Antitrust

ANTITRUST STATUTES

THE COMMON LAW AND CONTRACTS IN RESTRAINT OF TRADE

Earliest common law cases held that any contract in restraint of trade (my agreeing not to compete against you) was void per se, i.e., a nullity by definition. You could make the agreement, but you could not run to the court to enforce the agreement. The rule was originally formulated to protect people from themselves from agreeing to not compete thus making them a public charge.

Later common law cases held that certain contracts in restraint of trade were enforceable. Specifically, contracts in restraint of trade would be enforced if they were 1) ancillary to the core agreement (sale of a bakery); 2) partial (limited as to time, scope, and locality); and 3) reasonable (in the interest of the public and the parties). The reasonableness requirement is strongly carried over to modern cases. These rules are still enforced today pursuant to the sale of business or employment contracts (i.e., non-compete clauses).

Originally monopolies were granted by the King as an exclusive right to deal in certain goods. Also prevalent were guild restrictions. The first case that squarely dealt with monopolies was Darcy v. Allein, 77 Eng. Rep. 1260 (1602) where an English judge held that Queen Elizabeth I’s grant of an exclusive right to import playing cards was held invalid as against the common law. There was a royal grant of an exclusive import franchise to Bowes (who sold to Darcy) and a prohibition against domestic manufacture of cards. Presumably the public interest argument made by Bowes in favor of the franchise and monopoly was that card manufacturing was a waste of resources and the ne’er-do-well French should be allowed to spoil their economy in this exercise. The English court ruled against the franchise and, apparently, against royal monopolies in general. There is some vague reference to acts of Parliament supporting this judicial opinion.

What is important to know is the general background of a long history of common law responses to the tendency to monopolize. Also important to know is that the Statutes when enacted and first interpreted, were done so upon the backdrop of three hundred years of reported cases. Other elements of common law that set this backdrop are that predatory pricing and practices were ok, that is, not tortuous if conducted without force or fraud.

AMERICAN ANTITRUST STATUTES

Two factors predominately led to the enactment of the Antitrust statutes—the formation of large national trusts and the actions of the railroads. First, in the late 1800’s America was changing from agrarian to industrial. In addition, farming became more efficient and the cost of transportation was becoming more and more a part of the price of goods. RRs would use the need for transportation of farm products to charge high prices that could subsidize competitive routes. States responded to popular pressure and attempted to regulate RRs. These statutes were quickly trounced by the RRs on Constitutional Law grounds.

In addition to the actions of the RRs, many industries would form trusts in order to allegedly control output and prices. Examples were the Standard Oil Trust, American Cotton Trust, National Linseed Oil Trust, Sugar Trust, National Lead Trust and the Whiskey Trust. These factors combined to create a public swelling of support to protect the poor consumer from the ruthless, greedy capital forces. In the election of 1888, both parties had antimonopoly planks in their platforms.

The main statutes are the Sherman Act (1890) and the Clayton Act (1914).
SHERMAN ACT (1890)

Section 1 makes unlawful “every contract, combination, or conspiracy in restraint of trade” in interstate or foreign commerce. Section 2 prohibits monopolizing, attempts to monopolize, and combinations or conspiracies to monopolize any part of interstate or foreign commerce. Basics of a cause of action are: 1) a contract, combination, or conspiracy; 2) in restraint of trade; and 3) affecting interstate commerce. The commerce requirement is largely irrelevant. See, *Wickard v. Filburn*, S.Ct., where the Court held that wheat, grown on a small farm, for personal consumption, affects interstate commerce because the aggregate demand for wheat on a national level is diminished.

The maximum fine in the original Sherman Act was $5000. It was raised to $50,000 in 1955 and to $1,000,000 for corporations and $100,000 for other persons in 1974. The maximum term of imprisonment was set at one year in 1890; it was increased to three years in 1974.

“Sec. 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 declared to be illegal.

Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sec. 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 felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.”

CLAYTON ACT (1914)

The Clayton Act was passed in response to judicial over and under interpretation of the Sherman Act. See, *U.S. v. E.C. Knight*, where the Court held that the Sherman Act did not apply to the manufacture of commodities thus upholding a Sugar Trust; and *U.S. v. Trans-Missouri Freight Association*, where the Court held that every restraint of trade was illegal, regardless of the economic benefits of the arrangement. The Clayton Act and the Federal Trade Commission Act were passed to give businessmen some guidance on what was illegal.

The Clayton Act, together with the Federal Trade Commission Act, was passed in 1914 in the wake of the Supreme Court's decision in the govt.'s case against the Standard Oil Company. Although the Court held that Standard Oil had violated the Sherman Act, the vagueness of the Court's opinion created considerable disquiet (among both supporters and antagonists of anti-trust policy) concerning the scope and application of the Act. The desire for a more precise enumeration of antitrust violations expressed itself in the singling out in the original Clayton Act of four practices for specific regulation (price discrimination, section 2; tying and exclusive-dealing contracts, section 3; stock acquisitions, section 7; and interlocking directorates, section 8) and in the creation of a commission, the Federal Trade Commission, that was expected to enumerate additional specific restraints by interpretation of section 5 of the Federal Trade Commission Act, which forbade "unfair methods of competition."
Section 6 of the Clayton Act, exempting labor from the anti-trust laws, is noteworthy. The main purpose of labor unions is to raise wages by suppressing competition among workers, and before 1914 the Sherman Act had been applied to union activities, notably in connection with the famous Pullman strike of 1894. The precise scope of the labor exemption from the antitrust laws involves difficult questions, but this interesting subject is not developed in detail here.

Section 3 prohibits sales on the condition that the buyer not deal with competitors of the seller where the effect may be substantially lessen competition or tend to create a monopoly in any line of commerce. Includes tie-in sales, exclusive dealing, and requirements contracts.

Section 4 allows private enforcement of the Antitrust laws with treble damages.

Section 7—Mergers—prohibits acquisitions or mergers where the effect “may be to substantially lessen competition or tend to create a monopoly in any line of commerce in any section of the country.

Section 8—Director Restrictions—prohibits one person from being a director of competing businesses.

**FTC ACT (1914)**

The FTC Act created the FTC, with broad powers to enforce the Antitrust laws. FTC has exclusive jurisdiction to enforce the FTC Act and concurrent jurisdiction to enforce Antitrust laws. Private parties have no standing to enforce the FTC laws. Section 5 of the FTC Act prohibits "unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."

The original Act forbade only "unfair methods of competition." The prohibition of "unfair or deceptive acts or practices" was added by amendment in 1938, after the Commission had long held that the term "unfair methods of competition" included false advertising and other deceptive practices as well as monopolistic practices. The question of the precise scope of the term "unfair methods of competition" as applied to anticompetitive practices will recur from time to time throughout the book. Briefly, the term has been interpreted to forbid practices unlawful under the Sherman and Clayton Acts, and then some.

**OTHER STATUTES**

There have been two very important substantive amendments to the Clayton Act as well as a handful of minor revisions. The Robinson-Patman Act of 1936 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. In 1936 the Robinson-Patman Act overhauled the price-discrimination provision of the original act (section 2), creating the complex provision, which is not generally highly regarded by economists. Robinson-Patman Act (1936) prevents sellers from discriminating among buyers based on price in certain circumstances. This is largely unenforced. The prima-facie case is: 1) engaged in commerce; 2) to discriminate in price between different purchasers; 3) of commodities of like grade and quality; 4) where the effect may be to substantially lessen competition; and 5) to injure, destroy or prevent competition. Defenses are that the effect is de minimis, cost differential due to quantity or other factors, changing conditions, or meeting competition.

In 1950 section 7 of the original act was amended to make it reach mergers and other asset acquisitions as well as stock acquisitions.

Hart-Scott-Rodino (1976)—The DOJ’s investigative power is increased, mergers require-clearance, and a waiting period before the mergers in certain circumstances. State Attorneys general may sue in *parens patriae* under the Acts.
Three important procedural changes were made in the Clayton Act during 1976. The first change, which appears as sections 4C-4H, was enacted in response to Hawaii v. Standard Oil Co., 405 U.S. 251, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). Hawaii held that states could not bring actions on behalf of their residents, either for particular damages suffered by the residents or for harm to the state's economy. The 1976 amendment establishes an elaborate procedure for the institution of suits and the distribution of any recovery.

The third addition is section 7A, which requires firms that acquire the voting securities of other firms to notify the Gov't before the acquisition is consummated. The acquiring firm must provide detailed information about the nature and market shares of the enterprises. Regulations have been promulgated that define the submission requirements with great particularity. Although antitrust officials can (and often do) shorten the mandatory wait between notice and consummation, the provision affords time for the Gov't to bring suit to halt an acquisition before it takes place. This provision grew out of concerns that the remedy of divestiture of assets after acquisition was not satisfactory.

Several more procedural changes were made in September 1980. Congress amended all three damages provisions (sections 4, 4A, and 4C(a)(2)) to allow courts to award prejudgment interest against defendants that multiply the issues or act in other dilatory ways. The provisions (which are not reproduced) essentially create a penalty for bad faith litigation. (At the same time Congress amended 28 U.S.C.A. 1927 to allow a court to require attorneys personally to pay the costs and counsel fees created by dilatory or vexatious conduct.)

Finally, the 1980 statute revised section 7 to refer generally to "persons;" it had been limited to acquisitions by (or from) corporations. It also inserted in section 7 an "affecting commerce" jurisdictional provision. The changes to section 7 apply only to mergers after September 1980.

ECONOMIC ANALYSIS OF ANTITRUST

WAVES OF MERGERS IN AMERICAN HISTORY

There have been three or four waves of mergers that have swept over American industry.

1. 1887-1904: Merger for Monopoly
2. 1920s: Merger for Oligopoly
3. 1960s: Merger for Conglomeration
4. 1980-90s: Merger for Vertical Control

Merger is a term commonly used to refer to a situation where two stock corporations join together and become one by means of a stock swap. Shares of the target company are traded in for shares of the buyer. It does not necessarily make any sense to call these buyers and targets if the two companies are joining together on almost equal terms. The main issue is whether the management of the two companies is integrated or whether most of the management of one is dismissed. More generally, merger can be used to mean any form of corporation acquisition.

In the Merger for Monopoly wave, there was a large amount of corporate consolidation. Somewhere around 15 percent of all the assets of the country were affected in 1900 alone. In many cases 5 or more firms would join together. The explanation does seem to be that monopoly was the motive. In the latter half of the 19th century, there were many price fixing arrangements and trusts entered into by corporations. The Sherman Act passed in 1890 was intended to stop
this. It outlawed price fixing. Until the 1904 Northern Securities case, mergers were looked upon as a way around the Sherman Act’s prohibition of price fixing. After 1904, the first merger wave stopped.

The second merger wave is called Merger for Oligopoly somewhat tongue in cheek. The consolidations of this period were more associated with smaller firms across the industries than the largest. Also there were many mergers in banking and public utilities. The magnitude of the amount of assets involved was much lower.

In the 1960s, a new kind of corporate consolidation occurred. It was called the tender offer. The stock holders of a corporation control the business. Specifically, the stockholders have the power to hire and fire the top manager(s). Tender offers are a way to capture a company by direct appeal to the stockholders.

A tender offer is a contractual solicitation made directly to each shareholder of a corporation. Usually, the solicitation is printed in the newspaper and in many instances, the bidder gets the stock holder list and sends a solicitation directly to each shareholder. The offer is to buy each holders shares at a stated price. Tender offers are a quick and effective way to acquire all or a large portion of the stock of a corporation. If all or a substantial majority of stock of a company is acquired, then the new owner of the shares has the power to dictate the management of the company.

The tender offer craze of the 1960s led commentators to wonder what was going on. One observer, Henry Manne, suggested that tender offers were a way for the market to purge a corporation of its bad management.

Federal and state laws that significantly restrained the way that tender offers could be executed were passed in the late 60s and the merger wave died out.

In the 1980s and continuing even until today, another wave of mergers and corporate acquisitions have occurred. The early events were called bust up takeovers. They were generally tender offers. They were fueled by the new medium invented by financier Michael Milken called junk bonds. Bust up takeovers were acquisitions by individuals and investment groups in which the object was to take over a corporation and then sell off the parts. Goodyear was a target of this kind of takeover. So was the Singer company.

In spite of the bust up nature of the corporate acquisitions of the early part of this period there was a continued interest in actual corporate consolidation. Mergers continued through the 90s moving from one industry to the next. Banking and telecommunications have been favorites. This is probably because of the advances in computer technologies and changes in government regulation both of which significantly affect the structure of the firms in these industries. The mergers that we have seen in the telecomm industry recently seem most reasonably explained on the basis of integration that is necessary to allow for the efficient bundling of various kinds of telecomm services and pricing these in ways that are attractive to consumers.

CORPORATE CONCENTRATION

The question raised by merger waves is whether the increased consolidation of corporate America causes it to be more monopolized. We need to find a way to measure monopolization. Generally the approach has been to measure profits and then to determine if increased concentration has led to increased profits.

The first measure of profits is called the Lerner Index. The common parlance labels this Price-Cost Margins. PCM is a very bad measure of monopoly profits.

Another measure is Tobin’s q. This is a good index, but very difficult to measure. Tobin’s q is the ratio of the market value of the firm to the replacement cost of the firm’s productive
capacity. Tobin’s q should be equal to 1 for competitive firms. If it is greater than 1, it means that the market value of the assets (market value of stock plus the face value of bonds) is greater than the amount necessary to replicate the productive capacity. This means that the firm is either real lucky or it has monopoly power. Tobin’s q can bounce around 1 in the short run, but can only be greater than 1 in the longer term if there are monopoly restrictions on entry of firms into the business. However, the problem with Tobin’s q is that it is nearly impossible to measure the replacement cost of assets. Often the replacement cost of assets is substituted for by the book value of assets.

The measure of profit that is normally used is Return on Assets (ROA). This called the Bain Index in your book. It is just operating income less taxes divided by the book value of assets (usually the depreciated value of assets). ROA is a flow value that measures much the same thing as the stock concept in the bastard version of Tobin’s q.

The empirical fact to confront is that there is a high correlation between ROA and concentration. Bain was the first to present this result. It has stood up to different measurement. Brozen and then Peltzman argued that the correlation between concentration and profits was not necessarily causal. That is, efficiency could be causing both concentration and profits such that the relationship between them was not the result of monopolization. Peltzman’s empirical work seems to confirm this.

Demsetz went one step further. He argued that if profits were the result of concentration that allowed for monopoly, then there should be no relationship between profits and firm size. That is, if monopoly, which resulted from concentration, were driving profits, the small firms in the industry should benefit as well as the big firms, indeed, maybe more. On the other hand, if efficiency drives concentration and profits, then the efficient firms are the ones that get big, profitable, and leave the little guys behind. This is latter his what he found.

**MONOPOLY BY MERGER**

*or “The Dominant Firm and the Inverted Umbrella”*

One might reasonably ask whether it is possible to create a monopoly by merger. That is what are the gains and how can they be captured by the existing firms and promoters of the monopoly. This question is especially pithy if, in fact, there are no barriers to the entry of other firms.

Barriers to entry is a tricky issue. What is a barrier to entry. Surely, to begin production in any industry takes some amount of investment and along with investment the requisite knowledge to make equipment, resources, and people productive. If nothing else, there is a barrier to entry in the amount of time necessary to build productive facilities and get them up and running smoothly.

One of the requisites of a competitive industry is that there is free entry of new firms. However, it is expected that all firms in all industries face startup costs. To the extent that these retard the entry of new firms at least for some period of time there may be the potential to earn excess profits by merging together the productive capacity of an industry.

This is the claim about the experience of the United States Steel Company. US Steel chartered on February 25, 1901. It was a corporate merger of nine steel companies: Carnegie Steel, National Steel, National Tube, American Steel and Wire, American Sheet Steel, American Hoop Steel, American Tinplate, Federal Steel, and American Bridge Company.

In 1902 it had 168,000 workers, $561m in sales, $140 m in profits, and $1.4 b in capital value. The capital value of the companies prior to the merger was $700m. US Steel accounted for approximately 6.8% of GNP in 1902.
Two questions are raised by the argument that US Steel was a merger for monopoly:
   a) Why merge?
   b) Was it successful?

WHY MERGE?

The alternative to merger is collusion. However, merger is superior to collusion on several margins. One is that once the firm is created by merger, there is no problem policing the monopoly behavior of the participants. While collusion is ok in principle, it is hard to effect in fact. Indeed, when the US Sup Ct reviewed the antitrust case against US Steel, it leaned in favor of the argument that US Steel had essentially been unable to cartelize the rest of the industry and thereby inflict significant monopoly prices on the economy.

The other appealing aspect of monopolization by merger is that merger allows two things to happen. First, the monopoly partners are formally joined in their restrictive agreement in a way that the asset owners can be paid their individual shares of the capitalized value of the monopoly. Second, the promoter of the monopoly can also be compensated. In the case of US Steel, this was effected by means of the writing up of the assets of the US Steel components from $700m to $1.4b. Also, the instigator of the merger, J.P. Morgan, got his cut both in terms of shares in US Steel which are said to have amounted to $62m.

WAS MONOPOLY BY MERGER, MERGER FOR PROFIT?

The court didn’t think so. Essentially the court ruled in 1920 that any action against US Steel was unwarranted because it was not a monopoly then and had little success in being a monopoly before then. This view was obviously not held by the prosecutors or by investors.

The book value of the assets combined into US Steel were nearly doubled in the process of the merger and the market value of the merged firm followed this book value fairly closely. Investors perceived the sum, US Steel, to be worth more than its parts.

While one might argue that investors were fooled, a review of the stock market values of US Steel as well as the other companies in the steel industry over the years following the merger shows that US Steel outperformed the fringe firms by a fairly dramatic margin. The only fringe firm that was a better investment was Bethlehem Steel and this only after it was reorganized by the CEO of US Steel in 1905. The 1904 recession was hard on the industry and especially hard on US Steel, but it came back stronger than the others. Returns on ’01 through ’03 were approximately equal for US Steel compared to the rest.

The actual monopolization achieved by US Steel is somewhat more obscure than might be evident at first blush. The main object of the US Steel consolidation was to stop competition in the various finished product lines, such as pipe, wire, nails, tin plate, sheet steel, and the like. For instance, National Tube was itself a merger formed in 1899 by 25 small pipe makers. There was a significant element of vertical integration in US Steel because while National Tube had some steel making capacity, it purchased most of its raw input from Federal and Carnegie. However, this vertical integration aspect was monopoly inspired in the sense that there was a strong threat that both Federal and Carnegie would themselves move into the pipe fabricating business.¹

American Bridge was a 1900 merger of 27 bridge erection firms. Manufactured 90% of the bridge girders in the US; bought from Carnegie. Am Tin Plate: 1898, 38 companies; Federal and Carnegie. Amer Steel and Wire, 1899. Amer Sheet Steel, 1899; 70% bars, hoops, bands, and

¹ Andrew Carnegie was forced out of the industry as part of the US Steel deal.
cotton ties; bought from National Steel. National Steel was a raw steel ingot supplier organized by W.H. Moore who put together the tin plate merger.

Table 1: US Steel Market Share Over Time

<table>
<thead>
<tr>
<th>Product</th>
<th>1901</th>
<th>1911</th>
<th>1919</th>
<th>1927</th>
</tr>
</thead>
<tbody>
<tr>
<td>Iron Ore</td>
<td>45.1%</td>
<td>45.8%</td>
<td>42.1%</td>
<td>41.4%</td>
</tr>
<tr>
<td>Blast-Furnace Products</td>
<td>46.2%</td>
<td>45.4%</td>
<td>44</td>
<td>37.7%</td>
</tr>
<tr>
<td>Steel Ingots and Castings</td>
<td>65.7%</td>
<td>53.9%</td>
<td>49.6%</td>
<td>41.1%</td>
</tr>
<tr>
<td>Steel Rails</td>
<td>59.8%</td>
<td>56.1%</td>
<td>62</td>
<td>53.3%</td>
</tr>
<tr>
<td>Heavy Structural Shapes</td>
<td>62.2%</td>
<td>47</td>
<td>43.8%</td>
<td>38.8%</td>
</tr>
<tr>
<td>Plates and Sheets</td>
<td>64.6%</td>
<td>45.5%</td>
<td>44.3%</td>
<td>36.5%</td>
</tr>
<tr>
<td>Wire Rods</td>
<td>77.6%</td>
<td>64.7%</td>
<td>55.4%</td>
<td>47.4%</td>
</tr>
<tr>
<td>Wire Nails</td>
<td>65.8%</td>
<td>51.4%</td>
<td>51.9%</td>
<td>42</td>
</tr>
<tr>
<td>Tin and Terne Plate</td>
<td>73</td>
<td>60.7%</td>
<td>48.4%</td>
<td>40.5%</td>
</tr>
</tbody>
</table>

PREDATORY PRICE CUTTING IN THE STANDARD OIL (NJ) CASE, 1911

Standard Oil Case is a landmark and a legend. SO was portrayed as the archetype of an economic predator. The aura of this case and these events captured the public mind and led to specific provisions in the Clayton (1914) and Robinson-Patman (1936) Acts that proscribed predatory price discrimination. In spite of the fact that many economists and courts have worried that R-P may protect competitors more than competition, the specter of SO lurks in the background.

However, the theory of predatory price cutting is suspect at best, and the evidence is fleeting. The question is, When would price cutting ever be better than merger or purchase of assets? Some points:

1) Predatory pricing might be ok if you already have a monopoly and are simply trying to protect it by keeping other firms out, but to build a monopoly from scratch by predation is not likely to be a profitable venture. The problem is that to drive other firms out and then raise price so as to enjoy the fruits of victory puts losses first and possible profits second. Discounting works strongly against the predator.

2) As an alternative, why not just merge. This allows for immediate enjoyment of profits. True, merge requires paying off the competition. Possibly these competitors will require a share of the profits, but still makes it more profitable than trying to kill them off by price cutting.

3) The same line of argument follows when the alleged predator has gained some large share of the market. Instead of trying to kill off the remaining rivals, buying them out seems the more lucrative alternative.

4) Assume that costs are the same for the monopoly wannabee as for the firms that make up the competitive market at the inception of the alleged price cutting. Otherwise the question is not interesting. If all firms have equal costs and the incipient monopolist attempts to cut price to impose losses on rivals, it must necessarily increase output and increase it in a costly fashion by moving up the rising portion of its cost curve. Hence, it will be incurring more losses than its rivals.

5) Moreover, price cutting will not reasonably drive firms from the industry on a permanent basis. Manufacturing facilities idled because price is below average variable cost do not disappear in the mist. Workers and managers with knowledge of the business do not lose

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this knowledge because they are laid off. Even if the predator is able to quiet the production of
rivals for the short term, when the monopolist attempts to raise price so as to enjoy the fruits of
its victory it will likely find the jackals that it thought expelled returning to the feast.

6) It does not make sense to monopolize at every stage of the vertical chain of
production. Hence, if SO had a monopoly in refining, predatory pricing in marketing or in crude
would have been a waste.

7) Price differentials are not necessarily a sign of predatory pricing. They can be
merely responses to relatively levels of competition in segmented markets.

The evidence is lacking that SO ever engaged in predatory pricing in the refining segment
of the oil business, where it is acknowledged to have had a monopoly. Generally the record
shows that it bought out its rivals at prices that ranged from modest to handsome. Instances of
price cutting are more often attributed to the rivals than SO. The evidence suggests that SO was
itself a victim of frontrunning, where rivals bought out at one point would start new enterprises
only to be bought out again.

The following are excerpts from McGee's paper:

Perhaps the most famous of all of the monopolizing techniques that Standard is supposed to have
used is local price cutting. Given the bad repute in which monopoly has long been officially held in this
country, and the prominence of predatory pricing in Standard Oil, it is not surprising that the practice
received special attention in the law. Monopoly was not new in 1911, but a predatory giant may have
seemed novel. The vision of a giant firm that used a brutally scientific, and completely effective,
technique for acquiring and maintaining monopoly must have aroused uncommon concern. Standard was
invincible. Anything economists could say about the transience of monopoly must have seemed
hopelessly unrealistic in view of the vigor and success with which Standard was said to have prevented
entry. p 137

In any case, by 1914, in the Clayton Act, predatory price discrimination was included among a
select group of business practices the character or effect of which called for explicit statutory prohibition.
The Robinson-Patman amendment of 1936 lengthened the list, but certainly did not weaken the hostility
toward local price cutting. Indeed, its legislative history and subsequent interpretation reveal a continuing
dread of the device. p138

…

In general, monopolization will not pay if there is no special qualification for entry, or no
relatively long gestation period for the facilities that must be committed for successful entry. p. 143

…

The voluminous Record in the Standard Oil of NJ dissolution suit furnishes a test of these
propositions.

The Record shows that Standard established a refining monopoly. Collusion among 100 to 200
different sellers was unstable. Standard achieved its monopoly position through merger and acquisition.
Although the Government alleged that Standard employed other techniques as well, it concluded that:

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3 The Transcript of Record consists of over 11,000 printed pages of exhibits and testimony;
Appellants' briefs and oral argument covers more than 900 pages; Appellee's briefs and arguments almost 1300
pages. The full record is thus more than 13,500 pages long. Unless otherwise noted, volume references are to the
Transcript of Record.

4 In 1879, Standard and those concerns "in harmony" with it, apparently refined from 90 to 95 per
cent of the US output. See Vol. 6, at 3303. It is not clear just what these data mean, MR. Archbold testified that in
1870 Standard did about 10 per cent of the refining business in the United States; and that for 1888 Standard's share
was probably 75 per cent. Id., at 3246-68. I think that much work remains to be done to determine how Standard's
market position really changed over time. See, e.g. Vol. 2, at 783-784.
Unquestionably the principal means used by the defendants to monopolize and restrain trade and commerce in petroleum has been the combination of previously independent concerns...\(^6\)

...Standard acquired 123 refineries (many of which also did a marketing business), 11 lubricating oil works, 24 pipeline concerns, and 64 exclusively marketing concerns; a total number of 223.

Neither did these acquisitions all occur at an early date, about half of them, in number, occurred since 1879, and many important ones between 1890 and 1902...\(^7\)

Of the refineries it acquired, Standard dismantled at least 75, and ultimately produced a greatly increased volume in only 20 separate installations\(^8\).

In any case, Standard's position in crude oil production was relatively small; it did very little retailing and did not perform all of its own wholesaling; several major railroads and the pipeline systems of Pure, Tidewater, Texas Co., Gulf, and others competed in the transportation of crude oil Its strongest position was evidently in refining.

\(^5\)Q. Had you difficulty before you entered into relations with the Standard Oil Company to make money out of the business? A. The competition was always very sharp, and there was always some one that was willing to sell goods for less than they cost, and that made the market price for everything; we got up an association, and took in all the refiners until some of them went back on us, and that would break up the association; we tried that two or three times.” Vol. 6, at 3303.

See also Mr. Rockefeller's interesting testimony on the difficulty of effecting stable conspiracies. Vol. 16, especially at 3074-75.

\(^6\)Brief for the United States, Vol. 1, at 169.

\(^7\)Reply Brief for the United States, at 62. See Appendix C, Sheets 1-11.

\(^8\)Id., at 63-64.