American Landmark Legislation

PRIMARY MATERIALS

Compiled and Edited by
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Manufactured in the United States of America

To my Harvard Law School 1950 classmates:
Herbert Glaser, Richard K. Fink, Gerald Halpern
and Robert B. Ross on the occasion of our
twenty-fifth anniversary, 1975.

INTRODUCTION TO THE SERIES

The legislative background of our country reflects its past, its critical events, conflicts, and problems. More than this, legislation has a central place in America's governmental system. Acts of Congress increasingly control every citizen's political, social, and economic life. In selecting the laws for this series of *Landmark Legislation,* the editor used two criteria. The first of these was the important national significance they had at the time Congress passed them. Secondly, these laws carry principles that continue to be of great import to one dimension or another of American life. Even when particular laws are no longer in effect, either because they accomplished their purpose (*viz.,* the Homestead Act of 1862) or were declared unconstitutional at a later point by the judiciary (*viz.,* the Civil Rights Act of 1875), their legislative history helps us deal with contemporary issues. Thus public land use and civil rights have something of their genesis in the Homestead and Civil Rights Acts of the nineteenth century.

This series will provide general readers and students, as well as professional workers, with primary legislative materials not now readily available except in the largest library systems. And even there, the task of sifting out and distilling the specific and relevant materials takes skills, time, and energy a very limited number of people have. Hopefully, the *Landmark Legislation* series will make a study or investigation of these important pieces of legislation a pleasurable as well as a viable pursuit.

Reproducing as we have the actual legislative and judicially-related materials will give readers a sense of authenticity as well as "flavor" that cannot be conveyed with ordinary narrative texts.

The full, unabridged, and unedited primary sources are offered for each of the statutes covered. Editing or abridging would have resulted in selection, which in turn reflects an editor's point of view. While unedited accounts require the reader to wade through more than he may be looking for or wants to know, they have the advantage to alerting him to information he did not know existed and should have! In any case, the full reproduction of the congressional debates during the session of the Congress that passed the law is a feature of this series that distinguishes it from anything presently available.

Each "landmark" statute is preceded by a detailed narrative legislative history prepared either by the editor or adapted from an authoritative source. Following the statute are a variety of pertinent documentary sources.. In addition to the complete congressional debates already mentioned, there are committee reports, presidential messages, contemporary news or editorial accounts, and finally, judicial decisions that either interpret the legislation or some part of it or deal with its constitutionality. Together, such a set of materials relating to America's leading legislative enactments will fulfill a great variety of needs and purposes among our citizenry.

Irving J. Sloan
Scarsdale, New York

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CHAPTER I *

POLITICAL AND LEGISLATIVE HISTORY

THE student of legislation in the United States, especially if he happens to have had some practical experience in legislative matters, cannot but be impressed by the extraordinary difficulties which must have confronted the draftsmen of our anti-trust laws. The statutes concerned problems of trade competition and monopoly, and therefore dealt with some of the most complex features of the intricate mechanism of modern economic life. A complicated situation generally calls for a complicated legal document, as any draftsman of a corporate indenture can testify. To express fully and clearly the intention of the parties it may be necessary to introduce endless details and qualifications, so that nothing is left to implication, and every contingency is anticipated. From the lawyer who drafts such a document for a business client, certainty and completeness are expected above everything else. A statute, however, is a political as well as a legal document. It must stand the test of Congressional debate, and it must be defended on the public platform. The phrases which it embodies must be studied, not only for their legal import, but for their political and ethical quality as well. The enactment and public discussion of an important law is a part of the process of political education, and a statute fails in this respect if it is couched in language which is not comprehensible to the average citizen, or which conveys to the lay mind an imperfect picture of the objects and policies which it embodies.

The difficulty is greatly enhanced where the subject

* From, Henderson, Gerard C., *The Federal Trade Commission,* Yale University Press (New Haven: 1932), Chapter I, with permission.

matter is one upon which popular feeling has run high and formulas and phrases have acquired a political significance. There is in all political discussion a strong tendency to over-simplify the issues. An ethical sense is perhaps a more general attribute of mankind than is the capacity for practical judgment on matters of economic or business expediency, and there is a natural impulse to formulate complicated problems of conduct in simple terms of right and wrong. It has been almost a political necessity to divest the trust problem of its complicated reality, and to clothe it in the simpler raiment of personal ethics. With the best of intentions on the part of the draftsman, the inaccurate phrases and over-simplified concepts of popular discussion tend to force their way into the text of the statute, and necessary details and qualification are rejected because they seem to weaken the legislation from the political and rhetorical viewpoint.

The current vocabulary available to the draftsman of the Sherman Anti-Trust Law was peculiarly lacking in legal precision. The very word "trust" meant one thing to the layman and another to the lawyer, and the word "monopoly" was equally ambiguous. To a lawyer who had some regard for historical accuracy, a monopoly was a grant from the King of or for the sole buying, selling, making, working, or using of anything.[1] The word had acquired a broader meaning only because it was often used in a figurative sense, and because of its convenience as an epithet. Technically speaking, a man who bought up all the grain within carting distance and then raised the price, was an ingrosser,[2] but colloquially he was a monopolist, for his conduct was quite as objectionable

[1] Coke, 3 Inst. 181; Hawk., P.C. book 1, c. 79.

[2] "Monopoly differs from ingrossing only in this, that monopoly is by patent from the King, and ingrossing by the act of the subject between party and party." 1 Hawk., P.C. 624.

as if it had been sanctioned by grant of the King.[3] The words "restraint of trade" also had a dual meaning. When an aging cobbler sold his business to a younger man, and agreed not to practice in competition, the contract was technically in restraint of trade. Whether or not it was enforceable, might depend upon a number of considerations: the territorial extent of the restraint, the character, and at one time the adequacy of the consideration, the need for the restraint as a protection to the purchaser, and other factors. Popularly, however, a restraint of trade was an interference with the liberty of the subject, as objectionable as a monopoly. Indeed to presume to exercise a monopoly was to commit an offense against trade or commerce.[4] A monopoly was, in Blackstone's words, a grant from the King whereby the citizen was restrained in his liberty to trade.[5] In Mitchell *v.* Reynolds[6] the court spoke of "the great abuses these voluntary restraints are liable to; as, for instance, from corporations who are perpetually laboring for exclusive advantages in trade and to reduce it into as few hands as possible." Again without any attempt at legal precision, without any definition of terms, the words "restraint of trade" came to serve much the same use as the word "monopoly." If all the grain merchants in the vicinity agreed not to sell below a fixed price, they were making a contract in restraint of trade, and attempting to create a monopoly. If a society of tailors attempted to prevent outsiders from getting any business, they were monopolists who were trying to place unlawful restraints on the trade of their competitors.

To endeavor to secure, by research in the common law

[3] *Cf.* The King *v.* Waddington, 1 East 143, 156 (1800), where Lord Kenyon used the word in its popular sense.

[4] Blackstone, Bk. IV, Ch. 12, Sec. 9.

[5] *Ibid.*

[6] 1 P. Wms. 181 (1711).

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books, any comprehensive definition or delimitation of either of these terms is obviously useless, for they were not used where accuracy of expression was needed. Nobody would have thought that the Statute of Monopolies applied to persons who were not exercising or claiming to exercise exclusive rights under royal grant. When it became necessary to define and punish the type of offenses against which the Sherman Law was directed, the more technical words "forestalling, regrating, and engrossing" were used. In the Statute against Forestallers, Regrators, and Ingrossers,[7] these offenses are defined with a precision and detail that are quite astonishing. Indeed this Act, passed in the year 1552, is, from the juristic viewpoint, a much more highly developed product than the Sherman Act of 1890. In its technical aspects it would do credit to any modern legislative drafting service.

Instead of following this excellent model, and describing in simple and yet precise terms the conduct which they wished to forbid, the draftsmen of the Sherman Law chose instead to couch their prohibitions in terms of monopoly and restraint of trade. The words served to indicate strong moral reprobation, but were not helpful in identifying the subject matter to which the statute was applicable. The Standard Oil and Tobacco decisions in 1911[8] revealed clearly the faulty draftsmanship of the law. "Every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states" was denounced as criminal. A contract in restraint of trade, the precedents showed, was a contract limiting the right to exercise a trade. The context clearly showed that a broader meaning was intended, and it was fair inference that the law was aimed at agreements, combinations, or conspiracies which

[7] 5th and 6th Edw. VI, Ch. 14.

[8] Standard Oil Co. *v.* United States, 221 U.S. 1 (1911). American Tobacco Co. *v.* United States, 221 U.S. 106 (1911).

had the effect of eliminating or limiting competition between the participants. But the Act said that every such contract, combination, or conspiracy was illegal. If anything was clear from the precedents, it was that a contract might be technically in restraint of trade and yet entirely innocuous and undoubtedly valid and enforceable at common law. Did not Congress mean "every contract or combination or conspiracy in unreasonable restraint of trade"? Or did it mean to send to jail a grocer, living near the state line and delivering groceries in an adjoining state, who retired from business and sold his stock in trade with a covenant not to engage in a similar business in the locality? Did it mean that every regulation of a chamber of commerce or trade association, no matter how reasonable, which limited the manner in which an interstate trade could be transacted by its members, and any trade union rule which affected interstate commerce, had suddenly become an indictable conspiracy? Yet if Congress meant to prohibit only unreasonable restraints, why in the name of good sense did they not say so? Surely the eminent lawyers in the Senate were familiar with the common law distinctions as to restraint of trade.

The explanation, of course, lay in the fact which I have already adverted to, that legislative draftsmen cannot always confine their attention exclusively to legal considerations. Congress was using words to which the precedents ascribed a fairly precise though somewhat irrelevant meaning, but it was using them in a sense which was to be popularly taken to refer to the great trusts and combinations from which the people were understood to be suffering. Was Congress to admit that a trust or monopoly could ever be reasonable? Such a thing was politically impossible. It violated the axiom that all trusts and monopolies were reprehensible. Any qualification or definition or exception tended to weaken the apparently

sweeping and inclusive range of the statute, and hence its rhetorical value.

In the Standard Oil and Tobacco cases the Supreme Court took an important although a limited step toward supplying the legal deficiencies of the text of the Sherman Act. The court announced that certain common law analogies should guide the judiciary in determining whether or not a particular contract or combination was in restraint of trade or was an attempt at monopolization, in the sense in which those words were used in the statute. The test was that applied by the common law to contracts restraining the exercise of a profession or trade, namely, the reasonableness of the scope and terms of the restraint from the point of view of the parties and of the public. It may be conceded that the test is not of itself susceptible of precise and definite application. A court may have good reasons for concluding that it is not proper for a physician to covenant not to practice his profession within 100 miles of the city of York, but they are not very helpful in determining whether or not a consolidation of 40 per cent of the steel industry in the United States is reasonable. The common law analogies do not go far in indicating the principles to be applied in the solution of the modern trust problem. At most they suggest the frame of mind into which the judges should put themselves in arriving at a decision.

The promulgation of the "rule of reason" did, however, bring to the forefront a fundamental question of legislative policy. The Supreme Court had announced, what was doubtless fully appreciated by the legislators of 1890, that the text of the Sherman Act contained no definite rule of decision, but contemplated that the courts themselves, with the aid of common law analogies, should evolve their own rules and precedents as the cases came before them for decision. Was it in the public interest that such a sweeping power, in matters of such vital con-

cern, should be entrusted to a judiciary appointed for life and carefully shielded from the influence of public opinion? To put the matter differently, was it possible to develop, out of the storehouse of the common law, a set of legal principles capable of precise application, by which judges could solve all problems of restraint of trade and monopoly by logic and precedent? Or must the decision depend in each case upon the judge's personal notions of expediency and economic policy? At bottom, this was the issue between those who retained their faith in the Sherman Law as interpreted by the Supreme Court, and those who thought that the law should be amended or supplemented by new legislation.

We are fortunate in having, from the pen of the present Chief Justice of the United States, a contemporary defense of the Sherman Law which reveals clearly the issue which the legislators of 1914 were facing. Mr. Taft's book, *The Anti-Trust Act and the Supreme Court,* was published in 1914, and was doubtless suggested by the prospect of new anti-trust legislation at the current session of Congress. The main thesis of the book was that the Sherman Law, read in the light of common law analogies, contained principles capable of logical formulation and precise application, and afforded a certain guide to the judges charged with administering the law, so that supplementary legislation was unnecessary and might even be harmful. As the argument goes to the root of the justification for the new legislation, it is worth examining with some care.

At common law, Mr. Taft pointed out, a contract entered into with the sole object of restraining the exercise of a trade or profession was void. If a tailor should persuade an obnoxious competitor, in a moment of weakness, to sign a bond to cease exercising his trade, the courts would refuse to enforce the bond, for it is against public policy that a citizen should be deprived of his

means of livelihood, or that the public should be deprived of the advantages of competition. But if a tailor, intending to retire, sells his business, with an undertaking not to exercise his trade in competition with the buyer, the agreement is lawful. There is a restraint, but it is merely incidental. The main purpose of the contract is to secure a fair price for the business sold, and the restraint is only to prevent the vendor by subsequent competition from derogating from the value of his grant. If, however, the restraint is broader than is reasonably necessary for the purpose, it is void, for it then becomes apparent that the purpose of the buyer in exacting the restraint was not merely to protect the property purchased, but to exclude the seller from a legitimate occupation or to deprive the public of his services.

By the mere application of the accepted judicial technique of analogical reasoning this common law distinction could, in Mr. Taft's view, be applied to the decision of the problems of combination and monopoly encountered in the administration of the Sherman Law. Any agreement between two or more competing business concerns, of which the sole purpose is to restrict competition, say by fixing minimum prices, or apportioning territory, or restricting output, is unlawful at common law and indictable under the Sherman Act. It makes no difference how laudable the motive, or how beneficial the result; if restraint alone, whether partial or general, is the sole purpose of the contract, it is void. If, however, the restraint upon competition accompanies a transfer of property, or other legitimate business transaction, it becomes necessary to consider the scope and purpose of the restraint. Every combination of competitors restrains, because it eliminates, the mutual competition of the combining units, but every such combination is not illegal. If the purpose is to promote economy and efficiency, the combination is legal; but if the real purpose is to elimi-

nate competition, as a step toward the control of the market, the transaction is illegal. In substance, this was Chief Justice White's view of the rule of reason at common law, which treated as illegal those contracts "which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."[9]

The actual decisions of the Supreme Court, in Mr. Taft's view, were in harmony with this principle. In the traffic association cases,[10] the Addyston Pipe case,[11] the Nash case,[12] and the Bathtub case[13] there were agreements between nominally independent competitors, fixing prices, or otherwise restricting the scope of competition. In these cases restraint was the sole purpose, and the agreements or combinations were illegal. In the Northern Securities case,[14] there was a formal transfer of securities to a holding company, but the real purpose was to avoid competition and monopolize transportation. In the Standard Oil and Tobacco cases[15] there were combinations of

[9] Standard Oil Co. *v.* U.S., 221 U.S. 1, 58.

[10] U.S. *v.* Trans-Missouri Freight Association, 166 U.S. 290; U.S. *v.* Joint Traffic Association, 171 U.S. 93.

[11] U.S. *v.* Addyston Pipe & Steel Co., 175 U.S. 211.

[12] Nash *v.* U.S., 229 U.S. 373.

[13] Sanitary Manufacturing Co. *v.* U.S., 226 U.S. 20.

[14] Northern Securities Co. *v.* U.S., 193 U.S. 197.

[15] *Supra,* p. 4.

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