

CHAPTER I  
INTRODUCTION

On July 2, 1890, President Benjamin Harrison signed into law what has become known as the Sherman Act. Section 1 of the act succinctly states that “[e]very 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 declared to be illegal.”<sup>1</sup> This chapter will consider what Congress meant by these words and then examine early decisions by the Supreme Court that provide further insight into what Congress sought to regulate through Section 1.

**A. The Text and Background of Section 1**

***1. Why Congress Determined That a Federal Statute Was Needed***

Following the Civil War, the country was poised for economic growth and expansion of national transportation and communication networks. Firms rapidly moved into new geographic markets and took advantage of resulting increased economies of scale.<sup>2</sup> They developed increasingly sophisticated measures for control of industrial organizations. Standard Oil Company—which had control of the majority of the country’s petroleum refining assets—formed the first industrial trust in 1879.<sup>3</sup> The Standard Oil Trust was reorganized in 1882, and it was this organization that served as a model for creation of trusts by other firms.<sup>4</sup>

Under the reorganized trust, all stockholders of the corporations and some limited partnerships in which John D. Rockefeller had an interest or

- 
1. An Act to Protect Trade & Commerce Against Unlawful Restraints & Monopolies, § 1, ch. 647, 26 Stat. 209 (1890) (current version codified at 15 U.S.C. § 1).
  2. See, e.g., James May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257, 283 (1989).
  3. See, e.g., HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORGANIZATION OF AN AMERICAN TRADITION 76-77 (1955).
  4. See *id.* at 76-77, 96.

control, as well as forty individuals, ceded their ownership to a board of trustees in return for trust certificates issued by the trustees.<sup>5</sup> The trustees exercised complete working control over the business interests of the trust.<sup>6</sup> This form of organization was in short order adopted by firms controlling other industries, including cotton oil production, sugar refining, whiskey production and lead manufacturing.<sup>7</sup>

Public denunciation of the new legal device surfaced quickly. Popular opinion equated trusts with government-created monopolies, and outspoken antitrust advocates condemned trusts for driving out competitors by lowering prices, victimizing consumers by raising prices, defrauding investors by watering stocks, putting laborers out of work by closing down plants, and other abuses.<sup>8</sup>

Political parties recognized the potential for gaining popular support in the upcoming 1888 presidential election by denouncing the trusts that “the public found to be a growing and intolerable evil.”<sup>9</sup> The Republican Party mounted a condemnation of trusts and recommended in its 1888 convention “such legislation as will prevent the execution of all schemes to oppress the people by undue charges on their supplies, or by unjust rates for the transportation of their products to market.”<sup>10</sup> After Republican candidate Benjamin Harrison won the Presidency and the Republicans gained control of Congress, the party needed to deliver on the campaign promise to eradicate trusts.

Meanwhile, individual states had begun to take action against the largest industrial combinations. Prior to the passage of the Sherman Act, several states successfully secured forfeiture of corporate charters or other penalties against large trusts or combinations.<sup>11</sup> These initiatives were

---

5. *Id.* at 77.

6. *Id.*

7. *See id.* at 78-79. For a discussion of the principal varieties of trusts developed for industrial use at this time, see generally HERBERT HOVENKAMP, *ENTERPRISE & AMERICAN LAW, 1836-1937*, 249-67 (1991).

8. *See* William L. Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221, 235 (1956).

9. *Id.* at 223 (quoting WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 2 (1914)).

10. *Id.* at 248.

11. *See, e.g.*, THORELLI, *supra* note 3, at 79-82 (discussing enforcement initiatives in Louisiana, California, New York, Nebraska and Ohio). For a summary of state antitrust enforcement activity prior to the passage of the Sherman Act, see generally James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State*

limited to challenging compliance with an individual state's corporate or partnership laws, however, and they were largely ineffective in curtailing abuses by business combinations with regional or national activities.

Against this backdrop, Congress attempted to respond to public and political pressures to control trusts while at the same time accommodating the prevailing economic view that a productive economy and trusts could coexist as long as trusts did not unreasonably restrict trade.<sup>12</sup>

## 2. *Legislative Background of Section 1*

At the outset of the first session of the 51st Congress, Senator John Sherman, a Republican from Ohio, introduced a bill, designated S. 1. That legislation, in altered form, would become the Sherman Act.

As introduced by Senator Sherman, the first section of S. 1 contained no direct reference to any restraint of trade. Instead, it proscribed "all arrangements, contracts, agreements, trusts, or combinations . . . made with a view or which tend to prevent full and free competition . . . and all arrangements, contracts, agreements, trusts, or combinations . . . designed or which tend to advance the cost [of articles] to the consumer . . ." <sup>13</sup> The

---

*Antitrust Law, 1880-1918*, 135 U. PA. L. REV. 495, 499-501, 510-14 (1987).

12. *See generally* Letwin, *supra* note 8, at 235-40 (describing contemporary economic literature and formation of the American Economic Association).

13. The full text of Section 1, S. 1, as introduced, provided:

SEC. 1. That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view or which tend to prevent full and free competition in the importation, transportation, or sale of articles imported into the United States, or in the production, manufacture, or sale of articles of domestic growth or production, or domestic raw material that competes with any similar article upon which a duty is levied by the United States, or which shall be transported from one State or Territory to another, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.

The text is reprinted at 21 Cong. Rec. 2599 (1890), and in LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAW AND RELATED STATUTES, 89-

bill, according to Senator Sherman, did “not announce a new principle of law, but applie[d] old and well recognized principles of the common law to the complicated jurisdiction of our State and Federal Government. Similar contracts in any State in the Union [were], by common or statute law, null and void.”<sup>14</sup>

The Judiciary Committee simplified the text of Section 1 to provide only that contracts, combinations, or conspiracies “in restraint of trade or commerce” would be illegal. Members of the committee offered no specific explanation during debates for departure from Senator Sherman’s

---

90 (Earl W. Kintner, ed. 1978). The above quotation follows the punctuation in the Congressional Record.

14. 21 CONG. REC. 2456 (1890). Senator Sherman repeatedly urged that the bill was designed to give the federal courts jurisdiction only over conduct already proscribed at common law:

It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination . . . .

. . . .

Now, Mr. President, what is this bill? A remedial statute to enforce by civil process in the courts of the United States the common law against monopolies . . . .

. . . .

As I said in my argument—and I do not want to repeat it over again—this bill is simply an attempt to extend the jurisdiction of the courts of the United States, to declare unlawful contracts which have been held unlawful in every state of the Union where the subject has been brought before the courts; nothing more, nothing less.

*Id.* at 2457, 2461, 2563. This view of the bill was shared by Senator Hoar of Massachusetts, a senior member of the Judiciary Committee: “[Nothing is] prohibited in this bill which is not prohibited by the general common law, as [Senator Platt of Connecticut] and I learned it in our studies, in regard to such things as are covered by the English common law.” *Id.* at 2729. He, along with Senators Edmunds of Vermont and George of Mississippi, were the authors of the final version of the bill. *See* Letwin, *supra* note 8, at 254.

formulation of Section 1, but Senator George Hoar of Massachusetts declared that the Committee’s general objective was to “affirm[] the old doctrine of the common law in regard to all interstate and international commercial transactions, and . . . clothe[] the United States courts with authority to enforce that doctrine by injunction. We have put in also a grave penalty.”<sup>15</sup> He also confirmed that the terms of S. 1, as amended, were to draw their content from the common law.<sup>16</sup>

### 3. *Common Law and the Content of Section 1*

Section 1 of S. 1 stood on terms “well known to the law already.”<sup>17</sup> The legislative intent underlying Section 1 can, thus, be ascertained in large part from consideration of the common law meanings of “contract, combination, or conspiracy” in “restraint of trade” at the time of passage.<sup>18</sup> Indeed, the Supreme Court would later explicitly acknowledge the applicability of the common law definitions to Section 1 in *Standard Oil Co. v. United States*,<sup>19</sup> albeit more than 20 years after passage of the act.

Two separate and distinct common law doctrines underlie the operative language of Section 1: (1) contracts in restraint of trade; and (2) conspiracies in restraint of trade. In reformulating Section 1 to include “terms that were well known to the law already,”<sup>20</sup> the Judiciary Committee rejected the “arrangements, contracts, agreements, trusts, or combinations” language of Senator Sherman’s version of Section 1 in favor of the simpler “contracts, combinations, and conspiracies.” Contracts and conspiracies in restraint of trade were common law concepts

---

15. 21 CONG. REC. 3146 (1890).

16. *Id.* at 3152 (“The great thing that this bill does . . . is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and inter-state commerce in the United States.”).

17. *Id.* at 3148 (remarks of Sen. Edmunds). Sen. Edmunds was chairman of the Senate Judiciary Committee.

18. *See Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978) (“The legislative history makes it perfectly clear that it [Congress] expected the courts to give shape to the statute’s broad mandate by drawing on common-law tradition.” (footnote omitted)); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 498 (1940) (“This Court has . . . repeatedly recognized that the restraints at which the Sherman law is aimed, and which are described by its terms are only those which are comparable to restraints deemed illegal at common law . . .”).

19. 221 U.S. 1 (1911).

20. 21 CONG. REC. 3148 (1890) (remarks of Sen. Edmunds).

with specific meanings; combinations were a contractual arrangement comparatively new to the law but equally well understood.

a. Contracts in Restraint of Trade

At the time the Sherman Act was enacted, a contract in general restraint of trade was unenforceable at common law.<sup>21</sup> A contract imposing a partial restraint was enforceable if the restraint was not “larger than is required for the necessary protection of the party with whom the contract is made.”<sup>22</sup> Contracts with partial restraints were typically used (1) in connection with the sale of business assets to limit the seller’s ability to compete against the buyer to impair or destroy the value of the assets acquired, or (2) to prevent an employee from competing unfairly against a former employer.<sup>23</sup> Notably, case law around the time of the passage of the Sherman Act applied a test of reasonableness to partial restraints.<sup>24</sup>

Moreover, contracts in restraint of trade were not indictable offenses. Even if a contract were “general” or otherwise unreasonable, the only consequence was that the parties could not call upon the courts for assistance in enforcing it.<sup>25</sup> There was no criminal liability for any such

- 
21. *See, e.g.*, *Oregon S.S. Navigation Co. v. Winsor*, 87 U.S. (20 Wall.) 64, 66 (1873) (“it is a well-settled rule of law that an agreement in general restraint of trade is illegal and void”).
  22. *Id.* at 67 (footnote omitted).
  23. *See generally* WILLIAM HOWARD TAFT, *THE ANTI-TRUST ACT AND THE SUPREME COURT* 8-11 (1914) (discussing enforceable restraints of trade prior to passage of Sherman Act); Albert M. Kales, *Contracts to Refrain from Doing Business or from Entering or Carrying on an Occupation*, 31 HARV. L. REV. 193 (1917) (discussing common law authorities). For surveys of contracts in restraint of trade and their enforceability at common law prior to passage of the Sherman Act, see also Harlan M. Blake, *Employee Agreements not to Compete*, 73 HARV. L. REV. 625, 629-42 (1960); Amasa M. Eaton, *On Contracts in Restraint of Trade*, 4 HARV. L. REV. 128, 129-34 (1890); James M. Kerr, *Contracts in Restraint of Trade*, 22 AM. L. REV. 873, 880-88 (1888).
  24. *See, e.g.*, *Diamond Match Co. v. Roeber*, 106 N.Y. 473, 486, 13 N.E. 419, 423 (1887) (“We are of opinion that the covenant, being supported by a good consideration, and constituting a partial and not a general restraint, and being, in view of the circumstances disclosed, reasonable, is valid and not void.”).
  25. *See generally* TAFT, *supra* note 23, at 11-21; THORELLI, *supra* note 3, at 17-21; Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 VA. L. REV. 759, 771-83 (1955).

contract,<sup>26</sup> and no private cause of action for any third party injured as a result of performance of the contract.<sup>27</sup>

b. Combinations in Restraint of Trade

Combinations in restraint of trade were arrangements among firms, implemented by contract, that aimed at, or had the effect of, raising prices or otherwise eliminating competition. At the time the Sherman Act was enacted, state courts already had many opportunities to evaluate the legality of these types of combinations. For example, *People v. North River Sugar Refining Co.*,<sup>28</sup> characterized as a “leading case” by Senator Sherman during floor debate,<sup>29</sup> upheld an order requiring the dissolution of a company because “an unlawful combination had been entered into by the defendant and these other companies to control the production and sale of sugar in the country.”<sup>30</sup> A common theme of cases like *North River* was the principle that an agreement is illegal if it constitutes a combination among producers of “necessities” through which supply of the necessities is curtailed and their prices to consumers artificially elevated.<sup>31</sup> The

- 
26. See, e.g., *State ex rel. Monnett v. Buckeye Pipe-Line Co.*, 61 Ohio St. 520, 546, 56 N.E. 464, 467 (1900) (Ohio antitrust statute, the Valentine Act, changed the law by creating criminal liability for a combination in restraint of trade); TAFT, *supra* note 23, at 20-21.
27. See, e.g., *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497 (1940) (unreasonable restraints of trade “were not penalized and gave rise to no actionable wrong”); *Mogul S.S. Co. v. McGregor, Gow & Co.*, 21 Q.B.D. 544, 554 (1888), *aff’d*, 23 Q.B.D. 598, 632 (C.A. 1889), *aff’d*, [1892] A.C. 25 (1891); THORELLI, *supra* note 3, at 34; Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 IOWA L. REV. 1019, 1030-44, 1048-51 (1989).
28. 61 N.Y. Sup. Ct. 354, 7 N.Y.S. 406 (1889).
29. 21 CONG. REC. 2459 (1890).
30. 61 N.Y. Sup. Ct. at 375, 7 N.Y.S. at 410. The court in *North River* also observed that decisions of courts in other states supported the conclusion that the combination was void and the members’ respective contractual obligations unenforceable under the common law. *Id.* at 380-82, 7 N.Y.S. at 412-13; see also *India Bagging Ass’n v. B. Kock & Co.*, 14 La. Ann. 168, 169 (1859) (holding that an agreement among suppliers of India cotton bagging not to sell without the consent of the majority of the members was unenforceable because it was “palpably and unequivocally a combination in restraint of trade”).
31. 61 N.Y. Sup. Ct. at 383, 7 N.Y.S. at 413. For other significant cases dealing with the common law of combinations in restraint of trade, see Arnot v.

preponderance of cases challenging combinations in restraint of trade decided prior to the Sherman Act arose out of agreements, such as these, among producers or suppliers of essential commodities, such as sugar, cotton, friction matches, or petroleum.<sup>32</sup>

c. Conspiracies in Restraint of Trade

By the date of passage of the Sherman Act, conspiracy was well defined at common law.<sup>33</sup> An 1842 decision by the Massachusetts Supreme Judicial Court, *Commonwealth v. Hunt*,<sup>34</sup> is illustrative of the operation of common law conspiracy doctrines as applied to restraints of trade. In that case, the court dismissed a criminal complaint that alleged that an association of boot makers had entered into a criminal agreement not to work for any manufacturer who employed non-association boot makers. In reaching this result, the Massachusetts court applied the generally accepted definition of conspiracy: “a combination of two or more persons [who], by some concerted action, [seek] to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.”<sup>35</sup> Alleging harm to competitors was insufficient, the court found, because the object of the association, competition, was not unlawful, and the indictment did not charge any unlawful means by which that object was to be accomplished.<sup>36</sup>

---

Pittston & Elmira Coal Co., 68 N.Y. 558, 565-67 (1877); *Craft v. McConoughy*, 79 Ill. 346, 350-51 (1875); and *Richardson v. Buhl*, 77 Mich. 632, 658, 43 N.W. 1102, 1110 (1889). Senator Sherman discussed these decisions in floor debate on March 21, 1890. 21 CONG. REC. 2458 (1890).

32. See generally THORELLI, *supra* note 3, at 40-50 (discussing cases); Hovenkamp, *supra* note 27, at 1037-38, 1049-52 (noting judicial focus on articles of “prime necessity”); Letwin, *supra* note 8, at 244-46.
33. See generally Benjamin F. Pollack, *Common Law Conspiracy*, 35 GEO. L.J. 328, 338-52 (1947). For discussions of the evolution of conspiracy from the ancient writ of conspiracy, see *State v. Buchanan*, 5 H. & J. 317, 333-59 (Md. 1821); and *Savile v. Roberts*, 91 Eng. Rep. 1147, 1149-51 (1737).
34. 45 Mass. (4 Met.) 111 (1842).
35. *Id.* at 123.
36. *Id.* at 134 (“We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and