STANDARD OIL AND *U.S. STEEL*: PREDATION AND COLLUSION IN THE LAW OF MONOPOLIZATION AND MERGERS

WILLIAM H. PAGE*

I. INTRODUCTION

The Supreme Court's 1911 decision in *Standard Oil*[1] gave us embryonic versions of two foundational standards of liability under the Sherman Act: the rule of reason under Section 1[2] and the monopoly power / exclusionary conduct test under Section 2.[3] But a case filed later in 1911, *United States v. U.S. Steel Corp.*,[4] shaped the understanding of *Standard Oil*'s standards of liability for decades. *U.S. Steel*, eventually decided by the Supreme Court in 1920,[5] upheld the spectacular 1901

---

* Marshall M. Criser Eminent Scholar and Associate Dean, University of Florida Levin College of Law. I thank Herbert Hovenkamp, Barak Orbach, Daniel Sokol, and the participants in the "100 Years of *Standard Oil*" conference for their comments.

1. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

2. *Id.* at 66 (holding that in cases alleging a violation of the Sherman Act "the rule of reason, in the light of the principles of law and the public policy which the act embodies, must be applied."). For a discussion of the rule of reason, see Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733 (2012) (reviewing the rule of reason since *Standard Oil*); Alan J. Meese, Standard Oil *as* Lochner*'s Trojan Horse*, 85 S. CAL. L. REV. 783 (2012) (studying the constitutional origins of the rule of reason).

3. *Id.* at 75–76 (holding that "the unification of power and control over petroleum and its products which was the inevitable result of the combining in the New Jersey corporation by the increase of its stock and the transfer to it of the stocks of so many other corporations" created a "*prima facie* presumption of intent and purpose to maintain the dominancy over the oil industry, not as a result of normal methods of industrial development, but by new means of combination . . . with the purpose of excluding others from the trade").

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

5. The district court decided the case in U.S. Steel's favor in 1915. United States v. U.S. Steel Corp., 223 F. 55, 67 (D.N.J. 1915), *aff'd*, 251 U.S. 417 (1920). President Wilson and Attorney General Thomas Gregory, with the consent of Chief Justice Edward White, successfully petitioned the Supreme Court to suspend the government's appeal during World War I. MELVIN I. UROFSKY, BIG STEEL AND

merger that created the Corporation, as U.S. Steel was known. The majority found that the efforts of the Corporation and its rivals to control prices in the famous Gary dinners had violated Section 1 when they occurred, but paradoxically insulated U.S. Steel from liability under Section 2.[6] U.S. Steel was formed to monopolize the industry but failed; it demonstrated its impotence by fixing prices with rivals instead of crushing them, as Standard Oil had done.[7]

U.S. Steel's interpretation and application of *Standard Oil* essentially ended governmental enforcement of Section 2 until *Alcoa*.[8] Economic scholars suggest that the case ratified "the most socially damaging of all mergers in U.S. history"[9] and caused lasting harm to the American economy by making its fundamental steel industry less competitive.[10]

THE WILSON ADMINISTRATION: A STUDY IN BUSINESS-GOVERNMENT RELATIONS 181–82 (1969).

6. *See U.S. Steel*, 251 U.S. at 440 (finding that U.S. Steel's "power was efficient only when in cooperation with its competitors, and hence it concerted with them in the expedients of pools, associations, trade meetings, and finally in a system of dinners inaugurated in 1907 by the president of the company, E. H. Gary, and called 'the Gary Dinners'"). *See generally* William H. Page, *The Gary Dinners and the Meaning of Concerted Action*, 62 SMU L. REV. 597 (2009) [hereinafter Page, *Gary Dinners*] (discussing the Gary Dinners and their impact on different courts' analysis).

7. *U.S. Steel*, at 444–45 ("Monopoly, therefore, was not achieved, and competitors had to be persuaded by pools, associations, trade meetings, and through the social form of dinners, all of them, it may be, violations of the law, but transient in their purpose and effect.").

8. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416 (2d Cir. 1945). The Court reaffirmed the approach of *U.S. Steel* in United States v. Int'l Harvester Co., 274 U.S. 693, 702 (1927) (holding that a 1918 consent decree had restored competitive conditions and no further relief was warranted). For a discussion of *U.S. Steel*'s effects on Section 2 enforcement, see Robert W. Harbeson, *A New Phase of the Antitrust Law*, 45 MICH. L. REV. 977, 978–80 (1947); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1115 (1989).

9. Donald O. Parsons & Edward John Ray, *The United States Steel Consolidation: The Creation of Market Control*, 18 J.L. & ECON. 181, 215 (1975).

10. Craig A. Gallet, *The Gradual Response of Market Power to Mergers in the U.S. Steel Industry*, 18 REV. INDUS. ORG. 327, 329 (2001) ("Following the creation of the U.S. Steel Corporation in 1901, the structure of the U.S. Steel industry has remained that of a tight oligopoly."); William S. Comanor & F.M. Scherer, *Rewriting History: The Early Sherman Act Monopolization Cases*, 2 INT'L J. ECON. BUS. 263, 285 (1995) ("[W]e believe that a carefully executed dissolution of [U.S. Steel]—into several entities, each with efficient plants—would have led to a more competitive industry in the inter-war period and would have averted the tragic failures that occurred more recently."). On the importance of the steel industry, see United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 583 (S.D.N.Y. 1958) ("The iron and steel industry is one of the most important, if not the most important of all American industries. Indeed, in contemporary international terms, steel production is viewed as a basic measure of the strength and status of a country."); UROFSKY, *supra* note 5, at 2–3 (observing that steel was the most important war industry); United States v. Bethlehem Steel Corp., 168 F. Supp. 576, 583 (S.D.N.Y. 1958) ("The iron and steel industry is one of the most important, if not the most important of all American industries. Indeed, in contemporary international terms, steel production is viewed as a basic measure of the strength and status of a country.").

Equally important, I will argue here, is that it also harmed antitrust doctrine.[11] In cases like *Alcoa*, it played a role in confusing the law of monopolization under Section 2 of the Sherman Act. Moreover, by rendering Section 1 of the Sherman Act ineffective against monopolistic mergers, it contributed to the passage of the Cellar-Kefauver Act's amendment of Section 7 of the Clayton Act in 1950[12] and, indirectly, to the early misguided interpretations of that provision in cases like *Brown Shoe*[13] and *Von's*.[14] In this Essay, I will describe the errors of *U.S. Steel*, the mistaken responses to those errors in post–New Deal antitrust, and the role of competing ideologies in both. In a final part, I argue that modern reforms should assure that both *U.S. Steel*'s errors and the excesses of the post–New Deal antitrust will not recur.

II. IDEOLOGIES OF MONOPOLIZATION

Both *U.S. Steel* and its critics were led astray in part by ideologies—general and largely untestable conceptions of social and political causation.[15] Ideologies allow us to make sense of complex economic phenomena,[16] but can mislead by directing analysis away from critical evidence.[17] Fuller understanding depends on the development and application of theory,[18] as the next part will show.

Since the Enlightenment, two great ideologies that I call the

11. *Standard Oil* and *U.S. Steel* followed extensive private litigation. On the interaction between private and public litigation, see D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689 (2012).

12. Cellar-Kefauver Antimerger Act, ch. 1184, 64 Stat. 1125 (1950) (current version at 15 U.S.C. § 18 (2006)). I am grateful to Andrew Gavil for suggesting this linkage.

13. Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

14. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

15. This discussion draws on William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 TUL. L. REV. 1 (1991) [hereinafter Page, *Ideological Conflict*], which, in turn, draws on THOMAS SOWELL, A CONFLICT OF VISIONS 18–39 (1987) and F.A. HAYEK, THE CONSTITUTION OF LIBERTY 54–70 (1960). *See also* William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1 (1995); William H. Page, *The Ideological Origins and Evolution of U.S. Antitrust Law*, *in* 1 ISSUES IN COMPETITION LAW AND POLICY 1 (ABA Antitrust Section, Wayne Dale Collins ed., 2008).

16. *See* Page, *Ideological Conflict*, *supra* note 15, at 9; SOWELL, *supra* note 15, at 16 (noting that ideologies "set the agenda for both thought and action").

17. *Cf.* J.M. BALKIN, CULTURAL SOFTWARE: A THEORY OF IDEOLOGY 3 (1998) (noting that ideological thinking "can be beneficial and useful in certain contexts, but in others . . . can mislead and help produce or sustain unjust conditions"); IAN ADAMS, THE LOGIC OF POLITICAL BELIEF: A PHILOSOPHICAL ANALYSIS OF IDEOLOGY 1–26 (1989) (discussing "ideology and confusion").

18. *See, e.g.*, SOWELL, *supra* note 15, at 14 (ideologies provide "what we sense or feel *before* we have constructed any systematic reasoning that could be called a theory, much less deduced any specific consequences as hypotheses to be tested against evidence").

evolutionary and intentional visions have competed for influence in Western political and economic thought.[19] In late nineteenth-century America, adherents of these ideologies took very different views of the trusts.[20] In the evolutionary vision, transactions based on contract and property rights benefit all participants[21] and the market organization and distribution of wealth that emerge from the countless transactions in the economy are spontaneous, unintended, and legitimate.[22] Monopolies unprotected by state franchises, if they emerge, will soon be eroded by entrants seeking to share in the profits.[23] If a purely private monopoly should persist, it must be because it is providing the best product at the lowest cost. Successful trusts thus must have been the product of the natural evolution of manufacturing and transportation technology; trusts formed for monopolistic reasons would be doomed to failure if unaided by government.[24] In the evolutionary vision, government can best advance the general good, even in the era of the trusts, by providing the conditions for free contracting[25] and refusing to enforce any contracts that restrain trade.

In the intentional vision, markets are mechanisms by which the wealthy and powerful exploit the weak.[26] Far from eroding monopoly,

19. *See id*. Sowell traces the constrained vision (or the evolutionary vision in my terminology) to the writings of Thomas Hobbes, Adam Smith, and Edmund Burke. *Id.* at 19–23. He traces the unconstrained vision (or the intentional vision in my terminology) to Antoine-Nicolas de Condorcet, Jean-Jacques Rousseau, and William Godwin. *See id.* at 43–49.

20. Page, *Ideological Conflict*, *supra* note 15, at 9–23. For a comprehensive study of the conflict between the visions during this period, see SIDNEY FINE, LAISSEZ FAIRE AND THE GENERAL-WELFARE STATE: A STUDY OF CONFLICT IN AMERICAN THOUGHT 1865–1901 (1956).

21. *See, e.g.*, Edmund Burke, *Thoughts and Details on Scarcity*, *in* BURKE, PAINE, GODWIN, AND THE REVOLUTION CONTROVERSY 60, 64 (Marilyn Butler ed., 1984) (observing that it is "impossible" for free contracts to be onerous to the contracting parties). Perhaps the most influential work of the evolutionary vision in this period in the United States was HERBERT SPENCER, SOCIAL STATICS; OR, THE CONDITIONS ESSENTIAL TO HUMAN HAPPINESS SPECIFIED, AND THE FIRST OF THEM DEVELOPED (1872). *See also* BARBARA H. FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT 1–2 (1998).

22. *See, e.g.*, ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 477–78, 485 (Edwin Cannan ed., Modern Library 1994) (1776) ("By pursuing his own interest [the individual] frequently promotes that of the society more effectually than when he really intends to promote it.").

23. *See, e.g.*, ADAM SMITH, LECTURES ON JURISPRUDENCE 363 (R.L. Meek et al. eds., 1978) ("[I]f any trade is overprofitable all throng into it till they bring it to the naturall price, that is, the maintenance of the person and the recompense of the risque he runs.").

24. *See, e.g.*, FINE, *supra* note 20, at 72–73 (summarizing laissez-faire economists' views of the trusts).

25. *See, e.g.*, HERBERT SPENCER, *Specialized Administration*, *in* THE MAN VERSUS THE STATE 435, 456–57 (Liberty Classics 1981) (1871).

26. *See, e.g.*, Ian Fetscher, *Rousseau's Concepts of Freedom in the Light of His Philosophy of History*, *in* LIBERTY 29, 54 (Carl J. Friedrich ed., 1962) (observing that, for Rousseau "all acquisition of

market transactions promote it,[27] by reinforcing the positions of those with the greatest endowments of wealth and property. Big business and promoters created trusts and, later, the corporate form itself to perfect their dominance; all trusts were menaces to the economy and the body politic.[28] In the intentional vision, only government could impose democratic checks on trusts by means including dissolution,[29] direct regulation, or state ownership.[30]

The Sherman Act drew on both visions.[31] The statute reflected the evolutionary vision by adopting not only the common law's terminology, but also its mode of legal development through judicial precedent[32] rather than direct regulation of market outcomes.[33] Yet it also reflected the intentional vision by authorizing governmental intervention to restore competitive conditions, which could include the dissolution of unlawful trusts. Judicial interpretation of the statutory language has also reflected the ideology of the era. In the early years of the twentieth century, the evolutionary vision remained influential, but the intentional vision gathered

---

wealth appears to be robbery"). For fuller discussions of the development of these ideas, see FINE, *supra* note 20, at 198–251 (discussing the "new political economy"); FRIED, *supra* note 21, at 29–47 (discussing the origins of progressivism).

27. *See* Page, *Ideological Conflict, supra* note 15, at 7–18 (summarizing the intentional view that powerful firms can insulate themselves from competition).

28. *See* FINE, *supra* note 20, at 335–46 (summarizing the academic and popular opposition to the trusts, and the growing calls for governmental control). As Brandeis observed the same year *U.S. Steel* was decided,

> Many believed that concentration (called by its opponents monopoly) was inevitable and desirable; and these desired that concentration should be recognized by law and be regulated. Others believed that concentration was a source of evil; that existing combinations could be disintegrated, if only the judicial machinery were perfected; and that further concentration could be averted by providing additional remedies, and particularly through regulating competition.

FTC v. Gratz, 253 U.S. 421, 433 (1920) (Brandeis, J., dissenting).

29. *See* FINE, *supra* note 20, at 336–37.

30. *See, e.g.*, CHARLES WHITING BAKER, MONOPOLIES AND THE PEOPLE 161 (3d ed., rev. and enlarged 1990) ("But while monopolies are inevitable, our *subjection* to them is not inevitable; and when the public once comes to fully understand that *the remedy for the evils of monopoly is not abolition, but control*, we shall have taken a great step toward the settlement of our existing social evils."). *Cf.* John Dewey, *The Future of Liberalism*, 32 J. PHIL. 225 (1935).

31. Page, *Ideological Conflict*, *supra* note 15, at 36 n.176 (quoting legislative history). *See also* WILLIAM LETWIN, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 53–99 (Random House 1965); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 164–225 (1955) (describing the Sherman Act's "passage and provisions").

32. *See* 21 CONG. REC. 3152 (1890) (remarks of Sen. Hoar) (arguing that the "great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States").

33. *See* 15 U.S.C. §§ 1–7 (2006).

strength.[34] In interpreting the statute during its early decades, bare majorities of the Supreme Court subscribed to a form of the evolutionary vision, yet recognized exceptional cases in which governmental intervention might be appropriate. The challenge for those holding the evolutionary vision was to interpret the Sherman Act to provide meaningful standards that could distinguish lawful from unlawful combinations, standards that could apply to both loose-knit combinations like cartels and close-knit combinations like trusts. For adherents of the intentional vision, the question was which combinations might be excepted from liability.

III. MERGERS AND MONOPOLIZATION IN THE FORMATIVE PERIOD

The Supreme Court's condemnation of cartels during the 1890s[35] made mergers more attractive as means of acquiring monopoly power.[36] Around the turn of the new century, a wave of mergers created U.S. Steel, a new incarnation of Standard Oil, and many other entities, all "to make economies to lessen competition and to get higher profits."[37] A few years later, the Department of Justice began a series of dissolution suits under the Sherman Act.[38] The Supreme Court's resolution of those challenges between 1904 and 1920 wrote the earliest drafts of the law of monopolization. *Standard Oil* in 1911 was the most important of these cases, but it was framed by seminal four-vote opinions: Justice Harlan's plurality opinion in *Northern Securities*[39] at the outset of the period and Justice McKenna's majority opinion in *U.S. Steel*[40] at the end. Although the

34. HAROLD U. FAULKNER, THE DECLINE OF LAISSEZ-FAIRE 1897–1917, at 21 (1951) (arguing that, at the end of the nineteenth century, the nation seemed "committed to laissez faire," but "the first fifteen years of the new century developed a wave of reform which influenced every phase of American social and economic life").

35. *See, e.g.*, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 240–41 (1899); United States v. Joint Traffic Ass'n, 171 U.S. 505, 566–68 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 341–42 (1897).

36. FAULKNER, *supra* note 34, at 160–61.

37. *Id*. at 158 (quoting U.S. INDUS. COMM'N, I REPORT OF THE INDUSTRIAL COMMISSION 9 (1900)).

38. Kovacic, *supra* note 8, at 1112–16.

39. N. Sec. Co. v. United States, 193 U.S. 197 (1904). Justice Brewer concurred in the dissolution, but disclaimed Harlan's sweeping assertions of the reach of the Act, *id.* at 360–64 (Brewer, J., concurring); Justices Holmes, *id.* at 400–11 (Holmes, J., dissenting), and White, *id.* at 364–400 (White, J., dissenting), each wrote dissenting opinions.

40. The outcome in *U.S. Steel* was undoubtedly determined by the recusal of Justices Brandeis and McReyolds. *See* Marc Winerman, *Antitrust and the Crisis of '07*, THE ANTITRUST SOURCE, Dec. 2008, at 1, 7, *available at* http://www.abanet.org/antitrust/at-source/08/12/Dec08-Winerman12-22f.pdf. Brandeis later hinted at his view of the decision in his dissent in Bedford Cut Stone Co. v. Journeymen

intentional vision won the first split decision, the evolutionary vision won the last and the series.

The pure forms of both visions were on display in plurality and dissenting opinions in the *Northern Securities* case, which invalidated a holding company's acquisition of railroads "having competing and substantially parallel lines from the Great Lakes and the Mississippi River to the Pacific Ocean at Puget Sound."[41] For Justice Harlan, the merger was unlawful simply because it eliminated rivalry: "The natural effect of competition is to increase commerce, and an agreement whose direct effect is to prevent this play of competition restrains instead of promotes trade and commerce . . . ."[42] The Sherman Act "forbid[s] any combination which by its necessary operation destroys or restricts free competition among those engaged in interstate commerce."[43] Large-scale mergers of rivals, in other words, should be per se illegal, like cartels. A key dissent, by contrast, saw even mergers to monopoly as harmless (or at least beyond the reach of the Sherman Act) so long as they were not accompanied by coercion of competitors and new entrants. Holmes, joined by White, asserted the objection to trusts was "not the union of former competitors," which left the surviving firm free to act independently, "but the sinister power exercised or supposed to be exercised by the combination in keeping rivals out of the business and ruining those who already were in. It was the ferocious extreme of competition with others, not the cessation of competition among the partners, that was the evil feared."[44] This combination of railroads, he suggested, must be lawful because it had no

Stone Cutters' Ass'n, 274 U.S. 37, 65 (1927) (Brandeis, J,. dissenting) (suggesting that a union boycott must be a reasonable restraint if the Sherman Act permitted capitalists to "combine in a single corporation 50 per cent. of the steel industry of the United States dominating the trade through its vast resources"). On the precedential value of 4-3 decisions, see Note, *Lower Court Disavowal of Supreme Court Precedent*, 60 VA. L. REV. 494, 501–08 (1974). The Justice Department later argued, to little effect, that *U.S. Steel*

> should not be followed because it was decided by a minority of the whole number of Justices, although a majority of those who sat, and because . . . the Justices who composed the majority joining in the opinion later used expressions or said things which were at variance with what was said in that opinion.

United States v. Aluminum Co. of Am., 44 F. Supp. 97, 156 (S.D.N.Y. 1941), *aff'd in part*, *rev'd in part*, 148 F.2d 416 (2d Cir. 1945).

41. *Northern Securities*, 193 U.S. at 326.

42. *Id.* at 331. *See also* Robin A. Prager, *The Effects of Horizontal Mergers on Competition: The Case of the Northern Securities Company*, 23 RAND J. ECON. 123 (1992) (concluding that the merger reduced competition).

43. *Northern Securities*, 193 U.S. at 337.

44. *Id.* at 405 (Holmes, J., dissenting). In a separate opinion, joined by Holmes and two others, White dissented on the grounds that the Congress lacked power under the Commerce Clause to regulate the ownership of stock in the railroads. *Id.* at 370 (White, J., dissenting).

exclusionary purpose[45] and, unlike a cartel, imposed no continuing restraint on the contracting firms.[46]

Standard Oil[47] held unlawful the merger that formed the defendant, but took the Holmesian view of private monopoly. The district court held that the merger "constituted a combination in restraint of trade and also an attempt to monopolize and a monopolization under § 2" of the Sherman Act.[48] Chief Justice White affirmed, but not because the merger created a monopoly; that only raised what White called a "prima facie presumption" that the acquisition was unlawful.[49] Like Holmes in *Northern Securities*, White thought that the combination could only be harmful if accompanied by coercion against existing and potential rivals. White noted that the Sherman Act, by prohibiting monopolization rather than monopoly,

> indicates a consciousness that the freedom of the individual right to contract when not unduly or improperly exercised was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted.[50]

Private contracting would erode monopoly unless checked by a "sovereign power," as the evolutionary vision recognized, but also a limited category of "contracts having a monopolistic tendency" to exclude rivals or deter entry.

The defendants in *Standard Oil* contended that the trust was a natural step in the progress of the industry,

45. *Id.* at 408 (Holmes, J., dissenting) ("[T]he size of the combination is reached for other ends than those which would make them monopolies [and that the] combinations are not formed for the purpose of excluding others from the field"). The railroads allegedly played a significant role in the rise of Standard Oil. *See, e.g.*, Benjamin Klein, *The "Hub-and-Spoke" Conspiracy that Created the Standard Oil Monopoly*, 85 S. CAL. L. REV. 459 (2012); George L. Priest, *Rethinking the Economic Basis of the Standard Oil Refining Monopoly: Dominance Against Competing Cartels*, 85 S. CAL. L. REV. 499 (2012); Daniel A. Crane, *Were Standard Oil's Rebates and Drawbacks Cost Justified?*, 85 S. CAL. L. REV. 559 (2012).

46. *Id.* at 410–11 (Holmes, J., dissenting).

47. Standard Oil Co. v. United States, 221 U.S. 1 (1911).

48. *Id.* at 45. *See also id.* at 72–74 (affirming the district court's conclusion that the combination "operated to destroy the 'potentiality of competition' which otherwise would have existed to such an extent as to cause the transfers of stock which were made to the New Jersey corporation and the control which resulted over the many and various subsidiary corporations" a violation of Sections 1 and 2).

49. *Id.* at 75.

50. *Id.* at 62.

> serving to stimulate and increase production, to widely extend the distribution of the products of petroleum at a cost largely below that which would have otherwise prevailed, thus proving to be at one and the same time a benefaction to the general public as well as of enormous advantage to individuals.[51]

White, however, saw the merger not as an expression of "normal methods of industrial development,"[52] but of new means of exclusion that hindered the self-correcting mechanisms of the market:

> [T]he very genius for commercial development and organization which it would seem was manifested from the beginning soon begot an intent and purpose to exclude others which was frequently manifested by acts and dealings wholly inconsistent with the theory that they were made with the single conception of advancing the development of business power by usual methods, but which on the contrary necessarily involved the intent to drive others from the field and to exclude them from their right to trade and thus accomplish the mastery which was the end in view.[53]

Standard Oil's predatory conduct confirmed the "prima facie presumption" that the merger to monopoly was unlawful.[54]

In *U.S. Steel*, the Court considered the legality of a merger that had created the largest company in the world.[55] U.S. Steel had an initial capitalization of $1.4 billion, about one quarter of that year's gross national product.[56] The merger combined several major steel producers (themselves created by earlier combinations of 180 companies), including Carnegie Steel Company, Federal Steel Company, and National Steel Company, to achieve market shares ranging from roughly 40 percent in pig iron to 71 percent in wire rods.[57] In 1907, it acquired its largest remaining competitor,

---

51. *Id.* at 48.

52. *Id.* at 75. Not all contracts imposing restrictive conditions were monopolistic, however, because market participants can always reject the project if the price, "in dollars or conditions" is higher than the participants' "voluntary judgment of [the] utility" of the monopolist's product. United States v. United Shoe Mach. Co., 247 U.S. 32, 65 (1918).

53. *Standard Oil*, 221 U.S. at 76. For the significance of size in antitrust, see generally Barak Orbach & Grace Campbell Rebling, *The Antitrust Curse of Bigness*, 85 S. CAL. L. REV. 605 (2012).

54. *See* Christopher R. Leslie, *Revisiting the Revisionist History of* Standard Oil, 85 S. CAL. L. REV. 573 (2012).

55. ALFRED D. CHANDLER, JR., SCALE AND SCOPE: THE DYNAMICS OF INDUSTRIAL CAPITALISM 132 (1990).

56. Parsons & Ray, *supra* note 9, at 182–83; KENNETH WARREN, BIG STEEL: THE FIRST CENTURY OF THE UNITED STATES STEEL CORPORATION, 1901–2001, at 1, 22 (2001).

57. Parsons & Ray, *supra* note 9, at 182 (showing U.S. Steel's market shares in 1902 and 1910 for pig iron (44.7 and 43.3 percent), ingots and castings (66.3 and 54.7 percent), Bessemer steel rails (65.4 and 60.2 percent), open hearth steel rails (0 and 57.4 percent), structural shapes (57.9 and 51.3 percent), plates and sheets (59.4 and 48.0 percent), wire rods (71.5 and 67.3 percent), wire nails (64.8 and 55.4 percent), and tin plate (n/a and 61.0 percent)).

the Tennessee Coal, Iron, and Railroad Company, with the advance approval of President Roosevelt.[58]

Unlike Andrew Carnegie, Judge Elbert Gary, who led U.S. Steel until his death in 1927,[59] considered competition "immoral and unprofitable."[60] He later testified before Congress that Carnegie had tried "to keep his mills busy. . . [even if it meant selling] at prices which were ruinous to his competitors, because down to about his cost was very much below the cost of others. In my opinion, that was a very bad policy."[61] Instead, Gary sought to limit competition by mergers and price restraints. Aware that his strategies were legally dubious, however, he formulated a two-part antitrust compliance program.[62] First, he adopted policies that limited U.S. Steel's market share in each of its product lines to around 50 percent because, he later admitted, that was the number that William Jennings Bryan had argued should be established as a statutory maximum.[63] Second, he withdrew from explicit cartels and so-called statistical associations[64] but implemented the Gary dinner system, in which committees of producers in each product line announced their pricing intentions while disclaiming any agreement with rivals.[65] When that system came under official scrutiny in 1911, he abandoned it,[66] yet continued to pursue a policy of price and output restraint and at least tacit price coordination, except in export markets.[67]

58. *See* Winerman, *supra* note 40, at 6–7.

59. WARREN, *supra* note 56, at 128.

60. CHANDLER, *supra* note 55, at 134 (quoting ROBERT HESSEN, STEEL TITAN: THE LIFE OF CHARLES M. SCHWAB 186 (1975)).

61. Parsons & Ray, *supra* note 9, at 209 (quoting United States Steel Corporation, Hearings before the H. Comm. on Investigation of U.S. Steel Corp., 62d Cong., 2d Sess. 197 (1911)).

62. *See* GERTRUDE G. SCHROEDER, THE GROWTH OF MAJOR STEEL COMPANIES, 1900–1950, at 44–45 (1952).

63. IDA M. TARBELL, THE LIFE OF ELBERT H. GARY: THE STORY OF STEEL 257–58 (1925). The Democratic Party adopted this policy as part of its platform in the 1908 elections. Democractic Party, Democratic Party Platform of 1908 (July 7, 1908), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=29589#axzz1MXqflKdM. *See also* Thomas K. McCraw & Forest Reinhardt, *Losing to Win: U.S. Steel's Pricing, Investment, and Market Share*, 1901–1938, 49 J. ECON. HIST. 593, 610–13 (1989).

64. UROFSKY, *supra* note 5, at 2–3.

65. *E.g.*, Page, *Gary Dinners*, *supra* note 6.

66. *Id*. at 602, 610.

67. WARREN, *supra* note 56, at 32 (observing that Gary instituted "collaborative action and . . . stable, open price structures helped preserve existing centers of production yet at the same time provided shelter under which new producers could not only compete but also earn higher than average profits"); CHANDLER, *supra* note 55, at 135–36 (observing that Gary sacrificed profit to avoid dismemberment of the company).

These two strategies were successful. The Supreme Court majority agreed with two members of the district court panel that the Corporation had been formed in an attempt to achieve monopoly power, but that the realities of the market—the centrifugal and centripetal forces that Chief Justice White had traced to freedom of contract—prevented the Corporation from achieving its goal. The absence of the "brutalities"[68] of Standard Oil showed U.S. Steel's incapacity to exclude rivals. In a key passage, the *U.S. Steel* Court extracted the meaning of *Standard Oil*:

> The Standard Oil Company had its origin in 1882 and through successive forms of combinations and agencies it progressed in illegal power to the day of the decree, even attempting to circumvent by one of its forms the decision of a court against it. And its methods in using its power was of the kind that [the district judge in *U.S. Steel*] described as "brutal," and of which practices, he said, the Steel Corporation was absolutely guiltless. . . . And of the practices this court said no disinterested mind could doubt that the purpose was "to drive others from the field, and to exclude them from their right to trade, and thus accomplish the mastery which was the end in view." It was further said that what was done and the final culmination "in the plan of the New Jersey corporation" made "manifest the continued existence of the intent . . . and . . . impelled the expansion of the New Jersey corporation." It was to this corporation, which represented the power and purpose of all that preceded, that the suit was addressed and the decree of the court was to apply.[69]

Standard Oil's "original wrong was reflected in and manifested by the acts which followed the organization."[70] Thus, "the court had to deal with a persistent and systematic lawbreaker masquerading under legal forms, and which not only had to be stripped of its disguises but arrested in its illegality. A decree of dissolution was the manifest instrumentality and inevitable."[71]

68. United States v. U.S. Steel Corp., 251 U.S. 417, 441 (1920). The Court summarized the district court's findings that U.S. Steel

> did not secure freight rebates; it did not increase its profits by reducing the wages of its employees—whatever it did was not at the expense of labor; it did not increase its profits by lowering the quality of its products, nor create an artificial scarcity of them; it did not oppress or coerce its competitors-its competition, though vigorous, was fair; it did not undersell its competitors in some localities by reducing its prices there below these maintained elsewhere, or require its customers to enter into contracts limiting their purchases or restricting them in resale prices; it did not obtain customers by secret rebates or departures from its published prices; there was no evidence that it attempted to crush its competitors or drive them out of the market, nor did it take customers from its competitors by unfair means, and in its competition it seemed to make no difference between large and small competitors.

Id. at 441.

69. *Id.* at 455 (quoting Standard Oil Co. v. United States, 221 U.S. 1, 76–77 (1911)).

70. *Id.*

71. *Id.* at 457.

The U.S. Steel combination was different. First, although it achieved market shares in steel manufacturing of well over 50 percent in most markets, it gradually lost ground.[72] The declines showed, as the district court put it, "a strong trend away from any monopolistic absorption or trade-restraining control of iron and steel manufacture or markets of the United States by the Steel Corporation."[73] Second, unlike earlier trusts that had made rivals offers they could not refuse—"to become parties to the illegal enterprise or be driven 'out of the business'"[74]—U.S. Steel "did not oppress or coerce its competitors."[75] Instead, it tried to induce rivals to fix prices "by pools, associations, trade meetings, and through the social form of dinners,"[76] but failed because of the "operation of forces that were not understood or were underestimated."[77] These forces, no doubt, were the same ones that White had suggested could usually thwart monopolistic aspirations by freedom of contract alone. U.S. Steel's efforts at collusion, although illegal when they were in effect, evidenced only that the Corporation lacked the power unilaterally to exploit purchasers.

McKenna seemed mystified by the government's claim that a combination with significantly less than 100 percent of the market could reduce competition without engaging in coercion. He found the government's arguments to the contrary inconsistent:

> In one [argument] competitors (the independents) are represented as oppressed by the superior power of the Corporation; in the other they are represented as ascending to opulence by imitating that power's prices

72. *Id.* at 439 n.1. It continued to lose ground in ensuing decades. *See, e.g.*, George J. Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. REV. 23, 30 (1950) (estimating a 33.14 percent share of ingot capacity by 1948).

73. United States v. U.S. Steel Corp., 223 F. 55, 67 (D.N.J. 1915), *aff'd*, 251 U.S. 417 (1920).

74. *U.S. Steel*, 251 U.S. at 456.

75. *Id.* at 441.

76. *Id.* at 445. It summarized the district court's finding that U.S. Steel

> combined its power with that of its competitors. It did not have power in and of itself, and the control it exerted was only in and by association with its competitors. Its offense, therefore, such as it was, was not different from theirs and was distinguished from theirs "only in the leadership it assumed in promulgating and perfecting the policy." This leadership it gave up and it had ceased to offend against the law before this suit was brought. It was hence concluded that it should be distinguished from its organizers and that their intent and unsuccessful attempt should not be attributed to it, that it "in and of itself is not now and has never been a monopoly or a combination in restraint of trade," and a decree of dissolution should not be entered against it.

Id. at 441 (quoting United States v. U.S. Steel Corp., 223 F. 55, 176–78 (D.N.J. 1915), *aff'd*, 251 U.S. 417 (1920)).

77. *Id.* at 445. It seems unlikely that U.S. Steel's efforts to fix prices ended (if they did end) because they had failed; it is more likely because of the impending government antitrust suit and other investigations. Parsons & Ray, *supra* note 9, at 216.

> which they could not do if at disadvantage from the other conditions of competition; and yet confederated action is not asserted.[78]

If the Corporation did not coerce its rivals, the government's only complaint was about its size, but "the law does not make mere size an offence," only "overt acts."[79]

In his dissent, Justice Day agreed with the proposition that "the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power," but only "when that size and power have been obtained by lawful means and developed by natural growth."[80] In such a case, the firm is "entitled to maintain its size and the power that legitimately goes with it."[81] Where the firm acquires its monopoly power by merger, the dissent recognized, the formation of the corporation itself is the unlawful act.

IV. ECONOMIC ANALYSIS OF THE RECORD IN *U.S. STEEL*

Economic analysis has shown the error of McKenna's account of the effects of the creation of U.S. Steel.[82] The court lacked "a theoretical structure to guide its thinking," particularly the theory of partial monopoly or dominant firm pricing.[83] Consequently, it "was simply uncertain of the application of the Sherman Act when less than a complete monopoly was attained" and therefore rested its decision on the absence of "morally corrupt overt acts."[84] We can now see that the combination creating U.S. Steel gave it large enough shares in the relevant markets to engage in forms of dominant firm pricing. In the classic model of dominant firm pricing, the dominant firm cedes a portion of the market to a competitive fringe of small, price-taking firms and treats the residual portion of the market as its

78. *U.S. Steel*, 251 U.S. at 449.

79. *Id.* at 451.

80. *Id*. at 460.

81. *Id.*

82. One study of the economic evidence in *U.S. Steel* concluded that McKenna

> was simply uncertain of the application of the Sherman Act when less than complete monopoly was attained by legitimate business practices. The consequences of partial control of a market were apparently unclear to the Court and the absence of morally corrupt overt acts did not give it any clues of the distoritions possible from such a structure. . . . Without a theoretical structure to guide its thinking, the Court could legitimately require some evidence of social damage before undertaking such a major step as restructuring of the steel industry.

Parsons & Ray, *supra* note 9, at 217.

83. *Id*. The economic theory of dominant firm pricing existed, but was evidently not widely understood, particularly by courts. *See* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 450 n.26 (2010), which ascribes the theory to Karl Forchheimer, *Theoretisches zum Unvollständigen Monopole* [The Theory of Partial Monopoly], *in* 32 JAHRBUCH FÜR GESETZGEBUNG, VERWALTUNG UND VOLKSWIRTSCHAFT IM DEUTSCHEN REICH 1 (Gustav Schmoller ed., 1908).

84. Parsons & Ray, *supra* note 9, at 217.

monopoly.[85] The dominant firm sets its output at the point at which its marginal cost equals its marginal revenue for the residual portion of the market and chooses the corresponding price on its residual demand curve; the competitive fringe, as price takers, expand output to the point at which their marginal cost equals the dominant firm's price. The resulting price is higher and the resulting output is lower than under competition, but neither difference is as great as would be the case under pure monopoly.

Modern economic studies of the record and the available economic data suggest that U.S. Steel pursued a policy of dominant firm pricing, with periods of disciplinary price reductions (or dynamic limit pricing) and explicit or implicit price coordination with rivals.[86] In his classic study, *The Dominant Firm and the Inverted Umbrella*,[87] George Stigler, at the suggestion of Aaron Director, sought to explain the striking fact that the U.S. Steel's initial book value of $1.4 billion was twice the value of the assets of the firms it subsumed. Was the merger a stock watering scheme aimed at bilking investors, or a realistic measure of the firm's expected profits from dominant firm pricing? Stock market data provided the answer: investors in U.S. Steel achieved better returns than investors in all but one of U.S. Steel's rivals.[88] Consequently, Stigler concluded, the

85. Kaplow, *supra* note 83, at 449–50; William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 944–52 (1981).

86. CHANDLER, *supra* note 55, at 136 (observing that, after the Gary dinners, U.S. Steel "set a price that permitted the existing companies to compete for market share but reduced the incentive to expand output rapidly"); McCraw & Reinhardt, *supra* note 63, at 602–04 (suggesting that U.S. Steel pursued a policy of dynamic limit pricing that gradually ceded market share to rivals); Parsons & Ray, *supra* note 9, at 206–08 (arguing that U.S. Steel had dominant market shares, but also coordinated prices with rivals to avoid losing market share in periods of low demand); Hideki Yamawaki, *Dominant Firm Pricing and Fringe Expansion: The Case of the U.S. Iron and Steel Industry, 1907–1930*, 67 REV. ECON. & STAT. 429, 437 (1985) (presenting evidence that U.S. Steel acted as a dominant firm by "set[ting] its price in response to the fringe's market share, while the fringe's market share was determined by the dominant firm's price through its effects on both long-run capacity and short-run output decisions by the competitive fringe"). *But cf.* George L. Mullin, Joseph C. Mullin & Wallace P. Mullin, *The Competitive Effects of Mergers: Stock Market Evidence from the* U.S. Steel *Dissolution Suit*, 26 RAND J. ECON. 314, 315 (1995) (quoting GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900–1916 (1963) (echoing the majority opinion that "the steel industry was competitive before the World War, and the efforts by the House of Morgan to establish control and stability over the steel industry by voluntary, private economic means had failed")).

87. GEORGE J. STIGLER, *The Dominant Firm and the Inverted Umbrella*, *in* THE ORGANIZATION OF INDUSTRY 108, 108–09 (1968).

88. This result confirms the dissent's assessment in *U.S. Steel* itself.

> The enormous overcapitalization of companies and the appropriation of $100,000,000 in stock to promotion expenses were represented in the stock issues of the new organizations thus formed, and were the basis upon which large dividends have been declared from the

merger creating U.S. Steel was "a master stroke of monopoly promotion" by J.P. Morgan.[89] A later event study showed that the initial filing of the dissolution suit in 1911 increased the stock price of railroads that were U.S. Steel's largest customers and that the government's eventual defeat in 1920 reduced the stock price of the same railroads.[90] The authors concluded that U.S. Steel was charging noncompetitive prices and that dissolution would have reduced prices significantly.

The Court also erred in suggesting that U.S. Steel's participation in various forms of price fixing, including the Gary dinners, was somehow inconsistent with its possession of monopoly power. A dominant firm and the competitive fringe receive noncompetitive returns, but can increase their joint profits still more by setting a pure monopoly price and output. Indeed, the evidence suggests that U.S. Steel and its larger rivals coordinated prices and output throughout the relevant period, even after the end of the public Gary dinner episode. U.S. Steel may have maintained its market share in part because of its vertical control of rich iron ore supplies.[91] Even at that, however, a simple dominant firm strategy would likely have caused U.S. Steel to suffer greater losses in market share than it actually did during periods of low demand. One study infers that "the industry might be more properly characterized as a 'dominant cartel.'"[92] The industry was able to increase its profit further by a consistent policy of price discrimination in exports.[93]

V. MISREADING THE ERRORS OF *U.S. STEEL*: POST–NEW DEAL MONOPOLIZATION AND MERGER LAW

Chief Justice White pointed to Standard Oil's predatory conduct as

> profits of the business. . . . It is the irresistible conclusion from these premises that great profits to be derived from unified control were the object of these organizations.

United States v. U.S .Steel Corp., 251 U.S. 417, 459 (1920) (Day, J., dissenting).

89. STIGLER, *supra* note 87, at 112.

90. Mullin, Mullin & Mullin, *supra* note 86, at 325.

91. Parsons & Ray, *supra* note 9, at 184 ("The ownership of iron ore deposits appears as a key factor in the slow rate of entry of new firms as U.S. Steel methodically attempted to foreclose high quality ore supplies."). *But cf.* Joseph C. Mullin & Wallace P. Mullin, *United States Steel's Acquisition of the Great Northern Ore Properties: Vertical Foreclosure or Efficient Contractual Governance?*, 13 J.L. ECON. & ORG. 74 (1997) (concluding that one of U.S. Steel's major acquisitions was made for efficiency reasons).

92. Parsons & Ray, *supra* note 9, at 208. There is evidence that the industry engaged in price fixing in later periods as well. *See* Jonathan B. Baker, *Identifying Cartel Policing Under Uncertainty: The U.S. Steel Industry, 1933–1939*, 32 J.L. & ECON. S47 (1989).

93. *U.S. Steel*, 251 U.S. at 453–55; Parsons & Ray, *supra* note 9, at 190–92. Interestingly, the government argued that U.S. Steel's export activities were beneficial and suggested that they could be continued through an export association under the Webb Act.

proof that the consolidation creating it was monopolistic and not a legitimate effort to achieve the benefits of large scale production. Justice McKenna pointed to U.S. Steel's abjuration of comparable predatory conduct as proof that the consolidation creating the Corporation, although monopolistic in original intent, was benign in ultimate effect.[94] As we have just seen, this application of *Standard Oil* was a serious error. It ratified a merger that made the American steel industry less competitive for decades and derailed the government's efforts to dissolve other consolidations of the great merger wave and beyond.

In part because of *U.S. Steel*, the antitrust laws came to be viewed as ineffective.[95] Thurman Arnold famously portrayed them as largely symbolic devices that expressed moral disapproval, but permitted big business to thrive using more "respectable" tactics like "market dominance and price leadership" rather than predatory pricing or cartels.[96] This perception of ineffectiveness took on new urgency during the Great Depression, which some ascribed to the prevalence of monopoly and consequent underconsumption.[97] During the New Deal, advocates of versions of the intentional vision competed for influence in the Roosevelt administration.[98] In the early years, federal policy sought to regulate market behavior directly through agencies like the National Recovery Administration.[99] In the late New Deal, however, antimonopolists in the tradition of Brandeis gained greater influence in the executive branch and pressed for a broad policy of decentralization, in part by reinvigoration of monopolization and merger enforcement.[100] For many of these officials, the antipathy to concentration took precedence over productive and distributive efficiency.[101]

94. Edward S. Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34, 44 (1937) (observing that "whatever are considered to be the evils resulting from monopoly—enhancement of price, deterioration of product, or the like—a monopolistic situation, or an attempt to monopolize, is evidenced to the courts primarily, if not exclusively, by a limitation of the freedom to compete").

95. George W. Stocking, *The Rule of Reason, Workable Competition, and Monopoly*, 64 YALE L.J. 1107, 1125 (1955).

96. THURMAN W. ARNOLD, THE FOLKLORE OF CAPITALISM 226–27 (1937) ("[T]he antitrust laws, instead of breaking up great organizations, served only to make them respectable and well thought of by providing them with the clothes of rugged individualism.").

97. *See* ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE 295 (1966).

98. *See id.* at 283–304.

99. *Id*.

100. *Id.*

101. *Id.* at 287.

The influence of these ideas led to much more aggressive antitrust enforcement, initially (and paradoxically) under the leadership of Thurman Arnold.[102] After World War II, many of the Justice Department's policy positions found support in the emerging structuralist theory of industrial organization.[103] Lawyers during this period gradually came "around to the economists' view and increasingly were identifying monopoly as a structural rather than behavioral problem."[104] As Joe Bain later summarized the theory, "structure is systematically associated with or determines conduct; and conduct, as determined by structure, determines performance."[105] Structuralists recognized that *U.S. Steel* was wrongly decided. George Stocking observed in 1955, for example, that *U.S. Steel* mistakenly concluded that "unless [the defendant's] conduct is predatory, combinations falling short of monopoly under the rule of reason as originally enunciated are beyond the statute's reach."[106] Analyzed from a structuralist perspective, Stocking argued, the U.S. Steel combination should have been unlawful because it resulted in a market that "did not conform to the standard of workable competition. Its structure contributed to conduct incompatible with an effective interplay of market forces, and its structure and conduct resulted in unacceptable performance."[107]

But, the emphasis on structure as the determinant of conduct and performance led some courts to draw the wrong legal inferences from *U.S. Steel*'s errors. *U.S. Steel* undoubtedly made the antitrust laws ineffective against monopolistic mergers. In post–New Deal antitrust, however, some courts took the equally mistaken view that the antitrust laws should prohibit monopolies achieved and maintained by efficient conduct and mergers that created efficiencies and posed no risk of noncompetitive pricing.[108] Here again, ideologies played a leading role. As I observed in an earlier study, post–New Deal legal realists saw the decisions of antitrust's formative period, like *Standard Oil* and *U.S. Steel*, as the product of laissez-faire

102. *Id.* at 420–55. *See also* ALAN BRINKLEY, THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR 106–36 (1995).

103. Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 346–59 (2009).

104. *Id.* at 349.

105. JOE S. BAIN, INDUSTRIAL ORGANIZATION 329 (2d ed. 1968)

106. Stocking, *supra* note 95, at 1125.

107. *Id.* at 1135–36.

108. *See, e.g.*, United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 416–31 (2d Cir. 1945) (holding that Alcoa monopolized by "embrac[ing] each new opportunity as it opened, and to fac[ing] every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel"); Brown Shoe Co. v. United States, 370 U.S. 294, 344 (blocking a vertical merger in part because it would allow the defendant to "market [its] own brands at prices below those of competing independent retailers").

ideology and legal formalism; they sought to cut through that formalism to reveal social and economic reality. But this approach to antitrust

> reflected a new conceptualism and a new formalism that were as rigid as those they supplanted. The formal realists mistook their own intentionalist preconceptions for reality, and accepted economic and social generalizations that were consistent with those views. In the antitrust context, they were willing to base bright-line rules of liability on those preconceptions.[109]

A. MONOPOLIZATION

In *Alcoa*, Judge Hand suggested that *U.S. Steel*'s error lay in requiring a showing of predatory acts like those of Standard Oil in any monopolization case, including one like *Alcoa*, in which the defendant had acquired its monopoly power lawfully.[110] He pointed to *U.S. Steel* as "the most extreme expression of [the] view" that the "successful competitor, having been urged to compete, must not be turned upon when he wins."[111] He cited Justice McKenna's statement that "the law does not make mere size an offense," but "requires overt acts and trusts to its prohibition of them."[112] In the same footnote, he quoted Justice Day's acknowledgment in dissent that a firm that acquires monopoly power by "natural growth . . . is entitled to maintain its size and the power that legitimately goes with it, provided no law has been transgressed in obtaining it.[113]

At this point in his opinion, Hand ignored Justice Day's crucial distinction between monopoly power acquired by unilateral expansion and monopoly power acquired by merger.[114] This omission was fully consistent with the emerging structuralist paradigm. As Donald Turner later put the idea, "whatever the economic costs of continuing monopoly may be, they

109. William H. Page, *Legal Realism and the Shaping of Modern Antitrust*, 44 EMORY L.J. 1, 24 (1995).

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

111. *Id*. at 430.

112. *Id.* at 430 n.2 (quoting United States v. U.S. Steel Corp., 251 U.S. 417, 451 (1920).

113. *Id.* (Day, J., dissenting) (quoting *U.S. Steel*, 251 U.S. at 460).

114. Earlier in the opinion, Hand suggested that a merger to monopoly was monopolization per se, while achieving a monopoly by internal expansion was monopolization unless it was accidental.

> It does not follow because "Alcoa" had such a monopoly, that it "monopolized" the ingot market: it may not have achieved monopoly; monopoly may have been thrust upon it. *If it had been a combination of existing smelters which united the whole industry and controlled the production of all aluminum ingot, it would certainly have 'monopolized' the market.* In several decisions the Supreme Court has decreed the dissolution of such combinations, although they had engaged in no unlawful trade practices.

Alcoa, 148 F.2d at 429 (emphasis added) (citing railroad cases, but conspicuously not *U.S. Steel*).

are the same regardless of the monopoly's origin."[115] From this perspective, both the majority and the dissent in *U.S. Steel* erred in recognizing a right of any monopolist to compete on the merits.

Consequently, Hand reasoned, even a monopolist that acquires monopoly power lawfully violates Section 2 unless "it falls within the exception established in favor of those who do not seek, but cannot avoid, the control of a market."[116] Alcoa failed this test by "anticipat[ing] increases in the demand for ingot and be[ing] prepared to supply them":

> [W]e 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 emasculate the Act; would permit just such consolidations as it was designed to prevent.[117]

Judge Wyzanski endorsed this view in *United States v. United Shoe Machinery*.[118] He read *Standard Oil*, as interpreted by McKenna in *U.S. Steel*, as "encourag[ing] the view that there was no monopolization unless defendant had resorted to predatory practices."[119] "But," Wyzanki continued, "a reversal of trend was effectuated through the landmark opinion of Judge Learned Hand in *United States v. Aluminum Co. of America*."[120] In that case, Judge Hand

> did not rest his judgment on the corporation's coercive or immoral practices. Instead, adopting an economic approach, he defined the appropriate market, found that Alcoa supplied 90% of it, determined that this control constituted a monopoly, and ruled that since Alcoa established this monopoly by its voluntary actions, such as building new

115. Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1220 (1969). For a much earlier expression of this view, see Herbert Pope, *The Legal Aspect of Monopoly*, 20 HARV. L. REV. 167, 191 (1907).

116. *Alcoa*, 148 F.2d at 431.

117. *Id.*

118. United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 341 (1953).

119. *Id.* Judge Wyzanki also mentioned *United States v. United Shoe Machinery Co. of New Jersey*, 247 U.S. 32 (1918), as a monopolization case unduly focused on predation. That case, however, rested on the conclusion that the merger creating the defendant combined producers of noncompeting machines used in different aspects of the shoe manufacturing process. *Id.* at 44–45.

120. *United Shoe Mach.*, 110 F.Supp. at 341.

> plants, though, it was assumed, not by moral derelictions, it had "monopolized" in violation of § 2.[121]

Thus, by the middle of the twentieth century, a firm that had achieved monopoly power lawfully could run afoul of Section 2 by engaging in "voluntary" and "'honestly industrial'" conduct like "building new plants."[122]

This definition of exclusionary conduct essentially equates harm to competition with harm to rivals in monopolization cases. In this respect, it echoes Justice McKenna's mistaken focus on the absence of harm to rivals in this exoneration of *U.S. Steel*: "We may wonder at it," he wrote, "wonder that the despotism of the Corporation, so baneful to the world in the representation of the Government, did not produce protesting victims."[123] It is a short step from McKenna's absolution of U.S. Steel because it had not hurt rivals to Hand's condemnation of Alcoa because it had hurt rivals. "The search for victims is, in fact, the reason courts have tended to protect competitors and not competition: the 'victims' of competition are frequently quite vocal and not hard to find," while consumers, the victims of U.S. Steel's collusion with rivals, are "largely ignorant of the damage they suffered."[124] In the following section, we will see that the law of mergers took a similarly perverse turn.

B. MERGERS

Had the Court dissolved U.S. Steel in 1920, the rule of reason might have become the principal legal standard for evaluating mergers. Instead, enforcers came to view Section 1 of the Sherman Act as ineffective as a means of blocking or dissolving even clearly anticompetitive mergers. In 1922, for example, the Attorney General pointed to the decision as a reason for not challenging mergers by Bethlehem Steel[125] that later economists

121. *Id.*

122. *Id*. (citing United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 431 (2d Cir. 1945)). *See also* Eugene Rostow, *The New Sherman Act: A Positive Instrument of Progress*, 14 U. CHI. L. REV. 567, 577 (1947). Judge Wyzanski placed "beyond criticism . . . the high quality of United's products, its understanding of the techniques of shoemaking and the needs of shoe manufacturers, its efficient design and improvement of machines, and its prompt and knowledgeable service." *United Shoe Mach.*, 110 F. Supp. at 344. He condemned practices, like the defendant's policy of leasing rather than selling machines, that were "honestly industrial," yet not the "inevitable consequences of ability, natural forces, or law." *Id*.

123. United States v. U.S. Steel Corp., 251 U.S 417, 449 (1920).

124. Parsons & Ray, *supra* note 9, at 217–18.

125. SCHROEDER, *supra* note 62, at 101. The Federal Trade Commission ("FTC") challenged some steel mergers, but with little success. *Id.* at 101–03. One investigation ended when the Supreme

suggest may have "played an important role in controlling price cutting and capacity expansion" during the 1920s.[126] The failure of Section 1 during this period set the stage for later developments that confused the law of mergers for over two decades.

In the post–New Deal era, the government sought to reinvigorate merger enforcement along with monopolization enforcement.[127] It targeted more than mergers that created firms that could exercise monopoly power unilaterally or in concert with rivals, as U.S Steel had done. In the newly ascendant intentional vision, mergers were suspect if they enhanced the competitiveness of the surviving firm at the expense of smaller rivals.[128] Just as Judge Hand had suggested that a dominant firm could monopolize by "honestly industrial" competition that hurt its rivals,[129] the government now argued that mergers should be unlawful if they allowed the surviving firm to compete more effectively and, thus, hurt its rivals.[130]

The turning point in this campaign was another case against U.S. Steel. In *Columbia Steel*[131] in 1948, the government lost its challenge to U.S. Steel's acquisition of the assets of Consolidated Steel, a steel fabricator that purchased 3 percent of the rolled steel sold in the eleven western states in which Consolidated sold its products.[132] The government contended, in an argument reminiscent of Harlan's opinion in *Northern Securities*, that the acquisition was per se illegal under Section 1 of the Sherman Act because it excluded U.S. Steel's rivals in the production of rolled steel.[133] Justice Reed, however, writing for a bare majority of the Court, sensibly concluded that "[e]xclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical

Court held that the FTC lacked authority to order dissolution of a merger consummated before any challenge. FTC v. Eastman Kodak Co., 274 U.S. 619, 624 (1927).

126. Parsons & Ray, *supra* note 9, at 213.

127. RICHARD A. POSNER, ANTITRUST LAW 120–29 (2d ed. 2001)

128. *Id*. at 122–29.

129. United States v. Aluminum Co. of Am. (*Alcoa*), 148 F.2d 416, 431 (2d Cir. 1945).

130. Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962) (blocking a vertical merger in part because it would have reduced the defendant's costs).

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

132. *Id.* at 527.

133. *Id.* at 519. Herbert Hovenkamp notes that in this period

> arguments against vertical integration became increasingly fantastic, including the claims that a firm could vertically integrate in order to force its own subsidiary to purchase at monopoly prices; that vertically integrated firms received an unfair advantage because they could buy from their subsidiaries at cost, while others had to pay monopoly prices; or that they engaged in predation by charging below cost prices at one level, subsidized by excessive profits at a different level.

Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880–1960*, 95 IOWA L. REV. 863, 915 (2010) (citations omitted).

integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product," which could not occur from the foreclosure of 3 percent of a narrowly defined geographic market.[134] U.S. Steel also produced some types of fabricated steel, but the Court did not think the horizontal aspects of the merger were likely to reduce competition either.[135]

In a florid dissent for four members of the Court, Justice Douglas argued that the merger should be blocked because U.S. Steel—a firm that was the product of numerous earlier mergers and that produced 51 percent of the rolled steel sold in the western United States—was acquiring a significant customer, particularly of rolled plates and shapes.[136] Competition, he wrote, "is never more irrevocably eliminated than by buying the customer for whose business the industry has been competing."[137] Douglas continued:

> We have here the problem of bigness. Its lesson should by now have been burned into our memory by Brandeis. *The Curse of Bigness* shows how size can become a menace—both industrial and social. It can be an industrial menace because it creates gross inequalities against existing or putative competitors. It can be a social menace—because of its control of prices. . . . In final analysis, size in steel is the measure of the power of a handful of men over our economy. . . . The philosophy of the Sherman Act is that it should not exist. For all power tends to develop into a government in itself. Power that controls the economy should be in the hands of elected representatives of the people, not in the hands of an industrial oligarchy. Industrial power should be decentralized. It should be scattered into many hands so that the fortunes of the people will not be dependent on the whim or caprice, the political prejudices, the

134. *Columbia Steel*, 334 U.S. at 524.

135. *Id.* at 529–30. The Court also rejected the government's contention that the acquisition was an attempt to monopolize in light of the much earlier consolidations that created U.S. Steel itself. *Id*. The Court noted that "the acquisition of a firm outlet to absorb a portion of [the] rolled steel production" of a plant purchased from the government after the war, with the Attorney General's blessing "seems to reflect a normal business purpose rather than a scheme to circumvent the law." *Id*. at 532–33. The Court also noted U.S. Steel's market share had declined, by the end of the war, to just over 30 percent. *Id.*

136. *Id.* at 538–39 (Douglas, J., dissenting).

137. *Id.* at 537. This rationale later won the day in *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586 (1957), which held unlawful du Pont's acquisition (in 1917) of stock of General Motors, a large customer of its fabrics and finishes, because GM preferred du Pont's products as inputs. As Hovenkamp has observed, "[b]ecause the only economic purpose of vertical integration is self-provision or self-distribution, the government's position was basically that vertical integration was legal only if it made no economic sense to do so in the first place." Hovenkamp, *supra* note 133, at 916. The efficiency of the relationship was seemingly irrelevant.

> emotional stability of a few self-appointed men. . . . The Court forgot this lesson in [*U.S. Steel*] . . . . The Court today forgets it when it allows United States Steel to wrap its tentacles tighter around the steel industry of the West. . . . It is a purchase for control, a purchase for control of a market for which United States Steel has in the past had to compete but which it no longer wants left to the uncertainties that competition in the West may engender.[138]

As the Supreme Court later recognized, *Columbia Steel* "stirred concern whether the Sherman Act alone was a check against corporate acquisitions."[139] In response to the decision, Congress enacted the Cellar-Kefauver Antimerger Act in 1950 to "bring mergers within § 7 and thereby close what it regarded as a loophole in the section [and] to reach transactions such as that involved in *Columbia Steel*, which was a simple purchase of assets and not a merger."[140] The legislative history of Cellar-Kefauver reveals that Congress feared "what was considered to be a rising tide of economic concentration in the American economy,"[141] and therefore gave courts "authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency."[142]

The legislative history also suggested that one goal of antimerger law was to protect inefficient firms: "The possibility of lower costs was brushed aside in the legislative deliberations and there is every reason to believe that Congress preferred the noneconomic advantages of deconcentrated markets to limited reductions in the cost of operations."[143] In *Brown Shoe*, we can see the mischief of the incipiency notion taken to an extreme. The Court held unlawful a merger creating a firm with local market shares of as little as 5 percent[144] and vertical foreclosure of less than 4 percent.[145] It

138. *Columbia Steel*, 334 U.S. at 535–37.

139. United States v. Phila. Nat'l Bank, 374 U.S. 321, 340 (1963). *See also* Brown Shoe Co. v. United States, 370 U.S. 294, 318 n.33 (1962) (suggesting that "some understood" *Columbia Steel* "to indicate that existing law might be inadequate to prevent mergers that had substantially lessened competition in a section of the country, but which, nevertheless, had not risen to the level of those restraints of trade or monopoly prohibited by the Sherman Act").

140. *Phila. Nat'l Bank*, 374 U.S. at 341–42.

141. *Brown Shoe*, 370 U.S. at 315.

142. *Id.* at 317.

143. Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 318 (1960).

144. *Brown Shoe*, 370 U.S. at 343–44 (1962) ("In an industry as fragmented as shoe retailing, the control of substantial shares of the trade in a city may have important effects on competition. If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares."). For an extensive discussion of the debate within the Supreme Court that led to the unanimous decision in *Brown Shoe*, see Tony A.

explicitly rested liability on the prospect that the merger would allow the surviving firm to achieve efficiencies:

> The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.[146]

Similarly, in *Von's Grocery*,[147] the Court prevented the merger of grocery stores in a very fragmented market because the market was experiencing a trend toward concentration. "Like the Sherman Act in 1890 and the Clayton Act in 1914," the Court wrote, "the basic purpose of the 1950 Cellar-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business."[148] To condemn mergers of firms with small market shares that promised significant efficiencies oddly combined the ideological errors of the majority and dissenting opinions in *Northern Securities*—Harlan's view that virtually all horizontal mergers are unlawful and Holmes's view that mergers were only unlawful if they posed a threat to existing rivals.

VI. CORRECTING THE ERRORS OF *U.S. STEEL* (AND ITS POST-NEW DEAL CRITICS): MODERN MONOPOLIZATION AND MERGER LAW

Modern antitrust law has reached a new equilibrium that rejects both *U.S. Steel* and the misguided judicial responses to it in the decades after the New Deal. Monopoly achieved by internal expansion without the use of exclusionary practices is lawful,[149] because it presumptively (even if not

Freyer, *What Was Warren Court Antitrust?*, 2009 SUP. CT. REV. 347, 369–83.

145. *Brown Shoe*, 370 U.S. at 327.

146. *Id.* at 344.

147. United States v. Von's Grocery Co., 384 U.S. 270 (1966).

148. *Id.* at 275.

149. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 178 (1978) ("Antitrust should not interfere with any firm size created by internal growth, and this is true whether the result is monopoly or oligopoly.").

conclusively) suggests superior efficiency.[150] The rewards of monopoly provide an incentive for firms to innovate and reduce costs.[151] Consequently, a firm that achieves monopoly power lawfully may exploit its power by reducing output and increasing prices.[152] But it need not do so: even though modern courts still struggle to clarify the standard for unlawful maintenance of monopoly,[153] the law has discarded Hand's suggestion that firms that acquire monopoly power lawfully monopolize by expanding output. It would be truly perverse to require firms with lawfully acquired monopoly power to limit output as U.S. Steel did. As Judge Posner has observed, "[t]oday it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches."[154] Or as, the unanimous D.C. Circuit held in *Microsoft*, "to be condemned as exclusionary, a monopolist's act must . . . harm the competitive process and thereby harm consumers. In contrast, harm to one or more competitors will not suffice."[155] Microsoft did not harm the competitive process, for example, by offering services free or improving its

150. Although rare, a firm may violate Section 2 if it achieves monopoly power by unilateral exclusionary conduct. *See generally* Avishalom Tor, *Unilateral, Anticompetitive Acquisitions of Dominance or Monopoly Power*, 76 ANTITRUST L.J. 847 (2010).

151. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive conduct.").

152. *See, e.g.*, Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic, 65 F.3d 1406, 1412–13 (7th Cir. 1995) ("A natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of 'monopolizing' in violation of the Sherman Act and can therefore charge any price that it wants, for the antitrust laws are not a price-control statute or a public-utility or common-carrier rate-regulation statute." (citations omitted)). Different rules apply in other antitrust regimes. *See* Ariel Ezrachi & David Gilo, *Excessive Pricing, Entry, Assessment, and Investment: Lessons from the* Mittal *Litigation*, 76 ANTITRUST L.J. 873 (2010); Michal S. Gal, *Monopoly Pricing as an Antitrust Offense in the U.S. and the EC: Two Systems of Belief About Monopoly?*, 49 ANTITRUST BULL. 343 (2004).

153. *See, e.g.*, Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003).

154. Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 375 (7th Cir. 1986). *See also* Brooke Grp., Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993) (observing that "the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting"); E.I. du Pont de Nemours & Co., 96 F.T.C. 653, ¶ 51 (1980) (observing that "the essence of the competitive process is to induce firms to become more efficient and to pass the benefits of the efficiency along to consumers" and that "[t]hat process would be ill-served by using antitrust to block hard, aggressive competition that is solidly based on efficiencies and growth opportunities, even if monopoly is a possible result").

155. United States v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) (emphasis omitted).

product, even where those actions harmed rivals.[156]

A similar trajectory has occurred in merger law. Although *Brown Shoe* and *Von's* have not been overruled, antitrust law has abandoned their view of the purpose of antimerger law. A merger will not be condemned because it generates efficiencies that are likely to reduce prices and thus harm rivals, even if the market is becoming more concentrated.[157] The newly revised U.S. Department of Justice and Federal Trade Commission Merger Guidelines recognize that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies and thus enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products."[158] While antimerger law necessarily assumes that growth by merger is generally more likely to reduce competition than growth by internal expansion,[159] it also recognizes that mergers may sometimes allow firms to achieve efficiencies that are not available by other means.[160]

At the same time, the law does not excuse mergers like the one that created U.S. Steel simply because it did not achieve a complete monopoly or because the surviving firm did not engage in predatory conduct. Now, the law properly seeks to "identify and challenge competitively harmful

---

156. *Id.* at 62 (upholding free services); *id.* at 75 (upholding development of a Windows-specific and somewhat faster version of the Java programming language).

157. Judge Posner has observed,

> The most important developments that cast doubt on the continued vitality of such cases as *Brown Shoe* and *Von's* are found in other cases, where the Supreme Court, echoed by the lower courts, has said repeatedly that the economic concept of competition, rather than any desire to preserve rivals as such, is the lodestar that shall guide the contemporary application of the antitrust laws, not excluding the Clayton Act. . . . Applied to cases brought under section 7, this principle requires the [trier] to make a judgment whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in the market to collude, expressly or tacitly, and thereby force price above or farther above the competitive level.

Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir.1986) (citations omitted).

158. U.S. Dep't of Justice and Fed. Trade Comm'n, Horizontal Merger Guidelines para. 10 (Aug. 19, 2010) [hereinafter Merger Guidelines], http://www.justice.gov/atr/public/guidelines/hmg-2010.html#2b.

159. United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963) ("[S]urely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition."). *See also* BORK, *supra* note 149, at 199 ("[S]ize by internal growth demonstrates superior efficiency, but merger that creates real market control will certainly have the effect of restricting output and may or may not create new efficiencies.").

160. Alan Devlin & Bruno Peixoto, *Reformulating Antitrust Rules to Safeguard Societal Wealth*, 13 STAN. J.L. BUS. & FIN. 225, 245–46 (2007); William J. Kolaski & Andrew R. Dick, *The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers*, 71 ANTITRUST L.J. 207, 245 (2003); Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1697, 1722 (2010).

mergers while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral."[161] Mergers are competitively harmful if they "create, enhance, or entrench market power or . . . facilitate its exercise."[162] Anticompetitive effects may be unilateral, if the merger allows the surviving company to act as dominant firm, or they may be coordinated, if the merger facilitates interdependent or collusive behavior among the surviving company and its rivals.[163]

U.S. Steel provides a paradigm of how a merger can enhance or entrench market power under the Merger Guidelines. There were few complexities of market definition—the various products and which of the merging firms produced them were clear. Under the Gary dinner system, the rivals even sorted themselves into "subcommittees" of competitors to coordinate prices in "ore and pig iron, pipes and tubular goods, wire products, rails and billets (steel ingots), structural material, plates, steel bars, and sheets and tin plates."[164] The concentration levels were far above the thresholds now considered dangerous. To take one example, before the merger, the market for steel rails was moderately concentrated, with a Herfindahl-Hirschman index ("HHI") of around 1800.[165] Federal Steel and Carnegie Steel each sold roughly a quarter of the market's volume while National and four other firms sold roughly equal shares of the remainder.

161. Merger Guidelines, *supra* note 158, at para. 1.
162. *Id.*
163. *Id.*
164. Page, *Gary Dinners*, *supra* note 6, at 603.
165. The HHI measures concentration by "summing the squares of the individual firms' market shares." Merger Guidelines, *supra* note 158, at para. 5.3. The following figures for sales of steel rails (by volume) between September 21, 1900 and March 25, 1901 are drawn from Brief of Appellant at 95, United States v. U.S. Steel Corp., 251 U.S. 417 (1920) (No. 6). The percentages are added.

TABLE. Sales of Steel Rails from Sept. 21, 1900 to Mar. 25, 1901.

Types of Steel Rails	*Sales (tons)*	*Share (%)*
Federal Steel	467,185	27
Carnegie Steel	430,307	25
National Steel	166,302	10
Lackawanna Steel	206,597	12
Pennsylvania Steel	189,014	11
Cambria Steel	163,799	9
Colorado Fuel & Iron	108,390	6
Total	1,731,594	100

After the merger combined the shares of Federal, Carnegie, and National, U.S. Steel accounted for over 60 percent of the market's volume and post-merger HHI was over 4000—an increase of over 2000 points. Under modern standards, in highly concentrated markets, an increase in concentration one tenth as great would raise competitive concerns.[166]

The consummated merger facilitated unilateral and coordinated noncompetitive pricing of steel products. During the 1890s, while pooling arrangements were in effect, the price of steel rails was around $26 per ton. In 1897 and 1898, the pools fell apart and the price dropped to between $16 and $18 per ton.[167] These price wars led to the formation of Federal Steel and other efforts at cooperation and, eventually, consolidation. After the formation of U.S. Steel, standard Bessemer steel rails sold for $28 in domestic markets for fifteen years, with open-hearth rails selling for slightly more, depending upon their alloy content.[168] The district court found that this persistent standard pricing was not collusive, because "rail manufacturers simply followed that basic price to prevent the ruinous rail wars of the past."[169] As Charles M. Schwab, a former president of U.S. Steel, put it,

> if I were to vary that price of $28 for rails, which seems to have been recognized by all rail manufacturers as a fair price and giving a fair profit, if I were to vary that 10 cents a ton, I would precipitate a steel war, . . . that would result in ruining my works without any profit. Everybody by tacit and mutual understanding felt the same about that.[170]

The court correctly determined that this behavior did not amount to price fixing. Under modern analysis, however, tacit coordination would still be grounds for invalidating the merger that made it possible. As the Merger Guidelines put it, "a merger may diminish competition by enabling or encouraging post-merger coordinated interaction among firms in the relevant market that harms customers."[171] This sort of interaction

> can involve parallel accommodating conduct not pursuant to a prior understanding. Parallel accommodating conduct includes situations in which each rival's response to competitive moves made by others is

166. Merger Guidelines, *supra* note 158, at para. 5.3.

167. Brief of Appellant, *supra* note 165.

168. United States v. U.S. Steel Corp., 223 F. 55, 154 (D.N.J. 1915), *aff'd*, 251 U.S. 417 (1920).

169. *Id.*

170. *Id.* (quoting Schwab's testimony at a tariff hearing in 1908, which was read into the record of the monopolization case, Transcript of Record at 4387, vol. 11, United States v. U.S. Steel Corp., 223 F. 55 (1915) (No. 6214)).

171. Merger Guidelines, *supra* note 158, at para. 7.

> individually rational, and not motivated by retaliation or deterrence nor intended to sustain an agreed-upon market outcome, but nevertheless emboldens price increases and weakens competitive incentives to reduce prices or offer customers better terms. Coordinated interaction includes conduct not otherwise condemned by the antitrust laws.[172]

Given the prevalence of price wars and cartel activity before the merger, it seems clear that the merger enabled or encouraged coordinated pricing, as the promoters anticipated. As further evidence of jointly exercised monopoly power, U.S. Steel consistently sold steel rails in export markets for more than $6 less per ton than in domestic markets.[173] And, of course, in other product lines, U.S. Steel coordinated illegal collusive pricing through the Gary dinners system.

A merger might be justified under the guidelines by merger-specific efficiencies, those that are "likely to be accomplished with the proposed merger and unlikely to be accomplished in the absence of either the proposed merger or another means having comparable anticompetitive effects."[174] The evidence does not support the suggestion that the U.S. Steel merger achieved efficiencies unavailable to smaller firms—certainly not sufficient efficiencies to outweigh the monopoly power that the merger created.[175] The Supreme Court held that the purpose of the merger was to achieve monopoly power, not economies of scale or other efficiencies. Both Federal Steel and Carnegie Steel were well integrated backward into iron ore production before the consolidation.[176] U.S. Steel's efforts at rationalizing production were limited[177] and would likely have occurred even without the consolidation.[178] Even in 1920, U.S. Steel was strictly a holding company controlling the stock of twelve iron and steel manufacturers.[179] It did not establish a central research laboratory until

172. *Id*.

173. Parsons & Ray, *supra* note 9, at 193.

174. Merger Guidelines, *supra* note 158, at para. 10.

175. *See* Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 21–23 (1968) (illustrating the tradeoff between cost savings (productive efficiency) and deadweight loss (allocative inefficiency) from a merger that "yields economies but extends market power").

176. Parsons & Ray, *supra* note 9, at 181–82.

177. McCraw & Reinhardt, *supra* note 63, at 595–96 (noting U.S Steel "saddled itself with a locational inertia that minimized its ability to exploit new opportunities in growing geographical markets" and "persisted in the form of a loose holding company, long keeping intact about 200 subsidiaries [with] overlapping markets and duplicate sales forces").

178. CHANDLER, *supra* note 55, at 133.

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

1928.[180] Its greatest achievement was the "belated" construction in 1911 of "the world's largest and most efficient steel-producing works" in Gary, Indiana.[181] What efficiencies it achieved, moreover, did not benefit its customers because of Judge Gary's pricing policies.[182]

In 2010, Keith Hylton and Haizhen Lin argued that mergers toward monopoly should be viewed more favorably when they are accompanied by innovation.[183] They observe that some markets like banking and airlines may be too fragmented to allow firms to invest in necessary productive facilities and product improvements:

> When profit serves as a signal for investment, mergers for the sole purpose of gaining pricing power cannot be regarded as presumptively socially undesirable. If too much pricing power is attained, entry will occur, pushing prices back down. The ordinary process of entry and exit will regulate profits to a level sufficient to compensate investments in market expanding products and services.
>
> On a more general level, there is an open question about the fit between merger policy and general antitrust doctrine under Section 2. Given monopolization law's distinction between exploitation and exclusion, the policy against mergers for market power seems difficult to explain. Mergers toward monopoly are efforts to exploit market power. They sometimes include a risk of exclusion in the future, but it is by no means clear that a merger should be prohibited simply because of a risk that the merged entity may later exclude rivals. Let the law operate on the merged entity at the moment it attempts to exclude a rival.[184]

This argument echoes the majority opinion in *U.S. Steel* by suggesting that mergers toward monopoly unaccompanied by exclusion are often benign and sometimes necessary to gain the size necessary for adequate investment. Government intervention, in this view, is unwarranted because entry will regulate excessive pricing by eroding the dominant firm's market share. But a merger that enables monopoly pricing should be unlawful.[185]

It is true that, under Section 2, firms with monopoly power acquired lawfully by internal expansion—in other words, by producing products that

180. CHANDLER, *supra* note 55, at 139.

181. *Id.* at 133.

182. *Id.* at 135 (describing the demoralization of U.S. Steel's managers at being required to run mills at a fraction of their capacity).

183. Keith N. Hylton & Haizhen Lin, *Optimal Antitrust Enforcement, Dynamic Competition, and Changing Economic Conditions*, 77 ANTITRUST L.J. 247 (2010).

184. *Id.* at 269.

185. STIGLER, *supra* note 87, at 33 (observing that "there is support for the skeptics of easy entry in the fact that mergers for monopoly have frequently been very profitable").

consumers want more than others—can legitimately exploit that power by charging what the market will bear. As Justice Day wrote in his dissent in *U.S. Steel*, "the act offers no objection to the mere size of a corporation, nor to the continued exertion of its lawful power, when that size and power have been obtained by lawful means and developed by natural growth."[186] But a merger that *creates* substantial monopoly power that allows firms to engage in monopoly pricing should be unlawful. Mergers toward monopoly do not simply exploit monopoly power; they create it by means that do not necessarily or even probably benefit consumers. There is ample reason for a policy aimed at blocking (or dissolving) mergers that allow firms to acquire monopoly power, absent convincing evidence that the merger provides consumer benefits that are unavailable by other means.

VII. CONCLUSION

Chief Justice White emphasized Standard Oil's predatory conduct as evidence that the merger creating the firm was monopolistic. Justice McKenna drew the lesson that U.S. Steel's eschewal of predatory conduct was evidence that the merger creating the firm was benign in effect if not in intent. We can now see that McKenna, lacking a theoretical framework, and misled by a very different narrative in *Standard Oil*, drew the wrong economic conclusions from the available evidence. The merger creating U.S. Steel was perhaps the most monopolistic in American history. That economic error led McKenna to the wrong result: U.S. Steel should have been dissolved.

But it would be wrong to conclude that, because predation should not have been required to establish liability in *U.S. Steel*, it should never be required. *Alcoa*, for example, mistakenly held that a firm that acquired monopoly power lawfully could violate Section 2 by expanding output to meet new demand. That holding seemed to suggest, perversely, that U.S. Steel's strategy of maintaining high prices and ceding market share to rivals was the only way a monopolist could avoid liability. The same sort of thinking tended to support the equally perverse position, reflected in cases like *Brown Shoe* and *Von's* that a merger that created no monopoly power could be unlawful if it allowed the surviving firm to lower cost and expand output.

Modern antitrust law has corrected both the wrong turns of the post-New Deal era and *U.S. Steel* itself. Firms that gain monopoly power lawfully transgress Section 2 only by using exclusionary conduct to

186. United States v. U.S. Steel Corp., 251 U.S. 417, 460–61 (1920) (dissenting opinion).

maintain their monopoly power—that is, by actions that harm rivals and consumers. They may exploit their power by restricting output and raising prices to consumers, because that is the reward for achieving monopoly power by internal expansion; they may also expand output and lower prices to consumers, even if doing so harms rivals. Similarly, mergers that create no monopoly power and lower costs should be lawful even if they harm rivals. The correct lesson of *U.S. Steel* is that mergers that create monopoly power should be unlawful regardless of whether the surviving firm engages in predatory conduct. Modern antitrust law has learned this lesson. Under the Merger Guidelines, a merger is unlawful essentially if the surviving firm is likely to behave like *U.S. Steel*—maintaining noncompetitive prices unilaterally or collusively.