THE SHERMAN ACT 1890: BEHIND THE DISTORTION OF THE TRUE ORIGINS OF ANTITRUST LAWS

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Introduction

Competition is an essential ingredient to an effective market. It forces companies to attract consumers by offering cheaper and better products; thereby promoting the welfare of consumers.\textsuperscript{1} Paradoxically, unrestricted competition is a “brutal warfare and [is] injurious”\textsuperscript{2} as it eventually leads to “the destruction of all [weaker competitors] but one”.\textsuperscript{3} American legislators in the nineteenth century thought as much, which led to the emergence of the first federal antitrust statute in 1890: the Sherman Antitrust Act. To date, 122 years have passed since its enactment but the Act remains one of the principal antitrust regulations governing the United States economy.\textsuperscript{4} However, there is evidence that suggests the possibility of the distortion in the original intent of the

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\textsuperscript{1} US Department of Justice “Antitrust Enforcement and the Consumer” (5 June 2012) <www.justice.gov>.

\textsuperscript{2} Judith Freeman Clark \textit{The Gilded Age} (revised ed, Infobase, New York, 2006) at 136.


\textsuperscript{4} US Department of Justice, above n 1.
Act. As one academic put it, “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”.

The standard view of antitrust law is based on the public interest theory: that intervention by government is to regulate and promote the economy to protect the welfare of its consumers. Contrary to the standard view, this article will affirm that the passage of the Sherman Act did not accommodate the interests of the general public. A careful recollection of three non-mutually exclusive historical jigsaw pieces – the protection of inefficient competitors, the Senator Sherman’s payback motive, and a smoke screen to the enactment of McKinley Tariff Act – will prove there was no legitimate justification for passing the Sherman Act other than it being a product of the flaws in the United States democratic legal system. This article will conclude with an examination of the possible practical effects of the distorted legislative intents of the Sherman Act to the present day.

A. Antitrust Law — Public Interest Legislation

Anti-competitive initiatives and monopolies have existed for a long time, which dates back to the Ancient Greek society and the Roman

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Empire. The names for the corresponding law differed from time to time; but the fundamental idea behind the regulatory approach must have been the same. That is, competition plays an important role in creating an effective market; therefore any anti-competitive behaviour must be restricted.

Antitrust is a public policy process where the government is driven by an objective, which is to serve the general public’s interest. This is based on the notion that private individuals are motivated by self-interest whereas government decision makers are guided by the interest of the general public. The government should therefore intervene “to restrain the forces of private monopoly with the intention of benefiting that most diverse and unorganised of interest groups, consumers”. In this sense, the purpose that an antitrust law should strive to achieve is promotion of competition and protection of consumers via prohibiting monopolistic arrangements to ensure lower prices and better and a wider range of products to consumers. It is important to note though that these purposes are only plausible when based on the conventional

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10 Shughart II, above n 6, at 19.
view that law makers “act in [a] single-minded pursuit of the public interest”.12

This article, however, suggests that to be a naive view. It denies the fact that those politicians – just like private individuals – may have acted with their self-interest, where legislation was used as a means to achieve their own goals. This will be demonstrated by analysing the legislative history of the first federal antitrust legislation in the United States, the Sherman Act.

B. The Sherman Antitrust Act 1890

The Sherman Act was the first federal statute passed by the fifty-first Congress against trusts in 1890 and is widely considered as “the first antitrust law in the USA”.13 The introducer and principal contributor of the Sherman Act was a Republican senator, John Sherman. The enactment of the Act was under the constitutional power of Congress “to regulate Commerce with foreign Nations, and among the several States”.14 Upon its introduction, political support for the Sherman Act was overwhelming with merely one vote against its enactment from the Senate and unanimous votes from the House.15

12 At 197.
14 US Const art I, § 8, cl 3.
The major sections under the Act are as follows:16

§ 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 …

§ 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 …

Despite the support the outcome was a vague law, which has caused difficulties for academics and judges ever since its passage. For example, even after 50 years of its enactment, State Supreme Courts were not sure of the meaning of the terms under the Act:17

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 … the courts have been left to give content to the statute, and … courts should interpret its words in the light of its legislative history.

Likewise, the ambiguousness directed scholars and the judiciary to explore the history, in search of its true meaning.18 In doing so, the motivation behind Congress in passing the Act became the centre of controversy as its intentions were not clear.19 However, it is unmistakable that the Sherman Act was passed to meet purposes other

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16 Sherman Act 13 USC §§ 1 and 2.
17 Apex Hosiery Co v Leader et al 310 US 469 (1940) at 489.
19 Carey, above n 3, at 337.
than the aims of the standard view of antitrust law, which is to promote
competition and to protect consumers. As one academic pointed out: 20

… the record of the debates in Congress in 1890 shows that
Congress believed it was meeting more than one aim in the
legislation. Furthermore, the record suggests that … few, if any
members of the Congress, has worried more than verifying about
insuring the consistency of these aims.

Historical analysis of economic data prior to the enactment of the
Sherman Act clearly points to the implausible justifications in passing
the antitrust law. Coherently, the passage of the Sherman Act merely
appears to have been the means to achieve the secret master plan
drawn by the architects’ and their allies.

C. The Desirability of Antitrust Law in the Nineteenth Century

Senator John Sherman — as is indicated by the name of the Act —
was one of the principal contributors to the Sherman Act; hence
“understanding … the motives and the views of Senator Sherman is
crucial to understanding the intent of [the] law [which] bears his
name”.21 Senator Sherman expressed his concerns about trusts in
supporting the antitrust bill.22

20 At 338.
21 Dickson and Wells, above n 5, at 5. Also agreeing are: Thomas W Hazlett
“The Legislative History of the Sherman Act Re-examined” (1992) 20
Economic Inquiry 263 at 266; and Robert H Bork “Legislative intent and
the Policy of the Sherman Act” (1966) 9 JLE 7 at 14.
22 21 Cong Rec 2460 (1890) (emphasis added) as cited in Eleanor M Fox
and Lawrence A Sullivan “The Good and Bad Trust Dichotomy: a short
history of a legal idea” 35 Antitrust Bull 35 at 67.
The *popular mind* is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition …

Congruent with this speech, DiLorenzo and Bork also pointed out a strong justification for Senator Sherman and his allies in introducing the antitrust bill, which was that trusts tend to restrict outputs thereby increasing price. Sherman and his allies took the phenomenon of the increase in price and reduction of outputs to their advantage, in contending their indications of industries being monopolised by trusts.23 This economic consequence of monopolisation would have been an excellent measure of the need for introducing the antitrust law.

Upon close examination of the price and outputs of some industries that were allegedly being monopolised prior to the passage of the Sherman Act, it is evident the introduction of an antitrust law was undesirable. The Congressional Record of the fifty-first Congress included the following industries as being monopolised by trusts: “salt, petroleum, zinc, steel, bituminous coal, steel rails, sugar, lead, liquor, twine, iron nuts and washers, jute [and] castor oil…”24 Due to the lack of data, an examination of all industries is difficult.

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However, an investigation into some of the major industries contradicts Sherman’s claims. There was an average increase in the outputs and growth in the named industries, and the general price reductions in the industries were even greater than the reduction in the consumer price index at the time.\textsuperscript{25} The Congressional Record also shows senators’ acknowledgement of trusts’ positive effect on prices of sugar and petroleum - the two most widely criticised industries.\textsuperscript{26}

Close examination of the available market data for the 1880s proves a conflicting view to the desirability of the antitrust law strongly asserted by Sherman. What is more interesting is that in the construction of an important public policy statute like the Sherman Act, the rationale for its enactment was not influenced by economists of the era. One historian wrote that “… the Congressional debates indicated that no influence whatsoever was exercised by [economists] upon the development of the national legislative policy …”\textsuperscript{27} in relation to antitrust.\textsuperscript{28} If Congress was uninformed about economists’ views in passing the Sherman Act, how could it be sure it was doing the right thing for the public? Also, what was the basis on which Sherman made the claim that the \textit{popular mind was agitated} in trusts restricting the outputs and raising prices?

\textsuperscript{25} At 31.
\textsuperscript{26} 21 Cong Rec 4100 (1890) as cited in Hazlett, above n 21, at 266.
\textsuperscript{27} John D Clark \textit{The Federal Trust Policy} (The Johns Hopkins Press, Baltimore, 1931) at 31.
\textsuperscript{28} At 31.
Economists’ general consensus during the 1880s was not hostile to trusts, but rather to the view that antitrust law was desired. For example, John Bates Clark - “one of the best younger economists,” insisted that legislative restrictive measures on trusts and combinations would denote a reverse in the economic development.

Examination of market data for the 1880s indicated “there [was] no persuasive evidence that [the Sherman Act] was inspired to enhance economic efficiency” hence protecting consumers. It was further demonstrated by economists’ opinions in the nineteenth century.

D. The Distortion of Legislative Intent

(1) A shield to inefficient competitors

Academics suggested the Sherman Act was enacted to protect inefficient competitors from large-scale and more efficient competitors. For example, economist Robert Bradley highlighted that “[t]he Sherman Act discouraged scale economics [which] promoted lower costs and prices, penalized successful market entrepreneurships, and

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29 George Gunton “The Economic and Social Aspect of Trusts” (1888) 3(3) PSQ 385 at 389.
31 John B Clark “The Limits of Competition” (1887) 2(1) Pol Q 45 at 55.
rewarded the political entrepreneurship of less-efficient business rivals”.33

Two main pieces of evidence supporting this view are the letters received by John Sherman from inefficient companies lobbying for the introduction of antitrust law; and the farmers’ demand for such action.

(2) Letters to John Sherman

John Sherman received several noteworthy letters from inefficient companies.34 In particular his correspondence with small oil refiners shows his sympathy for inefficient competitors. Given his significant contribution to the passage of the Sherman Act:35

… his letters can be viewed as a barometer of antitrust sentiment. Take[n] as a whole, the Sherman letters undermine the traditional view that consumers lobbied for, and supported, anti-trust [law].

The letters from small oil refiners are the most active proponents for the introduction of the antitrust law against the Standard Oil Trust and other big oil companies. Their primary grievance was directed at large-scale oil companies, which were granted railroad rebates for tank cars36 thereby reducing transportation costs. One particular letter addressed to Sherman contained the precise wordings of the Bill which they wished

35 At 291.
36 This is a “train-tanker” in American English.
Sherman would use to introduce. Following this, Sherman introduced an anti-tank car Bill, reflecting the proposed wording in the letter.37

Sherman’s support and defence for small competitors was obdurate despite other senators’ coherent arguments. Numerous senators affirmed that the tank car rebates promote economic efficiency therefore ultimately benefiting consumers with discounted oil prices. For example, Senator Gray – also known as the antitrust person – stated that tank cars allow a “great economy in the distribution”.38 Likewise, Senator Reagan sarcastically commented “I do not think there is any human being on earth who will contradict”39 the fact that tank cars reduce the transportation cost.

To counter these arguments, Senate Sherman argued that the anti-tank car Bill would keep small competitors within the industry, thereby promoting competition:40

All this [legislation] is designed to do is to guard against the monopoly which … the oil-transporting companies with their tank car will have over the others. All that is asked by the people, most of whom are struggling now for their existence, is that their oil … shall be carried at the same rate per gallon in the barrels … as the Standard Oil and other companies …

Regardless of the unsuccessful anti-tank car Bill; small oil companies applauded Sherman for his attempt and further encouraged him to persist in his commitment against Standard Oil.41 This letter was seen as

37 At 280.
38 50th Cong 2d Sess 2436 (1889) as cited in Troesken, above n 34, at 281.
39 At 281.
40 At 282.
41 Troesken, n 34, at 282.
an attempt by smaller refiners to protect themselves from more efficient oil trusts as they were unable to access the new transportation technology due to their small-scale business.

In sum, Sherman’s empathy towards inefficient businesses was elicited upon the introduction of the anti-tank car Bill following the letters from small refiners, and his continued vigorous defence for them throughout the debate. Also, in light of other letters received by small inefficient companies, it is plausible to deduce that a substantial amount of his opinion of agitated popular mind was occupied by the interest of inefficient companies rather than a variety of different groups from the general public.

(5) Political movements by farmers

Behind the passage of the Sherman Act were politically powerful farmers led by “[o]rganisations such as the Grangers and the Farmer’s Alliance … the most powerful political interests of the day”.42 The American economy was predominated by the agricultural industry until the late 19th century, where most businesses were relatively small. As the century progressed, technology, transportation and communication developed and opened the era of mass-production. The by-product of this phenomenon was the creation of large and more efficient business enterprises that drastically changed the United States economy.43 On the flipside, this posed a competitive threat to small farmers, who

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42 Dilorenzo “the Origins of Antitrust: An Interest-Group Perspective”, above n 23, at 75.

therefore had to seek refuge in the regulatory powers of the government.\textsuperscript{44}

Sanford Gordon analysed the public’s attitude towards monopoly prior to the Sherman Act and pointed out that: \textsuperscript{45}

\begin{quote}
[T]he most violent reaction [against industrial combinations] of any single special interest group came from farmers … They singled out the jute bagging and [the] alleged binder twine trust, and sent petitions to both their state legislators and to Congress demanding some relief … In Georgia, Mississippi, and Tennessee the [farmers’] alliances passed resolutions condemning the jute bagging trust and recommended the use of cotton cloth.
\end{quote}

Furthermore, an overwhelming number of petitions and memorials flew into the fifty-first Congress and they were “…almost exclusively from farm groups”.\textsuperscript{46}

Accordingly, prior to the Sherman Act there was the passage of several intrastate antitrust laws. Academics claim the possibility of a correlation between these statewide antitrust movements and the Sherman Act: \textsuperscript{47}

\begin{quote}
The Sherman Act was not enacted in the Washington, D.C., political vacuum. It emerged from the same economic and political forces that gave rise to state antitrust legislation. It is particularly relevant that in
\end{quote}

\begin{footnotes}
\item[45] Sanford D Gordon “Attitudes towards Trusts prior to the Sherman Act” (1963) 30(2) Southern Economic Journal 156 at 158.
\item[46] At 162.
\end{footnotes}
1890 state legislatures still directly elected U.S. Senators and that the Sherman Act was introduced in the Senate rather than the House.

This nineteenth century statewide antitrust activism was investigated by Boudreaux, DiLorenzo and Parker - three credible economists. Their works included research into the development of Missouri’s antitrust law, which was considered as a “… representative of the states that enacted antitrust legislation during [the] late 1880s …”48 Proponents of the antitrust law were exclusively farmers who argued that the introduction of such law would benefit consumers from the artificial manipulation of prices and outputs by monopolies. Boudreaux and others tested this protest to see whether the activism was merely rent-seeking behaviour by less-efficient competitors to protect themselves from more competitive competitors. The trio conducted a close examination of 1870s and 1880s economic data from the agricultural sector prior to the passage of the antitrust law. They had three cogent variables: an increase in the price of farm outputs, a reduction in the volume of farm outputs, and a rise in the price of farm inputs. If anyone was present, monopolistic activities could be proven. In their absence, the farmers’ activism could be shown to be rent-seeking behaviour to create a shield from more competitive forces.

Missouri’s major agricultural products were cattle, hogs and wheat, which comprised more than 60 per cent of its total agricultural output in 1889. The statistical evidence of the price and outputs in these industries during the 1880s firmly supports general reductions in prices and increases in outputs.49 Furthermore, the evidence provided by

48 At 82.
Stigler does not support the allegation that monopolies were increasing the price of their inputs.\(^{50}\)

Overall, in the absence of evidence indicating monopolisation, that is, *an increase in prices of outputs and inputs, and a reduction in the volume of outputs* in the economy; we can agree with DiLorenzo and others, who claimed that the proponents of the antitrust law realised a decline in their incomes. In response they urged the government to alleviate the situation.

Having established that the farmers’ political involvement was an attempt for them to seek security from large competitors, what seems more important to establish is whether the farmers had sufficient political power to influence politicians to introduce and pass an antitrust law. The Missouri Farmers alliance possessed hugely influential political power. The Democrats’ success in the 1888 State Election is a good illustration. The Democrats had an affiliation with the Alliance and were “… very farm conscious. They were farmer-lawyers, farmer-bankers, farmer-teachers, farmer-preachers, farmer-editors, and farmer-druggists”.\(^{51}\) In fact, candidates for the state legislature were given pledge cards by the Alliance to decide if they would work in favour of the Farmers Alliances in 1888. The pledge card reads as follows: “I hereby pledge myself to work and vote for the [Alliance’s] demands irrespective of party caucus or action.”\(^{52}\) These cards were distributed to farmers with instructions to vote against any candidates who refused to sign. The campaign was successful in allowing 140 out of 174 State senators and representatives to sign “yes” to the pledge. “As did every

\(^{50}\) Stigler, above n 15, at 2.

\(^{51}\) Boudreaux and Dilorenzo , above n 47, at 83.

\(^{52}\) Frank M Drew “The Present Farmers’ Movement” (1891) 6(2) PSQ 282 at 303.
one of the congressman-elect headed for Washington … [t]he winners of all three state-wide races in 1888 had signed the pledge as well.”

From this, Boudreaux and others concluded that the driving force behind the passage of Missouri State’s antitrust law in 1889 was the political power held by the agricultural amalgamation. Of the league, the cattlemen and butchers were one of the principal driving forces that proposed such nation-wide regulation. Scholarly evidence proves that this movement had consequentially played “a prominent role in the events leading to the enactment of the Sherman Act”.

The invention of refrigeration and the development of transportation in the late nineteenth century opened doors for Chicago’s meatpacking industry, resulting in the “Big Four” meatpackers. Nationwide shipping of beef began, which reduced the consumer price of meat during the 1880s. However, this caused agitation for the local butchers and cattlemen, which led to the emergence of a rumoured “beef trust”, that is, that the Big Four would continue to cheapen the consumer price. The cattlemen and butchers lobbied for an antitrust action to counteract the realisation of such hearsay. As a result, the Vest Commission was appointed to investigate this issue but found no plausible evidence to support the lobbyists’ claims.

53 Boudreaux and Dilorenzo, above n 47, at 83.
Behind the Distortion of the True Origins of Antitrust Laws

Somewhat bizarrely the Missouri State Antitrust Legislation was nonetheless passed.\(^{55}\) Boudreaux, Dilorenzo, and Parker therefore concluded this sort of economic and political atmosphere was relevant to plausibly deduce that the Sherman Act was also enacted in order to protect small and inefficient but politically powerful entrepreneurs.\(^{56}\)

Twenty-four states passed some form of antitrust legislation between 1867 and 1893. Twelve of these states passed laws in 1889 and six more enacted legislation in 1890 – 1891. Given the speed of this process, it is reasonable to assume that these laws were passed within the same political climate, as described earlier. It was also the same political climate in which the 1890 Sherman Act was passed.

In support of this view there is evidence that members of the Vest Committee, who held hands with the farmers, played an influential role during the process of the passage of the Sherman Act. For example, Senator Vest and Senator Coke were on the Judicial Committee which drafted the final version of the Sherman Act.\(^{57}\)

\((6)\) Motive to Pay Back Russell Alger

Another plausible motivating event that may have triggered Sherman to introduce an antitrust Bill was his “desire to ‘pay back’ the New York industrialist-dominated delegation [Russell Alger] who he blamed for

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\(^{55}\) Dilorenzo “The Origin of Antitrust: Rhetoric vs Reality”, above n 24 at 29.


\(^{57}\) Libecap, above n 54, at 29.
denying him the Republican nomination for presidency at the 1888 Convention”.

Sherman’s desire to win the presidential nomination during his long political life in Washington and a number of unexpected defeats prior to the 1888 Convention assists our understanding of the degree of Sherman’s disappointment and resentment towards General Alger for his corrupt campaign, which in Sherman’s belief, was a principal cause of his defeat in the 1888 Convention. Sherman devoted his life as a public servant to Washington yet his desire to win the presidential nomination was never fulfilled.

The 1880s was Sherman’s decade of passion to win the presidential election. The most noteworthy is the 1888 Convention where Sherman’s desire to win presidency peaked after failing twice in the previous Conventions. He realised this would be his last opportunity to get to the White House, due to his retiring age and therefore the end to his political career. For this reason, he was more cautious to ensure that he had the full support from the Ohio delegation. He considered his chances of success were fairly high, but contrary to this expectation, Sherman’s lead in the early ballots did not reach until the very end. From the fourth ballot, a majority of the votes from New York went to Benjamin Harrison, a Civil War Hero from Indiana. This flipped the

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58 Letter from Donald J Boudreaux to the editor (Wall Street Journal) regarding a plausible John Sherman’s intention (19 July 2008).
60 John Sherman John Sherman’s Recollection of Forty Years in The House, Senate and Cabinet (The Werner Company, New York, 1895) at 787.
situation and unfortunately for Sherman ended with Harrison’s victory. 61

Sherman mainly blamed two people as contributors to his failure. First was Tammany Thomas C. Platt, leader of the New York delegation. Sherman believed Platt made a corrupt bargain to direct New York’s votes to Harrison. 62 The second person whom Sherman furiously accused for his defeat was one of his principal rivals, Governor Russell Alger of Michigan. Sherman’s accusation was an allegation that Alger secretly bought votes.

Interestingly enough, the allegation about Alger’s corrupt campaign was reported in a subtle manner by The New York Times early in the convention in June 20 1888, following a test vote on a different issue: “Alger had picked up some Southern delegates intended to be used for Sherman. Their change in allegiance was attributed to the use of money.” 63 Whether this led Sherman to retain his view about Alger’s corrupt bargain is unknown. However, a number of subsequent publications and Sherman’s furious statement in his autobiography, Recollection Book, clearly showed this was a very serious issue. After decades from the Convention Sherman firmly wrote that: 64

I believe, and had, as I thought, conclusive proof, that the friends of Gen. Alger substantially purchased the votes of many of the delegates

61 Kolasky, above n 59, at 86.
62 Sherman, above n 60, at 793.
63 “Everything Still In Doubt: The Contest Hotter Than Ever – Harrison Believed to Have The Best Chance- Depew’s Boom Extremely Weak- None of the Other Candidates Gaining” The New York Times (The United States, 20 June 1888) at 1.
64 Sherman, above n 60, at 793.
from the Southern States who had been instructed by their conventions to vote for me …

He further stated that: 65

The only feeling of resentment I entertained was in regard to the action of … Gen. Alger in tempting with money poor negroes to violate the instruction of their constituents.

This statement was quite controversial and there were several subsequent publications in The New York Times about Alger and Sherman. One publication revealed Sherman’s reply to Alger’s private letter dated 19 July 1888. In this letter, Sherman expressed his resentment against Alger; despite Alger’s initial letter to Sherman, written in a positive manner. Sherman replied: 66

… You made a good show of votes, and if you bought some, according to universal usage, surely I don’t blame you … To me it is a mystery that any man of ability should want a four-year office, sure to cost him all his real friends and pleasures of life, with no adequate compensation except the fealty and adulation of the multitude and of false friends …

65 At 795.
Furthermore, the publication noted Sherman’s furious statement towards Alger’s corrupt bargain was “written in the present tense, showing the present state of his mind upon the subject”.67

Sherman’s strong resentment against Alger’s alleged corrupt campaign seemed to last even after a decade. Sherman’s reference to the decision of the Michigan Supreme Court in Richardson v Buehl68 in his speech in support of the antitrust Bill only after two years from the incident, supports the view that the Bill’s introduction was used as a means to exact revenge on Alger for denying him the Republican nomination in 1888. This case found Alger’s Diamond Match Company to be an unlawful combination in restraint of trade under the Michigan State law. The case highlighted Alger’s participation in an unlawful monopoly, calling him a monopolist General Russell Alger. The next day, The New York Times sensed Sherman’s hostile motive towards Alger. During a report of Sherman’s speech, the paper sarcastically noted “with reluctance what Mr Sherman directed the attention of the Senate and the country to Gen. Alger’s connection with this unlawful combination.”69

This hostile payback motive was also confirmed later by President Benjamin Harrison. While signing the Sherman Act, he stated that “John Sherman has fixed General Alger.”70 Additionally, surrounding circumstances at the time of the introduction of the antitrust Bill

68 Richardson v Buehl 43 NW 1102 (Mich 1889).
70 Matilda Gresham Life of Walter Quintin Gresham, 1832 - 1895 (Rand McNally & Company, Chicago, 1919) at 632.
provide a plausible inference for the view that the passage of the Sherman Act was a *payback* directed at Alger. First, as rightly questioned by the author of *On the Origin of the Sherman Antitrust Act* “why did he wait until July 1888 to bring his antitrust crusade”\(^71\) after a long political career? He was in his mid-60s by the time he proposed the Bill and was described as “an aging man at times impatient and confused”\(^72\) who suddenly became interested in trust issues immediately after his defeat in the Republican nomination.

There does not seem to be any clear evidence to answer these questions, but sometimes silence in history speaks louder than words. It is plausible that there was a payback motive involved for Sherman to introduce the antitrust Bill.

### (7) A Smoke Screen over the Passage of the McKinley Tariff Act of 1890

The third persuasive explanation for the legislative intent behind the Sherman Act is its objective in serving a political function: “a smoke screen behind which politicians could grant tariff protection to their *big business* constituents …”\(^73\) On this view the Sherman Act was used to maximise Sherman’s and his allies’ re-election prospects. This smoothed the enactment of the McKinley Tariff Act of 1890 under which one of the principal beneficiaries were their big business constituents.

\(^{71}\) Bradley, above n 33, at 740.


\(^{73}\) Dilorenzo “The Origins of Antitrust: Rhetoric vs Reality”, above n 24, at 31 (emphasis added).
The McKinley Tariff Act was passed only three months after the enactment of the Sherman Act. It increased the tariff rate on manufactured products to as high as 49.5 per cent. The general consensus at the time was that high tariffs had a positive effect on combinations as it discouraged foreign competition; therefore protecting trusts and combinations altogether. Due to this counteractive effect to the Sherman Act on trust issues, the enactment of the McKinley Tariff Act almost immediately attracted substantial criticism from the public and brought controversy towards the true intention of the Sherman Act. The New York Times noted the suspicious connection between the Sherman Act and the McKinley Act, and heavily criticised the purpose of the former.

Surprisingly, Sherman himself acknowledged his clear knowledge regarding the contradictory nature and functions of the McKinley Tariff Act and the Sherman Act on many occasions. In response to Democratic President Cleveland’s annual message to Congress, Sherman admitted that one effective approach to regulating trusts was through tariff reductions: “[w]hen such combinations to prevent reduction of price by fair competition exist, I agree that they may and

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75 Mary L Azcuenaga “The Tariff is Still the Mother of the Trust” (1990) 29 Washburn LJ 359 at 361.

76 “Mr. Sherman’s Hopes And Fears” *The New York Times* (The United States, 1 October, 1890) at 4.
ought to be met by a reduction of duty.”77 Also, during the debates over the antitrust Bill, Sherman attacked the trusts on the basis that they “subverted the tariff system [and] … undermined the policy of government to protect … American industries by levying duties on imported goods”.78

Nonetheless Sherman soon contributed to the passage of the tariff Bill. During this time his conscience about the counteractive effect was subtly noted on the date of which the Tariff Act was enacted. Sherman expressed his concerns about the effect of the Tariff Act on combinations: 79

[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.

On 29 September 1890 Senator Sherman intended to voice his true mind about the McKinley Act and its effect on combinations; it was withdrawn by the Senator himself for dubious revision purposes. However, the abridged copy of the original speech was forwarded to a

79 21 Cong Rec 10668 (1890) as cited in Dickson and Wells, above n 5, at 11.
New York Times reporter, which was subsequently published as follows:80

We direct attention to those passages [of Sherman's speech] relating to combinations of protected manufacturers designed to take full advantage of high tariff duties by exacting from consumers prices fixed by agreement after competition has been suppressed … Mr. Sherman closed his speech with words of warning and advice to the beneficiaries of the new tariff. [His] earnest manners indicate[d] that he is not at all confident as to the outcome of the law. The great thing that stood in the way of the success of the bill, he said, was whether or not the manufacturers of this country would permit free competition in the American market. The danger was that the beneficiaries of the bill would combine and cheat the people out of the benefits of the law. They were now given reasonable and ample protection, and if they would resist the temptation attaching to great aggregations of capital to combine and advance prices, they might hope for a season of great prosperity ... He did hope, the Senator concluded, that the manufacturers would open the doors to fair competition and give its benefits to the people … [Also that] the manufacturers would agree to compete one with another and would refuse to take the high prices that are so easily obtained.

The two speeches above clearly display Sherman’s awareness of the likely effect of the McKinley Act on trust issues. This included an enhancement of monopoly problems, which undermines the essential purpose of the passage of the Sherman Act. What is peculiar about this speech is Sherman’s hope towards manufacturers. He wished they would not make use of the protective Tariff Act in order to advance their interest; thereby benefitting consumers. This sentiment directly contradicts his earlier statements from less than a year ago, where he

80 “Mr. Sherman’s Hopes And Fears”, above n 76.
acknowledged that the trust “subverted the tariff system; [and] … undermined the policy of government to protect … [the] American industries by levying duties on imported goods”. How can Sherman change his expectations in a mere year’s time, for the public to respect an even higher tariff system which would be more appealing for trusts? This, in turn supports the view that the passage of the Sherman Act was not motivated with genuine intentions to promote competition and increase the economy’s efficiency.

One question still remains: given such inconsistency, why did Sherman and his allies support both Acts? The answer to this question can be sought with reference to the pre-1888 Convention era. The direct relationship between the trust problem and the tariff was widely known – hence the public’s ample attention to trust problems. A number of attempts were also made by Democrats to link the tariff with trust problems and then to propose tariff reductions. Since the Post-Civil War era Republicans have continually advocated for high tariffs. Undoubtedly, the Democrats’ attempts were seen as a threat for the Republicans’ election prospects. The Republicans therefore wanted to be sure the Democrats “[would] not be able to ride the swelling public antipathy towards trusts to victory in November”. Consequently, trusts and tariff issues were important for both parties in the 1888

83 19 Cong Rec 11 (1887). See also Thomas Hudson Mckee The National Conventions and Platforms of All Political Parties, 1789 to 1904: convention, popular, and electoral vote; also the political complexion of both Houses of Congress at each biennial period (Friedenwald Company, Baltimore, 1904) at 235.
84 Kolasky, above n 59, at 86.
election. The antitrust plank was particularly crucial in attracting public votes. The public’s view towards antitrust was so overwhelming that according to the *Cincinnati Commercial Gazette*, anyone who had connection with trusts or favoured the trusts could not be elected. 85

While the Republicans were aware of the importance of the anti-trust planks in catching votes for the November election, they also wanted to maintain their position as a long opponent of tariff reductions. Therefore it was also in their best interest to “to reduce the pressure to lower tariff barriers and … [to] assure that whatever legislation was passed was not too radical”. 86 Their efforts were noted in the Republican’s Declaration of Principles 87 and in The New York Times: 88

> The Republican platform is very, very long and its merit is inverse proportion to its length … [They have] declared that [they] will not touch the protective and monopoly breed features of the tariff …

In sum, Sherman and his allies supported both the Sherman Act and the McKinley Tariff Act in spite of their clear knowledge regarding the contradictions. This supports the view that the enactment of the Sherman Act was not motivated by the genuine intention to promote competition thereby maximising the efficiency of the economy in order

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85 Gordon, above n 45, at158.
86 Kolasky, above n 59, at 86.
to benefit consumers. Instead, given the strong public opinion – from politically strong, inefficient competitors against trusts – it is plausible to view the passage of the Sherman Act as crucial to maximising re-election prospects. Additionally, the Republicans’ persistence with the pro-tariff position and the passage of the McKinley Tariff Act can be seen as an attempt to advance their re-election prospects further by winning the favour of their big constituents. In achieving their objective, the Sherman Act played an important role as it appeased the public – in particular the inefficient entrepreneurs – from their fear of trusts. This smoothed the passage of the McKinley Tariff Act without greatly compromising their political support which. In this sense, the Sherman Act was indeed a great tactful smoke screen to achieve Republicans’ political objectives.

E. True Intention

This article has so far established several plausible legislative intentions behind the passage of the Sherman Act, but one question is yet to be answered: the most plausible intent. Without clear written records of what was in Congress’ mind, answering this question in a conclusive manner would be a perilous act. Instead I suggest the three plausible intentions are not mutually exclusive. There also remains a possibility that the passage of the Act may have been due to a combination of the several explanations. What can be said with confidence is: given the analysis of economic data and the opinion of economists at the time of enactment, the Sherman Act was undesirable. Therefore, the legislative intent according to the standard rationale of antitrust law was undermined.

However, recognising the flaws of democracy and accepting that it does not necessarily lead to rational, predictable and consistent decision-
making,\textsuperscript{89} one can justify the passage of the Sherman Act from a political perspective. Politicians have an incentive to act in favour of their constituents to maximise re-election prospects in a democratic system.\textsuperscript{90} Meanwhile politically strong lobbyist groups may take advantage of this incentive to “redistribute wealth from society as a whole to themselves”.\textsuperscript{91} In a sense, this is like a “cozy back-scratching relationship between politicians and interest groups”\textsuperscript{92} where each party exchanges their own interest at the expense of the general public’.\textsuperscript{93} A product of this can be irrational legislation motivated by an ill intention to favour a particular interest group.\textsuperscript{94} This defect in democracy does not seem to be a one-off incident; rather, this is widely known as the “emblem of democracy”.\textsuperscript{95} This was observed by Judge Learned Hand: \textsuperscript{96}

I will not of course, deny that there are statutes of which we can say that they carry something like the assent of a majority. But most legislation is not of that kind; it represents the insistence of a compact and formidable minority.

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\item \textsuperscript{89} Glenn Harlan Reynolds “Is Democracy Like Sex?” (1995) 48 Van L Rev 1635 at 1648.
\item \textsuperscript{90} Frank B Cross “The Judiciary and Public Choice” (1999) 50 Hastings LJ 355 at 356.
\item \textsuperscript{91} Reynolds, above n 89, at 1642.
\item \textsuperscript{92} At 1648.
\item \textsuperscript{93} William M Landes and Richard A Posner “The Independent Judiciary in an Interest-Group Perspective” (1975) 18 JLE 875 at 877.
\item \textsuperscript{94} Frank H Easterbrook “Foreword: The Court and the Economic System” (1984) 98 Harv L Rev 4 at 15.
\item \textsuperscript{95} Reynolds, above n 89, at 1645.
\item \textsuperscript{96} Learned Hand “Is There a Common Will?” (1929) 28 Mich L Rev 46 at 50.
\end{itemize}
\end{footnotesize}
It would be difficult to conclude our question with a particular position. We can, however, explain how public interest legislation – an antitrust law – was passed irrationally without much consideration to its actual effects on the public. This political view seems to sit well with all of the three plausible explanations discussed.

F. Practical Implications to Present Day

The next question to explore is the importance of legislative history to the present time. Legal history of the Sherman Act continues to affect the present day in potentially two aspects: the statutory interpretation and determination of its constitutional legitimacy.

When interpreting statutes it is generally agreed that the judiciary relies on extrinsic materials such as legislative history and intent. This is due to the fact that these help to ascertain clearer statutory meanings and legislative intent, the purpose of the statute\(^\text{97}\) as well as in crafting policy.\(^\text{98}\)

Should not, then, the Act be interpreted so that small and inefficient competitors can be protected from large and efficient competitors, or be limited in its enforcement for parties with vengeance motives? Or perhaps, disregard it at all, as the current tariff rate is low enough on its own to soothe the public’s fear of trusts, or acknowledge that it is a product of the flaws in democracy? Theoretically this sounds viable.

\(^\text{97}\) Matthew B Todd “Avoiding Judicial In-Activism: The Use of Legislative History to Determine Legislative Intent in Statutory Interpretation” (2006) 46 Washburn LJ 189 at 217.

\(^\text{98}\) Beth M Henschen “Judicial Use of Legislative History and Intent In Statutory Interpretation” (1985) 10(3) Legis Stud Q 353 at 354.
In addition, should not the Sherman Act be declared void under the power of American courts to review Acts of Congress? Theoretically speaking, the courts may inquire into hidden legislative motives and strike down statutes if they are unconstitutional. Therefore, in theory the ulterior purposes behind the Act’s passage should warrant the courts to strike down the Sherman Act.

In sum, the legislative history and perverted intentions of the Sherman Act should theoretically present a substantial matter of contention regarding its legitimate status, as well as its provisional application. However, the practical chances of such are highly unlikely due to two well-known legal concepts: judicial activism and the doctrine of precedent.

(1) Statutory interpretation

A downside of judicial activism is the risk that judicial discretion is used to jeopardise duties to harmonise legislative intent and purpose in statutory application. This replaces the legislature’s intent with judicial will. This discretion in judicial activism extends to the use of extrinsic materials even down to their selection; this gives judges discretion to choose what they believe is right. In the context of the Sherman Act, this effect seems to be more predominant as a result of deliberate assignment of more discretion to the courts. This was pointed out by Robert Bork who, after examining the Congressional

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99 Marbury v Madison 5 US 137 (1803) at 177–178.
101 Marbury v Madison, above n 99.
102 Todd, above n 97, at 189.
103 Henschen, above n 98, at 358–360.
Debates, said that the Sherman Act was deliberately drafted vaguely to allow judicial activism.\textsuperscript{104}

Given this, it seems no coincidence that the use of legislative history in statutory interpretation of the Sherman Act is particularly low. Beth Henschen’s study of cases from 1950 to 1970 confirmed that the courts tend to use interest balancing and plain meaning methods to interpret Acts in antitrust cases, as opposed to using its legislative history and intent.\textsuperscript{105} This pattern is even more prevalent in the Sherman Act than in other antitrust statutes.\textsuperscript{106} A study of all Supreme Court cases involving statutory interpretation from 1953 to 2006 confirms a similar modern trend.\textsuperscript{107}

In conjunction with this low use of legislative history regarding the Sherman Act, the doctrine of precedent may further reduce the practical effects of the distorted legislative history of the Sherman Act to the present day. The Sherman Act has been used to protect consumers for over a century and cases have been developed under such assumptions. This directs future courts to interpret in a similar manner. Professors Richards and Kritzer have observed that the courts tend to set up a self-imposed system to provide guidance for future courts in choosing relevant considerations as well as the appropriate

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\textsuperscript{104} Bork, above n 21, at 47.

\textsuperscript{105} Henschen, above n 98, at 361.

\textsuperscript{106} At 363.

\textsuperscript{107} David S Law and David Zaring “Law versus Ideology: The Supreme Court and the Use of Legislative History” (2010) 5 Wm&Mary L Rev 1653 at 1706.
\end{flushleft}
level of scrutiny in statutory interpretation.\textsuperscript{108} This means the relatively low use of legislative intent in statutory interpretation over the years has probably created precedential guidance that legislative intent is a less useful consideration in the context of interpreting the Sherman Act.

\section*{(2) Constitutional legitimacy}

The effect of the doctrine of precedent and judicial activism\textsuperscript{109} diminishes the influence of legislative history in determining the constitutionality of statutes. American courts have power to strike down statutes if the legislative intent and purpose of the statutes contradict the authorised constitutional power. But for a long time courts have declined to strike down “an otherwise constitutional statute on the basis of an \textit{alleged} illicit legislative motive”.\textsuperscript{110} The reason for this was not because the legislative history was considered irrelevant. Instead, the court claimed restrictions on the judicial review of legislative purpose, thereby justifying their restraint in taking active steps to ascertain the distorted intention other than looking at the face of the statute.\textsuperscript{111} Therefore, unless there is certain and complete

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\item Mark Richards and Herbert M Krtizer \textquotedblleft Jurisprudential Regimes in Supreme Court Decision Making\textquotedblright{} (2002) 96(2) Am Pol Sci Rev 305 at 305.
\item Todd, above n 97, at 189 judicial activism is described in the following terms: \textquotedblleft[where] the judicial fails to take every reasonable measure available to discern the legislature’s intent, it can be considered an affirmative act of replacing the will of the legislature with that of its own.\textquotedblright{}
\item United States \textit{v} O’Brien 391 US 367 (1968) at 383 (emphasis added).
\item Caleb Nelson \textquotedblleft Judicial Review of Legislative Purpose\textquotedblright{} (2008) 83 NYULR 1784 at 1787.
\end{enumerate}
information on the face of the statute, courts will continue to decline to
hold the Act as unconstitutional.\textsuperscript{112}

While the modern trend has been for courts to be more active in
reading the legislative history when assessing constitutionality,\textsuperscript{113} the
difficulties in standard of proof remain.\textsuperscript{114} Moreover, the doctrine of
precedent directs the modern Supreme Courts to cases decided under
the old approach: where the judiciary failed to take reasonable steps to
obtain an Act’s legislative history “to the extent that those precedents
decided to investigate the legislature’s true motivation”.\textsuperscript{115} This has
conveyed a misunderstanding to the modern courts that legislative
history has no relevance in determining constitutional legitimacy.\textsuperscript{116}
Therefore, in practice the legislative history is an irrelevant
consideration in assessing the Act’s constitutionality.

In sum, the hurdle of the standard of proof which the courts would
need to overcome prior to using legislative history as a means to strike
down a statute, and the misconception created by precedents will
jeopardise the practical effect of the legislative history of the Sherman
Act in statutory interpretation and determining its constitutional
legitimacy. Therefore, it is unlikely that the plausible distorted legislative
intent will lead to the striking down of the Sherman Act.

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\item[112] At 1785.
\item[114] Nelson, above n 111, at 1856.
\item[115] At 1879.
\item[116] \textit{FCC v Beach Commc’ns} 508 US 307 (1993) at 315; \textit{DiMa Corporation v Town of Hallie} 185 F3d 823 (7th Cir 1999) at 829; \textit{Tenney v Brandhove} 341 US 367 (1951) at 377.
\end{footnotes}
G. Conclusion

Given the Sherman Act’s reputation to regulate the United States economy, it is natural for one to have faith in its intent: to protect the welfare of consumers through the promotion of competition and maximising the economy’s efficiency. However, an examination of the economy prior to the passage of the Sherman Act and opinions of economists indicate otherwise. This article has explored relevant historical evidence in search for plausible ulterior legislative motives behind the Sherman Act; several non-mutually exclusive intents were found. Yet, none aligned with the apparent rationale for the introduction of this antitrust statute.

While this article refrained from guessing at the truest intention, a deeper insight into the United States democratic system was able to expand our view. It revealed the relevance of politicians’ motives to win people’s hearts in pursuit of re-election. This in turn allowed us to justify, although uncomfortably, the rationale behind the Sherman Act’s enactment. However, this is starkly different from claiming a valid justification. The legislative intent argued in this article is deviant from the standard antitrust law account.

The article also suggested two possible areas which this distorted legislative intent may impact on in the present day, namely: statutory interpretation and the Act’s constitutional legitimacy. It is somewhat surprising that the distorted original legislative intent is unlikely to substantially affect the operation of the Sherman Act in the present day. The article can, however, explain how the Sherman Act is still considered one of the principal antitrust laws in the United States of America.