On the Origins of the Sherman Antitrust Act

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A "Cynical" Interpretation of the Sherman Act

This year is the 100th anniversary of one of the most famous (or infamous depending on perspective) statutes in U.S. history: the Sherman Antitrust Act of 1890. This law banned business arrangements in restraint of trade (Section 1) and prohibited attempts to monopolize (Section 2). While much emphasis in this centennial year will be placed on the law's application, the origin and intent of the Sherman Act are also important to understand why the law has been used to restrain competition and efficiency rather than promote it (Armentano 1982).

This inquiry was inspired by an anonymous reviewer of the antitrust chapter in my forthcoming history of oil and gas regulation. He criticized my "cynical explanation of the passage of the Sherman Act, a view not shared by most contemporary economists." Indeed, while not neglecting the fact that there was public support for regulating the trusts and a congressional bias toward protecting small firms, I identified Congress's high tariff policy as an important reason for political support for the Act. I also mentioned that Senator John Sherman (R-Ohio) had a personal score to settle with a trust entrepreneur.

The antitrust specialist suggested that I turn to the commonly accepted explanations of William Letwin (1956, 1965) and Hans Thorelli (1955). Their correct interpretation, he stated, was that "the passage of the Sherman Act was motivated by widespread hostility

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toward monopoly—considered to be detrimental to the interests of consumers and small business and also antithetical to democratic institutions."

After studying these standard accounts, I stand by my "cynical" interpretation of the Sherman Antitrust Act. I should add that the practice of antitrust enforcement, from the 1911 Standard Oil case and other early decisions to the present, has not rescued the law from its questionable beginnings.

The Textbook Interpretation

Many scholars have searched the record to better understand the origins and intent of the Sherman Antitrust Act. This interest has been inspired not only for the usual academic reasons but because the Sherman Act was very broad and ambiguous. They have properly concluded that Senator Sherman was the driving force behind the law, while Congress was relatively apathetic but supportive (Thorelli 1955, pp. 151–52, 162, 213, 215–16, and 218–20). Public opinion is found to be on the side of antitrust law (Letwin 1965, pp. 54–56, 58, and 70). Indeed, over a dozen states had already passed antitrust statutes similar to the bills under consideration by Congress. State-led activism, in turn, mirrored the "unscrupulous and often extra-legal" practices of the Standard Oil Trust (Thorelli 1955, p. 92) and industrial abuses of the agricultural sector (Letwin 1965, pp. 67–68).

Congress's high tariff policies are recognized as important in the trust debate. Sherman was an integral part of this policy. "As a true Republican," Thorelli (1955, p. 167) states, "he was unquestionably a pro-tariff man."

Thorelli (1955, p. 218) additionally posits that behind Congress's "indifference" was "ignorance," resulting from a lack of dedicated analysis of the voluminous data supplied by state and federal officials. He forthrightly devotes a special section to "The Problem of Congressional Interest and Sincerity" (Thorelli 1955, pp. 214–21).

All considered, these prominent writers conclude that since Sherman was sincere (if Congress was less so), the law had public support, and government regulation was merited in light of the trust problem. The law had sound intent to support its intellectual justification and real-world application.

Questions with the Conventional Wisdom

This textbook interpretation, however, raises three questions.

First, how great was the "public outcry" for trust regulation if Congress was ambivalent to Sherman's initiative? A different inter-

pretation is that most Americans were benefiting from expanding production and lower prices in the "Trust Age" and were not as inflamed as some of the journalists and politicians around them. Petroleum (chiefly kerosene) output was expanding, prices were falling, and product quality and standardization were improving as Standard's market share rose (Bradley, forthcoming). "Agrarian distress" as a lightening rod for antitrust law is useless. Agriculture was not uniquely vulnerable to industrial monoply, and evidence suggests that railroad practices stabilized and expanded farmer income (Stigler 1985, pp. 1–11). Tariffs as a promoter of trusts did not sit well with many voters, which was differentiable from regulating trusts.[1]

Second, if Congress did not research the economic performance of trusts, how can it be assumed they did the right thing? In fact, a more recent interpretation suggests that Congress did enough analysis to understand that bigness could have economic benefits that antitrust law was not intended to disturb.[2] Economists at the time generally recognized scale economies favoring combinations and big business, and viewed competition as a dynamic process rather than a specific industrial structure (i.e., a certain number of separately competing firms).[3]

Third, how could Congress support high tariffs on the one hand and antitrust law on the other? Tariffs blocked foreign competition and facilitated combinations, output restrictions, and higher domestic prices. If big was not necessarily bad and tariffs were anticompetitive, the solution was to expand free trade to trust articles rather than to regulate "big business."

Sherman's Intent

Sherman's sincerity may have been no better than the "billion dollar" Congress as a whole. As the most influential member of the Senate Committee on Finance, Sherman was intimately involved in the nation's high tariff policies that protected virtually every major

[1]Carl Schurz, described by Thorelli (1955, p. 218) as "a keen observer" of the debate, described antitrust law as "a lightning rod to prevent the popular feeling against the trusts from striking the tariff."

[2]Robert Bork (1966, p. 12) stated: "Congress was very concerned that the law should not interfere with business efficiency. This concern, which was repeatedly stressed, was so strong that it led Congress to agree that monopoly itself was lawful if it was gained and maintained only by superior efficiency."

[3]See Gordon (1963, pp. 156–67) and DiLorenzo (1985, pp. 73–90). These findings contradict Letwin's (1965, pp. 71–77) finding that the economics profession was very mixed on the performance of combinations and trusts.

U.S. industry (Thorelli 1955, p. 168). Reconciling this bias with his intense opposition to trusts is difficult. Thorelli cites Sherman's own rationale that properly structured tariffs promoted competition, while ill-conceived ones encouraged abuses. Thorelli (1955, p. 219) adds: "No one has successfully questioned Sherman's sincerity on this point." Yet did Sherman offer any theoretical or empirical evidence to substantiate what a "proper" tariff structure was? Was the McKinley Tariff Act of 1890, directed by Sherman just three months after his antitrust bill became law, composed of proper tariffs? Thorelli is conspicuously silent on these crucial points. Undoubtedly, Sherman had little concrete to say; the contradiction between competition and protection precludes a complementary relationship.

There are four other circumstances that suggest that there was more to Sherman's intent than his public antitrust pronouncements. (1) Why did he wait until July 1888 to begin his antitrust crusade? Trust regulation had political life since the 1870s, and some of the country's greatest trusts such as Standard Oil (1882) predated Sherman's attention by years. If it was so important an issue, why did Sherman not emphasize it during his campaign for the Republican nomination the year before? (2) Once it became a big issue to him, why did he not consider or even mention the "tariff [reduction] approach to domestic competition?" (Bork 1966, p. 16). (3) As Thorelli (1955, p. 170) notes, Sherman's version of an antitrust bill was "amateurish" compared to other bills submitted by his colleagues such as Senator John Reagan (D-Tx.). Sherman's version was a broad "catch all" despite his admission that some combinations were "lawful . . . in aid of production" in distinction to "unlawful combinations to prevent competition and in restraint of trade" (Thorelli 1955, p. 182). (4) Sherman was a tired politician in his mid-60s when he began his quest for a federal antitrust statute. William Letwin (1965, p. 87) described Sherman as "now an aging man at times impatient and confused" who "soon after [the Republican nomination] defeat . . . began to take serious interest in the trust question." What sparked the timing of this new interest? And how could a tariff man at the same time be an antitrust man? Another motivation was apparently present.

Solving the Puzzle

The missing piece of the puzzle concerns the man who blocked Sherman's front-running nomination for the Republican presidential nomination—Russel Alger. As head of the Diamond Match Company, Alger's trust became a target for a broadly based federal anti-

trust law.[4] The deep antagonism was confirmed by President Benjamin Harrison, who with Alger's help defeated Sherman on the seventh ballot for the Republican nomination. Upon signing the Sherman Act into law, Harrison stated: "John Sherman has fixed General Alger" (Gresham 1919, pp. 574, 632).[5]

Thorelli (1955, p. 168) mentions and dismisses this revelation in a footnote by saying: "The present writer is unable to believe that such a personal matter would play a part of significance as a factor motivating Sherman with regard to the antitrust bill or, in fact, any other major legislative measure." Also in a footnote, Letwin (1965, p. 92) mentions the Alger-Sherman connection only to abruptly conclude that "revenge cannot have been Sherman's chief motive in pressing for the Act." Instead, Letwin (1965, p. 87) explains the timing with the presumption that "his recent disappointment [of the lost presidential nomination] gave him the urge to do something memorable." Elsewhere, however, Letwin (1956, p. 253) more seriously considered the Sherman-Alger connection. During the "great debate" preceding the passage of the antitrust act,

> [Sherman] first read the full opinion of the Michigan Supreme Court in the case of *Richardson v. Buhl*, which had a double attraction for him. It struck at the Diamond Match Company's monopoly, and it labeled as a monopolist General Russel Alger, one of his chief rivals in 1888 for the Republican presidential nomination, the one whom Sherman blamed for his unexpected defeat and publicly accused of having bribed delegates.

These authors' downplay of this striking connection of events can only be explained by their fundamental faith in the beneficence of antitrust law itself and an naive view of politics, especially given the notorious pro-business-subsidy 51st Congress.

Conclusion

The Sherman Act was bad law. It not only preserved the nation's high tariff policies by diverting attention away from the root restraint of trade; it greased the wheels for another tariff law later the same year. The McKinley Tariff Act of 1890, also called the "Campaign Contributors' Tariff Bill," shocked the *New York Times* into revers-

[4]Interestingly, and perhaps coincidentally, the match industry was only one of two of 17 major industries that showed reduced output between 1880 and 1890 (DiLorenzo 1985, p. 19).

[5]Sherman remained bitter about the incident for many years (Letwin 1965, p. 92).

ing its once ardent support for the Sherman Act.[6] With tariffs and antitrust, the government at best was trying to undo with one hand what it was doing with the other. But at worst, as applications of the law would demonstrate, the Sherman Act discouraged scale economies that promoted lower costs and prices, penalized successful market entrepreneurship, and rewarded the political entrepreneurship of less-efficient business rivals.

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[6]On October 1, 1890, the *Times* stated: "That so-called Anti-Trust law was passed to deceive the people and to clear the way for the enactment of this . . . law relating to the tariff. . . . And now [Sherman] can only 'hope' that the rings will dissolve of their own accord" (p. 2). Quoted in DiLorenzo (1985, p. 83).