

The First Antitrust Statute

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Kansas enacted the first general antitrust law¹ in 1889. No less than eleven other states passed various forms of antitrust legislation before Congress approved the Sherman Act² in 1890. This Symposium thus celebrates antitrust's true centenary. The purpose of this essay is to examine the ideological context of these earliest antitrust statutes, to give the reader a better sense of what they meant to those who passed them. Next, the statutes and their significance from a historical point of view will be considered with the focus on the Kansas statute. The most important questions facing us today are not historical. They are questions about how we should deal with economic concentration now and in the future. Most of this Symposium is appropriately dedicated to such questions, so this essay leaves to others the task of divining whatever implications are to be drawn from this brief history lesson.

I

By the late 1880s virtually all of American society seemed united in a sense of anxiety and uncertainty about the explosion of industrial activity that followed the Civil War. The rise of an increasingly urban, industrial, commercial economy, linked by nationwide transportation and communication networks severely disrupted what the historian Robert Wiebe has described as "a society of island communities"³—a nation of local, static economies based on the linkages between small town and adjacent countryside. In the rapidly growing industrial centers, workers and others required to deal with manufacturing and processing firms confronted unprecedented economic power. Farmers in the West and South reacted against what they perceived to be abusive practices of powerful railroads, middlemen, providers of credit, and warehouse and grain elevator operators. Owners of small businesses fell prey to what were popularly perceived as cutthroat business strategies, and all Americans felt themselves at the mercy of those from whom they bought many of life's necessities.⁴

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1. Act of Mar. 9, 1889, ch. 257, 1889 Kan. Sess. Laws 389.

2. Sherman Act of 1890, ch. 647, 26 Stat. 209 (1890)(codified as amended at 15 U.S.C. §§ 1-7 (1982)).

3. See generally R. WIEBE, *THE SEARCH FOR ORDER, 1877-1920* (1967).

4. For discussion of the ways in which all segments of American society responded to these changes in economic life, see L. GOODWYN, *THE POPULIST MOMENT: A SHORT HISTORY OF THE AGRARIAN REVOLT IN AMERICA* (1978); S. HAYS, *THE RESPONSE TO INDUSTRIALISM 1885-1914* (1957); R. HOFSTADTER, *THE AGE OF REFORM* (1955); R. WIEBE, *supra* note 3.

The disruptive effects of economic growth and industrialization were not the sole cause of anxiety and discontent. By the later 1880s, the public correctly perceived that many of the changes that seemed so threatening were the result of concerted activity among firms seeking to achieve dominating economic power. Americans referred to these combinations as "trusts," the exemplar being, of course, the Standard Oil Trust.⁵ The basic idea behind the trust device was to evade state corporation law restrictions on consolidation through merger or holding company by exchanging stock for so-called trust certificates and yielding control of the constituent corporations to a central board of trustees. Through horizontal combination and administrative centralization, followed by vertical integration, Standard Oil gained control of most of the nation's petroleum refining capacity by the early 1880s.⁶ By the end of that decade, great nationwide combinations modelled on Standard Oil dominated the cottonseed and linseed oil industries, lead processing, and such crucial household commodities as sugar, salt, kitchen matches, and even whiskey. Other smaller scale but no less dominant combinations included the envelope, cordage, oilcloth, paving pitch, school slate, and paper bag trusts, not to mention the Chicago gas, St. Louis gas, and New York meat trusts. Reflecting the public's perception of these alarming developments, Henry Demarest Lloyd, the great antimonopoly publicist, declared as early as 1884 that monopolistic combinations controlled most, if not all, American commerce.⁷ The trusts thus became the focal point for all of the anxiety and discontent that recent social and economic changes were generating.

From a modern day vantage point, it is not easy to appreciate fully just how upsetting these developments were to most Americans. Severe criticism was not limited to lawyers and academic economists writing for the intelligentsia. Newspapers and widely circulated magazines ran frequent articles and editorials denouncing the evils of the trusts.⁸ The major political parties competed with each other to condemn the trusts in their 1888 platforms, and minor parties like the Union Labor, United Labor, Prohibition, and Anti-Monopoly Parties made the issue one of their centerpieces.⁹ Even one of Standard Oil's defenders wrote that "the public mind has begun to assume a state of apprehension, almost amounting to alarm."¹⁰

5. See A. CHANDLER, *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* 321-25 (1977).

6. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 143 n.10 (1958).

7. See Lloyd, *Lords of Industry*, 138 N. AM. REV. 535 (1884).

8. See H. THORELLI, *THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION* 132-43 (1954).

9. See T. MCKEE, *THE NATIONAL CONVENTIONS AND PLATFORMS OF ALL POLITICAL PARTIES 1789 TO 1905*, at 235, 241, 247, 251, 252-53 (1906).

10. See Gunton, *The Economic and Social Aspects of Trusts*, 3 POL. SCI. Q. 385 (1888).

This widespread and generally unequivocal hostility to the trusts was not the product of narrow concerns about higher consumer prices. Despite the activities of the trusts, prices generally declined while wages rose during the last decades of the nineteenth century. Thus, as consumers, Americans were generally better off, despite the trusts' activities. Instead, antitrust sentiment grew out of more basic, deeply rooted ideological concerns, concerns that were firmly grounded in a long-standing political tradition obsessed with protection of individual autonomy from coercive power.

Americans in the 1880s placed enormous value on the traditional ideal of personal independence based on economic opportunity and decentralized economic and political power.¹¹ At the core of this ideology was a conception of individual liberty defined largely in terms of autonomous self-direction and freedom from coercion. True personal freedom required a balanced distribution of wealth throughout society. Great concentrations of wealth—"monopoly" was the catch-all term for these—represented exclusion from access to economic opportunity. They also threatened to wield coercive force over workers, suppliers, and customers. More fundamentally, great disparities in wealth would lead to subversion of the political process. Here it is helpful to recall Thomas Jefferson's idealistic vision of a nation of independent property owners of roughly equal economic stature.¹² The point was not just that such a social structure would guarantee economic autonomy for the individual. Egalitarian distribution of wealth would eliminate the danger that a wealthy minority or an impoverished majority would seize governmental power in order to redistribute wealth for its own selfish benefit. In other words, unequal distribution meant either plutocracy or mob rule. In contrast, equal distribution would create the conditions necessary for a government devoted to the common good rather than to factional goals.

Nineteenth-century Americans adapted Jefferson's agrarian republicanism to changing economic conditions. This ideological shift substituted equal access to America's seemingly boundless commercial opportunities for egalitarian distribution of land. The point remained the same, however: to ensure individual autonomy and protect the integrity of the political process. Unimpeded access to commercial opportunity facilitated social mobility. Rather than a static social hierarchy, opportunity implied a fluid, dynamic situation in which thrift and industry would earn their rewards. Any success, however, would necessarily be

11. The ideas discussed in this and the following paragraphs in this section are treated extensively in Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219 (1988). For a briefer but generally similar discussion, see May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 258, 262-88 (1989).

12. See T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 216-17 (M. Peterson ed. 1975).

short-lived because of the constantly corrosive effects of entrepreneurial competition. Thus, in a competitive economy no aristocracy of wealth or permanent underclass unable to better its condition would emerge. Though always subject to fluctuation, the distribution of wealth would remain more or less balanced. To nineteenth-century Americans, economic opportunity was valued not only because it facilitated personal independence, self-determination, and freedom from coercion. Additionally, like Jefferson's vision of an egalitarian distribution of land, the balance of economic power that was thought to result from unimpeded opportunity was the ultimate guarantor of individual liberty because it was the only way to ensure that government would not be captured by those seeking to exercise its powers for their own benefit rather than for the common good.

One of the beauties of this ideology was the belief that the normal workings of the market—the “invisible hand”—would prevent the achievement of monopolistic concentration. Only misguided governmental intervention could upset the natural balance of economic power that would result from individuals pursuing America's seemingly unlimited economic opportunities. Accordingly, many state constitutions expressly forbade the creation of monopolistic privileges¹³ and common law refused to enforce agreements aimed at monopolistic combination.¹⁴ The states' activities with respect to preservation of balanced economic power were not limited to refusal to lend assistance to efforts to create monopoly power; in many areas, such as regulation of natural monopolies and promotion of general economic opportunities through public subsidies, the states played an affirmative role in seeking to assure that natural competitive processes worked effectively.¹⁵

It was this vision of individual liberty and its underlying economic assumptions that made the rise of the great monopolistic combinations so threatening to Americans during the 1880s. These gigantic concentrations of wealth represented the specter of unprecedented coercive power, wielded by small groups of distant and selfish men. Not only did the trusts possess the ability to oppress buyers and sellers with whom they dealt, they were able to crush independent entrepreneurs unwilling to play by their rules. Even more ominously, the trusts could buy up political influence, leading the economist E.B. Andrews to refer to the “political menace resident in these stupendous aggregations of wealth.”¹⁶

13. See N.C. CONST. Dec. of Rights, § 23 (1776); TENN. CONST. art. XI, § 23 (1796); ARK. CONST. art. II, § 19 (1836); FLA. CONST. art. I, § 24 (1838); TEX. CONST. art. I, § 18 (1845); MD. CONST. art. I, § 39 (1851).

14. See *Craft v. McConoughy*, 79 Ill. 346 (1875); *Chicago Gas Light & Coke Co. v. People's Gas Light & Coke Co.*, 121 Ill. 530, 13 N.E. 169 (1887); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880); *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. 173 (1871).

15. See Millon, *supra* note 11, at 1252-56.

16. Andrews, *Trusts According to Official Investigations*, 3 Q.J. ECON. 117, 150 (1889).

Individual entrepreneurial initiative and natural market forces no longer seemed sufficient to prevent establishment of entrenched positions of power. Through their conspiratorial combinations and predatory tactics, the trusts seemed able to immunize themselves from the otherwise corrosive effects of market competition, nor could the modest powers of government challenge their dominance. Existing law—common law as well as statute, state as well as federal—offered severely limited weapons for deployment against this unprecedented challenge to fundamental social, political, and economic values. As Henry Stimson warned in the *Harvard Law Review*, “[T]hese ‘trusts’ may realize the Satanic ambition,—infinite and irresponsible power free of check or conscience.”¹⁷

II

It was the states rather than the federal government that took the lead in challenging the power of the trusts. Just prior to passage of the Sherman Act, several states used corporation law to initiate prosecutions against corporations that had entered into monopolistic mergers.¹⁸ Of potentially further reaching importance, however, were the legislative efforts to create new rules and sanctions directed specifically at the novel problems presented by the trusts. Thus, several states began to enact antitrust statutes during the late 1880s, a process that continued during the following decade. There was nothing revolutionary about such legislation; it was perceived to be a natural extension of earlier state law efforts to promote economic opportunity and preserve the balance of economic power. In this respect, these laws were expressions of the states’ traditional police power responsibility to protect the welfare of their citizens.

Several states had constitutional provisions expressly proscribing state creation of monopolies.¹⁹ These were typically little more than broad denunciations to the effect that monopolies are repugnant to a free people and should not be allowed. None of these, however, was concerned with the particular problems that the newly emergent trusts presented during the 1880s because the trusts were not state-franchised monopolies. Accordingly, in the years before 1890, a handful of states adopted constitutional provisions designed to prevent corporate participation in anticompetitive combinations.²⁰ More important, no less than

17. Stimson, *Trusts*, 1 HARV. L. REV. 132, 132 (1887).

18. See *California v. American Sugar Ref. Co.*, 7 RY. & CORP. L.J. 83 (Cal. Super. Ct. 1890); *People ex rel. Peabody v. Chicago Gas Trust Co.*, 130 Ill. 268, 22 N.E. 798 (1889); *State v. Nebraska Distilling Co.*, 29 Neb. 700, 46 N.W. 155 (1890); *People v. North River Sugar Ref. Co.*, 121 N.Y. 582, 24 N.E. 834 (1890); *Mallory v. Hanaur Oil Works*, 86 Tenn. 598, 8 S.W. 396 (1888).

19. See *supra* note 13.

20. See IDAHO CONST. art. 11, § 18 (1889); MONT. CONST. art. 15, § 20 (1889); N.D. CONST. art. 7, § 146 (1889); S.D. CONST. art. 17, § 20 (1889); WASH. CONST. art. 12, § 22 (1889); WY. CONST. art. 1, § 30 (1889).

twelve states enacted penal statutes aimed at trusts and combinations in restraint of trade before the federal government finally got around to passing the Sherman Act. The twelve were Iowa, Kansas, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, North Dakota, South Dakota, Tennessee, and Texas.²¹ Eight more states passed legislation during the decade following the Sherman Act.²²

Of the twelve antitrust laws that preceded the Sherman Act, Iowa's was the first, "An Act for the Punishment of Pools, Trusts, and Conspiracies" passed on April 16, 1888.²³ The Kansas statute was not signed until March 9, 1889.²⁴ If Kansas's statute was not the first state antitrust law, why has Kansas been chosen as the site of this symposium on the centenary of antitrust law?

The Kansas statute was much broader than its predecessors. It opened with a general condemnation of "all arrangements, contracts, agreements, trusts or combinations" designed or tending "to prevent full and free competition" or to fix prices. This formulation differed in subtle but potentially important ways from statutes like Iowa's or Maine's. First, it sought to define collective action as broadly as possible. Second, it identified the general problem of restraint on competition as its target (rather than simply price or output fixing). Third, the Kansas statute referred to agreements that were anticompetitive either in purpose or in effect. Besides these differences, the statute was not limited to anticompetitive combinations affecting goods, as the Iowa and Maine laws were. In addition to restraints on the importation, transportation, production, purchase, or sale of articles, the Kansas statute also referred to credit, attorneys' and doctors' fees, insurance, and "any other services." The Kansas statute also included a separate prohibition on the issuance or ownership of trust certificates of the sort used in the formation of the great trusts. Like the Iowa and Maine statutes, violators of the Kansas law were subject to criminal punishment. However, the Kansas statute included another important innovation with respect to enforcement: an express private right of action for those injured by the activities of an illegal combination.

Thus, the Kansas antitrust statute of 1889 was significantly broader in scope than any of the other state statutes enacted before the Sherman Act.²⁵ It thus represents an important step in the direction of the broad

21. For these statutory provisions, see M. FORKOSH, *ANTITRUST AND THE CONSUMER (ENFORCEMENT)* app. A (1956).

22. The eight were Illinois (1891), Louisiana (1890), Minnesota (1891), Montana (1895), New Mexico (1891), North Carolina (1899), Oklahoma (1890), Wisconsin (1893). *Id.*

23. Act for the Punishment of Pools, Trusts, and Conspiracies, ch. 84, 1888 Iowa Acts 124. Maine also passed a statute before Kansas did. See Act of Mar. 7, 1889, ch. 266, 1889 Me. Acts 235.

24. Act of Mar. 9, 1889, ch. 257, 1889 Kan. Sess. Laws 389.

25. See generally Chen, *Sherman's Predecessors: Pioneers in State Antitrust Legislation*, 18 J. REPRINTS FOR ANTITRUST L. & ECON. 93 (1988).

prohibition on contracts, combinations, and conspiracies in restraint of trade or commerce contained in the Sherman Act's first section, a general proscription not limited to price or output restrictions or to the sale of goods. Equally important, the Kansas law was the first state law to anticipate the Sherman Act's private action remedy.

What the Kansas statute lacked was a provision akin to the Sherman Act's section two condemnation of monopolization.²⁶ Does this mean that the Kansas legislators sought to exclude monopoly or monopolizing conduct by individual firms from statutory proscription? Might one be tempted to read into this omission a decision to allow monopoly power based on internal expansion and superior efficiency, as opposed to cartel arrangements that achieved monopoly power unrelated to efficiency? Such an interpretation would be a mistake. First, the Kansas statute's broad condemnation of joint conduct includes no hint of any distinction between efficient and inefficient activities. Instead, it refers generally to any collaborative efforts to restrain "free competition" and, further, proscribes any tampering with price, whether designed to "advance, reduce or control the price or the cost to the producer or to the consumer." By its terms, the statute thus reaches the efficiency-creating merger as well as the naked price-fixing cartel. More importantly, there is absolutely no basis for the claim that Americans in 1889 believed that efficiency might legitimate possession of massive economic power.²⁷ Mainstream economists did not believe that large firms were more efficient than small ones. In any event, they denied that single-firm monopoly was possible unless the state conferred a legally enforceable privilege. A newly emerging school of antitraditional economists was beginning to recognize the implications of economies of scale, but these scholars unanimously insisted that private monopolies, even if more efficient than small firms, had to be prevented, or at least regulated, by the state in order to protect the public from abuse of the great economic and political power they would possess. Some even advocated state ownership. To the extent the seeds of the efficiency argument even existed, it was only as a faint glimmer in the eyes of a few as yet eccentric apologists for the Standard Oil Trust. Had it been clearly articulated, which it was not, it would have been considered pure and outrageous heresy, a repudiation of the basic system of social, political, and economic values discussed above. Opposition to economic concentration in the state legislatures as in Congress was earnest and unequivocal. There was simply no legitimate justification for privately controlled monopoly power.

If the absence of a monopolization provision was not due to a conscious policy decision to exempt potentially efficient behavior, perhaps

26. See 15 U.S.C. § 2 (1982).

27. See Millon, *supra* note 11.

there was a more obvious reason. The legislators simply may have believed that their strong condemnation of the trusts was sufficient to protect that state's citizens. In other words, the intended beneficiaries were those buyers and sellers forced to deal with monopolistic combinations. There was relatively little need for a bill to protect individual entrepreneurs from the predatory tactics of single firms seeking to drive them out of the market because Kansas in 1889 was a predominantly agrarian economy. In contrast, Congress had to take a broader view.

III

What is important about Kansas's statutes and the many others that were passed before or soon after the Sherman Act is not which came first or how they differed from each other or from the Sherman Act. What is important is the clear evidence they provide of the depth of antitrust sentiment among the American people. Steven Piott, who has written a history of popular resistance to the rise of big business, states: "Most antitrust activity began not at the national level, but rather at the state and local level. And the impetus for that activity came not from 'above,' but rather from the daily experiences of ordinary people 'below.'"²⁸ Surely the wave of state antitrust legislation demonstrates just how strongly Americans felt about the need to protect themselves from the threat to fundamental values that the trusts represented.

Antitrust statutes like Kansas's are also important for another reason. The proliferation of state legislative activity and state court litigation on the eve of the Sherman Act testifies to the key role that the states assumed in the earliest stages of the antitrust movement. This historical fact has, for the most part, been overlooked, no doubt because of the enormous shift in power from the states to the federal government which has occurred since 1890 and the correspondingly minor role that state law has played in efforts to preserve competition. Yet James May has fully documented the importance of extensive efforts to use state courts and existing state law to thwart the giant combinations during the late nineteenth century and notes that "[c]ontemporaries perceived state judges to be crucial players"²⁹ in the war against the trusts. We need also to appreciate the work of those state legislators who responded to the challenge that the trusts presented by seeking to correct deficiencies in the existing legal regime.

Their efforts did not only serve as an example to their counterparts in Washington. Congress in 1890 appreciated that it could not hope to

28. S. PIOTT, *THE ANTI-MONOPOLY PERSUASION* 4 (1985).

29. May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 504 (1987).

restore the balance of economic power to American society without the assistance of the states. Thus, the House Judiciary Committee reported:

No system of laws can be devised by Congress alone which would effectually protect the people of the United States against the evils and oppressions of the trusts and monopolies. Congress has no authority to deal, generally, with the subject within the States, and the States have no authority to legislate in respect of commerce between the several States or with foreign nations. . . . Whatever legislation Congress may enact on this subject, within the limits of its authority, will prove of little value unless the States shall supplement it by such auxiliary and proper legislation as may be within their legislative authority.³⁰

Our thinking about the respective legislative jurisdiction of the state and national governments has changed since those words were written. At least in the antitrust area, the reach of each is far broader. Congress' interstate commerce jurisdiction reaches almost everything, while the states enjoy broad power over extraterritorial conduct that has "effects" within state borders. Whatever that might imply about the proper role of state antitrust legislation in our federal system today, we should not forget that, in the earliest years of the antitrust movement, when the alarm was genuine and the opposition to economic power unqualified, the states played a leading role.

Now, as the federal government has seemed committed to noninterventionist policies whatever their costs, the states have stepped into the vacuum and are actively seeking to define a meaningful role for themselves. This is true in the area of antitrust enforcement, just as it is in the area of regulation of hostile corporate takeovers.³¹ Of course, circumstances have changed greatly since Kansas passed the first general antitrust statute in 1889. But the justification for state activism is the same now as it was then: the responsibility of state governments to use their legislative power to advance the welfare of their citizens.

30. H.R. REP. NO. 1707, 51st Cong., 1st Sess. 1 (1890).

31. See Johnson & Millon, *Missing the Point About State Takeover Statutes*, 87 MICH. L. REV. 846 (1989).