

Antitrust Potpourri

By Marlene Coir

Ancient Principles

The notion that those who govern may, and perhaps should, oversee competition within private enterprise is not a modern concept. Sovereign oversight of those who control property, trade, or commerce has been identified as one of the oldest principles of law—predating the Code of Hammurabi by some 300 years.¹

The Roman Empire regulated commerce to reduce price fluctuations, assure the consistent distribution of currency (silver coin), and restrain what was considered unfair business practice.² Medieval monarchs alternately promoted or restricted trade monopolies within their jurisdictions through royal grace or favour.³ Throughout Europe, a complex system of guilds, charters, and alliances developed and coupled with mutable laws to regulate costs and supply.⁴ In sixteenth-century England, the concept of “monopoly” met with general public disdain and was fervently condemned by Sir Thomas More, who is said to have introduced the term to the English in his treatise *Utopia* (1516).⁵

In 1602, the English court issued a courageous and prescient opinion that challenged the monarchy’s right to grant exclusive mercantile privilege as it saw fit. The court found that monopolies of trade and commerce are not in the public interest. This is so, it reasoned, because when a monopoly exists, prices rise based on the whim of those holding that monopoly. In addition, the quality of the commodities produced diminishes because those holding the monopoly do not have to contend with competition and will not independently regard the benefit of the commonwealth. A third detriment to the common good is that monopolies tend to decrease the skilled labor force and increase unemployment and poverty.⁶

Within 30 years of this opinion, English common law and statutes regulating trade and commerce significantly limited the power of the Crown to grant individuals and entities involved in private enterprise the right to establish trade monopolies.⁷ By the time William Blackstone published his *Commentaries on the Laws of England*, the practices of “regrating,” “engrossing,” and “forestalling” (buying goods only to resell them at a higher price) and monopolizing were punishable by the levying of treble damages and double costs.⁸

The American Confluence

The American colonies declared their independence in the same year Adam Smith published *An Inquiry into the Nature and Causes of the Wealth of Nations*, a work that shaped and continues to influence theories of economic thinking and analysis.⁹ Smith’s precept was that the free market price of a product, naturally regulated by supply and demand, will achieve a “balance of production and consumption and the best distribution and division of labor.”¹⁰ The evolution of the classical into the modern view of monopoly as a component within the concept of free enterprise is given extensive coverage in the scholarship of Lee Loevinger,¹¹ liberally cited in this brief column. Mr. Loevinger, in turn, refers to the *Principles of Economics*, a treatise by Alfred Marshall, who is described as “the most representative, and probably the leading economist of his era (1843–1924).”¹²

Starting in the late nineteenth and early twentieth centuries, economic theorists in the United States and abroad came to view the establishment of large companies, which were capable of using their capital and power to influence the growth of entire industries as well as control the distribution and pricing of goods and commerce, as a threat to a healthy and competitive free-enterprise system. In the United States, this spurred the enactment of federal legislation that would affect controls on industrial and commercial giants in an effort to promote competitive economic growth and, incidentally or not, protect the end consumer.¹³

The Sherman Act of 1890,¹⁴ the Clayton Act of 1914,¹⁵ and the Federal Trade Commission Act of 1914¹⁶ (notably Section 5), along with their families of revisions and interpretation, continue to oversee the regulation of free market competition within United States industry and commerce.¹⁷ The current body of antitrust and competition law includes more than 100 years of legislative amendment and judicial interpretation, the spawning of new and improved legislation to include new industries and redefine others,

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the formation of entire branches of federal government, the augmentation of federal law at the state level,¹⁸ and the publication of thousands of tomes and shorter treatises explaining, discussing, reviewing, and debating for or against more or less regulation.

The development of antitrust legislation and litigation continues to be robust. In 1992, the American Bar Association Antitrust Section commenced publication of its *Annual Review of Antitrust Law Developments*—in 2010 alone, this publication contained more than 400 pages of text and 20 pages within its table of cases.¹⁹ A recent subject search performed in WorldCat²⁰ using the terms “antitrust” and “United States,” with results limited to items written in English, uncovered more than 8,000 books and 3,000 other publications such as journal articles, serials, and online resources. A federal caselaw search executed in Westlaw Classic using the terms “Sherman Act,” “Clayton Act,” or the “Federal Trade Commission Act (Section 5)” resulted in more than 26,000 opinions. In this age of expanding markets, new industries, and rapidly advancing technologies, it would seem safe to assume that more is to come.

Additional Reading

Because stimulating further interest in the history and discourse of antitrust and competition law is one purpose of this column, I am including a few titles in addition to those cited within the body of this article that offer more thoroughly researched and detailed analyses:

- Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Basic Books, 1978)
- Hovenkamp, *Federal Antitrust Policy: The Law of Competition and its Practice*, Hornbook Series (St. Paul, MN: West, 2011)
- Kaysan & Turner, *Antitrust Policy: An Economic and Legal Analysis* (Cambridge, MA: Harvard University Press, 1959)
- Loevinger, *The Law of Free Enterprise: How to Recognize and Maintain the American Economic System* (New York: Funk & Wagnalls Co., 1949)

- Posner, *Antitrust Law: An Economic Perspective* (Chicago: University of Chicago Press, 1976) ■



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FOOTNOTES

1. Loevinger, *Antitrust and the new economics*, 37 Minn L R 505, 505 (1953).
2. *Id.*; see also Waller, *Neo-realism and the international harmonization of law: Lessons from antitrust*, 42 U Kan L R 557, 563, n 26 (1994); Ford, *Monopoly as rhetoric: The case of letters patent*, CASRIP Newsletter, Volume I, Issue 1 (2005), available at <<http://www.law.washington.edu/Casrip/Newsletter/default.aspx?year=2005/&article=newsv12i1Ford#top>>. All websites cited in this article were accessed November 18, 2012.
3. Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* (Toronto: The University of Toronto Press, 1947), p 29.

4. Ford, n 2 *supra*; see also Fox, n 3 *supra* at 26–34.
5. Thomas More, *Utopia* (HVS Ogden edition and translation, 1949), p 10.
6. Loevinger, n 1 *supra* at 506.
7. *Id.* at 505–506.
8. *Id.*; see also Blackstone, *Commentaries on the laws of England* (Buffalo: William S Hein & Co Inc, 1992), Book IV, ch 12, pts 6–9.
9. Loevinger, n 1 *supra* at 507.
10. *Id.* at 508, with references to Smith, *The Wealth of Nations* (Modern Library, 1937).
11. Lee Loevinger served as chief of the U.S. Justice Department's antitrust division under President Kennedy and was later a member of the Federal Communications Commission. See Files, *Lee Loevinger, 91, Kennedy-Era Antitrust Chief*, The New York Times, May 8, 2004, available at <<http://www.nytimes.com/2004/05/08/us/lee-loevinger-91-kennedy-era-antitrust-chief.html>>.
12. Loevinger, n 1 *supra* at 510.
13. *Id.* at 510–512.
14. 15 USC 1 *et seq.*
15. 15 USC 12 *et seq.*; 15 USC 52 *et seq.*
16. 15 USC 41 *et seq.*
17. See The U.S. Department of Justice website at <<http://www.justice.gov/atr/about/antitrust-laws.html>>.
18. All 50 states and the District of Columbia have antitrust statutes, based on a search using the term “antitrust” in Westlaw's 50 State Survey database. See also Saferstein & Everett, *State Antitrust Practice and Statutes* (American Bar Association Section on Antitrust Law, 4th ed, 2009).
19. American Bar Association, *2010 Annual Review of Antitrust Law Developments* (American Bar Association Section of Antitrust Law, 2011).
20. WorldCat is an online international subscription catalog of books and other resources. See <<http://www.oclc.org/worldcat/>>.