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## The Sherman Act after a century

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U.S. Sen. John Sherman, 1823-1900

# THE SHERMAN ACT AFTER A CENTURY

*Thomas E. Kauper reviews the lasting legacy of the 103-year-old Sherman Antitrust Act.*

*Adapted from a speech presented at the U.S. Department of Justice*

A few years ago, when I was asked to give a speech on the impact of Sherman Antitrust Act on its 100th anniversary, I was tempted to give this simple answer: It has spawned a bureaucracy and put the children of antitrust lawyers through college. Beyond that, who knows? For in the end, we can but speculate on how society would have differed in its absence.

But “who knows?” isn’t a very satisfying answer, so in searching for significance of the act, I looked back to an earlier speech in which I provided a brief tour of the “greatest moments of the Sherman Act during the preceding 20 years.” In that talk, I noted two effects felt by every American consumer – telephones that don’t always work and more televised college football games than anyone can possibly tolerate. Among the highlights I picked out in that speech were the Von’s and Schwinn cases, the Herfindahl-Hirschman Index, and, as the crowning highlight of all, the Antitrust Division’s Vertical Restraints Guidelines. Obviously, it was a speech that poked fun, and in doing so, trivialized the impact of the Sherman Act.

In recent years, trivializing the act has become common sport, particularly in academic circles. However, it has been done not in good humor, but to suggest either that the act has served no social purpose or, in the worst case scenario, has been counterproductive, impairing the operations of American enterprises without any benefit to consumers, business enterprises, or anyone else for that matter. The act, in these eyes, can do only harm. Its enforcement is a silly, trivial and expensive exercise. Such critics’ evaluations cannot simply be answered by a “who knows?” response.

Discussions of the Sherman Act often pair it with the general idea of competition, suggesting that the two somehow go hand in hand. Certainly we like to believe this is so. Yet there have been

times in the history of the Sherman Act when the two have seemed to diverge; unless one gives to competition a strange meaning, the act itself has at times been used to reach what seem to be anti-competitive results. The significance of competition may be one thing; the significance of the Sherman Act may be quite another.

What has been the significance of competition to society as a whole (a question which seems easier to deal with than the Sherman Act itself)? To antitrust lawyers, competition means rivalry among economic enterprises in a market. But competition is far more pervasive in American society than that. Individuals compete for jobs, for schools, for grades. Churches compete for parishioners. Bureaucracies compete for funds. Through competition, we believe, the best come to the top. In the market sense, resources are properly allocated. Throughout society, competition preserves choice and demands accountability. It is the result of economic liberty – a system of economic choices valued in its own right – but perhaps more important, because it is an integral part of the political and social liberty we cherish.

## DOES COMPETITION WORK?

Do we know that competition works as advertised? Can we actually prove the virtues of competition, or is all of this simply an act of faith? After all, there have been both economic and social systems which do not rest on competition as the regulator and stimulus to achievement. Indeed, even in the United States the value of competition has been questioned. Competition results in both success and failure, and failure is often unaccept-

able. It presupposes an equality of opportunity which is often lacking. Competition, particularly at the individual level, suggests a kind of social Darwinism which many consider destructive and counter to a democratic notion of egalitarianism.

The tension between individual liberty on the one hand and equality of individuals on the other has been a central feature of democracy from the beginning. This same tension has spilled over in antitrust decisions, particularly in the 1960s when, in words reminiscent of the civil rights cases of that same period, the Sherman Act seemed to reflect a restraint on the consequences of unbridled competition in the name of equality. We have, in other words, occasionally decided that too much competition is a bad thing, and have made the decision to temper it. We cannot simply assume that competition always produces the outcomes society seeks.



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During the Depression, competition itself was seen as a destructive process, a causative element in the nation's economic difficulties. In more recent years, a growing body of critics suggests that greater cooperation among enterprises and the government would improve the position of American firms in the market place. The government, and not competition, would choose winners and losers. While suggestions that competition is inherently destructive or destabilizing have passed from the scene, the contention that competition alone will not lead to optimal technological development and efficiency has been more difficult to counter, particularly when other players in world markets don't abide by the same rules. As markets become truly international, competition as a market regulator becomes suspect. Some of the players may win by stacking the deck. But there are dangers to responding in kind, not the least of which is the erosion of the economic liberty upon which our political liberty in part depends.

Clearly our belief in the value of competition rests in part in theory, in part on the success of American economy and the material gains it has produced, and in part on faith. The empirical measure may best be seen in the events of the late 1980s and early 1990s. Communism, and to a significant extent socialism, have failed. The Soviet Union and nations of Eastern Europe have turned in the direction of market economies, driven by the engine of competition. They are not all likely to be wrong. Competition is valued in part because it has provided greater prosperity and economic progress. But let us not forget that it also tolerated, and I use that word advisedly, as the price of political freedom. The Chinese learned, to their regret, that political freedom and economic liberty go hand in hand. The results of competition may be harsh. They often need tempering. But no one has yet devised a system which works better.

## THE INTENT OF THE ACT

But let us take the virtues of competition and a capitalistic and free market as given. What has been the significance of the Sherman Act? Has it done what it was meant to do, or does it represent a promise unfulfilled? Has it done more good than harm? In the academic world, at least, there is strong disagreement on these questions. Views on the act are mixed, to say the least.

To some, the act may be seen as a futile gesture indeed – an intentionally futile gesture meant only to deflect the late 19th century's growing interest in Marxism, Socialism and other methods of curbing the use of corporate power. In these terms, the act was a success at the moment of its enactment and has caused some degree of harm with every subsequent action to enforce it. Historically, there is little to support this cynical view; clearly the act was meant to have some continuing impact. But what was it to be?

Much of the considerable disagreement over the impact of the act arises out of uncertainty over what its purpose actually is (or was). While Ohio Sen. John Sherman and the

Congress of 1890 did not like the trusts, they didn't say why. "Restraint of trade" is a remarkably loose term. Analyses of legislative history and the common law have not been terribly helpful. Debate has been more over what the Sherman Act's goals should be as a policy matter than on what Congress originally meant. At various times, and to various

observers, the Sherman Act's purpose has been described as including consumer welfare, protection of small business, the control of corporate and social political power, redistribution of wealth and simple fairness. Each of these goals has appeared in antitrust decisions under the act at different periods of time.

Our inability to state the purpose of the Sherman Act led to inconsistent enforcement over a 100-year span,

which further complicates efforts to evaluate it. Shifts in enforcement and judicial philosophy (and, indeed, abandonment of the act altogether in crisis), have meant that the act has not over time fulfilled what some at any given moment expected of it. For example, the Sherman Act of the 1960s may in fact have aided small business (although this seems unlikely). As small business ceased to be a direct concern, that protection, if any, was lost. From a perspective of the 1990s, the Sherman Act seems to have done little to forestall the demise of small entrepreneurs.

Those who would impart to the Sherman Act lofty social and political ambitions, who perceive it as a bulwark against the oppression of economic and political liberty through the centralization of private economic power, may from the perspective of today characterize it as a failure – a failure resulting from the inability or unwillingness of agencies and courts to carry out its mandate. Economic concentration has increased steadily. Corporate America seems larger today and sometimes beyond control. The individual seems lost in the marketplace. Conversely, to those who believe the act's purpose is to protect consumer welfare, it is at best a mixed blessing, all too often leading to enforcement actions that have been both inappropriate and costly. Such actions have impaired efficiency and caused the loss of sales and jobs to foreign competitors.

Views of antitrust are shaped by values and beliefs about broad issues of political and economic power. These values are born out of tradition and our individual economic and political philosophies. Fear of economic concentration, faith in the ability of government to act responsibly and intelligently, and skepticism about the equation of private and public good will lead some to seek a highly interventionist antitrust program. Such a program is, in turn, an anathema to those whose major fear is the government and whose faith in free markets is unshaken.

These underlying values are as much a matter of faith as demonstrable truth, however hard we may try to wrap antitrust in the trappings of science. They are central to the evaluation of the Sherman Act, the body of antitrust doctrine which it has spawned, and the performance of the institutions involved in its interpretation and enforcement. Disagreements on these broad issues will not and cannot be resolved simply through the exercise of reason.

It would be a mistake, however, to conclude that the Sherman Act has been an exercise in futility, for it has in fact accomplished a great deal. It has deterred cartels, preserved freedom of entry and set the stage for the control of market-dominating mergers. It is easy to lose these truly major accomplishments by arguing over the peripheries. Without the act, there can be little doubt that cartels would be commonplace, and single-firm monopoly would be more persistent. Perhaps cartels and monopoly would erode over time, even without the Sherman Act (although those of us burnt by the economists' notion of contestable markets during the airline deregulation battle remain very nervous over assertions of ease of entry).

Perhaps the amount saved has not been worth the cost. The Sherman Act has imposed direct enforcement costs in terms of attorneys' fees, court time, litigation expenses and so

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on. It also added indirect costs in competitive conduct foregone for fear of liability and inefficiencies imposed by rules perceived to be misguided (although those who believe the act is to protect consumers may view resulting costs and inefficiencies as the price of social benefits). How much in costs cartels have (or would have) imposed is unclear. Efforts at cost-benefit analysis are necessarily doomed to failure; there is little agreement over what the costs of monopoly are even in purely economic terms (i.e., monopoly profits or only dead-weight loss). In any event, those costs cannot be measured (particularly with respect to cartels which never occurred because of the deterrent effects of the act). Much of what some describe as indirect costs of enforcement were the result of society conforming to its perceived purpose of the act – costs which we were prepared to incur to achieve “benefits” not included in this equation.

The act has deterred cartels and the development of monopoly power through enforcement actions, public and private. Perhaps it needs no further justification. But in my own view, the act has had a significance far beyond the cartels and monopolies it has directly deterred. The act, and the institutions it has spawned and supported, have been a steady force moving the economy in the direction of competitive outcomes.

## SYMBOL OF CAPITALISM

The Sherman Act is a symbol of commitment to a capitalistic market economy and to the government’s proper role in checking abuses of the market. It has been the counterpoint to direct economic regulation and the tendency of government to create and nurture monopoly power. Without the Sherman Act and those involved in its enforcement, there may have been no significant check on this tendency. Deregulation and the introduction of competitive considerations into a variety of government policies may have saved the American consumer as much as all of the Sherman Act’s direct enforcement combined. It is, after all, government which creates the most enduring market power. In totalling the benefits of the Sherman Act, this indirect effect must be given its due. Finally, the symbolism of the Sherman Act has had a dramatic impact outside the United States. The Sherman Act was not the first national antitrust legislation, but it has been the most influential. The world has moved in our direction. The examples are obvious: Germany, the EEC, and so on. No country has fully imitated the act and perhaps their antitrust systems are the better for it. The act, after all, is hardly perfect. But if our nation is best served when free market economies predominate throughout the world, in part because economic and political liberty go hand in hand, then we have also been well served by the Sherman Act, which perhaps more than anything else has been the symbol of our commitment to such an economy.

In June, 1989, I attended a small conference of American and Chinese scholars who were experts in something broadly called “economic law.” It was in many ways an astonishing event. Among other things under discussion were drafts of Chinese antitrust legislation. I observed during the euphoria of that conference that I never thought I’d live to see the day when China had an antitrust law. That thought turned out, I am afraid, to be prophetic. Several hours after our Chinese colleagues boarded aircraft to begin their long journey home, government troops entered Tianemen Square. The ideas we discussed died that night along with the gallant young Chinese who sought only a degree of freedom. But the point of our discussions was clear. Antitrust was necessary to preserve competition, according to our Chinese friends; otherwise plant managers, unwilling to bear the risks a free market imposes, would simply collaborate among themselves. But antitrust was seen as something more. It was a powerful symbol of commitment to a market economy and to the principle that society must keep some check on accretions of private power.

I do not know how the benefit of such symbolism can be measured. But it is real and an important part of the benefits of the Sherman Act. Has the act been worth the costs of enforcement and errors along the way? Surely it has, although its benefits cannot be quantified. What of the future? The impulse to cartels won’t go away. Nor will the urge of government toward monopoly. Entry will not always be free, and cartels will not inevitably fail. The act is still needed and can accommodate new learning in the next century just as it has in the past, if we are smart enough just to leave it alone.



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