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THE ANTITRUST LAWS AND MONOPOLY*

EDWARD H. LEVI†

THERE is a strong anti-monopoly tradition in this country. The word monopoly like cartel has an evil sound. As Gouverneur Morris wrote to Livingston in 1811, "the word 'monopoly' is of dangerous efficiency . . . it may turn the current of opinion against you."¹ The Sherman Antitrust Act embodies this tradition against monopoly. Yet concentration of economic control in the sense that a few companies together control the major output of an industry is the standard pattern of American business. The existence of a strong anti-monopoly tradition and of great economic concentration represents a confusion in the anti-monopoly tradition itself. We are not sure whether we are against monopoly or the abuses of monopoly. We do not know whether we want regulated competition or regulated monopoly. We do not know whether we are opposed to size or merely to unreasonably high prices. The confusion is deep and is a part of the tradition.

I

The tradition has at least four parts to it.

It was the fear of exorbitant prices which led to the passage of penal statutes against forestalling, regrating and engrossing.² The strength of the fear and the common-law heritage is indicated by the continued life in these statutes in England after their repeal. "There was scarcely a family in the realm that did not feel itself aggrieved by the oppression and ex-

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† Professor of Law, University of Chicago Law School; formerly Special Assistant to the Attorney General and First Assistant in the Antitrust Division.

¹ Dorfman, *The Economic Mind in American Civilization* 481 (1946).

² Adler, *Monopolizing at Common Law and under Section Two of the Sherman Act*, 31 *Harv. L. Rev.* 246, 257 (1917).

tortion which the abuses naturally caused. Iron, oil, vinegar, coal, lard, starch, leather, glass could be bought only at exorbitant prices," Lord Macaulay reminds us.³ The high rates charged by monopolies were the targets in this country of the Patrons of Husbandry and the populist parties.⁴ The Republican party platform of 1888 was for legislation to prevent undue charges and to prevent unjust rates. The Democrats were against combinations which enrich the few by robbing the body of our citizens.⁵

But the fear of monopoly was not limited to a fear of high prices alone. The monopolizer, as opposed to the man who merely possessed a monopoly, was one who worked his abuses on the public. And the abuses included high prices. But the monopolist and the monopolizer, when the monopoly was state conferred, shared one thing in common; they worked the abuse of denying access of the market to others. And so it has been frequently urged that our heritage of an antipathy toward monopoly is really an heritage against the government grant which by conferring a property right in the exclusive possession of a field of business denied equality of opportunity.⁶ The protest against monopoly was a protest against the favorites of government. It is only by analogy, we are told, that the courts have been able to reason from the illegality of the monopoly obtained by the exclusive government grant, as in the *Case of Monopolies*, to "the illegality of any control of the market no matter how secured."⁷

Our heritage against monopoly then is a heritage against exorbitant prices, unnaturally secured, and against the assertion of the exclusive right to do business based on a grant of government. But to these must be added also a belief in the rights of man.⁸ It is the right of every man to be free of restrictions except those recognized by law. It is the right of every man to engage in business and to seek his opportunity. It would be too much to say that this recognition of the rights of man implied a recognition of the merits of the free and competitive society. Governmental price fixing in the colonies was well known and widely practiced. And the right of every man to engage in business might include the right to be suc-

³ 1 Macaulay, *History of England* 67 (Lovell, New York); Naujoks, *Monopoly and Restraint of Trade under the Sherman Act*, 4 *Wis. L. Rev.* 386 (1928).

⁴ Jones, *Historical Development of the Law of Business Competition*, 36 *Yale L.J.* 42, 207 (1926).

⁵ Knauth, *The Policy of the United States towards Industrial Monopoly* 16-17 (1913).

⁶ Mason, *Monopoly in Law and Economics*, 47 *Yale L.J.* 34, 37 (1937).

⁷ Jaffe and Tobrin, *The Legality of Price-Fixing Agreements*, 45 *Harv. L. Rev.* 1164, 1166 (1932).

⁸ Holdsworth, *Industrial Combinations and the Law in the Eighteenth Century*, 18 *Minn. L. Rev.* 369 (1934).

cessful. This might include the right to emerge as a monopolist, albeit a monopolist who is not a "monopolizer"⁹ in that he does not abuse his earned position by charging exorbitant rates.

"It is remarkable," Mr. Chief Justice White was later to say with some satisfaction in the *Standard Oil* case, "that nowhere at common law can there be found a prohibition against the creation of monopoly by an individual. . . . After all, this was but an instinctive recognition of the truisms that the course of trade could not be made free by obstructing it, and that an individual's right to trade could not be protected by destroying such right."¹⁰ Somewhat along the same line, Mr. Justice Holmes was also to declare, presumably as a decisive step in a dissenting opinion, "I do not expect to hear it maintained that Mr. Morgan could be sent to prison for buying as many shares as he liked of the Great Northern and the Northern Pacific. . . ."¹¹ One boast of the American tradition, as Mr. Kales noted somewhat anxiously, although hopefully, was "there is no limit under the American law to which a business may not independently grow."¹²

The right of every man to engage in business free of restrictions not imposed by law, the necessity to guard against exorbitant prices, and opposition to governmental grants to favorites—these are the first themes of the Anglo-American tradition against monopolies. The colonies developed an additional theme and one always popular. They were opposed to other people's monopolies and restrictions on trade imposed upon them from afar. In later days the farmers of the middle west would rally against the monopolistic practices of the "eastern interests"; the west and the south would protest against their colonization by the trading companies of the north, and the country as a whole could be united against foreign monopolies, particularly German cartels. This theme began early. It was present at the Boston tea party. It was present in our first negotiations with the British after independence was secured. The control of commerce by the federal government was considered to be particularly useful as a means to deal with British monopolistic practices. So opposed were we to British monopolies that we were willing to counterattack with our own if necessary.¹³ The roots of the Webb-Pomerene Act are indeed deep.

⁹ Adler, *op. cit.* supra note 2, at 261; Morawetz, *The Supreme Court and the Antitrust Act*, 10 Col. L. Rev. 687, 695 (1910).

¹⁰ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 55-56 (1911).

¹¹ *Northern Securities Co. v. United States*, 193 U.S. 197, 409 (1904).

¹² Kales, *Good and Bad Trusts*, 30 Harv. L. Rev. 830, 852 (1917), quoting the district court opinion in the *International Harvester* case.

¹³ Jones, *op. cit.* supra note 4, at 207, 209.

So strong was the tradition against monopoly in this country in the early days, so efficient and unpleasant the word, that not only were prohibitions against it adopted in early state constitutions, but Thomas Jefferson writing from Paris protested against the failure to include an explicit provision outlawing the evil in the federal constitution.¹⁴ It would be an understatement to say this tradition is still with us. "During the past half century the United States has developed a tradition in opposition to private monopolies. The Sherman and Clayton Acts have become as much a part of the American way of life as the due process clause of the Constitution," President Franklin Roosevelt wrote to Secretary Hull on September 6, 1944. Courts today can and do repeat by rote the assurance that Congress has decreed that "competition, not combination, should be the law of trade."¹⁵ And it has become traditional, also, to greet victories or defeats on the battlefield of the Sherman Act with a fervor only slightly less than hysterical. Thus we are told that the effect of a decision of the Supreme Court in a Sherman Act case is as great in its effect upon the welfare of our country "as would be the results of decisive battles in a great war."¹⁶ The tradition in this country against monopoly is strong.

But it is confused. And those who wish to monopolize can make use of that confusion.

The traditional way to make use of that confusion by those who wish to monopolize is to point out that every property right is in some sense a monopoly right.¹⁷ The successful competitor achieves greater property rights. He may in fact become the sole occupier of the field. But this is because he has been a successful competitor. If it is said that he is a monopolist then every act of successful competition is an act of monopoly. So runs the argument. Our tradition does not make him a monopolist because he holds no exclusive grant from the king. If others may still enter the field,

¹⁴ 2 The Writings of Thomas Jefferson (1853): Letter to James Madison (Paris, Dec. 20, 1787), at 329; Letter to A. Donald (Paris, Feb. 7, 1788), at 355; Letter to James Madison (July 31, 1788), at 445: "The saying there shall be no monopolies, lessens the incitements to ingenuity, which is spurred on by the hope of a monopoly for a limited time, as of fourteen years; but the benefit of even limited monopolies is too doubtful, to be opposed to that of their general suppression." 3 The Writings of Thomas Jefferson 100 (1853), Letter to James Madison (Paris, Aug. 28, 1789): "... the following alterations and additions would have pleased me. . . . Article 9. Monopolies may be allowed to persons for their own production in literature, and their own inventions in the arts, for a term not exceeding — years, but for no longer term, and for no other purpose."

¹⁵ *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 129 (1905); *United States v. Crescent Amusement Co.*, 323 U.S. 173, 187 (1944).

¹⁶ Levy, *A Contrast between the Antitrust Laws of Foreign Countries and of the United States*, 167 *Annals* 125 (1930), quoting Mr. Justice Clarke; also in Levy, *The Sherman Act Is Outworn, It Should Be Amended*, 13 *Va. L. Rev.* 597 (1927).

¹⁷ Fetter, *The Masquerade of Monopoly* 33 (1931).

or, better yet, if there are a few left, he has no monopoly. All that he has done is to assert the right of man to the freedom of competition. It is only if he has abused this privilege by conduct outside the normal methods of business or by charging exorbitant prices that we will regard him as a monopolist.

For the greater part of its history, the Sherman Act has as a practical matter adhered to the abuse theory when applied to closely knit combination or monopoly cases. As a theoretical matter this is not strictly true. It is not true because the cases themselves are not clear. It is also not true because it is quite possible to point to dramatic deviations from the abuse theory. For example the *Northern Securities* case does not go on the abuse theory.¹⁸ It appears to go on the theory that a combination of competing units is bad in itself. But the railroad cases really are in a class by themselves.¹⁹ They are public utility cases.²⁰ The units were tangibly immense. And there was a recognition that the units themselves were monopolistic.²¹ This might have led the court to the conclusion that the Sherman Act did not apply or if it did apply then it did so with greater leniency than elsewhere.²² But the contrary was the result. Possibly the feeling was that it is better not to add one monopoly to another. The stricter application of the Sherman Act to railroads, which is an undoubted fact, finds an analogy today in the treatment of patents under the Sherman Act, or, more accurately, the general law.²³ And the basis for the treatment is probably the same—a franchise has been given; it is necessarily monopolistic; an attempt to extend the franchise will be carefully scrutinized.

In describing the effect of Supreme Court cases in Sherman Act monopoly suits, it is important to remember that there are not many such opin-

¹⁸ *Northern Securities Co. v. United States*, 193 U.S. 197 (1904).

¹⁹ *Ibid.*; *United States v. Terminal R. Ass'n of St. Louis*, 224 U.S. 383 (1912); *United States v. Union Pacific R. Co.*, 226 U.S. 61 (1912); *United States v. Reading Co.*, 226 U.S. 324 (1912); *United States v. Reading Co.*, 253 U.S. 26 (1920); *United States v. Lehigh Valley R. Co.*, 254 U.S. 255 (1920); *United States v. Southern Pacific Co.*, 259 U.S. 214 (1922).

²⁰ See the argument for the *United States* in *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 556-57 (1898); *United States v. American Tobacco Co.*, 221 U.S. 106, 114 (1911). See, also, Kales, *op. cit. supra* note 12, at 830-33; Reuschlein, *Aluminum and Monopoly: A Phase of an Unsolved Problem*, 87 U. of Pa. L. Rev. 509, 516 (1939).

²¹ See the concurring opinion of Mr. Justice Brewer in *Northern Securities Co. v. United States*, 193 U.S. 197, 363 (1904): "It must also be remembered that under present conditions a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly." Cf. *United States v. Union Pacific R. Co.*, 226 U.S. 61, 83 (1912).

²² Application of the Sherman and Clayton Acts to Holding Companies Organized by Parent Railroad Corporations, 78 U. of Pa. L. Rev. 652, 654 (1930).

²³ *Morton Salt Co. v. Suppiger Co.*, 314 U.S. 488 (1941); *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944).

ions, that the cases take a considerable amount of preparation before they can be brought, and that within the practical limitations of even a well financed staff, which the Antitrust Division normally has not had, only a very few cases could be brought in any event. The opinions of the Supreme Court in this field then have an unusual importance since it is their interpretation by business men and by the administration which may determine the trend in American industry to the extent that any law can do so. Even if the interpretation is wrong, it will still determine the trend. Dictum is very important in the monopoly cases.

It is for this reason that it is probably accurate to say that as a practical matter for most of its history the Sherman Act has adhered to the abuse theory. The *Standard Oil*,²⁴ *American Tobacco*,²⁵ and *United States Steel*²⁶ cases mark the direction. And this is so even though it is not clear what theory the court thought it adopted in any one of the cases.

It is probably unfortunate that the *Standard Oil* and *American Tobacco* cases were such good prosecution cases. The presence of enormous abuses in both made it unnecessary for the court to make up its mind about the basis of the Sherman Act. There were huge profits, espionage, local price cutting and rebates in the *Standard Oil* case.²⁷ In the tobacco case, the United States could argue, "if duress, and wicked and unfair methods are essential, they all appear."²⁸ The truth is, of course, that in most monopoly cases, if the court has a mind to do so, it can find abuses. As Mr. Brandeis stated in testifying before a Senate committee in 1912, he had not dealt with a monopoly situation where there were not also abuses.²⁹

²⁴ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911).

²⁵ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

²⁶ *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

²⁷ Handler, *Unfair Competition*, 21 Iowa L. Rev. 175, 214-16 (1936).

²⁸ Argument for the United States in *United States v. American Tobacco Co.*, 221 U.S. 106, 112 (1911).

²⁹ 1 Hearings before the Senate Committee on Interstate Commerce, 62nd Cong. 1st Sess., at 1167 (1912):

"SENATOR CUMMINS: Do you believe that a corporation can be so offensive to the anti-trust law on account of its size, even though it does not employ any of the vicious or unjust practices that have been characteristic of some of the trusts of which you have spoken?"

"MR. BRANDEIS: I should think it certainly might if it originated in combination."

"SENATOR CUMMINS: Ought there not, therefore, be some instrumentality of the law that would determine how large a corporation should become or be, even before it may be finally condemned through a prosecution against it under the antitrust law?"

"MR. BRANDEIS: I am inclined to think yes. Perhaps if I might—"

"SENATOR CUMMINS: Do not confine yourself to categorical answers, but give us your views upon the subject that may be contained in the question."

"MR. BRANDEIS: I thank you. I have had no belief that up to the present time a question had arisen to any corporation in that narrow form in which you put it; that is, each one of the large corporations I have had to deal with have been objectionable on grounds other than size

It would have been a simple matter in view of the Gary dinners and the use of the basing point system, for example, for the court to have found abuses in the *United States Steel* case.³⁰

The *United States Steel* case and the *International Harvester* case³¹ gave currency to the doctrine that size is no offense under the Sherman Act. That was not precisely what the Court said in either case. In both instances it was careful to use the word "mere."³² This however did not help clarify any precise meaning of the decisions. In the *United States Steel* case, possibly the trouble was that the size was not sufficiently big, for the corporation had less than 50 per cent of the steel market in general when the case was decided. The Court was impressed by the need the corporation felt to sit down with its competitors to determine prices. It made of such an abuse the proof of a lack of power. So one could argue that the *Steel* case is at least consistent with the proposition that the application of the act depends not on abuses but on either the existence or the assertion of the power to dominate. The effect of the decision was catastrophic, however, if one were interested in preventing the merger and concentration movement in the United States. Nor did the *International Harvester* case help, although that case was peculiar in that it could be said that the company had done what it said it would and should not be held to higher standards. Be that as it may, the *Harvester* case underlined the insufficiency of size as any violation, and raised the permissible percentage figure to 64 per cent.

It must be admitted also that to say that the *Steel* and *Harvester* cases affixed the abuse theory on the Sherman Act does not dispose of problems of size or percentages of control. Acts which might otherwise constitute

merely. I have considered and do consider that the proposition that mere bigness cannot be an offense against society is false, because I believe that our society, which rests upon democracy, cannot endure under such conditions. Something approaching equality is essential. You may have an organization in the community which is so powerful that in a particular branch of the trade it may dominate by mere size. Although the individual practices may be according to rules, it may be, nevertheless, a menace to the community; and I may add further that, in my opinion, it was bad legislation which removed all limits to the size of corporations, as we did from 10 to 20 years ago."

³⁰ *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

³¹ *United States v. International Harvester Co.*, 274 U.S. 693 (1927).

³² *United States v. United States Steel Corp.*, 251 U.S. 417, 451 (1920): "But we must adhere to the law, and 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." *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927): "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."

abuses in the presence of great size or percentage of control might appear more innocuous without size or a high percentage. Thus coercive activities or price fixing might well depend for their illegality on market control. For example, the percentage of control was undoubtedly a factor in the *Standard Co. v. Magrane Houston Co.* case³³ and the *Fashion Originators' Guild*.³⁴ In the presence of the *Appalachian Coals* case,³⁵ it would be a brave person indeed who would have then said that market control was unimportant. The abuse theory which the *Steel* and *Harvester* cases fashioned onto the act was really the notion that only alarming and ungentlemanly conduct—involving, for example, the use of slander concerning one's competitors, an insistence upon continued growth through price wars and resulting acquisitions, and in general the fist with the glove held in the other hand for the court to see—would be sufficient to invoke the Sherman Act against the crime of monopolizing. The Supreme Court did much in the *Steel* case to soothe the fears of the bar and to weaken the work which lower courts had been attempting to do in such cases as *Corn Products*³⁶ and *Eastman Kodak*.³⁷

It would be unfair to place the whole blame for economic concentration in this country on the Supreme Court. All that we can say is that neither the Sherman Act nor the Supreme Court did much to stop the trend.

II

More than ten years ago, Mr. Berle told us that we should recognize that "we have got concentration, whether we like it or not."³⁸ He spoke of it as a concentration "unmatched in history, with the single exception of the Communist system in Russia." In his dissenting opinion in *Liggett v. Lee*, Mr. Justice Brandeis spoke of this concentration as "the negation of

³³ 258 U.S. 346 (1922).

³⁴ *Fashion Originators' Guild v. Federal Trade Comm'n*, 312 U.S. 457 (1941).

³⁵ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

³⁶ *United States v. Corn Products Refining Co.*, 234 Fed. 964 (D.C.N.Y., 1916). The opinion by Judge Learned Hand foreshadows the *Alcoa* opinion. "The opinions of the Supreme Court certainly seem to indicate that it is the power and not its exercise which is the test." *Ibid.*, at 1011. "A national policy would be intelligible which looked only at the price and service to the consumer, disregarding the misfortunes of the producer altogether. Yet even then the consumer's interest in the long run is quite different from an immediate fall in prices, even if the quality of the service is maintained. The very defendants allege that a trade war is bad in the end for consumers, and no doubt they are right. If, therefore, 'public prejudice' be the test, it by no means follows that it is to be judged alone by price and quality. A given organization of industry may be thought to react to the public prejudice, regardless of its directly observable results." *Ibid.*, at 1011-12.

³⁷ *United States v. Eastman Kodak Co.*, 226 Fed. 62 (D.C. N.Y., 1915).

³⁸ Berle in Handler, *The Federal Antitrust Laws* 159 (1932).

industrial democracy.”³⁹ “The typical business corporation of the last century, owned by a small group of individuals, managed by their owners, and limited in size by their personal wealth,” he wrote, “is being supplanted by huge concerns in which the lives of tens or hundreds of thousands of employees and the property of tens or hundreds of thousands of investors are subjected, through the corporate mechanism, to the control of a few men. Ownership has been separated from control; and this separation has removed many of the checks which formerly operated to curb the misuse of wealth and power. And as ownership of the shares is becoming increasingly dispersed, the power which formerly accompanied ownership is becoming increasingly concentrated in the hands of a few. The changes thereby wrought in the lives of the workers, of the owners and of the general public are so fundamental and far-reaching as to lead . . . scholars to compare the evolving ‘corporate system’ with the feudal system; and to lead other men of insight and experience to assert that this ‘master institution of civilized life’ is committing it to the rule of a plutocracy.”⁴⁰

In the same vein, Senator O’Mahoney has seized upon an advertisement of the Union Oil Co. of California which announces that “America’s Fifth Freedom is Free Enterprise” and then goes on to show that of its 1944 net profits of \$8,932,944, each stockholder would have, if he could have a share of it, \$277.18, because the Union Oil Company is owned not by one man or two but by 32,227 individual Americans. This “is not individual free enterprise at all,” the Senator said. “It is a collective enterprise, with a lot of stockholders and a lot of workers. Such enterprises are under the direction of managers, expert managers in business, not the owners.”⁴¹ The Senator sounded the theme of the awful and momentous choice. He pointed out that “collectivism in business leads directly to collectivism in government.” He said his message to the House committee studying the problem was “a very simple one. It is this: You cannot hope to prevent the steady trend toward concentrated government unless you prevent the steady trend toward concentrated economic power. You cannot hope to decentralize government through the States and local communities if you do not undertake to preserve free enterprise in the States and in the local communities. The two things are absolutely tied together; and the history of the last 50 years has been the history of the steady loss to the Government at Washington of political power by the people in the

³⁹ 288 U.S. 517, 566 (1933).

⁴⁰ *Ibid.*, at 565.

⁴¹ Hearings on H.R. 2357 before the House Committee on the Judiciary, 79th Cong. 1st Sess., at 19 (1945).

States, because we have permitted the loss of economic power to economic concentrations of the kind I have been describing. If we permit ourselves to lose our economic independence, the loss of local political power is inevitable."⁴²

The Senator, however, thought we still had a choice. He thought so even though he stated that concentration in this country had reached the point where "less than one and one-half per cent of all the industrial employers in the United States employ about fifty-five per cent of all the industrial workers."⁴³ He thought so even though a chart which he presented to the committee showed that the gross revenues of some private corporate giants were greater than the revenues of any state or city in this country—a fact which was noted sixteen years ago by President Hoover's Committee on Social Trends, but then it was only true of four private corporations and today it is true of six, with the revenues larger.⁴⁴

It is of course difficult to judge or evaluate the effect of the amount of economic concentration in American industry today. We seem to have had economic concentration with us since the Civil War. The charge was made in 1884 that all the industries of the country were governed by combinations.⁴⁵ The debates on the Sherman Act brought forth the mention

⁴² *Ibid.*, at 9.

⁴³ *Ibid.*, at 12-13.

⁴⁴ Senator O'Mahoney referred to the trend as a "trend toward centralism" which is a more appropriate term than concentration. *Ibid.*, at 10. The charts introduced show the following:

COMPARISON OF CERTAIN CORPORATIONS, STATES, AND CITIES WITH
RESPECT TO GROSS REVENUES AND NUMBER OF EMPLOYEES, 1930

Corp. or Political Unit	Gross Revenues ^{1,2}	Employees ²	Corp. or Political Unit	Gross Revenues ^{1,2}	Employees ²
U.S. Steel Corp.....	\$1,201,377,367	211,055	Detroit.....	\$154,619,790	19,436
Great A.&P. Tea Co.....	1,053,692,882	40,000	Los Angeles.....	152,166,523	16,975
General Motors Corp.....	996,687,332	172,938	Philadelphia.....	133,522,058	21,997
Pa. R.R. System.....	616,638,650	166,607	California.....	116,919,827	17,495
New York City.....	611,571,726	86,509	New Jersey.....	91,068,090	8,385
Standard Oil Co. of Ind....	465,752,175	44,520	Boston.....	79,095,089	20,606
General Elec. Co.....	396,242,631	78,380	Ohio.....	78,527,215	6,426
Am. Telephone & Telegraph Co.....	292,014,871	324,343	Illinois.....	69,901,391	13,134
New York State.....	272,940,372	28,798	North Carolina.....	41,401,317	6,506
Chicago.....	241,748,819	41,983	Maryland.....	28,165,361	6,962
			Maine.....	18,014,201	2,500

¹ Corporation gross revenues include income from all sources for the year 1930. Figures from annual reports or from Standard Corporation Records. State figures are revenue receipts for 1929 and are from U.S. Bureau of the Census, Financial Statistics of States. City figures are revenue receipts for 1928 and are from U.S. Bureau of the Census, Financial Statistics of Cities.

² Figures on municipal and State employees are for 1930 with the exception of the States of New York and New Jersey, which are for 1928. The figures are not necessarily comparable because some of the items include only those in the classified service; some include educational employees and others do not.

³ These figures include a part of county receipts and receipts of special districts as allocated by the Bureau of the Census.

[Footnote continued on following page]

⁴⁵ Knauth, *op. cit. supra* note 5, at 13, quoting Henry D. Lloyd.

of a variety of trusts or monopolies—most of which in one form or another we still have with us today. And it was against this “alarming concentration of control”⁴⁶ and monopoly that the statute was primarily aimed. It is undoubtedly true, as Mr. Justice Brandeis has told us, that today we accept with resignation, if not with applause, those “evils attendant upon the free and unrestricted use of the corporate mechanism” which during the greater part of our history we did not think “were the inescapable price of civilized life.”⁴⁷ The Sherman Act was passed at a time when it was felt that a new charter of freedom was required—freedom from the “insidious menace inherent in large aggregations of capital, particularly when held by corporations.”⁴⁸ The words of Mr. Justice Harlan in the

[Continuation of footnote 44]

COMPARISON OF CERTAIN CORPORATIONS, STATES, AND CITIES—GROSS REVENUES AND NUMBER OF EMPLOYEES, 1942

Rank in 1942 Gross Revenues	Corporation or Political Unit	Gross Revenues	Employees	Rank in 1928-30 Gross Revenues
(1).....	General Motors Corp.	\$2,250,548,859	314,144	(3)
(2).....	United States Steel	1,862,951,692	335,866	(1)
(3).....	American Telephone & Telegraph Co.	1,469,263,216	327,107	(8)
(4).....	Great Atlantic & Pacific Tea Co.	1,378,147,240		(2)
(5).....	General Electric Co.	913,656,277	139,939	(7)
(6).....	Pennsylvania R. R. System	838,474,622	151,604	(4)
(7).....	New York State	720,306,000	55,873	(9)
(8).....	New York City	714,653,000	132,975 ¹	(5)
(9).....	California	517,261,000	29,010 ²	(14)
(10).....	Standard Oil of Indiana	464,558,256		(6)
(11).....	Illinois	368,572,000	20,999	(18)
(12).....	Ohio	358,380,000	20,277 ³	(17)
(13).....	New Jersey	202,685,000	13,898	(15)
(14).....	North Carolina	132,662,000	14,616	(19)
(15).....	Chicago	114,763,000	31,318 ⁴	(10)
(16).....	Detroit	104,981,000	23,758 ⁵	(11)
(17).....	Philadelphia	81,405,000	19,699 ⁶	(13)
(18).....	Boston	77,620,000	12,606 ⁷	(16)
(19).....	Maryland	76,887,000	9,253 ⁸	(20)
(20).....	Maine	40,342,000	6,196 ⁹	(21)
(21).....	Los Angeles	39,832,000	19,070 ¹⁰	(12)

¹ General government, 100,626; public-service enterprises, 32,349.

² General government, 28,486; public-service enterprises, 524.

³ General government, 18,928; public-service enterprises, 1,349.

⁴ General government, 27,807; public-service enterprises, 3,509.

⁵ General government, 16,629; public-service enterprises, 7,129.

⁶ General government, 18,696; public-service enterprises, 1,003.

⁷ General government, 12,075; public-service enterprises, 531.

⁸ General government, 9,176; public-service enterprises, 77.

⁹ General government, 5,940; public-service enterprises, 256.

¹⁰ General government, 10,997; public-service enterprises, 8,073.

Notes on public employment: Figures exclude schools, work relief, and contract-work employment. Unless otherwise indicated, employment total relates to general government only.

Source: Standard and Poor's corporation records; and publications of the U.S. Bureau of the Census.

Ibid., at 10.

⁴⁶ Handler, *Industrial Mergers and the Antitrust Laws*, 32 Col. L. Rev. 179, 180 (1932).

⁴⁷ *Liggett Co. v. Lee*, 288 U.S. 517, 548 (1933).

⁴⁸ Ibid., at 549.

Standard Oil case still carry a considerable amount of eloquence to recreate for us the period.⁴⁹

The trend appears to be toward greater concentration. The standard pattern for American industry today is control by three, four or five corporations. To be sure there is some movement away from one-company domination. In 1904, twenty-six trusts "controlled eighty per cent or more of the production in their respective fields. And there were at least eight concerns—the American Can Co., the American Sugar Refining Co., the American Tobacco Co., the Corn Products Co., the International Harvester Co., the National Cash Register Co., the Standard Oil Co., and the United Shoe Machinery Co.—that controlled at one time or another, 90 per cent or more of the output of some or all of their respective products."⁵⁰ Control is less often found in one company alone today, although it is still the case in nickel, and until recently was true for railroad sleeping cars and the production of aluminum. The Sherman Act itself can at least claim the credit for setting up the domination of the few as a substitute for the domination of the one in a number of industries, and production for war has given impetus in this direction.

The trend is not new, nor is it only lately observed. Studies by Berle and Means,⁵¹ by the Temporary National Economic Committee,⁵² the Twentieth Century Fund,⁵³ the National Resources Committee,⁵⁴ and the Smaller War Plants Corporation⁵⁵ have indicated the trend in a number of ways. Figures as to percentage of assets controlled, income received and workers employed show the direction.

In 1909, the 200 largest nonfinancial corporations owned one-third of

⁴⁹ *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 83 (1911). "All who recall the condition of the country in 1890 will remember that there was everywhere, among the people generally, a deep feeling of unrest. The Nation had been rid of human slavery—fortunately, as all now feel—but the conviction was universal that the country was in real danger from another kind of slavery sought to be fastened on the American people, namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the country, including the production and sale of the necessities of life."

⁵⁰ *Competition and Monopoly in American Industry*, TNEC Monograph No. 21, at 65 (1940).

⁵¹ Berle and Means, *The Modern Corporation and Private Property* (1936).

⁵² *Competition and Monopoly in American Industry*, TNEC Monograph No. 21 (1940); *The Structure of Industry*, TNEC Monograph No. 27 (1941); *The Distribution of Ownership in the Two Hundred Largest Non-Financial Corporations*, TNEC Monograph No. 29 (1940).

⁵³ Twentieth Century Fund, *Big Business, Its Growth and Its Place* (1937).

⁵⁴ National Resources Comm., *The Structure of the American Economy* (1939).

⁵⁵ *Economic Concentration and World War II*, Report of the Smaller War Plants Corporation to the Special Committee to Study Problems of American Small Business, Sen. Comm. Print No. 6, 79th Cong. 2d Sess. (1946).

the nonfinancial corporation assets. By 1929, this had increased to between 48 per cent and 50 per cent.⁵⁶ It was estimated in 1933 "that the relative rate of growth maintained by the larger and smaller concerns from 1909 to 1929, if continued for another twenty years, would place 70 per cent of the Nation's corporate wealth in the hands of the 200 largest in 1950."⁵⁷ By 1939, the share of the 200 largest had increased to 57 per cent.⁵⁸

In 1926, 316 large manufacturing corporations held 35 per cent of the working capital of manufacturing corporations; by 1938 this percentage had risen to 47 per cent.⁵⁹

If percentage of the total net income of nonfinancial corporations is taken as the measure, the trend is the same. The percentage of the total net income of all nonfinancial corporations earned by the 200 largest increased from 33 per cent in 1930 to 43 per cent in 1939.⁶⁰ That received by the upper 5 per cent of the companies went from 78.9 per cent in 1918 to 84.5 per cent in 1942.⁶¹ If the income of manufacturing companies alone is observed, the increase in the percentage of the total amount received by the larger manufacturing companies having at least five million annual net income increased from 34 per cent in 1918 to almost 51 per cent in 1942. At the same time the percentage for those firms receiving less than \$250,000 annual net incomes went down from 23.4 per cent to 11.6 per cent.⁶²

Employment figures are likewise indicative. In 1909 plants employing 1000 or more employees employed 15 per cent of all manufacturing wage earners. By 1919 this had risen to 26 per cent.⁶³ By 1944, 31 per cent of the total were employed by firms with 10,000 or more employees—62 per cent by firms with 500 or more employees.⁶⁴ In 1909 metal products establishments employing 1000 or more wage earners accounted for 21.3 per cent; the proportion increased to approximately 40 per cent in 1919 and went to 64 per cent during the last war.⁶⁵ There has been a "steady and continuous decline in the relative importance of the self-employed mem-

⁵⁶ *Ibid.*, at 6; *Competition and Monopoly in American Industry*, TNEC Monograph No. 21, at 299-300 (1940).

⁵⁷ *Competition and Monopoly in American Industry*, TNEC Monograph No. 21, at 299 (1940), citing Berle and Means, *The Modern Corporation and Private Property* 40 (1936).

⁵⁸ Note 50 *supra*, at 299-300.

⁵⁹ *Economic Concentration and World War II*, Report of the Smaller War Plants Corporation to the Special Committee to Study Problems of American Small Business 6, Sen. Comm. Print No. 6, 79th Cong. 2d Sess. (1946).

⁶⁰ *Ibid.*

⁶³ *Ibid.*

⁶¹ *Ibid.*, at 8.

⁶⁴ *Ibid.*, at 25.

⁶² *Ibid.*

⁶⁵ *Ibid.*, at 11.

bers of the working community" from approximately 37 per cent in 1880, to 30 per cent in 1900, to 23.5 per cent in 1920, to 19 per cent in 1939.⁶⁶

The trend can be seen also by the increase in domination in two key industries by a few firms. The three largest producers of automobiles accounted for 42 per cent of the total output in 1909. In 1938, they accounted for 90 per cent. In 1880, the four largest producers in the iron and steel industry owned 25 per cent of the rolling mill capacity. At the end of World War I, they held 55 per cent; by 1938 the percentage had risen to 64 per cent.⁶⁷ The increase in the percentage of control in each case is much more meaningful, of course, because of the enormous increase in capacity output and value of both the automobile and the iron and steel industries during this period.

As an overall matter, the war increased the amount of concentration. The award of prime contracts to the largest corporations, liberal tax provisions, and the fact that the greatest increase in the economy had to occur in the manufacturing industries where concentration is almost the set pattern—made this result inevitable. It is estimated that during the war one-half million small retail, service and construction firms disappeared.⁶⁸ The records of the War Production Board show that approximately 75 per cent of all prime war contracts were handled by 100 corporations.⁶⁹ From June, 1940 through September, 1944, prime war contract awards amounting to 175 billion dollars were made to 18,539 corporations. Over one-half in value of the contracts went to 33 corporations, each of which received awards totalling one billion or more. General Motors, largest producer in the most highly concentrated industry, received the greatest amount given to any one company.⁷⁰ At least the temporary effect on the concentration trend can be seen in that the 250 largest manufacturing corporations which owned in 1939, 65 per cent of the country's productive facilities operated during the war 79 per cent of all new privately operated plant facilities built with government funds (and as to which they frequently held options to purchase), and in September of 1944 held 78 per cent of the active prime war supply contracts. To the 25.9 billion dollars of capital assets held by them in 1939, they had added 3.7 billions in privately financed facilities and they were in addition operating 8.9 of the 11.5 billion dollars of federally financed facilities.⁷¹

⁶⁶ *Ibid.*, at 14.

⁶⁷ *Ibid.*, at 11.

⁶⁸ *Ibid.*, at 27.

⁶⁹ Hearings on H.R. 2357 before the House Committee on the Judiciary, 79th Cong. 1st Sess., at 6 (1945).

⁷⁰ Note 59 *supra*, at 30.

⁷¹ Note 59 *supra*, at 21-54.

The pattern which has been established is the control over an industry by a few corporations. In 60 per cent of the census-grouped manufacturing industries, the largest four companies contributed more than one-third of the value product of the industry.⁷² "More than 57 per cent of the total value of manufactured products was produced under conditions where the four largest producers of each product turned out over 50 per cent of the total United States output."⁷³ "Among the 275 categories included in the Census of Manufacturers for 1935, there were 54 in which the four largest firms produced more than two-thirds, by value, of the total supply."⁷⁴ It "appears that two-fifths to one-half of the goods covered by the census are made in fields where four concerns controlled three-fourths or more of the supply."⁷⁵

The extent of the pattern of control by a few is indicated by percentage of production or ownership figures for some of the industries.

Eight companies have produced and distributed 80 to 90 per cent of the feature films, and produced, distributed and exhibited 65 per cent of all the motion pictures shown in the United States. Seven companies produced 90 per cent of the nation's output of matches. The five largest producers of cement—an industry in which there were 75 companies in 1938 operating 162 mills, produced nearly 40 per cent of the total output.

Four companies in some recent year have accounted for the entire output of inlaid linoleum, watt-hour meters, rubber combs, borax, epsom salt, citric acid, tartaric acid, oxalic acid, calcium carbide, flake calcium chloride, corn binders, and sewing machines. Four firms have accounted for 99 per cent of the potash sold in the United States, 95 per cent of typewriters, 92 per cent of chewing gum, 84 per cent of marble, 80.9 per cent of rubber tires and tubes, 80 per cent of gypsum, 78 per cent of copper, 79 per cent of oleomargarine, approximately 75 per cent of soap and approximately 75 per cent of 21 among 41 drugs and medicines, 68 per cent of coke oven products, 74 per cent of rayon, 65 per cent of mechanical refrigerators, 64 per cent of iron ore, 63 per cent of asphalt, 62 per cent of steel ingot capacity, 60 per cent of cane sugar, shortenings, beet sugar, cereals, chocolate, cocoa, 55 per cent of vacuum cleaners, more than 50 per cent of baking powder and distilled liquors, approximately 50 per cent of home radios, 40 per cent of flavoring extracts, condensed and evaporated milk, malt, rectified and blended liquors. Four companies accounted for "66 per

⁷² Note 59 *supra*, at 55.

⁷³ Note 54 *supra*, at 115.

⁷⁴ Competition and Monopoly in American Industry, TNEC Monograph No. 21, at 115 (1940).

⁷⁵ *Ibid.*, at 116.

cent of the slaughter of meat animals, killed 52 per cent of the hogs, 67 per cent of the cattle, 71 per cent of the calves, and 85 per cent of the sheep, lambs, and goats, and sold 43 per cent of the pork, 52 per cent of the lard, 58 per cent of the beef, 59 per cent of the cured pork, and 70 per cent of the veal."⁷⁶

Three companies will probably in the future account for the total aluminum supply. Three companies in some recent year have accounted for 97 per cent of snuff, 90 per cent of household cotton thread, 87 per cent of gypsum board, 86 per cent of automobiles, 80 per cent of cigarettes, 78 per cent of copper, 75 per cent of window glass, 75 per cent of ophthalmic lenses, 74 per cent of the biscuits and crackers, 70 per cent of cast iron enamel ware and vitreous china ware, almost 70 per cent of electric ranges, 69 per cent of copper, 68 per cent of lead, 63 per cent of the national output of chemicals, 63 per cent of cheese, 60 per cent of the nation's total semi-ingot capacity, 55 per cent of clinical thermometers, and 44 per cent of canned milk.

Two companies in some recent year accounted for 100 per cent of electrically driven tabulator machines, 100 per cent of railroad air brakes, 95 per cent of plate glass, 90 per cent of American supply of borates, 90 per cent of sulphur, 90 per cent of compressed oxygen and acetylene to industrial consumers, 89 per cent of the domestic capacity for the production of synthetic nitrogen, 83 per cent of cans, 80 per cent of locomotives, 80 per cent of distribution and power transformers, 80 per cent of tungsten filament lamps, 70 per cent of milk bottles, 70 per cent of electric motors, 64 per cent of tire cord fabric, 63 per cent of ophthalmic lenses, 63 per cent of farm machinery, 60 per cent of dyestuffs, 56 per cent of glass containers, 55 per cent of steel industry's assets, 51 per cent of copper, and 47 per cent of beef products.

And, of course, in some industries there still is control by one company, as is the case with molybdenum, heat resisting ware, nickel, and shoe machinery.

As if our present concentration of industry were not sufficiently great, it is probable that we now have with us the third great merger movement. In the last quarter of 1945 mergers and acquisitions reached the highest level since 1931.⁷⁷ It is natural that this should occur if only because of

⁷⁶ *Ibid.*, at 115.

⁷⁷ Note 59 *supra*, at 62; Johnson, *Monopoly on the March Again*, *The American Mercury* 651 (Dec., 1946): "Preliminary studies by the Department of Commerce indicate that the rate is still rising: mergers reported during the first half of 1946 indicate a total for this year of more than 450." Unofficial and preliminary figures indicate that the merger rate for the first half of 1946 was twice that for the first half of 1945, despite a drop in the first quarter of 1946, and that the rate for the third quarter of 1946 was higher than at any time since 1930.

the liquidity made possible by war profits and the opportunities for readjustment and expansion this makes possible.

The first great merger movement occurred shortly after the passage of the Sherman Act, largely between 1898 to 1903. That period saw the beginnings of International Silver, International Paper, American Linseed, United Shoe Machinery, Standard Sanitary, American Snuff, International Salt, American Can, Eastman Kodak, International Harvester, Corn Products, International Nickel, and E. I. du Pont de Nemours Powder Co.⁷⁸ It saw the formation of the United States Steel Corporation. The stock market crash of 1903 and the depression of 1907 brought this first movement to an end. But before it was terminated, twenty-six corporations controlled 80 per cent or more of the production in their respective fields, and seventy-eight controlled 50 per cent or more.⁷⁹

The second great merger movement occurred from 1925 to 1929 although it undoubtedly began in 1919 directly after the first world war and was only temporarily halted by the early postwar depression in 1921. The analogy to the present period is tempting. More than 1,238 consolidations took place resulting in the disappearance of approximately 7000 companies.⁸⁰ Iron and steel and the machinery industries accounted for about one-fifth of the mergers. Control over dairies, cheese and bakeries was established. The motion picture industry began to assume its modern cartelized form.⁸¹ Mr. Robert Marx wrote in the *Cincinnati Law Review* in 1928, "This is the day of big business. Steel mergers, oil mergers, telephone mergers, railroad mergers, radio combinations, coal combinations, automobile combinations, chain stores, all evidence the new found economic advantage of mass purchasing, mass selling, and mass manufacture."⁸² It was the era of co-operation, sanctioned by the Supreme Court, in the *United States Steel Corporation* case. Co-operation supplanted the era of regulation sanctified by *Standard Oil* and *American Tobacco*, which in turn had supplanted competition, required by the *Addyston Pipe* and *Northern Securities* cases. Co-operation made public interest the true test, "and the proper application of that test will enable American business, labor and agriculture to reap the advantages of a new economic freedom."⁸³

⁷⁸ The Structure of Industry, TNEC Monograph No. 27, at 231 (1941).

⁷⁹ Note 59 supra, at 4.

⁸⁰ Handler, op. cit. supra note 46, at 180.

⁸¹ Note 59 supra, at 13; note 78 supra.

⁸² Marx, *New Interpretations of the Antitrust Law as Applied to Business, Trade, Farm and Labor Associations*, 2 U. of Cin. L. Rev. 211, 222 (1928).

⁸³ Ibid., at 217.

"The day of the blatant trust-buster is definitely over."⁸⁴ "Mergers, combines and perhaps even monopolies are permitted and welcomed."⁸⁵

But the new economic freedom soon lost its glamor. In 1930 Governor Franklin Roosevelt asked, "Are we in danger of the creation in these United States of such a highly centralized industrial control that we may have to bring forth a new Declaration of Independence?"⁸⁶ When the depression came it was recognized that artificial price rigidity, the mark of monopoly or effective trade restrictions, had played its part. Thomas Lamont in 1930 was quoted as attributing the world-wide depression "in part to the effort made in many parts of the world to hold up commodity prices artificially, whether in rubber, cotton, wheat, coffee, copper or what not. When prices for such commodities finally gave way, the severity of the business collapse was accentuated."⁸⁷ During the depression, rigid price behavior made readjustment and recovery difficult. "In the depression, there was a general tendency, though with many exceptions, for the industries whose sales dropped most to show relatively little price adjustment, while in the industries in which a major price readjustment took place, there was a tendency for consumption to drop the least. Likewise, in the recovery period, the industries whose sales were increasing most showed little price rise while those with the least rise in sales showed the greatest rise in price."⁸⁸ There was and there is substantial evidence of artificial price rigidity not only through statistics showing the behavior of prices over a period of time in the face of changing conditions,⁸⁹ but through the more specific evidence of identical bids.⁹⁰

The effect of such price rigidities was to further economic maladjustment. "For example, prices received by the farmer during the depression showed the greatest sensitivity and fell, as a whole, about 57 per cent, and grains about 64 per cent, while agricultural implements declined less than 17 per cent as a maximum, and for most of the years only 5 or 6 per cent."⁹¹ Somewhat the same relationship existed between prices and wages in

⁸⁴ *Ibid.*, at 223.

⁸⁵ Schmidt, *The Changing Economics of the Supreme Court*, 167 *Annals* 61 (1930).

⁸⁶ Barrett, *The True and Limited Function of Antitrust Statutes*, 167 *Annals* 27 (1930).

⁸⁷ Fetter, *The Masquerade of Monopoly* 399 (1931).

⁸⁸ Note 54 *supra*, at 140.

⁸⁹ Note 50 *supra*, at 302-304.

⁹⁰ Jackson, *Should the Antitrust Laws Be Revised?* 71 *U.S. L. Rev.* 575, 578 (1937); Jackson and Dumbauld, *Monopolies and the Courts*, 86 *U. of Pa. L. Rev.* 231, 240-41 (1938); *Competition and Monopoly in American Industry*, op. cit. *supra* note 50, at 300-302.

⁹¹ Jackson, op. cit. *supra* note 90, at 578.

the centralized industries. As Robert Jackson, then of the Department of Justice, reported in the *United States Law Review*, "If rigid prices meant stability of employment in the industry, we would find price control more tolerable. But generally, the more rigid and inflexible the price of a product during the depression, the more calamitous was the decline in its labor's payroll. . . . Payrolls for the iron and steel industries declined about 75 per cent while the wholesale price of ingots declined only 16 per cent. The depression prices of cast iron pipe declined 7 per cent and payrolls declined 74 per cent. While agricultural implements declined 14 per cent in price, the industry's payrolls took the price decline of 83 per cent. Virgin aluminum went down 21 per cent in price and payrolls of aluminum manufacturers declined about 70 per cent. Cement declined 13 per cent and its payrolls 72 per cent."⁹² This was not the situation in the industries which were more competitive.

Concentration and price rigidity had its effect on consumer purchasing power.

As a result of the depression there was more general acceptance of the doctrine that "No amount of monetary stabilization or stimulation can make an economy function better or tolerably as it becomes increasingly monopolized and syndicalized. Restrictive measures, widely applied, must add up to serious aggregate restrictions, to unemployment, and to a stagnant or contracting economy."⁹³

Yet today we are in the middle of what appears to be another giant merger movement. "Almost every successful business enterprise is con-

⁹² Jackson, *op. cit.* supra note 90, at 578-79. In general it appears that wage rates in the concentrated industries declined less than wage rates in other industries; nevertheless, it appears that there was a greater decrease in total amounts paid to labor in the concentrated industries because production was more curtailed. Again, it can be urged that labor benefited from a greater expansion in production in the concentrated industries after the depression. The point is not one of unusual disparity between price and wage changes, nor between income and total wage payments, but rather that concentration cannot be justified upon the basis that concentration cushions the shock of depression on labor. Taking industries by groups, with Group A as the most concentrated and Group E as the least, the percentage of price and production declines and increases appears to be as follows:

GROUP	DECLINE, 1929-32		INCREASE, 1929-35	
	Price	Production	Price	Production
A.....	9.4	52.6	2.0	81.0
B.....	18.7	32.8	6.9	26.5
C.....	28.2	45.7	15.5	46.8
D.....	37.9	38.7	25.0	32.2
E.....	53.4	-0.4	55.7	-5.9

National Resources Comm., *The Structure of the American Economy* 148 (1939).

⁹³ Simons, *Economic Stability and Antitrust Policy*, 11 *Univ. Chi. L. Rev.* 338, 345 (1944).

stantly offered opportunities to buy other businesses."⁹⁴ During the war years 832 acquisitions occurred.⁹⁵ Preliminary figures for 1946 show that 80 acquisitions occurred during the first quarter of the year—more than have occurred in any year since 1931.⁹⁶ In 1945, 295 acquisitions occurred—more than any year since 1931. As a part of this movement,⁹⁷ the three largest liquor companies, in an industry already showing great concentration, acquired twenty-two distilleries, six wineries, one brewery, one cooperage firm and one carbonated water concern. One company in the drug and pharmaceutical industry—American Home Products—made thirty-one acquisitions between 1940 and 1945. The sometimes-said-to-be-related Sterling Drug, Inc., acquired ten companies. Seven of the largest steel corporations bought out more than thirty-five smaller companies between 1940 and 1945. United States Steel has entered the prefabricated housing field through its acquisition of Gunnison Housing Corporation. The Continental Can Co. acquired eight concerns. General Electric continues to expand with the purchase of Ken-Rad Tube & Lamp Corp. General Foods bought the Wilmington Packing Co. and the coffee business of the Paton Corp. In all it had at least nine acquisitions. Lever Brothers purchased the Pepsodent Co.—thus completing the entrance of the three big soap companies into the dental preparations field. The Safeway chain store company acquired three grocery chains. In chemicals, American Cyanamid acquired two, Du Pont three, and Monsanto five corporations. In the dairy industry, the Borden Co. added nine concerns. In banking, the TransAmerica Corp. acquired fourteen other banks.

III

Against this amount of concentration and the strength of the movement, one may wonder whether the Sherman Act will survive. Yet the act has survived despite constant attacks from the right and the left and has shown amazing vitality.⁹⁸ It is quite probable that the Sherman Act

⁹⁴ Note 69 *supra*, at 22.

⁹⁵ Note 69 *supra*, at 66.

⁹⁶ Note 77 *supra*.

⁹⁷ The specific acquisitions are set forth in Hearings on H.R. 2357, *op. cit. supra* note 69, and in *Economic Concentration in World War II*, *op. cit. supra* note 59.

⁹⁸ Montague, *Proposals for the Revision of the Antitrust Laws*, in Handler, *The Federal Antitrust Laws* 23, 62 (1932): "One of the peculiarities of the Sherman Act is the frequency with which, under expanding interpretations of the Supreme Court, the Act has successively been found to be amply effective to accomplish one after another of most of the things that economists, publicists, and even several presidents of the United States at one time or another have assumed were quite beyond the scope of the Act.

"Another peculiarity of the Act is that its periods of greatest growth have always imme-

has at last grown to meet the situation, or possibly has returned to its original purpose.

One result of the *Steel* and the *Harvester* cases was to bring the act under constant attack because of the dichotomy between the closely knit combination cases or integrated cases, and the loose combination or ordinary restraint of trade cases.⁹⁹ If percentage of control was to be considered, it was startling that trade associations representing 30 per cent of an industry, for example, should be prevented in the *American Column and Lumber* case from taking steps which one corporation having 50 per cent control could take.¹⁰⁰ It was suggested that the rigorous application of the act in the restraint of trade cases was forcing many companies into mergers and combinations.¹⁰¹ For a time it looked as though there might be some relaxation of the law in the restraint of trade cases. The *Appalachian Coals* case¹⁰² marks the bulge. Together with the *Steel* case, the *Appalachian Coals* case marks a trip into cartel territory. If the trend had continued, it seems probable that we would have had a cartel commission or at least a regulating commission in this country. As it was we came rather close to it in the NRA. The analogy between those cases and European cases marking the trip away from a liberal economic tradition by opening the door to a justification of price fixing and restrictive practices is very marked.¹⁰³ But apparently the *Appalachian Coals* case was only a bulge.

As a matter of fact the Sherman Act has become increasingly clear in

diately followed the periods when its critics have been most firmly convinced that the Act is hopelessly inadequate.

"History shows that the Sherman Act marches best and furthest to meet the changing conditions of economic life after it has been prodded and goaded by sincere critics who have become convinced that the Act has reached an impasse." *Ibid.*, at 62.

⁹⁹ Dr. Thorp in Part 1 TNEC Hearings 112 (1938); Hardy, Loose and Consolidated Combinations under the Antitrust Laws, 21 Geo. L. J. 123, 144 (1933); Jaffe and Tobringer, The Legality of Price-Fixing Agreements, 45 Harv. L. Rev. 1164 (1932); Handler, Industrial Mergers and the Antitrust Laws, 32 Col. L. Rev. 179 (1932); Levy, The Sherman Act Is Outworn, It Should Be Amended, 13 Va. L. Rev. 597 (1927).

¹⁰⁰ See the dissent of Mr. Justice Brandeis in *American Column and Lumber Co. v. United States*, 257 U.S. 377, 413-19 (1921).

¹⁰¹ *Ibid.*; Dr. Thorp in Part 1 TNEC Hearings 112 (1938); Arnold in Part 1 TNEC Hearings 113 (1938): "Isn't it perfectly true that the lack of the application of the Sherman Act to new situations has certainly contributed in this case rather than the Sherman Act, itself, has?"

¹⁰² *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933); see Rostow, Bituminous Coal and the Public Interest, 50 Yale L.J. 543 (1941); Hamilton, Coal and the Economy—A Demurrer, 50 Yale L.J. 595 (1941).

¹⁰³ Wolf, Business Monopolies: Three European Systems in Their Bearing on American Law, 9 Tulane L. Rev. 325 (1935); Kronstein and Leighton, Cartel Control: a Record of Failure, 55 Yale L.J. 297 (1946). Cf. Kronstein, Dynamics of German Cartels and Patents, 9 Univ. Chi. L. Rev. 643 (1942), 10 Univ. Chi. L. Rev. 49 (1942).

the restraint of trade cases. In the *Madison Oil* case¹⁰⁴ it became almost perfectly clear that a pricing agreement could not be justified by reference to ruinous market conditions. And in the *Fashion Originators' Guild* case,¹⁰⁵ it became clear that boycott or coercion could not be justified by explaining the reasonableness of the practice as a means of stopping design piracy. Today one can almost say that price fixing, coercion or division of territories¹⁰⁶ are in themselves illegal under the Sherman Act.

The *Madison Oil* case was a very interesting case to carry the clarification of the law in the loose combination cases, for it was not a typical price fixing case at all. The conspiracy was a conspiracy to remove distress gasoline from the market. If a combination to remove an oversupply (from the standpoint of those co-operating) could be illegal without regard for its reasonableness, then it would seem as though one company dominating the market to an amount equal to the combination might well be illegal. But Mr. Justice Douglas does not make the transition; instead he somewhat carefully points out that the rule of reason has no application to a price fixing case.¹⁰⁷

The gap between the restraint of trade cases and the close combination or monopoly cases, however, has been considerably narrowed. This was done in the *Alcoa* case.¹⁰⁸ The *Alcoa* case was prevented from being a typical monopoly abuse case by the findings of fact of the lower court judge. A reversal of these findings would have been an almost impossible work for an appellate court to have performed. Under these circumstances, the *Alcoa* case comes near to being a holding that size alone is the offense. To be sure there was great size and a great percentage of control, and in addition, as the court points out, in the past there had been some abuse of power. The decision could rest on what Judge Hand termed the gloss of Mr. Justice Cardozo in the *Swift* case¹⁰⁹ where power once abused becomes

¹⁰⁴ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), noted in 49 Yale L. J. 761 (1940).

¹⁰⁵ *Fashion Originators' Guild of America v. Federal Trade Comm'n*, 312 U.S. 457 (1941).

¹⁰⁶ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (C.C.A. 6th, 1898); *United States v. National Lead Co.*, 63 F. Supp. 513, 523 (N.Y., 1945); *United States v. Aluminum Co.*, 148 F. 2d 416, 443 (C.C.A. 2d, 1945); *United States v. General Dyestuff Corp.*, 57 F. Supp. 642 (N.Y., 1944).

¹⁰⁷ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 214 (1940): "As clearly indicated in the *Trenton Potteries* case, the *American Tobacco* and *Standard Oil* cases have no application to combinations operating directly on price or price structures."

¹⁰⁸ *United States v. Aluminum Co.*, 148 F. 2d 416, 443 (C.C.A. 2d, 1945).

¹⁰⁹ *United States v. Swift & Co.*, 286 U.S. 106, 116 (1932): "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly, but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past."

illegal as a continual threat. It could also rest on the words of Mr. Justice Cardozo because Judge Hand was willing to say that *Alcoa* was a monopoly. It was a monopoly because it had 90 per cent control. Judge Hand expressed himself as uncertain as to what the result would have been if the percentage had been lower.

But the decision does much more than declare what presumably any economist knows—namely that *the* example of a monopoly in American industry is a monopoly. Quite intentionally, it would appear, the decision brings the monopoly and the restraint of trade cases closer together. The opinion reads:

Starting, however, with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for, when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers: they are really partial monopolies.¹¹⁰

This does not mean of course that the percentage operative in a price fixing case as sufficient to give market control will be a sufficient percentage for a monopolization case. A specific intent to monopolize, which was not required in the *Alcoa* case, since a monopoly was found, might be a substitute when the percentage of control is not sufficiently high. But in its treatment of the monopoly problem the *Alcoa* court has focussed attention either on the intention to monopolize, where there is a plan and an attempt to do so, or on the percentage of control over the industry. It is to be noted that the Supreme Court has taken particular pains to give its approval to the *Alcoa* case.¹¹¹ It may be that the courts have passed from the abuse theory to a recognition that size and power are themselves the abuse.

At the same time it appears to be increasingly clear, despite the doubt expressed in the *Alcoa* case, that the percentage of control as a practical matter in most cases would not have to be anything like as high as the 90 per cent in the *Alcoa* case. There are two reasons for this. In the first place the area as to which the percentage is to be determined can be nar-

¹¹⁰ *United States v. Aluminum Co.*, 148 F. 2d 416, 427-28 (C.C.A. 2d, 1945).

¹¹¹ *American Tobacco Co. v. United States*, 66 S. Ct. 1125, 1140 (1946).

rowed. Not only was the percentage in the *Farmer's Guide* for example not as high as 70 per cent and perhaps no higher than 40 per cent, but if the whole United States had been taken into account the percentage would have fallen to something like 15 per cent.¹¹² The court was willing to narrow the area to those states in which the defendant conducted his business. Other monopolization cases show us that the area can be limited. The area was limited in the *Crescent* case¹¹³ where a local motion picture exhibition circuit was held to have combined to monopolize. In *Eastman Kodak Co. v. Southern Photo Materials Co.*,¹¹⁴ the monopolization was the refusal to sell supplies to a local photographic stock house, although it is true that this refusal was part of a general plan. In the *St. Louis Terminal* case,¹¹⁵ of course, the area was clearly local. In the *Klearflax* case,¹¹⁶ a district court found an illegal attempt to monopolize in the refusal of the manufacturer of linen rugs to permit any purchaser, and one in particular, to take away from it the sole right to supply the United States government.

Because it is clear that monopolization may be achieved in a local area, the position taken by the Attorney General in permitting the acquisition by United States Steel Corporation of the Geneva Steel plant seems questionable.¹¹⁷ Geneva Steel, with ingot capacity of 1,280,000 tons, has the largest capacity on the West Coast. The Attorney General was apparently influenced by the small percentage of total ingot steel capacity possessed by the United States Steel Corporation. It has 31.4 per cent of the national capacity. Even with the acquisition of Geneva, it has only 39 per cent of the total ingot capacity on the West Coast.¹¹⁸ But an entirely different picture is presented if one looks at the West Coast capacity for

¹¹² *Indiana Farmer's Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U.S. 268 (1934).

¹¹³ *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944).

¹¹⁴ 273 U.S. 359 (1927).

¹¹⁵ *United States v. Terminal R. Ass'n of St. Louis*, 224 U.S. 383 (1912).

¹¹⁶ *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32, 33 (Minn., 1945): "... it appears that the total amount of Klearflax's annual production . . . is less than one-half of one per cent of the total rug business in the entire Nation."

¹¹⁷ Letter to General E. B. Gregory, Administrator, War Assets Administration (June 17, 1946).

¹¹⁸ *Ibid.*: "I have also considered certain statistics regarding the capacity of the steel industry in the Far West. These statistics show that the Far West, exclusive of Geneva, has aggregate annual capacity of approximately 3,619,000 tons, or 17.3%. Total far western capacity, including Geneva, amounts to approximately 4,900,000 tons. If United States Steel Corporation acquires the Geneva Plant, it would have 1,911,000 tons, or 39% of the total capacity of the Far West. The total western capacity, however, amounts only to approximately 5.3% of the total capacity of the steel industry in the United States."

specific items. The most important item made at Geneva under United States Steel will be hot roll coils for tin plate. United States Steel Corporation is the largest seller of tin plate, and it, together with three other companies, has accounted for two-thirds of the tin plate producing capacity. On the West Coast it has all the tin plate capacity. With the acquisition of Geneva, United States Steel has 100 per cent of Western Production of tin plates, hot rolled sheet and hot rolled strips.¹¹⁹

The second reason is somewhat more interesting. As has been indicated the pattern for many American industries is control by a few companies over a substantial portion of the output. It would appear probable that where such control exists, perhaps in most cases, there is an illegal concert of action among the companies. Together their percentage of control is probably sufficiently high to spell illegality, and in any event it would be sufficiently high to give credence to a charge of an attempt to monopolize or of a combination or conspiracy to monopolize. This seems in any event to be the direction in which the law is moving, and it is a necessary development if anything is to be done about the increasing concentration in American industry.

It has been known for some time, of course, that an express agreement is not required in order to support a charge of combination or conspiracy in an antitrust case. The phrase "concert of action" has become something of a substitute for the agreement concept.¹²⁰ In the *Interstate Circuit* case,¹²¹ the Court was quite clear that no agreement was required. Knowledge of a general plan and action on it were all that were required.¹²² In the *Socony* case¹²³ participation in a general buying program constituted the heart of the arrangement. In the last *Paramount* case,¹²⁴ it was uni-

¹¹⁹ See *Western Steel Plate and the Tin-Plate Industry*, S. Doc. 95, 79th Cong. 1st Sess. (1945); Berge, *Economic Freedom for the West* 24 (1946).

¹²⁰ This seems to be so despite *United States v. Wayne Pump Co.*, 44 F. Supp. 949 (Ill., 1942), appeal dismissed, 317 U.S. 200 (1942).

¹²¹ *Interstate Circuit v. United States*, 306 U.S. 208 (1939).

¹²² *Ibid.*, at 226: "While the District Court's finding of an agreement of the distributors among themselves is supported by the evidence, we think that in the circumstances of this case such agreement for the imposition of the restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing the concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *Ibid.*, at 227: "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Cf. the argument for the appellants at 212.

¹²³ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

¹²⁴ *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 337, 339 (N.Y., 1946). See also *Goldman Theatres v. Loew's, Inc.*, 150 F. 2d 738, 743 (C.C.A. 3d, 1945); *United States v. Masonite Corp.*, 316 U.S. 265, 275 (1942).

formity of action which "spells a deliberately unlawful system." In the latest and second *American Tobacco* case,¹²⁵ the jury was permitted to find a combination and conspiracy to acquire and maintain the power to exclude competitors. The evidence was the evidence of common action, as for example, that when dealers received an announcement of a price increase from one competitor, other competitors refused to fill orders until they likewise raised their prices.¹²⁶ There was no direct evidence of any agreement. Concert of action to exclude others, even though no proof of actual exclusion was required, was sufficient.

In some ways the second *American Tobacco* case applies the *Alcoa* case, which it praises, to the domination-by-a-few type case. The Supreme Court was careful to point out in the tobacco case that it did not have before it the problem of the *Alcoa* case in that a combination and conspiracy had been charged. But in its determination that no actual exclusion need be shown and its emphasis on the power of the combination, the *Tobacco* case, like the *Alcoa* case moves away from the abuse theory to the size or power theory. The barrier placed against newcomers because of the advertising expenditures of the defendants is specifically mentioned, not as an abuse but as an illustration of the power of the combination.¹²⁷ It is true, of course, that the jury found a combination and conspiracy. And it may be that the courts have now made of this area something analogous to the resale price maintenance case where companies may walk the wavering line between permitted suggestions and unlawful agreements. But the *Interstate Circuit* case makes it clear that common activities engaged in with knowledge, will join all in the conspiracy, and no agreement for this purpose is required.

There would appear to be good reasons why the outsider should be protected against the power of a combination participated in by a few companies with majority control over an industry. The success of such a combination in competition with an outsider cannot be said to have resulted from the skill of the individual enterpriser, as the court states in the *Associated Press* case.¹²⁸ This is similar to the problem of dealing with the

¹²⁵ *American Tobacco Co. v. United States*, 66 S. Ct. 1125 (1946).

¹²⁶ *Ibid.*, at 1138. Or, for example, that "petitioners refused to purchase tobacco on these markets unless the other petitioners were also represented thereon." *Ibid.*, at 1135.

¹²⁷ "In each of the years 1937, 1938 and 1939, American, Liggett and Reynolds expended a total of over \$40,000,000 a year for advertising. Such advertising is not here criticized as a business expense. . . . Such tremendous advertising, however, is also a widely published warning that these companies possess and know how to use a powerful offensive and defensive weapon against new competition." *Ibid.*, at 1133.

¹²⁸ *Associated Press v. United States*, 326 U.S. 1, 15 (1945): "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common

integrated company. The integrated company and the company in combination may not use power to force all others into a similar pattern or, by excluding them, force them out of the industry. The trend reflected in the *Associated Press* case is somewhat analogous to the decision of Thurman Arnold in *Potts v. Coe*¹²⁹ dealing with the award of patents. It is the problem of whether the individual enterpriser is to be rewarded or whether the reward is to go to those who work only in combination and only by means of combination have succeeded.

The spelling out of an unlawful combination and conspiracy to monopolize from concert of action and by common practices is continued in the last *Paramount* case. This would appear to be the theory to justify numerous cases. It would for example justify the government's case against the twenty-odd major oil companies if the alleged common practices exist in that industry.¹³⁰ Here the outsider is at a decided disadvantage without ownership of pipelines, barred by restrictive arrangements, if the charges are correct, from access to the market, and kept out of a type of banking system by which gasoline is exchanged among the majors in order to avoid the expense of shipment.

The integration cases probably will not move into the size and power classification and away from the abuse theory so easily. The integration

plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* 'enterprise and sagacity'; such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination." Cf. *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626, 677 (Ill., 1946).

¹²⁹ 140 F. 2d 470, 474 (App. D.C., 1944).

¹³⁰ *United States v. American Petroleum Institute*, Civil Action No. 8524, pending in the District of Columbia. It has been reported that the Department of Justice might abandon this suit in favor of a series of separate actions. Such a step would appear to ignore both the trend of the cases and the economic situation which is alleged to exist. The complaint itself set forth the theory of an illegal combination of dominant companies. A paragraph of the complaint reads:

"Each of the integrated companies is a large combination of capital and individuals possessing great economic power, including the power to handicap or even stifle effective competition by the non-integrated companies. Moreover, all of these integrated companies operate in effect as one unit under substantially identical business policies and practices. Through the control of oil reserves, wells, transportation and marketing facilities, the twenty-two companies have been able to restrict the production of independent producers, exclude independents from the use of transportation and marketing facilities and fix the price of petroleum and its products. In an attempt to prevent such restraints, the government has successfully prosecuted numerous actions against the majors. However, such piecemeal prosecutions have not resulted in the restoration of free competition or prevented the recurrence of such arrangements because the power inherent in the combinations continued to exist."

problem has been present in a surprising number of cases, as for example *Standard Oil*, *Swift*, *International Harvester*, *General Motors*,¹³¹ and *Pullman*.¹³² Where there is 100 per cent control, as was the case in *Pullman*, it would seem that today a court might take the step not taken in the *Pullman* case and declare the integration to be an illegal monopolization without more. Usually in an integration case, however, the effort is made to use ownership of one part of an industry to dominate another part—at least that is what separates the integration case from the straight monopolization case. Here an intent to monopolize may have to be found, and may well be found only in a plan recognized as such because of restrictive arrangements, price cutting or fraud—the earmarks of the abuse category. The problem is, or probably will be, dramatically presented in the chain store cases where percentage of control over an industry is low—if, for example, 25 per cent is low, and where it seems quixotic to find illegality based on what appear to be trivial abuses.¹³³ To base illegality on such abuses appears to be an indirect way of talking about the vice of integration. The case one has in mind, for example, is the *Atlantic and Pacific Tea Company* case.¹³⁴ The evidence presented in the opinion of the court is convincing as to abuses. One wonders if the abuses are required or whether the structure itself will always produce abuses of that order.¹³⁵

One may guess also that there will be a change in the patent monopolization cases. The *Hartford* case¹³⁶ suggests a form of relief for such cases reminiscent of the *St. Louis Terminal* case. It is not at all clear that such relief is adequate. Such relief sanctions illegal practices of the most dangerous type by making the abuse of a patent profitable not only up to the very day that a decree becomes effective but also by preserving in the form of reasonable royalty the advantage which has been obtained by the combination of patent monopolies. A somewhat more automatic and effective relief may operate, however, if the implication of the patent

¹³¹ *United States v. General Motors Corp.*, 121 F. 2d 376 (C.C.A. 7th, 1941).

¹³² *United States v. Pullman Co.*, 50 F. Supp. 123 (Pa., 1943).

¹³³ Cf. 60 Pol. Sci. Q. 577 (1945).

¹³⁴ *United States v. New York Great Atlantic & Pacific Tea Co.*, 67 F. Supp. 626 (Ill., 1944).

¹³⁵ "It is easy to make such excuses with plausibility when a business is so huge," Mr. Justice Cardozo in *United States v. Swift & Co.*, 286 U.S. 106, 118 (1932).

¹³⁶ *Hartford-Empire Co. v. United States*, 323 U.S. 386 (1945). The relief was compulsory licensing under abused patents. Cf. Mr. Brandeis' testimony before the Senate Committee on Interstate Commerce, op. cit. supra note 29, at 1266: "Now, if a decree of dissolution should be entered, or a decree entered declaring the defendant guilty of violating the law, and resulting in injunctions of one kind or another, there ought to be express power in the court to declare invalid a patent used for an illegal purpose."

abuse cases is carried out. It is illegal to tie one patent to another.¹³⁷ If this is so, then it would appear to be illegal to grant a license under one patent conditioned upon the licensee taking a license under another patent. The *Paramount* case adopts this view of the law in connection with patents and makes it effective as to copyrights.¹³⁸ It thus appears that patent pools in the future cannot be built on a structure where a license to the pool is all that is allowed, but presumably if any license is offered, then the licensee must be permitted, if he desires, to obtain a license to any single patent.¹³⁹

IV

Up to the present time the antitrust laws have not been successful in the monopolization field. That is to say, not only has concentration of industry not been prevented but the trend toward greater concentration continues. It must be admitted further that the interpretations of the *Alcoa* and *Tobacco* cases are problematical. It may well be that the Sherman Act will finally prove to be an insufficient instrument to handle so important a problem of the economy. It is not that a great amount of concentration is not possible, nor that the Sherman Act must require all that is possible. An act which would keep concentration from becoming more excessive and yet not make for more competition might be much more compatible with democracy than a measure creating some control over industry.

For most of the history of the Sherman Act such controls have been suggested. The suggestions come from both the right and the left. At one extreme is the suggestion that a commission be authorized to regulate monopolies by power to fix prices when necessary and authorized to permit reasonable agreements. That in effect was the suggestion of Judge

¹³⁷ *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1939); see *Mercoid Corp. v. Honeywell Co.*, 320 U.S. 680 (1944). In *Stokes & Smith v. Transparent-Wrap Machine Corp.*, 156 F. 2d 198 (C.C.A. 2d, 1946), it was held that an agreement to assign improvement patents tied to a license was an illegal agreement. Under the particular facts of the case the court stressed the situation which the licensee would be in after the assignment. His situation would be that he would have to get another license to continue in business and this was illegal as tying one license to another. The Supreme Court, speaking through Mr. Justice Douglas, reversed, 15. L.W. 4184 (Feb. 3, 1947), but on the ground that it was not illegal per se to require the assignment of patent rights in return for a license. The Supreme Court, therefore, did not treat the case as one equivalent to the tying of one patent to another. Nevertheless, the language of Mr. Justice Douglas in the *Transparent-Wrap* case, at 4186, "A patent is a species of property," is to be compared with the language of the Justice in his dissenting opinion in *Special Equipment Co. v. Coe*, 324 U.S. 370, 382 (1944), "It is a mistake therefore to conceive of a patent as but another form of private property."

¹³⁸ *United States v. Paramount Pictures, Inc.*, 66 F. Supp. 323, 349-50 (N.Y., 1946).

¹³⁹ Presumably the penalty will be inability to sue upon the patents until "the consequences of that practice have been fully dissipated," *B. B. Chemical Co. v. Ellis*, 314 U.S. 495, 498 (1942).

Gary in 1912.¹⁴⁰ Another type of suggestion is to have either federal licensing or federal incorporation. Both of these were urged in 1912 also.¹⁴¹ These are of course only devices. They might work by imposing a limitation on the size of corporations, their right to hold stock in other corporations, or they might spell out specific practices which would be illegal. As a matter of fact it is rare that some such proposal is not before some congressional committee. Usually proposals to strengthen the antitrust laws in effect are coupled with proposals to weaken them at the same time—as the proposal to increase the power of the Federal Trade Commission to cover asset acquisitions is coupled with a procedure for finding acquisitions to be legal and barring prosecution.¹⁴² Usually such proposals also involve some action by some commission, new or old. It seems a good guess that unless the Sherman Act is more effective in monopolization cases than it has been—that is to say in economic effect—some such legislation will pass. The prediction is hazardous because a depression will probably bring in another NRA in any event.

But if the Sherman Act is to be made effective in monopolization cases, something must be done about the relief secured from the courts. The position taken by the court in the last *Paramount* case is illustrative. The court found an illegal combination and conspiracy to restrain and monopolize. It refused to grant divestiture of the motion picture theaters from the owner producers. It did so even though it stated that in 40 per cent of the cities having 100,000 or more persons, the five defendants had no competition in first-run houses. It stated that it could not grant divestiture because the five majors could not be treated collectively to support a charge of monopolization. Yet in specific areas such monopolization had been achieved. There is no merit in the ceremony of finding a violation unless something like adequate relief is to be granted. The courts have consistently underestimated the requirements for adequate relief. It is not that atomization is desired. It is silly to speak of atomization in the face of the units that have been preserved, as for example in the *Tobacco* or in the *American Can* cases.¹⁴³ In this respect the courts have performed their function with a weariness suggesting that they believe it would be

¹⁴⁰ Note 29 supra, at 649.

¹⁴¹ Note 29 supra, at 453.

¹⁴² Note 41 supra, at 49-50.

¹⁴³ An entirely different approach to the problem of relief is reflected in Mr. Justice Douglas' opinion in *United States v. Crescent Amusement Co.*, 323 U.S. 173, 186 (1944): "The pattern of past conduct is not easily forsaken. Where the proclivity for unlawful conduct has been as manifest as here, the decree should operate as an effective deterrent to a repetition of the unlawful conduct and yet not stand as a barrier to healthy growth on a competitive basis."

more appropriate for a commission to do the job.¹⁴⁴ There is merit in not having a commission charged with what would look like the duty of supervising industry. Conceivably, however, a commission might be charged with the duty of making recommendations to a court as to the appropriate form of relief after violation has been found. The courts have not made use of the Federal Trade Commission for this purpose and there probably is some merit in creating an office separate from any agency having regulatory functions for this purpose.¹⁴⁵

The Sherman Antitrust law embodies a tradition against monopolies. That tradition is confused. It is not clear whether we are against monopolies or only against their abuses. For almost all of the history of the act, it has been applied as a practical matter only against the abuses. This has permitted an enormous and growing amount of concentration in economic power. It has permitted two great merger movements—each of which ended in a depression. We are now in the middle of a third great merger movement. It is doubtful if a free and competitive society can be maintained if the direction of concentration is to continue. It is surely doubtful whether the antitrust method of regulation will remain if it is not to be more effective. Today, however, as a result of an increased awareness of the monopoly problem, and as a result of the *Alcoa* and *American Tobacco* decisions we appear to have a new interpretation of the act, closer probably to its original intention, which can give the act strength against monopolies as such, and also against control by three, four or five corporations acting together. If the concentration problem in this country is to be dealt with by measures themselves not incompatible with free enterprise, it is probable that the hope lies in the new interpretation of the Sherman Act and an increased awareness of the responsibility of the courts to give adequate relief.

¹⁴⁴ Cf. Mr. Justice Roberts in *Associated Press v. United States*, 326 U.S. 1, 47 (1945).

¹⁴⁵ Compare the functions of the Surplus Property Board in *United States v. Aluminum Co.*, 148 F. 2d 416, 446 (C.C.A. 2d, 1945).