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MERGERS AND THE ANTI-TRUST LAWS: THE COLUMBIA STEEL CASE, THE SUPREME COURT AND A COMPETITIVE ECONOMY 1947 TERM *

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INTRODUCTION

The ablest study of the Supreme Court's decisions on this subject appeared sixteen years ago.¹ Prior to the injunction proceedings this Term instituted by the Department of Justice to restrain the United States Steel Corporation from acquiring assets of a leading West Coast steel fabricator,² neither the Federal Trade Commission

* The following article while complete in itself is part of a study of all the Supreme Court's decisions during the October 1947 Term in the trade regulation field. The other portions of the study are being published in a series of companion articles. See *Patents, Procedure and the Anti-Trust Laws*, 17 GEO. WASH. L. REV. 1 (1948); *Basing Points and Quantity Discounts*, 48 COL. L. REV. 985 (1948); *The Motion Picture Industry and the Sherman Act*, which will appear in the December, 1948, issue of the YALE LAW JOURNAL. The article in the GEORGE WASHINGTON LAW REVIEW contains an introduction to the entire study.

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1. Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COL. L. REV. 179 (1932). This study likewise appears in condensed form in HANDLER, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS 46-88 (TNEC Monograph 38, 1941). In this latter study Professor Handler outlines a suggested legislative program for dealing with the deficiencies in this body of law as evolved by the Supreme Court. *Id.* at 88-90.

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

nor the Department of Justice, with a single exception³ have brought any cases in this field before the United States Supreme Court. This is surprising in view of the complete change during this interval in the personnel of the Court. The failure of both the Federal Trade Commission and the Department of Justice to institute during the last decade a series of litigations to carry out Congressional intention and "arrest the creation of . . . monopolies in their incipency"⁴ is difficult to comprehend when viewed in the light of the following facts:

A. The State of the Supreme Court Decisions.

After a meticulous study of the little more than a handful of Supreme Court decisions dealing with the permissible extent of corporate mergers and combinations, Professor Milton Handler in 1932 concluded:

"This review of the Supreme Court decisions has shown . . . there is support in the body of authority for almost every position that might conceivably be taken; contrarywise there are embarrassing holdings and *dicta* which no one theory can fully explain, short of regarding the cases as fundamentally opposed to one another . . . And as for predicting what the Court will do, the safest counsel, of course, is to follow its latest pronouncement, at the same time keeping an eye upon the most recent appointees to the bench."⁵

3. *Arrow-Hart & Hegeman Electric Co. v. FTC*, 291 U. S. 587 (1934), Justices Hughes, Stone, Brandeis and Cardozo dissenting. It therefore cannot fairly be called the submission of a case to the present Supreme Court. The *Arrow-Hart* decision affirmed and extended the previous decision of the Supreme Court (four justices dissenting) in *FTC v. Western Meat Co.*, 272 U. S. 554 (1926) wherein the Supreme Court made Section 7 of the Clayton Act a nullity by holding that it only prohibited the acquisitions of stock and not of assets. In the *Arrow-Hart* case the majority went further and held that even if stock was first acquired, if the assets were acquired before the Federal Trade Commission ordered divestiture the Federal Trade Commission was without any jurisdiction to proceed further.

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

"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce. . . ." 38 STAT. 731 (1914), 15 U. S. C. § 18 (1946); for a criticism of the *Western Meat* and *Arrow-Hart* line of decisions see Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COL. L. REV. 179, 266-268 (1932); and HANDLER, A STUDY OF THE CONSTRUCTION AND ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS 86-88 (TNEC Monograph 38, 1941).

4. Senate Judiciary Committee reporting out the Clayton Act. SEN. REP. NO. 695, 63rd Cong., 2d Sess. 1 (1914).

5. Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COL. L. REV. 179, 242 (1932).

"But when all is said and done, the fact remains that the decisions are in good part inconsistent and the opinions hopelessly confused. No serious attempt has been made by the Supreme Court to clarify the subject or to offer any guidance to the bar . . . Its opinions have been marked by a disheartening lack of candor. No explanation has been given for obvious shifts in view."⁶

B. The Final Report and Recommendations of the Bipartisan Temporary National Economic Committee.

In 1938 following a message by the late President Franklin D. Roosevelt to Congress urging the creation of a non-partisan body to study the subject of the growing concentration of economic power, Congress created the Temporary National Economic Committee, familiarly known as TNEC, to conduct a comprehensive investigation of the subject and submit its recommendations for dealing with the problem.⁷ After conducting the most exhaustive study that the basic structure of our economy has ever received⁸ the Committee submitted its Report and Recommendations to Congress in 1941. Condensed into only forty-odd well-written pages, the Report repeatedly emphasized the various aspects of the growing concentration of economic power and the dangers that such concentration carry to our democratic way of life and our free enterprise economy.

"No person who with an open mind reviews the materials gathered by this Committee can fail to conclude that the rise of political centralism is largely the product of economic centralism . . . the Temporary National Economic Committee. . . avows its faith in free enterprise. Every recommendation which it makes is intended to keep enterprise free . . . economic power which becomes so great that it can regiment men enjoys but a temporary triumph, for eventually by its restrictive policies, it invites and makes inevitable its own subordination to arbitrary political power . . . so great a proportion of all national savings and all national wealth have fallen under the control of a few organized enterprises with the opportunity of those individuals who constitute the next generation will be completely foreclosed unless, by common consent of leadership in business and government, we undertake to reverse the trends responsible for the present crises. We know that most of the wealth and income of the country is owned by a few large corporations, that these corporations in turn

6. *Id.* at 271.

7. See Zlinkoff, *The Roosevelt Administration's Battle to Preserve an Economy of Competitive Private Enterprise*, 5 NAT. LAW. GUILD Q. 201, 204-207 (1945).

8. The Hearings conducted occupy more than 20,000 printed pages and an additional 3300 exhibits. These Hearings were supplemented by 43 monographic studies prepared by scholars throughout the country.

are owned by an infinitesimally small number of people and that the profits from the operation from these corporations go to a very small group with the result that the opportunities, whether corporate or individual, are constantly being restricted . . . it is generally agreed . . . that competition must be maintained as the principle of our economy, for every one seems to acknowledge that the alternative to competition is some form of concentrated government authority which might easily destroy democracy."⁹

C. The Third Merger Movement 1940-1947.

The Federal Trade Commission has, since the end of World War II, repeatedly called attention to the vast merger movement that has been in progress since 1940.¹⁰ The merger movement has continuously been in progress in this country for over 50 years, the first great era of trust building lasting from about 1897 to 1903. The second important merger period occurred during 1925 to 1929.¹¹ During the last seven years a third great merger movement has been progressing characterized by the very large organizations buying out small independents. Thirty per cent of the companies which have been merged since 1940 have been absorbed by corporations with assets over fifty million dollars; and an additional forty per cent of the total "have been taken over by corporations with assets from five to forty-nine million dollars . . . the distinctly small firms, those with less than

9. TNEC, FINAL REPORT AND RECOMMENDATIONS 5, 7, 9, 25 (1941).

10. See, *e. g.*, Report of FTC to Congress entitled FTC, REPORT ON THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS (Sen. Doc. No. 17, 80th Cong., 1st Sess. 1947).

11. See THORP AND CROWDER, THE STRUCTURE OF INDUSTRY 231-234 (TNEC Monograph 27, 1941).

This brief study contains the following illuminating table (p. 233) :

Mergers and acquisitions in manufacturing and mining,
by quarters, 1919-1939

NET NUMBER OF CONCERNS DISAPPEARING¹

Quarter						Quarter					
Year	I	II	III	IV	Total ^a	Year	I	II	III	IV	Total ^a
1919	57	82	147	125	438	1930	204	237	156	189	799
1920	209	186	188	166	760	1931	163	142	87	71	464
1921 ^a	184	99	80	122	487	1932	7	102	46	40	203
1922	86	53	82	76	309	1933	19	43	33	12	120
1923	84	67	44	105	311	1934	19	25	34	23	101
1924	110	71	87	85	368	1935	36	27	38	24	130
1925	124	104	127	175	554	1936	39	25	27	32	126
1926	286	236	171	146	856	1937	32	27	29	31	124
1927	161	247	220	213	870	1938	32	20	22	33	110
1928	197	315	242	274	1058	1939	24	22	16	25	87
1929	349	395	312	160	1245						

¹ Number of concerns merged less number of mergers plus concerns acquired.

² Annual totals are larger than the sum of the quarterly figures, because they include a small number of cases where exact dates were not available.

³ Includes 1 merger of 60 concerns.

Part IV of Monograph 27 consists of brief studies of the history of concentration in seven industries, agricultural implements; automobile; copper; cotton textile; iron and steel; petroleum and rayon yarn. *Id.* at 234-264.

one million dollars worth of assets, have made only eleven per cent of the acquisitions.”¹²

It has been the distinctly small firm which has been increasingly obliterated in the present merger movement. Of all of the firms bought out since 1940, ninety-three per cent had assets of less than five million dollars and seventy-one per cent had assets of less than one million dollars with only four per cent of the total number of firms bought out having assets of over ten million dollars. The extent of additional acquisitions by our giant industrial corporations can be seen from the fact that of the two hundred largest manufacturing corporations in this country one hundred and twenty-three have made corporate acquisitions since 1940 accounting in the aggregate for twenty-seven per cent of all the firms bought out. Of these top two hundred corporations thirty-three bought out an average of more than five companies each and thirteen purchased more than ten companies.¹³

This trend is the continuation of a phenomenon whose significance was emphasized by the pioneer work of Berle and Means that appeared in 1932,¹⁴ the studies of the Twentieth Century Fund—a nonpartisan research institute—published in 1937,¹⁵ the report of the National Resources Committee appearing in 1939,¹⁶ as well as by the report of the Smaller War Plants Corporation to Congress in 1946.¹⁷ Likewise a number of the special monographic studies submitted to Congress by the TNEC presented in detail the facts as to the ever increasing concentration of power into fewer and fewer economic units throughout the entire structure of our economy¹⁸ and even the Federal Reserve Board in 1945 submitted a similar study showing the growing concentration, through mergers, of banking institutions in this country.¹⁹ The unanimous conclusion of all these studies was summarized in the following statement made on July 1,

12. FTC, SUMMARY REPORT ON THE STUDY OF THE MERGER MOVEMENT, 5 (July 26, 1948).

13. *Ibid.*; see also the studies of the merger movement in 12 different industries submitted by FTC in the *Hearings before Committee on the Judiciary on H. R. 2357*, 79th Cong., 1st Sess. 87-126, 145-169, 170-243 (1945).

14. BERLE AND MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

15. *BIG BUSINESS, ITS GROWTH AND ITS PLACE*.

16. *THE STRUCTURE OF THE AMERICAN ECONOMY*.

17. *SMALLER WAR PLANTS CORPORATION, ECONOMIC CONCENTRATION AND WORLD WAR II* (Sen. Comm. Print No. 6, 79th Cong., 2nd Sess. 1946).

18. See particularly, WILCOX, *COMPETITION AND MONOPOLY IN AMERICAN INDUSTRY* (TNEC Monograph 21, 1940); THORP AND CROWDER, *THE STRUCTURE OF INDUSTRY* (TNEC Monograph 27, 1941); *THE DISTRIBUTION OF OWNERSHIP IN THE 200 LARGEST NONFINANCIAL CORPORATIONS* (TNEC Monograph 29, 1940).

19. This study was presented in the *Hearings before Committee on the Judiciary on H. R. 2357*, 79th Cong., 1st Sess. 336-349 (1945).

1946 by the Federal Trade Commission to the Small Business Committee of the House of Representatives:

"In the opinion of the Commission, the present, and still growing, concentration of economic power in the United States constitutes today's greatest domestic challenge to the American theory of competitive enterprises, and along with it all that is embodied in the meaning of the somewhat intangible, but none the less real, meaning of 'the American way of life' and 'freedom of enterprise' . . . large corporate consolidations make cooperation within each industry or trade group easier and leads inevitably to cartel organizations in America as well as in Europe . . . also private supergovernment in industry leads almost inevitably to political supergovernment."²⁰

Similarly, in urging the Supreme Court to take a more realistic approach toward preventing the growth of monopoly power, students of that tribunal's decisions have declared that the Court's decisions not only sanctioned but even encouraged the merger movement.²¹

THE COLUMBIA STEEL CASE

A. *The Facts.*

Belatedly recognizing the factual and legal developments outlined above, the Department of Justice on March 19, 1947 announced the formation in the anti-trust division of a Merger Unit which was created to scrutinize all mergers in terms of the anti-trust laws.²² Only a short while after the formation of this unit the Department of Justice instituted as its crucial initial litigation an injunctive proceeding to prevent the acquisition by the United States Steel Corporation, through several of its subsidiaries, of the assets of a leading West Coast in-

20. FTC REPORT TO CONGRESS ON THE PRESENT TREND OF CORPORATE MERGERS AND ACQUISITIONS 23 (SEN. DOC. NO. 17, 80th Cong., 1st Sess. 1947); see also the testimony of Senator O'Mahoney in the Hearings on H. R. 2357: "There is an awful lot of talk about free enterprise; but I think we have failed to note how it has been and is being undermined. A great many of the people mistake industrial collectivism for free enterprise . . . you can not hope to prevent the steady trend toward concentrated economic power . . . 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 States because we have permitted the loss of economic power to economic concentration of the kind I have been describing." *Hearings before Committee on the Judiciary on H. R. 2357*, 79th Cong., 1st Sess. 6-10 (1945).

21. See, e. g., Levi, *The Anti-Trust Laws and Monopoly*, 14 U. OF CHI. L. REV. 153, 183 (1947); Rostow, *The New Sherman Act: A Possible Instrument of Progress*, 14 U. OF CHI. L. REV. 567, 570-4 (1947). See also the testimony of Dr. Willard Thorp in the hearings conducted by the TNEC, Part I, p. 112 (1938).

22. See Zlinkoff & Barnard, *The Supreme Court and a Competitive Economy: 1946 Term*, 47 COL. L. REV. 914, 930, n. 75 (1947).

dependent steel fabricating corporation.²³ The facts of the litigation are relatively simple.²⁴

United States Steel Corporation had net assets of approximately one and one-half billion dollars during the ten year period, 1937-1946; during this period its average annual sales were almost one and one-half billion dollars, and it produced almost one-third of the Nation's production of rolled steel products. U. S. Steel is a classic example of growth through merger and acquisition and is a completely integrated company, from raw materials through finished products, including the ownership of railways and shipping lines to transport raw materials and intermediate products.

The Supreme Court in 1920 by a 4 to 3 vote—with two Justices not participating—rendered a much criticized decision²⁵ refusing to find that the Government was entitled to a dissolution of the corporation as an illegal monopoly. Although it thereafter acquired a number of additional companies its proportion of the Nation's total rolled steel production declined to roughly 31 per cent at the beginning of 1946 as compared to 50.1 per cent that it had at the time of its formation in 1901.

Because of war time needs the United States Government built two very large rolled steel production plants in the Far Western part of the United States, an area that had been largely dependent for its supplies upon Eastern producers. The largest of these plants was erected at Geneva, Utah, and, was designed, constructed and operated by U. S. Steel for the Government, costing nearly two hundred million dollars. This plant had an annual capacity of more than 1,200,000 tons of steel ingots which in turn could be employed to make about 700,000 tons of plates and 250,000 tons of shapes, both plates and shapes being types of rolled steel products. The capacity of Geneva was approximately two and a half times that of the steel producing plants in the Far West owned by U. S. Steel or its subsidiaries. The other large steel producing plant in the West was located at Fontana,

23. *United States v. Columbia Steel Co.*, 71 F. Supp. 734 (D. Del. 1947) (preliminary injunction granted); 74 F. Supp. 671 (D. Del. 1947) (complaint dismissed after trial on the merits); Comment, 96 U. OF PA. L. REV. 591 (1948); *aff'd*, 334 U. S. 495 (1948), Mr. Justice Reed writing the majority opinion, Justices Douglas, Black, Murphy and Rutledge dissenting.

24. The following statement of facts has been constructed from the District Court's findings as stated in its opinion, the briefs of the parties before the Supreme Court and the majority opinion of Mr. Justice Reed. Unfortunately these facts are not clearly set forth in any single place. We have limited our statement to the facts not in dispute and where any question was raised we have so indicated.

25. *United States v. U. S. Steel Corp.*, 251 U. S. 417 (1920); Handler, *op. cit. supra* note 1, has commented as follows upon the majority opinion (p. 257): "the manner in which it (*i. e.*, the Supreme Court) evaluated the evidence in the *Steel* case is little short of ludicrous from the viewpoint of the economist."

California, with a productive capacity of 720,000 tons of steel ingots. This plant was built by the Kaiser interests with Government loans.²⁶

Early in 1945 U. S. Steel considered making a bid for Geneva but "because of the speculative nature of the venture and the opposition both within and without the Government to a purchase or lease by an Eastern steel company" ²⁷ had decided not to submit a bid and so notified the Government on August 8, 1945. Shortly thereafter, however, the Surplus Property Administrator wrote the President of U. S. Steel advising him that a bid by that company for Geneva "would be welcomed." After considerable pressure on U. S. Steel "by various people in and out of the Government", it submitted a bid on May 1, 1946 of \$47,500,000, stating that it would spend an additional \$18,500,000 on changes and improvements, and that it likewise would build at a further cost of \$25,000,000 a cold-reduction mill at Pittsburg, California to utilize the Geneva produced steel. The bid stated that U. S. Steel would sell the output of Geneva so as to "foster the location of steel consuming manufacturing plants in the Western States."

Three weeks later, without holding public hearings, the Director of the War Assets Administration announced the sale of Geneva to U. S. Steel in a publicly released letter making an administrative finding that the bid of U. S. Steel met the objectives of the Surplus Property Act.²⁸ The letter, already published, requested the opinion of the Attorney General as to whether the proposed sale "will violate the anti-trust laws" in accordance with Section 20 of the Surplus Property Act of 1944.²⁹ That Section required that proposed disposals of Government

26. Government Reply Brief before the Supreme Court in the *Columbia Steel* case, p. 11.

27. A full story of the opposition by Western consumers to the acquisition of Geneva by U. S. Steel is set forth in SEN. REP., 79th Cong., 1st Sess. 199 (1945) being the Progress Report of the Surplus War Property Administrator, April 23, 1945, p. 8.

28. The Director of War Surplus Property found that the acceptance of United States Steel's bid for Geneva would conform to the objectives set forth in the Surplus Property Act. Thus it was found that the acquisition would ". . . assure the most effective use of the Geneva Steel Plant for war purposes and common defense . . ."; would ". . . stimulate full employment . . ."; would ". . . encourage and foster postwar employment opportunities not only in the Geneva Steel Plant but also in steel consuming industries in the West . . ."; would ". . . promote production, employment of labor and utilization of the productive capacity . . ."; would ". . . foster the development in the West of new independent enterprises. . . . The operation of the Geneva Steel Plant as a part of the integrated operations of United States Steel should tend to foster the location of steel consuming manufacturing plants in the Western States. . . ." Pp. 2 and 3 in the OPS. ATT'Y GEN. AD. WAA 679-680.

29. 58 STAT. 765 (1944); 50 U. S. C. APP. § 1629 (Supp. 1945) provides: "Whenever any disposal agency shall begin negotiations for disposition to private interests of a plant or plants or other property, which cost the Government \$1,000,000 or more, or of patents, processes, techniques or inventions, irrespective of cost, the disposal agency shall promptly notify the Attorney General of the proposed disposition and the probable terms or conditions thereof. Within a reasonable time, in no event to exceed

owned plants costing more than a million dollars be referred to the Attorney General for his opinion as to whether the sale would violate the anti-trust laws. Within three weeks after the receipt of the request, Attorney General Clark wrote a four page opinion³⁰ pointing out that the total ingot capacity of U. S. Steel had declined from 35.3 per cent of the national capacity on January 1, 1939 to 31.4 per

ninety days after receiving such notification, the Attorney General shall advise the Board and the disposal agency whether, in his opinion, the proposed disposition will violate the antitrust laws. Upon the request of the Attorney General, the Board or other Government agency shall furnish or cause to be furnished such information as it may possess which the Attorney General determines to be appropriate or necessary to enable him to give the advice called for by this section or to determine whether any other disposition of surplus property violates the anti-trust laws. Nothing in this Act shall impair, amend, or modify the antitrust laws or limit and prevent their application to persons who buy or otherwise acquire property under the provisions of this Act."

30. Almost a year after Attorney General Clark rendered his opinion there appeared the following copyrighted syndicated column by Colonel Robert S. Allen, New York Times, March 28, 1947, p. 41, column 1:

"An authoritative congressional source today revealed the long-sought Anti-Trust Division report that Attorney General Tom Clark suppressed when he approved the sale of the government's giant Geneva, Utah, Steel plant to the United States Steel Corporation.

"The report, which Clark had suppressed, strongly disapproved the disposal of the ultra-modern war-built plant to the dominant concern in the steel industry.

"In short', the report declares, 'the acquisition of the Geneva Steel plant by either of these two giant steel producers (United States Steel and Bethlehem) is inconsistent with the very clearly stated objectives of the Surplus Property Act of 1944.'

"Although the report was made by his own anti-monopoly agency, Clark did not send it to Congress. After holding it for weeks, he suppressed it and authorized the War Assets Administration to sell Geneva to U. S. Steel.

"The suppressed Anti-Trust Division report opposed the sale of Geneva to U. S. Steel on the ground the plant would give the corporation monopolistic control of Western Steel production.

"If this major Eastern producer obtains control of Geneva,' the report states, 'it would control more than 50 percent of the steel production capacity west of the Rockies. In addition, the company's access to cheap water-borne carriers would give it virtual control of the Western market for the most profitable steel products, such as tin plate, sheets, pipes and tubes, and a dominant position in other steel products.

"It can hardly be argued that U. S. Steel is a small business or that concentration of industrial ownership in the West would not be increased by its acquisition of the Geneva plant. This acquisition would strengthen a regional monopoly which, as has been shown, has been able to impose abuses of monopolistic control on the Western steel consumer.'

"Control of the Geneva plant by this company would mean that the most promising prospect for vigorous competition in the steel markets of the Far West would be frustrated by becoming another satellite of a tightly-controlled industry. In this way a great industrial enterprise built by the Government would be made to serve the interests of a great industrial trust rather than the interests of the country as a whole.'

"The report further declares that the provisions of the Surplus Property Act expressly require that plants like Geneva be sold to independent competitive interests.

"The Anti-Trust Division's report is very similar to another report submitted some time previously to Congress by former Attorney General Francis Biddle. He likewise strongly advocated disposal of Geneva to independent Western interests. The Senate Small Business Committee noted that Clark disregarded his predecessor's recommendations as well as those of the Anti-Trust Division.

"Clark declined to comment when informed of the disclosure of the suppressed report."

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cent of the national capacity on January 1, 1946 and that if the capacity of the Geneva plant were added to the present capacity of U. S. Steel its share of national capacity will rise from 31.4 per cent to 32.7 per cent as contrasted with its 50.1 per cent proportionate share in 1901. The opinion also stated that the Attorney General had considered statistics which showed that the "Far West"³¹ exclusive of Geneva had an aggregate annual ingot capacity of 3,619,000 tons of which U. S. Steel had approximately 17.3 per cent; that total "Far Western" capacity including Geneva would amount approximately to 4,900,000 tons; and that if Geneva were acquired by U. S. Steel it would have 39 per cent of the total capacity of the "Far West".

These statistics were related "in view of the analysis made by the Circuit Court of Appeals for the Second Circuit" in the *Aluminum* case. The Attorney General's opinion quoted the dictum from Judge Hand's opinion in that case "it is doubtful whether 60 or 64 per cent would be enough; and certainly 33 per cent is not". Mention was made of the fact that the *Aluminum* decision had been cited with approval at length by the Supreme Court in the *American Tobacco* case³²—but Attorney General Clark's opinion did not note that the Supreme Court in the *Tobacco* case failed to cite with approval the dictum of Judge Hand which Attorney General Clark quoted. Upon the basis of Judge Hand's dictum, Mr. Clark concluded that he "did not view the sale, as such, of this property by the War Assets Administration to the United States Steel Corporation as a violation of the anti-trust laws . . . this advice does not extend to the conduct or practices of the United States Steel Corporation in its use of the property, nor do I express herein an opinion concerning the legality or illegality of any acts or practices in which the United States Steel Corporation or its subsidiaries may have engaged or may hereafter engage, either alone or with others." Likewise, the approval was subject to the express condition that it should be without prejudice to any determination of the legal status "of any pricing policy" followed by U. S. Steel or its subsidiaries "alone or with others".³³

31. Including in this term the states of Washington, Oregon, California, Idaho, Nevada, Utah, Arizona, Montana, Wyoming, Colorado and New Mexico.

32. 328 U. S. 781 (1946) discussed in *Levi, op. cit. supra* note 21 and *Rostow, op. cit. supra* note 21.

33. The opinion concluded with the note that the Attorney General was aware of the fact ". . . that size carries with it the opportunity for abuse . . ." quoting the language of Mr. Justice Cardozo in the *U. S. v. Swift & Co.*, 286 U. S. 106 (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, *U. S. v. U. S. Steel Corp.*, 251 U. S. 417 (1920); *U. S. v. International Harvester Co.*, 274 U. S. 693, 708 (1927), but size carries with it an opportunity for abuse. . . ." *Id.* at 116.

Upon the rendition of this opinion, the sale of Geneva to U. S. Steel was promptly consummated in June, 1946. Immediately upon the transfer of the property, the president of U. S. Steel resumed negotiations for the purchase of the assets of Consolidated Steel Corporation, a company with plants in California, Texas and Arizona, engaged solely in the fabrication of structural and plate products, purchasing slightly less than half of its annual \$11,000,000 worth of rolled steel purchases from subsidiaries of U. S. Steel and the remainder from competitors of that company. Since the end of World War II, Consolidated had approached not only U. S. Steel but a number of other companies offering and making clear its desire to sell out.

Consolidated's depreciated plant had a book value of less than ten million dollars and during the five year period, 1937-1941, it averaged sales of "only \$20 million" but during the war with Government-furnished facilities it had produced over one and a half billion dollars worth of ships. The Government-owned facilities were sold to third parties. Approximately seventy per cent of the products sold by Consolidated consisted of those produced by plate fabrication in which neither U. S. Steel nor any of its subsidiaries were engaged. Sixteen per cent of its sales consisted of structural steel products, part of which it sold in competition with subsidiaries of U. S. Steel. The balance of its production was devoted to the manufacture of pipe but these were of a size and dimension as admittedly to make only a small amount of its output even arguably competitive with any of the particular types of pipe manufactured by U. S. Steel's subsidiaries. Consolidated sold its products for the ten years prior to 1947 in eleven states, Arizona, California, Idaho, Louisiana, Montana, Nevada, New Mexico, Oregon, Texas, Utah and Washington.³⁴ This area will be referred to as the Consolidated market.

Considering the total sales of rolled steel products in the Consolidated market, its purchases of 2,000,000 tons over the ten year period represent slightly more than 3 per cent of the 60,000,000 tons of such products sold in the Consolidated market during that period; if Consolidated's relative consumption would be limited to plates and shapes—the principal types of rolled steel products purchased by Con-

34. It will be noted that Colorado is excluded whereas it was included by the Attorney General in his calculations as to the proportion of the "Far Western" steel productive capacity that U. S. Steel would acquire with the acquisition of Geneva. Exclusion of Colorado means that U. S. Steel acquired 51 per cent of the productive capacity in the Consolidated market as contrasted with the Attorney General's calculation of 39 per cent of the "Far Western" productive capacity. It will also be noted that the Consolidated market includes the State of Louisiana which, of course, was not included by the Attorney General in calculating the "Far Western" productive capacity.

solidated—figures for 1937, the only “reliable” figures presented,³⁵ showed that Consolidated’s consumption of these products was approximately 13 per cent of the total sold in the Consolidated market area. With respect to sales of structural steel fabricated products for the five year period, 1937-1942, U. S. Steel, in the Consolidated market booked 17 per cent and Consolidated 5 per cent of the totals, but in 1946 the sales of this type of product in the Consolidated market were divided so that U. S. Steel had 13 per cent, Consolidated and Bethlehem each had 11 per cent and the next largest industrial fabricators had 9, 6 and 3 per cent, respectively, of the total with the balance being divided among eighty companies.³⁶

B. The Litigation.

The Government filed a complaint³⁷ charging that the purchase of Consolidated’s assets by U. S. Steel would result in the elimination of substantial competition “in the sale of rolled steel products” and “the manufacture and sale of fabricated steel products” and that it therefore constituted an unreasonable restraint of trade in violation of Section 1 of the Sherman Act. The Government also charged that the agreement of purchase constituted an attempt by U. S. Steel to monopolize “the production and sale of fabricated steel products” in the Consolidated market in violation of Section 2 of the Sherman Act.

The issues framed by the complaint serve to illustrate the type of deficiency which marred the Government’s presentation both in the trial court and before the Supreme Court. The complaint charged that the merger would eliminate competition in the sale of “rolled steel products” as contrasted with the sale of “plates and shapes”—the two types of rolled steel products to which Consolidated’s purchases were largely confined and upon which issue the Government before the

35. The majority Supreme Court opinion held that “. . . Data are offered by the Government for 1946 which are too uncertain to furnish a reliable guide. . . .” 334 U. S. 495, 509 (1948). Furthermore, as we shall see, the majority held that “. . . in this case and on this record we have circumstances that strongly indicate to us that rolled steel production and consumption in the Consolidated market area is the competitive area and product for consideration. . . .” *Id.* at 511. The failure of the Government to introduce sufficient evidence to establish that consumption of plates and shapes was the valid criteria, rather than the general classification “rolled steel products” may well have been largely responsible for the Government’s failure to succeed in preventing the merger, as the dissent was willing to enjoin the transaction solely on this aspect of the case, being willing to assume that plates and shapes were properly distinguishable from the general category “rolled steel products,” an assumption that the majority was unwilling to make.

36. The facts for 1946 were claimed by the Government to have been supported by the evidence which it introduced and although the defendants disputed their accuracy and the lower court made no reference to them in its findings, Mr. Justice Reed’s majority opinion accepted them “. . . as sufficiently reliable for our present purpose. . . .” 334 U. S. 495 (1948).

37. Transcript of Record on Appeal, p. 1.

Supreme Court sought to rely most heavily. Likewise the Government chose to present its evidence in the form of a "paper" case consisting of charts and tabulations designed apparently to establish the extent of the competition in the Consolidated market that would be eliminated by the proposed merger. The Government did not offer facts with respect to the nature and structure of the steel industry—such as the elaborate hearings and studies conducted by the TNEC³⁸—showing the degree of concentrated economic power over the entire industry exercised by U. S. Steel and the three other major steel companies.³⁹ Nor did the Government offer proof regarding the uniform pricing system that prevails in the steel industry under the leadership of U. S. Steel,⁴⁰ both nation-wide and in the Consolidated market area; a pricing system that has been charged by the Federal Trade Commission to be illegally discriminatory. The Government did not present either the trial court or the Supreme Court with the background of the proposed acquisition in relation to the general nature and scope of the merger movement and its effects in terms of the concentration of effective market control, although as our brief introductory discussion indicates such material was readily available. Likewise no evidence was introduced as to whether or not producers of plates and shapes could upon losing orders for such items relatively easily manufacture other types of rolled steel products. The evidence adduced from which the courts were asked to form a reasoned judgment as to the effects of Consolidated's absorption by U. S. Steel in the Consolidated market area upon (a) market control or dominance and (b) the extent and nature of the competition that would remain, consisted mainly of tables and statistical data covering sales in the Consolidated market.

No doubt the Government experimentation with the short form of record technique that it adopted in the *Columbia Steel* case was prompted by the desire to streamline litigations of this type with resultant savings financially and in manpower. But in a test case like *Columbia Steel*, with the background of Supreme Court decisions that we have outlined, the failure of the Government to present a detailed

38. See TNEC, Hearings, Parts 18, 19, 20 (1939) and Part 27 (1940).

39. *E. g.*, TNEC Monograph 27, p. 259, shows that while U. S. Steel's proportionate share of total national capacity has declined since its formation that of three other steel giants has increased enormously so that the 4 companies in 1938 controlled more than 63 per cent of the nation's steel ingot production; see also TNEC Monograph 21, analyzing the present day structure of the steel industry and the dominating market control over that industry exercised by U. S. Steel.

40. See, *e. g.*, TNEC Monograph 42, "The Basing Point System" (1941). Likewise the FTC has compiled a wealth of data on price uniformity in the steel industry which has been introduced in the FTC proceeding against the steel industry (a companion suit to its case against the Cement industry); see FTC Docket No. 5508.

record meant that the courts would not have all the fundamental economic material necessary for a proper evaluation of the issues.

Certainly the Government's failure to present the economic facts in its briefs—utilizing the technique made famous by the late Mr. Justice Brandeis—appears to be incomprehensible. Instead of supplying either the District Court or the Supreme Court with the essential economic materials, in terms of which the particular transaction should have been evaluated, the Government's briefs were largely devoted to a *legal* discussion of the Supreme Court's decisions in this field. Primary emphasis was placed upon last Term's decision of the Court in the *Yellow Cab* case⁴¹ as authority for the broad proposition that vertical integrations *per se* are illegal under the Sherman Act, at least when transactions of the size of the proposed absorption of Consolidated—a fifteen million dollar deal—are involved.

By way of contrast with the Government's technique of presentation, counsel for the defendants, U. S. Steel, its subsidiaries, and Consolidated, presented a mass of testimony both oral and written designed to show that:

(a) U. S. Steel was acquiring Consolidated for the legitimate business reason of assuring itself of an outlet for the Geneva plant production; (b) since the end of World War II Consolidated had made efforts to sell its business not only to U. S. Steel but to several other steel companies because it feared the return of normal postwar competitive conditions; that Consolidated had opened its major plant in 1929 and its existence prior to World War II had been a precarious one—; (c) Consolidated's purchases of rolled steel products constituted an infinitesimal part of the nation's consumption and even a very small percentage of sales of such products in the Consolidated market area; (d) there was little or no competition between the structural fabricating activities of Consolidated and those of U. S. Steel because (1) of the fact that Consolidated did light and medium fabricating work whereas U. S. Steel concentrated on heavy fabricated jobs and (2) it was a rare situation in which both U. S. Steel and Consolidated submitted competitive bids and even rarer when one of them lost a particular job to the other; (e) there was no competition between the type of pipe manufactured by Consolidated as compared with the type produced by United States Steel's subsidiaries because (1) the pipes of the respective companies were of vastly different

41. 332 U. S. 218 (1947); for a discussion of this case, its implications and possible limitation to the particular pleadings see Zlinkoff & Barnard, *op. cit. supra* note 22, at pp. 926-932.

gauges, constructed by different methods and predominantly used for different purposes—evidence not disputed by the Government; and (2) even the pipe produced by both companies for similar purposes were of different gauges, construction and cost—Consolidated oil and gas pipelines being sold at thirty dollars per ton more than that charged by U. S. Steel and uncontroverted testimony was offered to the effect that Consolidated was only able to sell its oil and gas pipelines because of the sellers' market for this type of product now prevailing; and (f) the absence of any intent upon the part of the defendants to monopolize or attempt to monopolize as a motive or purpose for the Consolidated acquisition.

The District Court accepted the defendants' view that the amount of competition which would be eliminated between U. S. Steel and Consolidated was too insubstantial to warrant the finding that the merger would constitute a restraint of trade in violation of Section 1 of the Sherman Act⁴² and that since there was no violation of Section 1 there could be none of Section 2.⁴³ While the Court recognized "that it is also clear that an unreasonable restraint may be considered in connection with a limited geographical area", it would appear that the trial court placed primary emphasis upon the national market rather than the Consolidated market area in determining whether or not the merger would eliminate any substantial amount of competition.⁴⁴

The Government appealed contending that (a) the vertical integration presented was illegal *per se*; (b) the amount of competition which would be eliminated in the Consolidated market was substantial enough to make the proposed merger an illegal restraint of trade under Section 1 and (c) the proposed purchase constituted an attempt to monopolize the production and sale of fabricated steel products in the Consolidated market in violation of Section 2.

C. The Supreme Court Decision.

Within five weeks after hearing the oral argument, the Supreme Court, speaking through Mr. Justice Reed, on behalf of five of the Justices, affirmed the dismissal of the complaint. Justice Douglas wrote what will undoubtedly be a memorable dissenting opinion on

42. 74 F. Supp. 671, 672-679 (D. Del. 1947).

43. *Id.* at 680.

44. See also the Trial Court's findings of fact and conclusions of law set forth in the Record at pp. 39-47.

behalf of himself, Justices Black, Rutledge and Murphy. The majority opinion is thirty-six pages long, rambling, and appears to have been written in great haste. The striking contrast between the opinion by Mr. Justice Reed in the *Columbia Steel* case—as well as the result in that case—and the opinion which he wrote on behalf of the Court, and the conclusions reached, a few months earlier in the *Gypsum* case⁴⁵ is largely explainable, we believe, by the difference between the detailed record made by the Government in the *Gypsum* case, as contrasted with the bare statistical type of short form record presented by it in the *Columbia Steel* litigation.

Mr. Justice Reed's opinion, in the *Columbia Steel* case, repeatedly emphasized the inadequacy of the record to support arguments advanced by the Government,⁴⁶ and it likewise repeatedly emphasizes that the conclusions enunciated are predicated upon "the facts of this case".⁴⁷ Unfortunately several of the broad statements set forth in the majority opinion are not as carefully guarded, and, because "*dictum* is very important in the monopoly cases,"⁴⁸ may have an unfortunate, perhaps unintended, effect, if taken out of the total context.

Precise analysis of the majority opinion is difficult because of its repetitious nature and the manner in which the facts and applicable legal principles are presented. Yet we believe that upon careful analysis Mr. Justice Reed's opinion, in its essentials, may constitute a landmark in the history of judicial efforts to cope with the problem of the growing concentration of economic power in this country. Grouping the facts and legal principles, the majority opinion may be broken down into the following subjects.

1. *The Market Criteria Applicable.*

The majority opinion again reiterated the views that had been expressed in this Term's decision in the *Griffith* case,⁴⁹ namely that the national market is not the only criterion for measuring the illegality of restraints of trade under the Sherman Act. ". . . It is the volume in the area which the alleged restraints affect that is important . . ." ⁵⁰

45. *United States v. Gypsum Co.*, 333 U. S. 364 (1948). See Zlinkoff & Barnard, *Patents, Procedure and the Sherman Act*, 17 GEO. WASH. L. REV. 1, 47-54 (1948) for a discussion of the *Gypsum* decision.

46. *See, e. g.*, *United States v. Columbia Steel Co.*, 334 U. S. 495, 507, 509-510, 514-515, 517, 518, 529, 530 (1948).

47. *Ibid.*

48. *Levi, op. cit. supra* note 21, at 158.

49. See Zlinkoff & Barnard, *The Motion Picture Industry and the Anti-Monopoly Statutes*, to appear in the December, 1948, issue of the YALE LAW JOURNAL, for a discussion of this decision.

50. *See United States v. Columbia Steel Co.*, 334 U. S. 495, 520 (1948).

Applying this principle, the yardstick for measuring the legality of the merger is the Consolidated market insofar as rolled steel purchases and structural fabrication is concerned, there being no dispute that the national market was the criterion to be applied to the sale of pipe.⁵¹ The Court's delineation of geographical area of competition, as well as of the type of product of competition was predicated upon the facts presented. The majority opinion expressed appreciation of the need for flexibility in working out such concepts in diverse situations; "we recognize the difficulty of laying down a rule as to what areas or products are competitive one with another."⁵²

2. The Legality of Vertical and Horizontal Integration.

As foreshadowed by Mr. Justice Douglas' statement in the *Paramount* case concerning the views of the majority of the Court upon the subject of vertical integration,⁵³ the majority in the *Columbia Steel* case squarely rejected the Government's contention that the acquisition of Consolidated—and the consequent exclusion of that company as a market for the rolled steel products of competitors of U. S. Steel—was a vertical integration which was illegal *per se* under the Sherman Act.⁵⁴ The fact that a subsidiary will "in all probability" deal only with the parent for the goods that the latter can furnish does not make the acquisition invalid *per se*. The *Yellow Cab* decision is vitiatingly construed to have turned upon the particular pleadings which were before the Court,⁵⁵ Mr. Justice Reed claiming that "nothing in the *Yellow Cab* case supports the theory that all exclusive dealing arrangements are illegal *per se*."⁵⁶

The majority opinion in dealing with this subject laid down the following broad principles:

51. *Id.* at 516: ". . . the government claims that Consolidated and National Tube compete on a nation-wide scale in the field of large diameter pipe for oil and gas pipelines. Other types of pipe made by the two concerns are apparently not competitive as the Government doesn't contest this assertion of the appellees. . . ."

52. *Id.* at 520: ". . . although our previous discussion has indicated the difficulties in accepting the 11 state area in which Consolidated sells its products as the relevant competitive market, we accept for the purposes of decision the Government's argument that this area is the one to be considered in measuring the effect on competition of the withdrawal of Consolidated as a market for other rolled steel producers and of the bringing together under common control of Consolidated and the fabricating subsidiaries of U. S. Steel. . . ."

53. See Zlinkoff & Barnard, *supra* note 49, for a discussion of this aspect of the *Paramount* decision.

54. See *United States v. Columbia Steel Co.*, 334 U. S. 495, 521-2, 524-5 (1948).

55. See Zlinkoff & Barnard, *op. cit. supra* note 22, at 926-932 for a full discussion of the *Yellow Cab* case.

56. See *United States v. Columbia Steel Co.*, 334 U. S. 495, 523 (1948). The majority opinion in footnote 23 takes pains to point out ". . . that the legality of contractual arrangements for exclusive dealing was sustained in *United States v. Bausch & Lomb Co.*, 321 U. S. 707, 728-29 (1943) . . ." but this was a 4-4 decision.

"A restraint may be unreasonable either because a restraint otherwise reasonable is accompanied with a specific intent to accomplish the forbidden restraint or because it falls within the class of restraints that are illegal *per se*. For example, where a complaint charges that the defendants have engaged in price fixing, or have concertedly refused to deal with non-members of an association, or have licensed a patented device on condition that unpatented materials be employed in conjunction with the patented device, then the amount of commerce involved is immaterial because such restraints are illegal *per se*."⁵⁷

No explanation was adduced by Mr. Justice Reed as to why the three categories of restraints of trade outlined by him were illegal *per se* and why a vertical acquisition of the size involved in the *Columbia Steel* case was not illegal *per se*, except the statement that "vertical integration is an indefinite term without explicit meaning" and "it is not for the Courts to determine the course of the Nation's economic development . . . if businesses are to be forbidden from entering into different stages of production that order must come from Congress not the Courts".⁵⁸ The same paragraph of Mr. Justice Reed's opinion which contains these statements also has the following sentences "on the other hand, the Courts have been given by Congress wide powers in monopoly regulation. The very broadness of terms such as restraint of trade, substantial competition and purpose to monopolize have placed upon the Courts the responsibility to apply the Sherman Act so as to avoid the evils at which Congress aimed." This attempt to straddle horses going in opposite directions renders the style of the opinion much like the one by the same Justice in the *Line Material* case.⁵⁹

Since vertical integrations are not illegal *per se* what criteria for determining the legality of such arrangements are formulated by the

57. *Id.* at 524. As stated in Mr. Justice Reed's opinion, however, at least a majority of the present Supreme Court favor substituting for blanket approvals or disapproval of exclusive dealing arrangements the following standard: "Exclusive dealings for rolled steel between Consolidated and U. S. Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product."

58. *Id.* at 526. In this same paragraph Mr. Justice Reed makes the following amazing statement—in the light of the TNEC studies of the structure of our economy and the specific conditions prevailing in our basic industries—" . . . the basic industries, with few exceptions do not approach in America a cartelized form. . . ." *Id.* at 526. Compare: "Private enterprise is ceasing to be free enterprise and is becoming a cluster of private collectivisms, masking itself as a system of free enterprise after the American model, it has in fact become a concealed cartelized system after the European model." Message of the late President Franklin D. Roosevelt, April 9, 1938, to Congress cited with unanimous approval by the Bipartisan TNEC's *Final Report and Recommendations*, *op. cit. supra* note 9, at 12.

59. See Zlinkoff & Barnard, *op. cit. supra* note 45, at pp. 42-45.

majority opinion? The following are the basic criteria which we distill therefrom:

(a) delineation of "the nature of the market to be served", namely, what are the areas and types of product that are to be considered in arriving at a judgment;

(b) the leverage on the market which the particular vertical integration creates or makes possible, in other words, "consideration of its effect on the opportunities of other competitor-producers to market" their products; and

(c) "the purpose or intent with which the combination was conceived. When a combination through its actual operation results in an unreasonable restraint, intent or purpose may be inferred; even though no unreasonable restraint may be achieved, nevertheless a finding of specific intent to accomplish such an unreasonable restraint may render the actor liable under the Sherman Act."⁶⁰

In setting forth these standards the majority opinion repeatedly refers to and quotes from the opinions of Mr. Justice Douglas in the *Griffith* and *Paramount* cases.⁶¹ In substance there appears to be no conflict between the criteria formulated by Mr. Justice Reed for judging the validity of vertical integrations as compared with the condensed statements of these criteria set forth by Mr. Justice Douglas in the *Paramount* case. Applying these standards the majority concluded that insofar as the proposed merger was a vertical integration it did not constitute an illegal restraint of trade because it was not shown that the merger would "unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product."⁶² Upon

60. See *United States v. Columbia Steel Co.*, 334 U. S. 495, 525 (1948). In referring to the *Paramount* case the majority opinion in *Columbia Steel* contains a dictum the broad scope of which, unless construed in the total context, may possibly be argued to vitiate the entire portion of Mr. Justice Douglas' opinion dealing with divestiture. Thus Mr. Justice Reed in the *Columbia Steel* case, says with respect to *United States v. Paramount*: "We held that control by the major producer-distributors over nearly three-fourths of the first run theatres in cities with population over 100,000 was not of itself illegal, and we remanded the case to the District Court for further findings." 334 U. S. 495, 524 (1948). We believe that this loosely written sentence was probably not intended to overrule or affect in any way the majority opinions in any of the movie cases because the majority opinion cited and quoted from the *Paramount* case, and it is also to be noted that Mr. Justice Douglas in his dissent in the *Columbia Steel* case did not raise any question about the majority's treatment of his opinion in the *Paramount* case. It is unlikely that if the majority opinion was intended to overrule any part of Mr. Justice Douglas' opinion in the *Paramount* case—rendered on behalf of six justices—that Mr. Justice Douglas would not have raised the question sharply.

61. For a discussion of the opinions of Mr. Justice Douglas in these two cases, see the companion article by the authors, cited *supra* note 49.

62. 334 U. S. 495, 527 (1948).

the record before it, the majority accepted as the relevant market criteria (1) the demand for rolled steel products; and (2) the eleven state area in which Consolidated markets its products. It is pointed out that over a ten year period Consolidated accounted for only three per cent of the total demand of such products in that area and that if expectations for the development in the Western area are fulfilled, Consolidated's proportion may be expected in the future to be lower than three per cent. Upon the facts presented the majority concluded that "so-called vertical integration resulting from the acquisition of Consolidated does not unreasonably restrict the opportunities of the competitor producers of rolled steel to market their product." If the majority's conclusion on this phase of the case is to be criticized, we believe that the Government must bear a considerable part of the responsibility because of the method of presentation it adopted.⁶³

"The same tests which measure the legality of vertical integration by acquisition are also applicable to the acquisition of competitors in identical or similar lines of merchandise."⁶⁴ The market in which the concerns compete, the extent of the competition, both actual and potential between the concerns, are the basic criteria. "In determining what constitutes unreasonable restraint, we do not think the dollar volume is in itself of compelling significance; we look rather to the percentage of business controlled, the strength of the remaining competition, whether the action springs from business requirements or purpose to monopolize, the probable development of the industry, consumer demands, and other characteristics of the market."⁶⁵ The opinion emphasizes the fact that fixed percentages or arbitrary standards are too inflexible and that "the relative effect of percentage command of a market varies with the setting in which that factor is placed."⁶⁶ It is significant to note that the majority agreed with the Government that the elimination of potential competition is a factor to "be taken into consideration in weighing the effect of any acquisition of assets on restraint of trade."⁶⁷ The difficulty that the majority found was not so much with the Government's contentions but with lack of proof to support its arguments.

Applying its own criteria, we believe unrealistically, the majority held that even assuming U. S. Steel "could be expected in the future to sell 13 per cent of the total structural steel products in the Consolidated trade area and that Consolidated could be expected to sell 11

63. See pp. 162-164 *supra*.

64. 334 U. S. 495, 527 (1948).

65. *Ibid*.

66. *Id.* at 528.

67. *Ibid*.

per cent . . . It can not be said there would be an unreasonable restraint of trade.”⁶⁸ The majority opinion, however, was careful to limit the ruling on this phase of the case to “the present unusual conditions of the Western steel industry”; the number of West Coast fabricators that would remain; and “. . . the ability of out-of-the-area fabricators to compete because of the specialized character of the structural steel production in regard to orders and designs.” The opinion expressly stated that the holding “does not imply that additional acquisitions of fabricating facilities for structural steel would not become monopolistic . . .”⁶⁹

The inadequacy of the proof with respect to the extent of competition, potential and actual, in the manufacture of pipe that would be eliminated by the merger was likewise the basis of the majority’s holding that “. . . it does not seem to us that it has been shown that competition in this field between the parties to this contract is so substantial that its elimination under these circumstances constitutes an unreasonable restraint . . .”⁷⁰

One of the most important aspects of the majority opinion is the manner in which it brushed aside the previous decisions of the Supreme Court and the lower federal courts, on the subject of mergers, and indicated that the present Court would not consider itself hampered or restricted by this heavily criticized group of decisions. Referring the reader to the same vitriolic criticism of the previous Supreme Court decisions by Professor Handler that we have already quoted,⁷¹ the court said, “we do not stop to examine those cases to determine whether we would now approve either their language or their holdings. The factual situations in all those cases is so dissimilar from that presented here that they furnish little guidance in determining whether the competition which will be eliminated through the purchase of Consolidated is sufficient to warrant injunctive relief . . .”⁷² The most significant illustration of the difference between the approach of the majority opinion in *Columbia Steel*—as contrasted with that of the Supreme Court in the *International Harvester* and original *Steel* cases, is its refusal to bind the Court to the adoption of any arbitrary fixed percentage rule. On the contrary, the opinion offers an intelligible, flexible standard—“. . . we do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation’s enlargement of its activities by the purchase of the assets of a competitor. The

68. *Id.* at 529.

69. *Ibid.*

70. *Id.* at 531.

71. See pp. 152-153 *supra*.

72. 334 U. S. 495, 531 (1948).

relative effect of percentage command of a market varies with the setting in which that factor is placed . . .”⁷³ This sound realism should serve to dispel the harmful effects that have been caused by Judge Learned Hand’s unfortunate dictum in the *Aluminum* case, to wit, “it is doubtful whether 60 or 64 per cent would be enough; and certainly 33 per cent is not.”

3. *The Proposed Merger and Section 2 of the Sherman Act.*

It must be noted at the outset that the Government did not charge the U. S. Steel Corp. with an attempt to monopolize the steel industry generally but only in “. . . the producing and selling of fabricated steel products in the Consolidated market . . .” That little or no importance was attached to this charge is shown by the fact that, in its main brief before the Supreme Court, the Government devoted exactly two pages to the subject, and, none at all in its reply brief. The claim was based solely upon the fact that since 1924 U. S. Steel had acquired eight steel companies, producers and fabricators, but the details concerning these acquisitions were not presented so that this phase of the case, like too many other aspects of the Government’s charges, was predicated upon inferences and argument rather than economic facts. Nor was any attempt made to reconcile this charge with the fact that Attorney General Clark a year before had sanctioned the acquisition of Geneva by U. S. Steel, an acquisition equal in size to all the other eight previous mergers put together.

The majority of the Supreme Court affirmed the lower court’s dismissal of this phase of the Government’s complaint although it held that the test applied by the trial court was too narrow “even though the restraint effected may be reasonable under Section 1, it may constitute an attempt to monopolize forbidden by Section 2 if a specific intent to monopolize may be shown.”⁷⁴ The majority correctly stated that it would look not only to the one hundred and eighty acquisitions consummated by U. S. Steel prior to the Supreme Court’s decision in the Government’s first case against U. S. Steel as an illegal monopoly,⁷⁵ but also to the eight acquisitions from 1924 to 1943, as well as the latest acquisition, namely Geneva. “We think that last acquisition is of significance in ascertaining the intent of U. S. Steel in acquiring Consolidated.”⁷⁶ This conclusion serves to underscore the extent to which the Attorney General’s opinion validating the Geneva ac-

73. *Id.* at 527-528.

74. *Id.* at 531-532.

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

76. 334 U. S. 495, 532 (1948).

quisition may have foreclosed the Court from giving proper weight to the "intent" that might otherwise have been inferred from the United States Steel Corporation's long history of acquisitions. Future merger cases should not present such an obstacle to the Court's giving the anti-monopoly statutes their full application.

There follows next in the majority opinion, however, a sentence so strange that one wonders why Mr. Justice Reed has not withdrawn it from his opinion as being unnecessary to the decision. He points out that U. S. Steel's bid for Geneva emphasized the importance of erecting fabricating facilities and that many of the other bids had been conditioned upon the Government making grants for erecting such facilities and he concludes, "it is doubtful whether objections could be raised if U. S. Steel proposed to build instead of to buy from a competitor fabricating facilities similar to those possessed by Consolidated."⁷⁷ In its petition for rehearing, the Government aptly, and we believe correctly, exposed the fallaciousness of this statement, "We submit that there is a vital distinction, apparently overlooked, between the case supposed and the case before the Court. To build additional facilities, in the course of vertical integration of an enterprise or otherwise, increases production, the flow of goods to market, and competition in their sale. Absorption of an independent concern, on the other hand, doesn't increase production or competition, but it may, and in this case it indubitably does eliminate competition both with respect to the purchase of the raw materials which the concern needs for its business and with respect to the sale of the goods which it produces . . . for to absorb an independent competitor is one of the most effective and insidious means of restraining trade and competition."⁷⁸

Unfortunately the record did not contain evidence that either War Surplus Administrator General Gregory or Attorney General Clark would not have accepted U. S. Steel's bid for Geneva if U. S. Steel had stated or implied that it intended to buy out the largest independent fabricators on the West Coast instead of building its own finishing and fabricating facilities, thus eliminating competition rather than promoting its growth.

The majority opinion concludes its discussion of this aspect of the case by pointing out that U. S. Steel's proportions of rolled steel products produced in the country had declined from 50.1 per cent in 1901, when U. S. Steel was formed, to 33.2 per cent in the period 1937-1946. It recognized that the size of U. S. Steel was impressive and that

77. *Id.* at 532.

78. Government's Petition for Rehearing, pp. 5-6; *rehearing denied*, 334 U. S. 862 (1948).

"... size has significance also in an appraisal of alleged violations of the Sherman Act..." but it emphasized that the steel industry "... is also of impressive size and the welcome westward expansion of that industry requires that the existing companies go into production there or abandon that market to other organizations..."⁷⁹

D. The Dissent of Mr. Justice Douglas.

The dissenting opinion of Mr. Justice Douglas, on behalf of four of the Justices, differed from the majority not in the criteria formulated for determining the legality of mergers, but in the application of those standards to the central facts presented. The dissent urged that it was not necessary to hold all vertical integrations illegal *per se* in order to find that the proposed merger would constitute an unreasonable restraint of trade. It urged that the elimination of Consolidated as a market for the purchase of rolled steel products, and particularly plates and shapes, of U. S. Steel's competitors rendered the proposed acquisition an illegal restraint of trade. It was pointed out that Consolidated's business amounts to around \$22,000,000 annually and that its competitive purchases of rolled steel products are over \$5,000,000 a year. "... I do not see how it is possible to say that \$5,000,000 of commerce is immaterial. It plainly is not *de minimis*... At least it can be said here, as it was in *International Salt Co. v. U. S.*, 332 U. S. 392, 396, that the volume of business restrained by this contract is not insignificant or insubstantial..."⁸⁰

The greater part of the dissenting opinion was devoted, however, to a reiteration of the late Mr. Justice Brandeis' views on the evils of bigness. Fallacies inherent in the arguments of the proponents of big business and claimed to have been demonstrated by the late Justice in his book "The Curse of Bigness" as well as several of the TNEC Monographs are quoted at length. "We have here the problem of big business. Its lesson should have by now been burned into our memory by Brandeis."

The dissent then pointed out that control of prices in the steel industry is (a) a powerful leverage on our economy; and (b) "... size in steel is the measure of the power of a handful of men over our economy..."⁸¹ The dissenting opinion concludes with a statement of economic philosophy—with which we do not believe Mr. Justice Reed is in fundamental disagreement—that furnishes the explanation of the motivating force behind the decisions of the Supreme Court in practically all of the cases that we have reviewed in our studies

79. 334 U. S. 495, 533 (1948).

80. *Id.* at 537.

81. *Id.* at 536.

of the trade regulation decisions rendered by the Court during its October 1947 Term.

"Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the emotional stability of a few self-appointed men. The fact that they are not vicious men but respectable and socially minded is immaterial. That is the philosophy and command of the Sherman Act. It is founded on a theory of hostility to the concentration in private hands of power so great that only a Government of the people should have it."⁸²

E. Critique: The Columbia Steel Decision.

Counsel for the defendants in anti-trust litigations have warmly embraced the majority decision in the *Columbia Steel* case and have urged that it constitutes a basic change in the construction of the anti-trust laws by the Supreme Court.⁸³ Such a viewpoint stems, we believe, from a misunderstanding of the meaning and significance of the substance of Mr. Justice Reed's opinion when read in its totality. True that opinion has shortcomings of style and is encumbered with loose language unessential to the decision, but, in its fundamentals, the *Columbia Steel* decision may furnish the federal judiciary with the

82. *Id.* at 536-537.

83. On the same day that the Supreme Court's decision in the *Columbia Steel* case was handed down, the opinion of the District Court was filed in the case of *United States v. Standard Oil of California*, 78 F. Supp. 850 (S. D. Cal. 1948), wherein the Court held an exclusive arrangement system with filling station dealers was illegal under the anti-trust laws. Promptly thereafter counsel for the defendants filed a lengthy motion for reargument on the basis of the *Columbia Steel* decision. District Judge Yankwich refused to hold that the *Columbia Steel* decision constituted grounds for reversing his former opinion. "At the outset, I advert to the fact that the range of the ruling that I made is not to be determined by the arguments which the Government advanced, but by what was actually decided." *Id.* at 876. Clearly and succinctly Judge Yankwich pointed out the narrow pleadings in the *Columbia Steel* case; the narrow scope of the inquiry; that the Government's position was weakened by the opinion of the Attorney General validating the acquisition of Geneva: ". . . on the whole, it is evident that the decision in the *Columbia Steel Co.* case can not be given the broad scope which the defendants claim for it. It is canalized in the narrow channel which the facts in the case established. . . . in the present case, as appears from the original opinion, we are dealing not with probabilities but with actualities. . . ." *Id.* at 879 (emphasis added). Probable jurisdiction was noted by the Supreme Court in this case, Oct. 18, 1948. 69 Sup. Ct. 69 (1948).

Several suits similar to the *Standard Oil* case have been filed recently by the Government; *e. g.*, *United States v. International Harvester*, CCH TRADE REG. SERV. ¶ 61,149 (D. Minn., Sept. 9, 1948), charging the big-three farm machinery manufacturers with violating the anti-trust acts by virtue of their exclusive franchise agreements with local dealers, as the result of which it is claimed competing manufacturers are denied access to vital market outlets. See also *United States v. Railway Express Co.*, CCH TRADE REG. SERV. ¶ 61,151 (D. Del., Sept. 17, 1948). The FTC has likewise commenced a number of similar proceedings, *e. g.*, *National Aluminum Co.* (March 30, 1948), CCH TRADE REG. SERV. ¶ 13,722; *Gamble Skogmo, Inc.* (July 20, 1948), CCH TRADE REG. SERV. ¶ 13,782.

most helpful criteria yet formulated by the Supreme Court as a means of dealing effectively with the growing concentration of economic power which threatens to undermine and destroy both our political democracy and our system of private, free competitive enterprise. The criteria adopted by the majority (from which there was no dissent) for determining the legality of vertical and horizontal integrations make intelligent economic sense, even though regrettably narrower than those enunciated in the *Yellow Cab* and *International Salt* cases.⁸⁴ The standards represent the substitution of intelligent economic thinking for the hodge podge to be found in the prior decisions of the Supreme Court upon this subject. In this respect the majority opinion is like those of Mr. Justice Rutledge in the *Scophony* and *National City Line* cases decided this Term where practical business standards were substituted for metaphysical and abstract legal concepts that had previously dominated in the decisions of the Court in the particular fields with which these two cases dealt. Dissatisfaction with the majority opinion in the *Columbia Steel* case will stem not from the legal principles laid down, but from their application to the particular situation before the Court. The aspect of the majority opinion perhaps most open to criticism on this score is that portion which dealt with the legality of the Columbia Steel merger in terms of the resulting *horizontal* integration. There will be those who contend that this portion of the majority decision supports the broad thesis that no illegal restraint of trade results from a merger that places 24 per cent of a basic industry—such as structural steel—within the control of a single company whereas previously there had been a competitive situation. This contention overlooks the majority's position that a merger case is *not* governed by percentages but by a consideration of the competitive situation in which the merger is made. It is regrettable, however, that support for an argument of this character should be furnished by Mr. Justice Reed's unrealistic application of his economically sound criteria to the facts of the case before the Court.

It is only conjectural why the Government should have chosen as its first case, since 1933, a situation where the Attorney General, on the basis of an unsound circuit court of appeals dictum—predicated upon outmoded Supreme Court decisions—had rendered an opinion stating that an increase in the proportionate share of "Far West" steel ingot capacity from 17 to 39 per cent did not violate the anti-trust laws. The Government's failure to present completely the picture of the steel industry in support of its charge of illegal intent, U. S. Steel's growth by acquisitions, the price leadership by U. S. Steel, and its use

84. See pp. 167-168, 174 *supra*.

of the basing point system (aspects which the Attorney General's opinion expressly left open as an escape clause) invited a judicial decision quite different in scope from the one handed down by Mr. Justice Reed for the majority of the Supreme Court. Instead of a resounding defeat, the Supreme Court may have presented the Executive branch of our Government with a new charter for enabling it, including the administrative agencies such as the Federal Trade Commission, to deal effectively with the increasing growth of monopoly power with its attendant dangers. True, as we have indicated, there is some ill chosen and loose language in the majority opinion but on the whole that document is a challenge and a warning. The Supreme Court has served notice that it is prepared to judge the legality of corporate mergers and combinations upon the basis of economic realities and it has challenged the Executive branch of our Government to present adequate economic material to it in cases of this character.

There will be those who will contend that the decision is a severe blow to any effective legal action against the growth of monopoly power because it will permit small acquisition after small acquisition to be consummated. While this is a possible construction of the *Columbia Steel* case, we do not think that it is a fair, adequate, or necessary one as shown by the fact that the Court served notice on U. S. Steel that its ruling with respect to the acquisition of Consolidated "does not imply that additional acquisitions of fabricating facilities for structural steel would not become monopolistic." Furthermore, we believe that the majority opinion indicates a willingness of the present Supreme Court to reconsider, and perhaps plug, the loopholes in Section 7 of the Clayton Act created by the Supreme Court of the Coolidge-Hoover era, and to apply that section to acquisitions of assets where such transactions are an indirect way of accomplishing precisely the same result as stock acquisitions.⁸⁵

It remains to be seen whether the Executive branch of our Government will make full use of its new charter, and whether the lower federal courts will carry out the mandate which the Supreme Court has given them. Naturally fulfillment of these tasks will require far more adequate financial grants to the anti-trust division and the Federal Trade Commission than Congress has made in the past.

85. See *United States v. Columbia Steel*, 334 U. S. 495, 507 (1948). ". . . This was not a purchase of stock of a competing company. See § 7, Clayton Act, 38 STAT. 730, 731; *Federal Trade Comm. v. Western Meat Co.*, 272 U. S. 554. It must be assumed, however, that the public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets of Consolidated by U. S. Steel with the same economic results as the purchase of the stock violates the prohibitions of the Sherman Act against unreasonable restraints. See Handler, *Industrial Mergers and the Anti-Trust Laws*, 32 COL. L. REV. 179, 266 (1932)." See also note 3 *supra*.

The validity of the analysis and interpretation we have presented with respect to the *Columbia Steel* decision may be tested by what the Supreme Court does on the appeal from District Judge Yankwich's decision in the anti-trust prosecution by the Government against Standard Oil of California;⁸⁶ but that is a chapter yet to be written. Meanwhile the Capehart Committee—recently created by the Senate (in the closing days of the 80th Congress)⁸⁷ to investigate the effect of the *Cement*⁸⁸ and other decisions “. . . construing Federal statutes relating to the regulation of trade practices . . .”—could render a real contribution to the preservation of our democracy, if it would pry loose from the pigeon holes to which they have been consigned the bills designed to carry out the recommendations of the bi-partisan TNEC for strengthening the anti-trust laws with reference to mergers.⁸⁹

We think it significant that in the hearings conducted by the Capehart Committee to determine whether or not the proposed inquiry should be voted, Senator O'Mahoney called attention to the work in this field that had been done by the TNEC—which had numbered among its members the late Senator Borah and former Republican National Chairman Representative Carroll Reece—and how legislation designed to carry out their recommendations had been “bottled up” in various committees.⁹⁰ The Senator emphasized that he believed that lack of legislation was responsible for the situation with respect to the concentration of economic power into fewer and fewer hands, “getting progressively worse from year to year.”⁹¹ It is hopeful to note that Senator Capehart, Chairman of the Senate Committee, replied that the purpose of the proposed investigation “is to do possibly what you have in mind and what the Congress and the Government have failed to do over the past twenty years. I think you have made a perfect case here for a thorough study of this whole problem . . . And I agree with you 100 per cent that the situation is getting progressively worse and is much worse today than it was even twenty years ago. I agree with that. And I think it is time that something should be done about it. That Congress should study it.”⁹² But if these promises of a legis-

86. See note 83 *supra*.

87. SEN. REP. NO. 241, 80th Cong., 2nd Sess. (1948).

88. For a full discussion of the *Cement* decision of the Supreme Court, see the companion article by the authors, *Basing Points and Quantity Discounts*, 48 COL. L. REV. 985 (1948).

89. For an excellent study of the provisions and background of the pending legislative proposals see Comment, *Corporate Consolidation and the Concentration of Economic Power: Proposals for Revitalization of Section 7 of the Clayton Act*, 57 YALE L. J. 613 (1948).

90. *Hearings before Subcommittee of Committee on Interstate Commerce on S. Res. 241*, 80th Cong., 2nd Sess. 41-47 (1948).

91. *Id.* at 47.

92. *Id.* at 54, 57.

lative contribution should come to naught after election time it is to be hoped that the Supreme Court and the federal judiciary will at least continue their restoration of the original spirit and scope of the Clayton Act so long denied effective expression because of restrictive judicial interpretation.

[After this article had been sent to the printer, the American public expressed themselves decisively at the polls and elected both a Democratic Senate and House of Representatives. It remains to be seen what steps, if any, will be taken to enact the legislation needed for dealing with the problems we have discussed. Senator Capehart, a leading Republican, openly challenging the majority party to *do* something about the problem of big business getting bigger and small business smaller, has pointedly remarked, "Congressman Patman doesn't have to study what's happened to little business because during the last sixteen years little business has been getting smaller and big business is getting bigger. They (the Democrats) always throw up their hands and cry 'monopoly, monopoly, monopoly', when they are the ones who are running the Government." ⁹³

The challenge to the new Congress to act on the problem of monopoly and increasing concentration of economic power ⁹⁴ has been forcefully put by one of the country's astute financial editors:

"Our nation's economic and social greatness originated in the independent, small businesses; our entire history reveals our deep fear of monopoly.

Yet, despite our background and traditions, the trend toward concentration of economic power has continued and flourished.

It is up to you, in this generation, to decide what shall be done. And in this one, all of us must participate. For we will be deciding the future of the American system." ⁹⁵]

93. N. Y. Times, Nov. 18, 1948, p. 41, col. 5. See also N. Y. Sun, Nov. 17, 1948, p. 36, col. 3.

94. The Small Business Committee of the House of Representatives has been extremely active recently in conducting hearings designed to lay the groundwork for the introduction of legislation strengthening the anti-trust laws. See, *e. g.*, a report of the testimony given the Committee by former Assistant Attorney General Wendell Berge, Journal of Commerce, Nov. 19, 1948, p. 1, col. 6.

95. Sylvia Porter, N. Y. Post, Nov. 18, 1948, p. 28, col. 1.