

Legal Background

Anti-Trust History

- ***The Sherman Act (1890)***
 - The grandfather of US anti-trust legislation.

Anti-Trust History

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding \$10,000,000 if a corporation, or if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Anti-Trust History

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding \$10,000,000 if a corporation, or if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Anti-Trust History

- ***The Sherman Act (1890)***
 - The grandfather of US anti-trust legislation.
 - Broad and vague language.
 - It applies to both individual acts and acts in concert with others. Thus acts by Acme Widgets on its own part can create an illegal monopoly, as can acts by Acme Widgets in combination with others.
 - It refers to monopolizing an industry. Merely being a monopoly is not a crime.

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 - The grandfather of US anti-trust legislation.
 - There earliest wave of merger activity in the US, periods was in the late 19th century, when people like JP Morgan and John D Rockefeller (of Lakewood Cemetery fame) came to the forefront. One of the consequences of the first movement was a desire by Congress to "do something" about trusts (hence the name anti-trust legislation).

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Aside: Rockefeller wanted to organized a national corporation, but laws allowed a corporation to do business in only one state. Set up corporation in each state Gave stock in each corporation to a "trust" which controlled all of the state corporations.

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Anti-Trust History

• *The Sherman Act (1890)*

- Senator Sherman assured Congress that the statue "does not recognize a new principle of law, but applies old and well recognized principles of the common law".
- According to Sherman, the statue said the Act was setting forth "the rule of the common law which prevails in England and in this country".

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- According to Sherman, the statue said the Act was setting forth "the rule of the common law which prevails in England and in this country".

This seems an oversimplification

Common Law Antecedents

- Dyer's Case (1411)
- Mitchell vs. Reynolds (1732)

Dyer's Case (1411)

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- The court refused to enforce the agreement, on the grounds that the court would not interfere with freedom of trade or one's right to earn a living. The decision left Dyer free to practice his trade.

Dyer's Case (1411)

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- The court's decision is Hicks-Kaldor Efficient, for it keeps a skilled worker in the labor force.

Mitchell vs. Reynolds (1732)

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- Mitchell leased a bakeshop for five years on the condition that Reynolds, a baker himself, would not practice his baker's art in the parish during the term of the lease. Mitchell was purchasing not only the rights to use the shop, but also the trade itself. Reynolds went ahead and kept on baking.

Mitchell vs. Reynolds (1732)

- Mitchell leased a bakeshop for five years on the condition that Reynolds, a baker himself, would not practice his baker's art in the parish during the term of the lease. Mitchell sued. Reynolds argued Dyer's case. Reynolds went ahead and kept on baking.

The Distinction

- The Judge made a distinction between general (invalid) and particular restraints (valid).
 - General restraints (such as an agreement never to engage in baking anywhere ever) are invalid. They serve no useful social purpose.

The Distinction

- The general principle (value) – that a restraint on trade anywhere (anywhere ever) are invalid. They serve no useful social purpose.

For example, an agreement not to bake ever could result in the baker becoming an unemployed public charge. It would be Hicks-Kaldor inefficient.

The Distinction

- The general principle (value) – that a restraint on trade anywhere (anywhere ever) are invalid. They serve no useful social purpose.

For example, an agreement not to bake. But reasonable restraints baker be should be allowed. A public charge business could not be sold without a non-compete agreement.

The Rule of Reason

- The general principle (value) – that a restraint on trade anywhere (anywhere ever) are invalid. They serve no useful social purpose.

For example, an agreement not to bake. Hence, we saw the birth of the *Rule of Reason*: a practice that might, on its face be a restraint of trade is valid if there is a reason for it.

An Extension

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- This excludes competitors like C from the market.
 - Hence the sale is in restraint of trade.
- But reason says the law should not prohibit this sale

Getting Greedy

- What if B agrees to buy from A not just a one week supply but all of B's requirements of these goods for the next 20 years?

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- What if B agrees to buy from A not just a one week supply but all of B's requirements of these goods for the next 20 years?
- Generally this seems to have no basis in economic reason and thus violates anti-trust law.

The Patent

- A has a patent on a product, which has 10 years to run. A requires that B purchase the product exclusively from him for the next 20 years.

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- **Restraint of trade.**

The Railroad

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 - A wants a 20 year contract to protect his investment.
 - B wants a 20 year contract to protect against gouging

The Railroad

- A proposes to build a railroad branch line to service B's mine. The line has no other use. A 20 year old agreement makes economic sense, and thus would seem to meet a rule of reason.
- A
- B wants a 20 year contract to protect against gouging

The Clayton Act

- In 1914, the Clayton Act specifically declared four practices illegal, but not criminal:
 - Price Discrimination
 - Tying and Exclusive Dealing Contracts
 - Corporate Mergers
 - Interlocking Directors

The Clayton Act

- In 1914, the Clayton Act specifically decries. However, the Clayton Act also says that these actions are illegal only
 - "where the effect... may be
 - substantially to lessen competition"
 - or "tend to create a monopoly in any line of commerce".

Federal Trade Commission Act

- A second piece of legislation in 1914 gives the FTC power to enforce the Clayton Act. This law declares that "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful".

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The Conclusion

- Statues are vague.
- Ergo court-made law.

End

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