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Manton M. Grier

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NOTES

MONOPOLIZATION UNDER SECTION 2 OF THE SHERMAN ACT

I. INTRODUCTION

Section 2¹ of the Sherman Act proscribes three separate offences: (1) monopolization, (2) attempts to monopolize, and (3) combinations or conspiracies to monopolize.² This note will deal generally with monopolization, sometimes called actual monopolization.

The law of section 2 monopolization is extremely confused. This confusion stems primarily from the existence of two competing theories regarding the nature of section 2 monopolization—the power theory and the abuse theory. The power theory regards the existence of monopoly power³ as the essence of the offense. Accordingly, a case of actual monopolization is made out when the defendant⁴ is shown to possess monopoly power. He may escape Sherman Act liability only if he can show that his monopoly power was inadvertently acquired. In contrast, the abuse theory regards the abuse of monopoly power as the essence of the offense. Accordingly, it is not enough to show that the defendant possesses monopoly power; it must also be shown that the defendant wrongly acquired or abused his monopoly power.

These two conflicting theories of actual monopolization are in part a reflection of a confusion that exists in the American antitrust tradition. “We are not sure whether we are against monopoly or the abuses of monopoly.”⁵ There is a strong tradition in this country against monopoly⁶ but there is an equally strong tradition in favor of competition. It is felt that every

1. 15 U.S.C. § 2 (1964).

2. *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373, 376 (S.D.N.Y. 1969); 15 U.S.C. § 2 (1964); 16 VON KALINOWSKI, *BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION* § 8.01 (1969) [hereinafter cited as *BUSINESS ORGANIZATIONS*].

3. Monopoly power has been judicially defined as “the power to control prices or exclude competition.” *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

4. Either an individual or a group of individuals acting in concert may be found guilty of section 2 monopolization. 16 *BUSINESS ORGANIZATIONS* § 8.02 at 8-8. For a general discussion of the term person under section 2, see *Id.* § 7.02[1].

5. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153 (1947).

6. *Id.*

individual has a right to engage in business and this right "might include the right to emerge as a monopolist"⁷

This confused tradition is embodied in the Sherman Act.⁸ The framers of the Sherman Act, either intentionally or unintentionally, left the question open and the courts have oscillated between the two extremes in applying the Act.

As a result, the Sherman Act has gone through various periods of interpretation.⁹ Professor Edward H. Levi, formerly of the University of Chicago Law School, has said that "[f]or the greater part of its history, the Sherman Act has as a practical matter adhered to the abuse theory"¹⁰ Professor Eugene V. Rostow of the Yale Law School has suggested that the Supreme Court adopted a power theory in a line of cases starting with *Standard Oil Co. v. United States*¹¹ and, as a matter of strict holdings, has maintained this position since that time.¹² Both men would agree that the Supreme Court endorsed a power theory in *American Tobacco Co. v. United States*¹³ when it approved Judge Learned Hand's opinion in *United States v. Aluminum Co. of America*.¹⁴ A reading of the relevant lower court opinions since *Alcoa*, however, reveals that both theories are still with us¹⁵ and recent opinions of the Supreme Court can be interpreted to support either theory.¹⁶

7. *Id.* at 155.

8. *Id.* at 153.

9. See Rostow, *Monopoly Under the Sherman Act: Power or Purpose?*, 43 ILL. L. REV. 745, 746 (1949).

10. Levi, *supra* note 5, at 157. Professor Levi points out that, theoretically, it may not be true that the Supreme Court has for the most part adhered to an abuse theory. The cases, which are distinguishable factually, are not clear one way or the other, and it is possible to point to specific deviations from the abuse theory. Until the mid 1940's, however, the Supreme Court opinions were interpreted, either rightly or wrongly, by businessmen and others, to stand for an abuse theory of section 2. Thus practically speaking, The Sherman Act for the most part has adhered to an abuse theory. *Id.* at 157-58.

11. 221 U.S. 1 (1911).

12. Rostow, *supra* note 9, at 750-63. Professor Rostow points out, however, that "the philosophy of decision in the majority opinions of [United States v. United States Steel Co., 251 U.S. 417 (1920) and United States v. International Harvester Co., 274 U.S. 693 (1927)] is quite markedly different from that in some, and perhaps all of the earlier cases." *Id.* at 758.

13. 328 U.S. 781 (1946).

14. 148 F.2d 416 (2d Cir. 1945).

15. Compare *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956) (abuse theory) with *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966) (power theory) and *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (power theory).

16. See *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966); *United States v. Griffith*, 334 U.S. 100 (1948).

In order to minimize the confusion engendered by the existence of these two theories, this note, after a historical presentation, will attempt to analyze the substantive elements of actual monopolization from the standpoint of criminal law. Like other crimes, those crimes proscribed by the Sherman Act¹⁷ have certain definitional elements, all of which must be proved in order to make out a violation. Analytically speaking, every crime has seven such definitional elements: (1) *mens rea* (the definitional intent) (2) *actus reus* (the definitional conduct) (3) causation (4) harm (5) concurrence of *mens rea* and *actus reus* (6) legality and (7) punishment.¹⁸ No less is true for the Sherman Act. The courts, however, have not been this formal. The cases generally define section 2 monopolization in terms of a combination of monopoly power and some form of conduct¹⁹ or intent.²⁰ The purpose of using a formal analysis here is not to more accurately restate the substantive content of section 2 monopolization but, as previously mentioned, to minimize confusion.

II. THE RELATIONSHIP BETWEEN §§ 1 AND 2.

The precise relationship between sections 1 and 2 of the Sherman Act has never been clear.²¹ Section 1 declares illegal "[e]very contract, combination . . . , or conspiracy, in restraint of trade" ²² Section 2 makes it a misdemeanor for any person to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce" ²³ Although the two sec-

17. Both section 1 and section 2 are misdemeanors. Only the Government can assert criminal liability under these sections. 16 BUSINESS ORGANIZATIONS § 7.01, at 7-1 n.1. Civil liability, however, may be imposed either by the Government or a private citizen who has been injured under the terms of the Act. 15 U.S.C. §§ 4, 15, 26 (1964).

18. J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 18 (2d ed. 1960); Mueller, *Foreword* to J. HALL & G. MUELLER, CRIMINAL LAW AND PROCEDURE at v (2d ed. 1965).

19. See, e.g., *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

20. See, e.g., *United States v. Griffith*, 334 U.S. 100, 107 (1948).

21. Handler, *Nineteenth Annual Review of Recent Antitrust Developments—1966*, 21 RECORD OF N.Y.C.B.A. 539, 554 (1966). For a general discussion of the relationship between sections 1 and 2, see 16 BUSINESS ORGANIZATIONS § 7.01[2].

22. 15 U.S.C. § 1 (1964).

23. *Id.* § 2. The original Sherman Act, ch. 647, 26 Stat. 209, was passed in 1890. Both sections 1 and 2 were amended in 1955 to increase the maximum fines for violations from \$5,000 to \$50,000. Act of July 7, 1955, ch. 281, 69 Stat. 282. Section 1 was amended in 1937 by the Miller-Tydings Act to exempt contracts made pursuant to fair trade laws from the operation of that section. Ch. 690, 50 Stat. 693.

tions obviously define separate offenses, there is some overlap between the scope of each section²⁴ and the problems arising under both sections are similar.²⁵ Professor Milton Handler of the Columbia University Law School summed up the practical relationship between the two sections when he said that “[m]ost Sherman Act litigation arises under Section 1, with a Section 2 charge thrown in as mere makeweight.”²⁶ But whatever the relationship between the two sections, the cases decided under one section influence the development of the law under the other.²⁷

The early cases viewed the Sherman Act as a unit aimed at restraints of trade in general.²⁸ Contracts, combinations, and conspiracies in restraint of trade and monopolies were all looked upon as unlawful restraints. In time, however, the courts developed a separate substantive content for each section²⁹ and specialization developed within each section.³⁰

III. THE LEGISLATIVE HISTORY AND THE IMPORTANCE OF THE CASES

At one time it was generally felt that Congress had intended the Sherman Act as a codification of the 1890 common law dealing with unlawful restraints of trade.³¹ Section 1 of the Sherman

24. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); 16 BUSINESS ORGANIZATIONS § 7.01[2], at 7-19.

25. Rostow, *supra* note 9, at 746.

26. Handler, *supra* note 21, at 554.

27. Rostow, *supra* note 9, at 746. For an example of the impact of section 1 law on the resolution of a section 2 issue, see the discussion of section 1 in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427, 428 (2d Cir. 1945).

28. In *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), Chief Justice White fused sections 1 and 2 together. He “treated these two sections as essentially synonymous, both being directed against unreasonable restraints of trade, but with Section 2 having a somewhat broader application.” 16 BUSINESS ORGANIZATIONS 701[2], at 7-18 (footnotes omitted). In speaking of the history of unlawful restraints, he said: “[M]onopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade.” 221 U.S. at 54.

This “concept of an all-inclusive Sherman Act” apparently existed prior to the *Standard Oil* decision. See Rostow, *supra* note 9, at 751.

29. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

30. Today section 2 is recognized to proscribe three separate and distinct offenses, note 2 *supra*, and under section 1, the courts are beginning to develop a law of combinations separate and distinct from the law of contracts and conspiracies. For a discussion of this development, see Underwood, *Combinations in Restraint of Trade: Are They No Longer Synonymous with Conspiracies?*, 18 J. PUB. L. 135 (1969).

31. See 16 BUSINESS ORGANIZATIONS § 1.01[2].

Act "employs terms known to the common law"³² and several statements in the legislative history of the Act support this conclusion. The legislative history is conflicting, however, and susceptible of more than one interpretation.³³ Moreover, the substantive content of the Sherman Act has been judicially expanded beyond the scope of the common law that existed in 1890.³⁴

Professor Phillip Areeda of the Harvard Law School has suggested that, because the "legislative history is so lacking in careful weighing or deliberate choices,"³⁵ the Sherman Act might best be viewed as an invitation to the federal judiciary to develop a federal common law of monopoly and unlawful restraints.³⁶ Professor Areeda's suggestion is logical, and it finds support in the legislative history of the Sherman Act.³⁷ It is also appealing because it emphasizes the importance of the cases in dealing with questions arising under the Sherman Act.

Because of the broad wording of the Sherman Act and its virtual immunity from drastic amendment or repeal,³⁸ a common law approach is more appropriate, from the standpoint of legal method, when dealing with Sherman Act questions. Although legislative history may be persuasive in a given case, much of the substantive content of the Sherman Act has been created and developed by the courts in a traditional common law fashion. Thus, as a practical matter, the courts are less hampered by traditional concerns of statutory interpretation in

32. P. AREEDA, *ANTITRUST ANALYSIS* 22 (1967).

33. *Id.* at 23.

34. 16 *BUSINESS ORGANIZATIONS* § 1.01[2], at 1-6, 1-7; *see* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

35. P. AREEDA, *supra* note 32, at 23.

36. *Id.* at 24, 23. Professor Areeda seems to suggest that the Sherman Act is purely jurisdictional in that it is not "a prohibition of any specific conduct." *Id.* at 23. Such an interpretation could, at least theoretically, raise constitutional problems. *See* Mr. Justice Frankfurter's dissenting opinion in *Textile Workers Union of Am. v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957). Moreover, the language of the Act seems to be directed at specific types of conduct. But the language is broad and neither the Act nor the legislative history set forth any definite legislative policy. Thus, although it appears substantive in form, the Sherman Act, because of its breadth and lack of direction, might best be described as a jurisdictional statute.

37. "When Senator Hoar was asked why Congress should bother to denounce monopoly, if it were already prohibited at common law he replied: 'Because there is not any common law of the United States.'" *Id.* at 23.

38. The material language of the Sherman Act has remained virtually unchanged since 1890. *See* discussion note 23 *supra*. Moreover, the consensus of opinion seems to be that the Sherman Act has become a fundamental element of the American political tradition and is consequently immune from repeal or drastic modification. *See* Levi, *supra* note 5, at 156; Rostow, *supra* note 9, at 750.

dealing with the Sherman Act; courts traditionally have been more willing to expand and contract legal doctrines of their own creation.

Antitrust cases are noted for their ambiguity, however, and most of the significant cases are subject to more than one interpretation. Moreover, technical distinctions between holding and dictum are not as important in antitrust litigation as in other areas of the law.³⁹ What is more important is the philosophy of a particular court at a given time. The legal technician should remember that "in connection with the Sherman Act, it is delusive to treat opinions written by different judges at different times as pieces of a jig-saw puzzle which can be, by effort, fitted correctly into a single pattern."⁴⁰

IV. HISTORICAL PRESENTATION

a. *The Early Cases*

In *United States v. Trans-Missouri Freight Association*⁴¹ the Court held that section 1 condemned all restraints of trade with no exceptions. Subsequently, however, the Court retreated from this absolutist position and said "that the statute applies only to those contracts whose direct and immediate effect is a restraint upon interstate commerce . . . ;"⁴² restraints that were lawful at common law, or at least some of them, were not considered to be unlawful under the Sherman Act.⁴³

b. *The Rule of Reason*

The modern history of section 2 monopolization begins with

39. The spirit of an antitrust opinion is significant because only a limited number of suits can be brought and of these, only a select few will ever reach the Supreme Court. Dictum in antitrust opinions often has a dramatic effect on industrial development and future prosecutions under the Sherman Act. Levi, *supra* note 5, at 158. The cases of *United States v. United States Steel Co.*, 251 U.S. 417 (1920) and *United States v. International Harvester Co.*, 274 U.S. 693 (1927), although they can be distinguished on the ground that the defendants did not possess monopoly power, Rostow, *supra* note 9, at 759, set off a wave of industrial mergers and "affixed the abuse theory on the Sherman Act." Levi, *supra* note 5, at 159. Moreover, the *Steel* "decision caused the government to abandon other cases against big business." D. WATSON, *ECONOMIC POLICY* 269 (1960). In both cases the Court said that mere size does not violate the Sherman Act. "The same, or a similar, view is still widely held," *Id.*, although it is not clear whether the notion of mere size is synonymous with monopoly power.

40. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 342 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

41. 166 U.S. 290 (1897).

42. *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 568 (1898).

43. *See id.* at 567-68; *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

the case of *Standard Oil Co. v. United States*,⁴⁴ which announced the rule of reason.⁴⁵ The rule of reason expressed the philosophy of Chief Justice White that the Sherman Act was not intended to reach every restraint of trade but only those restraints that, in view of all the circumstances, appeared unreasonable to the court.⁴⁶ The defendant's conduct and intent were, of course, appropriate circumstances to be considered; however, "resort to the rule of reason was not permissible in order to allow that to be done which the statute prohibited."⁴⁷ Thus if a defendant were found to possess a certain degree of market dominance, he would be conclusively presumed to have monopolized within the meaning of section 2 without regard to his intent.⁴⁸ The question of the defendant's intent became important only when the prohibited degree of economic dominance was lacking.

This view—"that the acquisition of a certain degree of economic power was in itself a violation of Section 2 and Section 1, without particular evidence of how the power had been acquired or exercised"⁴⁹—prevailed until 1920 when the case of *United States v. United States Steel Corp.*⁵⁰ was decided.

c. *The Abuse Heritage—The Steel and Harvester Cases*

In the *Steel* case, the Supreme Court said: "[T]he law does not make mere size an offense, or the existence of unexercised power an offense. It, we repeat, requires overt acts"⁵¹ This statement was reiterated in *United States v. International Harvester Co.*⁵² and only slightly weakened in *United States v. Swift & Co.*⁵³ where Mr. Justice Cardozo said, "Mere size . . .

44. 221 U.S. 1 (1911).

45. THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, REPORT 5 (1955).

46. 221 U.S. at 60, 64, 65; Rostow, *supra* note 9, at 751.

47. 221 U.S. at 64, 65.

48. Rostow, *supra* note 9, at 755. Chief Justice White viewed monopoly as a species of unlawful restraint. Note 28 *supra*. Where a restraint was of such a nature that it clearly constituted an unlawful restraint, then resort to the rule of reason was not permissible. 221 U.S. at 65. This line of reasoning, which was developed and refined in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) and *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), forms the basis of the modern day concept of *per se* illegality. Rostow, *supra* note 9, at 755.

49. Rostow, *supra* note 9, at 756. *But see* *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 341 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). "[Mr. Justice White's] opinions encouraged the view that there was no monopolization unless defendant had resorted to predatory practices." *Id.*

50. 251 U.S. 417 (1920).

51. *Id.* at 451.

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

53. 286 U.S. 106 (1932).

is not an offense against the Sherman Act unless magnified to the point . . . [of] monopoly."⁵⁴

Although the *Steel* and *Harvester* cases can be distinguished factually,⁵⁵ they signaled a shift in the philosophy of the Supreme Court towards an abuse theory of Section 2.⁵⁶

d. The Power Heritage—The Alcoa Case

The philosophy of the Court shifted back towards a power theory in 1946 when it endorsed⁵⁷ the opinion of Judge Learned Hand in *United States v. Aluminum Co. of America*,⁵⁸ the leading case on Sherman Act monopolization.

In that case, Judge Hand synthesized the law of actual

54. *Id.* at 116.

55. Professor Rostow feels that it is significant that the defendants in both cases lacked monopoly power.

[T]he decisions themselves, whatever their effect on public and legal opinion, do not support their doctrine [I]n the *Steel* case the determinative fact, the court said, was that the company had not in its opinion achieved monopoly power, having only 50% of capacity, and had given up the attempt to achieve monopoly power in view of the forces of resistance it met in the market

Similarly, in the *Harvester* case . . . [the defendant's] share of the . . . market had dropped . . . to 64% or less [T]he court concluded, International had lost both the power and the purpose to dominate the market.

Rostow, *supra* note 9, at 759. From the standpoint of economics, however, the two defendants probably did possess monopoly power.

With few exceptions . . . economists disagree that size is of no consequence in determining the level and pattern of prices in an oligopolistic industry. A firm with half the output of an industry can behave as if it had a complete monopoly, when it can be certain that its smaller competitors will follow its prices. Size, then, usually means oligopoly, and price leadership. Oligopoly can be, and price leadership by a dominant seller undoubtedly is, incompatible with workable competition.

D. WATSON, ECONOMIC POLICY 269 (1960).

56. Levi, *supra* note 5, at 159.

57. *American Tobacco Co. v. United States*, 328 U.S. 781, 812-14 (1946). Although Judge Hand's opinion is subject to more than one interpretation, the consensus of opinion seems to favor a power theory interpretation. See, e.g., *United States v. Grinnell Corp.*, 236 F. Supp. 244, (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333, 340-42 (S.D.N.Y. 1950); 16 BUSINESS ORGANIZATIONS § 8.02[4], at 8-60, 8-62; Levi, *supra* note 5, at 174, 175; Rostow, *supra* note 9, at 762, 763. The contrary position is suggested in a number of cases. E.g., *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 216, 217 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

58. 148 F.2d 416 (2d Cir. 1945). The case, pursuant to a newly adopted statute, Act of June 9, 1944, ch. 239, 58 Stat. 272 (codified at 28 U.S.C. § 2109 (1964)), was heard by a special circuit court in lieu of the Supreme Court, which lacked the necessary quorum to hear the case because four Justices had disqualified themselves. *American Tobacco Co. v. United States*, 328 U.S. 781, 812 & n.10 (1946); P. AREEDA, *supra* note 32, at 77, 78.

monopolization into a power theory with an exception in favor of the inadvertent monopolist. He rejected the abuse philosophy of *Steel* and *Harvester* after an examination of the recent developments under section 1 convinced him that possession of monopoly power was the real offense under section 2. The Supreme Court had held in *United States v. Trenton Potteries Co.*⁵⁹ that uniform price-fixing was illegal without regard to the reasonableness of the prices charged, where the price-fixers substantially controlled the market. This rule was broadened in *United States v. Socony-Vacuum Oil Co.*⁶⁰ where the Court said that "any combination which tampers with the price structure is [*per se* illegal]".⁶¹ Since a monopolist by definition has the power to control prices and, in effect, tampers with the price mechanism just by doing business, it followed that monopoly power without more was unlawful. As Judge Hand put it:

Starting . . . with the authoritative premise that all contracts fixing prices are unconditionally prohibited, the only possible difference between them and a monopoly is that while a monopoly necessarily involves an equal, or even greater, power to fix prices, its mere existence might be thought not to constitute an exercise of that power. That distinction is nevertheless purely formal; it would be valid only so long as the monopoly remained wholly inert; it would disappear as soon as the monopoly began to operate; for when it did—that is, as soon as it began to sell at all—it must sell at some price and the only price at which it could sell is a price which it itself fixed. Thereafter the power and its exercise must needs coalesce. Indeed it would be absurd to condemn such contracts unconditionally, and not to extend the condemnation to monopolies; for the contracts are only steps toward that entire control which monopoly confers; they are really partial monopolies.⁶²

After defining the relevant market as domestic and imported virgin aluminum ingot, Judge Hand found, as a matter of fact, that Alcoa dominated 90 per cent of this market and he concluded that such a dominance constituted a monopoly. But it did not necessarily follow that Alcoa was guilty of section 2 monopolization; Alcoa might have inadvertently acquired its

59. 273 U.S. 392 (1927).

60. 310 U.S. 150 (1940).

61. *Id.* at 221, 223.

62. 148 F.2d at 427-28.

monopoly power “automatically so to say: that is, without having intended either to put an end to existing competition, or to prevent competition from arising when none had existed; [it] may [have] become [a monopolist] by force of accident.”⁶³ Judge Hand reasoned that, since monopolization is “a crime, as well as a civil wrong, it would be not only unfair, but presumably contrary to the intent of Congress, to include such instances.”⁶⁴

The prior cases, recognizing but not fully articulating this problem of the inadvertent monopolist, had “from the very outset . . . at least kept in reserve the possibility that the origin of a monopoly [might] be critical in determining its legality”⁶⁵ This notion was expressed by the courts in different ways but it was usually “expressed by saying that size [alone] does not determine guilt;”⁶⁶ there must be size plus something else, such as exclusion of competitors, unnatural growth, wrongful intent, or unduly coercive means. But to Judge Hand, who clearly saw the reasons for “these compunctions,” there was only one question: “Whether [the defendant] falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market.”⁶⁷ He concluded that Alcoa did not qualify for the exception because, *inter alia*, it had excluded competitors by constantly expanding its capacity to gobble up any increases in demand. In Judge Hand’s words:

It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret “exclusion” as limited to manoeuvres not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not “exclusionary.” So to limit it would in our judgment

63. *Id.* at 429-30.

64. *Id.* at 430.

65. *Id.* at 429.

66. *Id.*

67. *Id.* at 431.

emasculate the Act; would permit just such consolidations as it was designed to prevent.⁶⁸

Judge Hand gave three examples where monopoly power might inadvertently be acquired:

[1] A market may, for example, be 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. [2] Or there may be changes in taste or in cost which drive out all but one purveyor. [3] A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that . . . the Act does not mean to condemn the resultant of those very forces which it is its prime object to foster: *finis opus coronat*. The successful competitor, having been urged to compete, must not be turned upon when he wins.⁶⁹

Judge Hand's first example describes an economic phenomenon commonly called a natural monopoly.⁷⁰ His third example de-

68. *Id.*

69. *Id.* at 430.

70. The term natural monopoly was broadly defined in C. KAYSER & D. TURNER, *ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS* (1959) as follows:

In the economic sense, natural monopoly is monopoly resulting from economies of scale, a relationship between the size of the market and the size of the most efficient firm such that one firm of efficient size can produce all or more than the market can take at a remunerative price, and can continually expand its capacity at less cost than that of a new firm entering the business. In this situation, competition may exist for a time but only until bankruptcy or merger leaves the field to one firm; in a meaningful sense, competition here is self-destructive.

As noted economies of scale is a relative concept. Natural monopoly may exist in a market as large as the entire country, as seems probably the case in the telephone industry.

Id. at 191. Likewise, in *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), the concept of the natural monopoly market was referred to in terms of economies of scale. *Id.* at 343. The concept was also expanded to include within the natural monopoly exception monopoly power resulting from "natural advantages, (including accessibility to raw materials or markets) . . ." *Id.* at 342 (dictum).

The defense of natural monopoly frequently reoccurs in the cases and is sometimes successful. *American Football League v. National Football League*, 323 F.2d 124 (4th Cir. 1963), *aff'g* 205 F. Supp. 60 (D. Md. 1962) (defendant, the first competitor to enter the field, acquired natural monopolies in several major cities; held no violation of section 2 monopolization); *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582 (1st Cir. 1960) (a city that, by reason of its size, could not support two good daily newspapers described as a natural monopoly); *Gamco, Inc. v. Providence Fruit &*

scribes a successful competitor who succeeds "by virtue of his superior skill, foresight and industry"⁷¹ and his second example

Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952) (the advantageous location of defendant's building resulted in a natural monopoly); *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373 (S.D.N.Y. 1969) (where the relevant market was defined as a particular type of squad radio, which was the subject matter of a United States Army contract, the defendant acquired a natural monopoly by virtue of his low bid); *United States v. Harte-Hawks Newspapers, Inc.*, 170 F. Supp. 227 (N.D. Tex. 1959) (a town of 17,000 was said to constitute a natural monopoly because it could not profitably support two daily newspapers and the purchase by one paper of the other did not violate antitrust laws); *United States v. Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated*, 358 U.S. 915 (1958) (defendants were said to possess a natural monopoly where the relevant market was "defined as the trade-marked toilet goods of each defendant"). See *John Wright & Associates, Inc. v. Ullrich*, 328 F.2d 474 (8th Cir. 1964) (the defendant accidentally acquired the only theater in a small town when its only rival went out of business).

The natural monopolist is not precluded from competing fairly to maintain his monopoly, *American Football League v. National Football League*, 223 F.2d 124 (4th Cir. 1963), and "a natural monopoly market does not of itself impose restrictions on one who actively, but fairly, competes for it, anymore than it does on one who passively acquires it." *Union Leader Corp. v. Newspapers of New England, Inc.*, 284 F.2d 582, 584 (1st Cir. 1960) (dictum); *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373 (S.D.N.Y. 1969). The natural monopolist is given more latitude under the antitrust laws, *Ovitron Corp. v. General Motors Corp.*, 295 F. Supp. 373 (S.D.N.Y. 1969); however, if the natural monopolist abuses his monopoly power, he may be found guilty of actual monopolization. *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F.2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); *United States v. Guerlain, Inc.*, 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated*, 358 U.S. 915 (1958). Indeed, any "use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful." *United States v. Griffith*, 334 U.S. 100, 107 (1948).

For a discussion of the judicial regulation of lawful monopoly power, see Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 935-37 (1962).

71. 148 F.2d at 430. This concept of the superior successful competitor is discussed at length in the text. In *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), Judge Wyzanski translated Judge Hand's general statement into specific examples: "superior products, . . . economic or technological efficiency, (including scientific research), [and] low margins of profit maintained permanently and without discrimination . . ." *Id.* at 342. This concept has also been expressed by using the term business acumen. *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Other specific examples that have been given to illustrate Judge Hand's general statement include "superior management" and "normal business practices and competitive activity." 16a BUSINESS ORGANIZATIONS § 9.03[1], at 9-45, 9-47. See, e.g., *Clark Marine Corp. v. Cargill, Inc.*, 226 F. Supp. 103 (E.D. La. 1964), *aff'd per curiam*, 345 F.2d 79 (5th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

For examples of cases where a defendant successfully withstood a charge of actual monopolization on the grounds, *inter alia*, of a superior product or service see the cases of *Cole v. Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964) (*semble*); *Clark Marine Corp. v. Cargill, Inc.*, 226 F. Supp. 103 (E.D. La. 1964), *aff'd per curiam*, 345 F.2d 79 (5th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); *United States v. E. I. duPont de Nemours & Co.*, 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

is seemingly a species of the third, in that a shift in consumer taste or a change in cost would normally be the result of superior skill, foresight and industry.⁷² In Judge Hand's view, both the superior successful competitor (*i.e.*, the competitor who succeeds by virtue of his superior skill, foresight and industry) and the natural monopolist were inadvertent monopolists; both were the inevitable result of the automatic operation of natural forces in the market place, which the Sherman Act was designed to protect. The superior successful competitor was characterized as "the passive beneficiary of a monopoly, following upon an involuntary elimination of competitors by automatically operative economic forces."⁷³

Strangely enough, however, Judge Hand's statements about the superior successful competitor are seemingly inconsistent with his actual decision in the case. Alcoa's practice of anticipating increases in demand with additional capacity, although characterized as honestly industrial, was found to constitute exclusionary conduct. But such conduct arguably was nothing more than the exercise of superior foresight. Indeed, Alcoa alleged its ability to stimulate new demand as evidence of its superior skill.⁷⁴ But anticipation of demand was not the type of superior foresight Judge Hand had in mind. In analyzing monopolization, he started with the proposition that monopoly was socially harmful⁷⁵ and should not be tolerated except under

72. Arguably, however, a shift in consumer taste or cost could occur independently of the defendant's superior skill, foresight and industry. Perhaps this idea is included in the term historic accident that was used by the Supreme Court in *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

Although subsequent cases have added to Judge Hand's list of examples, all of these subsequent additions can usually be characterized under either of the two categories of inadvertent monopoly implicit in Judge Hand's analysis: natural monopoly or superior successful competitor. Thus the example suggested by the Supreme Court in *American Tobacco Co. v. United States*, 328 U.S. 781 (1946)—where the defendant makes "a new discovery or an original entry into a new field", *Id.* at 786—can be characterized as an example of superior judgment. *But see United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (historic accident).

In *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954), Judge Wyzanski listed a third category of legally exempt monopoly—legally licensed monopoly—which has always been an implicit exception to the antitrust laws for obvious reasons. *See generally* 16a BUSINESS ORGANIZATIONS § 9.03[2].

73. 148 F.2d at 430.

74. *Id.*

75. *Id.* at 428-29.

We may start therefore with the premise that to have combined ninety per cent of the producers of ingot would have been to "monopolize" the ingot market; and, so far as concerns the public interest, it can make no difference whether an existing competition is put an end to, or whether prospective competition is prevented. *Id.* at 429. Judge Hand described the vice of monopoly as "the denial to commerce of the supposed protection of competition." *Id.* at 428.

certain limited circumstances where it resulted automatically from natural economic phenomena. Where, for example, the defendant acquired or maintained monopoly power by virtue of his superior product or service, his monopoly resulted from the operation of the market place; individual consumers, acting in concert and recognizing the superior quality of his product or service, rewarded him with monopoly. But where the defendant acquired or maintained his monopoly power by simply overwhelming his actual or potential competitors with increases in capacity, his monopoly could not be said to be the result of the operation of the market place; the actions of individual consumers had nothing to do with the defendant's acquisition or maintenance of monopoly. His monopoly was the direct result of his business policies and thus, it could not be said to be economically inevitable.⁷⁶

e. Beyond Alcoa—The Subsequent Cases

Subsequent cases refined Judge Hand's treatment of the inadvertent monopolist into what is commonly called the thrust-upon defense or thrust-upon exception.⁷⁷ The idea of the thrust-upon defense is simply this: the defendant will be permitted to escape liability under the Sherman Act if he can show that he is either a superior successful competitor or a natural monopolist.

76. The proposition that monopoly is illegal unless economically inevitable in the sense just described is suggested but not fully articulated in Judge Hand's opinion. 148 F.2d at 429-31. It is also suggested in some of the subsequent cases. *E.g.*, *United States v. United Shoe Machinery, Corp.* 110 F.Supp. 295, 341-45 (D. Mass 1953), *aff'd per curiam*, 347 U.S. 521 (1954). There are, however, other interpretations of Judge Hand's opinion that are generally accepted. For example, Professor Milton Handler of the Columbia University Law School, in discussing the thrust-upon exception, said:

Because the methods by which the defendants in *Alcoa* and *United Shoe* attained their dominance were not intrinsically unlawful, some commentators have interpreted these decisions, despite the explicit disclaimers of their authors, as punishing business success as such and making it extremely perilous for large concerns to engage in hard competition. The cases do not go that far. What they condemn is growth by business methods designed for and having the effect of impeding new entry or excluding those whose occupancy is already precarious. It is one thing to compete fairly and aggressively regardless of the consequence to one's rivals; it is another to surround one's manor with moat and wall to keep out new competition or to deprive others of fair and reasonable access to supplies and markets by recognizably exclusionary devices.

Handler, *Some Unresolved Problems of Antitrust*, 62 COLUM. L. REV. 930, 934 (1962) (footnotes omitted). This interpretation, which accords with 16 BUSINESS ORGANIZATIONS § 8.02[4], at 8-62 n.146 and THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 60 (1955), may or may not be consistent with the analysis proffered above.

77. See generally 16a BUSINESS ORGANIZATIONS § 9.03[1].

Although all of the post *Alcoa* cases recognize the thrust-upon exception, an analysis of these cases reveals that some courts still adhere to the abuse heritage of *Steel* and *Harvester*,⁷⁸ whereas other courts adhere to the power heritage of *Alcoa*.⁷⁹ The power cases, generally speaking, interpret Judge Hand's opinion in a way that corresponds to the above discussion of *Alcoa*. The abuse cases, however, interpret Judge Hand's opinion differently. They distinguish that case on the basis of its facts, pointing to Alcoa's use of unlawful practices from 1909 to 1912.⁸⁰ They also emphasize Judge Hand's findings of exclusionary conduct⁸¹ and his statement that Alcoa's monopoly

78. See, e.g., *Deesen v. Professional Golfer's Ass'n of Am.*, 358 F.2d 165, 171 (9th Cir. 1966), cert. denied, 385 U.S. 846 (1966); *Winn Avenue Warehouse, Inc., v. Winchester Tobacco Warehouse Co.*, 339 F.2d 277, 281 (6th Cir. 1964); *Cole v. Hughes Tool Co.*, 215 F.2d 924, 937, 938 (10th Cir. 1954), cert. denied, 348 U.S. 927 (1955); *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 718 (D. Hawaii 1964); *Clark Marine Corp. v. Cargill, Inc.*, 226 F. Supp. 103, 111 (E.D. La. 1964), aff'd per curiam, 345 F.2d 79 (5th Cir. 1964), cert. denied, 382 U.S. 1011 (1966); *United States v. Chas. Pfizer & Co.*, 217 F. Supp. 199, 203 (S.D.N.Y. 1963); *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 214-17 (D. Del. 1953), aff'd, 351 U.S. 377 (1956).

79. See *Bergians Farm Dairy Co. v. Sanitary Milk Producers*, 241 F. Supp. 476, 485 (E.D. Mo. 1965), aff'd, 368 F.2d 679 (8th Cir. 1966); *United States v. Grinnell Corp.*, 236 F. Supp. 244, 246-48, 257 (D.R.I. 1964), aff'd except as to decree, 384 U.S. 563 (1966); *United States v. Guerlain, Inc.*, 155 F. Supp. 77, 85-86 (S.D.N.Y. 1957), vacated, 358 U.S. 915 (1958); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 341-45 (D. Mass. 1953), aff'd per curiam, 347 U.S. 521 (1954); *United States v. Aluminum Co. of Am.*, 91 F. Supp. 333, 340-42 (S.D.N.Y. 1950). Note 15 *supra*.

80. Alcoa, which was incorporated in 1888, was able to maintain its monopoly by a series of patents until 1909. From 1909 to 1912 it maintained its position by a series of illegal contracts, which were the subject of a separate action in 1912. 148 F.2d at 422-23. The importance of this unlawful conduct to the decision in the *Alcoa* case is unclear. See 148 F.2d at 430-31. Compare *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 216-17 (D. Del. 1953), aff'd, 351 U.S. 377 (1956) with 16 BUSINESS ORGANIZATIONS § 8.02[4], at 8-58 n.141.

81. "There were at least one or two abortive attempts to enter the industry, but 'Alcoa' effectively anticipated and forestalled all competition, and succeeded in holding the field alone." 148 F.2d at 416.

In referring to Judge Hand's statement to the effect that Alcoa was not a passive beneficiary of monopoly because it had actively sought monopoly by constantly expanding its capacity to gobble up anticipated increases in demand, 148 F.2d 430-31, the Attorney General's Committee said:

This statement . . . is sometimes misconstrued to suggest that "monopoly" may become "monopolization" merely by being active, enterprising, and dynamic. This construction implies that the safest course for large companies is passive stagnation, with a gradual loss of market share—a business policy directly at odds with anti-trust aims. Such is not the teaching of *Alcoa*. Defendant's conduct there was held to constitute "monopolization" . . . because it acted with calculation to head off every attempted entry into the field. That history of frustrating potential entrants and the vital fact that no company succeeded in breaking into a basic manufacturing industry, whose technology was widely known, over a period of more than 25 years, while Alcoa's output increased 800 percent,

resulted "from a persistent determination to maintain the control, with which it found itself vested in 1912."⁸² Moreover, and most importantly, they quote convincingly from Judge Hand's opinion, statements to the effect that the Sherman Act does not condemn successful competition. *A fortiori*, where the defendant's monopoly results from essentially fair methods of competition, he has not violated section 2.⁸³ But, in *Alcoa* and at least one subsequent case, certain conduct, although characterized as fair and honestly industrial, was said to be exclusionary.⁸⁴

The opinions of the Supreme Court appear to espouse a power philosophy, but this is by no means clear.⁸⁵ The most recent Supreme Court case to deal with monopolization is *United States v. Grinnell Corp.*⁸⁶ There the Court, speaking generally, said:

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.⁸⁷

Seemingly this statement is nothing more than a reformulation of the thrust-upon defense;⁸⁸ however, the words "willful acquisition or maintenance" may incorporate ideas traditionally associated with an abuse theory of section 2—that section 2 is not

convinced the court, as a practical matter, that Alcoa's monopoly position rested on a good deal more than its technical and business skill.

THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT 60 (1955) (footnotes omitted).

82. 148 F.2d at 430.

83. See, e.g., *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 718 (D. Hawaii 1964); *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 215-17 (D. Del 1953), *aff'd*, 351 U.S. 377 (1956).

84. *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). See Professor Handler's comments note 76 *supra*.

85. See, e.g., *United States v. Griffith*, 334 U.S. 100 (1948). The Court's opinion in *Griffith* and in particular its statement that monopoly power "is itself a violation of § 2, provided it is coupled with the purpose or intent to exercise that power," *Id.* at 107, precipitated a great deal of confusion in the lower courts.

86. 384 U.S. 563 (1966).

87. *Id.* at 570-71.

88. See Handler, *Nineteenth Annual Review of Recent Antitrust Developments—1966*, 21 RECORD OF N.Y.C.B.A. 539, 557 (1966).

directed against the status of being a monopolist but rather monopolizing conduct.⁸⁹

The differences between the power and abuse cases may be more theoretical than actual; the judges often use the same language and purport to be applying the same rule.⁹⁰ In reading these cases, however, one cannot help but sense the existence of two distinct antitrust philosophies, which, theoretically at least, are inconsistent, even though they may produce the same result in a given case.⁹¹ The power theorist tends to focus on the existence or nonexistence of monopoly power. Like Judge Hand, he starts with the proposition that monopoly power is an evil not to be tolerated unless economically inevitable. The abuse theorist, on the other hand, tends to focus on the defendant's conduct. If the defendant's methods appear fair and proper under the circumstances, he is not guilty of monopolization despite the fact that he possesses monopoly power.

(1) *The Power Cases*

There are two leading power theory cases: *United States v. United Shoe Machinery Corp.*⁹² and *United States v. Grinnell Corp.*⁹³ Both opinions were written by a noted advocate of the

89. Although the Court found it unnecessary to reach the position of the district court that the burden of proving the thrust-upon defense rested with the defendant, 384 U.S. at 576, the wording of the second element of the Court's synthesis suggests that the plaintiff must show, as a part of his case, that the defendant acquired his monopoly by means that do not qualify for the thrust-upon exception.

90. Compare *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) with *Cole v. Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).

91. It is often difficult to determine whether a given case should be classified as an abuse case or a power case. In most of the cases, the courts merely quote the most recent formulation of the rule by the Supreme Court and purport to apply that rule. In a few cases, the courts will articulate their position, but these cases can usually be reconciled on the basis of their facts and reasoning. Where the court espouses an abuse theory, the judge will often find that the defendant's product or service was superior. See, e.g., *Clark Marine Corporation v. Cargill, Inc.*, 226 F. Supp. 103, 111 (E.D. La. 1964), *aff'd per curiam*, 345 F.2d 79 (5th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966); *United States v. E.I. duPont de Nemours & Co.*, 118 F. Supp. 41, 214-17 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956). And there is almost always some abuse present where the court espouses a power theory. "Most monopoly situations, after all, arise out of acquisition or merger, exclusion or boycott, or agreement among competitors. The nice question of monopolization by internal growth rarely occurs." Handler, *supra* note 76, at 934-35 (footnotes omitted).

92. 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

93. 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

power theory approach, Judge Charles E. Wyzanski, Jr., of the United States District Court of Massachusetts.

In the *United Shoe Machinery* case, the defendant was a corporation engaged primarily in the manufacture of machines used in the production of shoes. In accordance with a long-standing practice in the shoe machinery industry, the defendant leased but did not sell any of its more important machines; only its simple machines, which were auxiliary or preparatory to its more important machines, were available for purchase. The defendant's leasing agreements were long term and they contained other exclusionary features, such as: a full capacity clause, which required the lessee to discriminate against competing machines with respect to available work; a return charge, which made termination expensive and also discriminated against competing machines with respect to replacement; and a service provision, which failed to segregate service charges from rental payments.⁹⁴ The court determined that the defendant supplied over 75 per cent of the American shoe machinery market and concluded that this dominance constituted a monopoly. Moreover, this monopoly was held to be illegal under *Alcoa*⁹⁵ because it was "not attributable solely⁹⁶ to defendant's ability, economies of scale, research, natural advantages, [or] adaptation to inevitable economic laws."⁹⁷ Much of the de-

94. The full capacity clause required the lessee to use United's machines to full capacity so long as the work was available. In practice, however, this provision was not considered breached unless the lessee used a competing machine to perform available work instead of a United machine. 110 F. Supp. at 320. The return charge in practice was reduced to insignificance, through a right of deduction fund, if the lessee kept the machine for the duration of the lease. *Id.* at 340. Moreover, the lessee was given more favorable terms if he replaced old United machines with new United machines instead of competing machines. *Id.* at 320, 340. United's practice of servicing its machines without separate charges discouraged the development of an independent service organization capable of repairing the complicated machines. "In turn, this . . . had the effect that the manufacturer of a complicated machine must either offer repair service with his machine, or must face the obstacle of marketing his machine to customers who know that repair service will be difficult to provide." *Id.* at 340.

95. The court also said that the evidence satisfied the *Griffith* rule. Namely, the use of monopoly power to foreclose competition, gain a competitive advantage, or destroy a competitor constitutes a violation of section 2. Here the defendant possessed monopoly power that had the effect of excluding some actual and potential competition. 110 F. Supp. at 343.

96. *But see United Banana Co. v. United Fruit Co.*, 172 F. Supp. 580 (D. Conn. 1959) (thrust-upon defense successfully withstood a motion to strike on the ground that defendant did not allege that his monopoly was due solely to acceptable causes).

97. 110 F. Supp. at 343.

fendant's monopoly power was instead attributable to its leasing system and other miscellaneous activity.⁹⁸

Although the defendant's leasing system and these other activities⁹⁹ were characterized as natural, normal and honestly industrial, they were held to be exclusionary, because:

they [were] not practices which [could] be properly described as the inevitable consequences of ability, natural forces, or law. They represent[ed] something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution, which a competitive society must foster. They [were] contracts, arrangements, and policies which, instead of encouraging competition based on pure merit, further[ed] the dominance of a particular firm. In this sense, they [were] unnatural barriers; they unnecessarily exclude[d] actual and potential competition; they restrict[ed] a free market. While the law allows many enterprises to use such practices, the Sherman Act is now construed by superior courts to forbid the continuance of effective market control based in part upon such practices. Those courts hold that market control is inherently evil and constitutes a violation of § 2 unless economically inevitable¹⁰⁰

98. This other activity included a discriminatory pricing policy as between different machine types (United fixed a higher rate of return on machine types facing less competition), the acquisition of patents, purchases in the secondhand market, and the selling of supplies to shoe manufacturers.

99. The court excepted United's purchases in the secondhand market from the above characterization.

100. 110 F. Supp. at 344-45. This statement and others suggest that there are two levels of illegality. First, consistent with *Alcoa*, the defendant's monopoly is illegal unless it is economically inevitable in the sense that it results from superior skill and industry. Second, the defendant's monopoly is illegal if it results in part from business policies that are not the inevitable consequences of ability, natural forces, natural advantages, or adaptation to inevitable economic laws.

This second position finds some support in *Alcoa*. There Judge Hand said that it was not inevitable that *Alcoa* should anticipate increases in demand; nothing compelled it to do this. Judge Hand made these statements immediately after he said that "[t]he only question is whether [*Alcoa*] falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market." 148 F.2d at 431. Thus, arguably, unless the defendant's conduct was somehow compelled by economic forces or was the inevitable result of economic forces, he does not qualify for the thrust-upon exception.

Judge Wyzanski apparently reached this conclusion. In discussing the meaning of *Alcoa*, he said that Judge Hand emphasized that a defendant who achieves monopoly power by maneuvers not economically inevitable is guilty of monopolization. 110 F. Supp. at 341.

The court found United's leasing system, which was one of the three major sources of its monopoly,¹⁰¹ particularly objectionable. The court said that the lease-only system contains many partnership aspects that allow the lessor to establish better relations with its customers. In particular, United's "leasing system, especially the service aspect of that system, [gave] United constant access to shoe manufacturers and their problems. This... promoted United's knowledge of their problems and... stimulated United's [research and development]."¹⁰² Moreover, the lease-only system discouraged the development of a secondary market, which had two effects: 1) United did not face direct competition from a secondary market and 2) United's competitors were unable to purchase an old United machine and copy its unpatented features. Although the court specifically held that the defendant's leasing system was not unlawful in markets where United lacked monopoly power,¹⁰³ the court said: "when control of the market has been obtained in large part by such leases, the market power cannot be said to have been thrust upon its holder through its own skill, energy, and initiative, or through technological conditions of production and distribution, or the inevitable characteristics of the market."¹⁰⁴

The subsequent *Grinnell* case was a much easier case to decide on its facts than was *United Shoe Machinery*. For in that case the defendants had acquired an 87 per cent share of the national accredited central station protective service industry by abusive conduct, including *per se* violations of section 2. Thus the case turned primarily on the issue of market definition. Once the

Perhaps these two levels of illegality are simply two ways of saying the same thing. That is to say, where the defendant's monopoly rests in part upon business practices that are not the inevitable consequences of his superior skill, superior product, natural advantages, or economic laws, his monopoly could not be said to have resulted from the automatic operation of a free market. This idea is supported by Judge Wyzanski's suggestion that the defendant's practices, in order to qualify, must represent the type of activity that "a competitive society must foster:" policies that encourage "competition based on pure merit." *Id.* at 344-45. In other words, policies that seek to achieve business success, not by restricting the market, but by catering to natural market forces with competitive merit.

101. United's monopoly was attributable to three major sources: 1) the original constitution of the company (which had been held lawful in former litigation) 2) the superiority of United's machines and service and 3) United's leasing system. The court said that the first two sources were above reproach but not the leasing system.

102. 110 F. Supp. at 323.

103. United had been charged with monopolization of the tanning machinery market; however, the court found that United lacked monopoly power in this market. United's tanning machinery leases were like its shoe machinery leases.

104. *Id.* at 346.

court defined the market as the national accredited central station protective industry, liability under section 2 was clear.¹⁰⁵

But the significance of *Grinnell* lies, not in its facts, but in its method. For there Judge Wyzanski, although it wasn't necessary, rested his decision, on a strict power theory of section 2. More importantly, he used a power theory approach, not merely for the sake of craftsmanship, but in a practical sense by shifting the burden of proof on the issue of the thrust-upon exception to the defendant.¹⁰⁶ Under this approach the defendant is presumed to have monopolized within the meaning of section 2 upon a showing that he possesses an overwhelming share of the relevant market. He may rebut this presumption by showing that his predominant share of the market qualifies for the thrust-upon exception. Otherwise, he will stand condemned under section 2.¹⁰⁷ With respect to proving improper conduct on the part of the defendant, Judge Wyzanski said:

The Government need not prove, and in a well-conducted trial ought not to be allowed to consume time in needlessly proving, defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role. If defendant does wish to go forward, it is free to do so and to maintain the burden of showing that its eminence is traceable to such highly respectable causes as superiority in means and methods¹⁰⁸

105. Seemingly, the *Grinnell* case could have been disposed of under the pre-*Alcoa* classic test of actual monopolization. Under that test monopoly achieved by conduct constituting an unlawful restraint under section 1 was held to constitute monopolization. P. AREEDA, *supra* note 32, at 116.

106. In *United Shoe Machinery* Judge Wyzanski interpreted *Alcoa* as requiring that the defendant bear the burden of showing that his monopoly was thrust upon him; however, he did not rest his decision on this position. *But see* *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 425-26 (1956) (dissenting opinion). In *Grinnell*, however, Judge Wyzanski went out of his way to place the burden on the defendant.

107. 236 F. Supp. at 257. Earlier in the opinion Judge Wyzanski stated the rule somewhat differently:

[O]nce the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that the defendant has monopoly power and has monopolized in violation of § 2.

Id. at 248. It is not altogether clear, however, to what extent a defendant can rebut a presumption of monopoly power once he is clearly shown to possess an overwhelming share of a properly defined relevant market. *See United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

108. 236 F. Supp. at 248.

On appeal the Supreme Court found it unnecessary to reach the question whether the burden of proving the thrust-upon exception rests with the defendant. Here the record disclosed that the defendant's consciously acquired their monopoly "in large part by unlawful and exclusionary practices."¹⁰⁹

(2) *The Abuse Cases*

In contrast to the power cases, the abuse cases stress the necessity of the plaintiff's showing some form of monopolizing conduct before a case of actual monopolization is made out.

Perhaps the case that best articulates the position of the abuse theory is *United States v. E.I. duPont de Nemours & Co.*¹¹⁰ In that case the Government charged the defendant, duPont, with *inter alia*, monopolization of the relevant market, which the Government contended should be limited to cellophane. During the relevant time period, duPont produced approximately 75 per cent of the cellophane sold in the United States. The court, however, using a theory of substitute competition or cross-elasticity of demand, defined the relevant market to include other flexible packaging materials and concluded that duPont lacked monopoly power in this market. But the Court, in the course of a lengthy opinion, went on to discuss the other elements of monopolization.

The question whether the Sherman Act is aimed at conduct or status was clearly put in issue by the parties:

Defendant contends the offense of monopolization requires, in addition to proof of monopoly power or market control, proof such power or control was achieved in a manner prohibited by the statute. Plaintiff contends mere possession of the power, no matter how acquired, in itself establishes a violation. Once power has been obtained, plaintiff argues, it does not even have to be exercised. Mere possession of power, it is argued, is sufficient to constitute offense of monopolization.¹¹¹

In rejecting the Government's theory of the Sherman Act, the court said that the Sherman Act does not prohibit monopoly in the concrete. By using the verb monopolize, the Act prohibits conduct rather than status. It is directed

109. 384 U.S. at 576.

110. 118 F. Supp. 41 (D. Del. 1953), *aff'd*, 351 U.S. 377 (1956).

111. *Id.* at 214.

against activities rather than results. This is not a matter of semantics. It is a matter of facts. That this is so is obvious from fact the statute carried criminal as well as civil sanctions. Thus, decisions recognized the manner in which a monopoly position was obtained was a crucial consideration in determining whether or not a defendant has monopolized within the meaning of the Act.

The decisions state a defendant may lawfully obtain a monopoly position if that position is "thrust upon it". Thus the right to normal growth and to enjoy the results of technical achievement and successful competition has been preserved.¹¹²

The Government, relying on *Alcoa*, contended that monopoly must result from circumstances beyond the defendant's control in order to qualify for the thrust-upon exception.¹¹³ The court took this contention to mean that the defendant could not "have done anything to further its own interests"¹¹⁴ and rejected it as theoretical. The court then found on the facts that duPont's dominant position as a producer of cellophane was due to "research, business skill and competitive activity."¹¹⁵ Thus, the court concluded that duPont's dominance was lawful under the section 2 cases. The court said that the Sherman Act was not intended to condemn certain competitive activity. This activity, in addition to skill, foresight, scientific research, new discoveries, and original entries into new fields or territories, was described as legitimate means, lawful methods, fair dealings, honest business methods, and legitimate competition.

On appeal to the Supreme Court, the majority of the Court affirmed the decision of the district court on the ground that duPont lacked monopoly. Thus, it was not necessary to consider the other elements of actual monopolization. There was, however, a strong dissent by three members of the Court: Chief Justice Warren, Justice Black, and Justice Douglas. The dissenters defined the relevant market differently¹¹⁶ and concluded that duPont did indeed possess monopoly power. They also

112. *Id.* at 214-15.

113. It is not clear from the opinion whether the Government was contending that the defendant's monopoly must be economically inevitable in the sense discussed in this note.

114. 118 F. Supp. at 215.

115. *Id.* at 217.

116. The dissenters felt that cellophane was a sufficiently distinct packaging material to constitute the relevant market. 351 U.S. at 414-18.

said that duPont was guilty of actual monopolization because it had acquired and maintained its monopoly by a series of agreements that constituted unlawful restraints of trade¹¹⁷ and by numerous honestly industrial but exclusionary maneuvers. Thus, the dissenters concluded that "[d]uPont was not 'the passive beneficiary of a monopoly' within the meaning of [*Alcoa*]."¹¹⁸

The district court's treatment of the thrust-upon question, however, can easily be made consistent with the analysis of *Alcoa* set forth in this note. That court found that duPont's dominance as a cellophane producer was primarily the result of research activity that improved the quality of cellophane and lowered its cost.¹¹⁹ Thus one might characterize this dominance as the result of natural economic phenomena—the inevitable reaction of a free market economy to superior quality and lower prices. To distinguish the *duPont* case in this fashion, however, merely distorts the philosophy of the *duPont* court, which looked to conduct and not results. That court did not assert that thrust-upon monopoly must be the inevitable consequence of economic phenomena; indeed, it, implicitly at least, rejected this theory when it rejected the Government's contention that thrust-upon monopoly must result "through circumstances beyond [the defendant's] control."¹²⁰ Moreover, the court in *duPont* interpreted *Alcoa* narrowly, distinguishing it factually on the grounds of abusive conduct, actual exclusion of competition, and a persistent determination on the part of *Alcoa* to maintain the control it acquired by unlawful acts.

(3) *The Differences and Similarities Between the Power and Abuse Cases*

The *duPont* court accords with both *Alcoa* and *United Shoe Machinery* with respect to its discussion of superior skill, foresight, and industry. In the area of effective competitive activity, honest business methods, and the like, however, the differences and similarities between *duPont* on the one hand, and *Alcoa* and *United Shoe Machinery* on the other, are uncertain.

In *duPont* the court listed at least two examples of duPont's competitive activity which it found acceptable: duPont's program of creative assistance and its advertising policies.¹²¹

117. *Id.* at 418-20, 425-26.

118. *Id.* at 425.

119. 118 F. Supp. at 217-18.

120. *Id.* at 215.

121. *Id.* at 74-82, 218.

DuPont's program of creative assistance involved working closely with its actual or potential customers and using its research to solve their problems with cellophane. Through this program of creative assistance, duPont was able to improve and adapt cellophane to fit the needs of particular customers, thereby developing new uses for cellophane. It developed over 50 different types of cellophane, each designed to satisfy the needs of certain users and it assisted "customers in the development of special types of materials."¹²² Its research activities also "involved creative assistance to manufacturers of packaging machines, [and] to converters with their printing and other problems"¹²³ It improved the overall general quality of cellophane and improved sealing techniques, thus making cellophane feasible for use on automated packaging machines. It also participated in the promotion and development of a packaging machine that could use cellophane as well as other packaging material.

Presumably, this type of creative assistance is a "[technique] of . . . production, and distribution, [that] a competitive society [should] foster;"¹²⁴ it results in the development of improved products and greater uses for those products. It is thus inventive and innovative. There are, however, potential objections to creative assistance. Creative assistance in itself contains certain partnership aspects similar to the ones found in the defendant's leasing system in *United Shoe Machinery*: it gives the defendant "constant access to [his customers] and their problems [thereby promoting the defendant's] knowledge of their problems and [stimulating the defendant's research and development]."¹²⁵ Moreover, a program of creative assistance might easily develop into an arrangement or policy "which, instead of encouraging competition based on pure merit, further[s] the dominance of a particular firm."¹²⁶ For example, one firm might, through an informal arrangement, place its extensive research staff at the disposal of its customers on the understanding that they would not do business with anyone else. In *duPont*, however, the defendant simply used its research staff to tailor its products to fit the individual needs of its customers, thereby achieving a superior product in their eyes.

122. *Id.* at 218.

123. *Id.*

124. 110 F. Supp. at 344.

125. *Id.* at 323.

126. *Id.* at 345.

DuPont's advertising policies were also, according to the court, first rate. "Cellophane was sold to knowledgeable buyers on the basis of quality performance."¹²⁷ This type of advertising, which is designed to objectively present the relative quality of the defendant's product, serves a useful purpose in that it educates the consumer and helps him to make a more intelligent purchase. Thus, in this sense, it represents a technique of distribution that a competitive society should foster. Other types of advertising, however, would be suspect. For this latter type of advertising, which is usually based on exaggerated claims or tactics of hidden persuasion, artificially stimulates demand and thereby tampers with the operation of the market mechanism.¹²⁸ DuPont's advertising, however, merely alerted its customers to the superior quality of cellophane, which in turn triggered the market into action.

Because they are expensive, both research and advertising are inherently exclusionary in the sense that they discourage potential competition from entering a given market.¹²⁹ Where the existing firms possess extensive research departments and spend large sums of money on advertising, the prospective entrant must be prepared to compete on these terms if he expects to succeed. Moreover, the firms already there have a head start. The sheer amount of money required to overcome these barriers to entry would be enough to discourage most potential entrants and thus

127. 118 F. Supp. at 218.

128. Even the *duPont* court remotely hinted that a monopoly achieved by "national advertising and high-pressure tactics fortified with elaborate salesmen's entertainment expenses" would be objectionable. *Id.*

The term hidden persuasion refers to a technique of advertising whereby the advertising or product itself is designed to trigger a subconscious buying response in the buyer. For example, research may reveal that women have a propensity to buy products that are wrapped in red cellophane. Accordingly, the defendant's product, which is sold in large super markets, is attractively packaged in red cellophane. Women shoppers will, if the theory is correct, prefer the defendant's product over other brands, not because of its quality but because it is wrapped in red cellophane. *See generally*, V. PACKARD, *THE HIDDEN PERSUADERS* (1957).

129. A common industrial pattern is that of a firm that has considerable control over price by virtue of its technological efficiency, its patents, its trademarks, and its slogans. Its "monopoly profits" are plowed back into further research and advertising, so that it is always able to keep abreast or ahead of its rivals. General Electric, RCA, and Du Pont are perhaps typical of such companies.

Because research and advertising are expensive and their results commulative, success tends to breed success, and profits tend to breed more profits. Therefore small business claims that it cannot always effectively compete with such firms. In other words, industrial research may be subject to economies of large scale which small businesses cannot enjoy.

P. SAMUELSON, *ECONOMICS* 500 (6th ed. 1955) (footnotes omitted).

perpetuate the monopoly of the existing firm or firms. But from the standpoint of social advantages, research and certain kinds of advertising should be encouraged. Under a strict power theory, however, it is difficult to rationalize the existence of any monopoly that is the direct result of advertising, especially where the advertising is excessive or extravagant.

In one case, *Bailey's Bakery, Ltd. v. Continental Baking Co.*,¹³⁰ the plaintiff specifically relied on a theory of excessive advertising in a treble damage action brought under section 7 of the Clayton Act and sections 1, 2 and 3 of the Sherman Act. The plaintiff, a Hawaiian baker, alleged that the defendant, "one of the largest baking companies in the United States,"¹³¹ acquired the leading bakery in Hawaii, Love's Biscuit & Bread Co. It was alleged that Love's controlled 83 percent of the local bread market and consequently, that it possessed monopoly power. It was further alleged that "Love's carried out an extensive advertising program and . . . introduced 13 new varieties of bread into the Honolulu market, accompanying each new introduction with expensive advertising"¹³² in an effort to suffocate its competition. The court, although manifesting an abuse philosophy, held that the complaint stated a claim under the Sherman Act, apparently on the theory of a conspiracy to monopolize between Continental and its Hawaiian subsidiary. The court found that Love's achieved its monopoly position by virtue of honest industry and seemed to conclude that, for this reason, there was no actual monopolization. Later the court said:

If, as pled, these [new varieties] were introduced and accompanied with excessive advertising costs for the purpose of destroying competition, and it could be shown that the costs of such advertising were as extravagant as alleged, i.e., that the defendants' "market power" was applied, and if there was no factor which could justify such expenditures as fair economic necessities, then from such facts the proscribed intent to destroy competition might be found, i.e., a Sherman Act violation.¹³³

130. 235 F. Supp. 705 (D. Hawaii 1964).

131. *Id.* at 710.

132. *Id.* at 711.

133. *Id.* at 720. This statement seems to suggest that the complaint alleged that the defendants actually exercised their monopoly power in an effort to destroy competition. Thus, seemingly under *United States v. Griffith*, 334 U.S. 100 (1948), the complaint stated a claim of actual monopolization as well as conspiracy to monopolize.

The case of *Cole v. Hughes Tool Co.*¹³⁴ demonstrates the actual or potential differences that exist between the power and abuse theories in the area of the superior successful competitor. That case was a consolidation of three separate but identical actions brought by the plaintiff, the Hughes Tool Co. Hughes was engaged in the business of manufacturing and leasing rotary drilling bits. The bits were leased to its customers under formal agreements that required the lessee to return the bits to Hughes after it had finished with them. Each defendant was engaged in a blackmarket retipping operation. They would acquire dull bits belonging to the plaintiff and retip them so that the bits could be used again by the plaintiff's customers or by other drillers. In its complaint, Hughes alleged patent infringement, conversion, and interference with property and contract rights. Each defendant counterclaimed alleging, *inter alia*, actual monopolization. In one of the three actions, *Hughes Tool Co. v. Ford*,¹³⁵ the district court found the defendant guilty on all three of the counts alleged in the complaint, but the court denied relief on the ground, *inter alia*, that Hughes was guilty of actual monopolization. The court, finding that Hughes supplied "approximately 75% of the rotary drilling bits used in the drilling industry,"¹³⁶ concluded that this dominance amounted to a monopoly that was illegal because it resulted in part from the plaintiff's leasing practice, which, the court found, was designed to forestall competition. Based on the evidence, the court concluded that the primary purpose and effect of the plaintiff's leasing practice was to enable "the plaintiff to make certain that the majority of [its bits would not be] repaired and used again in competition with [its] new bits."¹³⁷ Moreover, the court said "that the paramount aim of the lease agreement as used by the plaintiff was to promote sales rather than to achieve engineering perfection."¹³⁸

In the court of appeals, one judge agreed with the analysis of the district court; however, the majority of the court held that the district court's finding of monopoly power and its conclusions regarding the object of the plaintiff's leasing practice were clearly erroneous. The majority said the plaintiff's success was the result of valid patents and the superior quality of its

134. 215 F.2d 924 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).

135. 114 F. Supp. 525 (E.D. Okla. 1953), *rev'd in part*, 215 F.2d 924 (10th Cir. 1954), *cert. denied*, 348 U.S. 927 (1955).

136. *Id.* at 542-43.

137. *Id.* at 544.

138. *Id.* at 547.

bits. This superior quality was the result of the plaintiff's extensive research program, of which its leasing practice was an integral part. By repossessing and testing its worn out bits, the plaintiff was able to develop better ones. The majority interpreted *United Shoe Machinery* to stand for the proposition that a leasing practice, which results in monopoly power, is objectionable if it interferes with the right of the lessee to use the products of a competitor.¹³⁹ Here the plaintiff's leasing practice did not deter, nor was it "intended to deter, a driller from acquiring and using bits made by Hughes' competitors,"¹⁴⁰ the leases contained no provisions making "it disadvantageous for the lessee to use the bits of a competitor."¹⁴¹ Speaking generally, the majority said:

One who gains a large portion of a market by manufacturing a better product and by furnishing better service to his customers, which constitutes legitimate competition, is not denounced by the Sherman Act.

The maintenance of a research department, the carrying on of intensive research, constant efforts to improve the manufactured products and to render better service to customers by a manufacturer are not condemned [by the Sherman Act]. That Act does not condemn business success, arising from quality and performance of a manufacturer's product.¹⁴²

The *Hughes* case demonstrates the closeness of the questions that can arise where one competitor is exceedingly successful. It may be that the differences between the opinions of the district court and the court of appeals turned on questions of fact but it seems more likely that the different philosophies of the two courts produced different results. Both opinions, however, accord with *Alcoa* and *United Shoe Machinery* when viewed separately and in light of the reasoning used by each court. The court of appeals regarded the plaintiff's dominance as the result of superior skill, foresight, and industry. The district court, on the other hand, saw the plaintiff's dominance as the result of its leasing system, which represented "something more than the use of accessible resources, the process of invention and innovation, and the employment of those techniques of employment, financing, production, and distribution which a competi-

139. 215 F.2d at 932-33.

140. *Id.* at 933.

141. *Id.*

142. *Id.* at 938.

tive society must foster.”¹⁴³ Under the reasoning of the court of appeals, the plaintiff’s dominance could be characterized as the automatic operation of a free market. Under the district court’s reasoning, the plaintiff’s dominance could not be said to be economically inevitable; it was the result of an arrangement “which, instead of encouraging competition based on pure merit, further[ed] the dominance of a particular firm.”¹⁴⁴

V. SUBSTANTIVE ANALYSIS

a. In General

As previously mentioned the Sherman Act imposes criminal liability on anyone adjudged to be a monopolist within the meaning of section 2. Like other crimes, section 2 monopolization can be formally analyzed on the basis of its definitional elements, the most important of which are: 1) the definitional harm 2) the definitional intent and 3) the definitional conduct. Of course, the definitional conduct must coincide with the definitional intent in point of time, causing the definitional harm, which must be legally proscribed.¹⁴⁵

The definitional harm of section 2 monopolization might logically be characterized as the existence of monopoly itself, “the denial to commerce of the supposed protection of competition,”¹⁴⁶ or some other evil commonly associated with monopoly. It is clear, however, that the courts will not look beyond the existence of monopoly power to determine whether the defendant’s monopoly is harmful or beneficial.¹⁴⁷ Thus the definitional harm, although not necessarily synonymous with monopoly, is made out when monopoly is shown to exist.

The definitional intent of any given crime can range from a specific intent, where the prosecution must show a particular frame of mind, to strict liability (*i.e.*, no intent requirement at all). The intent requirement of actual monopolization is the general intent to engage in the conduct that produced the

143. 110 F. Supp. at 344.

144. *Id.* at 344-45.

145. Note 18 *supra*.

146. *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428 (2d Cir. 1945).

147. *See, e.g., United States v. Aluminum Co. of Am.*, 148 F.2d 416, 427 (2d Cir. 1945); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 345 (D. Mass. 1953); *see generally* 16a BUSINESS ORGANIZATIONS § 9.03[3].

monopoly.¹⁴⁸ The courts, however, do not require the government to show the defendant's frame of mind as a separate element of its case. Once the defendant is shown to possess monopoly power, an intention to monopolize is assumed.¹⁴⁹

From a theoretical standpoint, the definitional conduct of any crime has two aspects: one physical and one psychological.¹⁵⁰ That is to say, that the definitional conduct must be manifested by a physical act of volition.¹⁵¹ Possession can constitute an act, provided that "the possessor knowingly procured or received the thing possessed or was aware of his control thereof for a sufficient period to have been able to terminate his possession."¹⁵² The definitional conduct of section 2 monopolization is associated with the existence of monopoly power. It is the conduct that causes the definitional harm; more particularly, the conduct by which the defendant acquires, maintains, or, under a strict power theory, possesses monopoly power.

b. Monopoly power

Monopoly power is indeed the central element of section 2 monopolization. As previously mentioned, once monopoly power is shown to exist, an intention to monopolize is assumed¹⁵³ and under a strict power theory, liability is complete unless the defendant can show that his monopoly power comes within the thrust-upon exception.¹⁵⁴

Monopoly power is defined generally as the power to control prices or exclude competition in the relevant market,¹⁵⁵ which is usually defined in terms of a product and a geographic area. The courts will consider a number of factors in assessing the defendant's power in the relevant market (market power),¹⁵⁶

148. *United States v. Griffith*, 334 U.S. 100, 105-06 (1947); *John Wright & Associates, Inc. v. Ullrich*, 328 F.2d 474, 477-79 (8th Cir. 1964); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431-32 (2d Cir. 1945); *United States v. United Shoe Machinery Corp.*, 110 F. Supp. 295, 346 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); 16 *BUSINESS ORGANIZATIONS* § 8.02[4], at 8-45.

149. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 392 (1956).

150. J. HALL & G. MUELLER, *CRIMINAL LAW AND PROCEDURE* 103-17 (2d ed. 1965).

151. *But see* R. PERKINS, *CRIMINAL LAW* 749 (2d ed. 1969).

152. MODEL PENAL CODE § 2.01(4) (Proposed Official Draft 1962).

153. Note 149 *supra*.

154. *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

155. *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

156. *See, e.g., United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377 (1956); *See generally* P. AREEDA, *supra* note 32, at 71, 127-35.

the most important of which is the defendant's share of the relevant market (market share).¹⁵⁷

Market share, although an important indication of monopoly power, is not synonymous with monopoly power. But ordinarily, market power will be assumed where the defendant possesses a predominant share of the relevant market.¹⁵⁸ There is no set percentage of market share that will automatically trigger this assumption, however. In *Alcoa* 90 percent of the relevant market was held to be a monopoly but in the *Harvester* case 64 percent was insufficient.

Courts sometimes precisely define the relevant market to fit the peculiarities of the defendant's product.¹⁵⁹ Thus, in such a case, a finding of monopoly power is almost assured. This precision in market definition raises the following problem: should the substantive content of the other definitional elements be raised to compensate for the tailor-made relevant market? At least one court has suggested that the answer to this question should be yes. In *United States v. Guerlain, Inc.*¹⁶⁰ the court said that a determination of guilt could not be based solely on a finding of honestly industrial but exclusionary conduct where the relevant market was "defined as the trade-marked toilet goods of each defendant."¹⁶¹

c. Definitional Intent

In *Alcoa* Judge Hand synthesized the existing case law of section 2 monopolization around one central theme—the need to avoid convicting the accidental monopolist who “unwittingly [finds himself] in possession of a monopoly, automatically . . . without having intended either to put an end to existing competition or prevent competition from arising when none existed”¹⁶² Judge Hand said that since the Sherman Act makes monopolization a crime, it would be unfair to convict the inadvertent or unintentional monopolist. Yet, further on in his opinion Judge Hand said, “We disregard any question of intent.”¹⁶³ Seemingly, if he were concerned with the possibility

157. See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

158. *Id.*

159. See, e.g., *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

160. 155 F. Supp. 77 (S.D.N.Y. 1957), *vacated*, 358 U.S. 915 (1958).

161. *Id.* at 87.

162. 148 F.2d at 429-30.

163. *Id.* at 431.

of convicting an inadvertent monopolist, his first inquiry would be whether the defendant intended to monopolize the relevant market. But Judge Hand saw the problem of the inadvertent monopolist not from the standpoint of the defendant's subjective state of mind but rather from the standpoint of the objective operation of a free market economy. The question was whether the defendant's monopoly was economically unavoidable, not whether the defendant unintentionally acquired monopoly power. The competitor who spends large sums of money in an effort to develop a superior product does so with the intention of enlarging his share of the market at the expense of his rivals. But even if his efforts are successful to the point that he becomes a monopolist, he is not guilty of monopolization, because his monopoly was the inevitable consequence of his superior product. He is an inadvertent monopolist despite his intent.¹⁶⁴

d. Definitional Conduct

It is no longer necessary to show that the defendant acquired or maintained his monopoly by predatory tactics or unlawful restraints of trade.¹⁶⁵ Indeed, under a strict power theory all the Government need show is that the defendant possesses monopoly power.¹⁶⁶ The defendant, of course, will be allowed to escape statutory liability if he can show that his monopoly power was thrust upon him. The abuse cases, presumably, would require the plaintiff to show, as an element of its case, that

164. Arguably, some of Judge Hand's statements could support a contrary conclusion, at least where the defendant specifically intended "either to put an end to existing competition, or to prevent competition from arising when none existed . . ." *Id.* at 429-30. Viewing the opinion as a whole, however, and considering the nature of competitive activity, the superior successful competitor just described should be immune from liability even though he specifically intended to foreclose competition and successfully used the market as a means for accomplishing his end. In his discussion of the inadvertent monopolist, Judge Hand was not concerned with the concept of *mens rea*. Rather, his use of terms such as accidental and automatic suggest that he was more concerned with the volitional aspect of *actus reus*. In other words, where the defendant's monopoly is thrust upon him, so to speak, by the automatic operation of a free market, there is no act of volition on his part on which to support a finding of criminal liability. Thus, the government's case must fail regardless of the existence of a specific intent. Moreover, competition, by nature, involves rivalry between contestants each intending to capture the same thing—the relevant market or as big a slice of that market as possible. Thus, to condemn a superior successful competitor because he intended to achieve monopoly would be to condemn competition itself.

165. *See, e.g.,* United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

166. United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

the defendant's monopoly power was not thrust upon it.¹⁶⁷ The Supreme Court has declined to say where the burden of proof should lie. Its most recent reformulation of the rule, however, suggests that the burden is on the plaintiff to show that the defendant wilfully acquired and maintained its monopoly.¹⁶⁸

As previously mentioned, most of the confusion in the law of section 2 monopolization centers around the concept of the superior successful competitor. Just how far a competitor can go under the guise of vigorous competition is uncertain. This subject was dealt with in detail in the historical presentation; it should be sufficient to point out here that a lot depends on the philosophy of the court. Some of the cases seem to suggest that the question should be whether the defendant's conduct constituted an essentially fair method of competition¹⁶⁹ or, stated somewhat differently, whether the defendant's conduct was designed to foreclose competition or had that effect.¹⁷⁰ It was suggested that Judge Hand saw the problem in terms of the automatic operation of a free market. This view was alluded to in *Alcoa* but not fully articulated. It may be that this analysis is no different from the other standards mentioned above. Or it may be that this analysis reads too much into the words of Judge Hand.¹⁷¹ At the very least, however, it represents a useful tool from the standpoint of judicial craftsmanship, even though it may prove inadequate under the facts of a given case. Moreover, one primary purpose of the Sherman Act was to protect competition and competition takes place within the framework of a market. Thus, it makes sense to analyze the defendant's monopoly position in terms of market behavior.

The term market has been described as "the complex of institutions and processes through which commodities and services

167. See, e.g., *Clark Marine Corp. v. Cargill, Inc.*, 226 F. Supp. 103 (E.D. La. 1964), *aff'd per curiam*, 345 F.2d 79 (5th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

168. Note 89 *supra*.

169. See, e.g., *Clark Marine Corp. v. Cargill, Inc.*, 226 F. Supp. 103 (E.D. La. 1964), *aff'd per curiam*, 345 F.2d 79 (5th Cir. 1965), *cert. denied*, 382 U.S. 1011 (1966).

170. See note 76 *supra*.

171. *Id.* In discussing the role of economic theory in antitrust analysis, Professor Areeda raises the following question:

How far must we search for economic truth in a particular case when the economic facts may be obscure at best, when the relevant economic theories may be controversial or indefinite, and when the statute does not give us a clear-cut value choice?

P. AREEDA, *supra* note 32, at 5.

are produced, exchanged, and bought for final consumption."¹⁷² The market is a method for getting things done, namely, the allocation of resources that are scarce in terms of the number of potential consumers. The market mechanism itself, which is a complex interaction of two sets of economic forces commonly called supply and demand, determines what goods are to be produced, how much is to be produced, and who is to get that which is produced.

For purposes of this note, however, a sophisticated economic analysis of the operation of a free market is unnecessary. For most, if not all, of the cases can be analyzed simply in terms of the preference of consumers for lower prices and superior quality. As previously mentioned, where one competitor reduces his price or improves the quality of his product without raising his price, the likely result is that more and more business will come his way. And if his competitors are unable to make corresponding changes in their product or prices, he is likely to end up a monopolist. But from the standpoint of the Sherman Act, he should not be adjudged a criminal monopolist because under these facts, there is no element of direct causation, which is necessary to support a finding of criminal liability. In other words, where the defendant's monopoly is the result of a superior product or service, his business activities that led to the development and introduction of that superior product or service are not the primary and direct causes of his monopoly. They are, rather, remote causes. It is the inevitable and automatic reaction of a free market to the introduction of that superior product or service that is the primary and direct cause of his monopoly. This automatic market reaction is an intervening cause that insulates the defendant from criminal liability.¹⁷³

Under this analysis, the problem in every case would be essentially one of causation.¹⁷⁴ If the court finds that the de-

172. D. WATSON, *supra* note 55, at 42. Professor Watson points out that it is no longer fashionable in economic circles to speak in terms of natural economic laws. "[M]odern economists use such terms as tendencies, or propensities, or functions, or theories, or relationships. The term 'law' is generally avoided . . . because . . . [m]ost economists hold that generalizations about economic behavior have a character fundamentally different from those that explain natural phenomenon." *Id.* at 49. Terms connoting natural economic laws have been used in this note in part because the courts have used them but mostly for convenience.

173. An alternative but related theory would be that the monopoly was acquired by the defendant without an act of volition on his part. Note 164 *supra*.

174. Causation is used here not in the sense of causation in fact but more in the sense of proximate causation.

defendant's monopoly is the direct result of the automatic operation of a free market, then he escapes liability. If on the other hand, the court finds that the defendant's monopoly is in part a direct result of the defendant's own business policies, then he is guilty of monopolization.

For example, suppose that a defendant is charged with acquiring a monopoly in a particular market by virtue of his advertising. The problem for the court would be to determine whether the defendant's advertising is a direct cause of his monopoly. If his advertising is designed simply to call attention to the superior quality of his products, then the direct cause of his monopoly would be the natural reaction of a free market to that superior quality. But if his advertising relies primarily on psychological techniques of hidden persuasion,¹⁷⁵ then the proximity between that advertising and the defendant's possession of monopoly is increased. If the court finds that the defendant's advertising is a substantial and direct cause of his monopoly, then, under the teaching of *Alcoa*, he should be found guilty of section 2 monopolization. For, as previously mentioned, Judge Hand started with the proposition that monopoly is basically evil and, unless economically inevitable, illegal under section 2.

IV. SUMMARY AND CONCLUSION

Based in part on the legislative history of the Sherman Act, the courts have fashioned an exception to section 2 monopolization that allows certain monopolists to escape liability. This exception, commonly called the thrust-upon exception, applies generally to two different types of monopolists: 1) the unintentional monopolist and 2) the competitor who acquires monopoly by virtue of his superior skill and industry. The scope of the exception as applied to the second type of monopolist is uncertain because of the existence of two theories regarding the nature of Sherman Act monopolization—the power theory and the abuse theory.

The differences between these two theories may be more theoretical than actual. There is, however, at least one actual difference in the area of burden of proof. Under the power theory the defendant bears the burden of proving that his monopoly comes within the thrust-upon exception. Under the abuse theory, presumably, the plaintiff bears the burden of

175. Note 128 *supra*.

proving that the defendant's monopoly does not come within the thrust-upon exception.¹⁷⁶

With respect to burden of proof, the position of the power theory seems to be more in line with the *Alcoa* opinion. There Judge Hand, in discussing the question whether the plaintiff should be required to prove that the defendant charged a monopolist's price, said:

It may be retorted that it was for the plaintiff to prove what was the profit upon ingot in accordance with the general burden of proof. We think not. Having proved that "Alcoa" had a monopoly of the domestic ingot market, the plaintiff had gone far enough; if it was an excuse, that "Alcoa" had not abused its power, it lay upon "Alcoa" to prove that it had not. But the whole issue is irrelevant anyway, for it is no excuse for "monopolizing" a market that the monopoly has not been used to extract from the consumer more than a "fair" profit.¹⁷⁷

Placing the burden of proving the thrust-upon exception on the defendant would also be in the interest of the sound administration of the Sherman Act. By simplifying the proof process, it would help reduce the length of monopolization cases, which, like other antitrust cases, are noted for their oppressive length.¹⁷⁸ And since the cases that call for an application of the thrust-upon exception are rare,¹⁷⁹ it seems pointless to require the plaintiff to go through the motions of showing exclusionary conduct in every case. Moreover, the defendant is in the best position to demonstrate his superior skill and industry.

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176. Note 167 *supra*. In his case book, Professor Areeda raises the following question:

Once sufficient monopolizing behavior has been found to warrant holding the defendant guilty of monopolization, do the "defenses" discussed by Judges Hand and Wyzanski have any relevance? That is, if the defendant has actually behaved unlawfully, can he escape liability by proving one or more of the "defenses"?

P. AREEDA, *supra* note 32, at 117-18. Thus, theoretically, the defendant may bear the burden of proving that he comes within the thrust-upon exception even under an abuse theory. The plaintiff, however, would be required to show sufficient monopolizing behavior before any discussion of the thrust-upon exception would become relevant (*i.e.*, once the plaintiff shows monopolizing behavior the burden shifts to the defendant), and most, if not all, monopolizing behavior would preclude the defendant from coming within the thrust-upon exception.

177. 148 F.2d at 427.

178. See Judge Wyzanski's comments in the *Grinnell* case. 236 F. Supp. at 247.

179. *Id.* at 248.