Fairness in Competition Law and Policy: The US Experience

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Brussels 25 January 2018

Outline

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- 2 The evolution of US antitrust law and its informing values
  - Sherman Act 1890
  - Federal Trade Commission Act and Clayton Act 1914
  - The depression years
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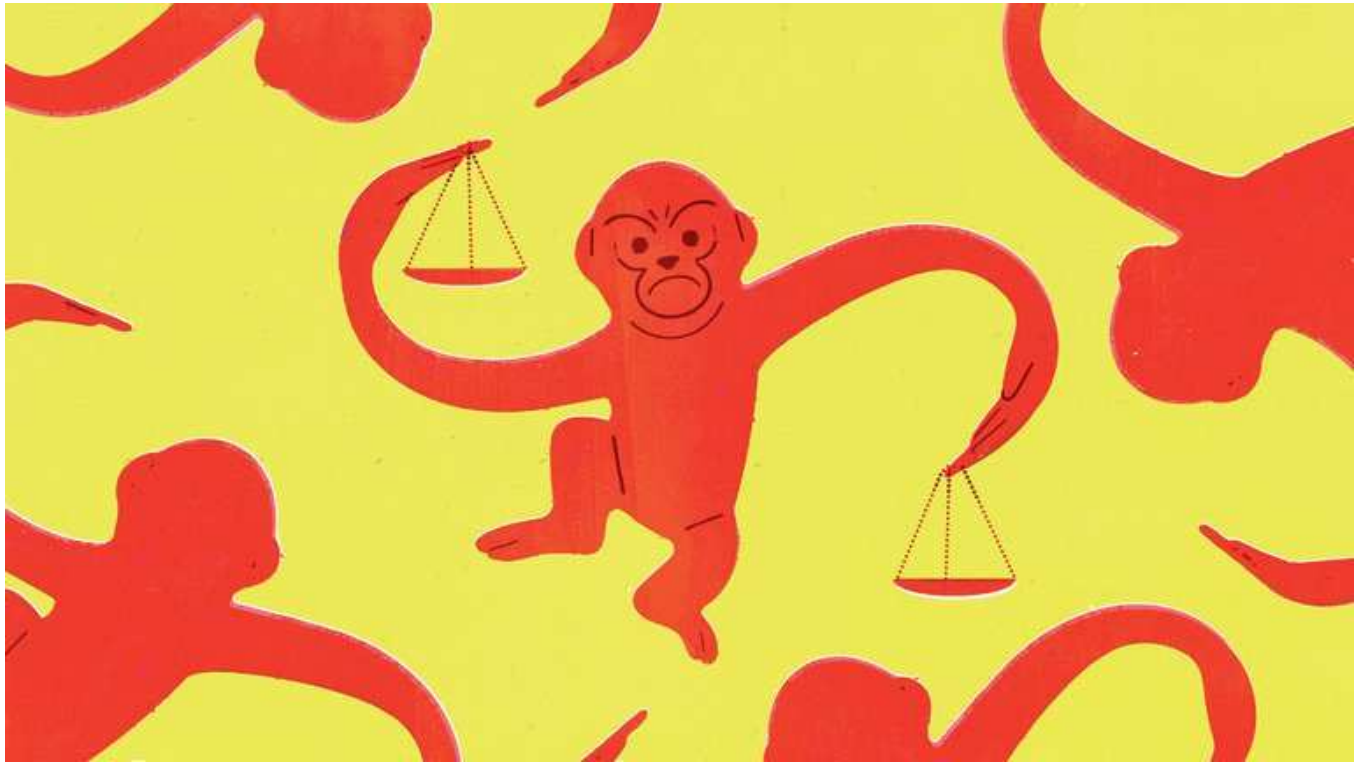
  - The Reagan Revolution and beyond: squeezing fairness out of the dialog
  - Federal Trade Commission: defining “unfair methods of competition”
  - The surge of populism, The Open Markets Project:
    - Bringing antitrust to the people
- 3 Conclusion

I Introduction and Thesis: The fairness debate

- People care about fairness
- The exploitation by the strong of the weak is considered unfair
  - This was one of the main motivations for the Sherman Act
- If the antitrust laws were perceived as *unfair* they would lack legitimacy and the support of the people
    - There is good reason for embracing "fairness" and defining what it means in antitrust – how it fits with making markets work
- History: US antitrust law recognized and incorporated threads of fairness in its case law until the Reagan revolution, when it became unpopular
  - Fairness discourse led us down the slippery slope to protect inefficient competitors
    - This led to the challenge: How can we explain fairness in terms consistent with efficiency, making markets work, and sound rules for the game? That is the legitimate way that fairness is invoked today

Sources of law?

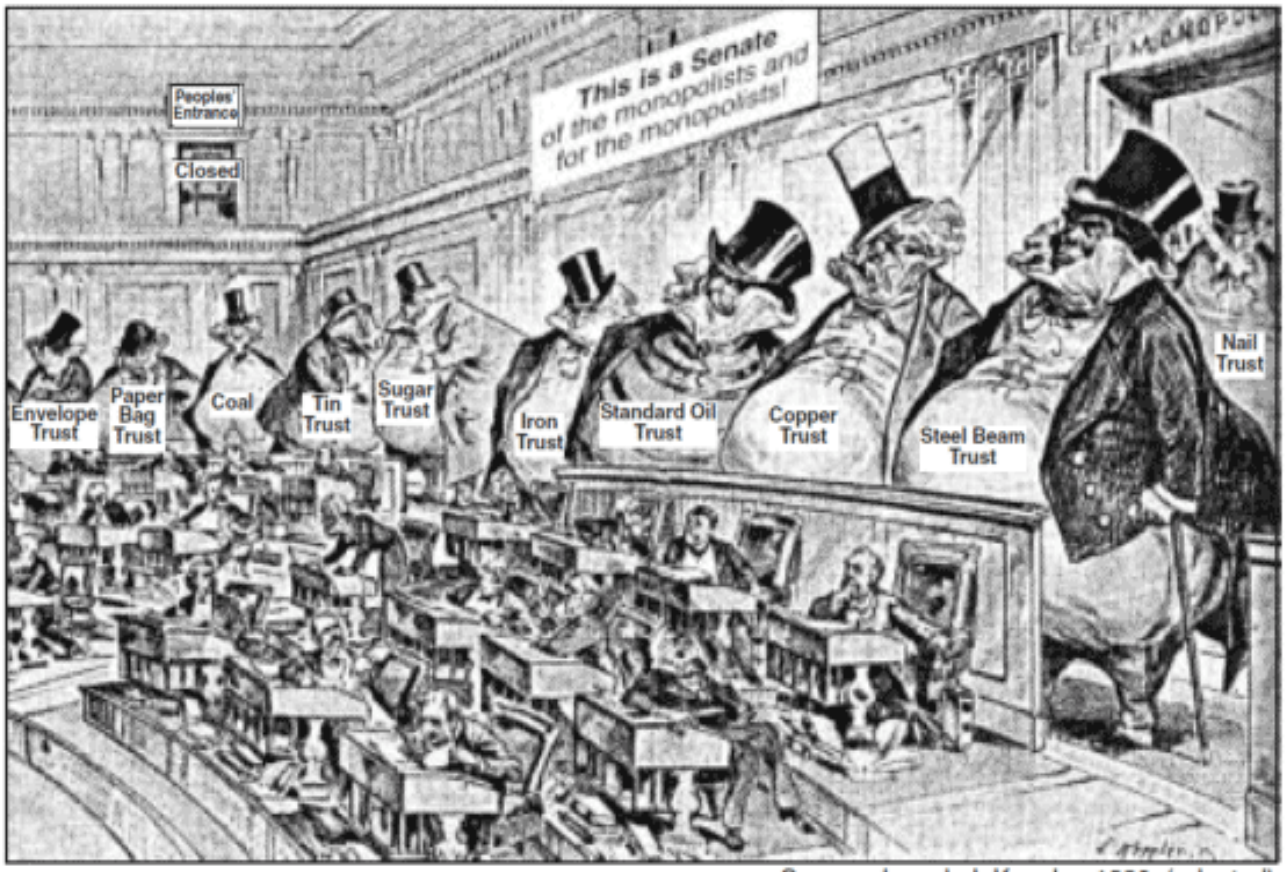
What Monkeys Can teach us about Fairness, New York Times JUNE 3, 2017



Even monkeys detect unfair treatment and rebel against it.

THE BIG TRUSTS CONTROLLED CONGRESS and MARKETS. THAT WAS UNFAIR.

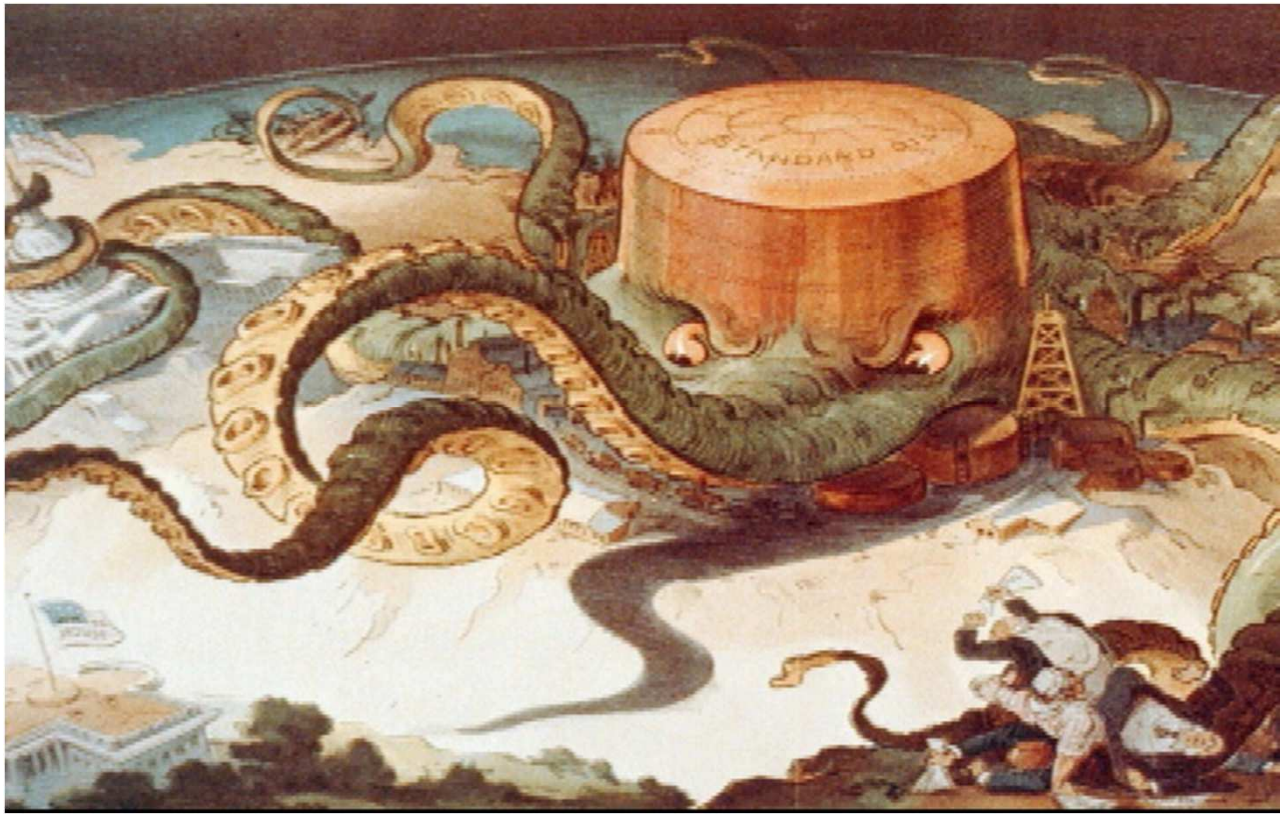
Bosses of the Senate



Source: Joseph J. Keppler, 1890, (adapted)

II. The statutes, their motivations and meanings:

A. The Sherman Act 1890



Standard Oil controlled industry and Congress.
Robber barons ruthlessly squeezed out small business if they would not go along with the club.

B. 1914 The Clayton Act and FTC Act: The Progressive Era and evolution beyond

- Clayton Act– against certain tying, exclusive dealing and mergers
- Federal Trade Commission Act, Sec. 5
  - Prohibits **unfair acts and practices** (consumer protection) and **unfair methods of competition** (antitrust)
    - The FTC recognized the need to anchor "unfairness"
      - The agency, heralded by policy statements, interpreted "unfair methods of competition" to mean "anticompetitive," and followed Sherman Act interpretations
    - When much later the Supreme Court began to shrink the scope of the Sherman Act for fear of nuisance class actions and an ideology of business freedom (2004+):
      - the FTC debated whether to fill the slack. In 2015 it issued a one-page statement saying that "unfair methods" includes acts that contravene the spirit of the Sherman and Clayton Acts, and that the Commission will be guided by consumer welfare
        - https://www.ftc.gov/policy/federal-register-notices/statement-enforcement-principles-regarding-unfair-methods

C. The Great Depression, the War

- The 1930s: The Great Depression –
  - The law was used to help big business lift itself by its bootstraps; the courts were "fair" to collaborating competitors; sometimes they saw too much competition as unfair
    - Appalachian Coals, Sugar Industry exchange of information
  - 1936 – the Robinson Patman Anti-price-discrimination statute
    - This act was meant to protect small business from price discrimination
    - The Robinson Patman Act is out of favor with the technocrats; the Supreme Court and usually the agencies construe it to gut it, fearing that the prohibition of price discrimination will chill competition
- 1950, in the aftermath of World War II
  - The Celler Kefauver amendment to the Clayton Act
    - To help assure that the country does not fall into fascism or communism
    - [again, not meant for efficiency, if efficiency is seen as the counter-objective to fairness]

D. Modern times: The Supreme Court's current (dis)regard of fairness

- Brooke Group, predatory pricing 509 US 209 (1993)
  - Charging below marginal cost for 18 months to compromise competition by no-frills cigarettes (which strategy succeeded) was not a violation because the Court did not see a recoupment scenario
    - "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition."
- Trinko 540 US 398(2004)
  - The incumbent telecom, which controlled the local loop, did not violate the antitrust law by cutting off local loop connections sporadically to the new local competitors in order to keep its customers for itself
    - The Court said: Antitrust cannot be bothered with competitors' claims of "death by a thousand cuts"; this would chill competition and investment
      - [Regulatory oversight was a separate ground of the decision]

E. The populist backlash

- There is a new push to expand antitrust to meet the challenges of growing concentration and control in the digital economy
- A recent former AAG called the goal of antitrust “economic fairness”
- Open Markets Institute and some congresspeople fear new forms of high tech economic power gripping America, leading to a downward cycle of inequality and loss of control over our lives
  - Inequality and unfairness motivations merge
    - Antitrust is perceived as not fair, not legitimate; a law that helps the elites
    - A law that helps the elites and not the people is inefficient as well as unfair
      - And the law does so to some extent but by no means entirely
    - Using fairness language to show how the law helps the people is “fair” game
    - And modifying law that “unfairly” protects incumbents is also fair game

III. Conclusion

- Fairness and efficiency can live relatively comfortably side by side as long as the law molds the concept of antitrust fairness
  - Fairness does not have an unhinged life of its own
  - Fairness in antitrust does NOT include protecting inefficient competitors at the expense of consumers; at least not in the US
- Fairness is a part of our lives, comfort zones, and legitimacy of the law, and can and should be recognized as a help-meet not an enemy of making markets work