, v. *United States, supra*, at 360, 361, 373.

[6] (1933) 288 U. S. 344.

[7] Handler, Industrial Mergers and the Anti-Trust Laws (1932), 32 Col. L. Rev. 179.

[8] Capital combinations controlling 50 percent (*United States* v. *U. S. Steel Corp.* (1920), 251 U. S. 417), 64 percent (*United States* v. *International Harvester Co.* (1927), 274 U. S. 693), and even 90–95 percent (*United States* v. *United Shoe Machinery Co.* (1918), 247 U. S. 32) of an industry have been sustained. On the other hand, integrations covering but 20 percent (*United States* v. *Lehigh Valley Railroad Co.* (1920), 254 U. S. 255), and 33 percent (*United States* v. *Reading Co.* (1920), 253 U. S. 26) of an industry have been declared illegal.

[9] (1940) 310 U. S. 150.

Only a confusion between the nature of the offenses under those two sections * * * would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under § 1.[10]

The Court does not assert that the absence of monopoly power may not be a factor in determining the legality of other activities of trade groups. Its discussion relates to price-fixing only. However, its analysis appears to be hostile to any practices which suppress competition, whether indulged by minority or monopoly groups.

In its decision in the *Apex Hosiery case*, [11] 21 days later, the Court in dealing with a totally different problem creates the impression by, its repeated references to the *Appalachian Coals case* [12] that the absence of monopoly power may save a combination which otherwise would be unlawful. Mr. Justice Stone states:

* * * In the cases considered by this Court since the *Standard Oil case* in 1911 some form of restraint of commercial competition has been the *sine qua non* to the condemnation of contracts, combinations, or conspiracies under the Sherman Act, and, in general, restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. * * * [13]

* * * So far as appears the delay of these shipments was not intended to have and had no effect on prices of hosiery in the market, and so was in that respect no more a restraint forbidden by the Sherman Act than the restriction upon competition and the course of trade held lawful in *Appalachian Coals, Inc.*, v. *United States, supra*, because notwithstanding its effect upon the marketing of the coal it nevertheless was not intended to and did not affect market prices.[14]

These oscillations of opinion thus leave unclear the precise effect accorded the factor of market control in loose-knit confederation cases.

(C) SUGGESTIONS

The statute will be immeasurably weakened if minority groups are permitted to eliminate competition among themselves. Such arrangements inevitably lessen to some extent the competition to which the public looks for its protection. They are often the first step in a program of monopoly control. Each group when separately considered may not affect the competitive texture of the industry, but with the formation of each additional group, competition becomes more and more attenuated until it disappears. Moreover, these combinations are normally not established unless competition in the industry as a whole can be affected. The only justification for minority combinations is economic self-defense, when unorganized businessmen are subjected to over-reaching and other improper practices by those with whom they trade. This, however, is not the typical situation in industry.

Courts are ill-equipped to apply a rule which is more economic than legal in nature and which necessitates the minute examination of many subtle factors. An erroneous determination by the Court,

[10] *Id.* at 225, 226, n. 59.
[11] (1940) 310 U. S. 469.
[12] (1933) 288 U. S. 344.
[13] 310 U. S. 469, 500. The Court cites with apparent approval the decisions in the *Window Glass* and *Chicago Board of Trade cases* and also the various merger cases in which combinations not controlling the market were sustained.
[14] *Id.* at 501. For similar passages in the opinion see *id.* at 492, 493, n. 15; 495, n. 16, 512.

exculpating incipient monopolies, will have dangerous social consequences. The inadequate and sporadic nature of judicial control might eventually make more thoroughgoing governmental supervision necessary. No suppression of competition, however minute, could long continue without such regulation. To supervise and regulate the multitudinous arrangements that would be made were the dictum of the *Appalachian case* [15] to become the established rule would impose an administrative burden upon government which could only be justified by indubitably clear social and economic gains.

If the antitrust laws are to retain their potency, vigilance is necessary to prevent their attrition by nibbling exceptions.

In our opinion, every contract or combination in or affecting interstate commerce, between two or more persons, to eliminate, prevent, impair, or lessen in any degree the competition between the parties thereto or among any persons affected thereby should not be permitted, save possibly under very special circumstances and then only under effective governmental supervision.

In most of the cases before the Federal Trade Commission, the combinations dominated their industries; in the few cases in which predominant control was lacking, the groups nevertheless possessed considerable strength. There is no indication in the orders that any distinction is being drawn by the Commission on the basis of degree of market control.

The uncertainty concerning the element of market control thus still persists and can only be finally removed by legislative action.

PRICE UNIFORMITY AND IDENTICAL BIDS

(A) DESCRIPTION OF PRACTICE

Price uniformity is not uncommon in many industries. Over considerable periods of time, virtually the same price may be quoted by sellers for the same or substantially similar products. Such prices may be constant for a long time, or they may fluctuate, but the fluctuations, either up or down, tend to be uniform. Changes will be announced or placed in effect at substantially the same time. The movements of such prices do not harmonize with changes in the general price level. The uniform price tends to be rigid or "sticky" when other prices are rapidly mounting or declining. Its rise may be more rapid or its decline more gradual and less precipitate than prices of related goods. This uniformity of price is not sporadic or intermittent; it is the regular and normal procedure in many industries.

Sporadic uniformity may occur in fields characterized by the widest diversity of price and price movements. Such momentary uniformity, if not typical of the behavior of prices in the industry, raises no serious problem under the antitrust laws. It must, however, be distinguished from price uniformity which is prolonged and continuous.

Uniformity also characterizes the prices in the open markets maintained on organized exchanges. Everyone buys and sells at the market price, which is highly sensitive to market conditions and which represents a temporary truce in the clash of the opposing forces of buyers and sellers. But such prices are extremely fluid and change with great frequency, sometimes with almost every sale. Such uni-

[15] (1933) 288 U. S. 344.

formity as may obtain at any moment in such markets manifests the perfection rather than any imperfection of competition.

Uniformity or identity of price frequently occurs in the case of competitive bids. In recent years there have been many instances of bids submitted to public and private purchasers which were identical to the last penny.

Although it is essential to draw a sharp distinction between sporadic and constant uniformity in fields in which price is determined by direct negotiation between buyer and seller in each transaction, there is no need for a similar distinction in the case of competitive bids. Bids are submitted in response to a specific invitation; they are concerned with a definite transaction. Identity of bids is seldom a mere fortuitous occurrence or the product of natural economic causes, as may be the case of sporadic uniformity in a fluctuating market. Such identity bespeaks collusion; it is an abnormal condition which is not to be anticipated in an industry truly competitive.

Uniformity or identity does not connote in this context that the prices of competitors are invariably the same. It is sufficient if, considering all the circumstances, the prices or bids are substantially alike or virtually identical. In other words, slight variations or studied differences do not negate uniformity or identity, but the degree of variation must necessarily be limited.

(B) ANALYSIS OF PRICE UNIFORMITY

It is a curious paradox that uniformity of price may, under diverse circumstances, be a token both of perfect competition and of collusive restraint. Under conditions of perfect competition, with products standardized and undifferentiated, sellers numerous and of approximately equal economic strength, and buyers fully informed concerning the conditions of the market, uniformity from moment to moment is to be anticipated. That is not to say, however, that under conditions of perfect competition, prices are maintained without modification over considerable periods of time or that there is a complete uniformity in the fluctuations of the prices of all sellers.

The conditions of perfect competition characterize the ideal market so frequently encountered in the books and so rarely found in actual business life. Except for organized exchanges, most markets do not conform to the ideal pattern of perfect competition. Products may be intricate and unstandardized; they are differentiated by trade-marks, trade names, and similar symbols, and by variations in quality and other characteristics. Information percolates slowly through most markets; there are disparities of knowledge of market conditions between seller and buyer; few buyers are adequately informed concerning available supplies and quotations; sellers are limited in number and some producers may be sufficiently powerful to affect the market price by their independent action; there is no uniformity on the part of businessmen as to their margins of profit or volume of business; disorganized buyers may be confronted with highly organized sellers. Uniformity of price in the face of such rich diversities of product and other market factors, especially when prolonged or when the movement of prices is contrary to general economic trends, is neither natural nor accidental; it is an artificial condition induced by collusive restraint. To mistake such uniformity for the perfection of competition is to confuse the perfect competition of the books with the imperfect competition of the market place.

(C) STATE OF THE AUTHORITIES

The Supreme Court has indicated that uniformity of price may be evidence from which an unlawful price agreement may be inferred.[16] Such uniformity, however, has not been deemed conclusive proof of collusion; it is but one of the facts tending to prove the existence of an unlawful arrangement concerning prices. The Court has heeded the teachings of classical economists that uniformity is a symptom of perfect competition, without always taking into account the actual competitive texture of the market in which the uniformity occurs.

In *Cement Mfrs. Protective Assn.* v. *United States*,[17] evidence was introduced that the prices charged for cement were substantially uniform. In considering the effect of this proof on the legality of the collection and dissemination of trade statistics by an association, the Court stated:

> It is urged by the defendants that such uniformity of price as existed in the trade was due to competition. They offered much evidence tending to show complete independence of judgment and of action of defendants, by large expenditures in competitive sales efforts and by variations in the volume of their production and shipment, earnings and profits. A great volume of testimony was also given by distinguished economists in support of the thesis that, in the case of a standardized product sold wholesale to fully informed professional buyers, as were the dealers in cement, uniformity of price will inevitably result from active, free, and unrestrained competition; and the Government in its brief concedes that "undoubtedly the price of cement would approach uniformity in a normal market in the absence of all combinations between the manufacturers."
>
> We realize also that uniformity of price may be the result of agreement or understanding, and that an artificial price level not related to the supply and demand of a given commodity may be evidence from which such agreement or understanding, or some concerted action of sellers operating to restrain commerce, may be inferred. But here the Government does not rely upon agreement or understanding, and this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement to which we have referred; and it fails to show any effect on price and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action.[18]

In determining whether competitive conditions existed in the agricultural implement industry, the Supreme Court in *United States* v. *International Harvester Co.*,[19] found that many of the competitors of the International Harvester Co., which controlled about 64 percent of the business in this industry, were—

> accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines; * * * and the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.[20]

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[16] See *Cement Mfrs. Protective Assn.* v. *United States*, (1925) 268 U. S. 588, 606; *cf. United States* v. *United States Steel Corp.*, (1920) 251 U. S. 417, 448, 449; *United States* v. *International Harvester Co.*, (1927) 274 U. S. 693, 708.

Bibliography: Burns, the Decline of Competition (1936), ch. V; Dennison and Galbraith, Modern Competition and Business Policy (1936), generally; Lyon and Abramson, the Economics of Open Price Systems (1936), ch. IV; Federal Trade Commission, Open-Price Trade Associations (1929), especially pp. 355 et seq.; Fly, Observations on the Antitrust Laws (1936), 45 Yale L. J. 1339.

[17] (1925) 268 U. S. 588.

[18] *Id.* at 606.

[19] (1927) 274 U. S. 693.

[20] *Id.* at 708.

This statement conformed to the Court's earlier pronouncement in *United States* v. *United States Steel Corp.*[21] The issue in this case was not whether a price agreement had been made by the members of the steel industry but whether the Steel Corporation constituted an unlawful monopoly. In considering the competitive position of the Steel Corporation, the Court refused to regard the fact that prices in the industry had been uniform or that competitors had followed the corporation's price leadership as proof of monopoly power. It rejected the contention that—

> when prices are constant through a definite period an artificial influence is indicated; if they vary during such a period it is a consequence of competitive conditions. It has become an aphorism that there is danger of deception in generalities, and in a case of this importance we should have something surer for judgment than speculation, * * *.[22]

It is evident that the Court misapprehended the Government's contention that price uniformity manifested monopoly domination. In holding that the monopoly provision of the statute had not been violated, the Court did not rule upon, and indeed had no occasion to pass upon, the probative force of uniformity in establishing a collusive agreement.

As the Sherman law merely forbids contracts, combinations, or conspiracies in restraint of trade, it has not been enough for the Government to show in any litigation that conditions exist in an industry which are inconsistent with the maintenance of competition. It has had further to show that these conditions have been induced by some agreement or understanding. This it may do by proof of an actual agreement or of facts from which such agreement may be inferred. Under the decisions, uniformity is clearly one of the facts from which the inference of agreement may be drawn, but it is not conclusive evidence of a collusive agreement. Although there is no decision holding such evidence to be *prima facie* proof of collusion, it must be noted that no decision has expressly refused to accord the evidence such weight. And one recent decision has intimated that uniformity may be exceedingly weighty under certain circumstances. Thus the Court in *Interstate Circuit Co., Inc.*, v. *United States* [23] said:

> It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.[24]

The weight of such evidence should be further clarified in the decisions of several pending cases. Such decisions may obviate the need of any legislation.

(D) SUGGESTIONS

The limited effect accorded proof of price uniformity under the rule laid down by the Supreme Court adds to the difficulty of enforcing the Sherman law. As conspirators typically take care to leave no record of their activities and avoid reducing to writing their unlawful arrangements, the conspiracy can only be proved by circumstantial evidence. In many cases, the Government can merely establish uniformity of price or identity of bids. While there is always a strong

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[21] (1920) 251 U. S. 417.
[22] *Id.* at 448.
[23] (1939) 306 U. S. 208, discussed in 23 Minn. L. Rev. 689; 52 Harv. L. Rev. 846.
[24] (1939) 306 U. S. 208, 223.

probability that uniformity is the result of collusion, it may be impossible to adduce additional legal proof of direct price-fixing. Unaided by any presumption, the Government's suit must fail, and the public is thus deprived of the benefits of competition in the many instances in which collusion is in fact secretly practiced.

It would obviously be unwise to adopt legislation making proof of price uniformity conclusive evidence of an illegal agreement to fix prices or eliminate competition, in view of the diverse circumstances and innocent occasions in which uniformity may occur. A statutory presumption, however, which could be rebutted by appropriate evidence showing the causes of uniformity to be other than that of a collusive agreement, would greatly facilitate the enforcement of the statute without imposing any unfair burden on persons charged with a violation of the law. Such a presumption would merely effect a more equitable division of the evidential burdens of antitrust litigation. Its principal effect would be to compel those in a position to know the facts to come forward and explain the reasons for the continuous uniformity of prices.

To invoke a presumption of collusive agreement in every instance of uniformity would not be wise. As we have seen, uniformity may occur in highly competitive industries. There are numerous forces at work in retailing, for example, which induce uniformity entirely apart from any collusive restraint. Some limitations must therefore be placed on the occasions when the presumption may be invoked. In drafting the presumption, the objective should be to exclude that uniformity which is more likely the product of natural causes and to include those instances of uniformity in which it is probable that there was or is collusion. Considerations of fairness and convenience should determine the point at which the line is to be drawn. This being the distinction, it is impossible to draw perfectly the line separating these two types of uniformity. This undoubtedly means that some instances of collusion will be excluded from the operation of the presumption, but such exclusion does not clothe the conduct with any immunity. The Government, unaided by any presumption, may still challenge and prove the concert of action by which uniform prices were set. On the other hand, the presumption may embrace conduct which is essentially innocent. It is for this reason that the presumption is a rebuttable and not a conclusive one. By appropriate evidence, the normal inferences from uniformity can be negated and the true explanation presented.

The existence of an illegal restraint is highly probable where uniformity is prolonged, constant, and continuous, where uniformity has persisted during periods when material changes in demand have occurred or when there have been substantial changes in the prices in related industries, trades, or lines of commerce or in the general price level, or where prices are uniformly maintained at a set level despite a marked decline in related prices or in the general price level, or where the prices of unstandardized and undifferentiated products are identical. To hedge the presumption with numerous qualifications would greatly impair its utility and defeat its purpose by requiring a preliminary factual determination by the court as difficult as the proof of the disputed price-fixing agreement. The characteristic features of the uniformity of price and price movements, which are highly probative of collusion, are its regularity, constancy, and prolonged character. Consequently, a presumption arising only when the uniformity is prolonged and constant will include the principal situations in which artificial restraints occur, and exclude the main instances in which uniformity is the product of natural causes. The relationship of price to changes in demand and to the level and movement of prices in related industries, as well as other explanatory factors, may be inquired into on rebuttal.

The distinction between continuous and momentary uniformity has no application to bids submitted by sellers or buyers in response to a specific invitation. Substantial identity in such a case, regardless of any disparity in the prices of the bidders in other transactions, is highly suggestive of collusion and should be the occasion for a rebuttable presumption of illegality.

Neither presumption should be deemed rebutted by slight and studied differences of price quotations, or by any arrangement whereby one or two bids are placed out of line.

It is our conclusion that the rules laid down by the Supreme Court concerning the probative force of evidence of uniformity of price should be changed. Proof of a price uniformity which is constant and prolonged should give rise to a rebuttable presumption that such uniformity is the result of an unlawful contract, combination, or conspiracy in restraint of trade. The presumption should not apply to sales on open exchanges which are subject to State or Federal regulation.

A rebuttable statutory presumption should also be formulated making proof of identity of bids on both public and private contracts presumptive evidence of an unlawful contract, combination, or conspiracy in restraint of trade.

Additional safeguards against collusion in bids for governmental contracts can be erected in special legislation dealing with such contracts.

PRICE LEADERSHIP

(A) ANALYSIS OF PRACTICE

Price leadership has supplanted the price-fixing agreement in many industries as the principal device by which prices are stabilized. Like direct price-fixing, the object and effect of the practice is the establishment of a noncompetitive market price. This end, however, is achieved without any agreement or understanding. The price announcement of one of the companies in the field, typically the dominant concern, or principal producer, is loyally followed by most of its competitors. The price leader sets the market price. It assumes the lead both in advancing and reducing prices. Administrative action of one seller, and not the competition among sellers and the higgling between buyer and seller, determines the market price.

Price leadership occurs primarily in industries in which there are but a limited number of sellers. It is not feasible in the atomistic industries in which there are numerous producers.

An agreement among competitors to sell at the price set by a member of the industry would be in clear contravention of the statute. Price leadership, however, is rarely encompassed by any agreement or understanding, but exists typically as the result of convention. Each producer waits for the announcement of the leader's price before publishing his own price. There need be no meetings, no discussions, no direct interchange of price information, no exchange of assurances, no commitments to adhere to any announced price for the practice to take root in an industry. In other words, all the ingredients of an agreement may be absent, or, if present, they may be so shrewdly concealed that discovery is virtually impossible.

If the leadership is to be followed, the price must be placed at a level which is attractive to the other companies in the field, or the leader must possess sufficient power to compel the observance of its prices by competitors fearful of reprisals.

Complete uniformity does not always exist; in many fields in which price leadership occurs there are occasional variations in the prices of competitors as well as secret "shading" and discrimination of price.

Price uniformity is the necessary consequence of price leadership, except where the leadership is partial or incomplete. If the leader's prices are stationary, the price structure of the industry tends to become rigid. Fluctuations in the leader's price provide only that degree of flexibility which the leader is prepared to vouchsafe the industry. It is not the flexibility which results from the individual responses of buyers and sellers in an unrestrained market and through which supply may be equated with demand. It is a controlled flexibility, which may or may not harmonize with changes in the general price level. Dictation, and not competition, determines price, despite the fact that the followers may be free from the compulsions of an agreement or economic pressure.

Price dictatorships, like other forms of despotism, may be benevolent as well as tyrannical. It is not inconceivable that the controlled price of an enlightened leader may be economically more satisfactory than the haphazard price produced by the blind forces of competition. Such theoretical possibilities, however, did not deter the Supreme Court from forbidding price-fixing agreements, whether reasonable or not. They are entitled to no greater weight in appraising the desirability of price leadership. Private, noncompetitive price-making which is not subject to any effective checks and balances, can in the long run only be detrimental to the public. Price-making is too important a function to be entrusted to the uncontrolled discretion of a single concern or a group acting in concert.

Price leadership and price-fixing are both subject to the same economic and administrative objections. The price set by the leader tends to be sufficiently high to permit the continuance in business of the high-cost, inefficient producers. It exacts a toll from the unorganized purchaser. It lacks the flexibility and resiliency necessary to mitigate cyclical economic disturbances. It destroys the capacity of the business system to adjust itself quickly and effectively to changes in business conditions. It increases the economic pressure on uncontrolled prices and thus unbalances the entire price structure. It unstabilizes production and reduces the opportunities for gainful employment. The sole advantage of leadership is that it may avoid wasteful price wars.

The only difference between direct price-fixing and price leadership is that group control of prices is achieved by agreement in the one case and by convention in the other. If the consequences of a noncompetitive price are evil when established by agreement, they are equally harmful when effected through the tacit acceptance of a leader's price. Unfortunately, the prohibitions of the Sherman law

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are limited to the restraints of trade accomplished by contract or combination and do not extend to practices equally reprehensible which do not involve the element of agreement.

Leadership is not limited to price but may relate to production, distribution, and other commercial policies. What is said in the present section about price leadership applies equally to other forms of business leadership.

(B) STATE OF THE AUTHORITIES

The legality of price leadership in and of itself has never been directly tested in any litigation under the antitrust laws. Price leadership, apart from any agreement, could not by itself constitute an offense, since it is neither a contract, combination, or conspiracy in restraint of trade nor a monopoly. Its significance is limited to its probative force in proving monopoly or a conspiracy in restraint of trade.

In the only two reported cases in which evidence of price leadership was adduced,[25] the Government sought to use the evidence to establish the existence of a monopoly. In both cases, the Supreme Court refused to draw this inference from the proof.

In *United States* v. *United States Steel Corp.*[26] in considering whether the United States Steel Corporation was exercising monopoly power and suppressing its competitors, the Court referred to the evidence of price leadership as follows:

> Competitors, it is said, followed the corporation's prices because they made money by the imitation. Indeed the imitation is urged as an evidence of the corporation's power. * * * The Government does not hesitate to present contradictions, though only one can be true, such being we were told in our school books the "principle of contradiction." In one competitors (the independents) are represented as oppressed by the superior power of the corporation; in the other they are represented as ascending to opulence by imitating that power's prices which they could not do if at disadvantage from the other conditions of competition; and yet confederated action is not asserted. If it were this suit would take on another cast. The competitors would cease to be the victims of the corporation and would become its accomplices. And there is no other alternative. The suggestion that lurks in the Government's contention that the acceptance of the corporation's prices is the submission of impotence to irresistible power is, in view of the testimony of the competitors, untenable. They, as we have seen, deny restraint in any measure or illegal influence of any kind.[27]

The position taken in the *Steel* case was reiterated in *United States* v. *International Harvester Co.*[28] The Court there found that many of the competitors of the International Harvester Co. were—

> accustomed, independently and as a matter of business expediency, to follow approximately the prices at which it has sold its harvesting machines; * * *. and the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.[29]

[25] *United States* v. *United States Steel Corp.*, (1920) 251 U. S. 417; *United States* v. *International Harvester Co.*, (1927) 274 U. S. 693.

Bibliography: Whitney, Trade Associations and Industrial Control (1934), 131; Marquand, The Dynamics of Industrial Combination (1931), 175; Jones, The Trust Problem in the United States (1929), 225 *ff.*; N. R. A., The Operation of the Basing Point System in the Iron and Steel Industry (1935), 139; Senate Committee, Report on the High Cost of Gasoline (1923), 41; F. T. C., Prices, Profits, and Competition in the Petroleum Industry (1928), F. T. C., The High Prices of Farm Implements (1920); Jones, The Anthracite Coal Combination in the United States (1914), 172; F. T. C., Newsprint Paper Industry (1930); F. T. C. Commercial Feeds (1924), 1921; Whitney, Trade Associations and Industrial Control (1934), 129 *ff.*; Fetter, Masquerade of Monopoly (1931), 202; Sakolski, Price Making and Price Stability (1925) 3 Harv. Bus. Rev. 207.

[26] (1920) 251 U. S. 417.

[27] *Id.* at 447, 449.

[28] (1927) 274 U. S. 693.

[29] *Id.* at 708.

In neither case did the Court explicitly reject the relevance of evidence of price leadership to the proof of monopoly; nor did it intimate that such evidence was entitled to no weight. The tenor of the opinions, however, is that the fact of leadership is legally unimportant in determining whether the leader has violated the monopoly provisions of the statute.

There has been no case in which evidence of price leadership was offered as proof of direct price-fixing. There is, however, authority to the effect that price uniformity is to be treated as some evidence of a price agreement to be considered with all the other facts in the case.[30] By its language in the *Steel* [31] and *Harvester cases*,[32] the Court did not necessarily mean that in a proper case evidence of price leadership would not have some probative effect in determining whether an unlawful agreement had been made. Price leadership is some evidence of an agreement, to be considered with all the other facts of the case. There can be no doubt that where uniformity results from leadership, the evidence is entitled to considerable weight on the issue of collusive restraint.

(C) SUGGESTIONS

The prevalence of price leadership reveals the fundamental weakness in the Sherman Act. A law which prohibits merely the means by which evil consequences are engendered rather than the consequences themselves provides an easy avenue of escape. The prohibitions of the Sherman law are directed against the elimination of competition by agreement or understanding. The act is powerless to prevent the elimination of competition by other means. Uniform price and production policies can be pursued without resort to any prohibited agreement. Understandings, if there be any, can be concealed and remain virtually incapable of detection.

Leadership, of course, is not possible in all industries. It is most effective in those industries in which there is concentrated economic power, in which competition is already attenuated. It is thus chiefly used in areas of business life in which the need for competition is most urgent. No believer in a free competitive order will deny the desirability of preventing price leadership from being utilized as a device to eliminate price competition in our concentrated industries. The difficulty is in devising ways and means of doing so.

An outright prohibition of price leadership as such is not feasible. Where leadership is not accomplished by agreement, what would be the precise conduct to be forbidden? Businessmen must be left free to meet the competition of their rivals and this may involve the duplication of another's prices. Where an industry is ordered to abandon price leadership, what in practice must it do to comply with the order? The leader must be permitted to announce its price at some time even though it is no longer the first to publish a price change. Its action may still be followed. The dictates of business judgment may require some adherence by the smaller companies to the price schedule of the dominant concern in the industry. An order directed against an agreement is objective and is capable of enforcement and compliance. Any prohibition of price leadership can only be effective if it is directed against conduct which is similarly objective.

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[30] See *Cement Mfrs. Protective Assn.* v. *United States*, (1925) 268 U. S. 588, 605.
[31] (1920) 251 U. S. 417.
[32] (1927) 274 U. S. 693.

One approach might be to eradicate the conditions under which leadership flourishes. Leadership chiefly occurs in the oligopolistic or concentrated industries. To remove the conditions favorable to leadership would entail a degree of pulverization which is not only impractical but would cause immeasurable social loss and impede the program of national defense. Breaking an industry of 5 units into 10 or even 20 fragments would not preclude price leadership.

A more practical approach is possible. When leadership is the result of agreement, the creation of a statutory presumption of illegality arising from proof of price uniformity would compel the defendants to come forward with proof peculiarly within their control regarding the existence or nonexistence of a collusive agreement. Such a presumption has been suggested in the section on price uniformity. To make leadership *prima facie* evidence that the leader is a monopoly would also aid in discouraging the practice. Leadership by a smaller concern is unlikely to occur except as part of an agreement with the dominant company in the field, and would be covered by the presumption in respect of price uniformity. Any rule which drives an industry into the field of agreements brings it within the scope of the statute.

None of these suggestions, however, will materially retard the price leadership which is the product of convention rather than agreement. The problem can only be dealt with by administrative action designed to ferret out the causes of leadership, eliminate them where elimination is called for, and generally to encourage a restoration of competitive conditions. It would, of course, be preferable to prohibit directly those acts and practices which produce, encourage, or facilitate leadership. There is, however, no unitary cause and a fixed set of prohibitions could easily be circumvented by a new set of practices. Only by a flexible administrative procedure can the present causes of leadership be outlawed and the creation of new devices prevented.

The nature and extent of the administrative action called for would necessarily vary from industry to industry. It might be necessary in some fields to impose restrictions on the collection and dissemination of price data. Secrecy, which may be undesirable in highly competitive industries, may actually promote competition in industries characterized by monopoly conditions. The restrictions imposed by the administrative agency must not prevent sellers from meeting the prices of rivals in fair competition. In general, the agency if established must be granted broad discretionary power to regulate and control the circumstances making for price leadership and formulate the solutions necessitated by the occasion.

It would be the function of the administrative agency to restore, invigorate, and protect competition. In removing the causes of price leadership it will encourage the smaller companies to compete with the leader, and the agency must stand ready to offer protection against reprisal. The abandonment of price leadership without administrative supervision and protection might result in disastrous price wars. This can be avoided by administrative regulations so conceived as to eliminate one set of evils without creating others.

Such discretionary administrative supervision involves a degree of control greater than has been traditionally accorded governmental agencies. It does not, however, as in the case of the utility regulation, mean control over the prices to be charged. It is regulation directed to a specific evil. The price of concentrated power, like monopoly, is governmental regulation. What is here said of price leadership applies with equal force to other practices and business methods, indigenous to the concentrated industries, which though inconsistent with the proper functioning of a competitive order are outside the reach of the Sherman Act because they are not brought about by any agreement, combination, or conspiracy. A sophisticated and well-advised industry avoids the crudities of the familiar restraints, achieving its ends by usages of the trade, which, whatever their genesis, are widely accepted and observed without the compulsion of any agreement. Our anti-trust policy must fail if the condemnation of our law continues to be limited to the elimination of competition by agreement or understanding. The elimination of competition by other means must be interdicted and a positive policy formulated for the restoration of competition in those industries now characterized by industrial folkways antagonistic to free competition.

(D) CONCLUSIONS

In order to prevent price leadership to the fullest extent practicable, proof of price leadership should give rise to a rebuttable presumption that such leadership is the result of collusion or monopoly, and industries in which the practice is prevalent should be subjected to flexible administrative regulation designed to eliminate the causes of and conditions favorable to the practice, and to restore, invigorate, and protect competition in such industries.

MISCELLANEOUS PRACTICES

The courts have passed upon the legality of numerous other activities of trade groups besides those considered in the previous parts of this report. Industry has become well versed in the arts of restraint, and the amorphous practices in which it currently engages are still little understood. The more novel restraint is probably of greater importance today than the traditional restrictions, but the paucity of authority precludes any extended discussion in this report. The courts, operating under the broad general standard of the Sherman Act, have shown their capacity in particular litigations to outlaw those activities which are essentially inconsistent with our competitive institutions while sanctioning practices which generally operate to the advantage of the public as well as the industry.[33]

The current program of vigorous and widespread antitrust enforcement should lift the haze which enshrouds many corners of the law. It would be best, pending such litigation and the concomitant widening of our knowledge, to defer any legislative treatment of these miscellaneous and novel restraints.

We shall consider in our recommendations the approach we believe should be taken in respect of the restraints on competition resulting from convention and the usages of trade rather than by concerted action and agreement.

Mention should be made in passing to the established rule that the involuntary exclusion of competitors by boycott and other coercive measures is actionable.[34] The Court has adhered to this rule without

[33] For miscellaneous activities which the Court has sanctioned, see *Maple Flooring Manufacturers' Assn.* v. *United States* (1925), 268 U. S. 563; *Cement Manufacturers' Protective Assn.* v. *United States* (1925), 268 U. S. 588; Fly, *Observations on the Anti-Trust Laws* (1936), 45 Yale L. J. 1339, 1351 *et seq.*

[34] This line of cases covers both the exclusion from as well as the entry into the industry.

deviation during the entire life of the statute and has outlawed the boycott no matter what its justification may have been and regardless of the beneficent intentions of those practicing it.[35]

The restraints practiced by the labor unions now being challenged in the current drive by the Department of Justice fall outside the scope of this study which is concerned primarily with restraints by industry. It is sufficient for our purpose to observe that the cooperation by labor with industry in the elimination of competition is not clothed with any exemption and is on a parity with restraints practiced by industry alone.[36]

MERGERS AND CONSOLIDATIONS [37]

The combination of companies is probably as old as the corporation itself, but the merger of giant organizations in building large industrial empires is a distinctly modern phenomenon. The earliest cases in this country involving the lawfulness of a corporate integration date from the late eighties. The cases are relatively sparse. There is no reported decision on the problem in England; the number of capital combinations passed upon by the Federal and the State courts is relatively small. Only the Supreme Court decisions will be reviewed in this section; reference, however, will be made to the important decisions of other courts.

1. SUGAR TRUST

The first suit under the antitrust laws to reach the Supreme Court was a merger case.[38] Five years after the passage of the Sherman Act, the Court was called to pass upon the validity of a series of mergers in the sugar refining industry. Strictly speaking, these were not mergers but stock acquisitions. The American Sugar Refining Co., the successor of the Sugar Refining Trust, purchased with its own stock all the stock of four independent refineries located in Philadelphia, which together produced 33⅓ percent of the sugar refined in the United States. This left The Revere Co. of Boston, with an output of about 2 percent of the total domestic production, as the sole independent refinery in the country. Thus, as a result of these stock acquisitions, control of 98 percent of the industry was obtained. Prices were immediately advanced. The suit by the Government was to declare void the contracts for the exchange of stock, to compel the return of the stock which had been exchanged, and to enjoin further performance of the agreements. Relief was denied on the ground that the challenged transfers related merely to the control of manufacturing as distinguished from interstate commerce and hence were beyond the purview of the Sherman Act. Under the Constitution, it was pointed out, the Congress could merely forbid restraints

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[35] *Paramount Famous Lasky Corp.* v. *United States* (1930), 282 U. S. 30; *United States* v. *First National Pictures, Inc.* (1930), 282 U. S. 44; *Binderup* v. *Pathe Exchange, Inc.* (1923), 263 U. S. 291; *Eastern States Retail Lumber Dealers' Assn.* v. *United States* (1914), 234 U. S. 600; *Fashion Originators' Guild of America, Inc.* v. *Federal Trade Commission* (1941), 9 U. S. L. Week 4229. Handler, The Sugar Institute Case and the Present Status of the Anti-Trust Laws (1936), 36 Col. L. Rev., 1, 14.

[36] *United States* v. *Brims* (1926), 272 U. S. 549; *Local 167* v. *United States* (1934), 291 U. S. 293. The present rulings of the Supreme Court defining the extent to which the anti-trust laws apply to the acts of labor units should be noted at this point. See *Apex Hoisery Co.* v. *Leader*, 310 U. S. 469 (1940); *United States* v. *Hutcheson*, 61 S. Ct. 436 (1941).

[37] The author has in this section drawn upon his previous writings. See Handler, *Industrial Mergers and the Anti-Trust Laws* (1932), 32 Col. L. Rev. 179; Handler, Cases and Materials on Trade Regulation (1937), 387. The compendious footnotes of the original are omitted.

[38] *United States* v. *E. C. Knight Co.* (1895), 156 U. S. 1.

upon interstate commerce; monopolies and restraints of manufacturing or of production were matters of State and not Federal regulation.[39] It is thus evident that this was no decision on the merits, the case going off on constitutional grounds.

Here was a monopoly of an important necessity, brought about by the formation of a trust, which was succeeded by a single consolidated corporation, and followed by a series of stock acquisitions by which control of the remaining competitors in the field was achieved. Of the monopolistic purpose and intent of the combining companies there could be no question. Competition in the industry had been completely suppressed. The power to fix a monopoly price had been acquired. Whether the initial trust had been guilty of predatory practices does not appear in the Court's opinion, but the subsequent history of the company reveals that it did not refrain from predatory methods to attain its ends. Sources extrinsic to the Court's opinion indicate that the "trust" was heavily overcapitalized, that generous profits throughout its history were made by the promoters, and that large dividends for a long period of years were paid upon its watered stock. Its inability to retain its control, which dwindled from 98 percent in 1892 to 30 percent in 1927, casts considerable doubt on its economic efficiency.

Had not the Supreme Court receded from its extreme position with respect to the scope of the Federal power, the Sherman Act would have been without effective application to industrial mergers.

2. NORTHERN SECURITIES CASE

The recession began within less than a decade with the decision in the *Northern Securities case*.[40] The Northern Securities Co. was a New Jersey corporation organized by the Hill-Morgan interests to hold stock in the Northern Pacific Railway, a Morgan road, and the Great Northern Railway, a Hill road, two parallel and competing lines extending across the northwestern tier of States from the cities of Duluth and St. Paul to Seattle and Portland.

This was not the first attempt to bring these roads under common control. A majority of the bondholders of the Northern Pacific Co. during the receivership of 1893 had arranged with the Great Northern for a virtual consolidation of the two systems, control passing to the latter company. The Supreme Court, however, in *Pearsall* v. *Great Northern Railway*,[41] held that the arrangement violated the Minnesota statutes forbidding the consolidation of competing and parallel railroads.

Undeterred by this decision, the two companies in 1901 acquired joint control of the Chicago, Burlington & Quincy Railway, a road extending westward from Chicago and serving as a feeder for both of these northern railways as well as for the Union Pacific System, with which it competed in part. Harriman, who then controlled Union Pacific, became alarmed at the acquisition of the Burlington stock by Morgan and Hill, and in self-defense began to buy into the Northern Pacific Co. So skillfully were his purchases conducted that Harriman

[39] The opinion was delivered by Mr. Chief Justice Fuller for a Court composed of Field, Gray, Brewer, Brown, Shiras, and White, JJ. Mr. Justice Harlan dissented on the ground that under the prior decisions of the Court, commerce included not only transportation but also acts incidental to the movement of goods across State lines, such as the production of articles intended for interstate commerce.

[40] *Northern Securities Company* v. *United States* (1904), 193 U. S. 197. The majority of the court consisted of Harlan, Brown, Day, and McKenna, JJ. Brewer, J., concurred in a separate opinion. White and Holmes, JJ., wrote dissenting opinions, each concurred in by the other and by Fuller, C. J., and Peckham, J.

[41] (1896) 161 U. S. 646.

was able to obtain 41,000,000 of preferred and 37,000,000 of common, constituting a majority of the capital stock, before Morgan became conscious of what was transpiring. By the time Morgan stepped into the market, it was already too late.

As both classes of stock possessed voting power, it appeared as though Harriman had succeeded in wresting control of the Northern Pacific from Morgan. But under the articles of the company the preferred issue was callable at par, and Morgan controlled the company. The validity of this provision not being entirely clear, a compromise was inevitable. The compromise took the form of the Northern Securities Co., to which the chief actors in this financial drama transferred their holdings in exchange for the Northern Securities stock. Stockholders of both companies were invited to exchange their stock and the holding company subsequently obtained about nine-tenths of the outstanding Northern Pacific stock and more than three-quarters of the Great Northern. There was thus practically no pyramiding.

The suit by the Government was to rescind the stock transfers and to compel the holding company to divest itself of the stock of these competing roads. Despite the protestations of the defendants, the Court found that the purpose and effect of the formation of the holding company was to suppress competition between the two systems, and ordered the dissolution of the combination.[42]

As in the *Knight* [43] *case*, the combination resulted in the elimination of competition between the combining companies. But here, unlike the *Knight case*, there existed an active competition between the combining units and other transcontinental railroads. This fact is generally overlooked in discussions of the case. It is customary to regard the Northern Securities Co. as controlling two natural monopolies which together had a complete monoply of the northwestern railroad business and the decision is thus easily disposed of. But as a matter of fact, the overwhelming proportion of the competitive business of the two roads—and it must not be forgotten that only 26 percent of their total earnings was derived from such competitive traffic—was itself subject to the competition of other railroads. The combination brought together two roads possessing in part a natural monopoly in the territories tributary to their separate lines, but competing with other carriers for the through traffic. Only a minor

[42] Four opinions were written in the Supreme Court. Justice Harlan's opinion may be summarized as follows: (*a*) The Sherman Act declares illegal every contract or combination which directly restrains interstate trade, whether or not reasonable; (*b*) railroads are not excluded from the operation of the act; (*c*) the holding company, like the trust, restrains and monopolizes trade by smothering competition for the mutual benefit of the combining units; (*d*) the power of a corporation to hold stock is primarily a matter of State regulation, but where the ownership of stock is used to restrain interstate commerce, the Federal authority prevails. Justice Brewer, concurring, pointed out the dangers of holding company control with its attendant pryamiding, and stated that while an individual could legally procure control of both railroads, a corporation was under a special disability. He took issue with the view of the majority regarding the application of the rule of reason, but he apparently was of opinion that this restraint was unreasonable. Justice White, in his dissenting opinion, contended that the ownership of stock is not interstate commerce, and hence is beyond the power of Federal regulation. He regarded as untenable the majority's distinction between stock ownership by an individual and by a corporation. Justice Holmes argued that a holding company does not fall within the definition of contract, combination, or conspiracy, and hence is not covered by the statute. The contracts forbidden at common law are those that unreasonably restrain the covenantor from engaging in business; the forbidden combination or conspiracy relates to the exclusion of persons from the trade. The present case involved a fusion, not a contract; there was no evidence of any purpose to exclude other railroads, hence there was no conspiracy. See Canfield, *The Northern Securities Decision and the Sherman Anti-Trust Act* (1904), 4 Col. L. Rev. 315; Biklé, *The Northern Securities Decision* (1904) 52 Am. L. Reg. 358; (1903) 3 Col. L. Rev. 404; (1904) 4 Col. L. Rev. 287; Morawetz, *The Anti-Trust Act and the Merger Case* (1904), 17 Harv. L. Rev. 533; Langdell, *The Northern Securities Case and the Sherman Anti-Trust Act* (1903), 16 Harv. L. Rev. 539; Canfield, *Is a Large Corporation an Illegal Combination or Monopoly Under the Sherman Anti-Trust Act?* (1909) 9 Col. L. Rev. 95

[43] (1895) 156 U. S. 1.

part of the business for which the two roads competed was free from the competition of other carriers and only with respect to this traffic was competition completely eliminated.

In the *Sugar case*,[44] the combination took the form of a property owning corporation followed by stock acquisitions; here a holding company device was employed to unite the two roads. In both cases there were explicit findings that the purpose of the combination was the suppression of competition. There were no predatory practices either before or after the combine was formed. It must be remembered in this connection that the regulatory power of the Interstate Commerce Commission was very limited at this time.[45] In view of the expense and difficulty of constructing a new railroad, potential competition was less likely than in the sugar refinery field. But the combination placed no obstacle in the way of new competition and in 1909 an independent railroad system, the Chicago, Milwaukee & St. Paul, was constructed across the same tier of States. Whether any economies would have been effected as a result of the union is difficult to say; it is interesting to note that the Interstate Commerce Commission in 1930 gave its approval to a proposed consolidation of the two lines.[46] There is no evidence of excessive promoters' profits or of any wildcat financing. While the holding company was capitalized at some 122 millions over the par value of the stock of the two roads, the value put upon the securities seems to have been no higher than the prevailing market price.

3. OIL AND TOBACCO TRUSTS

The dramatic incidents of the commercial biographies of the Standard Oil and American Tobacco companies are almost household legends and, except for a few of the operative facts in the two dissolution suits, need not be repeated here. There were three stages in the creation of the Standard Oil hegemony. In 1870, the Standard Oil Co. of Ohio was formed with a capitalization of $1,000,000 to take over the partnerships controlled by Rockefeller, Andrews, Harkness, and Flagler. The union of these partnerships made the company the largest oil refining concern in the industry although it refined only 10 percent of the country's output and bad some 250 competitors. By 1879 the Ohio corporation, through predatory practices, control over pipe lines, and railroad rebates, had increased its control from 10 percent to about 90 or 95 percent, having either driven its competitors out of business or having forced them to sell out. The concerns so acquired were either absorbed by the Ohio Company or operated as ostensibly separate entities under the names of their

[44] *Ibid.*

[45] See 1 Sharfman, The Interstate Commerce Commission (1931), 19–40.

[46] The dissolution decree permitted distribution of the stock of both Great Northern and Northern Pacific to the shareholders of the Securities Co., each recipient receiving a part of the stock of the two roads. Harriman objected to the form of the decree inasmuch as it split up his block of Northern Pacific and made him a minority stockholder in both roads. His objections were futile, the Supreme Court approving the decree drafted by the lower court. *Harriman* v. *Northern Securities Company* (1905), 197 U. S. 244. On August 3, 1921, the Interstate Commerce Commission filed its tentative plan for the consolidation of railroads under the Transportation Act of 1920. Under that plan the Northern Pacific and Burlington were placed in system No. 14, while the Chicago, Milwaukee and the Great Northern were grouped in system No. 15. 63 I. C. C. 455, 461–462 (1921).

This arrangement was not satisfactory to the roads concerned, and on July 8, 1927, the Great Northern Pacific Railway Company, a holding company, petitioned the Interstate Commerce Commission to permit it to acquire control of the properties of Great Northern and Northern Pacific by lease and stock ownership. On December 9, 1929, the Commission issued another plan, placing these roads in system No. 12. 159 I. C. C. 522, 538 (1929). The petition of the Great Northern Pacific Railway Co. was decided favorably to the petitioner on February 11, 1930, with two Commissioners dissenting. 162 I. C. C. 37 (1930). However, the application was dismissed on February 19, 1931, upon request of the applicants.

former owners. The consideration for these purchases was chiefly stock of the Ohio Company, sometimes cash. The period from 1882 to 1899 was the period of the Standard Oil Trust. Under the management of the trustees, the holdings were reorganized and separate Standard Oil companies were formed, to which the business in particular localities was allocated. In 1892, the trust was adjudged illegal and its dissolution ordered by the Supreme Court of Ohio in a *quo warranto* proceeding against the Standard of Ohio.[47] At the time of the *quo warranto* proceedings, the trustees controlled 84 companies. Pretending to comply with the decree of the Ohio court, they transferred the stock of 64 of the companies to the remaining 20, which the trustees still controlled, and then dissolved the trust. The attorney-general of Ohio having initiated contempt proceedings in 1897, it became necessary to devise a new method of controlling the industry. The Standard Oil of New Jersey, an operating company, had been formed in 1892 with a capitalization of $10,000,000. In 1899 the charter of this company was amended so as to empower it to hold stock in other companies, and its capitalization was increased to $110,000,000. Thereupon an exchange was effected of the shares of the New Jersey company for those of the companies previously controlled by the trustees. The New Jersey company thus became essentially a holding company, although it continued to operate the refineries it had owned prior to the reorganization. The formation of the New Jersey holding company marks the third period in the history of Standard Oil, and it was against this holding company that the Government in 1906 brought its suit for dissolution.[48]

The percentage of the industry controlled at the time of suit is not stated in the court's opinion. In 1904, however, between 85 to 90 percent of the country's output was refined either by the Standard Oil's constituent companies or by companies which it dominated. The degree of control had not decreased in the following years. The important pipe lines in the country—the strategic center of the monopoly—were under its control. Although the production of crude oil was in other hands, the disorganized and highly competitive condition of that branch of the industry operated to the advantage of Standard, which was practically the sole purchaser. This monopoly of the oil refining business had been acquired as a result of the preferential rebates exacted from the railroads, and through the ruthless suppression of competition. The list of predatory acts practiced by the company filled some 57 pages of the record. Its violation of the antitrust laws was deliberate; its desire to obtain a monopoly and to exclude competition from the industry is evident in almost every page of its history. The spoils were enormous, and stockholders were given a goodly share. Though the holding company was adopted as the device for effectuating the combination, there seems to have been no pyramiding, and the company's financial record is clear of undue promoters' profits, extravagant underwriting charges, and stock frauds. The verdict of impartial students of the subject is that its dominance did not result from efficient management and economies in production, but rather from the abuse of its control

[47] *State* v. *Standard Oil Company* (Ohio 1892), 30 N. E. 279.

[48] *Standard Oil Company of New Jersey* v. *United States* (1911), 221 U. S. 1. Mr. Chief Justice White wrote the opinion, holding that the defendants had violated the Sherman Act and enunciating the famous rule of reason, for a court composed of McKenna, Holmes, Day, Lurton, Hughes, Van Devanter, and Lamar, JJ. Mr. Justice Harlan concurred in the dissolution of Standard Oil but disagreed with the Chief Justice's construction of the statute. For the final decree see (C. C. Mo. 1909) 173 Fed. 177, 192.

of the pipe lines, from railroad discriminations and unfair methods of competition. Integration, the location of refineries near the source of supplies, and large-scale operation were productive of great economics; but all these were possible without monopolistic control, as has been amply proved by the growth of giant competitive petroleum companies since the dissolution of the "trust."

The Government's case was so strong that it is difficult to appraise the legal significance of the numerous facts that have been reviewed. Whether the case turned upon the fact that the company had acquired monopolistic power, or upon the existence of a wrongful intent to monopolize the industry, or upon the indulgence in predatory practices and the exclusion of competitors, or upon the use of the holding company to control the industry, or upon the combination of all these features, it is not easy to say. The lengthy opinion of Mr. Chief Justice White is more concerned with the profundities of the rule of reason than with an explicit statement of the grounds of decision. The element which is most stressed in the opinion is the defendants' intent to monopolize the industry and to maintain their monopoly through the exclusion of competitors.[49]

The American Tobacco suit,[50] in which dissolution of the combination was decreed, ran along much the same lines. Here again is the story of a so-called bad trust dominating all branches of the tobacco industry, manufacturing at the time of suit 86.1 percent of the country's output of cigarettes, 91.4 percent of little cigars, 96.5 percent of snuff, 84.9 percent of plug, 76.2 percent of smoking tobacco, 79.7 percent of fine cut tobacco, and 14.4 percent of cigars. Purchases of competing companies, dismantling of plants, predatory practices, exclusion of competitors, restriction of potential competition by the uniform practice of tying up the sellers of the acquired companies by agreements not to compete for long periods of time, an unmistakable intent to monopolize the industry, which in the main was successfully achieved, concentration of control of the companies in a handful of men, tremendous over-capitalization, over-valuation, enormous profits, and large dividends—all of these were present. That the combination so dominated the industry as to control prices and that the competition of the independents was generally ineffective seem reasonbly clear. A complete monopoly was not, however, obtained.

The financial history of the various combinations eventually resulting in the formation of the American Tobacco Co. is too complicated to be reviewed in any detail here, but a few of the important purchases can be enumerated. The original American Tobacco Co. organized under the laws of New Jersey was a consolidation of five cigarette companies, the property and assets of which were conveyed in 1890 to the new corporation in exchange for its capital stock. The original capitalization was $25,000,000 which apparently was much in excess of the value of the constituent companies. The consolidated company

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[49] Upon the recent merger of the Standard Oil Co. of New York with the Vacuum Oil Co., the Government filed a supplemental bill on the ground that the original decree forbade the union of any of the defendants. The court, however, dismissed the bill, ruling that the combination violated neither the decree nor the Sherman Act. *United States* v. *Standard Oil Company of New Jersey, Standard Oil Co. of New York,* and the *Vacuum Oil Company* (E. D. Mo. 1931), 47 F. (2d) 288. The court in the decision specifically stated that it was not deciding that all former Standard Oil Companies could lawfully combine; it limited its holding to the union of these companies and rested its decision on the particular facts there involved. It gave much consideration to the nature and extent of competition between the merging companies as well as as to the competitive situation in the industry at large.

[50] *United States* v. *American Tobacco Company* (1911), 221 U. S. 106. The alignment of the justices was the same as in the Standard Oil decision. The Chief Justice wrote the opinion for the Court, ordering the dissolution of the combination, and Mr. Justice Harlan dissented from the adoption of the rule of reason.

at the outset manufactured 96 or 97 percent of the domestic output of cigarettes. It soon increased its capital stock and branched out into the allied business of manufacturing cigars, smoking tobacco, and snuff, constantly buying up large numbers of companies, sometimes for cash, sometimes for stock, or a combination of both. In 1893, an attempt to combine the leading plug tobacco manufacturers proved unsuccessful. Then followed a ruinous price war which cost American Tobacco about $4,000,000, but which, by 1898, brought its competitors to terms. In that year the Continental Tobacco Co. was formed with a capital of $75,000,000, later increased to $100,000,000, to take over the assets of five large plug manufacturers and the plug business controlled by American Tobacco. The properties were exchanged for Continental's stock and for cash, and were greatly overvalued. Control of the new company was assured by Mr. Duke, president of American Tobacco, becoming president of Continental, and by American Tobacco, receiving $30,000,000 of stock for its plug business. This combination made American Tobacco an important factor in each of the various fields of tobacco products.

American Tobacco in preparation for fresh conquests doubled its capital stock to $70,000,000 and declared a 100 percent stock dividend. In the next few years, American and Continental acquired 30 competing companies at an aggregate cost of $50,000,000. In all these acquisitions covenants not to compete were systematically required of the sellers. Most of the plants so purchased were shut down and never operated despite the disbursement of what the Court terms enormous sums. Next came consolidations in the snuff, tin foil, cigar, licorice, and stogy fields. Following the American Tobacco traditional method of combination, a corporation was formed in each case, to which the properties of the important independents and of Continental and American were transferred in exchange for stock in the new company. In some instances, the consolidated company merely acquired stock in the selling company. Occasionally a purchase of assets carried with it stock in nominally independent companies. As a result of these acquisitions, American Tobacco became to a large extent a holding company of the stocks of its affiliated and subsidiary corporations.

In 1901, the Consolidated Tobacco Co. was incorporated in New Jersey. A majority of its shares was taken by Duke and his associates. Largely in exchange for its bonds, the new company acquired substantially all the common stock of the American and Continental. Consolidated was thus a pure holding company. In 1904, possibly because of the decision of the Supreme Court in the *Northern Securities case*,[51] it was decided to reorganize the three companies. American Tobacco was recapitalized at $180,000,000 and Continental and Consolidated were dissolved, the assets and properties of the companies being transferred to the merged company, the new American Tobacco Co., the chief defendant in the Government suit. The stock in the new company was so distributed as not to disturb the control of the six men who had dominated the other corporations. American Tobacco after the reorganization was both an operating and holding company.

We find here instances of almost every type of corporate combination that has ever been attempted—consolidation, *i. e.*, acquisition of

[51] (1904) 193 U. S. 197.

assets of combining companies by a new company created for this purpose, holding company, acquisition of stock, and merger, i. e., the absorption of one competitor by another through the transfer of assets for either a cash or stock consideration or for both. The *Northern Securities* [52] and the *Standard Oil* [53] *cases* had declared a combination effected through the holding company device to be unlawful; here even an out and out fusion was held to violate the Sherman Act. The Court in its opinion set forth at length the details of these intricate corporate relationships, but it seemingly gave little weight to the forms of combination employed. In no uncertain terms, it pointed out that the wording of the statute was broad enough to bring within its condemnation every conceivable act, regardless of the "garb in which such acts were clothed," which contravened the underlying policy of the statute. It rested its decision essentially upon the ground that the intent and purpose of this long series of combinations was to monopolize the tobacco industry and to stamp out competition. This inference the Court drew not from the size of the consolidation, nor from the number of acquisitions, nor from the domination of the industry which thus resulted, but from the following facts: (1) that the first combination was impelled by the fierce trade war which immediately preceded its formation, (2) that the consolidations in the various fields were always preceded by trade conflicts designed either to drive competitors out of business or to force them to enter the combination, (3) that the manifest purpose of the small coterie who put through these consolidations was to obtain control of the industry and to retain such control in their own hands, (4) that by obtaining control of the various stages in the manufacture of tobacco products perpetual barriers to the entry of others into the trade were thereby created, (5) that millions were expended in buying plants which were immediately dismantled, and finally (6) that covenants not to compete were systematically obtained in all these transactions.

As in the oil suit,[54] the case is complicated by the presence of so many factors that it is impossible to determine with any assurance which was controlling. The Court seems to give paramount importance to the wrongful intent which here, as we have seen, is inferred not from the fact of monopoly as much as from the manner in which such monopoly was obtained. In the *Standard Oil case*,[55] the inference was drawn from the degree of control which the combination was able to exercise as well as from the other factors mentioned. We shall note a similar oscillation in the later cases. Before leaving the case, the Court's emphasis upon the restrictions on new or potential competition should be noted.

4. TERMINAL CASE

The *St. Louis Terminal case* [56] dealt with a "neck-of-the-bottle" monopoly. The topographical position of St. Louis makes its terminal transportation facilities peculiarly susceptible to monopoly control. The city lies upon a series of hills which hug the western

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[52] *Ibid.*
[53] (1911) 221 U. S. 1.
[54] *Ibid.*
[55] *Ibid.*
[56] *United States* v. *Terminal Railroad Association of St. Louis* (1912), 224 U. S. 383. The opinion, written by Justice Lurton, represented a court composed of White, C. J., McKenna, Hughes, Van Devanter, and Lamar, JJ. Holmes and Day, JJ., took no part in the decision of the case. Mr. Justice Pitney was appointed after the argument but before the publication of the opinion.

bank of the Mississippi River, receding rapidly toward the west. These hills are penetrated on the west by the narrow valley of Mill Creek which crosses the city at about its center. This valley forms the sole ingress for railways coming from the West, and its limited area is fully utilized by the western roads. The approach to the city from the north on the western side of the river is through the valley formed by the Missouri and Mississippi Rivers, the hills dropping back from the water at this point. The broad Mississippi Valley is on the Illinois or eastern side of the river and it is in this valley that the roads from the East, Northeast, and Southeast have their termini. Thus, although 24 railroads converge at St. Louis, not one passes through the city or connects directly with the others approaching from opposite directions. To connect these roads, extensive facilities had to be constructed, the river spanned, and the western hills tunneled. Cooperation among the carriers was imperative as no one road could afford to construct a separate terminal system, and the topographical condition of the section did not permit of many separate systems.

In 1889, several of the roads acquired the properties of a few independent terminal companies for the purpose of combining and operating them as a unitary system. These properties included the union station, the Eads or St. Louis bridge, the only railroad bridge over the river at the time, and extensive trackage on both sides of the river. The consolidated company was known as the Terminal Railroad Association of St. Louis and was jointly owned by several railroads, all of which bound themselves to use these facilities exclusively. Under the agreement by which the Terminal Co. was formed, unanimous consent of the members was required for the admission of new roads or the use of its properties by non-member roads. The restrictive effect of this rule on non-member roads is evident. In competition with the Terminal Co. was the Wiggins Ferry Co., which operated car transfer boats across the river and which possessed the necessary rail connections, and the Merchant's Bridge with its allied terminals, a toll bridge which had been constructed after the formation of the Terminal Co., and which was open to all roads coming into St. Louis. While the rates of these companies were uniform, there was competition in services between them, and new roads seeking an entrance into St. Louis were assured of terminal connections from at least one of the three companies. There was, of course, some duplication and overlapping of facilities. The act of Congress authorizing the construction of the Merchant's Bridge forbade the ownership of its stock by any other bridge company or stockholder therein.

This provision was later eliminated by Congress and immediately thereafter the Terminal Co. acquired stock control of the Merchant's Bridge and related terminal companies. In 1892, the Rock Island attempted to obtain an independent entrance to the city. It accordingly sought to acquire control of the stock of the Wiggins Co. The Terminal Co. looked askance at this project and a battle for control of the Ferry Co. ensued, its shares being pushed up to an abnormal price. The final result being in doubt, a compromise was effected by which the Rock Island was admitted as a member of the Terminal Co., the shares of the Ferry Co. which it had acquired being turned over at cost to the Terminal Co. Control of the city's terminal facilities was thus concentrated in one company and the separate properties were thereafter operated as a single system. The Government thereupon brought suit for dissolution and the Court held the combination to be illegal.

At the outset, the Court conceded that the unification of the terminal facilities and the elimination of competition among them was not necessarily an unlawful restraint of trade. Illegality would depend, according to Mr. Justice Lurton, "upon the intent to be inferred from the extent of the control thereby secured over instrumentalities which such commerce is under compulsion to use, the method by which such control has been brought about and the manner in which that control has been exerted." [57] That the purpose of the combination was to obtain control of all the terminals and to eliminate competition was made an express finding of fact. The power thus obtained had not been abused, the non-member companies having been permitted to use the terminal connections at the same rates charged the 14 member companies. The free competition of the other roads with respect to their railroad business proper had therefore not been impeded. The Terminal Co. had, however, discriminated against traffic originating within an area of 100 miles of St. Louis and had made certain arbitrary rebilling charges which were unfavorable to the eastern traffic. But the Court made it clear in its opinion that its decision did not rest upon these practices. Nor was it grounded on the mere fact that monopoly control had been attained. The Court apparently believed that unification was highly expedient. The decision seems to be based upon the fact that because of the peculiar geographical situation, there was no possibility of potential competition. Had it been feasible to construct new facilities or if membership in the defendant company had been open to all roads, the combination would probably have been upheld. Thus it is stated:

> It cannot be controverted that, in ordinary circumstances, a number of independent companies might combine for the purpose of controlling or acquiring terminals for their common but exclusive use. In such cases other companies might be admitted upon terms or excluded altogether. If such terms were too onerous, there would ordinarily remain the right and power to construct their own terminals. But the situation at St. Louis is most extraordinary, and we base our conclusion in this case, in a large measure, upon that fact.[58]

To recapitulate therefore, we find the Court stressing three factors: (1) the intent to obtain a monopoly, (2) the method by which monopoly is obtained, and (3) the manner in which monopoly control is exerted. However, in emphasizing the fact that non-member roads were compelled to use the system and could be excluded by the adverse votes of the member roads, it seemingly takes the position that the mere existence of the power of exclusion, although not exercised is violative of the act. On the other hand, it suggests that had potential competition been physically possible and economically feasible, the unification might not have been unlawful.[59] At no place in the opinion does it indicate whether it regarded as wrongful the method by which control was obtained. It does in passing state that "To close the door to competition large sums were expended to acquire stock control." [60] But this statement can hardly be regarded as condemnatory of the "method" of combination employed, which, as

[57] *Id.* at 395.
[58] *Id.* at 405. It is possible to put a different interpretation on the language quoted in the text, although my construction is supported by other passages in the opinion. See, *e. g.*, *id.* at 409.
[59] *Id.* at 398.
[60] *Id.* at 398.

we have seen, was a stock acquisition followed by a merger. It stresses the discriminatory practices of which the terminal company was guilty, holding that they were not consistent with freedom of competition, but it is extremely unlikely that the case would have been differently decided had there been no such abusive charges. Unlike the *Standard Oil* [61] and *Tobacco* [62] *cases*, the record was free of any evidence of predatory practices or the exclusion of competitors. Here the wrongful purpose was inferred from the extent of control and the power of the combination, whereas in the *Tobacco* [63] *case*, the Court drew the inference from the wrongful practices rather than the size of the combination. The rates charged non-members were not excessive; they were no greater than those imposed upon members; members received no dividends from the company; and besides the terminal systems were subject to regulation by the Interstate Commerce Commission.

The Court's decree is most illuminating, in ascertaining what was the true basis of the decision. The Government's prayer for dissolution was not granted. Instead, the parties were given leave to submit a plan for the reorganization of the Terminal Co., providing for admission to stock membership of any existing or future railroad and calling for reasonable rates for such roads as did not desire to become joint owners of the terminal properties.[64] The jurisdiction of the Interstate Commerce Commission over rates was expressly reserved and a provision added that if the parties could not agree on such a plan, the Court would then enter a decree of dissolution.

It is apparent from this decree that the Court recognized the advantages of unification and desired to preserve the resulting efficiencies without impairing competition among the roads. To put an end to the discriminatory charges was possible without dissolving the combination. Whether or not the three systems were jointly operated, additional facilities were not likely to be added and hence the Court had to accept as its *datum* the improbability of new competition arising. The problem therefore was to restore competitive equality as to the railroad business proper by either destroying the combination or by dividing the monopoly control of the Terminal service among all the roads, existing or prospective. The disturbance of the parity which had previously been enjoyed by all the roads thus seems to be the chief impetus to judicial intervention. Where the field is open to newcomers, monopoly, the Court seems to imply, is not necessarily wrongful; where, however, potential competition is obstructed by a "neck-of-the-bottle" monopoly, the monopoly must be regulated or dissolved.[65]

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[61] (1911) 221 U. S. 1.

[62] (1911) 221 U. S. 106.

[63] *Ibid.*

[64] The decree also forbade the discriminatory charges and required the elimination of the offensive clauses in the membership contract.

[65] The execution of the decree was involved in *Ex Parte United States*, (1913) 226 U. S. 420. The decree was interpreted in *United States* v. *Terminal Railroad Association of St. Louis*, (1915) 236 U. S. 194. In a petition by the western roads to have the Terminal Association adjudged in contempt of the decree because of certain allegedly discriminatory transfer charges, the Supreme Court held in *Terminal Railroad Association* v. *United States* (1924) 266 U. S. 17, that the decree did not cover such rates and therefore there was no contempt. In *Chicago, Rock Island & Pacific Railway Co.* v. *Baltimore & Ohio Railroad Co.*, 113 I. C. C. 681 (1926), the Interstate Commerce Commission found the charges to be unreasonable and prescribed a proper rate. On appeal, it was held that the Commission's ruling was not based on evidence showing the reasonableness or unreasonableness of the action taken by the roads. *Baltimore & Ohio Railroad Co.* v. *United States*, (1928) 277 U. S. 291. At the present time the Association is jointly controlled by 15 railroad companies. Moody, Railroads (1940) 1391.

5. RAILROAD CASES

The Union Pacific [66] and Southern Pacific [67] litigations concerned the legality of the acquisition by large transportation systems of the stock in other carriers. The Union Pacific had its eastern termini at Omaha, Neb., and Kansas City, Mo., at which points it connected with other systems leading to Chicago and thence to points east. Its main line extended from Omaha almost due west to Ogden, Utah,[68] where it joined the Central Pacific, a road extending from Ogden to San Francisco. From Ogden, a branch extended northwest to Portland, Ore. A steamship line was operated by the company between Portland and San Francisco. Union Pacific thus had no direct rail connection with San Francisco, being obliged at Ogden either to use the Central Pacific facilities or to route its shipments to Portland and thence to San Francisco by water.[69] Southern Pacific owned the entire capital stock of the Central Pacific Ry. Co. and operated its lines under a long-term lease.[70] Its own tracks extended from New Orleans through Texas, New Mexico, Arizona, and California to Los Angeles and San Francisco, thence to Portland. It also operated a fleet of vessels from New Orleans to New York.

In 1901, the Union Pacific through its subsidiary, the Oregon Short Line R. R. Co., purchased a 46 percent stock interest in Southern Pacific. The Government contended that the stock purchase violated the Sherman Act and brought suit to compel the divestment of the stock. The Court sustained the contention of the Government and ordered the sale of the stock.

This clearly was no "neck-of-the-bottle" case. Unlike the *Terminal case*,[71] potential competition, while unlikely because of either the cost of constructing new roads or the difficulty of combining new systems, was not physically impossible. The combination of the two roads resulted in no monopoly. If Union Pacific competed with Southern Pacific, then by the same token, both roads were in competition with the other transcontinental systems. Unlike the *Northern Securities*[72] *case*, the roads were not parallel, they did not ply between the same cities and did not even have the same termini. Competition between them related to the transcontinental traffic and some local business. The combination therefore mainly eliminated competition between one branch of the business of these gigantic roads; it neither eliminated competition in the field of transcontinental transportation at large, nor did it shut the door to new competition.

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[66] *United States* v. *Union Pacific Railroad Company*, (1912) 226 U. S. 61. The opinion was written by Justice Day for a court composed of White, C. J., McKenna, Holmes, Lurton, Hughes, Lamar, and Pitney, JJ. Van Devanter, J., took no part in the determination of the case.

[67] *United States* v. *Southern Pacific Company*, (1922) 259 U. S. 214. The opinion was written by Justice Day for a majority composed of Taft, C. J., Holmes, Van Devanter, Pitney, and Clarke, JJ. McKenna, J., dissented, while McReynolds and Brandeis, JJ., took no part in the decision of the case.

[68] A branch joins Ogden and Salt Lake City. There is also a Union Pacific line which begins at the Kansas City terminal, continuing west to Denver, where it cuts directly north to Cheyenne on the main road.

[69] By 1912, when the case was finally decided, it also had the option of using the independent Western Pacific tracks to San Francisco, or the San Pedro, Los Angeles and Salt Lake line to Los Angeles. The Western Pacific R. R., opened in 1911, ran between San Francisco and Salt Lake City broadly parallel to Central Pacific, and was the westerly link of the Gould transcontinental system, joining at Salt Lake City the Denver & Rio Grande R. R., which extended eastward to Denver. See Moody, Railroads (1936) 1764. The San Pedro, connecting Salt Lake City with Los Angeles was jointly controlled by Senator Clark and the Oregon Short Line R. R. Co., a subsidiary of Union Pacific. The road was permanently established in 1912. Union Pacific acquired Clark's interest in 1921. *Id.* at 1246, 1260.

[70] In 1885, Central Pacific leased its properties to Southern Pacific for 99 years. The stock acquisition came in 1899. The United States, in the later action against Southern Pacific, contended both transactions were illegal.

[71] (1912) 224 U. S. 383.

[72] (1904) 193 U. S. 197.

Moreover, the predatory practices and the exclusion of competitors which characterized the *Standard Oil*[73] and *Tobacco cases*[74] were lacking here, as were the arbitrary charges and discriminations of the *Terminal case.*[75] Nor do we have any increases in rates or any monopoly profits; besides, the combined roads were under the supervision of the Interstate Commerce Commission. The only counterpart for the wrongful purpose and intent to monopolize stressed in the previous cases was Harriman's Napoleonic ambition to control the important carriers in the West—an ambition which had been thwarted by Morgan in the Northern Pacific struggle and by the decision of the Supreme Court in *Harriman* v. *Northern Securities Co.*[76] and which was certainly difficult if not impossible of attainment.

Most of the factors which were emphasized in previous cases are thus lacking. To say that the case rests upon an intent to obtain a monopoly is to fly in the face of the facts. The most that can be said, and the Court went no further, is that the purpose of the acquisition was to eliminate competition between the two systems, but such a purpose is present in the combination of any two competing businesses. Are we not compelled to conclude that the holding of the Court is that the unification of control and management of two giant companies doing a substantial proportion of the total business in a field, with a consequent elimination of competition between them, is unlawful notwithstanding that a monopoly is not attained, and notwithstanding further that no predatory methods are employed, and competitors are left unrestrained? The following excerpt from the Court's opinion indicates the scope of its holding:

> The consolidation of two great competing systems of railroad engaged in interstate commerce by a transfer to one of a dominating stock interest in the other creates a combination which restrains interstate commerce within the meaning of the statute, because, in destroying or greatly abridging the free operation of competition theretofore existing, it tends to higher rates. *United States* v. *Joint Traffic Association*, supra, 557. It directly tends to less activity in furnishing the public with prompt and efficient service in carrying and handling freight and carrying passengers, and in attention to and prompt adjustment of the demands of patrons for losses, and in these respects puts interstate commerce under restraint. Nor does it make any difference that rates for the time being may not be raised and much money be spent in improvements after the combination is effected. It is the scope of such combinations and their power to suppress or stifle competition or create monopoly which determines the applicability of the act.[77]

Two further aspects of the decision should be noted. It is the existence of the power to stifle competition and not its exercise which is frowned upon. And the view expressed in the *American Tobacco case*[78] that the form of the combination is not a material factor is reiterated. Thus in rapid succession the pool, the trust, the holding company, the consolidation, the merger, and now the stock acquisition, were banned.[79]

In the *Southern Pacific case*,[80] the Court held that the stock acquisition of Central Pacific by Southern Pacific violated the Sherman Act. The Court stated:

[73] (1911) 221 U. S. 1.
[74] (1911) 221 U. S. 106.
[75] (1912) 224 U. S. 383.
[76] (1905) 197 U. S. 244.
[77] (1912) 226 U. S. 61, 88.
[78] (1911) 221 U. S. 106.
[79] The decree of dissolution was more drastic than that in the *Northern Securities case*. Union Pacific was not permitted to distribute Southern Pacific stock to its shareholders as was attempted. *United States* v. *Union Pacific Railroad Company* (1913), 226 U. S. 470.
[80] *United States* v. *Southern Pacific Company* (1922), 259 U. S. 214.

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 restraint upon, that freedom of commerce which Congress intended to recognize and protect, and which the public is entitled to have protected." * * *

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.[81]

The only basis for holding the two roads competitive is by regarding Central Pacific as a natural link in the Union Pacific system. As the Central Pacific had been operated since 1885 by Southern Pacific under a long-term lease, this assumption seems somewhat gratuitous. But the Court even at the time of the *Union Pacific case* [82] hinted at the desirability of the unification of the Union and Central Pacific lines and seemed determined to regard both roads, regardless of their separate ownership, as part of one transcontinental system. Nor was there any danger of monopoly here. The combined roads were subject to the active and vigorous competition of the other railway systems. The presence of such competition in all the railway cases should be carefully noted in view of what the Court has said and done in other cases. Thus, as late as 1922, we find the views expressed in the *Northern Securities case* [83] still being followed—the elimination of competition between two competing companies is unlawful notwithstanding that competition in the field at large continues unabated.[84]

6. SHOE MACHINERY TRUST

The first *Shoe Machinery case* [85] was a criminal prosecution of the moving spirits of the United Shoe Machinery combine, which united the following companies: (1) Consolidated and McKay Lasting Machine Co. (controlled by Winslow), which prior to 1899, the year of the consolidation, produced 60 percent of the lasting machines made in this country, (2) the Goodyear Shoe Machinery Co. (controlled by Howe), making 80 percent of the welt-sewing machines and 10 percent of the lasting machines, (3) the McKay Shoe Manufacturing Co., making 70 percent of all the heeling machines and 80 percent of the metallic fastening machines produced in the United States, and (4) the Eppler Welt Machine Co., manufacturers of welt-sewing machines, its percentage of the domestic output not being indicated by the Court. The indictment charged the defendants with violating the Sherman Act by combining these companies and

[81] *Id.* at 230.

[82] (1912) 226 U. S. 61.

[83] (1904) 193 U. S. 197.

[84] The subsequent proceedings relating to the ownership of Central Pacific are interesting. Southern Pacific applied to the Interstate Commerce Commission in 1922 for authority under par. 2 of sec. 5 of the Interstate Commerce Act to control Central Pacific by stock ownership and lease, and contended that the Supreme Court decision did not preclude this relief. The Interstate Commerce Commission held for the applicant on February 6, 1923, on a finding that the arrangement would be "in the public interest." See 76 I. C. C. 508 (1923). In *United States* v. *Southern Pacific Co.* (D. Utah 1923), 290 Fed. 443, the court sustained the order of the Commission. No further court proceedings were had. Commissioner McManamy in his opinion on the final consolidation plan, 159 I. C. C. 522, 573 (1929) said:

"It has been demonstrated that the extraordinary and comprehensive power which renders inoperative certain State and Federal laws is sufficient to enable this Commission in effect to annul a decision of the Supreme Court of the United States. *Control of Central Pacific by Southern Pacific*, 76 I. C. C. 508."

In the final consolidation plan, the Commission places the Southern Pacific Co. (159 I. C. C. at 541) and its subsidiaries, including Central Pacific (*id.* at 523) in system No. 16.

[85] *United States* v. *Winslow* (1913), 227 U. S. 202. Mr. Justice Holmes wrote the opinion, supported by a unanimous Court composed of White, C. J., McKenna, Day, Lurton, Hughes, Van Devanter, Lamar, and Pitney, JJ. This was the same court that had decided the *Terminal* and *Union Pacific cases*.

by imposing onerous terms in the leases under which the machines which they manufactured were rented to shoe manufacturers. The district court construed the indictment as questioning the validity of a consolidation of noncompeting companies and as being confined to the issue of the consolidation alone, apart from the tying leases. It therefore sustained the defendants' demurrers. The only question before the Supreme Court on the appeal was whether the combination, standing by itself, violated the Sherman law.[86] The opinion of the Court, by Mr. Justice Holmes, was as follows:

> On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case; the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, *Paper Bag Patent case*, 210 U. S. 405, 429, and it may be assumed that the success of the several groups was due to their patents having been the best. As, *by the interpretation of the indictment below*, 195 Fed. Rep. 591, *and by the admission in argument before us*, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from 70 to 80 percent of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendants' share in commerce among the States does not appear. But taking it as true we can see no greater objection to one corporation manufacturing 70 percent of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine and to put the machine together as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt.[87]

The Court accepted, and in fact regarded itself bound by the lower court's interpretation of the indictment. The indictment explicitly states that the purpose of the combination was to suppress competition and the facts as alleged showed that there was some overlapping of the business of these companies. Goodyear's lasting machines in view of the company's strength and dominance in allied lines could effectively compete with Consolidated's machines. Adding Goodyear's 10 percent to Consolidated's 60 percent was not a matter to be thus lightly disposed of and cannot be regarded as a case of *de minimis*. The same is true of the combined control of the welt-sewing machines put out by Goodyear and Eppler. Because this industry was characterized by patent monopolies was no reason to permit the further concentration of production in the hands of one company; if anything the scrutiny should have been more searching.

But even assuming that the companies were noncompetitive, does it follow that the Sherman Act permits a union of complementary companies where each of the constituent units possesses substantial control of its own line?[88] May not such integration stand on a separate footing from that of companies all of which are subject to competition in their own field? Where four giant companies control successive stages in the production of the final commodity, though they are not

[86] This is a paraphrase of the statement made by Justice Holmes in the Supreme Court opinion. *Id.* at 216. Actually, the lower court regarded the charge with respect to the tying clauses as stating a separate offense and sustained the count in the indictment relating thereto. See *United States* v. *Winslow* (D. Mass. 1912), 195 Fed. 578, 594.

[87] *United States* v. *Winslow* (1913), 227 U. S. 202, 217. [Text italics ours.]

[88] See Stone, J., dissenting in *Federal Trade Commission* v. *Eastman Kodak* (1927), 274 U. S. 619, 629.

n actual competition, there is some likelihood of competition arising ımong them. The manufacturer of welt-sewing machines may desire o expand into allied fields. Such potential competition is not without ninatory value in keeping prices at a reasonable level; provided, of ourse, there is no restrictive agreement among such manufacturers. 3ut with all the companies combined, the newcomer is without leverıge to break into the field and must invent an entire line of shoe nachinery rather than one or two new machines. The patent situaion plus the consolidation created a wall against new competition, omparable to that resulting from the physical conditions stressed in he *St. Louis Terminal case.*[89]

Contemporaneously with the criminal prosecution, the Government ıad filed a bill in equity for the dissolution of the United Shoe Mahinery Co., proceedings in which the technicalities of criminal proedure did not preclude a full consideration of the entire history of his combination, and a careful weighing of all the operative facts. The facts were most complicated and were largely in dispute—patient xamination of the testimony was necessary to evaluate the rival conentions and to resolve the conflicting versions of the facts. The Supreme Court, however, rested its opinion on the findings of the ower court, contained in three separate opinions.[90] The trial court ıad held that the companies combined in the original consolidation vere not competitive, and that the 56 subsequent acquisitions were ither of companies operating under noncompetitive patents or were nade to compose actual or threatened patent litigation. The Supreme Court did not review the conflicting evidence; [91] it merely analyzed a ew of the acquisitions, to show that the lower court's conclusions vere supported by the weight of the evidence.

The production of the United Co. has been estimated at about 90–95 percent of the shoe machinery used in this country.[92] Giving the ullest weight to the contentions of the defendants, and assuming vith the Court that the properties and patents thus put together were ssentially complementary to each other, the fact remains that there ıad been some competition among them and that the consolidation ompletely eliminated this competition. The situation is undoubtedly

[89] (1912) 224 U. S. 383.

[90] *United States* v. *United Shoe Machinery Company* (D. Mass. 1915), 222 Fed. 349.

[91] *United States* v. *United Shoe Machinery Company* (1918), 247 U. S. 32. Mr. Justice McKenna wrote the pinion for the majority, consisting of White, C. J., Holmes and Van Devanter, JJ., deciding that both the ombination and the tying clauses were lawful; Mr. Justice Day dissented, holding the tying clauses to be nlawful restraints of trade. Mr. Justice Clarke dissented on the ground that the defendant was a monopoly. Note his views on the significance of the form of the combination. *Id.*, at 77. Mr. Justice Pitney oncurred in both dissents, and each writer concurred in the other dissent. Brandeis and McReynolds, JJ., lid not take part in the consideration of the case.

[92] This chart is taken from the dissenting opinion of Mr. Justice Clarke, *id.* at 89:

"Machines in use in this country	Manufactured by defendants	Manufactured by all others
Lasting machines	7,496	7
Standard screw machines	409	None
Pegging machines	146	None
Tacking machines	3,488	6
Welt sewing machines	2,527	142
Outsole stitching machines	2,676	758
Loose-nailing machines	1,835	24
Heeling machines	2,019	17"

In *United Shoe Machinery Co.* v. *La Chapelle*, 212 Mass. 467, 99 N. E. 289, the Court assumes that the ompany controlled 90–95 percent of the industry at the time of suit.

complicated by the presence of multifarious patents.[93] While some of these patents mutually infringed each other, some were probably valid, and were competitive in the sense that they were capable of performing the same functions. That the combination shut the door to potential competition cannot be seriously questioned. Reference has already been made to the concentration of patents for allied machinery; what was equally as important was the congestion or "blocking" resulting from the various acquisitions of patents and inventions covering the entire field, which made it almost impossible to invent a machine which would not conflict in some part with one of the combination's patents. The inventive genius of the sellers of the patents was generally mortgaged to the company in the form of covenants not to compete and covenants to surrender their future inventions to the company.[94] In this way the important technological knowledge and skill without which new competition could not possibly arise were put beyond the reach of new capital. And finally there were the famous tying agreements under which the lessees of the machinery were forbidden from using machines of any other company either for the process for which United's machines had been leased or in connection with any of the other processes or stages incident to the manufacture of shoes. The potency of this device, regardless of its legality,[95] in keeping out new competition can scarcely be ignored. The intent to dominate the industry was fairly to be inferred from the long series of acquisitions and the tying agreements.[96]

To repeat then, there was here monopoly power both to fix prices and to exclude new competition. Irrespective of whether there was any real competition in the industry at an earlier date, there assuredly was none at the time of suit. The combination took the form of consolidation and holding company; the acquisitions sometimes were of assets, sometimes of stock; the consideration was cash or stock.

The Court throughout its opinion stresses the efficiency of the combination, but it furnishes the reader with little evidence of the basis for its conclusion. It states—

> The company, indeed, has magnitude, but it is at once the result and cause of efficiency, and the charge that it has been oppressively used is not sustained. Patrons are given the benefits of the improvements made by the company and new machines are substituted for the old ones without disproportionate charge.[97]

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[93] As to the patents, the Court said: "No one can tell the strength of the competition that may be in a patent. It may be more than competition; it may be destruction, and the Antitrust Act surely does not require the acceptance of that or forbid effort to prevent it. But even if such extreme does not impend, certainly improvement of business and its efficiency can be striven for without offense to the law." 247 U. S. 32, 53.

To the effect that the combination of competing patents may violate the Sherman law, see (1924) 24 Col. L. Rev. 654.

[94] In *United Shoe Machinery Co.* v. *La Chapelle*, 212 Mass. 467, 99 N. E. 289, the company asked specific performance of a contract by which the defendant-inventor agreed to assign all patents which he might take out while in plaintiff's employ, and for 10 years thereafter. The defendant had refused to assign after his discharge, and set up the defense that plaintiff was a monopoly in violation of the Sherman Act. The Court held for the defendant, stressing that a corporation with 90-95 percent of the industry is a monopoly even though its control is derived from the ownership of patents.

[95] The Supreme Court held the leases to be lawful under the Sherman Act. After the enactment in 1914 of the Clayton Act, the restrictions in the leases were held to be illegal under section 3 of that act. *United Shoe Machinery Corporation* v. *United States* (1922), 258 U. S. 451.

[96] The Court's contrary finding on the issue of intent is difficult to understand. The motives of the proponents of the combination need not be impugned; it may be that they were desirous of composing serious patent difficulties; it may be that their chief aim was to increase the efficiency of the combining units; but it seems equally clear that they intended to dominate the industry and to narrow the field of actual and potential competition to the vanishing point. See the opinion, 247 U. S. 32, 54. There was evidence that Winslow had threatened competitors with extinction, and while the Court passes over such threats as being "isolated instances, separated in time, without relation, not coordinated acts in a scheme of oppression," their probative value on the issue of intent was not entirely inconsequential. *Id.* at 55.

[97] *Id.* at 56.

The leasing of machinery was highly beneficial to the small shoe manufacturer who lacked the capital for an out and out purchase. The only oppression of which the United was guilty was the tying leases. But is there any evidence that as a result of the combination, costs of manufacturing machinery were lowered, rental charges decreased, the position of labor improved, or technological advance furthered? On these points the opinion is not very explicit.[98]

7. STEEL CORPORATION

The United States Steel Corporation escaped dissolution by a margin of one judicial vote. Only seven justices participated in the decision, and the Court divided four to three.[99] The Steel Corporation was organized as a holding company in 1901 to acquire the stock in 12 operating companies in exchange for its own stock. The events leading up to its formation and the intricate financial details of its organization are not pertinent to the present discussion. The Steel Corporation originally issued securities amounting to $1,402,846,817, of which $508,227,394 was in common stock. It has generally been believed that the entire common stock was watered. The promoters' profits were stupendous, being estimated at $62,500,000. Every stage in the production of iron and steel from the mining of ore and the manufacture of coke to the production of pig iron, as well as the manufacture of rails, bars, plates, sheets, tubes, rods, and other finished products, came under the control of the holding company. The lower court estimated the percentage of control of steel products to be between 80 and 90 percent; this figure seems much too high, most writers placing it at about 60 or 70 percent. At the time of suit, this had been reduced to about 50 percent. One of the purposes of the combination, as found by the Supreme Court, was the monopolization of the steel industry. However, a complete monopoly in the sense of the entire elimination of competition was never attained. At the outset, and increasingly as the years went by, the corporation was subjected to the competition of independents for part of the domestic business, and as indicated, the company did not retain its proportionate share, although its gross business increased tremendously. Price competition was avoided by pooling agreements, and in later years, by tacit understandings reached at the famous Gary dinners. The policy of the company was not to eliminate the independents; it engaged in none of the brutal practices that characterized the earlier trusts; it followed a "live and let live" policy, keeping the independents in check by agreement.

The fact that the combination was effected through the formation of a holding company was given no weight by the Court. The fact that the purpose of the combination was the monopolization of the

[98] Before leaving the case, mention should be made of the Court's fear that the drastic remedy of dissolution demanded by the Government would disrupt the entire industry and prejudice the interests of investors. It apparently felt that the difficulties of effecting a dissolution were insuperable. The series of questions which it poses and the psycological bias which it reveals may explain the ineffectiveness of many of the dissolution decrees which have been handed down by the courts. The Court further felt that the Government's delay of 12 years in bringing suit condoned "the offense if offense there was." *Id.* at 45. Compare the *Southern Pacific case* on the effect of delay.

[99] *United States* v. *United States Steel Corporation* (1920) 251 U. S. 417. The majority opinion was written by Mr. Justice McKenna—White, C. J., Holmes, and Van Devanter, JJ., concurring. Mr. Justice Day wrote a dissenting opinion with which Pitney and Clarke, JJ., concurred. McReynolds and Brandeis, JJ., took no part in the decision of the case.

industry was condoned because the purpose had failed of achievement. The tremendous overcapitalization and excessive promoters' profits passed without the slightest disapproval. The fact that the vast power which was concentrated in the holding company had not been abused was strongly emphasized and probably saved the company from dissolution. This was not the first instance of the integration of both competing and noncompeting companies to be presented to the Court, for in both the *Oil* [1] and *Tobacco* [2] *cases* the combination had branched out into allied and complementary lines, and in the *Northern Securities* [3] and *Union Pacific* [4] *cases*, the combining companies competed as to part of their business only. In their respective spheres, the Carnegie and Federal Steel Corporations, two of the constituent companies, were no less important and no less in competition with each other than were the Northern Pacific, Great Northern, Union Pacific, and Southern Pacific Railroads with respect to the transcontinental traffic. While the Court talks of the efficiencies resulting from the steel combination and the benefits which the public had derived therefrom,[5] there was no evidence that similar economies might not have been effected by the railroad combinations. In the railroad cases, however, the Court had been most unsympathetic to the attempts of counsel to justify the combinations on that ground.

Ordinarily, the proof of a wrongful intent and of actual violations of a criminal statute would tend to strengthen the Government's case; here it seemed to have the contrary effect. The Court appeared to be much impressed by the fact that the combination, having failed to eliminate competition at an early period of its history, saw the error of its ways and voluntarily abandoned its original purpose of monopoly. To be sure, the corporation, in the course of years, had bought up some additional companies but only under circumstances found by the Court to be extenuating, and as to one purchase, only after the approval of President Theodore Roosevelt had first been obtained. And the fact that the corporation had found it necessary to enter price-fixing arrangements with its competitors and otherwise violate the Sherman law with their assistance was deemed conclusive proof of its impotency and lack of monopolistic power.

Mere size by itself, the Court felt, was not conclusive since "the law does not make mere size an offense, or the existence of unexerted power an offense. It, we repeat, requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible." [6] That is to say, it is the exercise of monopoly power and not its possession which is determinative. Having thus stated the issue, the next question is what constitutes an improper exercise of monopoly power.

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[1] (1911) 221 U. S. 1.
[2] (1911) 221 U. S. 106.
[3] (1904) 193 U. S. 197.
[4] (1912) 226 U. S. 61.
[5] "In conclusion we are unable to see that the public interests will be served by yielding to the contention of the Government respecting the dissolution of the company or the separation from it of some of its subsidiaries; and we do see in a contrary conclusion a risk of injury to the public interest, including a material disturbance of, and, it may be serious detriment to, the foreign trade. And in submission to the policy of the law and its fortifying prohibitions the public interest is of paramount regard." *United States* v. *United States Steel Corporation, supra*, at 457.
[6] "The corporation is undoubtedly of impressive size and it takes an effort of resolution not to be affected by it or to exaggerate its influence." (1920) 251 U. S. 417, 451.

The Government's contention that "a combination may be illegal because of its purpose; it may be illegal because it acquires a dominating power, not as a result of normal growth and development, but as a result of a combination of competitors" was explicitly rejected. *Id.* at 447.

To the Court, this means the unilateral fixing of a monopoly price and the exclusion of competitors—and the corporation was found guilty of neither.

The Court approached the case from an additional angle. If there was competition in the industry after the merger, the combination could have no monopoly. The officers of the corporation, its competitors, and 200 customers all testified that competition was genuine, direct, and vigorous. The Court was impressed by the fact that "no competitor came forward and said he had to accept the Steel Corporation's prices." [7] There being competition, the conclusion was irresistible that there was no monopoly. Therefore, whether the test of legality under the statute be monopoly power or its exercise, the defendant had not violated its provisions.

The Steel Corporation controlled a smaller percentage of the industry than any other "trust" that had been prosecuted up to the time of this decision, with the possible exception of the Union Pacific-Southern Pacific combination. There were in the industry several independents capable of vigorous competition. The Court did not seem averse to forbidding the previous restraints on this competition, but the Government had not sought such relief, presumably because the restraints had been abandoned.

Eliminating the factors of wrongful motive and the participation by the corporation in the violation of the statute by the price-fixing arrangements with competitors, as the Court did, there was nothing left to the case but the element of size. Does the Sherman law forbid the formation of a capital combination controlling 50 percent of an industry, which no longer intends to monopolize the field and which does not restrain or limit the competition of its rivals? The Court felt that this was the sole issue before it and the only issue it sought to determine.[8] Following this decision, the Government dismissed its appeals in other cases, then pending before the Court, from similar lower court rulings.[9]

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[7] *Id.* at 447. The Government had relied upon the movement of prices, but this the Court regarded as insufficient in view of the explicit testimony of the 200 customers that no "adventitious interference was employed to fix or maintain prices and that they were constant or varied according to natural conditions." *Id.* at 449. When the Government pointed out that there were some 40,000 customers of which only 200 had been called, the Court responded that 200 was a representative number and pointed out that the Government had not seen fit to call the others itself.

[8] As in the *Shoe Machinery case*, the Court was impressed by the difficulties of dissolution and the possible injury to investors. *Id.* at 453. The fact that the Government had stood by for 10 years before instituting proceedings was not without influence upon the decision. *Id.* at 453. The case, it will be remembered, was argued in March 1917, just before war was declared, and reargued in the latter part of 1919 before the Nation had acclimated itself to the new peace.

The Court was satisfied that the price-fixing arrangements, which were stopped several months before the suit was started, were not abandoned in anticipation of the suit, but from a conviction of their futility. *Id.* at 445. The only cases reviewed by the Court were the *Standard Oil* and *Tobacco decisions*, and they were distinguished on the ground of wrongful purpose and predatory practices. *Id.* at 455.

Mr. Justice Day in his dissent, while agreeing that mere size by itself, if the product of natural growth is not condemned by the law, emphatically expressed his view that combination is not a method of natural growth, and that the size and power thus obtained are unlawful. He pointed out that in both the *Standard Oil* and *Tobacco cases* the corporations dissolved had been long in existence at the time of the Government's suit, but that had not deterred the court from decreeing dissolution. A dominating corporation, controlling one-half of the country's steel business, resulting from a combination of competing companies, in his opinion violated the act, and he voted for a dissolution to restore competitive conditions.

[9] *United States* v. *Keystone Watch Case Co.* (E. D. Pa. 1915), 218 Fed. 502, appeal dismissed on motion of the United States (1921), 257 U. S. 664 (42–47 percent of the industry); *United States* v. *American Can Company* (D. Md. 1916), 230 Fed. 859, decree denying dissolution entered in (D. Md. 1916), 234 Fed. 1019, appeal dismissed on motion of the United States (1921), 256 U. S. 706 (50 percent); *United States* v. *Quaker Oats Company* (N. D. Ill. 1916), 232 Fed. 499, appeal dismissed on motion of the United States (1920), 253 U. S. 499 (70–75 percent).

8. ANTHRACITE COAL CASES

The *Reading Anthracite Coal case* [10] was decided within 7 weeks of the *Steel* [11] *decision*. A full Court sat and the majority opinion was delivered by Mr. Justice Clarke, one of the dissenters in the *Steel case*. Three of the four members of the *Steel case* majority dissented, but it is noteworthy that Mr. Justice McKenna joined the majority.[12]

Practically all the anthracite coal in the country is found in three fields in northeastern Pennsylvania, the most northerly, the Wyoming field, with approximately 176 square miles of coal land, the middle or Lehigh field with about 45 square miles, and the southerly or Schuylkill field with some 263 square miles. The chief marketing centers for anthracite are New York City, about 140 miles by rail from the fields, and Philadelphia, about 90 miles distant. The Wyoming field has six rail outlets to the New York Harbor, the Lehigh three, and the Schuylkill only two.[13] Six of the carriers either directly or through subsidiaries produce about 75 percent of the annual output, and own or control about 90 percent of the unmined deposits.[14]

The Philadelphia & Reading Railroad extends into the Schuylkill field. From an early date, it began to acquire coal properties in this region to assure itself of the valuable coal traffic. Its holdings were increased from 70,000 acres in 1871 to 102,573 acres in 1891, constituting at that time about one-third of the total area of coal lands of the State, about two-thirds of the acreage of the Schuylkill field, and about 50 percent of the State's unmined deposits. In 1892, it leased the lines of two important competing roads, the Central of New Jersey and the Lehigh Valley, both of which controlled valuable coal properties. The Central lease was assailed in the New Jersey courts, and as a result of the litigation both leases were abandoned.[15] After a receivership in 1896, the company was reorganized and its various properties allocated as follows: The coal lands to the Reading Coal & Iron Co., the railroad to the Reading Railway Co., and the equipment and rolling stock to the Reading Co. In all other respects, the Reading Co. became a holding company, controlling the capital stock of the other two Reading companies. The formation of this holding company was held in and of itself to be a violation of the Sherman Act, the Court declaring:

[10] *United States* v. *Reading Company* (1920), 253 U. S. 26. The opinion in the *Steel case* was handed down on March 1, 1920, the *Reading case* on April 26, 1920. For the decree, see (D. C. Pa. 1921) 273 Fed. 848, 854.
[11] (1920) 251 U. S. 417.
[12] The majority consisted of Clarke, McKenna, Day, Pitney, McReynolds, and Brandeis, JJ., the minority of White, C. J., Holmes and Van Devanter, JJ.
[13] This is stated by the court, *id.* at p. 42, but the facts are somewhat differently stated by the district court. (E. D. Pa. 1915) 226 Fed. 229, 234.
[14] The following table of the various percentages of unmined anthracite is contained in *United States* v. *Reading Company* (1912), 226 U. S. 324, 339.

	Percent
Reading Co	44.00
Lehigh Valley Co	16.87
Delaware, Lackawanna & Western Co	6.55
Central R. R. of N. J	19.00
Erie R. R	2.59
New York, Susquehanna & Western R. R	.54
Total	89.55

The balance is owned by independents who mine about 20 percent of the annual output. The mines of the various coal companies are in the main in the vicinity of the tracks of the parent railroads. Except for the Delaware, Lackawanna & Western Co., the coal properties are owned by subsidiary operating companies.
[15] *Stockton* v. *Central Railroad Company of New Jersey*, 50 N. J. Eq. 52, 24 Atl. 964 (1892). The chancelor held that the Central R. R. lease to the Reading system was contrary to a New Jersey statute of 1885 forbidding the lease of a domestic railroad to a foreign corporation without legislative consent, and held also that the leases tended to monopoly and hence were injurious to the public interest.

Thus, this scheme of reorganization, adopted and executed 6 years after the enactment of the Antitrust Act, combined and delivered into the complete control of the board of directors of the Holding Company all of the property of much the largest single coal company operating in the Schuylkill anthracite field, and almost 1,000 miles of railway over which its coal must find its access to interstate markets. This board of directors, obviously, thus acquired power: to increase or decrease the output of coal from very extensive mines, the supply of it in the market, and the cost of it to the consumer; to increase or lower the charge for transporting such coal to market; and to regulate car supply and other shipping conveniences, and thereby to help or hinder the operations of independent miners and shippers of coal. This constituted a combination to unduly restrain interstate commerce within the meaning of the act.[16]

As evidence of the purpose of the Reading combination to dominate the Schuylkill field and the transportation facilities from that region to the eastern markets, the Court relied upon the series of acquisitions already described and the abuse of the power which thus became vested in the holding company. Such abuses were the combination of the Reading with five other carriers to prevent the construction by the independent coal operators of a new road to the eastern seaports and the successful suppression of such contemplated competition, and also its participation in a combination of carriers and controlled coal companies, whereby the present and future output of the independents was obtained under exclusive contracts at a uniform rate of 65 percent of the seaport price.[17] The participation in these combinations was characterized by the Court as a flagrant violation of the antitrust law.

The holding company had also acquired a controlling stock interest in the Central Railroad of New Jersey, which operated a road from the Wyoming and Lehigh regions to the New York harbor, and which owned eleven-twelfths of the stock of the Lehigh & Wilkes-Barre Coal Co., a coal company with extensive properties in the Wyoming field amounting to about 19 percent of the total unmined deposits in the State.[18] The Court found that both the railroad and its coal company were in direct competition with the system of the acquiring company. Reading and Central railroads together carried an anthracite tonnage of 18,000,000 tons or about one-third of the total domestic production.[19] "This acquisition", said the Court, "placed the Holding Company in a position of dominating control not only over two great competing interstate railroad carriers but also over two great competing coal companies, engaged extensively in mining and selling anthracite coal, which must be transported to interstate markets over the controlled interstate lines of railway." As "this dominating power was not obtained by normal expansion to meet the demands of a business growing as a result of superior and enterprising management, but by deliberate, calculated purchase for control", the Court held the com-

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[16] *United States* v. *Reading Company* (1920), 253 U. S. 26, 47.

[17] Both acts of the combination were held unlawful in a former suit, *United States* v. *Reading Company* (1912), 226 U. S. 324. As this case is concerned with a loose-knit combination, it is not analyzed in this section. However, one aspect of the case should be noted. The competing roads formed a company to acquire the stock of an independent producer, which was the largest supporter of the projected railroad, each of the defendant railroads acquiring a stock interest in the new company. The unified control of the company by the 6 competitors was held unlawful. Cf. *State* ex inf. *Barker* v. *Armour Packing Company*, 265 Mo. 121, 176 S. W. 382 (1915), in which the court held a company with 7 percent of the meat packing trade of the United States to be illegal where its owners were the leading meat packers of the country.

[18] Of the total coal mined in 1912, Wilkes-Barre produced 7½ percent and Reading Coal 16 percent. *United States* v. *Reading Co.* (E. D. Pa. 1915) 226 Fed. 229, 249. This latter court estimated Central's unmined deposits at 10 percent and not 19 percent, the figure given by the Supreme Court in the first *Reading case*.

[19] *United States* v. *Reading Company* (1920), 253 U. S. 26, 53. It is clear that their production of coal did not exceed this figure of their coal transportation. In 1912 the combined production of their coal companies amounted to only 23½ percent of the annual output. The percentage of unmined deposits was, as we have seen, much higher.

bination unlawful, stating "that such a power, so obtained, regardless of the use made of it, constitutes a menace to and an undue restraint upon interstate commerce within the meaning of the Antitrust Act."[20] As authority for its position the Court cited with approval and quoted statements in the *Northern Securities* [21] and the *Union Pacific* [22] *cases* that it is the existence of power and not its exercise which determines whether the act has been violated. The Court also quoted from a previous case to the effect that the good results of the combination or the good intentions of its prime movers constitute no defense for a violation of the statute.[23] It was further held that the joint control of carrier and coal company violated the commodities clause of the Hepburn Act.[24] A decree of dissolution was accordingly entered, the constituent companies being freed from the domination of the holding company, and their separate independence reestablished. A more drastic dissolution had not up to that time been ordered by the Court.[25]

Here, then, we have a combination with about 33⅓ percent of the annual production of anthracite coal declared unlawful under the antitrust laws. Is the result to be placed on the ground that the defendants joined a combination of other carriers to exclude competition and to monopolize the entire output of coal? These violations had occurred long prior to this suit and had been enjoined in a separate proceeding more than 8 years before the decision of this case by the Supreme Court. The Court emphatically states that the formation itself of the Reading holding company rather than the abusive exercise of its power violated the antitrust laws. Apart from the acts enjoined in the previous suit, the combination had been guilty of no predatory practices. The case cannot be rested on the ground that the commodities clause of the Hepburn Act was violated. The Hepburn Act had no application to the Central of New Jersey acquisition; it pertained merely to the joint control of carrier and coal company. The Court, moreover, regarded the combination as violating the antitrust laws, and did not rest its decision upon the Hepburn Act. Nor can the

[20] *Id.* at 57.

[21] (1904) 193 U. S. 197.

[22] (1912) 226 U. S. 61.

[23] *International Harvester Co.* v. *Missouri* (1914), 234 U. S. 199, 209. "It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect."

[24] 34 Stat. 584 (1906), 49 U. S. C. A., sec. 1, par. 8 (1926). This act declares that it shall be unlawful for any railroad company to transport in interstate commerce "any article or commodity, * * * mined, or produced by it, or under its authority, or which it may own in whole or in part, or in which it may have any interest, direct or indirect, * * *." In *United States* v. *Delaware & Hudson Company* (1909), 213 U. S. 366, it was held that the act is not necessarily violated by the transportation of coal shipped by a company in which the railroad has a stock interest. Where, however, the railroad owns all the stock of the coal company, depriving it of all real independent existence and making it virtually an agency of the carrier, the transportation of its coal is unlawful. *United States* v. *Lehigh Valley Railroad Co.* (1911), 220 U. S. 257. The test is whether there is a bona fide separate administration of the affairs of the coal company. The next device adopted by the coal-carrier combinations to circumvent the statute was outlawed in *United States* v. *Delaware, Lackawanna & Western Railroad Co.* (1915), 238 U. S. 516. The Delaware, Lackawanna & Western Railroad Co. incorporated the Delaware, Lackawanna & Western Coal Co., selling the stock of the coal company to the stockholders of the railroad. The coal company agreed to buy all the coal mined by the railroad and not to handle the output of any other company. The Court held the contract unlawful, stating that the arrangement made the coal company merely an instrumentality of the carrier. The Reading and Lehigh set-ups, which were obvious modifications of the arrangements described above, are discussed in the text. See (1915) 14 Mich. L. Rev. 49; (1920) 19 *id.* 221; (1921) 19 *id.* 553; (1932) 41 Yale L. J. 439. In *United States* v. *Elgin, J. & E. Ry. Co.* (1936), 298 U. S. 492, the Court held that the commodities clause of the Interstate Commerce Act had not been violated by the ownership of all the stock of the Elgin, J. & E. Ry. Co., by the United States Steel Corporation, a holding company, notwithstanding the fact that 60 percent of the tonnage carried by the railroad consisted of commodities shipped by subsidiaries of the steel corporation. The Court stressed the absence of interlocking directorates, the infrequent participation by the holding company in the affairs of the railroad, the separate accounting systems of each company, and the independent ownership by each of their respective facilities and stated the mere existence of power to exercise an active control, without its exercise, does not constitute a violation of the law. See the sharp dissent of Mr. Justice Stone, *id.*, at 504.

[25] For subsequent litigation over the decree, see *Continental Insurance Company* v. *United States, Reading Company* (1922), 259 U. S. 156.

decision be put on the ground that a monopoly was acquired or sought. There was no evidence that the Reading Co. planned to buy up all or a dominant part of the competing coal companies and carriers; such wrongful intent as there may have been was clearly ineffectual. No one will pretend that an active and vigorous competition prevailed in the anthracite fields, but the absence of competition was to be accounted for by the collusive agreements among the operating companies and carriers and not by the Reading combination. While large capital was required to embark upon the industry, the artificial restrictions on potential competition had at least been removed by the decree in the first Reading case. The conclusion is inescapable that the union of the Reading and the Central interests did not stifle competition in the industry at large; at best it merely eliminated competition between two of the largest factors. Does not the case hold that a combination of giant companies doing a substantial part of the business in their fields is unlawful?

United States v. *Lehigh Valley Railroad Co.*[26] dealt with another series of acquisitions in this industry. The Lehigh Valley Railroad extends to the Wyoming and Lehigh fields, reaching but one colliery in the Schuylkill region. Much the larger part of its tonnage is derived from the Wyoming field and it transports more coal than any other railroad in the country. Like the other coal carriers, it has extensive coal holdings in territories tributary to its lines. Most of its purchases preceded the enactment of the Sherman law, but from 1900 to 1905, it made several important stock acquisitions in competing coal companies, culminating in the purchase of the entire capital stock of Coxe Bros. & Co. in 1905 for $17,440,000 in cash. This company was the largest independent coal operator on the Lehigh Valley lines, and controlled not only extensive coal deposits but also all the capital stock of the Delaware, Susquehanna & Schuylkill Railroad, a 50-mile railway serving many of the large independents and connecting with the Reading, Pennsylvania, and Central Railroads. After the acquisition, the Delaware fell into disuse. The coal properties of the Lehigh were held by its controlled company, the Lehigh Valley Coal Co. The combined acreage of the Lehigh and the Coxe companies was 90,719 acres, of which about two-thirds were located along the lines of the railroad. The coal companies and railroad had common officers, no dividends were paid by the coal companies, the financial relations of the various companies being "intimate and interlaced."[27] In 1912, to avoid the possible application of the Sherman and Hepburn Acts, a subsidiary sales company was organized to market the coal produced. This device was a patent subterfuge and was so regarded by the Court.[28] The purpose of these purchases of coal properties, the Court found, was to suppress competition, and their

[26] (1920) 254 U. S. 255. Cf. *United States* v. *Lake Shore and Michigan Southern Railway Co.* (S. D. Ohio 1912), 203 Fed. 295.

[27] 254 U. S. 255, 263.

[28] *Id.* at 267. The history of the company is a long record of attempts to frustrate the State and Federal statutes regulating carriers or business competition. Its efforts to lease its lines to the Reading, as indicated in the text, proved abortive. It participated in the illegal combination which was castigated in the first *Reading case*. In 1911, the Interstate Commerce Commission held it guilty of monopolizing the coal field served by it and of unjust discrimination. *Meeker* v. *Lehigh Valley Railroad Company*, 21 I. C. C. 129, 154, 163 (1911), supplemental report, 23 I. C. C. 480 (1912); *Meeker* v. *Lehigh Valley Railroad*, (1915) 236 U. S. 412. In 1915, its rates were branded as unreasonable, and it was held guilty of unlawful rebates. In the Matter of Rates, etc., Governing the Transportation of Anthracite Coal, 35 I. C. C. 220 (1915). As stated by the court, "This history of almost 25 years casts an illuminating light upon the intent and purpose with which the combination here assailed was formed and continued." *United States* v. *Lehigh Valley Railroad Co., supra*, at 269. See (1932) 41 Yale L. J. 439.

ultimate result was the attainment of "a practical monopoly" in "the transportation and sale of anthracite coal derived from such lands." [29] The Court said:

> The area of the anthracite territory is so restricted that to thus obtain control of the supply of such coal on a great system of railway (the amount transported exceeded one-fifth of the entire production of the country for the year before this suit was commenced) by a combination of corporations, such as we have here, and by such methods as we have seen were employed, effected a restraint of trade or commerce among the several States and constituted an attempt to monopolize and an actual monopolization of a part of such trade or commerce in anthracite coal, clearly within the meaning of the first and second sections of the Antitrust Act as they have frequently been interpreted by this court.[30]

The combination between carrier and coal companies was ordered dissolved, the independence of each affiliated unit to be completely restored.[31]

While the Court talks of a practical monopoly and of attempts to monopolize, it does not reveal Lehigh's share of the annual output of coal. It is clear from the other coal cases that the percentage did not exceed 20 percent. Lehigh had no monopoly in any real sense other than the regional monopoly which every carrier possesses. There were many other transportation and coal companies, and with Reading and Central separated, at least two with larger unmined coal holdings.[32]

In the discussion of the *Anthracite cases*, the combination of competing coal companies rather than the integration of coal company and carrier has been stressed. The Court, as indicated, declared both types of combination unlawful under the Sherman as well as the Hepburn Acts. It is noteworthy that in both cases the stock in the coal companies was acquired either by the carrier or a holding company and not by a coal company. In the *Reading case*,[33] the holding company acquired Central of New Jersey stock and thus obtained control of Central's subsidiary coal company. In the *Lehigh case*,[34] the railroad purchased the stock in Coxe Co. The decree of dissolution required the separation of railroad and coal company, the Reading Co. being compelled to relinquish its holdings of Reading Railroad, Reading Coal Co., and Central of New Jersey, which in turn had to divest itself of its coal holdings. Lehigh Railroad was ordered to relinquish control of its subsidiary coal company and to dispose of its stock in the Coxe colliery. Under the decree, a horizontal union of the Reading and Central Coal companies, or of the two carriers, or of Lehigh Coal and Coxe Coal companies, was not directly forbidden. If there is difficulty in reconciling these cases with the *Steel decision*,[35] treating them as involving merely combina-

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[29] *Id.* at 270.

[30] *Ibid.*

[31] The opinion was written by Clarke, J., for a court composed of McKenna, Day, Van Devanter, and Pitney, JJ. Chief Justice White and Mr. Justice Holmes concurred specially, stating that they regarded themselves bound by the previous determinations in the *Reading* and *Lackawanna cases*. McReynolds and Brandeis, JJ., did not sit.

The court ordered the dissolution of the intercorporate relations between the Lehigh Valley Railroad Co., the Lehigh Valley Coal Co., Coxe Bros. & Co., Inc., the Delaware, Susquehanna & Schuylkill Railroad Co., and the Lehigh Valley Coal Sales Co. with such disposition of all securities as would establish their entire independence. The contract between the coal company and sales company was declared void, and the sales company was freed from the domination of the railroad, and was in effect, as well as in form, to be an independent dealer in coal, free to compete with the coal or railroad companies.

[32] The Reading Co. with 44 percent and the Central Railroad of New Jersey with 19 percent while the Lehigh Valley Co. had but 16.87 percent.

[33] (1912) 226 U. S. 324.

[34] (1920) 254 U. S. 255.

[35] (1920) 251 U. S. 417.

tions of coal companies, how explain the decisions under the Sherman Act if they are treated as vertical integrations only?

The percentage of control in both *Anthracite cases* was less than that in the *Steel case*.[36] The form of combination, at least in the *Reading case*,[37] was identical. The combinations cooperated with the independents—in one case to fix prices, in the others to drive out competitors. Cooperation with competitors in all the cases had theoretically ceased at the time of suit, in one voluntarily, and in the others under compulsion of law. The intent to monopolize had been abandoned—or at least had proven ineffectual—in all three cases. Monopoly power was not attained by any of the defendants. Apart from combining with competitors, no defendant was guilty of predatory practices, although to be sure the anthracite companies had joined with their competitors to drive out new competition, whereas Steel had been content with price-fixing. The likelihood of potential competition was about the same; perhaps more likely in the steel industry. All the corporations were preeminent in their respective fields, but there was a fair number of strong independents. The majority opinion in the *Anthracite cases* bears an uncommonly strong resemblance to the dissenting opinion in the *Steel case*.[38] The *Steel decision* is neither cited nor discussed by Mr. Justice Clarke.

9. ANACONDA MERGER

Somewhat reminiscent of the *Steel case* [39] is the decision in *Geddes* v. *Anaconda Copper Mining Co.*[40] This was a bill by minority stockholders of the Alice Gold and Silver Mining Co. to have a deed of the corporation's property to the Anaconda Copper Co. declared invalid on the ground that the transfer violated the antitrust laws. The assets of the Alice Co. were sold to Anaconda in consideration of 30,000 shares of the latter's stock. Anaconda at this time was an operating company and held the fee to the properties of several companies which it had previously absorbed. The Amalgamated Copper Co., a holding company formed in 1899 to serve, as its name indicated, as an instrumentality for combining the copper companies in the country, controlled the Anaconda Co. by stock ownership. The promoters back in 1899 had probably intended to unify the entire industry but their efforts proved ineffectual, and in 1911 when the present bill was filed, less than 22 percent of the American output was produced by Anaconda and its associated companies. The Alice was a small copper company. Its proportionate output is not indicated by the Court, but it could not have been very high in view of the consideration given for it. At the time of the transfer, Alice was in financial difficulties and was unable to operate its properties profitably. While the case goes off on other grounds, the Court was clear that the purchase did not violate the Sherman law, the small proportion of the industry not giving Anaconda any monopolistic power.

Much was made of the wrongful purpose of the original combination, but as in the *Steel case*,[41] the Court felt that the abandonment,

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[36] *Ibid.*
[37] (1912) 226 U. S. 324.
[38] (1920) 251 U. S. 417.
[39] *Ibid.*
[40] (1921) 254 U. S. 590. The opinion was written by Mr. Justice Clarke for a court composed of White, C. J., McKenna, Holmes, Day, Van Devanter, Pitney, and Brandeis, JJ. Mr. Justice McReynolds concurred in result.
[41] (1920) 251 U. S. 417.

long prior to suit, of the intent to monopolize, as well as its ineffectiveness, precluded dissolution under the Sherman Act. While the Court does not directly pass upon the earlier acquisitions, its approval of the present purchase is an oblique ruling, at the very least, upon the legality of a merger not exceeding 22 percent of the industry, achieved without predatory practices or injury to competitors.

10. INTERNATIONAL HARVESTER CONSOLIDATION

The *International Harvester case* [42] arose in a peculiar way. In 1902, 5 of the largest companies manufacturing harvesting machinery and agricultural implements were consolidated into the International Harvester Co.. Subsequently the stock of the only remaining large company was acquired.[43] The aggregate output of the combined companies exceeded 85 percent of the total domestic production. Thereafter, the properties of other competitors were acquired, steel and coal companies were purchased, and Harvester added other classes of agricultural implements to its lines. The company was conservatively financed, its stock was singularly free of water, the properties purchased were not overvalued, and promoters' profits were unusually slight. While the company had been variously charged with unfair practices, it was guilty of none of the brutal methods of the oil and tobacco companies and the trial court explicitly found that its competitors had not been unfairly or unjustly treated.[44] The intent to monopolize was inferable from the size and power of the combination. At the suit of the Government, the combination was ordered dissolved in 1914, the decree providing for the division of the assets and business of Harvester into "at least 3 substantially equal, separate, distinct, and independent corporations with wholly separate owners and stockholders." [45] Later that year, the decree was modified, pursuant to a stipulation between the Attorney-General and the company, eliminating the requirement of separation into 3 companies, and providing 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." Harvester then appealed to the Supreme Court, but by agreement of the parties the appeal was dismissed and a consent decree was entered in 1918 whereunder Harvester was ordered to sell 3 of its branded harvester lines, with the manufacturing plants, and was limited to a single sales representative or distributor in any one town or city. Jurisdiction to modify the decree was retained in the event it failed to achieve its purpose of bringing about "a situation in harmony with the law." [46] Relying upon a study of competitive conditions in the industry made by the Federal Trade Commission, the Government in 1918 petitioned for the separation of International Harvester into 3 companies in accordance with the terms of the original decree. The trial court denied the petition on

[42] (1927) 274 U. S. 693.

[43] The companies consolidated were the McCormick Harvesting Machine Co., Warder, Bushnell & Glessner Co., Deering Harvester Co., Milwaukee Harvester Co., and the Plana Manufacturing Co. Shortly after, D. M. Osborne & Co. was acquired.

[44] *United States* v. *International Harvester Company* (D. Minn. 1914), 214 Fed. 987, 993.

[45] *United States* v. *International Harvester Company* (D. Minn. 1914), 214 Fed. 987, appeal dismissed on motion of appellants, (1918) 248 U. S. 587, supplemental bill, (1927) 274 U. S. 693. See (1915) 63 U. of Pa. L. Rev. 315; (1914) 14 Col. L. Rev. 659; (1914) 28 Harv. L. Rev. 87; Eldridge, "A New Interpretation of the Sherman Act," (1914) 13 Mich. L. Rev. 1, 113.

[46] The company thereafter disposed of two of its lines, but it was unable to find a purchaser for the plants. The third line was not sold until after the Government brought the present proceedings for additional relief under the decree.

the ground that the consent decree had restored competitive conditions, that the defendant's percentage of control had been reduced from 85 in 1902 to 64 in 1918, that the independents were powerful enough to engage in vigorous competition with Harvester, that defendant had no control over prices, and that, in fact, prices had been lowered. The Supreme Court in affirming held that competitive conditions had been restored.[47] The Government's reliance upon the contrary conclusions of the Federal Trade Commission was criticized as follows:

> * * * the Government relies in large measure upon various statements and tabulations contained in the report of the Federal Trade Commission, which was introduced in evidence over the objection of the International Co. But it is entirely plain that to treat the statements in this report—based upon an *ex parte* investigation and formulated in the manner hereinabove set forth—as constituting in themselves substantive evidence upon the questions of fact here involved, violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination.[48]

One of the ways in which defendant had restricted competition had been by tying up all the responsible dealers in a locality with exclusive contracts whereby each was limited to one of defendant's lines. Under the decree, the Court pointed out, these channels of trade were opened to Harvester's competitors. The Court was impressed by the testimony of the purchasers of the three lines sold pursuant to the decree, who expressed confidence in their ability to compete energetically and successfully once the agricultural depression ended. The Court further found that Harvester had not used its capital and resources to restrain or suppress competition, that it had not controlled prices, and that it had not sold its machines below cost except in disposing of surplus stock. It pointed out that the company's percentage of control had decreased to 64 percent. Repeating the dictum of the *Steel case*,[49] it said:

> The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power.[50]

With respect to the company's price leadership, it said:

> And the fact that competitors may see proper, in the exercise of their own judgment, to follow the prices of another manufacturer, does not establish any suppression of competition or show any sinister domination.[51]

Its conclusion from the evidence was that International Harvester had not only complied with the decree but that a "situation in harmony with the law" has been brought about.

All that the Court was called upon to determine in the *Harvester*[52] *case* was whether the defendant had complied with the consent decree of 1918. The position might be taken that the legality of a combination with 64 percent control of an industry was not really before it, that while it might well have rendered a more drastic decree were the

[47] *United States* v. *International Harvester Co.*, (1927) 274 U. S. 693. Mr. Justice Sanford wrote the opinion for a Court composed of Taft, C. J., Holmes, Van Devanter, Sutherland, and Butler, JJ. McReynolds, Brandeis, and Stone, JJ.. took no part in the case.

[48] *Id.* at 703.

No mention was made of sec. 6 (c) of the Federal Trade Commission Act empowering the Commission to make such investigations, nor account taken of the fact that one of the purposes of Congress in creating the Commission was to devise a new technique for the effective formulation of dissolution decrees. See 38 Stat. 717, sec. 6 (c) (1914), 15 U. S. C. A., sec. 46 (c) (1926).

[49] (1920) 251 U. S. 417.

[50] *United States* v. *International Harvester Co.*, *supra*, 708.

[51] *Ibid.*

[52] (1927) 274 U. S. 693.

matter *res integra,* the Court was limited, by the form of the submission and the nature of its review, to the terms of the decree which the Government had accepted and by which it was bound. So construed, the value of the decision as a precedent is much circumscribed. While it must be admitted that the issue before the Court was rather narrow, yet the right of the Government to apply for further relief to bring about a condition "in harmony with law" had been expressly reserved and the question before the Court was whether such a condition had been restored. If the power of a consolidated company controlling 64 percent of the industry is excessive and transcends the limits imposed by the anti-trust laws, the Court, despite the limited scope of its review, had ample jurisdiction to modify the decree.

Under this decision, it would appear that the abandonment of a wrongful purpose purges the combination of its initial unlawfulness. The existence of monopoly is evidenced by a control over prices and the absence of energetic competition by independent manufacturers. The fact that independents follow the price leadership of the dominant company is not, standing by itself, conclusive on the question of control. It is not essential that the aggregate power of the independents equals that of the combination so long as they have the ability and are free to compete with the combination. If there be such competition, the merger, regardless of its size, is lawful.

The existence of competition in the industry subsequent to the formation of the combination is thus regarded as more significant than any of the other factors stressed in the previous decisions.[53]

11. RECAPITULATION

It is apparent from this review of the Supreme Court cases that the course of decision in the field of mergers and consolidations has been erratic and unpredictable and that there is today virtually as much doubt and uncertainty regarding the permissive limits of capital combinations as there was in 1890. Numerous factors which may have an important bearing upon the legality of a merger of two or more competing companies have been stressed by the Court and the writers on the subject. A recapitulation of the Court rulings in terms of these factors may be fruitful in determining whether the decisions permit of any reliable generalizations concerning the lawful limits of corporate integrations.

A. SIZE OF THE CAPITAL COMBINATION AND ITS POSITION IN THE INDUSTRY

Although there is a popular belief that the Sherman Act is aimed primarily at bigness, the Supreme Court has emphatically stated on two occasions that the size of a capital combination is not of decisive importance in determining its illegality. Thus in the *Harvester case* [54] Mr. Justice Sanford, rephrasing the earlier *dictum* in the *Steel case,*[55] said:

> * * * The law, however, does not make the mere size of a corporation, however impressive, or the existence of unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. * * *

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[53] For similar emphasis upon this factor, see *United States* v. *Standard Oil Company of New Jersey, Standard Oil Company of New York,* and the *Vacuum Oil Company* (E. D. Mo. 1931), 47 F. (2d) 288.

[54] *United States* v. *International Harvester Co.* (1927), 274 U. S. 693, 708.

[55] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417, 451.

A company may have gigantic resources and immense capitalization, but being pitted against other giants may have no control over price or industrial policy. Whether there should be any limitations on corporate size is dependent upon considerations of policy extrinsic to the monopoly problem.[56] Though not of decisive importance, the element of size may not be ignored in determining the monopolistic power of any combination. The Court has not rejected the relevance of size in proving monopoly; it has merely held that size by itself does not constitute a violation of the statute.

It is difficult to believe that the Court regards the economic position of a corporation in an industry or its control of the market as of no greater importance than capitalization or net worth, although its language in the passage above quoted is capable of such a construction. Such a view would strip the statute of its meaning and efficacy, and fortunately the Court has not taken this position in its other merger decisions.

A few preliminary observations are essential to a full understanding of the significance of the factor of market control. It is customary to use percentages in describing the economic strength of a capital combination. The use of numerical figures may, however, be misleading. Many businesses defy classification. They cannot be neatly articulated in any well-recognized industry. An industry itself is a tangle of affairs, sprawling, disorderly, and with ill-defined borders.[57] Given one definition of an industry, the combine's strength may be impressive; with another definition used as the base, its power may shrink to insignificance. Nor can the matter of geography be ignored. While exerting monopolistic influences in local markets, the combine may face vigorous competition in the national market. Even when these factors are taken into account, there is always the difficulty of obtaining accurate statistical information concerning the relative position of the enterprises in any industry. Percentages based upon financial resources or productive capacity may differ from those based upon output or sales and be entitled to different weight. Degree of market control is thus not merely a matter of mathematical computation; it is a shorthand expression for the economic strength of a combine in the field in which it operates; its correct determination depends upon the weighting of all the relevant factors.

What importance has been attributed to this factor in the decisions of the Supreme Court? Eight capital combinations have been pronounced unlawful by the Court. The percentage of the industry controlled by the combine has not always been disclosed by the opinion of the Court or by the record of the case. The ascertainable degree of control shows a variation from 20 percent in the case of *Anthracite Coal* [58] to 85 to 90 percent in the case of oil.[59] The Reading combination [60] brought within the control of a single holding company 33⅓ percent of the anthracite coal marketed in the country. The Northern Securities,[61] the Union Pacific,[62] and the Southern Pacific [63] amalgamations combined important transcontinental railroad systems

[56] See Mr. Justice Brandeis, dissenting in *Louis K. Liggett Co.* v. *Lee* (1933), 288 U. S. 517, 541, 548 *et seq.*
[57] See Hamilton and Associates, Price and Price Policies (1938), sec. 1.
[58] *United States* v. *Lehigh Valley Railroad Co.* (1920), 254 U. S. 255.
[59] *Standard Oil Company of New Jersey* v. *United States* (1911), 221 U. S. 1.
[60] *United States* v. *Reading Co.* (1920), 253 U. S. 26.
[61] *Northern Securities Company* v. *United States* (1904), 193 U. S. 197.
[62] *United States* v. *Union Pacific Railroad Company* (1912), 226 U. S. 61.
[63] *United States* v. *Southern Pacific Company* (1922), 259 U. S. 214.

which, although lacking monopoly power, were responsible for a substantial part of the Nation's transcontinental traffic. The *Terminal Railroad case* [64] dealt with a monopoly of the terminal facilities in the city of St. Louis. The American Tobacco combine [65] involved a circular and vertical as well as a horizontal integration, the degree of control varying in the different branches of the industry which it dominated, the range of its power in the important divisions of its business extended from approximately 76 to 96 percent.

Of the five integrations upheld by the Supreme Court, four controlled 50 percent or more of their respective industries. The American Sugar Refining Co.,[66] at the peak of its power, was responsible for 98 percent of the sugar refined in this country. The percentage of control of the United Shoe Machinery Co.[67] exceeded 90 percent. The United States Steel Corporation [68] at the time of suit was the dominant producer of steel and controlled about 50 percent of the industry. The International Harvester Co.[69] accounted for 64 percent of the business done in its field. The copper combine [70] is the only merger upheld embracing less than 50 percent of its industry, its percentage being 22.

The same variations are to be noted in the State and lower Federal court decisions.[71]

It is evident, therefore, both from a careful reading of the opinions of the Court and from a comparison of these figures, that the degree of control is not the decisive factor in determining the legality of capital combinations.

Although the decisions cannot be reconciled in terms of any mathematical formula, it is doubtful whether the Court would decline to accord considerable weight to the element of market control. Unfortunately, this factor has not been accorded the prominence in judicial ruling which it clearly merits. A construction of the statute which permits one company to control 64 percent of an industry has placed the wall of the law's protection too far from the center of the monopoly evil to have any real salutary economic effect.

The Court is not alone at fault for the vagueness and inconsistency of its rulings. Little guidance was furnished either by the common law development of the monopoly concept or by the legislative history of the Sherman law. The word "monopoly" was not defined in the legislation and the broad use of the term in legislative discussion and popular literature afforded no reliable clue to the legislative purpose. It was clear that Congress intended to prohibit concentration of industrial control this side of total ownership or domination; otherwise the statute would have little meaning. How far short? The Supreme Court, unaided by history and unschooled by experience, was called upon to draw the line somewhere in the scale from 0 to 100. It naturally eschewed a mathematical approach to the problem. There are other factors to be considered. In practice the facts of the particular case has dominated the decision. Each case is thus a law unto itself. The dividing line has been located at one point on

[64] *United States* v. *Terminal Railroad Association of St. Louis* (1911), 224 U. S. 383.
[65] *United States* v. *American Tobacco Company* (1911), 221 U. S. 106.
[66] *United States* v. *E. C. Knight Co.* (1895), 156 U. S. 1.
[67] *United States* v. *United Shoe Machinery Co. of New Jersey* (1918), 247 U. S. 32.
[68] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417.
[69] *United States* v. *International Harvester Co.* (1927), 274 U. S. 693.
[70] *Geddes* v. *Anaconda Copper Mining Co.* (1921), 254 U. S. 590.
[71] See Handler, Industrial Mergers and the Anti-Trust Laws (1932), 32 Col. L. Rev. 179, 245.

the scale in one industry and elsewhere in another. Clarity and precision of doctrine cannot be expected in such a legal regime.

"Monoply" under the statute thus means that degree of control which the Supreme Court deems unlawful. The illicit degree of control is an unknown quantity and obtains its meaning from the traditional process of judicial inclusion and exclusion. The role of the Court has thus far been experimental. It has groped its way cautiously and tentatively in an effort to locate the dividing line at a point fair to all the interests concerned. The results thus reached have been entirely unsatisfactory. The prevailing confusion and uncertainty, deplorable though they may be, leave both the Congress and the Court free to ascribe greater weight to the element of market control, by the adoption of a series of rebuttable presumptions or by the formulation of a more definite criterion of the permissive degree of corporate integration.

B. INTENT TO MONOPOLIZE

The element most emphasized in the decisions is the intent to monopolize. The statute does not directly forbid monopoly, its penalties are imposed upon those persons who "shall monopolize or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations."

A plausible argument predicated upon the wording of the statute can be advanced in support of the view that the mental element is an essential part of the statutory offense. Such a construction, however, is not inescapable.

Although the intent to monopolize was present in several of the combinations held violative of the statute,[72] such intent was also present in at least two decisions in which the Court refused to order dissolution, *viz*, the *Knight case*,[73] where the proponents of the combination intended to monopolize the entire sugar refining industry, and in the *Shoe Machinery cases*,[74] where the manifest purpose of the defendants was to control the shoe machinery industry. And there are rulings upholding corporate fusions despite the existence of a wrongful purpose on the part of the promoters of the combine. The moving spirits of the steel [75] and copper [76] combines intended to control their respective industries. Their purposes, however, were never achieved, and the Court found that the intent to monopolize had been abandoned. Several combines have been condemned by the Court, notably in the railroad cases,[77] in the absence of any evidence of a monopolistic purpose, the intent of the parties being merely to unite competitive properties. Thus, as a matter of authority, it can be definitely stated that the element of intent has not always been decisive.[78]

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[72] *Standard Oil Company of New Jersey* v. *United States* (1911), 221 U. S. 1; *United States* v. *American Tobacco Company* (1911), 221 U. S. 106; *United States* v. *Terminal Railroad Association of St. Louis* (1912), 224 U. S. 383.

[73] *United States* v. *E. C. Knight Co.* (1895), 156 U. S. 1.

[74] *United States* v. *Winslow* (1913), 227 U. S. 202; *United States* v. *United Shoe Machinery Co. of New Jersey* (1917), 247 U. S. 32.

[75] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417.

[76] *Geddes* v. *Anaconda Copper Mining Co.* (1921), 254 U. S. 59.

[77] *United States* v. *Union Pacific Railway Company* (1912), 226 U. S. 61; *United States* v. *Southern Pacific Company* (1922), 259 U. S. 214; *Northern Securities Company* v. *United States* (1904), 193 U. S. 197.

[78] But *cf. United States* v. *Socony-Vacuum Oil Co., Inc.*, (1940), 310 U. S. 150, 224, n. 59.

This is not at all surprising. Since a person must be held accountable for the necessary consequences of his conduct, one who attains a monopoly position can hardly be permitted to deny his monopolistic purpose. Where monopoly exists, the intent to monopolize is conclusively presumed,[79] and thus, as a practical matter, is not a factor of any consequence. Where the intent to monopolize, though present, is ineffectual, the tendency is for the courts to find that the intent has been abandoned and to give it no weight. In the borderline cases, where it is difficult in fact to determine whether monopoly control has been attained, the element of intent may become decisive.[80]

In short, whatever may be the theoretical significance of the mental element in the monopoly cases, in point of authority, the element is inconsequential, both where the combination clearly possesses and clearly lacks monopoly control. In such cases, it is the presence or absence of monopoly power in fact which is important. It is only in the borderline cases that the mental element may be legally significant.

Whatever may be its importance in theory and as a matter of authority, the issue of intent is generally tendered by the defendants in monopoly litigation and the Government thus feels obliged to establish the wrongful purposes of the defendants. Though a close analysis of the opinions of the Supreme Court indicates that intent is not an essential element in the offense of monopoly, in the absence of any clear authority declaring intent an inconsequential factor, it would appear to be desirable in any statutory revision to consider whether, as a matter of policy, the Government in antitrust litigation should be required to prove guilty purpose on the part of the defendants.[81]

To adopt a purely subjective test of legality in the complicated field of industrial integration would seem unwise. The proponents of any combination always profess the most exalted motives. Since their hearts and minds cannot be searched by the Court, the Government, in the absence of admissions, must rely upon the objective facts for contradiction. To infer intent from extrinsic circumstances is to add another link to the chain of proof and to open the door to metaphysical distinctions, evasion, and further uncertainty.

The antitrust laws should be concerned not with a state of mind but with economic realities. It is the existence of monopoly, and not the reasons which prompted those responsible for its creation, which calls for corrective action.[82]

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[79] This was expressed by Mr. Justice Lurton in *United States* v. *Reading Company* (1912), 226 U. S. 324, 370:

"Whether a particular act, contract or agreement was a reasonable and normal method in furtherance of trade and commerce may, in doubtful cases, turn upon the intent to be inferred from the extent of the control thereby secured over the commerce affected, as well as by the method which was used. Of course, if the necessary result is materially to restrain trade between the States, the intent with which the thing was done is of no consequence. But when there is only a probability, the intent to produce the consequences may become important. * * *"

[80] See *United States* v. *Reading Company* (1912), 226 U. S. 324, 370.

[81] In suits under sec. 1 charging a restraint of trade, it is settled by authoritative pronouncement of the Supreme Court that wrongful intent need not be established by the Government and that good motives will not condone action in contravention of the statute. See *Standard Sanitary Manufacturing Company* v. *United States* (1912) 226 U. S. 20, 49; *United States* v. *Socony-Vacuum Oil Co.* (1940), 310 U. S. 150, 220, 221, 228; *United States* v. *Trenton Potteries* (1927), 273 U. S. 392, 395.

[82] Recent reports of the Attorney General have forcefully called attention to the debilitating effects of the requirement that wrongful intent or guilty purpose be established and have pointed out that one of the factors contributing to the failure of the Sherman law has been the importation of moral considerations into the construction and enforcement of the statute. Report of Attorney General (1938) p. 3; *id.* (1939) p. 37.

C. INDULGENCE IN PREDATORY PRACTICES

It has been suggested by the Supreme Court [83] that the statute is concerned more with the improper exercise than the mere existence of monopoly power. The emphasis upon the brutal practices of the Oil [84] and Tobacco [85] Trusts, coupled with the importance ascribed to the absence of any overt, repressive acts and abuse of power in the *Steel case*,[86] has led to the popular distinction between "good" and "bad" trusts. Implicit in this distinction is the notion that legality depends in a large measure upon whether the combination has indulged in predatory practices.

The term, predatory practices, requires definition. "Predatory" may mean either brutal, overt acts by which competition is suppressed, or any conduct violative of the antitrust laws or other laws regulating business competition.

Although some of the unlawful trusts were guilty of predatory conduct in the first or narrow sense,[87] several combines have been held unlawful in the absence of any evidence of improper competitive conduct, no matter how broadly the term "predatory" is used. There was no evidence of overt acts, abuse of power, exclusion of competitors, exaction of monopoly profits, discrimination, price-cutting, or artificial restrictions on potential competition in about half the reported cases in which combinations were held unlawful.[88] On the other hand, there was evidence of unfair conduct in some cases in which the combinations were upheld.[89] While not brutal, the behavior of the combines in these cases was no less "predatory" than the practices in some of the instances in which trusts have been condemned. It is thus apparent that proof of the improper exercise of monopoly power is not a prerequisite of illegality.

The matter can be further tested hypothetically. No matter how unlawful and brutal its practices may be, a combination controlling less than 10 percent of an industry would hardly be held to be an unlawful monopoly. On the other hand, a combination controlling an entire industry could not escape dissolution by virtue of the fact that it had eliminated competition by purchase of its competitors rather than through resort to methods suppressive of competition.

As in the case of intent, the element of predatory conduct may be of great importance as a practical matter in borderline cases, but the conclusion is inescapable, from a careful reading of the authorities, that the lawfulness of a merger or consolidation does not depend upon the presence or absence of such conduct. Here also, to condition legality upon this extrinsic factor would be to introduce moral considerations into antitrust enforcement. Monopoly is reprehensible in a political democracy whether or not accompanied by evil purpose or improper conduct. There is no reason why monopoly and predatory behavior should not be both outlawed, whether they occur separately or in combination. Notwithstanding the contrary *dictum* of the

[83] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417; *United States* v. *International Harvester Co.* (1927), 274 U. S. 693.
[84] *Standard Oil Company of New Jersey* v. *United States* (1911), 221 U. S. 1.
[85] *United States* v. *American Tobacco Company* (1911), 221 U. S. 106.
[86] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417.
[87] *Standard Oil Company of New Jersey* v. *United States* (1911), 221 U. S. 1; *United States* v. *American Tobacco Company*, (1911) 221 U. S. 106.
[88] See Handler, Industrial Mergers and the Anti-Trust Laws (1932), 32 Col. L. Rev. 179, 252.
[89] Handler, Industrial Mergers and the Anti-Trust Laws (1932), 32 Col. L. Rev. 179, 251.

Court in the *Harvester case*,[90] quoted above, it is inferable from the authorities as a whole that both are equally inhibited by the statute. The distinction between good and bad trusts belongs to that outmoded era when the antitrust laws were regarded as a moral pronouncement rather than a charter of economic freedom.

D. MONOPOLY POWER TO EXCLUDE COMPETITORS OR TO FIX PRICES

Although combinations have been held unlawful which lacked either the power to exclude competitors or to fix the market price,[91] the cases frequently advert to the power of the defendants to exclude competitors or to fix prices. How the existence of such power is to be determined is not disclosed. It will hardly be denied that he who can exclude his competitors, and, without the cooperation of rival sellers, can determine the market price, enjoys monopoly control; but the determination of the existence of such power is no less difficult than the proof of monopoly itself. What degree of control is necessary to enable one to exclude competitors or establish the market price?

By posing the issue in terms of the power of exclusion and the power to fix the market price, the lines of inquiry are better marked and analysis can be more pointed. But apart from its better restatement, the problem remains unsolved. It is no easier from either a legal or an economic standpoint to determine whether the jurisdiction of a company over price is monopolistic than it is to determine whether the company is a monopoly.

Evidence revealing the exclusion of competitors or the control of prices in fact is strong and convincing proof of the existence of monopoly power. But such power may be present though proof of its improper exercise may be lacking or difficult of establishment in a court of law. As has been pointed out, the existence of monopoly power, regardless of the manner of its exercise, deprives the public of the benefits of free competition, and hence should not be tolerated.

E. EXISTENCE OF ACTUAL COMPETITION IN THE INDUSTRY AFTER THE COMPLETION OF THE MERGER

Monopoly is sometimes defined as the absence of competition, and the contention is frequently advanced in anti-trust suits that the presence of unrestricted competition in the industry negates the existence of any monopoly. This appears to have been the criterion applied in the *Steel*,[92] *Harvester*,[93] and the *Standard Oil-Vacuum cases*.[94]

Here again we are dealing with a factor whose importance is ambiguous under the authorities. It is true that there was no outside competition in the case of some unlawful combinations,[95] and that there was outside competition in some of the combines upheld by the courts.[96] On the other hand, there are several instances of combines

[90] *United States* v. *International Harvester Co.* (1927), 274 U. S. 693, 708.

[91] *Northern Securities Company* v. *United States* (1904), 193 U. S. 197; *United States* v. *Union Pacific Railroad Company* (1912), 226 U. S. 61; *United States* v. *Southern Pacific Company* (1922), 259 U. S. 214; *United States* v. *Reading Company* (1920), 253 U. S. 26; *United States* v. *Lehigh Valley Railroad Co.* (1920), 254 U. S. 255.

[92] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417.

[93] *United States* v. *International Harvester Co.* (1927), 274 U. S. 693.

[94] *United States* v. *Standard Oil Co. of New Jersey* (E. D. Mo. 1931), 47 F. (2d) 288.

[95] *Standard Oil Company of New Jersey* v. *United States* (1911), 221 U. S. 1; *United States* v. *American Tobacco Company*, (1911) 221 U. S. 106; *United States* v. *Terminal Railroad Association of St. Louis*, (1912) 224 U. S. 383.

[96] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417; *United States* v. *International Harvester Co.*, (1927) 274 U. S. 693; *United States* v. *Standard Oil Company of New Jersey, Standard Oil Co. of New York, and the Vacuum Oil Company* (E. D. Mo. 1931), 47 F. (2d) 288.

which, although subject to effective outside competition, were condemned by the courts.[97] And there are also instances of combines which, though not subject to outside competition, were nevertheless upheld by the courts.[98]

This factor is more attractive than any of the other criteria that have been suggested for the determination of the legality of corporate integrations. If there is outside competition, actual as well as potential, monopoly power cannot be exerted, the evils of monopoly are avoided, and the public is adequately protected. The simplicity of the test is delusive and there are serious impediments to its practical application. What constitutes vigorous and effective competition? Under what circumstances can it be said that the independents are able to compete on a parity with the combination? When the independents enter into price-fixing agreements with the combination or follow its price leadership, is their competition free? When the independents are conscious of the power of the combination to crush them at will, are they competing on an equal basis? These are not legal questions. Nor are they questions of fact which an untrained mind can resolve. The details are multitudinous, the facts of perplexing intricacy.

The Supreme Court has not been notably successful in the handling of such issues. The manner in which it evaluated the evidence of competition in the *Steel case* [99] is open to criticism from the viewpoint of the economist. In the *Harvester case*,[1] it rejected the conclusions of the economists of the Federal Trade Commission as being based on *ex parte* statements and hearsay. To use statistical data in court without running afoul of the hearsay rule is a rare feat of prestidigitation.

The present machinery of court litigation is not well adapted to the thoroughgoing economic study which is essential to a proper determination of the existence, strength, and efficacy of outside competition. Perhaps this criterion could be better applied administratively. In any event, it has not been, under the authorities, the decisive element in antitrust litigation.

F. POTENTIAL COMPETITION

Although there are those who feel that the public is adequately safeguarded if potential competition remains free and unfettered at all times, the Sherman law demands that actual as well as potential competition be uncurbed. The complete elimination of competition is unlawful even in a field entirely open to new enterprise and capital. The contrary *dictum* in the *Terminal case* [2] is without support in the other authorities. Many of the mergers condemned by the Supreme Court imposed no restrictions on potential competition. Not only was such competition likely, but the subsequent history of these industries reveals the rise of many new enterprises.[3] The likelihood

[97] *United States* v. *Reading Company* (1920), 253 U. S. 26; *United States* v. *Lehigh Valley Railroad Co.* (1920), 254 U. S. 255; *United States* v. *Union Pacific Company* (1912), 226 U. S. 61; *United States* v. *Southern Pacific Company* (1922), 259 U. S. 214.

[98] *United States* v. *Winslow* (1913), 227 U. S. 202; *United States* v. *United Shoe Machinery Co. of New Jersey*, (1917) 247 U. S. 32.

[99] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417.

[1] *United States* v. *International Harvester Co.* (1927), 274 U. S. 693.

[2] *United States* v. *Terminal Railroad Association of St. Louis* (1912), 224 U. S. 383, 405.

[3] See Handler, Industrial Mergers and the Anti-Trust Laws (1932), 32 Col. L. Rev. 179, 258.

of potential competition thus falls down as a test of legality. A combination may be held unlawful even though new competition is unrestricted. Thus, again we have a factor which, though of undoubted importance, does not explain the divergent court rulings.

Suppose on the other hand, that such restraints have been imposed. Does this taint the combination with illegality? Only those organizations already possessing monopoly control can effectively restrict potential competition. Moreover, wherever the field is thus closed to new enterprise, many of the other factors discussed above are apt to be present. A combination, therefore, that possesses and exercises the power to exclude new competition is probably unlawful, for this and other reasons.

The interesting case is where no restraints are imposed by the combination, but the entry of new capital is extremely unlikely for either economic or physical reasons. This was essentially the situation in the *Terminal case;*[4] in fact the Court believed it was impossible for new competition to arise. The situation in the *Shoe Machinery case*[5] was not very different, but the point was not strongly urged. If existing competition is vigorous, it is doubtful whether the combination will be declared unlawful merely because it is difficult for new companies to enter the field. But where actual competition is ineffective and new competition unlikely or impossible, the combination in all probability, despite the *Shoe Machinery case*,[6] will be forbidden.

G. FORM OF COMBINATION

The decisions cannot be reconciled in terms of the form taken by the combination. Trusts, holding companies, stock acquisitions, and outright purchases of property and other assets have been all held unlawful.[7] It is interesting to observe that the trusts condemned all possessed a very high degree of control of their industries. This was also true of most of the holding companies which were found to violate the statute.[8] The most severe application of the Sherman Act has been in cases involving stock acquisitions.[9] Nevertheless, the *dictum* in the *American Tobacco case* that "the mere form in which the assailed transactions are clothed becomes of no moment" [10] is essentially true of proceedings under the Sherman Act, whatever may be the importance of corporate forms in Clayton Act litigation.

H. OTHER JUSTIFICATIONS

Attempts to justify combinations exceeding the permitted degree of concentration on the ground that prices have been reduced,[11] the quality of the article improved,[12] service bettered,[13] competitors fairly treated,[14] or that the purpose of the combination was to avoid the

[4] *United States* v. *Terminal Railroad Association of St. Louis* (1912), 224 U. S. 383.
[5] *United States* v. *Winslow* (1913), 227 U. S. 202.
[6] *Ibid.*
[7] See Handler, Industrial Mergers and the Anti-Trust Laws (1932), 32 Col. L. Rev. 179, 259 *et seq.*
[8] The exceptions are: *Northern Securities* v. *United States* (1904), 193 U. S. 197; *United States* v. *Reading Company* (1920), 253 U. S. 26; *United States* v. *Lehigh Valley Railroad Co.* (1920), 254 U. S. 255.
[9] *United States* v. *Southern Pacific Company* (1922), 259 U. S. 214; *United States* v. *Union Pacific Railroad Company* (1912), 226 U. S. 61.
[10] *United States* v. *American Tobacco Company* (1911), 221 U. S. 106, 180.
[11] *Northern Securities Company* v. *United States* (1904), 193 U. S. 197.
[12] *State* v. *Standard Oil* (Ohio 1892), 30 N. E. 279, 290.
[13] *United States* v. *Great Lakes Towing Company* (N. D. Ohio 1913), 208 Fed. 733, decree (N. D. Ohio 1914), 217 Fed. 656, appeal dismissed on motion of United States (1917), 245 U. S. 675.
[14] *United States* v. *International Harvester Company* (D. Minn. 1914), 214 Fed. 987, 993, appeal dismissed on motion of appellants (1918), 248 U. S. 587, supplemental bill (1927), 274 U. S. 693.

excesses of the fierce competition that preceded the formation [15] have all been unsuccessful. Despite all the emphasis on intent, the courts have been disinclined to inquire into the motives of the proponents of the combination.

Yet, in some of the cases, the economic effects of the combination have been considered and the efficiencies of the new company stressed.[16] A contrary attitude has also been manifested.[17] Theoretically, the upper limit of a combination should never exceed the point of highest economic efficiency. Such a test is difficult of practical application. The facts are not easily ascertained, the evidence is apt to be conflicting and speculative, and the conclusions uncertain. In any event the courts have not purported, except in rare instances, to apply any such test.

The most frequent justification has been the insolvency of the selling company or the imperative need for financial readjustment.[18] By permitting combinations under such circumstances, the courts may be opening an inviting field for subterfuge.

The existence of other forms of governmental regulation has been considered a justification for monopoly power, notably in the public utility field.[19] Where the combined companies are not in competition with each other, the union has generally been upheld.[20]

12. RULE OF REASON IN MONOPOLY CASES

We have seen that the adoption of the rule of reason had little perceptible effect on the doctrine of restraint of trade applicable to loose-knit confederations. As the Supreme Court passed upon but two capital combinations before the promulgation of the rule of reason, upholding the combine in the *Knight case*,[21] and condemning it in the *Northern Securities case*,[22] it is not fruitful to contrast the decisions before with those after the adoption of the rule.

The standard of reason has permitted the Court to sit as a censor on corporate integrations and undoubtedly has resulted in a more tolerant attitude toward such combines than would have been the case had the rule of reason been rejected. Once it was decided that the statute does not, on the one hand, prohibit every business consolidation, nor permit, on the other, integrations just short of complete domination, the Court, with or without a rule of reason, was compelled to draw the line somewhere in the scale from 1 to 100 percent. The rule of reason has not altered the nature of the problem with which the courts have been confronted and, except for its doubtful psychological value, has not assisted the courts in the formulation of any clear and predictable tests by which the legality of corporate integrations might be measured. Little would thus be accomplished

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15 *State* v. *International Harvester Company of America*, 237 Mo. 369, 383, 384, 391, affirmed (1914), 234 U. S. 199.

16 *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417, 443; cf. *United States* v. *Terminal Railroad Association of St. Louis* (1912), 224 U. S. 383, 410.

17 *Northern Securities Company* v. *United States* (1904), 193 U. S. 197, 327 *et seq.*; *United States* v. *Union Pacific Railroad Company* (1912), 226 U. S. 61, 87 *et seq.*

18 *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417 (with regard to the acquisition of the Tennessee company); *Lumbermen's Trust Co.* v. *Title Insurance Company* (C. C. A. 9th, 1918), 248 Fed. 212; *United States* v. *Quaker Oats Company* (N. D. Ill. 1916), 232 Fed. 499; *Northwestern Consolidated Milling Co.* v. *Callam* (C. C. E. D. Mich. 1910), 177 Fed. 786.

19 *Continental Securities Company* v. *Interborough Rapid Transit Company* (C. C. A. 2d, 1915), 221 Fed. 44; *Doherty & Company* v. *Rice* (C. C., M. D. Ala. 1910), 186 Fed. 204, affirmed (C. C. A. 5th, 1911), 184 Fed. 878.

20 *United States* v. *Winslow* (1912), 227 U. S. 202; *United States* v. *United Shoe Machinery Co. of New Jersey* (1917), 247 U. S. 32.

21 *United States* v. *E. C. Knight Co.* (1895), 156 U. S. 1.

22 *Northern Securities Company* v. *United States* (1904), 193 U. S. 197.

by the repeal, judicial or legislative, of the rule of reason in its application to mergers and consolidations. Other than a possible tightening of the lines, such a repeal of itself would not make the law less confused or more predictable than it now is.

13. DISSOLUTION

We have not undertaken a study of the efficacy of the various dissolution decrees which have been entered in important antitrust litigations. It is common knowledge, however, fortified by the findings of Government agencies [23] and private investigators,[24] that the decrees have rarely succeeded in restoring competition. Although their immediate effects have been negligible, in some instances there has been a recrudescence of competition after a lapse of many years.[25]

Dissolution decrees could undoubtedly be made more effective.[26] A decree of dissolution, if too drastic, may have catastrophic effects upon investors, workers, and consumers and may, in case of our basic industries, unsettle our entire economy. Indeed, one cannot read the opinion in the *Steel case* [27] without obtaining the firm impression that the Court's apprehensions of the adverse economic effects of dissolution were in part responsible for its doubtful construction and application of the law.

Attempts to strengthen the dissolution procedure were made in the legislation of 1914.[28] Little resort has, however, been made to these provisions and their effect has been negligible.

The processes of dissolution can unquestionably be strengthened, but the question arises whether it is not better through new legislation to prevent undue concentration of economic power than to streamline the procedure for unscrambling the eggs after the evil has occurred.

14. RELATION OF MONOPOLY TO RESTRAINT OF TRADE

Although Chief Justice White in the *Standard Oil case* treated restraint of trade as synonymous with monopoly,[29] there are vital distinc-

[23] Federal Trade Commission, Agricultural Implement and Machinery Industry (1938), 20, 164, 1037.

[24] Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size (1940), 40 Col. L. Rev. 615, 623; Cox, Compilation in the American Tobacco Industry (1933) 21.

[25] *Id.* at 618, 622; Handler, Cases and Materials on Trade Regulation (1937) 480.

[26] The decrees could provide that in the process of dissolution the stock of the member companies may not be distributed to the same persons. Some action might also be taken to prevent the situation which obtains where each of the member companies after dissolution operates, in the same territory as it did when part of the unlawful combine, without the competition from any of the other member companies. See Handler, Cases and Materials on Trade Regulation (1937), 479.

[27] *United States* v. *United States Steel Corporation* (1920), 251 U. S. 417.

[28] Sec. 7 of the Federal Trade Commission Act of 1914, 38 Stat. 722, 15 U. S. C. sec. 47 (1934). By virtue of sec. 6 (c) of the same act, 38 Stat. 721, 15 U. S. C. sec. 46 (c) (1934), the Federal Trade Commission is required, on application of the Attorney General, to make an investigation of the manner in which a dissolution decree is being carried out. Sec. 6 (e), 38 Stat. 721, 15 U. S. C. sec. 46 (e) (1934), requires the Federal Trade Commission on application of the Attorney General to make recommendations for altering a business which is thought to be violating the anti-trust laws.

Bibliography: For a thorough treatment of the post-litigation history of the oil industry and the effectiveness of the decree in *Standard Oil Co. of New Jersey* v. *United States* (1911), 221 U. S. 1, see Stocking, The Oil Industry and the Competitive System (1925), chs. V and VI; Burns, The Decline of Competition (1936) 103 *et seq.* For an analysis of the proceedings in the anthracite coal cases see (1932), 41 Yale L. J. 439: As to the effectiveness of the decrees in *United States* v. *E. I. du Pont de Nemours & Co.* (C. C. Del. 1911), 188 Fed. 127, see Stevens, The Powder Trust, 1872–1912 (1912), 26 Quar. J. Econ. 444; *id.*, Dissolution of the Powder Trust (1912), 27 Quar. J. Econ. 202; Laidler, Concentration in American Industry (1936), 306–309; Jones, Trust Problem in the United States (1920) 474–475; Seager and Gulick, Trust and Corporation Problems (1929) 406–408; Haney, Business Organization and Combination (3d ed. 1934) 244–245; in *United States* v. *Eastman Kodak Co.* (W. D. N. Y. 1913), 226 Fed. 62, decree (W. D. N. Y. 1915), 230 Fed. 522, appeal dismissed on motion of the appellant (1921), 255 U. S. 578, 41 Sup. Ct. 321; see Jones, *op. cit.*, 495, 504, 519; and in *United States* v. *Corn Products Refining Co.* (S. D. N. Y. 1916), 234 Fed. 964, appeal withdrawn, defendant consenting to decree see Dewing, Corporate Promotions and Reorganizations (1914) 49–111; Watkins, Industrial Combinations and Public Policy (1927) 201–220; Jones, *op. cit.*, 296, 436–438, 484–485; Laidler, *op. cit.*, 242.

On the topic generally see Handler, Cases and Materials on Trade Regulation (1937) 463 *et seq.*; Hale, Trust Dissolution: "Atomizing" Business Units of Monopolistic Size (1940). 40 Col. L. Rev. 615.

[29] *Standard Oil Company of New Jersey* v. *United States* (1911), 221 U. S. 1, 53.

tions between the two concepts. As is pointed out in the recent *Socony-Vacuum case* [30] every monopoly may constitute a restraint of trade but not every restraint of trade is monopolistic.[31] In practice, the doctrines of restraint of trade have developed in and have been applied to confederations of competitors [32] whereas the monopoly concept has been of principal importance in the field of mergers and consolidations. Where competition is restrained by agreement or understanding between ostensibly independent competitors, the courts have perceived that the public sustains injury notwithstanding that the conspirators may lack monopoly power. Where, however, competing businesses are fused by merger or consolidation, the courts have not regarded the consequent disappearance of competition as serious where the new unit lacked at least a semblance of monopoly power. Hence, for many years a sharp distinction in fact obtained between the doctrines laid down in the loose-knit and merger cases. As we have noted in the section on degree of market control,[33] prior to the *Appalachian Coals case* [34] it was consistently held that the suppression of competition by agreement was unlawful regardless of the market position of the parties to the agreement. The *Appalachian case* [35] not only inaugurated a new rule in respect of loose-knit confederations, now somewhat eclipsed by the recent *Socony-Vacuum* [36] decision, but denied any difference between the application of the statute to mergers and loose-knit combinations. Mr. Chief Justice Hughes stated:

> * * * We agree that there is no ground for holding defendants' plan illegal merely because they have not integrated their properties and have chosen to maintain their independent plants, seeking not to limit but rather to facilitate production. We know of no public policy, and none is suggested by the terms of the Sherman Act, that, in order to comply with the law, those engaged in industry should be driven to unify their properties and businesses, in order to correct abuses which may be corrected by less drastic measures. Public policy might indeed be deemed to point in a different direction. * * * The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize. If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration. * * * [37]

It is arguable that the elimination of competition by purchase should no more be tolerated than its suppression by agreement, and that the same rules should govern both branches of the anti-trust laws. The problem, however, remains whether the coalescence should be effected by the adoption of the more liberal rule applicable to mergers, as was suggested by the Court in the *Appalachian case*,[38] or of the more stringent rule applicable to restraint of trade. The recent *Socony-Vacuum case* [39] appears to reinstate the distinction which the *Appa-*

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[30] *United States* v. *Socony-Vacuum Oil Co.* (1940), 310 U. S. 150.

[31] "The existence or exertion of power to accomplish the desired objective * * * becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of sec. 2 of the act. An intent and a power to produce the result which the law condemns are then necessary. * * * But the crime under sec. 1 is legally distinct from that under sec. 2 * * * though the two sections overlap in the sense that a monopoly under sec. 2 is a species of restraint of trade under sec. 1. * * * Only a confusion between the nature of the offenses under those two sections * * * would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under sec. 1. * * *" Id. 226 n. 59.

[32] See sections dealing with the loose-knit confederations, *supra*, p. XXX *et seq.*

[33] *Supra.*

[34] *Appalachian Coals, Inc.*, v. *United States* (1933), 288 U. S. 344.

[35] *Ibid.*

[36] *United States* v. *Socony-Vacuum Oil Co.* (1940), 310 U. S. 150.

[37] *Appalachian Coals, Inc.*, v. *United States* (1933), 288 U. S. 344, 376.

[38] *Id.* at 377.

[39] *United States* v. *Socony-Vacuum Oil Co.* (1940), 310 U. S. 150.

lachian decision [40] sought to obliterate, but a single standard is still possible, should the courts decide to narrow the area of permissible corporate integration.

15. STOCK ACQUISITIONS AND HOLDING COMPANIES

Congress in the Clayton Act of 1914 [41] sought to discourage the merger process by curbing two of the easiest methods by which companies may be combined. Section 7 of the act forbids stock acquisitions in [42] and holding company control of [43] competing companies engaged in interstate commerce where the acquisition has the effect of (1) substantially lessening competition between such companies, (2) restraining commerce in any section or community, or (3) creating or tending to create a monopoly in any line of commerce.

Although the first of the statutory standards was an innovation in the antitrust field, the second and third were essentially the same as those prescribed by the Sherman Act. Precisely what was intended by the first standard is not easy of determination. Since the acquisition of a controlling interest in two competing corporations for non-investment purposes [44] cannot fail to eliminate competition between them, it is difficult to understand what is meant by the qualifying expression "substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition." The phraseology implies that there may be some acquisitions which may not lessen competition substantially and which are therefore lawful. Yet it is difficult to envisage a case where such purchases would not fail to eliminate competition entirely, notwithstanding that the controlled company might be operated as an ostensible competitor. If Congress merely desired by this language to permit the combination of non-competing companies, its intention could evidently have been more directly expressed. Similarly, if it intended to prohibit all acquisitions of a controlling interest in competitive corporations, a more explicit interdiction would have avoided the frustrating construction of the courts.

The judicial interpretation of section 7 has deprived it of most of its intended effect. The courts have held that for the statute to be applicable the combining companies must have been in substantial competition with each other prior to their union.[45] The cases have also indicated that an acquisition is not to be condemned merely because it diminishes competition between the two companies involved in the transaction; it must also be shown that competition in the industry at large has been substantially affected.[46] In other words, there is a tendency to erase the first of the statutory standards of legality, or stated differently, to amalgamate it with the familiar standards of the Sherman law.

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[40] *Appalachian Coals, Inc.*, v. *United States* (1933), 288 U. S. 344.
[41] 38 Stat. 730 (1914), 15 U. S. C. sec. 12.
[42] 38 Stat. 731 (1914), 15 U. S. C. sec. 18.
[43] 38 Stat. 732 (1914), 15 U. S. C. sec. 18.
[44] There is a specific exemption from the condemnation of the act where corporations purchase stock for investment purposes only, and the stock is not used to bring about the substantial lessening of competition. 38 Stat. 732 (1914), 15 U. S. C. sec. 18.
[45] *International Shoe Company* v. *Federal Trade Commission* (1930), 280 U. S. 291; *Temple Anthracite Coal Company* v. *Federal Trade Commission* (C. C. A. 3d, 1931), 51 F. (2d) 656; *V. Vivaudou, Inc.*, v. *Federal Trade Commission* (C. C. A. 2d, 1931), 54 F. (2d) 273.
[46] *Temple Anthracite Coal Company* v. *Federal Trade Commission* (C. C. A. 3d, 1931), 51 F. (2d) 656; *V. Vivaudou, Inc.*, v. *Federal Trade Commission* (C. C. A. 2d, 1931), 54 F. (2d) 273.

The Federal Trade Commission is authorized by section 11 to issue orders compelling persons subject to the act to cease and desist from such violations and to divest themselves of stock acquired in contravention of the statute.[47]

Under this section as interpreted by the courts the Commission may order the divestiture of stock only if the wrongfully acquired stock is held by the respondent at the time its order is promulgated. The Commission is ousted of jurisdiction if the respondent exchanges the stock for the assets of the acquired company either before [48] or after [49] the issuance of the Commission's complaint but before the issuance of the cease and desist order.[48a] Thus, by using the wrongfully acquired securities to consummate the corporate integration which was initiated by a stock acquisition or holding company, the respondent can defeat the Commission's jurisdiction and the transaction can only be assailed in a plenary action in the courts.[50]

The Federal Trade Commission has repeatedly advocated amendment of section 7 and has described at length the adverse conditions under which it operates in the enforcement of this section.[51] It offered considerable testimony to this committee concerning the difficulties confronted in the administration of this section and it has presented at length its suggestions for legislative change.[52]

The need for legislative amendment of section 7 is apparent. It is clear that the present limitations on the Commission's power of enforcement should be removed. The Commission's jurisdiction should not end with the surrender of the wrongfully acquired stock for the physical assets and property of the acquired company. It should be given the power to proceed against persons who have violated the statute even though they no longer retain the illegally acquired stock. Moreover, since section 7 subjects the acquisition of stock and holding company control to the administrative regulation of the Federal Trade Commission, it is difficult to perceive why the

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[47] 38 Stat. 734 (1914), 15 U. S. C. sec. 21. Authority to enforce compliance with the act is vested in the "Interstate Commerce Commission, where applicable to common carriers * * * in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication * * *, in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce, * * *."

[48] *Federal Trade Commission* v. *Thatcher Manufacturing Company* (C. C. A. 3d, 1925), 5 F. (2d) 615, *modified* (1926), 272 U. S. 554; *Swift & Company* v. *Federal Trade Commission* (1926), 272 U. S. 554.

[48a] *Federal Trade Commission* v. *Thatcher Manufacturing Company*, (C. C. A. 3d, 1925), 5 F. (2d) 615, Modified (1926) 272 U. S. 554.

[49] *Arrow-Hart & Hegeman Electric Co.* v. *Federal Trade Commission*, (1934), 291 U. S. 587.

[50] Authority to enforce section 7 is vested in the Department of Justice as well as the Federal Trade Commission. 38 Stat. 736 (1914), 15 U. S. C. sec. 25. Persons aggrieved by a violation of this as well as other sections of the Clayton Act may under section 16 bring a private suit for injunction. 38 Stat. 737 (1914), 15 U. S. C. sec. 26. There appears to be no reported case in which the power of the Department of Justice to assail an acquisition of assets brought about by the use of illegally acquired stock has been considered. It is impossible to state with any assurance whether a similar limitation is applicable in a court proceeding brought by the Department of Justice.

[51] Hearings before the Temporary National Economic Committee (1939), vol. III, pp. 38 ff.; vol. II, pp. 262 *ff*. F. T. C. Annual Report (1940) 13. In its Annual Report for 1940 the Federal Trade Commission renews its recommendations set forth in its previous reports. F. T. C., Annual Report (1940) 12. The Annual Report for 1939 reveals that the changes sought by the Commission are (1) that sec. 11 of the Clayton Act be amended in order that the Commission will have authority to require a corporation to divest itself of assets illegally acquired; (2) that sec. 7 be amended in order to make it unlawful for any corporation, directly or indirectly, through a holding company, subsidiary, or otherwise, to acquire any of the capital stock or assets of a competing corporation when either of said corporations is engaged in interstate commerce, or for a holding corporation to acquire any of the capital stock or assets of a single corporation, engaged in interstate commerce, or for a holding corporation to acquire any of the capital stock or assets of a single corparation, engaged in interstate commerce in competition with a subsidiary of the holding corporation when the effect of such acquisition of stock or assets may be substantially to lessen competition between the two corporations or, where, from the relative size of the corporation resulting from the merger and the surrounding conditions, the effect of such acquisition may be to restrain competition or tend to create a monopoly in any line of commerce. F. T. C., Annual Report (1939) 14 *et seq*. The Commission regards as undesirable, however, the enactment of an inflexible limit on the permissible percentage of control which a corporation can acquire in any one industry. *Id*. at 16.

[52] Id. vol. IV, p. 643 ff.

acquisition of assets in competing companies should not similarly be placed under the Commission's supervision.

Such changes, however, do not go to the root of the difficulty. If it be desired to outlaw the use of the holding company and the acquisition of stock as a means of uniting competing companies, an unequivocal prohibition is essential. Furthermore, it will serve no useful purpose to widen the Commission's authority over property acquisitions if the substantive law governing their legality remains untouched.

For 50 years we have sought to curb undue concentration of economic power by attacking capital combinations after, rather than before, their formation. This has given rise to the vexing problem of "unscrambling the eggs," and has created a psychological barrier to the vigorous enforcement and the sound interpretation of the law.

We believe that no combination of competing companies should be permitted without the advance approval of an administrative agency, such as the Federal Trade Commission, operating under a new legislative standard. In a field such as this, it is impossible to formulate a standard which will be free of all uncertainty, unless some inflexible limitation on the size of corporate enterprise or the degree of permitted concentration in any industry is imposed. Limitations on corporate size, however, confuse bigness with monopoly. The adoption of any mathematical standard in respect of the permissible degree of control of any industry would strait-jacket our economy and would achieve certainty only at the expense of that flexibility without which the legal control of economic life cannot succeed. More general and less precise standards are to be preferred.

We accordingly recommend the enactment of legislation—

(1) Prohibiting the acquisition of stock in and holding-company control of competing companies, in the case of corporations of a net worth of $1,000,000 or more, with suitable exceptions for bona fide investments and the control of true subsidiaries by parent corporations;

(2) Subjecting the acquisition of the assets and property of competing companies to administrative supervision in the case of corporations with a net worth of $5,000,000, or more, no such acquisition to be permitted without the advance approval of the Commission. The approval of a merger, consolidation, or property acquisition should only be granted if the Commission finds after investigation and hearing—

(*a*) That the acquisition is in the public interest and will be promotive of greater efficiency and economy of production, distribution, and management;

(*b*) That it will not substantially lessen competition, restrain trade, or tend to create a monopoly in the trade, industry, or line of commerce in which such corporations are engaged;

(*c*) That the corporations involved in such acquisition do not include one or more of the 10 leading companies in the trade, industry, or line of commerce in which they are engaged as determined by plant capacity, output, or volume of sales of the goods or services as to which such corporations compete;

(*d*) That the size of the acquiring company after the acquisition will not be incompatible with the existence and maintenance of vigorous and effective competition in the trade, industry, or line of commerce in which it is engaged;

(*e*) That the acquisition will not so reduce the number of competing companies in the trade, industry, or line of commerce as materially to lessen the effectiveness and vigor of competition in such trade, industry, or line of commerce;

(*f*) That the size, strength, and position of the acquiring company after the acquisition will not be such as to enable it, by reason of its own administrative action, apart from the forces of competition, to fix and maintain the prices of the goods or services which it sells;

(*g*) That the acquiring company has not, to induce the acquisition, indulged in any unfair or deceptive methods of competition or has not otherwise violated the provisions of the Federal Trade Commission Act, as amended.

No merger should be approved which does not satisfy all of the standards. We have been content here to express merely the principles of this method of regulation; the standards themselves must be carefully drafted so as to be administrable and workable. The Commission should have the power in exceptional cases, notwithstanding noncompliance with the above-enumerated standards, to approve a proposed corporate acquisition where the public interest so requires as in the case of bankruptcy or threatened insolvency or where the combining companies are engaged in an industry dominated by a larger company and the integration is designed to remove or reduce the disparity of power between the combining and the dominant corporation.

To facilitate the administration of the new law, a statutory presumption should be adopted making any acquisition or fusion presumptively unlawful when the acquiring company after the acquisition will control more than 15 percent of either capacity, output or volume of sales in the trade, industry, or line of commerce in which such company is engaged. This presumption should be subject to rebuttal by competent proof showing satisfaction of the statutory standards.

Full judicial review should be permitted in cases where administrative approval of a contemplated acquisition is withheld.

These tentative proposals would (1) outlaw the stock acquisition and holding company as methods of combining competing corporations without disturbing the legitimate use of the holding company device in the relations between parent and subsidiary companies, (2) strengthen the administrative authority of the agencies entrusted with the administration of the new law thus avoiding the vexatious limitations upon the powers of enforcement of the Federal Trade Commission, (3) would clarify to a degree the substantive standards governing the legality of the combinations of competitors, (4) would employ the administrative rather than the judiciary in the initial application of standards which are as much economic as legal, and (5) would substitute prevention for punishment by requiring approval in advance of any integration rather than compulsory dissolution after the evils of concentration have been suffered by the public.

ANTITRUST ENFORCEMENT

As part of our examination of the antitrust laws and their enforcement we studied the procedural and administrative aspects of these laws as well as their substantive content. These phases of the antitrust laws were simultaneously surveyed by Professor Walton Hamilton and Miss Irene Till. As their report, entitled "Anti-Trust Laws in Action," has been already filed with this Committee, so, we shall, to avoid repetition, merely confine our consideration of this topic to a statement of our conclusions, without setting forth the factual data upon which they are based.

We find that the basic weaknesses in antitrust enforcement derive from (a) the inadequacy of appropriations and personnel; (b) the complexity of antitrust litigation and the inadequacies of procedure; and (c) the inadequacy of existing penalties and remedies.

A. THE INADEQUACY OF APPROPRIATIONS AND PERSONNEL

No matter how perfect the substantive law may be and how efficient and streamlined the machinery for enforcement, effective enforcement is impossible without adequate funds and personnel. On the other hand, adequate personnel, well supplied with funds, can achieve marked success in the enforcement of any statute, notwithstanding serious procedural and substantive defects. The point, therefore, cannot be reiterated too emphatically that improvement of the enforcement of our antitrust laws is dependent primarily upon larger appropriations and a larger and better-rounded enforcement staff. There has been a considerable expansion of the Antitrust Division during recent years. Neither appropriations nor personnel are as yet adequate for the enormous tasks of antitrust enforcement. The objectives of our antitrust policy can only be achieved through continuous, systematic and efficient enforcement of the laws. To tolerate wrongdoing by reason of a paucity of money and manpower is to sanction the discriminatory and uneven administration of the law.

B. COMPLEXITY OF ANTITRUST LITIGATION AND THE INADEQUACIES OF PROCEDURE

Antitrust suits are of enormous complexity and the procedures suitable for ordinary litigation have frequently proved inadequate.

1. To ascertain whether a breach of the law has occurred the Government has customarily relied for the most part on the complaints of those adversely affected by the violation. However satisfactory such a procedure may be in other fields, the restriction of investigation to such complaints as are received may have the effect of granting a temporary immunity to industries in which restrictive practices have become the established order and are thus not the subject of objection. An industry, skilled in the ways of evasion and violation, may thus for long periods of time violate the law with impunity. A suitable machinery for the detection of violations must be created if the statute is to be enforced not merely against the flagrant violation which gives rise to complaint, but the secret transgression which may insidiously

impair our competitive institutions. A valuable start in this direction has been made by the recently adopted project method of enforcement, as in the drive against the restrictive practices in the building industries. A systematic attack upon the practices of an entire industry or concentration upon certain well-defined practices infesting all of industry is more fruitful than the hit-and-miss prosecution of the sporadic and unrelated complaints of miscellaneous practices in various industries. Adequate machinery of detection is essential to any well-rounded and coherent program of enforcement.

2. The processes of investigation are unduly cumbersome. Access to the books and records of corporations under investigation can be had only with the consent of such companies or by convening a grand jury. To summon a grand jury in the initial stages of an investigation may be tactically unwise and may involve elements of unfairness to the persons under investigation. The grand jury is a ponderous and costly institution, which is ill-suited for the usual preliminary ascertainment of possible wrongdoing. More efficient machinery can undoubtedly be constructed for preliminary investigation, reserving the grand jury for the difficult and important inquiries for which its historic processes are better adapted.

3. Under the decisions of the Supreme Court, each case is virtually a law unto itself and the unreasonableness of a restraint or practice must be shown in terms of the facts and conditions of the industry in which they occur. There must be proof that the conduct under question in tendency or effect is restrictive of competition and that the restraint in terms of the facts of the particular industry is unreasonable. The items of proof which the Court regards material are indicated in the following passage from the opinion of Mr. Justice Brandeis in *Board of Trade of the City of Chicago* v. *United States*: [53]

> * * * But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. * * *

The collection of all this background information is attended with much difficulty and is very costly of time, manpower, and money. The burden of assembling such material is very considerable and the preparation of an antitrust case for trial presents problems which are virtually *sui generis*.

4. The ordinary processes of litigation are ill-adapted to the trial and determination of economic questions. In addition to the fact that there exist technical rules which complicate and make expensive the proof of facts which are indisputable, it is no easy feat to conform the difficult economic inquiries involved in antitrust litigation to the rules of evidence and procedure which the common law developed for the trial of simple issues of law and fact. In the *International Har-*

[53] (1918), 246 U. S. 231, 238.

vester case, [54] for example, the Government offered in evidence and relied upon a study of the Federal Trade Commission dealing with the competitive conditions in the agricultural machinery industry. The Supreme Court reproached the Government for its reliance upon the report of the Federal Trade Commission in the following terms:

> * * * the Government relies in large measure upon various statements and tabulations contained in the report of the Federal Trade Commission, which was introduced in evidence over the objection of the International Co. But it is entirely plain that to treat the statements in this report—based upon an *ex parte* investigation and formulated in the manner hereinabove set forth—as constituting in themselves substantive evidence upon the questions of fact here involved, violates the fundamental rules of evidence entitling the parties to a trial of issues of fact, not upon hearsay, but upon the testimony of persons having first hand knowledge of the facts, who are produced as witnesses and are subject to the test of cross-examination. * * * [55]

5. The cost of antitrust litigation to the Government and the defendants is notoriously large. With the cost of cases to the Government ranging from $100,000 to $150,000, the number of suits that may be instituted in any one year is necessarily limited and would continue to be limited even were Congress to double, treble, or quadruple current appropriations.

6. To redress a violation of the antitrust laws frequently requires considerable changes in the organization and structure of an industry or of the businesses involved in the violation. In capital combinations, the constituent units of a combine have usually been completely merged and their identities lost. In trade association cases, the practices assailed have become part of the fabric of the industry and any modification is fraught with serious economic consequence. Enforcement involves, therefore, not merely punishment for past derelictions and restraints upon future violations but a reorganization of a business or industry to bring about a condition in harmony with the law. Too much emphasis is placed upon punishment and too little upon prevention.

C. RECOMMENDATIONS

These difficulties can only be overcome by a simplification of the processes of antitrust enforcement, by the discouragement of violation through effective implementation of the statute, and by the development of new procedures which will achieve the objectives of the antitrust laws through their own automatic operation rather than through cumbersome regulation, or widespread prosecution, or litigation.

We accordingly recommend the following changes in antitrust law and procedure:

I. *Registration of trade groups.*—A trade association is a public institution. It may be a powerful agency for good or for evil. Unlike a private business concern which may have a definite interest in keeping secret its production methods and marketing strategy, a trade association when acting in the public interest should have nothing to hide or keep secret. Its operation should be completely in the open. Perhaps Adam Smith exaggerates when he says:

> * * * people of the same trade seldom meet together even for merriment and diversion but the conversation ends in a conspiracy against the public or in some contrivance to raise prices,[56]

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[54] (1927), 274 U. S. 693.
[55] *Id.* at 703.
[56] Smith, Wealth of Nations (Ed. Cannan) I, 130.

but there is always a danger when people of the same trade get together that competition may be compromised. This danger can be obviated in part at least if associations function openly. We propose the enactment of legislation requiring every trade association to register with an agency of government and to file a registration statement in such form as the agency may by rules and regulations prescribe as necessary or appropriate in the public interest, containing information concerning the nature of the association; the trade, industry, or line of commerce in which its members are engaged; the date and place of its formation; its purposes and objectives; the nature and scope of the activities in which it has engaged or proposes to engage; and a list of its officers and members. With the registration statement there should also be filed a copy of the charter, articles of incorporation, by-laws, agreement of association, code of ethics, and all other papers and documents concerning the establishment and organization of such association. Every association in addition should be required to file with the agency, in such form and at such times as the agency may by rules and regulations require as necessary or appropriate in the public interest, but not more often than twice a year, a report of all of its activities covered by such report. These reports should be accompanied by an affidavit duly sworn to and acknowledged by all the officers, and if there be no such officers, by all the members of the association, to the effect (*a*) that such reports constitute a complete record of all the activities of the association, (*b*) that there has been no discussion at any meeting of the association of price or production policies of its members or of persons engaged in the same trade, industry, or line of commerce, and (*c*) that no agreement or understanding concerning prices, production, or the elimination of competition has been made by the members of such association during the period covered by the report.

Trade associations should also be required to keep a complete stenographic record of their proceedings at all regular and special meetings. The stenographic reports should be kept at some accessible place together with an affidavit duly sworn to by the stenographer and the officers of the association, to the effect that such stenographic record and the transcript thereof include all business transacted and all matters discussed at the meetings of the association. The files of the association should be maintained at the office of a designated officer or other convenient place and should contain all correspondence between the association and its members, transcripts and stenographic records of all meetings and all pertinent papers, documents, and other material relating to the association and its activities. These files should be available at all reasonable hours to the agents of the Government for the purpose of inspection and the making of copies. The contents of the files should be preserved for such periods of time as may be prescribed by rules and regulations of the Government agency and should not be destroyed without the consent of such agency in accordance with such rules and regulations as it may prescribe. Heavy penalties should be imposed upon associations, their members and officers, for the neglect and failure to register; the neglect and failure to file a registration statement; the neglect and failure to file a report of its activities; for willful misstatements; for false or incomplete entries in any report, record, or affidavit; for the neglect or failure to make or cause to be made complete, true, and correct entries in all reports, records, and affidavits required to be filed or preserved; for the willful removal, destruction, mutilation, or alteration of any report or record; and finally, for the refusal to permit the agents of the Government to inspect and make copies of the contents of the trade association files.

This proposal is not designed or expected to be a cure-all. Its desirable effects, however, may be briefly summarized:

1. The proof of background facts in antitrust litigation would be facilitated by the use of the registration statements and the filed reports. Access to such statements and reports would to some extent reduce the expense and obviate the present difficulty of collecting background data.

2. By requiring the maintenance of complete files by associations at some convenient place and making the files accessible to the Government, preliminary investigations would be greatly expedited.

3. The requirement for open business covenants openly arrived at would undoubtedly drive collusive restraints underground. This is not an unmixed evil. The ordinary businessman is a law-abiding person and is not disposed to participate in a willful infraction of the law. It is not improbable that some businessmen have been induced to embark on questionable associational programs under a misapprehension of their legality or on the assumption that the Government, engaged in a few major litigations, would be too preoccupied to challenge the program. If an association engages in unlawful conduct and files a complete report of its activities, detection no longer is a problem, and proof of violation is a simple task. If the association secretly engages in unlawful activities and fails to make a full report, it cannot keep this fact from its members. It is our belief that a very high percentage of American businessmen will have nothing to do with a hush-hush policy of secret violation. We regard as a definite likelihood the withdrawal of responsible and respectable men of business from associations that fail to fulfill the requirements of law with regard to the accuracy and completeness of their reports. By driving the illicit associations beyond the pale of respectability, we deprive them of the support of the respectable members of the business community. We therefore force them either to remain within the bounds of law or to become outlaw organizations. Juries would be much less loath to convict organizations operating underground in violation of law than they are today to return a verdict of guilty against an association which openly has engaged in activities of dubious legality under the antitrust laws.

4. This proposal simplifies the litigable issues of fact and law. Under present procedure, when the Government has reason to believe that persons engaged in the same industry or trade have engaged in concerted acts affecting competition, it must prove both the commission of the alleged acts as well as that such acts constitute in law and fact an unreasonable restraint of trade. Under the proposal, where the reports and files fully disclose the arrangements made, no time need be wasted on proving what the association actually has done, the only litigable issue being the legality of such conduct. If, however, the record is incomplete,

the Government need merely show the incompleteness, thus proving a violation of the proposed amendment, without embarking on the complicated task of proving that the defendants have engaged in an unlawful restraint of trade.

5. As the periodic reports will disclose the initiation of any concerted activity, the Government can take action promptly before the activity has become the established practice of the industry, thus avoiding the difficulties of disrupting industry by compelling the abandonment of usages that have become firmly entrenched.

6. As the issue in trade association cases becomes simplified, the cost of litigation should be materially reduced. It obviously is much less expensive to prove a failure to file a report or the filing of an incomplete report than it is to prove an unreasonable restraint of trade.

The proposal, however, is not without its difficulties. The definition of the trade association which is adopted will naturally determine the scope of the proposal. If limited to formal associations, the new legislation might result in the transformation of formally organized associations into informal groups. We, therefore, recommend that the concept of the trade association be broadened to include any group, whether or not incorporated or otherwise formally organized, of three or more persons engaged in the same trade, industry, or line of commerce, which is concerned with or engages in concerted activities affecting the conduct and operation of business in such trade, industry, or line of commerce. In other words, we believe that any arrangement among persons engaged in the same business is affected with a public interest and should be disclosed to the public. It will also be necessary to provide for access to all communications between competitors, in the cases where there is no organization, formal or informal.

The requirement of periodic reports does not appear to impose an undue burden upon trade groups. Engaging in concerted action is a privilege which government can extend or withhold from business. The preparation of the registration statement would not be unduly difficult. The information which the Government might demand is information which the association must assemble, if it is to function properly. Requiring all communications to and from the association and its members, as well as all communications among the members, to be reduced to writing and preserved for reasonable periods of time is frankly a burdensome requirement, but one which can be fulfilled without serious effort or cost. Undoubtedly, associations and their advisers might be perplexed by the practical problems of inclusion and exclusion. Transcripts and records would become very bulky if they included everything said and done no matter how inconsequential. The problem could undoubtedly be solved by the promulgation of rules and regulations by the administrative agency, but in order that there should be no evasion of the purposes of the legislation it would be essential that the requirement of completeness be rigorously applied.

II. *Declaratory rulings and legality of capital combinations.*—One of the principal difficulties in the application of the statute to capital combinations derives from the fact that litigation is carried on after rather than before the event. This is only essential if the legality of a capital combination is made dependent upon the manner in which it wields the power it possesses rather than upon the mere existence of power. Since it is possible to adopt a clearer criterion of the legality of capital combinations, it would seem desirable for the validity of such combinations to be determined in advance rather than after their formation. It requires no expatiation to make the point that such procedure for advance approval would solve the present difficulties of detection, collection of background data, inadequate machinery for preliminary investigation, "unscrambling the eggs," and cost of litigation. We have accordingly recommended in a previous section [57] the adoption of new standards and new procedure for the advance approval and determination of the legality of corporate integrations.

III. *Open comprehensive and complete files on major industries.*—It is improbable that any substantial progress will be made in the enforcement of the anti-trust laws and the regulation of industry until we maintain open, comprehensive, and complete files of all our major industries. One of the primary tasks of the Bureau of Industrial Economics advocated by President Roosevelt should be the maintenance of such files. An extraordinary amount of information concerning industry is contained in the records of numerous Government agencies. The task at hand is essentially one of coordination. These files could be kept up to date by a vigorous enforcement as well as slight broadening of section 6 of the Federal Trade Commission Act, which requires corporations engaged in commerce to make regular and periodic reports to the Commission with regard to various aspects of their business activity.

The device of Federal licensing affords a useful method for collecting information regarding modern business, which it should be the duty of the Government to assemble, analyze, and coordinate. The existence of such files would materially lighten the burden of anti-trust litigation, as there would be available to the Government a good deal of the background data which today is collected only with much labor. Knowledge is essential to fair enforcement and wise regulation.

IV. *Specification of offenses.*—President Wilson in his message in 1914 recommended an item-by-item definition of the offenses prohibited by the anti-trust laws. Apart from the specific prohibition of a few practices in the Clayton Act, this recommendation was not adopted by Congress. Codification is generally opposed on two grounds. It is opposed for its alleged straight-jacketing effect. In explaining why Congress in 1914 had adopted in the Federal Trade Commission Act the general standard of unfair methods of competition rather than a specific prohibition of enumerated offenses, Mr. Justice Brandeis gave eloquent expression to this view:

> Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, might involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed. * * * [58]

[57] See *supra*, p. 88.
[58] *Federal Trade Commission* v. *Gratz* (1920), 253 U. S. 421, 436.

It is frequently assumed that there is an irreconcilable conflict between the general and the specific. If choice had to be made between the specific and the general, the general prohibition is clearly to be preferred because of its flexibility, adaptability, and capacity for discriminating application as well as growth. But there is no such irreconcilable conflict. There is no reason why both the general and the specific cannot be employed in the same legislation. The existing general standards of the Sherman Act can be supplemented by specific prohibitions of offenses which experience has taught are fraught with danger to our competitive institutions. The danger that the courts might, under the doctrine of *ejusdem generis*, construe the general in terms of the specific and thus narrow the scope of the statute can be obviated by clear, unequivocal statutory language indicating the legislative purpose of supplementing rather than curtailing the general provisions of the present law.

The other objection to codification is that clarification can best be achieved through litigation of specific cases rather than through any generalized formulation of experience in the form of legislative enactment. If 50 years of litigation under this statute have failed to bring clarity of meaning and scope to its provisions, what reason have we to believe that additional years of litigation will be more successful in this regard? The Government publication, The Federal Anti-Trust Laws, lists 428 cases instituted under the statute from 1890 to January 1938. Since that time, many additional cases have been started. The Government Printing Office has published a compilation of Federal antitrust decisions consisting of 12 volumes. This compilation covers only the years from 1890 to 1931. About 2 or 3 additional volumes would probably be required for the publication of the opinions rendered since 1931. Is it at all likely that further litigation will achieve the clarity that has been denied us by 15 thick volumes of court opinions?

The time has come, it is believed, for Congress to take a hand in the clarification of the antitrust laws and to pass upon the difficult questions of policy involved in the choice of conflicting doctrine. Legislative codification and clarification would go a long way in reducing the necessity and volume of litigation and would facilitate enforcement by the simplification of the issues to be litigated.

V. *Implementation of the statute.*—The ineffectiveness of the existing sanctions of our antitrust laws is notorious.

The need for increased penalties is widely recognized. It is important, however, that the new sanctions be not over-severe since excessive penalties tend to be self-defeating. A penalty can be sufficiently stringent to serve as a deterrent without being so severe as to engender a natural reluctance on the part of juries to convict or to arouse that antagonism on the part of the courts which leads to an unsympathetic construction of the substantive provisions of the law.

We believe it desirable to retain the criminal sanction as this serves as the principal deterrent to wrongdoing. We favor the retention of the equitable remedies of injunction and dissolution. These traditional remedies should be supplemented by the imposition of moderately severe civil penalties for wrongdoing.

The consent decree is a useful device for settling litigation and for bringing about a condition in harmony with the law.[59] We doubt the wisdom, however, of utilizing this device as an instrument for the affirmative regulation of industry, for the reason that there are available better and more satisfactory and more efficient instruments for the administrative control of business. Although it frequently may be necessary for the Government to initiate simultaneously criminal prosecution to punish past derelictions and civil proceedings to restrain existing transgressions, we question whether the negotiation of a consent decree looking toward affirmative restrictions in addition to those imposed by the antitrust laws should be undertaken during the pendency of a grand jury investigation. A threat of criminal punishment is not conducive to free negotiation. However well such procedures may have operated in the past, there is always a danger that the grand jury proceedings may be used to compel the acceptance of terms which otherwise might be resisted. The fact that such powers may not have been abused in the past is no guarantee that they may not be oppressively wielded in the future. The consent decree is an efficient device for the settlement of civil litigation. Criminal prosecutions can be terminated without tr al by the filing of a plea of guilty or a plea of *nolo contendere*. If the violation is deserving of the institution of a criminal prosecution or the convening of a grand jury—steps which will themselves constitute a serious punishment to those accused of wrongdoing—no discontinuance of a prosecution should be permitted without the entry of either of the aforementioned pleas. The time to negotiate a consent decree is before the initiation of criminal proceedings, or after their successful termination. The civil and criminal suits should be handled separately, and negotiations for a consent decree must be conducted without any threat of criminal prosecution if the negotiations are unsuccessful. The use of the consent decree should be limited to the type of violation which is typically litigated on the civil side of the court; violations which are typically enforced by criminal prosecution should be settled by the normal method of a plea by the defendant.

Such restrictions on the use of the consent decree might have proved a serious handicap to enforcement officials when the grand jury was the only efficient instrument for the preliminary investigation of probable violations, especially when those suspected of wrongdoing refused the Government access to their books and papers. Were the recommended changes of law and procedure adopted, the handicaps under which the Government now operates would be removed, and the suggestions concerning limitations on the use of the consent decree would consequently not impair the fair and effective enforcement of the law.

It is vital that the profit be taken out of antitrust violations. Were this possible, the principal incentive for wrongdoing would be removed. We suggest, therefore, that consideration be given to the adoption of the ancillary remedy of accounting in all equitable proceedings instituted by the Government. In such accountings the defendants would be required to turn over all profits traceable to and derived from their unlawful acts. The rules governing such accountings would be similar to those obtaining in trade-mark and patent

[59] For a discussion of the use of the consent decree see Isenberg and Rubin, *Antitrust Enforcement through Consent Decrees* (1940) 53 Harv. L. Rev. 386; Katz, *Consent Decree in Antitrust Administration, id.* at 415.

litigation. To facilitate the trial, a rebuttable presumption might be invoked to the effect that all profits during the period of violation in excess of the profits earned during a base period were the product of the violation, the burden being shifted to the accounting party to show that such profits might be attributable to other causes.

VI. *Distressed industries.*—Excessive competition creates problems no less serious than those resulting from an absence of competition. Special treatment of the distressed industries may be necessary if they are to function satisfactorily. The nature and extent of the administrative regulation which may be necessary will vary industry by industry and depend upon the causes of distress and economic dislocation. Any program of legislative revision should make provision for the special treatment of our sick industries.

VII. *Existing concentration in industry.*—The tightening of the law relating to capital combinations affects future corporate integrations but leaves untouched existing concentrations of economic power. We observed in our review of the judicial construction of section 1 of the Sherman Act the almost insuperable difficulty of enforcing the law in the concentrated industries in which competition is suppressed by convention rather than by agreement or by resort to secret devices which are virtually incapable of detection. Equally perplexing is the application of the monopoly provisions of the statute to those industries in which competition has either disappeared or remains weak, inert, or attenuated. What is to be done with our concentrated industries?

A program of vigorous antitrust enforcement may bring to light the secret arrangements and practices by which competition is compromised and might release the potential forces of competition which have been long confined within the bounds of industrial convention and usage. Such a program would entail tremendous difficulties of detection and prosecution. It could succeed only to the extent that the absence or impairment of competition was the result of some arrangement prohibited by the antitrust laws. To the extent that the noncompetitive behavior of industry resulted from the fewness of competing units or the gargantuan size or power of the market leader or the established usages of the industry, the enforcement of section 1 of the Sherman law, no matter how vigorous, would not restore competition.

Competition in such industries can be restored only through a far-reaching reorganization of their structure. The extent to which the pulverization of industry is required for the reestablishment of competitive conditions is not fully appreciated. The atomization of industry would cause serious economic dislocation and would seriously impede the current defense program. The segregation of our large enterprises into two or three component parts has little beneficial short-term competitive effects. The slight increase of competition which might result would hardly compensate for the unsettling effects of such dissolutions. This, however, is not to deny the advantageous long-term effects of any carefully conceived and well-executed program of corporate reorganization.

We have considered various proposals for invigorating and resuscitating competition in our concentrated industries. We find that most of such suggestions are lacking in practical appeal or are politically inexpedient. Although one is naturally reluctant to suggest further governmental regulation of industry, we see no escape from the conclusion that some administrative control of our concentrated industries is essential, so long as, and only as long as, such industries by their organization and operation deny the public the benefits of free competition. It is only in the case of industries in which competition does not function properly or has disappeared and cannot be restored without undue disturbance of its economic organization that such administrative regulation is indicated. The aim of such control would be the attainment, through regulation, of the benefits normally flowing from a competitive regime, notably the constant lowering of prices with a corresponding increase of production. Only in this way can the standards of living be raised and real income enlarged.

CONCLUSION

Our study of the antitrust laws and their administration have satisfied us that the objectives of these laws are socially desirable, are economically sound, and are capable of practical attainment. With increases of appropriation and personnel, with moderate changes in the substantive law, and with some modifications of our administrative procedure, these ends could be easily attained. The gains of intelligent, far-sighted, and vigorous enforcement of our antitrust laws greatly outweigh the costs of these recommended changes.

APPENDIX

SHERMAN ACT[1]

(U. S. C., Title 15, Sec. 1)

AN ACT To protect trade and commerce against unlawful restraints and monopolies

SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the act entitled "An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commecre between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts[2] of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be

[1] Published as amended by Miller-Tydings Act (Public, No. 314, 75th Cong., H. R. 7472, approved August 17, 1937). See p. 176.

[2] Act of March 3, 1911, ch. 231, 36 Stat. 1167, abolishes the courts referred to, and confers their powers upon the district courts.

enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case, and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one State to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved July 2, 1890.

SECTIONS OF THE CLAYTON ACT ADMINISTERED BY THE FEDERAL TRADE COMMISSION

(U. S. C., Title 15, Sec. 12)

AN ACT To supplement existing laws against unlawful restraints and monopolies, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That "antitrust laws," as used herein, includes the act entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July second, eighteen hundred and ninety; sections seventy-three to seventy-seven, inclusive, of an act entitled "An act to reduce taxation, to provide revenue for the Government, and for other purposes," of August twenty-seventh, eighteen hundred and ninety-four; an act entitled "An act to amend sections seventy-three and seventy-six of the act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An act to reduce taxation, to provide revenue for the Government, and for other purposes,'" approved February twelfth, nineteen hundred and thirteen; and also this act.

"Commerce," as used herein, means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this act contained shall apply to the Philippine Islands.

The word "person" or "persons" wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

SEC. 2.[1] (a) That it shall be unlawful for any person engaged in commerce,

[1] This section of the Clayton Act contains the provisions of the Robinson-Patman Anti-Discrimination Act, approved June 19, 1936, amending section 2 of the original Clayton Act, approved October 15, 1914. For certain exemptions from the provisions of the later act concerning cooperatives and purchases for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit, see the later act as published at p. 168.

in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescense of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

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

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale to any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

* * * * * * *

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof, or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

* * * * * * *

SEC. 7. That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: *Provided*, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

SEC. 8. * * * That from and after two years from the date of the approval of this act no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, other than banks, banking associations, trust companies, and common carriers subject to the act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. The eligibility of a director under the foregoing provision shall be determined by the aggregate amount of the capital, surplus, and undivided profits, exclusive of dividends declared but not paid to stockholders, at the end of the fiscal year of said corporation next preceding the election of directors, and when a director has been elected in accordance with the provisions of this act it shall be lawful for him to continue as such for one year thereafter.

When any person elected or chosen as a director or officer or selected as an employee of any bank or other corporation subject to the provisions of this act is eligible at the time of his election or selection to act for such bank or other corporation in such capacity his eligibility to act in such capacity shall not be affected and he shall not become or be deemed amenable to any of the provisions hereof by reason of any change in the affairs of such bank or other corporation from whatsoever cause, whether specifically excepted by any of the provisions hereof or not, until the expiration of one year from the date of his election or employment.

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SEC. 11. That authority to enforce compliance with sections two, three, seven, and eight of this Act by the persons respectively subject thereto is hereby vested; in the Interstate Commerce Commission where applicable to common carriers subject to the Interstate Commerce Act, as amended; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Authority where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938; [2] in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce, to be exercised as follows:

Whenever the commission, authority, or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven, and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission, authority, or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission, authority, or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission, authority, or board. If upon such hearing the commission, authority, or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such persons an order requiring such person to cease and desist from such violations, and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission, authority, or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report of any order made or issued by it under this section.

If such person fails or neglects to obey such order of the commission, authority, or board while the same is in effect, the commission, authority, or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission, authority or board. Upon such filing of the application and transcript

[2] By subsection (g) of section 1107 of the "Civil Aeronautics Act of 1938," approved June 23, 1938, Public, No. 706, 75th Cong., Ch. 601, 3d sess., S. 3845, 52 Stat. 1028, section 11 of the Act of October 15, 1914, the Clayton Act, was amended by inserting after the word "energy" (in the sixth line from the beginning of the paragraph, reading "wire or radio communication or radio transmission of energy;"), the following: "in the Civil Aeronautics Authority where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938;" and by inserting after the word "commission" wherever it appears in that section a comma and the word "authority."

the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission, authority, or board. The findings of the commission, authority, or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, authority, or board, the court may order such additional evidence to be taken before the commission, authority, or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, authority, or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendations, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section 240 of the Judicial Code.

Any party required by such order of the commission, authority, or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission, authority, or board be set aside. A copy of such petition shall be forthwith served upon the commission, authority, or board, and thereupon the commission, authority, or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission, authority, or board as in the case of an application by the commission, authority, or board for the enforcement of its order, and the findings of the commission, authority, or board as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission, authority, or board shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission, authority, or board, or the judgment of the court to enforce the same shall in any wise relieve or absolve any person from any liability under the antitrust Acts.

Complaints, orders, and other processes of the commission, authority, or board under this section may be served by anyone duly authorized by the commission, authority, or board, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the principal office or place of business of such person; or (c) by registering and mailing a copy thereof addressed to such person at his principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

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Approved October 15, 1914.