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## A Two Level Anti-Monopoly Law\*

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THE antitrust law with respect to monopoly appears to be developing on two levels, in part no doubt because of an uncertainty as to what monopoly is or how it is to be recognized. At one level, monopoly itself is deemed illegal monopolizing without any showing of abuses.<sup>1</sup> At the other level, power together with its use in a particular way must be shown. The so-called integration cases are to be found at both levels. Where monopoly power itself is deemed illegal, the assumption may be that monopoly, since it gives to the entrepreneur the power to change prices by curtailing his own production, inevitably leads to higher than competitive prices. The abuse theory is much more likely to emphasize conduct injurious to competitors, and so prices which are too low may cause illegality. The assumption behind the abuse theory is often stated to be that such exclusionary tactics have as their purpose the enjoyment of monopoly once it is achieved. Whatever the rationale, the abuse theory is developing into a vague system of law restricting the activities of large enterprises, or enterprises so situated that they are deemed to have monopoly power although the power itself may not be illegal.

### Illegality of Monopoly without Abuse

The theory of the illegality of monopoly without abuse rests on the *Alcoa* case,<sup>2</sup> decided by the Court of Appeals for the Second Circuit. The relative size deemed monopoly was production or control of over 90% of the relevant market. The court stated it was

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1. The implication of the theory of power as illegal monopolizing, including its possible application to industries where more than one but a relatively few firms control a large portion of the market, may be traced in the following articles: Levi, *The Antitrust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153 (1947); Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. OF CHI. L. REV. 567 (1947); Harbeson, *A New Phase of the Antitrust Law*, 45 MICH. L. REV. 977 (1947); Rostow, *Monopoly Under the Sherman Act: Power or Purpose?* 43 ILL. L. REV. 745 (1949); Johnston and Stevens, *Monopoly or Monopolization—A Reply to Professor Rostow*, 44 ILL. L. REV. 269 (1949); Rahl, *Conspiracy and the Antitrust Laws*, 44 ILL. L. REV. 743 (1950).

2. *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945).

doubtful, thinking no doubt of the *International Harvester* case,<sup>3</sup> whether sixty or sixty-four percent would be enough, and concluded that "certainly thirty-three percent" would not be. The automaticity of the percentage test, possibly implied by the Learned Hand opinion, has been alleviated by the general statement of the Supreme Court in the *Columbia Steel* case<sup>4</sup> where it was said, "We do not undertake to prescribe any set of percentage figures." The factors there set forth to be examined were: "the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirement or purpose to monopolize, the probable developments of the industry, consumer demands, and other characteristics of the market." These broad standards, among others, were applied by Judge Knox in the remand of *Alcoa*. Despite the result in *Columbia Steel*, there is reason to believe that these standards suggest not that 90% control would be inadequate by itself to spell illegality, but that, on the contrary, under some circumstances, 64% and even 33% might bring into play some of the anti-monopoly restrictions of the antitrust laws.

The significant step taken by the *Alcoa* opinion is in its finding of monopolizing independent of illegal acts, despite the price squeeze, or of any monopolistic purpose, other than a purely formal one, and where the size has been achieved without combination. Chief Justice White's much quoted paragraph in the old *Standard Oil* case<sup>5</sup> that size gives rise, "to say the least, to the prima facie presumption of intent and purpose" to monopolize does not go as far as the *Alcoa* case because the size in *Standard Oil* was achieved through combination.<sup>6</sup> The *International Harvester* and *United States Steel* cases, although variously interpreted, furthered the belief that even with combination, if abusive acts or purposes were abandoned sufficiently prior to the bringing of the antitrust action, the Government would lose its cause or would at least go remediless. The kind of remedy perhaps available is suggested by the unaccepted offer of the District Court in the *United States Steel* case to retain jurisdiction so that if illegal acts were resumed, they then could be restrained.<sup>7</sup> Judge Cochran in *Patterson v. United States*,<sup>8</sup> prior to these cases, had in fact said that "monopolizing ceases whenever the pugnacious competitor ceases to fight" and thereafter "holding onto the spoils of victory" is not monopolizing.

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

4. *United States v. Columbia Steel Co.*, 334 U.S. 495, 527 (1948).

5. *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1, 75 (1911).

6. Cf. Rostow, *Monopoly Under the Sherman Act: Power or Purpose*, 43 ILL. L. REV. 745, 754-755 (1949).

7. *United States v. United States Steel Corp.*, 251 U.S. 417, 445 (1920); *id.*, 223 Fed. 55, 161 (D.N.J. 1915).

8. *Patterson v. United States*, 222 Fed. 599, 625 (6th Cir. 1915).

Judge Hand's opinion removes combination, illegal acts, or intent, past or present, as indispensable elements in the crime of monopolizing, although of course the exception in favor of those who have become monopolists by accident and have had monopoly thrust upon them is there to be enlarged.<sup>9</sup>

Judge Hand arrived at his conclusion in part by analogizing the power of the individual monopolist to the power inherent in price fixing conspiracies. That portion of Hand's opinion together with his statement that the exclusion of competitors would result from the monopolist embracing new opportunities, and was not to be limited to maneuvers "not honestly industrial," was quoted with approval by the Supreme Court in the second *Tobacco* case.<sup>10</sup> Since that case involved a jury finding of monopolization by three tobacco companies, each of which produced considerably less than one third of the national domestic cigarette production, but which were found to have been linked together in a combination or conspiracy to monopolize, the possible implications of the *Alcoa* decision in the so-called oligopoly area were immediately apparent. For if in such areas the power possessed by the relatively few dominating companies, having common practices could be aggregated, the coverage of the combined power over the market might well be as in tobacco, between 60% and 80%, and in some cases higher.

The concert of action doctrine of *Interstate Circuit*,<sup>11</sup> to say nothing of conscious parallelism, would make easier the finding of conspiracy on which such an aggregation could be based. The *Paramount* case gave some support to this theory. The District Court had first found that the five major producers distributing and exhibiting films could not be treated collectively to establish claims of general monopolization in exhibition.<sup>12</sup> The Supreme Court, noting that there had been a finding of an attempt to monopolize in the fixing of prices, granting of unreasonable clearances, block booking, and other restraints found unlawful, sent the case back for a determination of what the results of the conspiracy were in the first-run field nationally or by localities.<sup>13</sup> Upon the remand

9. 148 F.2d at 429-431.

10. *American Tobacco Co. v. United States*, 328 U.S. 781, 813, 814 (1946).

11. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). At 226, Mr. Justice Stone states: "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 restrictions upon subsequent-run exhibitors was not a prerequisite to an unlawful conspiracy. It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." See *United States v. Masonite Corporation*, 316 U.S. 265, 275 (1942); Sunderland, *Changing Legal Concepts in the Antitrust Field*, 3 SYRACUSE L. REV. 60, 68 *et seq.* (1951).

12. *United States v. Paramount Pictures*, 66 F. Supp. 323, 353 *et seq.* (S.D. N.Y. 1946).

13. 334 U.S. 131, 168-175 (1948).

of this case, the District Court explained<sup>14</sup> that its original findings had been made in the light of the remedies it had proposed. It now held "in respect to monopoly power, we think it existed in this case . . . the defendants were all working together."<sup>15</sup> In its original opinion, it had said that "in about 60 percent of the 92 cities having population of over 100,000, on which the government mainly relies to prove its case, there are independent first-run theatres in competition with those of the major defendants, except so far as it may be restricted by the trade practices that we have criticized."<sup>16</sup> It now said, "if viewed collectively the major defendants owned in 1945 at least 70 percent of the first run theatres in the 92 largest cities and the Supreme Court has noted that they owned 60 percent of the first run theatres in cities with populations between 25,000 and 100,000. As distributors, they received approximately 73 percent of the domestic film rentals from the films except Westerns, distributed in the 1943-44 season. These figures certainly indicate, when coupled with the strategic advantages of vertical integration, a power to exclude competitors from these markets when desired."<sup>17</sup> Accordingly, it ordered divestiture of exhibition from production and distribution.

Thus starting with the *Alcoa* opinion, and continuing through *Tobacco*, *Paramount*, and *Columbia Steel*, the antitrust laws have been brought into more direct relationship to the problem of size, whether the relative size of one company which dominates, or the domination by a few, and also to what is deemed to be the problem of integration. The direction of the Hand opinion was to remove from the monopoly achieved case, the questions of intent and abuse. The emergence of the *Alcoa* theory of illegality *per se* in the monopoly field necessarily raises questions as to the status of the older cases which proceeded on an abuse theory, and of the comparatively few recent cases which emphasize the way power has been used rather than the existence of the power itself. The abuse theory standing by itself was a different theory than one which now accompanies and supplements a doctrine of illegality *per se*. It appears that *Alcoa* has not destroyed the abuse theory, although it has changed it, perhaps by setting an upper limit for monopoly power, or by making it necessary to recognize that, contrary to the implications of *Alcoa*, in some areas monopoly power is lawful as long as it is properly used. A concomitant of this is the recognition that where there is size, there may be restrictions on its use, even

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14. 85 F. Supp. 881, 886 (S.D. N.Y. 1949).

15. *Id.* at 894.

16. 66 F. Supp. at 354.

17. 85 F. Supp. at 894.

though in the particular case no court will deem the size by itself (in accordance with *Alcoa*) to be illegal. A kind of public utility or unfair competition theory thus is a part of the abuse theory.

### Continued Existence of Abuse Theory

The continued existence of an abuse theory is shown by the fact that the second *Tobacco* case, despite the deference paid by it to *Alcoa*, refers to *Alcoa* as involving the use of unlawful means to establish or maintain a monopoly.<sup>18</sup> Moreover the second *Tobacco* case rests on a finding of conspiracy, which in addition to avoiding the problem of monopoly unwittingly thrust upon an enterprise, also can import into the proceeding questions of intent.<sup>19</sup> The questions of purpose and normal business conduct are re-established as of importance by the enumeration of standards in the *Columbia Steel* case. Undoubtedly the continuing vitality of the abuse theory is based in part on a recognition that there is a kind of legerdemain, which cannot be helped, when the percentage test to find illegal size is applied. A more striking difficulty with the size illegal in itself theory is that the law will not entirely accept as its standard for determining what size should be illegal the standard implicit in *Alcoa*; namely, that size which gives the enterprise the power to change prices by curtailing its own production. This leaves a gap which the abuse theory must fill. So far as cases are concerned, the emerging abuse theory rests on two of the cases from which *Alcoa* itself grew; the *Corn Products*<sup>20</sup> and the *Swift* cases.<sup>21</sup> These are supplemented by the *Atlantic and Pacific* case<sup>22</sup> the remand of the *Alcoa* case,<sup>23</sup> the *Griffith* case,<sup>24</sup> and the *Lorain Journal* case.<sup>25</sup> The modern abuse theory runs into difficulty when it is asked whether it is based in application on a finding of intent, or of effect, or the use of specific devices. The lack of clarity in this respect gives the law a flexibility which emphasizes that if it can be said that the antitrust laws are developing so as to have one law for the large and another for the small, this is more likely to be found to be so, as an effective matter, where the abuse theory is applied, with its growing restrictions on the use of size, than in the more limited area of *Alcoa*.

18. 328 U.S. 781, 786 (1946).

19. See Dession, *The Trial of Economic and Technological Issues of Fact: I*, 58 YALE L. J. 1019 (1949).

20. United States v. Corn Products Refining Co., 234 Fed. 964 (S.D. N.Y. 1916).

21. United States v. Swift & Co., 286 U.S. 106 (1932).

22. United States v. New York Great Atlantic & Pacific Tea Co., 173 F.2d 79 (7th Cir. 1949).

23. United States v. Aluminum Co. of America, 91 F. Supp. 333 (S.D. N.Y. 1950).

24. United States v. Griffith, 334 U.S. 100 (1948).

25. Lorain Journal Co. v. United States, 342 U.S. 143 (1951).

### Difficulties in the Application of Relative Size Theory

The application of the illegality *per se* of size is difficult because the automaticity of the percentage test is illusory. The percentage test by itself requires an evaluation of market conditions. Monopoly control is only meaningful in terms of a market area and for designated products. It may seem automatic to have results follow a calculation, but the calculation itself is a battle-ground reflecting arguments as to the market. In the old *American Can* case,<sup>26</sup> the court based its percentage on a market excluding, in the main, cans which were made for concerns for their own use; by this means, as the court was aware, one third of the cans were eliminated from the calculation. As is well known, Judge Hand got away from the doubtful figure of 64% in the *Alcoa* case, by excluding secondary aluminum. In the *Columbia Steel* case, the percentage figure chosen by the Court was that Consolidated's purchase of rolled steel products, using the eleven state market area, was only three percent. It would perhaps have been more reasonable to have limited this to plates and shapes which would have brought the percentage up to 13%, or for the nine state area up to approximately 21%, or, if limited to California plate purchases then up to 34% in 1937. Using figures after 1937, the percentages would run considerably higher, and for plates alone in the eleven state area might get up as high as 48%.

The difficulties inherent in the percentage test can be seen in the handling of the relief in the *Alcoa* case. The exclusion of secondary aluminum by Judge Hand was accomplished by pointing out that the secondary had come from Alcoa, and that if Alcoa "was as far sighted as it proclaims itself,"<sup>27</sup> Alcoa in producing ingot today would take into account the amount which would come back later as secondary. A less subtle analysis might go on the basis that at any one time, Alcoa must find itself competing with whatever will come out. It is not clear whether Hand's analysis was intended to be factual in this regard, or a kind of legal conclusion. His citation of the legal rule that a patentee may not control a patented item after he has sold it, and yet is deemed to have a monopoly on it, points in the direction of a general legal rule. But Judge Knox in applying the opinion to the determination of relief chose to take the question of ability to control the quantity of secondary aluminum produced by Alcoa as a question of fact.<sup>28</sup> He therefore decided that since Alcoa had not been producing for war production, it could not limit its output in the same way as it

26. *United States v. American Can Co.*, 230 Fed. 859, 899 (D. Md. 1916).

27. 148 F.2d at 425.

28. 91 F. Supp. at 357 *et seq.*

might have done previously, and that therefore it did not exercise that kind of control over secondary which, in the market calculation would remove secondary as competing material controlled by others. Having decided that much, Judge Knox then appears to abandon the percentage test. If he had held to the percentage test, with secondary regarded as competing and had included Aluminium Limited's production of primary aluminum in the total given to Alcoa, he would have arrived at the uneasy figure of 64%. On the other hand, if he had combined the production of the two companies, and had not included secondary as a competitive factor in the market, he would have had an argument for the disposition by the shareholders of Alcoa of their stock interests in either Alcoa or Aluminium (which he in fact ordered), because Alcoa and Aluminium together had 70% of the 1948 production of primary aluminum. This figure is arrived at by including the total Aluminium production; it would be diminished to 58%, however, if only that Canadian production expected to come into the United States market were included.

The difficulties inherent in the application of the percentage test arise in part precisely because the analysis of production or capacity control must be in terms of a particular market and the competitive forces within it. The application of the monopoly concept on an illegality *per se* basis is therefore not simplified by the broadening analysis of Justice Reed in the *Columbia Steel* case or by the doctrine of workable or effective competition set forth by Judge Knox in the remand of the *Alcoa* case.<sup>29</sup> There is a further problem in that the percentage of control which makes for illegality is uncertain, and so far as it is certain does not embrace the same amount of power which the underlying rationale would have it cover. An eminent economist, firmly committed to the preservation of the competitive system, once wrote, "one may suggest tentatively, that in major industries no ownership unit should produce or control more than five percent of the total output."<sup>30</sup> The law has not adopted, and, it is safe to say, will not adopt, without further legislation, any such embracing standard, although it may be recalled that little more than five percent was involved in the combined purchases which made for price fixing illegality in the *Socony-Vacuum* case.<sup>31</sup> A law which uneasily permits great relative size and bigness, but with a lack of assurance as to where monopoly power is to be found moves naturally to a restriction on

29. *Id.* at 340.

30. SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 319 (1948). See Hale, *Size and Shape: The Individual Enterprise as a Monopoly*, [1950] U. OF ILL. L. FORUM 515.

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



the use of permitted power. Perhaps for small industries the percentage of control may be higher with legality than with the large or major industries. The doctrine of the *Alcoa* case carries with it the suggestion of such a division in the exemption which it permits for the enterprise which has had monopoly thrust upon it, as, for example, where a market is "so limited that it is impossible to produce at all and meet the cost of production except by a plant large enough to supply the whole demand."<sup>32</sup> Thus for some industries and for some markets, even the single firm may be all that is expected. At all events the uncertainties of the law with respect to the relevance in a monopoly proceeding of bigness which carries with it great power, although the relative size of the particular enterprise within the market may not be outlawed automatically, is an invitation for the continuation and creation of a law of regulated activity and of unfair competition.

### Concern of the Act with Size and Its Abuse

The Antitrust Act has, of course, always been concerned with the problem of bigness and the abuse of permitted size. This is no new preoccupation, and it goes beyond an inquiry into relative size within a defined market. The old suggestion that there might be one law for the large and another for the small is old. As early as 1904, in his dissent in the *Northern Securities* case,<sup>33</sup> Justice Holmes wrote critically of what he termed "a natural feeling that somehow or other the statute meant to strike at combinations great enough to cause anxiety on the part of those who love their country more than money, while it views such little ones as I have supposed with just indifference. This notion, it may be said somehow breathes from the pores of the Act, although it seems to be contradicted in every way by the words in detail. And it has occurred to me that it might be that when a combination reaches a certain size it might have attributed to it more of the character of a monopoly merely by virtue of its size than would be attributed to a smaller one." He found that argument inapplicable to the case at hand because great size was inevitable for railroads, the combinations which made them were presumably not formed for the purpose of excluding others, and finally even "a small railroad will have the same tendency to exclude others" as would a great one.

The Act has been concerned with the behavior of large scale enterprise not merely from the standpoint of its ability to raise

32. 148 F.2d at 430.

33. 193 U.S. 197, 407, 408 (1904).

prices by curtailing its own production which is the central theme of the *Alcoa* opinion, but also from the standpoint of the ability and tendency of the enterprise to charge prices deemed too low, which is one earmark of the abuse or unfair competition theory. Price wars were, of course, one of the abuses charged against the older monopolies. In the *Trans-Missouri Freight Association* case,<sup>34</sup> Justice Peckham, writing about price fixing combinations, said "In this light it is not material that the price of an article be lowered. It is in the power of the combination to raise it, and the result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers, who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein." One item against the American Tobacco Company was that it had lowered the price of plug below its cost.<sup>35</sup> In the second *Tobacco* case, the Court reports that the combination lowered the price of cigarettes to diminish the competition of the ten-cent brands.<sup>36</sup>

The *Corn Products* case is remembered today chiefly because of Judge Hand's statement "the opinions of the Supreme Court certainly seem to indicate" that it is the power of a combination and not its exercise which is the test of its legality<sup>37</sup>—the precursor of his position in the *Alcoa* case. The opinion, however, is mostly devoted to showing monopolistic intent and effect, or, in other words, abuses. As to intent, Judge Hand was aided, because as he said, "the officers of the Corn Products Refining Company apparently had a custom of communicating with each other by type-written, unsigned memoranda."<sup>38</sup> He remarked that these memoranda were preserved "for some strange reason," and "it may be safely assumed that evidence such as was by chance available here of the actual purposes of those in charge will never again exist." Further as to the intent and the effect, and perhaps use of power, he found that the "defendants having control of the prices at which glucose and starch could be manufactured, lowered prices to a sum less than a fair profit, for the purpose of securing the trade to themselves, and harassing, annoying and, if possible, driving out their competitors."<sup>39</sup> Significantly Judge Hand found the defendants had power to lower prices as distinguished from the power to raise them.<sup>40</sup> In the *International Harvester* case,

34. 166 U.S. 290, 324 (1897).

35. 221 U.S. 106, 160, 182 (1911).

36. 328 U.S. 781, 806 (1946).

37. 234 Fed. 964, 1011 (S.D. N.Y. 1916); see also *id.* at 1012.

38. *Id.* at 978.

39. *Id.* at 1010

40. *Id.* at 994.

the Supreme Court in refusing to give further relief to the Government emphasized that "The International Company did not at any time reduce its prices below replacement cost." This was in answer to the argument of the Government that the International Company, with its large capital credit, resources, profitable sidelines, and subsidiaries, was able, in times of depression, to sell its machines at cost, generally lower than that of its competitors.

The *Swift* case emphasizes this fear of low prices. The defendants had by consent been enjoined from dealing in groceries and from engaging in the retail meat business. They now petitioned for relief, pointing to changed conditions. One changed condition, they wrote in their brief, was the new buying power of a quantity purchaser. They said, "Because of the advent of the chain store into the retail meat business, this buying power is now exercised against the packing industry."<sup>41</sup> They quoted a witness who testified that "a person who has a buying power of five percent of the available supply of meat is in a very advantageous position," and they conclude, "There is no doubt that both Swift and Armour are subject to the necessity of selling on a lower basis to chain organizations." The Supreme Court of the District of Columbia refused to modify the decree with respect to retail operations, because, as the opinion states, "The petitioners admit that if they go into the retail business they must buy out many in the business, they will necessarily compete with other retailers, now their customers, and can by the elimination of salesmen and in other ways, reduce the cost of their products to their own retail stores."<sup>42</sup> Justice Cardozo refused to permit the modification of the decree with respect to the handling of groceries, in part, because the ownership of refrigerator cars and branch houses as well as other facilities, would enable the defendants to distribute substitute foods and other unrelated commodities "with substantially no increase of overhead."<sup>43</sup>

The force of the *Swift* case is, of course, lessened because Justice Cardozo was interpreting the Sherman Act in the light of a petition to revise a consent decree. Judge Hand in *Alcoa*<sup>44</sup> relies on *Swift* as a gloss on the *Steel* case, and quotes Cardozo's sentence that "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." Yet the *Swift* case imposes restrictions on the use of size where presently there was no monopoly, for

41. Brief for Petitioner, pp. 116, 117, *United States v. Swift & Co.* (D.C. Sup. Ct. 1931) (unreported).

42. Transcript of Record, p. 1058, *United States v. Swift & Co.*, 286 U.S. 106 (1932).

43. 286 U.S. at 118 (1932).

44. 148 F.2d at 430, quoting from 286 U.S. at 116.

Justice Cardozo goes on to say in the opinion that the "meat monopoly has been broken, for the members now compete with one another. The size of the component units is substantially unchanged."<sup>45</sup> The restrictions were imposed presumably to prevent the abuse of size otherwise lawful, and a significant abuse would have been low prices. Size, efficiency, fear of past aggression, and the diffusion of responsibility which comes with size, are the predominant themes of the opinion. The opinion serves to reinforce the doubt expressed by Judge Lindley in the *Atlantic and Pacific* case<sup>46</sup> as to "whether we ever needed the Robinson-Patman Law . . .," and unless the force of *Swift* has been changed by *Alcoa*, the *Swift* case is a strong reminder that we have a two-level anti-monopoly law.

Both the *Corn Products* and *Swift* cases involve problems of integration. The Corn Products Company was held to have gone into the candy business at less than cost in order to impede the business of the Clinton Sugar Refining Company, a subsidiary of the National Candy Company, and to have attempted to have monopolized the trade in mixed syrups. The government indeed charged that the Company attempted to drive down the price of the main products, meanwhile making up the profits necessary for their own dividends by the sale of their package starches, grape sugar, and their other specialties, and as to this Judge Hand states, "That the defendants contemplated just such a maneuver and supposed themselves capable of carrying it out, their private correspondence abundantly proves."<sup>47</sup> In the *Swift* case, the District Judge gave as one reason for refusing to modify the decree to permit retailing, the testimony of the president of Armour and Company.<sup>48</sup> He testified that the possession of the liberty to engage in that business would be useful because "I can conceive of a situation developing around our business where we have a customer of very large proportions, with whom we are dealing in millions of dollars of business. I can conceive of his buyer and my salesman getting into a situation of antagonism one with the other, and of getting notice that that man would not buy any more products from this great house of Armour and Company. . . . I could not conceive of that ever happening if that big buyer thought that there was an opportunity, because he or his people refused us his business, for us to go into

45. 286 U.S. at 117. Cf. Transcript of Record, p. 1057, *supra* note 42, where Justice Bailey's opinion states: "Today the combination no longer exists; no one alone of the packers is of sufficient size to constitute a monopoly, even if it tried to do so. . . ."

46. *United States v. New York Great Atlantic and Pacific Tea Co.*, 67 F. Supp. 626, 676 (E.D. Ill. 1946).

47. 234 Fed. at 985.

48. Transcript of Record, pp. 1058, 1059, *supra* note 42.

the retail business. I cannot conceive that he would reach that conclusion."

Against this background, the Government's criminal action against the New York Great Atlantic and Pacific Tea Company appears less unusual. The Court of Appeals said<sup>49</sup> that "one cannot escape the conclusion," from the record, that A & P obtained preferential discounts by threatening to put suppliers on a blacklist or to go into the manufacturing business itself, and that it forced some manufacturers to widen the spread between store door deliveries and warehouse deliveries in order to preserve for itself the advantage of its warehousing system. It would not buy from suppliers who sold to anyone through a broker. The Court of Appeals stated<sup>50</sup> that "the record is replete with evidence of deliberate reductions of gross profits in selected areas. . . . Sometimes the gross profit rate is fixed so low that the store runs below the cost of operation. . . ." The District Court stated<sup>51</sup> that in many instances "it was A & P's definite program that the super market activities should eventually enjoy 25% of the available business." Its sales of meat were frequently at substantial loss.<sup>52</sup> There was in addition some evidence, as is undoubtedly inevitable, of particular abusive acts directed by local managers at particular stores. It also appears that some of the coercive measures were protective against powerful sellers.

The decisions in the *A & P* case have been criticized because of their apparent adoption of the recoupment theory; namely, that profits from one area or from the manufacturing business are used to subsidize the retail stores. They have been criticized also because of the apparent acceptance of the theory that sales by Acco, a buying subsidiary, which also acted as a selling broker for the rest of the trade on 30% of its business, gave to A & P not only the advantage of not paying a broker's fee, but the benefits of the fees paid in by its competitors. The latter theory, it is correctly said, overlooks the fact that Acco performed a service and constituted an investment. The recoupment criticism is based on the assumed fact that any profit which A & P could make, it would have made in any event, and that therefore the profit was not obtained in order to subsidize a loss. Such inner-enterprise arrangements, however, would not determine whether the business was deliberately conducted at little or no profit in certain areas, and whether prices were too low. In this respect the situation need not be different than in the *Corn Products* case where recoupment was also claimed but less successfully in that the opinion places no weight on it.

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49. 173 F.2d 79, 83 (7th Cir. 1949).

50. *Id.* at 87.

51. 67 F. Supp. at 641.

52. *Id.* at 640.

The *A & P* case is different from *Corn Products* because the percentage is considerably lower. It has been said by an economist<sup>53</sup> who has carefully studied the record that, with respect to *A & P*'s bargaining power and the claim that it forced people to drop their tithes into its coffers, "perhaps this could be done by a purchaser who occupied three to seven and one half percent of the markets in which it operated. But most of us would like to know how." The question implies that the percentage is too low to permit monopoly power, although as a matter of fact some of the percentages are said to be higher than five percent—a percentage testified to in the *Swift* case (to be sure without much supporting evidence) as giving an "advantageous position."

A defense chart in *A & P*<sup>54</sup> showed that in 1933 of the total sales of stores engaged primarily only in sales of food at retail, chain stores did 38.2% and *A & P* 11.6% and that in 1943, food chains did 29.8% and *A & P* did 7.1%. The Government contended that the picture was somewhat different in particular areas. In the central division in 1941 there were eight cities where *A & P* had more than 50% of the available business, 15 in which it had from 40 to 50%, and 51 in which it had from 30 to 40%. In approximately three-fourths of the cities in that division, it had more than 20% of the business. In 1948 its share in the total United States food business was nine percent.

The Government, as reported in the opinion of the Court of Appeals, did not in the criminal case attack *A & P* because of its size, integration, or power, but rather because of its abuse of that power. By analogy to the argument made by the critics of the recoupment theory, and in keeping with the spirit of *Alcoa*, one might argue that power, if it exists, will be exercised. This is quite contrary to the line of argument followed by the Court of Appeals. For example, it draws a line between large buying power and the buying advantages which go therewith, and the abuse of that power by threats to boycott and blacklist.<sup>55</sup> It might be thought that the court's reliance on the recoupment theory is a reliance on actual intent to monopolize; that is, for this case, to do more than was accomplished. Such emphasis on intent as there is, however, appears to be on the intent to do the acts which are regarded as abuses, and such intent as may be implied from them. The conspiracy to monopolize and to restrain are based on these

53. Professor M. A. Adelman, *Integration and the Antitrust Laws*, 63 HARV. L. REV. 27, 55 (1949).

54. See 67 F. Supp. at 633; Fulda, *Food Distribution in the United States: The Struggle between Independents and Chains*, 99 U. OF PA. L. REV. 1051, 1074 *et seq.* (1951).

55. 173 F.2d at 83, 87.

abuses, and for the most part these are the securing and offering of low prices, albeit in a particular way.

Judge Knox's opinion in the remand of the *Alcoa* case is very much in this tradition of the fear of low prices and a law of unfair competition. Operating under a mandate which the Judge construed as making him search for what would be effective competition in the aluminum industry, Judge Knox was concerned with the relative financial strength of the three integrated units, their cost figures, and the possibility that low prices on the part of Alcoa might preclude Reynolds and Kaiser from the business. In terms of integration, he assumed the necessity for it,<sup>56</sup> and in this respect surely deviated from the theme of the *Swift* case. He found that Alcoa had lost five million dollars in profits in 1948 by supplying pig and ingot to the nonintegrated fabricators, but he thought that this might be financially justified in the long run by a gain in good will.<sup>57</sup> He treated Kaiser's arrangements to buy bauxite from Alcoa as an arrangement by which "Kaiser may gain in the short-run, but at the long-run sacrifice of independent integration. . . . The contract has the effect of profiting Kaiser's competitor, and at the same time, it raises Kaiser's own costs of production above that of its competitor."<sup>58</sup> Possibly the suggestion is that this arrangement is somewhat similar to the practices followed by A & P with respect to its buying subsidiary which sold to its competitors. Thus when it concerns the question of relief, the *Alcoa* case on remand, perhaps under the stimulus of Reed's directive in *Columbia Steel*, becomes a search for permitted power viewed through an analysis of the possibilities of unfair competition.

### Theory of Lawful Monopoly with Restricted Use

Under the present law, a monopoly, at least in the popular sense, can exist and be regarded as lawful but its use restricted. The category of "thrust upon it" in Hand's *Alcoa* opinion admits this. Justice Holmes in his dissent in the *Northern Securities* case pointed out that "a single railroad down a narrow valley or through a mountain gorge monopolizes all the railroad transportation through that valley or gorge."<sup>59</sup> Justice Douglas in the *Griffith* case stated that "anyone who owns and operates the single theatre in a town, or who acquires the exclusive right to exhibit a film, has a monopoly in the popular sense."<sup>60</sup> It is not an unlawful monopoly unless he has

56. See Comment, *Vertical Integration in Aluminum: A Bar to Effective Competition*, 60 YALE L. J. 294 (1951).

57. 91 F. Supp. 333, 384 (S.D. N.Y. 1950).

58. *Id.* at 371-2.

59. 193 U.S. 197, 406 (1904).

60. 334 U.S. 100, 106 (1948).

illegally acquired it, or, on the other hand, to quote the opinion, unless he has "maintained his strategic position, or sought to expand his monopoly, or expanded it by means of those restraints of trade which are cognizable under section one." Thus if the theatre owner uses that "strategic position to acquire exclusive privileges in a city where he has competitors, he is employing his monopoly power as a trade weapon against his competitors. It may be a feeble, ineffective weapon where he has only one closed or monopoly town. But as those towns increase in number throughout a region, his monopoly power in them may be used with crushing effect on competitors in other places."<sup>61</sup> Justice Douglas draws somewhat the same distinction as the Court of Appeals in the *A & P* case when he goes on to say that "large scale buying is not, of course, unlawful *per se*. It may yield price or other lawful advantages to the buyer."<sup>62</sup>

The *Griffith* case is then a monopoly use case, where the monopoly was lawful before its use, and where the effect of its use in a certain manner must be to restrain.<sup>63</sup> That is to say in view of the language in the *Griffith* case, and the finding by the District Court that no competitors were driven out of business, or acquired by appellees or impeded in their business by threats or coercion, it would seem doubtful that some effect would not be presumed when a closed town is tied to an open one. The *Griffith* case is therefore very much like the tying of a patent to an unpatented item. And wherever the monopoly can be assumed, as in a formal sense it can be with a patent, this type of tying or exclusive arrangement would seem to fit into an illegality *per se* category. To what extent the only store in town or the only road down a narrow valley would be the same as the only theatre is not clear, but there are very broad implications flowing from the Douglas opinion.

The *Lorain Journal* case indeed deals with the activities of the only daily newspaper in a town. The Supreme Court held that it was a violation of Section 2 of the Act, for the newspaper to refuse to accept advertising from customers because these customers also advertised through the competitive medium of a radio station. Justice Burton analogized the case to a conspiracy between all newspapers in a city to eliminate a competitive radio station by accepting no advertising from anyone who advertised over that station. Here there was a single newspaper "enjoying," Justice Burton said, "a substantial monopoly in its area."<sup>64</sup> There is no

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61. *Id.* at 107.

62. *Id.* at 108.

63. See Rostow, *Problems of Size and Integration*, in CCH SYMPOSIUM ON BUSINESS PRACTICES UNDER FEDERAL ANTITRUST LAWS, 117, 122 (1951).

64. 342 U.S. 143, 154 (1951).



suggestion that the existence of such a substantial monopoly violates the rule of *Alcoa*; yet its use of its power becomes the basis for a finding that it is attempting to monopolize to secure more. Similarly the refusal of A & P to purchase from suppliers who in previous instances "did not meet the prices dictated by A & P" would have been a "boycott . . . in and of itself . . . a violation of the Sherman Act,"<sup>65</sup> according to Judge Minton. The refusal of the sole manufacturer of linen rugs to sell to a distributor in order to make it impossible for that distributor to fulfill a government order was likewise held to be a violation of Section 2 of the Act in the *Klearflax* case.<sup>66</sup> These are instances where power and conduct otherwise lawful when joined together spell illegality.

The result is not too suprising. The law of price fixing was, at least at one time, based not only on the conduct of the parties but on their dominance over the market. The characterization of a refusal to buy or sell as a boycott where there is monopoly power has long been foreshadowed. The monopoly power so involved, however, is not the monopoly power of Judge Hand's *Alcoa* opinion. It is something less because it is not illegal *per se*; it is something more because it is the basis for a developing law restricting the uses of size or position. The *Associated Press* case<sup>67</sup> is relevant. While it may now be classified after the fact as an inmate of the boycott category, along with *Fashion Originators Guild*<sup>68</sup> and the *American Medical Association*,<sup>69</sup> since the arrangement was exclusionary, the holding that members might not take into account the ability of an applicant to compete with members in the same field marks a new step in the law, only to be accounted for by the size and strength of the combination. The step was moreover taken in such a way as to almost foreclose consideration of what the past actual effects of the combination had been and with a finding by the District Court that the Associated Press did not monopolize or dominate the furnishing of news, access to original sources of news, or transmission facilities.<sup>70</sup> The case is therefore a considerable extension of the *St. Louis Terminal* case<sup>71</sup> which recognized monopoly power and regulated it. The suggestion of Judge Wyzanski in *Minnesota Mining and Manufacturing Co.*<sup>72</sup> that it might

65. 173 F.2d at 87.

66. *United States v. Klearflax Linen Looms*, 63 F. Supp. 32 (D. Minn. 1945).

67. *Associated Press v. United States*, 326 U.S. 1 (1945).

68. *Fashion Originators Guild of America v. FTC*, 312 U.S. 457 (1941).

69. *American Medical Association v. United States*, 317 U.S. 519 (1943).

70. See dissenting opinion by Mr. Justice Roberts, 326 U.S. at 29, 43; Lewin, *The Associated Press Division—An Extension of the Sherman Act?*, 13 U. OF CHI. L. REV. 247 (1946); Ellis, *Paradoxes of the Associated Press Decision—A Reply*, 13 U. OF CHI. L. REV. 471 (1946).

71. *United States v. Terminal Railroad Ass'n*, 224 U.S. 383 (1912).

72. 92 F. Supp. 947, 963 (D. Mass. 1950).

be a *per se* violation of Section One of the Sherman Act for dominant firms in an industry to have joint factories, because this would inevitably reduce their zeal for competition among them in the American market, moves somewhat in the same direction in that it points to the expansion or creation of categories in the combination or conspiracy area where there is size or dominance.

The existence of a second level anti-monopoly law is therefore not dependent upon the creation of some overall new category. Many of the cases which point in the direction of curbs on permitted monopoly power can be placed after the fact in some standard classification. The new trend stresses exclusion and therefore can work within, while expanding, the boycott category and the concept of attempts to monopolize. It is aided also by the growth of the conspiracy classification to concert of action size where more or less independent firms of considerable power engage in common action, and by the acceptance of conspiracies within the corporate framework where it is one enterprise, as for example in the *General Motors* case.<sup>73</sup> The new trend, however, shows unmistakable signs of attempting to create new categories as well, as for example integration or tie-ins, in order to avoid a showing of actual effect or of specific intent.

So far as vertical integration is concerned, the old *Winslow* case<sup>74</sup> is a direct holding that the integration of non-competing units is not by itself illegal. Much has happened since then. The integration cases cause no theoretical problem for the law when a monopoly has been clearly achieved at one of the stages.<sup>75</sup> This was true in the *Pullman* case.<sup>76</sup> It was also so in the old *Standard Oil* case and in the *Alcoa* cases. In the *Paramount* case, it was almost achieved by aggregating the major defendants into a monopoly. Moreover, when annexed to monopoly power, there is a reason for curtailing integration or tie-ins since they can result in further barriers to entry to the market and also in a further exploitation of monopoly through price discrimination.<sup>77</sup>

73. 121 F.2d 376 (7th Cir. 1941).

74. *United States v. Winslow*, 227 U.S. 202 (1913).

75. See Hale, *Vertical Integration: Impact of the Antitrust Laws Upon Combinations of Successive Stages of Production and Distribution*, 49 COL. L. REV. 921 (1949); Comment, *Vertical Forestalling Under the Antitrust Laws*, 19 U. OF CHI. L. REV. 583 (1952); Rostow and Sacks, *Entry into the Oil Refining Business: Vertical Integration Re-examined*, 61 YALE L.J. 856 (1952).

76. 50 F. Supp. 123 (E.D. Pa. 1943).

77. A type of loose integration, the exclusive arrangement, where the purchaser agrees not to handle the goods of a competitor of the seller, has been brought into what appears to amount to a *per se* category under the *Standard Oil of California* [337 U.S. 293 (1949)] interpretation of Section 3 of the Clayton Act. It would not have been surprising if the same result had been reached in that case through emphasis on the fact that all the other major suppliers individually "and at the same time collectively, though not collusively" used the same system. For exclusionary rules the law about collectivism may have moved to the place that *Maple*

But integration and tie-ins may be unlawful when the monopoly power to which they are annexed is itself legal. So viewed, the law's concern with them is but part of a movement which recognizes what is deemed to be lawful monopoly power and seeks to find automatic curbs on abuses. It has been said that if integration is thus regarded as an abuse, "we shall bog down in moral muddlement," for "if an abuse is an attempt to monopolize, that attempt requires an intent to monopolize."<sup>78</sup> But integration may be approached not so much as an attempt to monopolize but as an abuse when connected with a restraint, which is the rule on relief of *Paramount*, or an abuse by itself when it is the reaching out of an enterprise with considerable power. The *Griffith* case holds that under such circumstances no specific intent will be required in the tie-in case, and despite the second *Yellow Cab* case, it would not be much of a step to fasten the same conclusion on vertical integration under similar circumstances. These similar circumstances would be a finding in an integration case, comparable to the finding of restraint in *Paramount*, that there was the same amount of monopoly power, or monopoly in a popular sense, as there was in *Griffith*. The *Columbia Steel* case, which refused to find integration illegal in general, is not contrary to such an analysis, although it leaves vague what amount of power would have to exist before its use would be curbed.

The difficulty with the concepts of integration and tie-in is precisely the difficulty of determining what is to constitute such monopoly power, even though the power may be lawful. It is this difficulty which makes the concepts dangerous and deceptive, for to find illegal integration or a tie-in is tantamount to a conclusion on the existence of monopoly power. For example, the aggregation of buying power in the *A & P* case would be unlawful automatically if the only store in an area were treated as an only theatre. To the extent that the buying power of many stores is aggregated in the *A & P* case, it is somewhat like the buying power of the circuit in the *Griffith* case. Combining the manufacture of a particular brand of coffee with the wholesaling and retailing of it in the *A & P* case would be distinguishable from the *General Motors* case, since the dealers in *General Motors* were independent, but it could be urged that it is like the integration which the Department of Justice tried to make illegal *per se* in the *Columbia Steel* case. Under this kind of an analysis, integration and tie-ins will

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*Flooring* [268 U.S. 563 (1925)] somewhat clumsily tried to take it for trade association statistical activities. But this is not to agree with the somewhat dismal statement of the Court of Appeals for the Seventh Circuit in the *Milwaukee Towne* case [190 F.2d 561, 564 (7th Cir. 1951)] that it "is difficult to visualize a case" where evidence would not be sufficient to support a finding of conspiracy.

78. Hale, *supra* note 75, at 948.

appear in almost every situation. The point is that integration and tie-ins are only useful concepts when monopoly power of a sort is deemed to exist and yet is thought to be illegal because used in a particular way, and perhaps without a showing of specific intent to monopolize. These concepts are a part of a developing second level of anti-monopoly law.

### Antitrust Relief Beyond Monopoly Power

A two level monopoly law can operate to decree divestiture when other abuses or restraints have been found. At one time it was fashionable to talk about relief in antitrust cases, as Brandeis did—namely, an immunity bath. In the *United Shoe Machinery* case, Justice McKenna asked in connection with the Government's petition that the combination be dissolved, "will their monopoly cease, or be regarded as an instrument of illegal purpose and forfeited as a deodand?"<sup>79</sup> The question may have unwittingly presaged at least a new turn in the law of relief. In the motion picture cases, Justice Douglas has moved the law to where perhaps it can be said that once abuses or restraints of the monopoly type have been shown, the Court is directed to remove the fruits of the conspiracy as well as to put an end to the combination and render impotent its monopoly power. This together with the Celler amendment to the Clayton Act represents a major change in the law. The *Paramount* case makes it clear that when there is a conspiracy to monopolize through restraints, the fruits achieved in the process which fall short of monopoly must be removed. Justice Douglas derived some solace from this change in his dissent in the *Standard Oil of California* case, where in a footnote he comments on his own opinions of this fashion, "Those cases have largely expended the force of *Hartford-Empire Co. v. United States* . . . an indefensible decision where the Court allowed those who had built one of the tightest monopolies in American history largely to retain their ill-gotten gains and continue their hold on the economy."<sup>80</sup> The refusal of the Court to decree divestiture relief in the *Timkin* case,<sup>81</sup> however, suggests some limitations to the new doctrine.

The antitrust laws reflect conflicting purposes and doctrines. They represent a common law of their own, but they carry with them the history of an ancient common law, of rules to preserve the market place and government regulation of all types, including a goodly measure of price fixing. They are not the mirror of

79. 247 U.S. 32, 46 (1918).

80. 337 U.S. 293, 317 (1949).

81. *Timkin Roller Bearing Co. v. United States*, 341 U.S. 593 (1951); see *United States v. Minnesota Mining and Manufacturing Co.*, 96 F. Supp. 356 (D. Mass. 1951).

one economic theory carefully carried into application. They are somewhat limited of course by our own lack of knowledge, although laws often proceed into areas where no one knows the answer. There is lack of knowledge in our society with respect to what goes on in industry and how it should be measured. This lack of knowledge extends to the monopoly concept. The second level of anti-monopoly law springs from our own uncertainties. Despite *Alcoa*, monopoly power is regarded as existing and not unlawful. In this gap the law moves to curb what are deemed to be abuses and excesses. The trend arises to curb the dangers of monopoly power; it carries with it its own dangers. The antitrust laws have been a symbol of both competition and non-regulation. The attempt to escape from too rigid rules, as reflected in the broadening influence of Justice Reed's dictum in *Columbia Steel* and its application by Judge Knox in the remand of *Alcoa*, may have joined with an overall concern with the excesses of permitted monopoly power to turn the antitrust laws in the direction of greater regulation.