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Evolution of Antitrust Regulation
American Legal History

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Introduction

Economists and policy makers have long been concerned over the power that trusts, monopolies, and other restraints impose on economies and economic development. It is this concern over trusts in particular that gave rise to the Sherman Act in 1890. Since the inception of the Sherman Act, federal enforcement of antitrust has changed. The reasons behind the changes in federal antitrust enforcement, as well as the means by which the changes were brought about are presented in this paper.

After the passage of the Sherman Act, the federal courts were not clear on how to interpret the language contained in the first two sections. Through changes in the political and social climate, along with court challenges, the federal courts have refined the definitions for antitrust concepts such as monopolies, horizontal restraints (agreements among competitors) and vertical restraints (agreements among the supply chain). Subsequent acts were passed by Congress to help federal courts enforce and define antitrust behavior. In addition, economic theories have evolved which allow for the analysis of potential antitrust behavior. A broader interpretation of interstate commerce, which changed due to pressure on many social issues, especially during the 1960s, has also given more power to the federal government for antitrust enforcement.

Early Views on Monopolies

There have been restraints on trade dating far back into history, including the trade guilds from the Middle Ages in Europe. During the late 14th Century, Britain's Parliament was not against the concept of monopolies. In some situations the king or queen would grant a letters-patent, which gave an exclusive right to make or sell a product, when the patent would pay the government good returns.¹

Britain's movement against monopolies began towards the latter part of the 16th Century.² The case of *Darcy v. Allin* was decided in 1602 where the court held that a royal grant of a patent to make, import, and sell playing cards was invalid because restraint of trade is not good for the economy and development of the kingdom.³

An early American case examining monopolies was the *Proprietors of the Charles River Bridge v. Proprietors of the Warren* which was decided in 1837. The Charles River Bridge Company, plaintiff, a private company chartered by Massachusetts, built the Charles River Bridge in 1785. Massachusetts later allowed another bridge to be built near the Charles River Bridge, by the defendant company, the Warren. The Supreme Court of the

¹ William Letwin, *Law and Economic Policy in America, The Evolution of the Sherman Antitrust Act*, 20-21 (The University of Chicago Press 1965).

² Letwin, *supra* n. 1, at 22

³ *Darcy v. Allin*, 77 Eng.Rep. 1260 (1602) King's Bench.

United States rejected the Charles River Bridge Company's claims of entitlement to a monopoly from the grant of a state charter. The Court stated that there was no implied grant of a monopoly contract with Massachusetts.⁴ The court went on to discuss how allowing such grants would be harmful to the economy and the growth of the nation.⁵

Historical Context for the Sherman Act

Various economic factors gave rise to the public concern over trusts and the power of large businesses. The first of these factors was Black Friday in 1869. In this instance Jay Gould, who controlled railroads and telegraphs, along with James Fisk, the owner of a brokerage and steamboat lines, tried to corner the market on gold, which was the basis for the value of currency in the United States. About this time, the federal government released gold reserves causing the value of gold to collapse. These events caused financial ruin for many investors and initiated a financial crisis.⁶

During the period from 1873 to 1878, 47,000 businesses went bankrupt.⁷ In this financial crisis, and subsequent other crises, there were typically runs on banks to convert assets into cash. There was a general loss

⁴ *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 549 (1837).

⁵ *Id.* at 552-553.

⁶ Bartleby.com, *The Columbia Encyclopedia, Black Friday* <<http://www.bartleby.com/65/bl/BlackFri.html>> (accessed December 15, 2003).

⁷ Digital History, *The Rise of Big Business – Why Business Grew* <http://www.digitalhistory.uh.edu/database/article_display.cfm?HHID=197> (accessed December 15, 2003).

of confidence in the economy and financial institutions.⁸ The cause of this crisis was blamed on the railroads being overbuilt and large corporations not being regulated.⁹

In the time between the Civil War and the passage of the Sherman Act, there was a rise of corporations and their power increased drastically. Before the Civil War, most companies were small, and were partnerships. After the Civil War, the growth of industrialization led to the emergence of the corporation as the means for creating companies. These corporations, though stock issues and use of professional management, were better able to grow in size and scope.¹⁰ By the 1880s, large, vertically integrated corporations began to emerge. These corporations were often beyond the scope of the states' individual regulatory authority.¹¹

Railroads often came under the scrutiny of antitrust enforcement. The history of the railroads began when the Baltimore & Ohio became the first publicly chartered railroad in 1827. The Pennsylvania Railroad was created in 1846. These railroads and others grew in size and scope up through the Civil War. After the war in 1869, the Central Pacific and Union Pacific

⁸ Bartleby.com, *The Columbia Encyclopedia, Panic* <<http://www.bartleby.com/65/pa/panic.html>> (accessed December 15, 2003).

⁹ Susan Pace Hamill, *From Special Privilege to General Utility: A continuation of Willard Hurst's Study of Corporations* 49 Am. U. L. Rev. 81, 114 (1999).

¹⁰ Digital History, *The Rise of Big Business – The Corporate Revolution* <http://www.digitalhistory.uh.edu/database/article_display.cfm?HHID=196> (accessed December 15, 2003).

¹¹ Hamill, *supra* n. 9, at 115-116.

railroads met at Promontory Summit in Utah, completing the first transcontinental rail line. Other railroads like the Pennsylvania had expanded their operations as far as the Mississippi. Between 1883 and 1893, large and important rail lines such as the Southern Pacific, Santa Fe, and Great Northern were completed. Due to the expansion of railroads the national economy became more integrated, linking farmers, industry, and consumers across the nation.¹²

The western farmers resented the economic power wielded by the railroads. At the time of the passage of the Sherman Act, the nation's economy was primarily agrarian, especially in the western part of the country. The farmers, often living in isolated communities, felt dependent on the railroads to bring them supplies and send their produce to market. The farmers often felt that they were discriminated against by the railroads, while big businesses were given favorable treatment.¹³ The communities in the west were often served by only one railroad line, giving these railroads an effective monopoly.¹⁴

In the more urbanized parts of the country there was plenty of competition among railroads. This competition led to consolidations and the

¹² HistoryChannel.com, *Railroads* <http://www.historychannel.com/perl/print_book.pl?ID=35608> (accessed December 15, 2003).

¹³ Lawrence A. Sullivan & Warren S. Grimes, *The Law of Antitrust: An Integrated Handbook* 5 (West 2000).

¹⁴ Stephen B. Goddard, *Transport at the Millennium: The Road to Now* 553 *Annals* 30, 33 (1997).

desire to expand lines westward. By the 1890s overbuilding created very low prices that in turn led to mergers and the formation of cartels to stabilize prices.¹⁵

In 1867 the Grange movement was organized to advocate for the rights of farmers and for regulation in industry.¹⁶ Individual states attempted to regulate the railroads but this proved to be ineffective. By 1887 the Federal government created the Interstate Commerce Commission to help regulate the railroads.¹⁷

Public Opinion on Monopolies

Trusts are created when several corporations within the same industry transfer their entire stock holdings over to a group of trustees. The trustees then run the corporations as one entity. This structure gives trustees a greater amount of central control over the management and operation of these entities. The formation of a trust was often a way used to create a monopoly in the time around the passage of the Sherman Act. Standard Oil invented this form of organization in the 1880s.¹⁸

¹⁵ Hamill, *supra* n. 9, at 149.

¹⁶ Earl W. Kintner, *An Antitrust Primer* 10 (The Macmillan Company 1964).

¹⁷ Goddard, *supra* n. 14, at 33.

¹⁸ Tony Freyer, *The Sherman Antitrust Act, Comparative Business Structure, and the Rule of Reason: America and Great Britain, 1889-1920*, 74 Iowa L. Rev. 991, 997 (1989).

There were strong feelings held by the general public against trusts in the late 1800s.¹⁹ The public's feelings were so great that issues regarding the trusts were often reported daily in newspapers.²⁰ The Grange movement in the 1870s was one of the forces attacking injustices inflicted by the trusts, such as the exorbitant prices charged by monopolies, especially the railroads.²¹ Some of the industries controlled by trusts were beef, oil, steel, barbed wire, sugar, rope, cottonseed oil, and whisky.²²

The government offered trusts special treatment and protection, creating disdain among citizens. The trusts raised prices of goods, eliminated competition, defrauded investors, put people out of work and caused other problems.²³ The railroads in particular were distrusted for their dilution of their stock values.²⁴

The Sherman Act

The Sherman Antitrust Act was enacted in 1890.²⁵ The first two sections have been the core of antitrust enforcement over the Act's history. The first section prohibits the restraint of trade and the second section prohibits monopolies.

¹⁹ Letwin, *supra* n. 1, at 57

²⁰ Letwin, *supra* n. 1, at 57.

²¹ Kintner, *supra* n. 16, at 10.

²² Nolan Ezra Clark, *Antitrust Comes Full Circle: The Return to the Cartelization Standard*, 38 Vand. L. Rev. 1125, 1147-1148 (1985).

²³ Letwin, *supra* n. 1, at 70

²⁴ Goddard, *supra* n. 14.

²⁵ 26 Stat. 209 (1890).

§ 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, at the discretion of the court.²⁶

§ 2. 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 misdemeanor, and, on conviction thereof; shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.²⁷

The Sherman Act has not changed drastically over the years. The penalty of the Sherman Act was changed to a felony from a misdemeanor, fines have been updated, and there have been some minor wording changes. There has been a long and colorful history of interpretation of the Sherman Act that continues to evolve today.

Early Prosecution: the Sugar and Railroad Trusts

One of the first tests of the effectiveness of the Sherman Act was *United States v. E. C. Knight Co.* involving the sugar trust in 1895.²⁸ The Court held that the purchase of stocks of four Philadelphia area sugar refineries to create a trust was not an illegal restraint of trade. The Court

²⁶ *Id.*

²⁷ *Id.*

²⁸ *United States v. E. C. Knight Co.*, 156 U.S. 1 (1895).

stated that the manufacture of sugar was not interstate commerce. The acts of buying and selling were viewed by the Court to embody the definition of commerce.

Aside from the provisions applicable where Congress might exercise municipal power, what the law struck at was combinations, contracts, and conspiracies to monopolize trade and commerce among the several States or with foreign nations; but the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Pennsylvania, and bore no direct relation to commerce between the States or with foreign nations.²⁹

This holding in *E. C. Knight Co.* set back antitrust enforcement until 1904 with the *Northern Securities* case.³⁰

Justice Peckham delivered the opinion of the Court in 1897, in *Trans-Missouri Freight Association*, which held that an association formed to set rates, rules, and regulations of a group of individual railroad companies is covered under the Sherman Act.³¹ The Court found that railroads are subject to federal regulation under the Interstate Commerce Clause of the Constitution.³² The previous decision from *E. C. Knight Co.* was discussed when the Court reiterated that sugar refining was not part of interstate

²⁹ *Id.* at 16-17.

³⁰ Sullivan & Grimes, *supra* n. 13, 514-515.

³¹ *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

³² *Id.* at 343.

commerce because the Court considered manufacturing to be only local in nature.³³

Another trust under scrutiny during this same time period was the pipe trust, which fixed prices and divided territory. In 1898 the Court of Appeals for the Sixth Circuit found that the actions of the pipe trust restrained interstate trade. William Howard Taft, who would later become both President and then later Chief Justice of the Supreme Court, stated that the actions of the pipe trust might be considered a *per se* violation of the Sherman Act. The Court's analysis concludes that for some actions in restraint of trade there is no point to consider reasonableness, which is not a concrete standard.

It is true that there are some cases in which the courts, mistaking, as we conceive, the proper limits of the relaxation of the rules for determining the unreasonableness of restraints of trade, have set sail on a sea of doubt, and have assumed the power to say, in respect to contracts which have no other purpose and no other consideration on either side than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not.³⁴

Taft relied on the common law principles against monopolies to form his opinion in this case. The restraint was considered to be unreasonable with

³³ *Id.* at 313.

³⁴ *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 283-284 (6th Cir. 1898).

no other purpose but to restrain competition.³⁵ Other cases followed this decision that would further define a *per se* violation of the Sherman Act.

The *Northern Securities* case in 1904 involved the merger of two railroads, the Northern Pacific and the Great Northern, under a holding company called the Northern Securities Company. Both of these railroads served the northern states between the Great Lakes and the Pacific Ocean. These two railroads were the main competitors in this region of the country. The court in this case held that there is a violation of the Sherman Act when there is a merger between firms that were previously competitors.

The dissenting opinion by Justice White states that the ownership in stock of a corporation chartered by a state is not interstate commerce.³⁶ The dissent by Justice Holmes declared that congress did not have the power to regulate the activities in this case.³⁷ Justice Holmes believed that the majority opinion would lead to an overbroad interpretation of the Sherman Act.³⁸ Although this decision broke up the monopoly formed by Northern Securities, it did little to alter the industry. Railroads continued to buy the stock of their competitors serving the same areas.³⁹

³⁵ Letwin, *supra* n. 1, at 175.

³⁶ *Northern Securities Co. v. United States*, 193 U.S. 197, 369 (1904).

³⁷ *Id.* at 411.

³⁸ *Id.* at 410.

³⁹ Goddard, *supra* n. 14, at 34.

Theodore Roosevelt, who served as president from 1901 to 1909, was a Progressive and sought to limit big business by regulation.⁴⁰ Roosevelt created the Bureau of Corporations in 1903 to regulate large corporations. The Bureau of Corporations shared Roosevelt's opinion that there were certain trusts that were "bad" that needed to be regulated, while other trusts were "good" and should be free from regulation.⁴¹ Under William Howard Taft's term, Roosevelt's handpicked successor, trusts were strongly prosecuted.⁴²

Standard Oil: Example of a Trust

During the 19th century, oil was being used as a fuel and a lubricant. The industry underwent a transformation in 1859, when oil was extracted for the first time using a drill in Titusville Pennsylvania. Soon after, John D. Rockefeller entered the oil business opening an oil refinery in Cleveland. Rockefeller's Standard Oil Company was created in the 1860s and grew using various tactics to gain and maintain market share, such as predatory pricing and secret agreements with railroads. By 1880 Standard Oil controlled 90 percent of the United States oil market.⁴³

⁴⁰ Bartleby.com, *The Columbia Encyclopedia, Roosevelt, Theodore* <<http://www.bartleby.com/65/rs/RsvltT.html>> (accessed December 15, 2003).

⁴¹ Rudolph J. R. Peritz, *Competition Policy in America, 1888-1992*, 60 (Oxford University Press 1996).

⁴² Bartleby.com, *The Columbia Encyclopedia, Taft, William Howard* <<http://www.bartleby.com/65/ta/Taft-Wil.html>> (accessed December 15, 2003).

⁴³ HistoryChannel.com, *Rockefeller, John Davison* <http://www.historychannel.com/perl/print_book.pl?ID=110368> (accessed December 15, 2003).

Standard Oil was able to create a cartel that monopolized oil transportation which in turn allowed Standard Oil to control the market for petroleum products. The nature of the oil industry, requiring shipment from the oil fields to refineries, and then to market, made the price of transportation, a critical component of competition. The resulting profits that Standard Oil made from its monopoly were shared with the railroads, which provided the transportation.

Standard Oil was able to enter into agreements, with railroads serving Pennsylvania and neighboring states to ensure preferential rebates and rates below those charged to Standard Oil's competitors. The dominant position that Standard Oil obtained allowed it to punish railroads that deviated from the cartel arrangement through isolation. This control over transportation induced competing refineries to sell to Standard Oil or leave the market.⁴⁴

In 1911, an antitrust case against Standard Oil made its way to the Supreme Court.⁴⁵ The Court declared that the trust had a "complete mastery over the oil industry."⁴⁶ It was held that Standard Oil had worked to dominate the oil industry by exclusion of others by unfair means. This exclusion that Standard Oil maintained was accomplished by combination,

⁴⁴ Elizabeth Granitz & Benjamin Klein, *Monopolization By "Raising Rivals' Costs": The Standard Oil Case* 39 J.Law & Econ. 1 (1996).

⁴⁵ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁴⁶ *Id.* at 33.

the formation of a trust.⁴⁷ *Standard Oil* also formed the basis for the “rule of reason”. With the “rule of reason”, the court considers reasonableness of the restraints of trade.⁴⁸ The “rule of reason” requires that restraints of trade be evaluated on an individual basis, considering a variety of factors. In “rule of reason” analysis, a court would compare the procompetitive and anticompetitive effects of the conduct. The court would ask whether the conduct injures competition and what justifications there are for the restraint. Another question the Court would ask is whether there are less restrictive restraints. The Court felt that it was important to preserve the right to contract while preventing restraints of trade.⁴⁹

The decision in *Standard Oil* led to the breakup of the company. The use of the “rule of reason” was interpreted as a pro business decision. “[T]he Rule of Reason quickly became the pro-trust idiom that stirred public sentiment and legislative reaction, the apparently severe consequence of corporate dissolution notwithstanding.”⁵⁰ The use of the “rule of reason” was considered by some to create a presumption that there were some trusts that the Court found to be “good”.⁵¹

⁴⁷ *Id.*

⁴⁸ Sullivan & Grimes, *supra* n. 13, 192-193.

⁴⁹ Letwin, *supra* n. 1, at 258.

⁵⁰ Peritz, *supra* n. 41, at 61.

⁵¹ Peritz, *supra* n. 41, at 64.

The Court followed the *Standard Oil* decision with *American Tobacco*. This case also used the “rule of reason” to hold that a tobacco trust was illegal.⁵² The “rule of reason” was used in this case because the Sherman Act should not take away the right to contract, just restraints that are unreasonable should be prohibited.⁵³

The Wilson Administration and Antitrust Enforcement

Federal Trade Commission and Clayton Antitrust Acts

Some considered the Sherman Act to be too general to be effective.⁵⁴ People began to demand a law that was more specific. In 1914, the Federal Trade Commission Act and the Clayton Antitrust Act were passed.⁵⁵ Some of the sentiment of distrust that led to these Acts came from the outrage of the Court’s use of the “rule of reason”.⁵⁶

The Federal Trade Commission was created to find and stop unfair restraints of trade and competition.⁵⁷ The Act prohibits unfair methods of competition, and such methods must be involved with interstate commerce.⁵⁸

The Clayton Act was passed in order to fix what were considered problems in the Sherman Act. Congress felt that certain areas, such as price

⁵² *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁵³ *Id.* at 180.

⁵⁴ Letwin, *supra* n. 1, at 238.

⁵⁵ Letwin, *supra* n. 1, at 238-239.

⁵⁶ Peritz, *supra* n. 41, at 64.

⁵⁷ Peritz, *supra* n. 41, at 65.

⁵⁸ Kintner, *supra* n. 16, at 23.

discrimination, exclusive dealings, and mergers were not sufficiently covered by the Sherman Act. The Clayton Act expanded the scope of illegality to include a “probable result of substantially lessening competition.”⁵⁹

Chicago Board of Trade and US Steel

In 1918, the Supreme Court examined a case involving restrictions, governed by the Chicago Board of Trade, on the price that could be charged for commodities to arrive in Chicago in after-hours trading. The government alleged that restricting the price to the “call price”, the one at the market close, was illegal price fixing.⁶⁰ The Court held this practice was a reasonable regulation of business by the Chicago Board of Trade.⁶¹ Justice Brandeis’, writing for the Court in this case, affirmed the use of the “rule of reason”, taking into account the intent and the effect of the restriction.⁶²

The intent and effect of the restriction was to increase the number of buyers and sellers in the market of commodities arriving in Chicago. The restriction made prices of such commodities more public by ensuring sellers receive the closing price on commodities to arrive in Chicago. Essentially,

⁵⁹ Kintner, *supra* n. 16, at 23.

⁶⁰ *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918).

⁶¹ *Id.* at 238-239.

⁶² Robert H. Bork, *The Antitrust Paradox – a Policy at War With Itself* 44 (The Free Press 1978).

this restriction allowed farmers to be paid more without increasing the price to consumers and eliminating the need for brokers.

Some huge conglomerates were not found to be in violation of the law. *United States v. United States Steel Corp.* was decided in 1920 and held that a large steel and iron conglomerate did not violate the antitrust laws simply because of its size.⁶³ The holding illustrated two principals, size and dominance alone are not an antitrust violation and cooperation among rivals is not necessarily bad because prices tend to stabilize.⁶⁴ The Oil trust in *Standard Oil* had used coercion, while in *United States Steel*, the participants entered willfully into an agreement⁶⁵

Calvin Coolidge and Herbert Hoover

The time between 1920 and 1935 was a period of lower antitrust enforcement.⁶⁶ This period has been considered by some, those favoring more enforcement, to have provided a “moratorium from the Sherman Act.”⁶⁷ Calvin Coolidge, who came into office in 1923 upon the death of Warren Harding, embraced a laissez faire attitude towards business, a sentiment shared by many politicians and policy makers at that time.⁶⁸

⁶³ *United States v. United States Steel Corp.*, 251 U.S. 417 (1920).

⁶⁴ Peritz, *supra* n. 41, at 67.

⁶⁵ Sullivan & Grimes, *supra* n. 13, 83.

⁶⁶ Sullivan & Grimes, *supra* n. 13, 7.

⁶⁷ Edward S. Herman, *dollars & sense, The Threat From Mergers, Can Antitrust Make a Difference?* <<http://www.dollarsandsense.org/archives/1998/0598herman.html>> (accessed December 15, 2003).

⁶⁸ Bartleby.com, *The Columbia Encyclopedia, Coolidge, Calvin* <<http://www.bartleby.com/65/co/>

Calvin Coolidge was pro-business and he subverted the Federal Trade Commission allowing it to be dominated by big business.⁶⁹ The Coolidge and Hoover administrations were also a time of speculation in the stock market which eventually led to its collapse in 1929.⁷⁰

Herbert Hoover had been the Secretary of Commerce under both the Harding and Coolidge administrations. In this position, he worked to help promote trade associations.⁷¹ The public and antitrust enforcers did not trust these associations because information was shared among competitors that might lead to unfair competition, such as price fixing. In a victory for Hoover, the Court held in *Maple Flooring Mfrs. Ass'n v. United States* that an association that gathers and disseminates information about the industry without taking action to fix prices or levels of production is not an illegal restraint of trade.⁷² In 1929, Herbert Hoover, as the President, faced the greatest economic crisis in the United States' history, the stock market crash in 1929 and the beginning of the Great Depression. This miserable economic climate led to changes in antitrust enforcement.

CoolidgeC.html> (accessed December 15, 2003).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Bartleby.com, *The Columbia Encyclopedia, Hoover, Herbert* <<http://www.bartleby.com/65/ho/Hoover-H.html>> (accessed December 15, 2003).

⁷² *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

Franklin Delano Roosevelt: the New Deal and the War Years

Franklin Delano Roosevelt became President in 1933 while the nation was still struggling to find its way out of the Great Depression. One of Roosevelt's first acts as President was to establish his "New Deal" programs to help the nation out of crisis. These programs called for more regulations in finance, banking, industry, and agriculture.⁷³

In the late 1930s, cartels were associated with totalitarian regimes, especially those coming to power in Europe and Asia.⁷⁴ This sentiment was reflected in *United States v. Socony-Vacuum Oil Co.* This was a case that set the foundations for the "per se" doctrine of antitrust violations.⁷⁵ At the time this case was decided, the oil refining industry was still depressed. Independent refiners sold excess petroleum on the spot market which in turn would force all prices to be lower than production costs. The major refiners entered into a series of concerted efforts to purchase the over produced gasoline.⁷⁶ The Court held that the buying programs were a type of price fixing, because they created an artificial price floor and were thus illegal.⁷⁷

⁷³ Bartleby.com, *The Columbia Encyclopedia, Roosevelt, Franklin Delano* <<http://www.bartleby.com/65/rs/RsvltF.html>> (accessed December 15, 2003).

⁷⁴ Sullivan & Grimes, *supra* n. 13, 7.

⁷⁵ Sullivan & Grimes, *supra* n. 13, 200.

⁷⁶ Sullivan & Grimes, *supra* n. 13, 200-201.

⁷⁷ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

This decision increased the scope of the *per se* doctrine to cover not just literal price fixing, but also to include tampering with price structures.⁷⁸

United States v. Aluminum Co. of America examined a firm that sold both raw aluminum ingots and processed aluminum products, which had both horizontal and vertical market power.⁷⁹ The Aluminum Company of America was able to control prices in the market because of its monopoly power over raw materials, giving it vertical market power. The company also had horizontal market power because it had a sufficient market power over competitors making finished aluminum products. The court went on to say “size does not determine guilt; that there must be some 'exclusion' of competitors; that the growth must be something else than 'natural' or 'normal'; that there must be a 'wrongful intent,' or some other specific intent; or that some 'unduly' coercive means must be used.”⁸⁰

The Post-War Years

In 1950, the Celler-Kefauver Act was enacted in order to prevent oligopoly power through mergers.⁸¹ The purpose of the Celler-Kefauver Act was to correct problems with the Clayton Act of 1914. The Celler-Kefauver

⁷⁸ James Ponsold & Lance McMillian, *The Judicial Legitimization of Horizontal Price-Fixing Among Partially Integrated Health Care Providers: An Antitrust/Health Care Case Study*, 50 Ala. L. Rev. 465, 471 (1999).

⁷⁹ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d.Cir. 1945).

⁸⁰ *Id.* at 429.

⁸¹ Sullivan & Grimes, *supra* n. 13, 511.

Act added language to distinguish between substantially lessening of competition versus simply lessening competition. The Celler-Kefauver Act also covered mergers involving the acquisition of assets, not just stock purchases.⁸²

At the time of the passage of the Celler-Kefauver Act, there was a fear of rising economic concentration in the United States. Economic concentration within the industry was considered by leading authorities and policy makers to be harmful to the economy and therefore they wanted it stopped immediately. Such economic concentration was considered to lead to collectivism and communism. Communism was a great fear in the late 1940s and early 1950s, led in part by Senator Joseph McCarthy and his charges that communists had infiltrated the United States government.⁸³

The 1953 case *United States v. United Shoe Machinery Corp.* deals with intent. The court determined that intent is not important for finding an antitrust violation.⁸⁴ United Shoe controlled approximately seventy-five percent of the market for machines used in the manufacture of shoes.⁸⁵ The

⁸² E. Thomas Sullivan & Herbert Hovenkamp, *Antitrust Law, Policy and Procedure: Cases, Materials, Problems* 827 (LexisNexis 2003).

⁸³ Bartleby.com, *The World History Encyclopedia, 1948-49*, <<http://www.bartleby.com/67/3393.html>> (accessed December 15, 2003).

⁸⁴ *United States v. United Shoe Machinery Corp.*, 110 F.Supp. 295 (D.Mass.1953).

⁸⁵ *Id.* at 307.

methods that United Shoe used to sell and lease its products created barriers that restrained competition in violation of the Sherman Act.⁸⁶

United Shoe controlled the market for shoe machinery equipment because it possessed expertise in the manufacture of shoe equipment, its ability to research and develop new equipment, and its economies of scale. The lease terms that United Shoe employed did not allow customers to purchase equipment and customers were locked into long and expensive leases. According to the leases, United Shoe was the only company allowed to service the equipment, bundling repair services without a separate charge.⁸⁷ The court considered all of these factors as barriers to the entry of competition against United Shoe.

In the 1960s, the courts placed more emphasis on the use of the Clayton Act. The Clayton Act prohibits mergers that substantially reduce competition or create a monopoly in a segment of a market.⁸⁸ Horizontal mergers are those between competitors in the same industry. There has been much focus on such horizontal mergers because “they are thought most

⁸⁶ *Id.* at 344.

⁸⁷ *Id.* at 344.

⁸⁸ Sullivan & Grimes, *supra* n. 13, 574.

likely to create or enhance market power.”⁸⁹ In determining market power, one must first determine both the product and geographic markets.⁹⁰

United States v. E. I. Du Pont de Nemours & Co. demonstrated the use of the Clayton Act to examine market definitions.⁹¹ Du Pont controlled seventy-five percent of the market for cellophane, but this was only twenty percent of the total market for flexible packaging materials.⁹² The Court found that Du Pont did not have a significant share of the market for flexible packaging materials because there was elasticity of demand, meaning that if the price for cellophane goes up then customers will substitute cellophane with other products. There was a strong dissent in this case, led by Chief Justice Warren who claimed there were limitations to the cross-elasticity theory and that the market definition was wrong.⁹³ The dissenters brought out several points that they considered to be flaws in the majority’s decision. First, Du Pont’s profits were unusually high showing that Du Pont was already making a monopoly profit. Second, firms making flexible packaging materials were essentially indifferent to increases in prices charged by Du Pont for cellophane. This showed that these firms were not actually competitors with Du Pont. Third, some of Du Pont’s customers

⁸⁹ Sullivan & Grimes, *supra* n. 13, 575.

⁹⁰ Peritz, *supra* n. 41, at 211.

⁹¹ Peritz, *supra* n. 41, at 211.

⁹² *United States v. E. I. Du Pont de Nemours & Co.*, 351 U.S. 377, 379 (1956).

⁹³ Peritz, *supra* n. 41, at 212.

were not able to switch to substitute products, pointing to the fact that for these customers, there are no substitutes for cellophane.⁹⁴

The early 1960s was a time when courts worked to further refine their conception of a market for antitrust analysis. The Supreme Court further examined market definition in *Brown Shoe Co. v. United States*. The government alleged that the merger between two large shoe manufacturers, Kinney and Brown, would violate the Clayton Act. In this case the court examined the existence of submarkets to be considered in market definition. Submarkets are economically significant groups, such as the shoe buyers in the various metropolitan areas in the United States. Submarkets are determined by examining the interchangeability of use and cross-elasticity of demand. Additionally, submarkets are a separate economic entity. Submarkets may have unique production facilities, distinct customers, distinct prices, and specialized vendors.⁹⁵ Businesses and corporate attorneys criticized this decision and said that *Brown Shoe* did not give enough guidance to businesses to determine if a merger would be considered an illegal restraint of trade. The *Philadelphia National Bank* case was decided the following year giving the guidance sought by businesses.⁹⁶

⁹⁴ *E. I. Du Pont de Nemours & Co.*, 351 U.S. 377.

⁹⁵ *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962).

⁹⁶ Peritz, *supra* n. 41, at 216-217.

In *Philadelphia National Bank*, the Court held that the merger between two banks in the Philadelphia area would tend to lessen competition. The court looked at the current market share and then considered the future market share that would exist after the merger. The Court concluded that a bank with control over more than thirty percent of the market for banking services “presents a threat” to competition.⁹⁷

In the late 1960s, the Antitrust Division of the Department of Justice was working to enforce policies of reducing economic concentration by using methods of market share analysis. The Antitrust Division issued the Merger Guidelines, which explained the situations under which the Department of Justice would challenge mergers.⁹⁸ The Four-Firm Concentration Ratio was the method used by the Antitrust Division to determine the economic concentration of an industry. The Four-Firm Concentration Ratio considers the market shares for the four largest firms in a particular industry. The ratios are examined to see if there would be a change in the structure, post merger, requiring prosecution.⁹⁹ According to the 1968 guidelines, a market that is considered to be highly concentrated is

⁹⁷ *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 364 (1963).

⁹⁸ United States Department of Justice, *Merger Guidelines – 1968* <<http://www.usdoj.gov/atr/hmerger/11247.pdf>> (accessed December 15, 2003).

⁹⁹ Sullivan & Hovenkamp, *supra* n. 82, 862

one where the four largest firms have a combined output of seventy-five percent.¹⁰⁰

The 1970s and the Chicago School

The Hart-Scott-Rodino Act of 1976 requires companies to give notice to the Federal Trade Commission and the Department of Justice before commencing with a merger or acquisition. This allows the agencies to examine and prosecute any possible antitrust issues before the merger or acquisition is completed.¹⁰¹

In the 1970s, economics became an important consideration in antitrust prosecution.¹⁰² The Chicago School, which considers the impact of economics on antitrust issues, became influential in antitrust philosophy and policy during this time.¹⁰³ Some of the people behind this way of thinking were such notable figures as Robert Bork and Richard Posner.¹⁰⁴ The Chicago School considers economies of scope and scale to be important. It also says that most markets are competitive, even if there are only a few firms in that market. In such markets with only a few firms, there will be competition on other aspects of the product besides price. The Chicago

¹⁰⁰ Peritz, *supra* n. 41, at 232.

¹⁰¹ Sullivan & Grimes, *supra* n. 13, 522.

¹⁰² *International Encyclopedia of the Social and Behavioral Sciences, Antitrust Policy* 553 (Pergamon Press 2001).

¹⁰³ *Id.*

¹⁰⁴ William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking* <<http://faculty.haas.berkeley.edu/shapiro/century.pdf>> (accessed December 15, 2003).

School claims that monopolies will not last forever because the monopoly prices will naturally encourage entrants into the market. It also states that entry barriers, besides those constructed by governments, are not as important as previously thought. The Chicago School does not consider monopoly power in vertical markets to be much of a threat because its theory is that firms with such a monopoly do not have an incentive to leverage their monopoly power. It assumes that businesses strive to maximize profits. Additionally, the Chicago School feels that government intervention is only appropriate when such intervention improves the efficiency of the market where there are anticompetitive practices.¹⁰⁵

The Reagan Era

The Reagan administration was a shift to more conservative values. Ronald Reagan was a supporter of big business and supply-side economics.¹⁰⁶ This administration marked a period of decreased antitrust enforcement.¹⁰⁷ During this time there was a series of mergers that were generated by low stock prices. The junk bond market was also seen as a source for financing mergers between corporations during this period.¹⁰⁸

¹⁰⁵ *International Encyclopedia of the Social and Behavioral Sciences*, *supra* n. 102, 553.

¹⁰⁶ Bartleby.com, *The Columbia Encyclopedia, Reagan, Ronald* <<http://www.bartleby.com/65/re/Reagan-R.html>> (accessed December 15, 2003).

¹⁰⁷ Sullivan & Grimes, *supra* n. 13, 7.

¹⁰⁸ Sullivan & Grimes, *supra* n. 13, 522-523.

Enforcement in the 1990s

In 1992 a means for analyzing mergers and market concentration was added to the Merger Guidelines to replace the Four-Firm Concentration Ratio. This method was the Herfindahl-Hirschman Index (HHI) which considers the sums of the squares of all of the market participants in a certain market.¹⁰⁹ To derive the HHI, the market shares of all firms are determined. These individual shares are squared and then all the squared market shares are added together. Antitrust enforcers can calculate the HHI for the market both before and after the merger. Antitrust enforcers are able to examine the pre and post merger HHIs to determine if merger will create too much concentration in the market. The HHI takes into account market dominance with greater accuracy than its predecessor, the Four-Firm Concentration Ratio¹¹⁰

Antitrust enforcement began to rise during the presidential administration of George H. W. Bush. Enforcement was still greater under President Bill Clinton.¹¹¹ With changes in various industries, such as deregulation, downsizing, globalization, advancements in technology, and convergence of markets, the mid 1990s saw record levels of mergers.¹¹²

¹⁰⁹ Sullivan & Hovenkamp, *supra* n. 82, 862.

¹¹⁰ Sullivan & Hovenkamp, *supra* n. 82, 863.

¹¹¹ Sullivan & Grimes, *supra* n. 13, 7.

¹¹² Sullivan & Grimes, *supra* n. 13, 523-424.

In 1997, a district court case challenging the merger between Staples and Office Depot, respectively, the first and second largest retailers of office supplies was held to lessen competition. The court used § 7 of the Clayton Act in its analysis to evaluate the lessening of competition.¹¹³ In reaching this holding, the court examined the impact of reduced competition in forty-two distinct geographic areas, finding that the proposed merger would result in Staples having one hundred percent control in fifteen of these forty-two areas.¹¹⁴ Additionally, in reaching this conclusion the court used HHI analysis to examine post merger market concentration.¹¹⁵

Recent Developments

In 2001, a case regarding the monopoly power of baby food producers made its way to the Circuit Court of the District of Columbia. Two of the three main baby food makers, Heinz and Beech-Nut planned to merge. The Federal Trade Commission sought an injunction to stop this merger because this would create a corporation with excessive market power.¹¹⁶ The court held that the proposed merger would violate § 13(b) of the Federal Trade Commission Act because the merger would not be in the interest of the

¹¹³ *FTC v. Staples, Inc.*, 970 F.Supp. 1066 (D.D.C. 1997).

¹¹⁴ *Id.* at 1081.

¹¹⁵ *Id.* at 1081.

¹¹⁶ *Federal Trade Commission v. H. J. Heinz, Co.*, 246 F.3d 708, 711 (D.C. Cir. 2001).

general public.¹¹⁷ The granting of such an injunction is predicated on the Federal Trade Commission's showing that there is a likelihood of success of the case on the merits.¹¹⁸ The court examined such factors as premerger competitions, post-merger efficiencies, innovation stemming from the merger, and structural barriers to collusion. The court found that there was competition both on the retail and wholesale levels that would suffer as a result of the merger. Additionally, where there is a high market concentration, there is a requirement to show that extremely great efficiencies would result from the merger. It was also determined by the court that the merger would not increase innovation and that in a highly concentrated market, like this one, collusion is likely.¹¹⁹

The software giant Microsoft, because of its dominant market position, has been the center of accusations of antitrust violations recently. The most publicized antitrust case in recent history is the one involving Microsoft and its web browser, Internet Explorer. Additionally, this case dealt with other practices of exclusion of internet service providers by Microsoft.¹²⁰ The District Court found that the inability to delete Internet Explorer using the removal utility in Microsoft's Windows operating system

¹¹⁷ *Id.* at 727.

¹¹⁸ *Id.* at 714.

¹¹⁹ *Id.*

¹²⁰ *United States v. Microsoft Corp.*, 346 U.S. App. D.C. 330 (2001).

was exclusory conduct. Additionally, the court held that commingling of browser with the operating system code was exclusory. Contracts between Microsoft and internet service providers were also held to be in violation of the Sherman Act.¹²¹

Antitrust law will continue to evolve along with changes in industry and society. Just as antitrust regulated the mighty railroads and oil companies in the late nineteenth and early twentieth centuries, so to will it regulate the giant high tech and pharmaceutical companies of the twenty-first century. The definition of restraints of trade and monopolies may need to be refined by this and subsequent generations. Although much of the regulatory framework is in place to manage mergers along with horizontal and vertical restraints, further refinement will continue and evolve as industry and society evolve.

¹²¹ *Id.*