

# The Sherman Act - 1890

*Title 15, Chapter 1, 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 \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*

# The Sherman Act - 1890

*Title 15, Chapter 1, 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 \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.*

# The Sherman Act - 1890

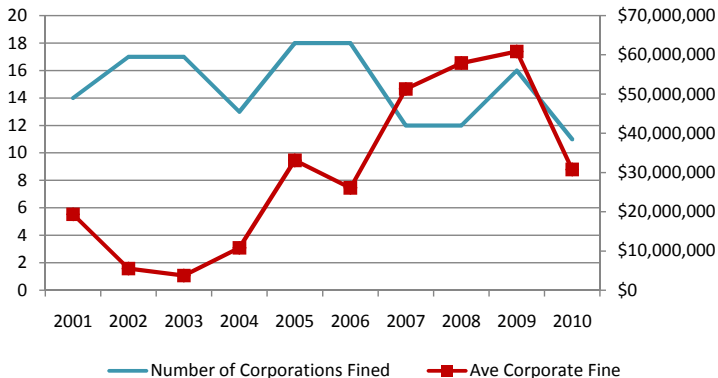


Image from <http://ehistory.osu.edu/osu/mmh/1912/trusts/NorthernSecurities.cfm>

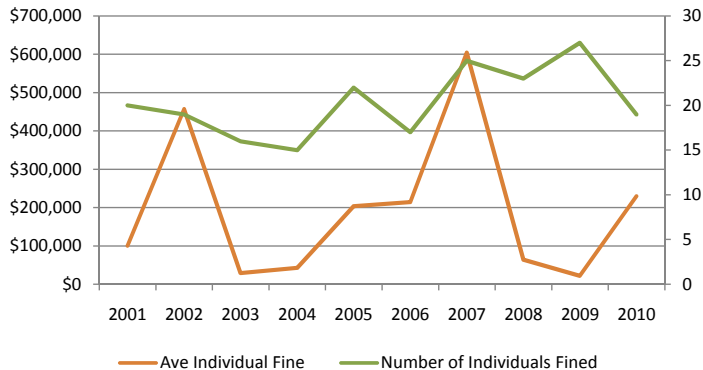
# The Clayton Act - 1915

*Title 15, Chapter 1, Sec. 13: It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality...*

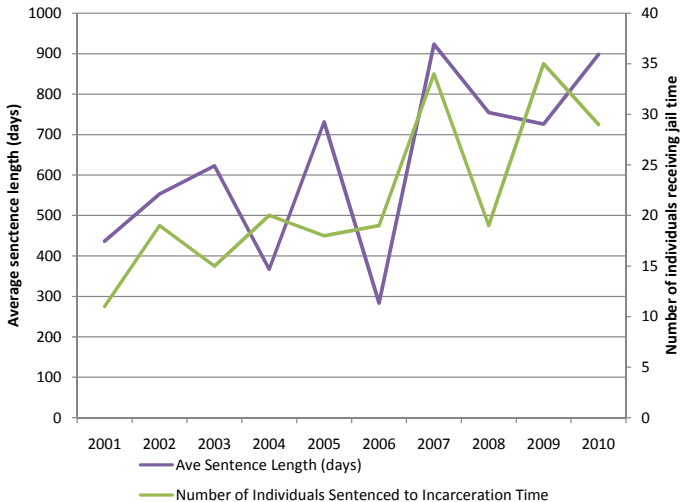
# Prosecution of Antitrust Cases



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# Per Se vs. Rule of Reason

There are two broad categories of antitrust cases, *per se* and *rule of reason* cases

- *per se* - cases where a practice has no beneficial effects and only harmful effects, only need to prove behavior existed
- *rule of reason* - court must examine the 'inherent effect' and the 'evident purpose' of potentially anti-competitive actions, much more involved cases



Justice Marshall on the rationale for a per se category:

*Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result...potential competitive harm plus the administrative costs...must far outweigh the benefits that may result.*

## Basic facts of the *American Tobacco* case:

- On June 30, 1931, Reynolds increased wholesale price for 1,000 cigarettes from \$6.40 to \$6.85. American and Liggett & Myers followed within 24 hours (leaf prices and labor costs were falling at the time).
- In November 1932, the Big Three dropped prices to \$5.50 forcing economy brands out of business.
- The Big Three bought large amounts of low-grade tobacco even though it wasn't used in their cigarettes.
- The Big Three would participate in leaf tobacco auctions only if all three were present.

# American Tobacco Company et al v. United States (1946)

- These facts were sufficient for the court to infer the existence of a conspiracy
- This was a big step in how the court established illegal conspiracies
- This has softened over time to an approach of 'parallelism plus'
- Tacit collusion is tough to prosecute, modern cases tend to focus on more overt collusion

# DRAM pricing (2002)

- One of the biggest recent cases has been price fixing by manufacturers of DRAM chips
- Hynix, Infineon, Micron Technology, Samsung, and Elpida have all pled guilty to price fixing
- The list of charges from the Samsung plea:
  - Participating in meetings, conversations, and communications...with competitors to discuss the prices of DRAM to be sold to certain customers
  - Agreeing, during those meetings, conversations and communications, to charge prices of DRAM at certain levels to be sold to certain customers
  - Issuing price quotations in accordance with the agreements reached
  - Exchanging information on sales of DRAM to certain customers for the purpose of monitoring and enforcing adherence to the agreed-upon prices

# DRAM pricing (2002)

- Hynix agreed to pay a \$185 million fine
- Infineon agreed to a \$160 million fine
- Samsung agreed to a \$300 million fine (second largest in history)
- Four Infineon executives pleaded guilty to price fixing, receiving a \$250,000 fine and a four to six month jail term

# Sotheby's and Christie's (1997)

- Sotheby's and Christie's accounted for 90% of the auction market
- Competition is largely on the basis of commissions
- Collusive agreement between the auction houses:
  - Raise and fix sellers' commissions
  - Public non-negotiable sellers' commission rate schedule
  - Agreed to the order in which rate schedule would be published
  - Exchange customer information for enforcement
  - Agreed to not make interest free loans on consignment
  - Agreed to not make charitable contributions as part of pricing

# Sotheby's and Christie's (1997)

An interesting feature of the Sotheby's and Christie's case was the approach to the civil settlement

- The lead counsel for the class-action civil suit was decided by auction
- Law firms named a dollar amount that was the minimum they expected to win for the plaintiffs
- The firm with the highest bid won the position of lead counsel
- The winning firm would receive 25% of any settlement in excess of the bid
- The result: lead council received legal fees equal to about 5% of total recovery (voluntary contingency fees are 33-40%)

# USAID and Bid Rigging (2000)

- Contractors were colluding to submit high bids to build wastewater treatment plants for USAID
- From the Department of Justice's charges against American International Contractors Inc.:
  - participating in meetings and conversations to discuss rigging bids on a USAID-funded contract
  - agreeing to reduce or eliminate competition on that contract
  - agreeing that AICI would accept payments in return for a commitment not to bid on the contract
- The contract in question was for \$107 million, AICI received a multi-million dollar payment for not bidding
- AICI was fined \$4.2 million



# Herbert Dow, the Bromkonvention and Predatory Pricing



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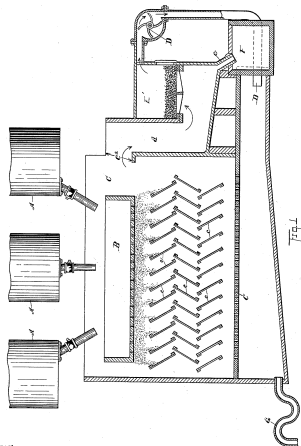
(No Model.)

2 Sheets—Sheet 1.

H. H. DOW.  
PROCESS OF EXTRACTING BROMINE.

No. 460,370.

Patented Sept. 29, 1891.



Witnesses  
Edw. J. Forster  
Hall & Day

Inventor  
Herbert H. Dow  
Bygett & Bygett  
Attorneys

# Herbert Dow, the Bromkonvention and Predatory Pricing

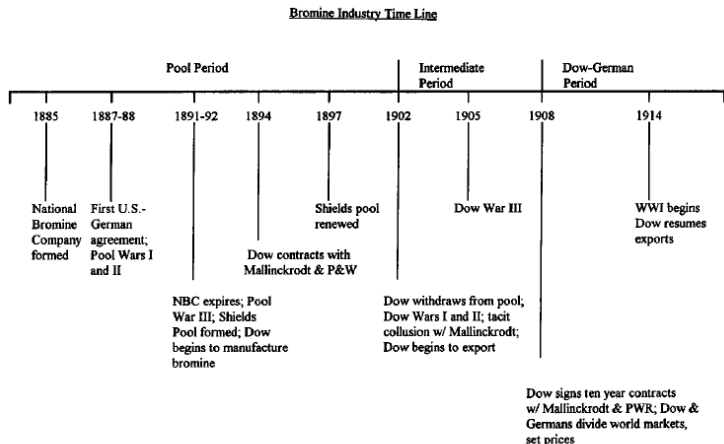


FIG. 2. Major events in the bromine industry, 1885–1914.

From Levenstein, "Do Price Wars Facilitate Collusion?", *Explorations in Economic History*, 1996

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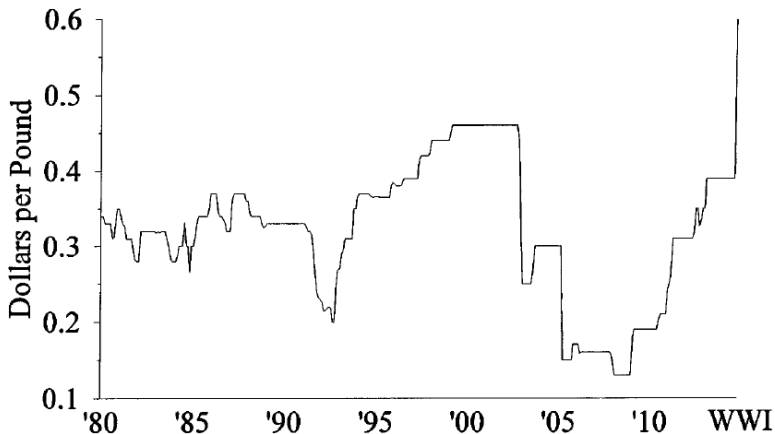
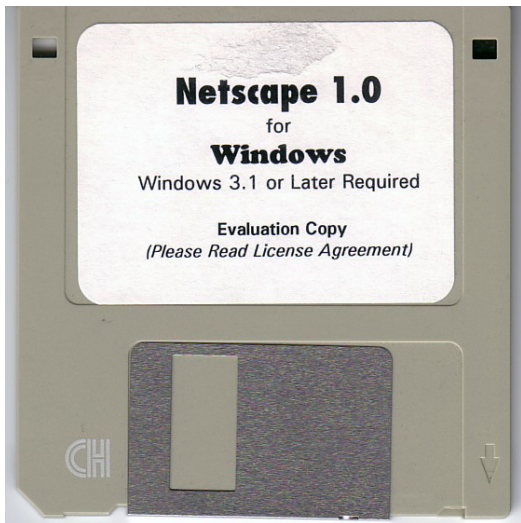


FIG. 1. Potassium bromide prices, 1880–1914. Source: *Oil, Paint and Drug Reporter*.

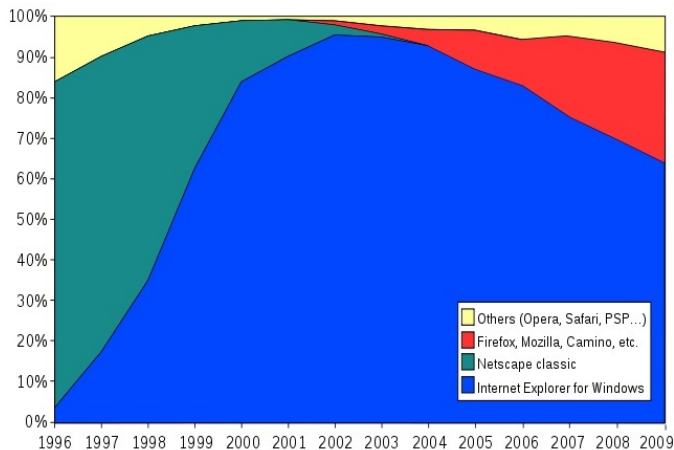
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# Microsoft and the EU



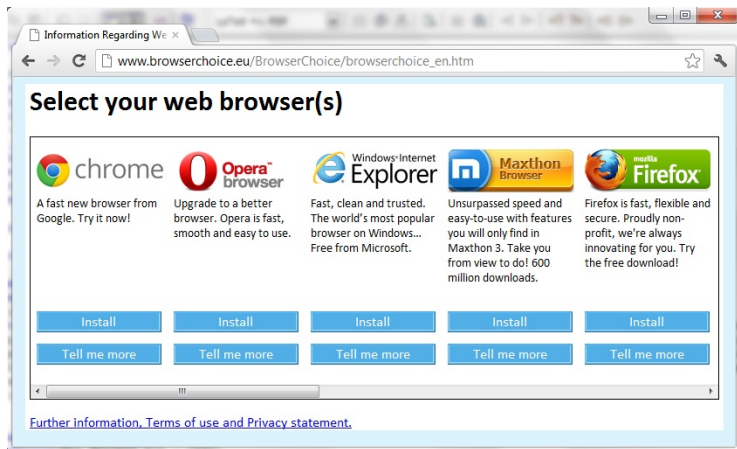
From [computerhistory.org](http://www.computerhistory.org), <http://www.computerhistory.org/timeline/?year=1994>

# Microsoft and the EU



Browser market shares, 1995 to 2010

# Microsoft and the EU



The screenshot shows a web browser window with the address bar displaying [www.browserchoice.eu/BrowserChoice/browserchoice\\_en.htm](http://www.browserchoice.eu/BrowserChoice/browserchoice_en.htm). The page title is "Information Regarding We x". The main heading is "Select your web browser(s)".

chrome	Opera <sup>™</sup> browser	Windows <sup>®</sup> Internet Explorer	Maxthon Browser	mozilla Firefox
A fast new browser from Google. Try it now!	Upgrade to a better browser. Opera is fast, smooth and easy to use.	Fast, clean and trusted. The world's most popular browser on Windows... Free from Microsoft.	Unsurpassed speed and easy-to-use with features you will only find in Maxthon 3. Take you from view to do! 600 million downloads.	Firefox is fast, flexible and secure. Proudly non-profit, we're always innovating for you. Try the free download!
<a href="#">Install</a>	<a href="#">Install</a>	<a href="#">Install</a>	<a href="#">Install</a>	<a href="#">Install</a>
<a href="#">Tell me more</a>	<a href="#">Tell me more</a>	<a href="#">Tell me more</a>	<a href="#">Tell me more</a>	<a href="#">Tell me more</a>

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# Microsoft and the US





*The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market.*

*The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest.*

– *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993), Justice White in the majority opinion

*But the very existence of those undefinable statutes and contradictory case law inhibits businessmen from undertaking what would otherwise be sound productive ventures. No one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act before they were born. No one can ever compute the price that all of us have paid for that Act which, by inducing less effective use of capital, has kept our standard of living lower than would otherwise have been possible.*

*– Alan Greenspan, Antitrust in Capitalism, the Unknown Ideal (1967)*