The Dubious Origins of the Sherman Antitrust Act: The Mouse That Roared

Peter R. Dickson and Philippa K. Wells

The authors trace the dubious origins of the Sherman Antitrust Act through the legislative debate reported in the Congressional Record *and contemporary commentary in the newspapers, particularly the* New York Times. *This examination shows that the evolution of effective market governance mechanisms is sometimes unpredictable, unintended, and fortuitous. Just as weak law and market governance mechanisms can result from the best of legislative intentions, so superior law and market governance mechanisms can result from the worst of legislative intentions. The authors discuss implications for marketers and marketing scholars, particularly how powerful and useful generally worded law can become in the hands of judges who are invited by the initial legislators to interpret the specific reach of the law.*

> I have shown that this bill is utterly unconstitutional, and, even if constitutional, utterly worthless. If we pass it we do not only a vain and useless thing; we do a wicked thing. We give to a suffering people, as a remedy for a great wrong, that which will prove utterly inefficient, but will prove an aggravation of the evils. There is, however, a power we can exercise: the power to reduce or abolish duties on the foreign competing articles.
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> —Senator James Z. George
> (*Congressional Record*, February 27, 1890, p. 1772)

The major challenge of contemporary competition policy and antitrust law is how it will adapt to the realities of new technologies that challenge conventional definitions of restraint of trade, competition, economic efficiency, and consumer welfare. For marketers observing the travails of Microsoft in the courtroom or contemplating what is illegal restraint of trade in cyberspace markets, it may seem that highly successful marketers face a winner's curse. If they risk being first movers in new technology and are wildly successful in creating a standard or a cyber marketplace, they risk the ire of antitrust law. It is an adverse-selection, double-jeopardy problem. The innovator that first risks all and succeeds in changing the world with its technology, use of intellectual property, inventive new horizontal and vertical trading, and distribution alliances and practices in ways that only free market capitalism can achieve (Dickson 1992; Hayek 1978) faces a second risk of becoming a target of public policy and antitrust law if it is too competitively successful. The system selects the take-all winners for winnowing. Is the intent of the law to make markets competitive by making firms not too competitive?

What makes the goal and intent of antitrust law even more uncertain is the extraordinary flexibility given to contemporary judges in determining what is anticompetitive and how to define restraint of trade. A great deal of public policy that applies to marketing practice is quite specific, and when ambiguous, it has been made specific by precedent-setting case law. The greatest and oldest exception is the Sherman Act from which evolved the rule of reason and legislatively sanctioned judicial activism: what in some circles has become a pejorative term for progressive judges making new laws.

The goal of this article is twofold. Hutt, Mokwa, and Shapiro (1986) point out the need for marketing scholarship to explore the deeper intentions of public policy and its players in the parallel political marketplace and not to take "contemporary framing" of the positions and issues for granted. Our first goal is to extend these authors' argument by pointing out the risks of challenging contemporary assumptions about the philosophical and ideological origins and intent of business regulation. What scholars, senior business executives, and lawyers discover may surprise and perplex, creating further complexity rather than clarification. The case study that is explored is no less than the Sherman Act. The second, related goal is to argue that just as individual marketers get lucky through serendipity, marketers have collectively benefited from the unintended and fortuitous evolution of the rule of reason in antitrust law. Our conclusion is that however accidentally or fortuitously antitrust public policy evolved, its uncertainty-creating character also provides flexibility and adaptability that is preferable to any alternative.

The Sherman Act

The Sherman Act (1890) is perhaps the most important piece of federal regulatory legislation, insofar as trade and commerce is concerned, in existence today. This act, together with its offspring, the Clayton and Federal Trade Commission Acts and their amendments, constitutes a large part of the regulatory umbrella under which U.S. business operates. Moreover, in enshrining the principle that more competition is better than less competition, the Sherman Act has been compared in importance to the due process clause in the con-

PETER R. DICKSON is Knight Ridder Eminent Scholar in Global Marketing, College of Business Administration, Florida International University. PHILIPPA K. WELLS is Senior Lecturer in Commercial Law, The University of Waikato, New Zealand. The authors thank Hans Thorelli, Indiana University, for his comments on a previous draft; Ray O. Werner, the Colorado College, for his extensive editorial suggestions; and the five anonymous *JPP&M* reviewers for their extensive comments and suggestions.

stitution.[1] Given the contemporary concern over the influence of lobbyists and their campaign contributions, it is interesting to consider how such a consumer-friendly, anti–big business measure as the Sherman Act could ever have come into being at a time when the political power of the great commercial enterprises called trusts and their "robber baron" leadership were at their height. After all, this was a time when basic worker rights to unionize and demand safer working conditions were being aggressively blocked by big business.

The mystery deepens with the discovery that the act passed in both the Senate (52–1) and the House of Representatives (242–0) with little significant debate and almost no organized resistance. The simple, if unpalatable, explanation is that the powerful business lobby sanctioned the passing of a smoke screen act that was so vague (that is, as vague as common law in its definition of terms such as "monopoly" and "restraint of trade") that the lobby believed the act could never be effectively used to attack the trusts. This was a self-interested mistake of historical proportions, because the arguments used to justify the vagueness of the act were later used to justify the creation of the rule of reason and judicial activism, which have become powerful drivers of the evolutionary path that competition policy and antitrust law has taken over the last 100 years. The lesson is that sometimes big business and its legislators can become too clever by half in their legislative initiatives, because they do not think through the long-term, unintended consequences of their actions.

It has been suggested that the study of the political economy of antitrust is long on quantitative analysis but short on the historical analysis of the legislative process (Dam 1979). In the tradition of Hazlett (1992), our purpose is to demonstrate the value of using contemporary events, the *Congressional Record*, and newspaper commentaries to counter a tendency for history to be revised to fit contemporary evaluations of the purpose and value of today's antitrust law and its interpretations. Our concern is not just that the study of the political economy of antitrust has been short on historical analysis but that the historical analysis has been decidedly biased toward putting a positive spin on the intentions of legislators, thus greatly reducing marketers' and public policymakers' understanding of how competition policy and public policy have evolved.

Conventional Interpretations of the History of the Sherman Act

In a 1979 seminar on the political economy of antitrust, a group of leading antitrust law professors attempted to identify the political constituency for the passage and enforcement of the original antitrust laws in the United States. The identified constituencies ranged from public-spirited legislators to ambitious politicians who sought to wrest market power from the trusts, lawyers who profited from the litigation, and politicians who used antitrust legislation as a tool to control deflation or inflation (Tollison 1979).

In the early 1950s, the leading interpreters of the origins and intent of the Sherman Act characterized it as a sincere attempt by public-spirited legislators to control the power of the trusts. Levitt (1952, p. 894) calls the Sherman Act "a reaction to the economic concentration that resulted from the leviathan of shady financial manipulations, immoral intrigue and primitive aggrandizement of power." In his classic thesis on federal antitrust policy, Thorelli (1955, p. 168) characterized the ideology and aims of Senator John Sherman's public policy as preserving "freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition" (*Congressional Record*, July 10, p. 6041). He dismisses any other legislative intent, particularly any argument that Sherman introduced his bill to give political shelter to his party, which intended to promote the interests of the trusts further through the 1890 McKinley legislation that raised tariffs. Thorelli (1955, p. 167) describes such an interpretation as misleading and unfair, stating:

> Like most of his party colleagues in Congress, however, [Sherman] failed to recognize that there existed such an uncomplicated and direct relationship between the trust problem in general and the tariff as popular agitation and Democratic members of Congress would oftentimes maintain. It has sometimes been said that the stand of Sherman and some other prominent politicians on these two issues was somewhat incongruent. That may be true; as far as John Sherman is concerned it also seems safe to say that he was not aware of such inconsistency.

Letwin (1956) concludes that the act was the best effort of well-intentioned lawmakers seeking a democratic compromise. He argues that the legislators were led by public opinion and that there was much attention paid to the trust problem in the press of the time. Similar to Thorelli, Letwin references but largely ignores Fainsod and Gordon's (1941) conclusion that the Sherman Act was a fraud and a sop to public opinion.

A major historical review, written by Robert Bork (1966, p. 11), to help economists, legal scholars, and the courts understand the "true" intent of the law, comes to the conclusion that because "the legislative history of the Sherman Act shows consumer welfare to be the decisive value, it should be treated by a court as the only value." This work was prompted by Bork's (1966, p. 7 n.) recognition that in his earlier writings on the rule of reason he "seriously underestimated the clarity of the legislative intent behind the Sherman Act which a closer study of the full record reveals." In a subsequent book, Bork (1978) expands on the thesis that the intent of the law was to protect the consumer interest and that its interpretation was deliberately vague to allow judicial activism: "It is difficult to resist the conclusion that the most faithful judicial reflection of senator Sherman's and his colleagues' policy intentions was the rule of reason enunciated by Chief Justice White in the 1911 Standard Oil and American Tobacco opinions" (Bork 1966, p. 47). Lande (1982, p. 70 n.) challenges Bork's close study and conclusion, arguing that the Sherman Act was passed for several purposes:

> preventing monopolistic transfers of wealth from consumers to trusts, encouraging corporate productive efficiency in order that consumers would receive these benefits as well, reducing the social and political power of large aggregations of capital, and providing opportunities for small entrepreneurs. Congress' more

[1] President Franklin D. Roosevelt stated that "The Sherman and Clayton Act have become as much a part of the American way of life as the due process clause of the Constitution" in a letter to Secretary of State Cordell Hull on September 6, 1944. Thorelli (1955) presents this quotation on his title page.

minor goals were not, however, meant to interfere significantly with the right of purchasers to buy competitively priced goods.

George Stigler (1985, p. 1), the information economist and Nobel Laureate, has also addressed the question as to "why the United States introduced [the Sherman Act as] an affirmative competitive policy." He observes that states that had an economy in which there were more potential monopolists of markets that might hurt small business interests, such as farmers, were more likely to have passed antitrust laws before 1890. He also seeks an explanation in the state-by-state vote in Congress for the passage of the Sherman Act, but because the final vote was so overwhelmingly in favor (52–1 in the Senate, 242–0 in the House) and the votes on amendments are difficult to interpret, Stigler concludes that he is not very successful in explaining the passage of the act. His alternative explanation is that it was simply a codification of common law and therefore a minor and not very controversial change in public policy that could be widely supported by legislators of all political persuasions. This may largely explain why the act has been almost universally supported, but it does not explain why the act was initiated.

More recent reviews of the origins and intent of the Sherman Act have returned to more cynical explanations. DiLorenzo (1990, p. 31) concludes that "Evidence exists that a major political function of the Sherman Act was to serve as a smoke screen behind which politicians could grant tariff protection to their big business constituents while assuring the public that something was being done about the monopoly problems." In his opinion, there is little evidence that the intent was to protect the welfare of consumers who had materially benefited from the ever-decreasing prices resulting from the trusts' market reach and economies of scale (see also Baxter 1980). Hazlett (1992) also finds no evidence to support Bork's economic efficiency and consumer welfare intent and instead explores the hypothesis that the Sherman Act was intended to facilitate the passage of rent-creating tariff increases. The basis for his case is (1) evidence that the Senate was not particularly concerned about limiting the reach of the law to exclude economically efficient enterprises; (2) the absence of any evidence of Senator Sherman's long-lived commitment to the claimed efficiency goals of the act as evidenced in his letters, biographies, his autobiography, and his speeches during the debate; and (3) the transparent connection between the passage of the Sherman Act and the McKinley tariff. The case for the latter connection is made in two ways. First, Hazlett (1982) draws on an unpublished doctoral dissertation on the significance of public opinion in the passage of the Sherman Act (Gordon 1953) that describes the *New York Times*'s crusade against both the Sherman Act, as a sop to public opinion, and tariff increases that pandered to the trusts. Second, in an analysis similar to Stigler's (1985), Hazlett attempts to relate the tariff vote to the Sherman Act vote. Although he is unable to analyze the relationship between support for the tariff and the Sherman Act in the Senate because there was only one vote for the Sherman Act, he analyzes the relationship between the House vote on the tariff increase and earlier votes in the House on the Sherman Act (before the final 242–0 vote). This reveals that the votes on the laws were not independent of each other and the dependence relationship did not support a proconsumer thesis, which would predict a high correlation between yes votes on Sherman and no votes on raising the tariffs. Instead, Hazlett observes a correlation between no votes on the Sherman Act and no votes on raising tariffs.

Both Bork (1966, p. 14) and Hazlett (1992, p. 266) agree on one thing: Understanding the motives and views of Senator John Sherman is crucial to understanding the intent of the law that bears his name. In the context of this scholarship, which comes to very different conclusions as to the origins and intent of the Sherman Act, we undertook the following analyses. First, we searched, identified, and copied all of the speeches made in the Senate (reported in the *Congressional Record*) from 1887 to 1890 on antitrust legislation and particularly the Sherman Act. Most of the extracts we quote have not appeared in the previous published articles on the legislative history of the Sherman Act. Second, we searched the leading newspapers that reported on the passage of the act and, unlike any other previously published historical analysis, closely couple this coverage with the legislative process. Because the *New York Times* coverage provides ample evidence of contemporary cynicism toward the bill, we focus on its reporting. Our goal was not to describe the tone of all the media coverage of the passage of the bill;[2] rather, we use the facts and arguments presented by the *New York Times* as one of several bases for concluding that political opportunism was the major intent behind the initiation and promotion of the act by the Republican leaders of the Senate. Third, this article is unique in that it places this description of the legislative process within the larger before-and-after context and time line by describing the major political events in Senator Sherman's life before he launched his legislative initiative and providing a brief early history of the enforcement of the act and early efforts to improve and amend the act (that were nonexistent). Our specific conclusions are as follows:

1. It is probable that Sherman believed that he lost the 1888 Republican presidential nomination because of the Machiavellian scheming of the trusts and their suspicions that he might not prove reliable. This defeat, along with an electioneering call by the party for Congress to pass antitrust regulation, provided the motivation for Sherman's initial personal and independent promotion of trust regulation to curb what he said was the "unbridled power" of the trusts.
2. The Republican leadership needed to appease the public opinion that was hostile to its policy of continued tariff protection, particularly protection of several major trusts (e.g., the sugar trust, the twine trust, the linseed oil trust) from overseas competition. They opportunistically used the Sherman Act to attempt to appease public opinion and to smooth the passage of the McKinley bill that raised tariffs and further protected the trusts. We could not establish whether Sherman, after initiating legislation, became a willing party to such a scheme. What is clear is that he was unhappy with the product of the process and was not proud of the act that bore his name. That he was aware of the connection between antitrust legislation and tariff protection of trusts is indisputable.
3. Senator James Z. George, a Democrat and the most informed and intelligent critic of the bill in the Senate, foresaw many of the act's implementation problems and suggested sound remedies, such as class-action suits, that were not carefully

[2]For such an analysis, see Thorelli (1955).

considered, debated, or incorporated into the final act by his colleagues, including Sherman. The lack of any reasoned response to his consumer welfare criticisms from the promoters of the legislation and the lack of amendment of the act and further supporting enactment legislation, when it became clear that Senator George's criticisms were correct, raises indisputable questions about Senator Sherman's and the Republicans' best intentions. It is at such times that the silence of the historical record is powerful empirical evidence (the watchdog did not bark).

4. To the extent that the trusts were instrumental in producing what they believed to be an impossibly vague and unenforceable law, this maneuver ultimately backfired when later judicial interpretations used the specious arguments of the trusts' congressional supporters both to empower the act and to justify the rule of reason and therefore judicial activism in commercial law.

Historical Antecedents

From a historical perspective, there is nothing new in legislative attempts to control anticompetitive restrictive business practices. Ancient Greeks and Romans left records of attempts to curb monopolistic tendencies. Julius Caesar enacted the Lex Julia da Annaria in approximately 50 B.C. in an attempt to prevent unnatural rises in the price of corn, and this law not only addressed individual cases of profiteering but sought to control the "general classes of case resulting from the systematic operation of traders ... in concert with each other" (Wilberforce, Campbell, and Elles 1957, p. 109). Other laws of this nature promulgated by Roman rulers have been recorded. Significantly, some of these laws recognized the connection among tariff controls, monopolies, and restrictive trade practices.

Laws forbidding the formation of private monopolies existed in England even before the Norman conquest of 1066, and many restraint-of-trade practices were also regarded as contrary to common law centuries before any specific legislation was enacted. Excluded from the scope of this law were the practices of guilds, merchant adventurers, and licensed monopolists. State-controlled monopolies were commonplace throughout most of Europe. During the reign of Elizabeth I and through the eighteenth century, the royal prerogative of granting a monopoly license conferring commercial privilege on individuals was much abused, despite criticism from the House of Commons and the passage of the Statute of Monopolies of 1620. Much of the relevant debate in the common law courts of the time centered on whether a restraint-of-trade contract was valid, where the line should be drawn, and what definitions should be used (Wilberforce, Campbell, and Elles 1957).

The British legislation that most influenced the development of the Sherman Act was the 1844 act that declared forestalling, regrating, and engrossing to be offenses and repealed certain statutes that prevented contracts in restraint of trade. However, this act was also quoted in the 1890 Senate debate on the Sherman bill as an instructive lesson on the failure of legislation to control monopolistic and anticompetitive tendencies (*Congressional Record*, March 24, 1890, p. 2564).

Many of the early colonists used the English common law to object to the granting of monopolies by royal decree or through political patronage. Because of the deep-seated prevailing hostility toward such institutions, most of the early trading monopolies founded in America failed to flourish. For example, the Central Bank of the United States was compelled to disband in the 1830s. Before the Revolutionary War, some colonies (e.g., Massachusetts) passed legislation that forbade certain monopolistic practices, and after the war several of the states' bills of rights incorporated controls on monopolies and restraint of trade practices (Virginia, 4, 1776; Massachusetts Constitution, Part I, Article 6, 1780; Connecticut Constitution, Article 1, 1818). In 1787, Connecticut went so far as to refuse to permit the incorporation of a medical society that was denounced as a monopoly (Letwin 1956). During this era, any commercial enterprise granted corporate status was regarded as a monopoly, in part because "most ... were chartered by special legislation" (Letwin 1956, p. 229). These corporations were granted extensive powers, exemption from taxes, and employee exemption from military service. A general outcry against this favoritism finally resulted in the development of a less privileged form of incorporation. It is noteworthy that Amos Kendall, a member of President Jackson's cabinet, suggested in 1832 that a nobility system was developing in the United States: "Its head is the Bank of the United States; its right arm, protecting Tariff and manufacturing monopolies" (*Washington Globe*, December 13, 1832, p. 4). This connection between tariffs and monopolies was commonly appreciated by both politicians and merchants from the 1830s through the end of the century and is key to understanding the political and legislative intent of the Sherman Act.

Setting the Stage

The initial impetus for specific federal antitrust legislation came from the Granger movement (Letwin 1956). In 1871, this group was seeking a legislative means of breaking up the railroad monopolies and was actively encouraging the development of farmers' cooperatives to safeguard its members' interests. By 1880, although they had lost most of their political momentum, the Grangers had succeeded in reviving the pre–Civil War sentiments against monopolies—sentiments further heightened during the Greenback and Anti-Monopoly parties' (otherwise unsuccessful) campaign in the 1884 election. It should be noted, however, that neither of the major parties regarded antimonopoly measures as politically significant at this time, probably because the real growth in trust formation did not take place until the mid to late 1880s. The Republican party's lack of interest in attacking the emerging trusts can also be partly attributed to the increasing association of the party with wealthy businessmen. For example, during the 1884 presidential election, James Gillespie Blaine, the Republican candidate, was lavishly entertained by several leading industrialists at what became popularly known as the "royal feast of Belshazzar Blaine and the Money Kings."

What was the general attitude of legislators and the courts toward monopolistic enterprise in the United States by the late 1880s? Several states had passed or were in the act of passing antitrust and/or other restraint-of-trade legislation. However, legal actions under these laws did not tend to be pursued with any noticeable enthusiasm. For example, in the case *People v. Chicago Gas Trust* (1889), the attorney gen-

eral initially refused to pursue the case, pleading a lack of political support and funds to collect the evidence (*Chicago Tribune*, February 3, 1888). He eventually succeeded in gaining both and won the case.

The Democratic party made great political capital out of the New York sugar case (*People v. North River Sugar Refining Co.* 1890), which was prosecuted successfully under the existing common law. An insurmountable problem for the state legislators was that they lacked constitutional authority to regulate corporations or trusts involved in interstate commerce. The first significant, if brief, political debate on the trust question began with Democratic President Grover Cleveland discussing the tariff during the course of his annual message to Congress on December 4, 1887:

> In speaking of the increased cost to the consumer of our home manufactures, resulting from a duty laid upon imported articles of the same description, the fact is not overlooked that competition among our domestic producers some times has the effect of keeping the price of their products below the highest limit allowed by such duty. But it is notorious that this competition is too often strangled by combinations quite prevalent at this time, and frequently called trusts, which have as their object the regulation of the supply and price of commodities made and sold by members of the combination. The people can hardly hope for any consideration in the operation of these selfish trusts. (*Congressional Record*, December 6, 1887, p. 11)

Cleveland's remedy was the removal of the tariff that protected trusts from foreign competition. Republican Senator John Sherman of Ohio, responding to this portion of the speech, said, "when such combinations to prevent a reduction of price by fair competition exist, I agree that they may and ought to be met by a reduction of duty" (*Congressional Record*, January 4, 1888, p. 190). However, Sherman went on to assert that he knew of no such combination that benefited from the high tariff and requested that the president specify any that did. What is most significant about this statement is not his claim that he knew of no such trust that benefited from tariff protection but his admission that the way to deal with trusts and their price collusion was by reducing protective tariffs. Such a public position connecting tariffs to the trusts would not have helped Sherman in his goal of obtaining the support of Andrew Carnegie and the other robber barons for the Republican party's 1888 presidential nomination, because this was not the first time Sherman had connected tariffs to monopolies. Five years earlier he had stated that "The measure of protection should extend only so far as to create competition and not to create a home monopoly" (*Congressional Record*, 1883, p. 1479).[3] According to Letwin (1956), this was a major political blunder, because connecting the trusts to the tariff bills played into the hands of the Democrats.

The 1888 Republican Convention

Before the Republican convention, Sherman had high hopes of becoming the presidential nominee, and his chances were considered good. However, as the *New York Times* (June 20, 1888, p. 1) reported, in a test vote taken on another issue early in the convention, "[Russel] Alger had picked up some southern delegates originally intended to be used for Sherman. Their change in allegiance was attributed to the use of money." In the same issue of the newspaper, other facts of interest about the convention were revealed. For example, in an editorial headlined "Is It the Party of Monopoly?" the newspaper explained that the privilege of furnishing a chairman for the convention developed as a battle between two states, California and Nebraska, both of whose delegations were dominated by agents and representatives of railroad companies. It also observed that because Chauncey M. Depew was a likely early contender for the Republican presidential candidacy and was heavily favored by the railroads, someone less controversial, such as Benjamin Harrison, would be the "candidate against whom the least objection could be made" (p. 4). The leader of the Republican party, George Blaine, was absent from the convention, communicating by telegram from Scotland, where he was a guest of the head of the steel trust, Andrew Carnegie. The *New York Times*'s view of Sherman was that he was "penurious" (strapped for cash), unsupported by trust interests, and probably too honest to accept any help should it be offered.

Two days later, on June 22, 1888, the *New York Times* published the Republicans' Declaration of Principles, delivered by Representative William McKinley (Ohio), which included the following:

> We are uncompromising in favor of the American system of protection.... [T]he Republican party would effect all needed reduction of the national revenue by repealing the taxes upon tobacco and spirits.... If there should still remain a larger revenue that is requisite for the wants of the government we favor the entire repeal of internal taxes rather than the surrender of any part of our protective system at the joint behest of the whisky Trust and the agents of foreign manufacturers.... We declare our opposition to all combinations of capital organized in Trusts or otherwise to control arbitrarily the condition of trade among our citizens and we recommend to Congress and the state legislatures ... such legislation as will prevent the execution of all schemes to oppress the people by undue charges ... or by unjust rates. (*New York Times*, June 22, 1888, p. 1)

This is an important statement from a future president who orchestrated the raising of protective tariffs two years later, and it is the first evidence that the Republicans sought to address popular opinion against the trusts in a way other than reducing their tariff protection. The *New York Times* (June 22, 1888, p. 4) then proceeded to attack this statement with the following words: "The Republican platform is very, very long and its merit is in inverse proportion to its length.... [It has] declared that it will not touch the protective and monopoly breed features of the tariff, except to make them worse."

It is significant that the *New York Times* made no mention of the Republicans' declared opposition to the trusts and instead pointed out that the party had failed to promise tariff reform as a means of controlling the trusts. At least this organ of public opinion was convinced that no control of the trusts could be achieved by means other than tariff reform.[4]

[3]Furthermore, the *New York Times* of August 20, 1888 (p. 4) reported that Sherman had predicted the evil of "rings" (an early name for trusts) and had urged a reduction of duties on such combinations as early as 1872.

[4]The *Chicago Tribune*, in reacting to Cleveland's address on February 2, 1888 (p. 4), had also taken the position that a public investigation of the trusts was needed and that tariff legislation was needed to control the trusts: "Is there any surer way than to revise the tariff so that it cannot be made the instrument for plundering the people?"

On the same page, the *New York Times* also published an article that stated that Sherman was for reducing the tariffs that protected the trusts. It also stated that Blaine had agreed to support Sherman if the latter, when he became president, appointed him as secretary of state. The next day the *New York Times* reported that Depew had withdrawn from the race and given his support and votes to Harrison, whose total support by the fifth ballot was nearly equal to Sherman's. Harrison was generally regarded as a party hack, colorless and lacking any great personality or originality. Why, then, did he gain this sudden support? On June 23 the *New York Times* provided a devastating answer: Harrison's late gain in support was part of a Machiavellian attempt by Blaine and Carnegie to manipulate the ballots so that a deadlock would be created, at which point Blaine would be requested to step in as a compromise candidate. The exposure of this plot through the interception of telegrams sent from Scotland caused Blaine's growing party support to disappear, leaving Harrison as the more acceptable candidate to the trusts. Harrison finally won the nomination, and Sherman suffered the most devastating defeat of his political career. What is seldom recognized is that Blaine had also sent a letter from Paris that declared Cleveland a free trader, and this letter had acted as a clarion call to the Republican party to defend the protective tariffs, a topic on which Sherman had equivocated (Goebel and Goebel 1945).

Sherman's Resolution

Following McKinley's call on June 22, 1988, for Congress to pass legislation that prevents the execution of schemes to oppress the people by undue charges or rates, on July 10 Sherman submitted the following resolution to the Senate:

> *Resolved*, That the Committee on Finance be directed to inquire into and report, in connection with any bill raising or reducing revenue that may be referred to it, such measure as it may deem expedient to set aside, control, restrain, or prohibit all arrangements, contracts, agreements, trusts, or combinations between persons or corporations, made with a view, or which tend to prevent free and full competition in the production, manufacture, or sale of articles of domestic growth or production, or of the sale of articles imported into the United States, or which, against public policy, are designed to tend to foster monopoly or to artificially advance the cost to the consumer of necessary articles of human life, with such penalties and provisions, and as to corporations, with such forfeitures, as will tend to preserve freedom of trade and production, the natural competition of increasing production, the lowering of prices by such competition, and the full benefit designed by and hitherto conferred by the policy of the Government to protect and encourage American industries by levying duties on imported goods. (*Congressional Record*, July 10, 1888, p. 6041)

In an article titled "Suddenly Aware to the Dangers of Monopoly," the *New York Times* (July 11, 1888, p. 1) speculated that Sherman's move was part of the Republicans' continuing political bluff to catch votes in November. A further *New York Times* editorial on August 20, 1888 (p. 4) suggested a payback motive: that Sherman had personally discovered the evil of the trusts only in June, immediately after he had failed to obtain the votes of a majority of the delegates to the Chicago convention.

The wording of the resolution clearly connected trusts to any bill that raised or reduced revenues, which would include any tariff bill (the major source of tax revenues at the time, before comprehensive income tax), thus challenging the official Republican line that there was no connection between the tariffs and the trusts. Because Sherman was chair of the Senate Finance Committee, which was responsible for tariffs, the assignment of the inquiry to the Finance Committee also risked an investigation that would (1) identify trusts that earned economic rents from high protective tariffs, (2) reveal that the tariffs themselves were schemes that resulted in unduly high charges and rates, and (3) propose a reduction in tariffs. It is therefore highly unlikely that Sherman's resolution was a cleverly planned party initiative to appease voters in the upcoming presidential campaign. Such an initiative would have come from a reliable senior Republican on the Commerce or Judiciary Committee, thus distancing any antitrust investigation and legislation from the tariff question. Whether done in pique against the trusts or to help the party (or both), Sherman's resolution placed him back in the position of being a loose cannon on the question of trusts and tariffs but a force to be reckoned with given the Republican party's call for congressional action in its declaration of principles. The resolution was considered by unanimous consent and agreed to immediately without any debate or discussion by anyone.

Tariffs, Trusts, and Party Politics

On August 1, 1888, the *New York Times* reported the "whitewash" findings of a special House committee set up to investigate selected trusts. Two weeks later, Senator John H. Reagan, a Democrat from Texas, introduced a bill (S.3440) to define trusts and provide for the punishment of those participating in them. Although some senators argued that the bill should be referred to the Committee on the Judiciary, Sherman used a resolution to get it transferred to the Finance Committee. In doing so, he stressed that any power of Congress to prohibit trusts and combinations "must be done upon a tariff bill or upon a revenue bill" (*Congressional Record*, August 14, 1888, p. 7513; *New York Times*, August 16, 1888, p. 4). Sherman went on to state that "Where these combinations grow out of revenue laws, as the Sugar Trust, which is one of the most dangerous and wrongful Trusts ever organized in this country, the Trust can certainly be reached by the operation of our revenue laws." In light of such documented statements, it is impossible to argue that Sherman saw no direct connection between tariffs and the trusts, as Thorelli (1955) claims. Sherman immediately introduced a bill of his own (S.3445) on the same matter and had it referred to the Finance Committee as well.

This flurry of activity on the part of the Republicans in the Senate was viewed with scorn by the *New York Times*. The newspaper castigated them for having failed to take any positive steps against their "pet monopolies." A statement issued by Blaine (still very much the leader of the party) reported by the *New York Times* on August 17 supported this view. Blaine baldly stated that tariffs and trusts had nothing in common and that "Trusts are private affairs in which no one, including Congress, has the right to interfere" (*New York Times*, August 17, 1888, p. 4). On the eve of the election, the national headquarters desperately attempted to

downplay this remark. Even the *Chicago Tribune*, which tended to be more sympathetic than the *New York Times* to the Republican party, commented, "[W]hat is a Trust but a combination of tariff-protected manufacturers to strangle competition?" (quoted in *New York Times*, August 21, 1888, p. 4).

The *New York Times* continued its campaign to have the Republicans adopt tariff reform as a means of controlling the trusts. For example, it drew to Blaine's attention an article containing a report of the findings of the Republican-controlled New York State Senate that criticized the marketplace power of the trusts in the state (*New York Times*, August 25, 1888, p. 4). The newspaper then followed with an article suggesting that the Republicans had used Cleveland's comments in his December 1887 speech to start a free-trade scare. The *New York Times* claimed that the plot had backfired when people began debating seriously how reform of the tariff structure could best be achieved to protect only infant industries and not the powerful agricultural-supply trusts (*New York Times*, August 28, 1988, p. 4).

On September 11, 1988, Sherman's bill was reported back from committee, and the following day Senator George (a Democrat) proposed an amendment that gave the president discretionary power to amend the tariff structure so as to prevent trusts from gaining unfair benefits from a tariff bill (*Congressional Record*, September 12, 1888, p. 8519).[5] He was answered by George F. Hoar, a Republican Senator, who, after pressing Reagan or George to produce evidence of the antisocial activities of any trusts, went on to express reservations as to the wisdom of giving power to manipulate the tariff structure to the current president, "who notoriously owes his election to the aid of the grossest interest of such a trust (the Railways) that exist on the face of the earth and has it represented in his cabinet" (*Congressional Record*, September 12, 1888, p. 8521). In short, the discussion of the trusts and tariffs involved a great deal of election posturing.

By November 1888, both parties had maneuvered themselves into their final election positions on the tariffs and the trusts. On the one hand, the Republicans, though obviously opposed to tariff reductions, recognized the need to succor public opinion on the trusts, particularly in areas of the country where it seemed the party was losing support. Those areas included, principally, the Northeast, but also the Midwest and the South, where agriculture or particular labor-intensive industries predominated. In contrast, the Democrats stuck to their original line—emphasizing the need for tariff reform that would curb the powers of the trusts. There the matter rested until after the election, which was won by the Republican candidate, Benjamin Harrison.

The Shredding of the Bill

The next development occurred on February 4, 1889, when George launched a four-pronged attack on the Sherman bill, heavily criticizing it on the following grounds: (1) the difficulties involved in determining when it might apply, (2) doubts as to the degree to which the federal government had the constitutional power to pass such a measure, (3) the ability to pursue a prosecution effectively under the act, and (4) the likelihood that combinations of farmers and laborers formed to combat the trusts would themselves fall within the punitive provisions of the bill (*Congressional Record*, February 4, 1889, pp. 1458–62). This speech is perhaps the most famous one associated with the Sherman Antitrust Act for its length, detailed analysis, and extraordinary foresight. The reaction to the speech was minimal: No one answered George's concerns either in general or specifically. The only comment made by Sherman recorded in the *Congressional Record* or in the newspapers was a declaration that it was not his desire or the desire of the committee to have the bill apply to farmers and laborers. He then flippantly asked George whether a temperance society would be judged to be a combination in restraint of the trade liquor sellers (*Congressional Record*, February 4, 1889, p. 1458). The lack of serious and considered response to George's criticisms then or later signals, in its silence, the shallowness of the intentions of both Sherman and the Republicans.

Matters proceeded extremely slowly, perhaps as a result of George's criticisms. The next event of note occurred some nine months later in Harrison's first State of the Union address to Congress, in December 1889, in which he argued that

> Earnest attention should be given by Congress to a consideration of the question how far the restraint of those combinations of capital commonly called "Trusts" is a matter of federal jurisdiction. When organized, as they often are, to crush out all healthy competition and to monopolize the production or sale of an article of commerce and general necessity, they are dangerous conspiracies ... and should be made the subject of prohibitory and even penal legislation. (*Congressional Record*, December 4, 1889, p. 87)

This was a somewhat surprising statement from the leader of the Republican party. However, the *New York Times* was immediately (and as it turned out correctly) suspicious that this was the start of a softening-up campaign for a new tariff bill that would further protect several of the major trusts. The *New York Times* pointed out that the president had deliberately distanced the connection between the trusts and tariffs by separating the previous statement from his comments on tariff reform (*New York Times*, December 4, 1889, p. 4). It is also interesting to note that this particular paragraph was sandwiched between statements on the salaries of judges, the need for modification of the copyright laws, and the naturalizations question—it could hardly be said to have been given either prominence or priority.

The press remained singularly unimpressed by the proposed controls on trusts. What little discussion occurred arose in February 1890 and centered on the beneficial effect the proposed McKinley tariff bill would have on the trusts, particularly the sugar trust. The *Chicago Tribune* ran a series of articles on the progress of the tariff bill in the House Ways and Means Committee, in which it criticized the Republican policy on trusts and tariffs. On February 27, 1890, Sherman's bill "coincidentally" again came up for discussion to be comprehensively attacked again by George as unconstitutional and futile (*Congressional Record*, February 27, 1890, pp. 1765–72). At this time, George introduced a further, very modern criticism that the consumer, injured indirectly by a restraint of trade by manufacturers on

[5]Senator George was a former Confederate general from Mississippi, a rural southern state whose farmers and small businesses were particularly vocal in their concerns about the trusts.

intermediaries, who then pass on the increased prices, had no recourse under the bill (*Congressional Record*, February 27, 1890, p. 1767). Neither Sherman nor anyone else answered these attacks. It is noteworthy that George's continued criticisms of the difficulties in interpreting and executing the law would not have been lost on the Senate, as 68 of the 82 senators were lawyers. The inescapable conclusion is that the senators wished the act to remain obscure and ambiguous in its meaning and enforceability—a piece of legislation that a corporate lawyer could drive a truck through. A month later the Senate laughed at and dismissed the suggestion that the law might apply to the price-setting activities of bar associations and doctors (*Congressional Record*, March 27, 1890, p. 2726).

There were no further developments until late March. One rumor was that the Republicans were wavering, thinking seriously of attaching an antitrust provision directly to McKinley's tariff bill (Letwin 1956, p. 251). However, nothing eventuated (probably because of judicious lobbying from the trusts), and the Republicans maintained their dogged but now transparent stance that there was no more than a coincidental connection between the trusts and any benefits the trusts might gain from the new tariff legislation. Instead, in a flurry of activity in late March, the Senate debated a revised version of Sherman's bill that purportedly answered Senator George's objections. In speaking to the necessity for some sort of antitrust bill, Sherman did not discuss George's concerns. Instead, Sherman cited, presumably with something akin to glee, a case that had been brought at the state level against Russel Alger (the same Alger he suspected of being partly instrumental in his humiliating defeat at the Chicago convention) in relation to Alger's involvement in several trusts, including in particular the one organized by the Diamond Match Company (*Congressional Record*, March 21, 1890, p. 2461). This was not the response of a legislator who was sincerely concerned about passing effective antitrust legislation.

Sherman admitted that it was difficult to identify the line between lawful and unlawful combinations but suggested that it should be left to the courts to decide each particular case. Moreover, in arguing that the actions ought to be pursued by the justice department, he recognized that the individual citizen could not pursue a suit and admitted that

> [E]ven the United States is scarcely the equal of a powerful corporation in a suit where a single officer with insufficient pay is required to compete with the ablest lawyers encouraged with compensation far beyond the limits allowed to the highest government officer. It is in such proceeding that the battle with these great combinations is to be fought. (*Congressional Record*, March 21, 1890, p. 2461)

Democratic Senator George G. Vest's view was that the Supreme Court would view the bill as "vox et praeteria nihil; sound and fury, signifying nothing" (*Congressional Record*, March 21, 1890, pp. 2465, 2570). A variety of amendments, some frivolous, were offered to this bill, which finally got so confusing that by March 24, Sherman made a plea for the Senate to make only such amendments as it deemed absolutely necessary but to pass some form of legislation. On March 26, in several close votes on amendments, the Republicans frustrated the Democrat's attempts to include a regulation giving the president power to suspend any tariff protection given to a trust. Finally, against some spirited opposition from Sherman, his bill was referred to the Committee on the Judiciary with instructions to examine the bill and report back within 21 days. This is clearly the point at which the Republican party leadership took control of antitrust legislation for its various political purposes.

When the bill was referred to the Judiciary rather than the Finance Committee, Sherman lost any control he had had over his antitrust legislation. But perhaps, by now, it did not trouble him greatly: A further indication of the questionable importance of the bill and its anticipated effect was that 40 of the 82 senators were absent and only a handful participated in the debate. At this stage, many senators and the press regarded the bill as virtually a dead letter, because the Judiciary Committee was widely regarded as one to which the Senate customarily referred a bill when it did not wish to pass the bill but also did not want to be clearly identified as the instrument of its demise. Sherman protested that "If it is proposed to kill this measure, let it be done in a fair and legitimate way" (*Congressional Record*, March 25, 1890, p. 2604).

The press did not regard the apparent demise of the proposed antitrust legislation as important. The *New York Times* (April 1, 1890, p. 4) regarded it as a farce, initiated to "engage the attention of the farmer who is to find in the end that he has gained nothing by an alleged attempt to restrain unlawful trusts and combinations." The newspaper went further, asking questions such as "Was it a Hum-Bug bill?" and "Even the Republicans have abandoned it?" The *Chicago Tribune* did not pay a great deal of attention to the bill—except that on April 28 it gave a two-paragraph description and a report of the bill's reference to the committee, and on April 29 it denounced the move: "[T]he pretense that the bill needs further consideration and study by the Judiciary Committee will deceive no one but fools" (*Chicago Tribune*, April 29, 1890, p. 4).

Further grounds had already been revealed for regarding the Sherman bill as a sham. Senator Henry M. Teller (Republican) explained how several trusts had now formed themselves into holding corporations, which moved them beyond the powers of the proposed legislation (*Congressional Record*, March 24, 1890, p. 2560). Senator Frank Hiscock, also a loyal Republican, now reiterated Democrat George's earlier concern that intermediaries would never seek damages under the act and the ultimate consumer, only able to pursue an individual action, would never sue to retrieve $10 damages (*Congressional Record*, March 24, 1890, p. 2571).

Perhaps to everyone's surprise, a bill came back from the Judiciary Committee within the time limit prescribed—a bill that was largely written by the committee chairman (Senator George F. Edmunds). Senator George, who served on the committee, stated that he believed the bill would be a great disappointment to the people, "a sham, a snare and a delusion." He sought amendments to allow class-action suits and the right of individuals to sue in the circuit courts of the United States. This would have made it easier for the farmer and laborer to seek redress against the trusts. In an impassioned final speech, George asked his colleagues to explain specifically why the law would not benefit from his amendments (*Congressional Record*, April 18, 1890, p. 3150).

Again, not a single senator, including Sherman, responded to his challenge, and all of his amendments failed.

However, Sherman was quoted by the *New York Times* on April 8, 1890, as saying, at a public meeting, that the new bill was worthless. According to the *New York Times*, the *St. Louis Globe and Democrat* had reported that Sherman had said the substitute bill would be "totally ineffective in dealing with combinations and Trusts. All corporations can ride through it or over it without fear of punishment or detection." This public outburst may have indicated Sherman's frustration over the way he and his legislation had been used by the Republican leadership.[6] Relatedly, and more likely given his future total lack of interest in his antitrust act, it signals that Senator Sherman had washed his hands of any responsibility for antitrust regulation. But by now the Republican leadership was providing the momentum for the passage of the legislation, and after a little more desultory debate, the Sherman Antitrust Act (that Sherman had had no hand in writing) passed the Senate and the House and was signed into law by the president on July 2, 1890. Its passage was briefly noted by the *New York Times* on the same page that it reported the formation of a new and very powerful trust.

What did the United States have in the way of a new statute? It is clear that the contemporary opinion was that it was a statute that failed to provide adequate means of enforcement and was regarded by many as merely a red herring, diverting the public attention away from the more important issue, reduction of the tariffs. It has been argued that this is not the case, that the act was passed in good faith and was the best that could be expected in the circumstances. Yet if events both before and after the passage of the act are examined, such a view of legislative intent is simply untenable.

When the tariff debate was raging in the Senate in late September 1890, two months after the antitrust act became law, Sherman strictly followed the party line in supporting the McKinley tariff bill. The duty on high-grade sugar, which had been a controversial public issue for the past year because it protected the sugar trust, was raised by Sherman's Finance Committee. Moreover, when discussing the effect of the new tariff bill on the trusts, Sherman did not even mention the antitrust act. On the day the tariff bill passed the Senate, he said,

> [T]his protective policy must not degenerate into monopoly, into Trusts or combinations to raise the prices against the spirit of the common law.... I do hope now that this bill when it becomes a law will be acted upon by the manufacturers in our country judiciously, that they will avoid those contracts that have been made and which occasioned popular discontent, that they will invite fair competition.... If they do not, I for one, will be as ready to repeal this law as I am now ready to vote for it. (*Congressional Record*, 1890, p. 10668)

Sherman's statement was, in effect, a warning (if a hollow warning) to trusts and combinations to restrain themselves or effective action might be taken against them. It was so regarded by the newspapers. But what is most telling is that the new antitrust law was not considered significant enough, in this context, to be even worthy of Sherman's mention. His threat was not to use the new antitrust law but to repeal the new tariff law. It might be asked that if the Sherman Act was a smoke screen for the McKinley Tariff Act, then why was it not raised by the Republicans at the time it was passed? Another variation of this question is, If the Sherman Act was genuine, sincere antitrust legislation to act as a checks-and-balance device to the new tariff act, then why was it not raised by the Republicans during the Tariff debate in answer to claims that the Republican party was in the pocket of big business? The most likely explanation is that even the Republicans now recognized that their scheme had been blown. Again, silence in the historical record can, at times, speak louder than words.

Indeed, from the date of the Sherman Act's passage, the Senate and the House clearly signaled their lack of interest in it. Sherman never proposed any further amendments or antitrust legislation even when it became apparent that it was not being enforced and that prosecutions were failing (e.g., the 1895 *Sugar Trust* case) because of the ambiguity of the law. Moreover, no extra funding was appropriated for the Department of Justice to enforce the antitrust law until 1903 (Neale 1960). Even at the height of Theodore Roosevelt's famous trust-busting crusade, the personnel of the antitrust division of the justice department consisted of only five lawyers and four stenographers (Arnold 1940). Of further interest, four of the first six cases brought by the justice department under the Sherman Act were against labor unions (May 1989; Thorelli 1955). Such a consequence of the act had been foreseen by several critics, including even Sherman, who initially assured the Senate that this would never occur and later proposed his own amendment that excluded labor unions and agriculture marketing cooperatives from the provisions of the act (*Congressional Record*, March 25, 1890, p. 2611). What is even more extraordinary is that the *Congressional Record* reports that his amendment was agreed to by a voice vote of the Senate. This amendment was "mysteriously" ignored by the Judiciary Committee that drafted the final legislation. Finally, and perhaps most telling, in the period 1898–1901, 44 new major trusts were formed, which "embraced a considerable part of the total industry of the United States in their respective branches of business" (Davies 1916, p. 13).

Discussion

Because marketing is an applied economics discipline, its scholars and practitioners should have a deep interest in competition, competition policy, and antitrust law, particularly regarding how these terms are applied to new competitive innovations created and promoted by marketers. For example, can a company's efforts to restrain the ability of independent Internet intermediaries (i.e., "bots") to search and obtain information from the company's Internet sites about product quality and price constitute a restraint of trade, in the sense that this reduces market access to price information and therefore restrains price competition? If the Internet fails to deliver an information superhighway full of

[6]Clark (1931, p. 43) notes that in Senator George Hoar's autobiography, Hoar claims that the final bill offered by Senator Sherman was one that removed the tariff from any trust-controlled article. If this is true, such a bill never made it into the *Congressional Record*. However, it provides further evidence that Sherman and the Republican leadership of the house understood the uneasy relationship between the trusts and tariffs.

comparative price information that leads to more dynamic (i.e., perfect) price competition, will this constitute a failure of competition policy (Dickson 2000) and antitrust law?

Does Microsoft's failure to incorporate the readily available innovation of voice recognition into the word-processing software for dictation and editing constitute evidence of a lack of competitive innovation in this hugely important market that Microsoft monopolizes? Marketers, who understand the game-theoretic effects of dealing with four or five rather than one other rival, might also ask why Microsoft should not be broken up into many companies. Other marketers in the wireless industry who understand the positive feedback advantage of a single technology standard (as exists in Europe and Japan) might ask what the contemporary limits are to the public interest and the welfare of the economy of promoting competition among multiple standards. The marketing discipline has not played as prominent a role in shaping the evolution of antitrust public policy and case law as the pure economic and legal disciplines. If this is to change, as it needs to change because marketers (and not economists and lawyers) are the makers of the new forms of competition and markets, then it might be useful for marketing strategists to develop a more sophisticated understanding of the evolution of competition policy and antitrust law, including its philosophical origins.

The Sherman Act of 1890 together with its offspring, the Clayton and Federal Trade Commission Acts and their amendments, constitutes a large part of the regulatory umbrella under which U.S. business operates. In 1979 Chief Justice Burger, citing Bork (1978), stated that the legislative debates "suggest that Congress designed the Sherman Act as a 'consumer welfare prescription'" (Lande 1982, p. 67, n. 2; *Reiter v. Sonotone Corp.* 1979, p. 343). It is likely that future Supreme Court justices will make similar pronouncements in adjudicating the reach of antitrust law into cyberspace markets and new marketing practices. Grady (1992) has further described how social myths (stories that have a fairy tale nature) about the origins and intent of the Sherman Act have directed public policy and antitrust law along several paths, some quite separate from the theories underlying common law.

Our first goal in this article was to point out that attempts to establish the true legislative intent of antitrust law such as the Sherman Act may end up taking academics, marketers, economists, lawyers, public policy agents, and the courts to surprising places where they may not want to go. Our conclusion is that there is a great deal of recorded evidence that the intent of the Sherman Act was to be a harmless (to the trusts), ineffective sop to public opinion, a public relations smokescreen behind which the McKinley tariff increase could shelter. If courts have imputed such honorable intentions as economic efficiency, assistance to small businesspeople, and help and protection of consumers in making important rulings, why then should a future court not decide that the real intent of the Sherman Act was to be harmless to combinations (or companies such as Microsoft) that attempt to monopolize, restrain trade, and otherwise artificially raise prices, and why should the court not rule accordingly? For example, Chief Justice Edward D. White, rather than creating the rule of reason precedent, could have made a case that it was common knowledge that the real intention of the Sherman Act was as a public relations initiative and that it would be most inappropriate, given the business context of the time it was passed (that defined its real intent), that it be given sweeping reach and influence. Instead, Justice White argued in the Standard Oil opinion of 1911 that the act was a confirmation of the common law (as Sherman said and Stigler has said) to which a rule of reason, befitting the context of the times, could be applied, and this was the intent of the legislators and the act (May 1989; Neale 1960). In later rulings, the justices continued to quote the speeches from the *Congressional Record* to justify their right to interpret and reinterpret the law (e.g., *United States v. Aluminum Co. of America* 1945). According to Chief Justice Harlan F. Stone,

> The prohibitions of the Sherman Act were not stated in terms of precision or of crystal clarity and the Act itself does not define them. In consequence of the vagueness of its language, perhaps not uncalculated, the courts have been left to give content to the statute, and in the performance of that function it is appropriate that courts should interpret its words in the light of its legislative history and of the particular evils at which the legislation was aimed. (*Apex Hosiery Co. v. Leader et al.* 1940, p. 489)

Legislative Intent in Context

The importance of the legislative intentions behind the Sherman Act must be placed in its proper perspective. Other dimensions, such as the preponderance of the findings and the moral, legal, and philosophical arguments presented to the courts, frequently outweigh legislative intent issues that may not even be raised by the litigants or the judge.

The great majority of antitrust cases are adjudicated according to precedent-setting judgments and per se rulings. Both defendant and the justice department argue not only the facts or findings but also whether they constitute a violation of the current interpretation of the letter of the law. Only in precedent-setting cases do issues of interpretation of the law as it applies to new technologies, new organization forms, and new collusive business practices (i.e., economic innovation) become a central issue. It is within this relatively rare context that contemporary courts discuss legislative intent. It is also in such precedent-setting economic innovation cases that the license given to the court to apply the rule of reason is most potent and important, often producing groundbreaking new interpretations of antitrust law and competitive practice. Perhaps judges and jurisprudence scholars see no useful purpose in disparaging the origins of the rule of reason because the rule of reason mechanism (and the jurisprudence processes associated with its application) is a major way of enabling the courts to evolve in ways that complement and support the evolution of the U.S. economy and nation-state.

If the courts attempt to interpret the legislative intent of the Sherman Act from the public statements of legislators in the *Congressional Record*, we recommend that they do so cautiously. This is because arguments made in legal briefs about the legislative intent of the Sherman Act in the past (such arguments are too numerous to list, according to Lande [1982]) or in the future that do not recognize the probability of the naked political purpose of the Sherman Act—and therefore raise questions about any other publicly stated intentions—at best are poor scholarship and at worst

are dissembling. The commonsense reality is that, then as often now, legislators were spin masters and the *Congressional Record* contains no statement such as "I am promoting this legislation because I am indebted to lobbyists who have an agenda and goal that is far from the public interest. I know that many of my colleagues are in a similar position and I call on their support."

Lessons from History

Instead of seeking intent or precedent-setting cases that define the reach and purpose of the Sherman Act, marketers and other interested groups might learn two important lessons. The first is that if a firm attempts to get legislation passed that protects or promotes its industry or a marketing scholar interprets the likely effect of new legislation, there is a risk of the unintended consequences effect. In the Sherman Act, the unintended consequence was the promotion and codification into U.S. commercial law of the common law rule of reason principle that now justifies antitrust judicial activism.

The second lesson is that instead of resenting such activism, marketers should rejoice in it. Freed from the restrictions imposed by initial intent, the courts and judges have extraordinary latitude under the rule of reason to take competitive policy and antitrust laws in new directions. This flexibility and adaptability is crucial in dealing with the "new economy" that is evolving not only as a result of technological innovation and globalization but also as a result of the new dynamic, evolutionary theories of competition (e.g., Arthur 1994; Boulding 1981; Dickson 1992, 1994, 1997, 2000; Hodgson 1993; Shapiro and Varian 1999) that emphasize innovation and quality competition (as well as price competition) and are replacing the outmoded equilibrium and industrial organization concentration theories of competition. Legislation and regulation inevitably must play catch-up as new entrepreneurs and innovations change the way markets are organized and function (Hayek 1978). In such circumstances, it is a huge advantage to the welfare of the political economy system for the courts to be able to respond in ways that reduce the incidence of market failure or anticompetitive behaviors caused by new emerging technologies or trading practices, without limiting competition through the mindless application of either legislative intent or outdated precedent-setting case law. For example, in the Microsoft case the desirability of a standard platform to promote more competition among application software providers that operate on the same playing field (that is, Windows) can be argued along with the theoretical and empirical evidence that standards promote the more rapid evolution of information technology markets. A rule of reason interpretation might be to allow private ownership of a competitively obtained standards monopoly, provided that the monopoly is benevolent in its behavior and restricted in its entry to up- and downstream markets. It is not that the new economy is different from the old in the benefits of standards; rather, it is that the emerging theory of positive returns (Arthur 1994; Dickson 1992; Shapiro and Varian 1999) argues that the positive feedback effects of a common standard can dominate the negative feedback effects that are the raison d'être of neoclassic equilibrium theory. The economy is being seen through a new lens that creates a new view of the economy and economic efficiency.

The application of the rule of reason to generally stated statutes by judicial activists is a particularly powerful governance response mechanism in rapidly changing economic times with rapidly evolving economic entities and trading relationships. Consider what would have happened if antitrust regulation had been made specific to particular industries or practices unique to the technologies of the time. The alternative of having, say, Microsoft-specific antitrust legislation passed by politicians dependent on lobbyists for their present and future careers beggars the imagination. At best, the process would be hopelessly slow; at worst it would be partial and corrupting and a poor way of maintaining the public interest. Antitrust law would need to be updated continually, and with every update it would be subject to massive lobbying and influence efforts by the industries and technologies affected. It would inevitably have been weakened over time. For example, how likely is it that the triple damages part of the original Sherman Antitrust Act would have survived 100 years of such updating?

A remedy for those who deplore the uncertainty and ambiguity of such law and its implementation is agency guidelines. Just as the rule of reason evolved from the Sherman Act, agency guidelines have evolved from the rule of reason. Recent merger guidelines, competitor collaboration guidelines, and intellectual property licensing guidelines not only provide the specificity as to what is legal and illegal that marketers seek but also enable new marketing developments to be addressed more promptly than test case litigation does.[7] They also provide a healthy nonjudicial arena for marketers and regulators to discuss, debate, and learn from each other about what constitutes legal and illegal competition, thus creating a better process for evolving antitrust regulation.

Finally, scholars of competition in marketing should have a particular respect for the generality of the founding antitrust law. Its generality and the rule of reason open up exciting opportunities for marketing scholars' theories of competition to be received and accepted by the courts as useful lenses for appreciating the competitive behavior of firms in the marketplace, and these theories may lead to a change in the reasoning of the courts. The discrediting of the economic theory used to justify per se rulings of monopolization based on industry concentration led to a shift in the thinking of the courts as to what constitutes a monopoly. It is possible that the new increasing-returns, disequilibrium theories of competition and market evolution that challenge neoclassic price theory may lead to similar changes in the direction of the courts and antitrust policy. Marketing scholars who study consumer behavior, channels and trading relationships, and firm competitive behavior have something to contribute to such a potential revolution in antitrust jurisprudence.

Conclusion

It is one of the great ironies in the history of the U.S. jurisprudence and free-market capitalism that the Sherman Act became the foundation of modern economic regulation,

[7]We thank one of our reviewers for this important insight.

the legislative promoter and protector of the competitive efficiency of the modern competitive political economy. But the irony associated with the Sherman Act is multifaceted. First, some of the original speakers who had argued for a legislative vagueness and specific judicial interpretation, in the hope of forever snarling effective prosecution, would not have appreciated the way their specious arguments were later used against big business. Second, the great progressive justices under Theodore Roosevelt's presidency who used legislative intent to argue for their application of a rule of reason (also soundly based in common law) were surely aware of the potentially specious nature of the arguments presented in the *Congressional Record*. They were interested observers of the passage of the Sherman Act and could not have been unaware of the vocal criticism of the act. Third, modern legislators who rail at courts making law through the rule of reason and agencies making law through guidelines should recognize that it was their ancestors who created such license, probably for similar reasons—the interests of specific firms. Fourth and finally, the Sherman Act has survived the age of global tariff protection, and now that tariffs are coming down, its reach is becoming ever greater, extending into global markets such as passenger jet aircraft.

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