THE LEGISLATIVE HISTORY OF THE SHERMAN ACT RE-EXAMINED

THOMAS W. HAZLETT*

According to Robert Bork's influential analysis, the Sherman Act was expressly instituted by the 51st Congress to advance consumer welfare, but has often been misinterpreted by federal courts handing down anticonsumer decisions. This paper suggests that the political coalition backing the 1890 antitrust statute sought multiple social ends and did not faithfully seek to impose economic efficiency. The key evidence includes historical economic trends, congressional debate, the legislative agenda of Senator John Sherman, and the political conflict generated by the most contentious (and most electorally important) issue of the 51st Congress: the highly protectionist McKinley Tariff Act.

I. THE CONSUMER WELFARE HYPOTHESIS

Economists have singled out the Sherman Antitrust Act as a uniquely proconsumer piece of legislation. While the general economic analysis of political processes has proceeded from George Stigler's presumption that "[A]s a rule, regulation is acquired by the industry and is designed and operated primarily in its benefit" (Stigler [1971, 114]), no similar cynicism has enveloped the nation's preeminent antitrust statute. Strong evidence that the Federal Trade Commission Act of 1914 was shaped by the protectionist vision of Louis Brandeis (McCraw [1981]), or even a solid economic consensus as to the anticompetitive sentiment behind the 1936 antitrust law, the Robinson-Patman Act (see Sowell [1980, 210]; Ross [1984, 243]; Schwartz [1986]) has failed to cloud the Sherman Act's good name. As Stigler himself has concluded: "I like the Sherman Act So far as I can tell, it's a public interest law—in the same sense in which I think having private property, enforcement of contracts, and suppression of crime are public interest phenomena" (Stigler [1984, 46]; see also Stigler [1985]).[1]

This proconsumer view of antitrust is all the more ironic in light of recent dissatisfaction with anticonsumer consequences of antitrust policy generally. (See Goldschmid et al. [1974]; Demsetz [1978]; Baxter [1980]; Brozen [1982]; Armentano [1982]; Johnson [1983]; Baumol and Ordover [1985]; Hazlett [1986]; Bittlingmayer [1992]). There is widespread concern that antitrust law has been employed *against* competitive market rivalry. Moreover, the central paradox of an 1890 antimonopoly law remains: Why should an economy rapidly *expanding* outputs in virtually all major industrial sectors move to quash restrictions of output (Baxter [1980], DiLorenzo [1985]), particularly when such

* Associate Professor, University of California, Davis, and Visiting Chief Economist, Federal Communications Commission. The author wishes to thank Stan Ornstein, Lee Alston, George Bittlingmayer, Harold Demsetz, Ken Heyer, Richard Sexton, and anonymous referees for helpful comments. Research assistance by Jong Hin Kim is gratefully acknowledged. All interpretations, however, remain solely those of the author.

1. Telser [1987, 21-23] believes that popular opinion was key in motivating the Sherman Act (as well as the Interstate Commerce Act of 1887 and the 1894 income tax), but that common concerns regarding monopolistic output restrictions were misplaced. This deviates from the Stigler public interest hypothesis and creates an analytical dilemma for those who see legislative outcomes as rationally determined.

Economic Inquiry
Vol. XXX, April 1992, 263–276

©Western Economic Association International

Copyright © 2001 All Rights Reserved

output increases were intrinsically tied to the emergence of large corporate forms (Chandler [1977])? It is also troubling that the Interstate Commerce Act of 1887, generally rejected as a proefficiency measure, occurred under such close and similar political auspices (Hilton [1966]). Indeed, a recent re-examination of the Commerce Act has nicely revealed a multiple interest group demand for legislation (Gilligan et al. [1989]). Perhaps, the consumer welfare model differs sharply from the popular notions of monopoly that the Sherman Act sought to discourage in law. Yet, this would tend to jeopardize the notion that the Act was wholly proconsumer. And American economists of the Sherman Act era, in typically viewing competition as a dynamic market phenomenon, largely rejected the antitrust approach as failing to advance the consumer's long-run interests (DiLorenzo and High [1988]).

The proconsumer view of the Sherman Act has been most thoroughly elaborated by Robert Bork, who writes: "The legislative history of the Sherman Act displays the clear and exclusive policy intention of promoting consumer welfare" [1978, 61]. While competing motivations for antitrust legislation were admittedly advanced, with only trivial exceptions "It is impossible to find even colorable language suggesting most of the other broad social or political purposes that have occasionally been suggested as relevant to the application of the Sherman Act" (Bork [1966, 42]). The law, argues Bork, should be interpreted as wholly devoted to maximizing economic efficiency, for even though "The legislators did not, of course, speak of consumer welfare with the precision of a modern economist, their meaning was unmistakable" [1966, 10]. And, more inclusively: "Congress' position with respect to efficiency cannot be explained on any hypothesis other than that the consumer welfare was in all cases the controlling value under the Sherman Act" [1966, 26].

The policy importance of this interpretation is vast. Antitrust courts have repeatedly found various "noneconomic" grounds for preserving particular firms or market forms, the classic being Justice Peckham's concern over the "small dealers and worthy men" (*U.S. v. Trans Missouri*, [1897]) who deserved a judicial reprieve from competitive extinction. This line of reasoning forms the basis of the protectionist thrust in antitrust law. In his famous *Alcoa* decision, Judge Learned Hand supplies the paradigmatic counterefficiency hypothesis:

> Throughout the history of these [antitrust] statutes, it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry of small units which can effectively compete with each other. (148 F.2d. 416,429, 1945)

It is this interpretation which Bork finds everywhere in the courts, and nowhere in the Congress of 1890, and which has led antitrust to be "a policy at war with itself."[2] This paper seeks to explore evidence suggestive of an alternative hypothesis that, similar to other special interest legislation, the Sherman Act was primarily intended not to improve consumer welfare but to satisfy the demands of an array of political interest groups, including the facilitation of rent creating legislation by the Republican congressional majority.

II. SENATE DEBATE

The Senate debate on the Sherman Act evidences several anticonsumer turns. In an alarmingly prescient discussion concerning the possibility that the Sherman Act would be used to attack economically efficient firms, Senator Kenna (West Vir-

2. As Bork's compelling overview, *The Antitrust Paradox* [1978], is subtitled.

Copyright © 2001 All Rights Reserved

ginia) questioned the Act's Section 2, outlawing monopolization:

> Is it intended...as the section seems to indicate, that if an individual engaged in trade between States...by his own skill and energy, by the propriety of his conduct generally, shall pursue his calling in such a way as to monopolize a trade, his action shall be a crime under this proposed act?...
>
> Suppose a citizen of Kentucky is dealing in shorthorn cattle and by virtue of his superior skill in that particular product it turns out that he is the only one in the United States to whom an order comes from Mexico for cattle of that stock for a considerable period, so that he is conceded to have a monopoly of that trade with Mexico; is it intended by the committee that the bill shall make that man a culprit? (21 Cong. Rec. 3151)

Senator Gray (R-Delaware) arose to offer an amendment to limit monopolization to those "who shall combine or conspire with any other person," and, therefore, to clearly exempt from the Act a person (or firm) who gained a monopoly "on his own." It is instructive that the members of the Judiciary Committee[3] (who had, in actuality, written most of the bill and were energetic in pushing it through the Congress) denounced the Gray amendment as unnecessary because, as Senator Edmunds responded to Kenna's hypothetical example, "Anybody who knows the meaning of the word 'monopoly' as the courts apply it, would not apply it to such a person at all" (21 Cong. Rec. 3151). But Mr. Gray, honestly admitting that he was ignorant of the legal interpretation the courts had attached to "monopoly,"[4] suggested that "we avoid the danger by this amendment of incorporating in the bill words that are not susceptible of exact legal interpretation, and we confine the provisions of this bill to an inhibition of the combination or conspiracy to monopolize, which we all agree should be the object of its denunciation" (21 Cong. Rec. 3152).

"All agree[ing]" in their aims or not, the bill's backers were steadfast in protecting the Act from Gray's proposed amendment. Senator Hoar informed the doubters that the courts, under common law, entertained an exact standard of monopoly, which was

> a merely technical term which has a clear and legal signification, and it is this: It is the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him. (21 Cong. Rec. 3152)

But this definition is hardly a neat, technical delineation (as a century of expensive litigation has shown),[5] and instantly raises precisely the questions Mssrs. Kenna and Gray were keen to ask: What constitutes "fair competition"? Is ruthless efficiency, which drives competitors to extinction, "fair"—or "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition"? The sharp deviation from common law which Sherman Act enforcement soon took (Grady [1990]) only adds to this confusion. The senators were able to stare the "antitrust paradox" squarely in the face as they sat in session in 1890.

3. Senator John Sherman (R-Ohio) was chairman of the Finance Committee and was not a member of Judiciary. This committee was composed of: Edmunds (R-Vermont), Hoar (R-Massachusetts), Ingalls (R-Kansas), Evarts (R-New York), Wilson (R-Iowa), Coke (D-Texas), Vest (D-Missouri), George (D-Mississippi), and Pugh (D-Alabama).

4. Senator Gray may not have been ignorant of the law; existing precedents did not offer an unambiguous definition of "monopoly" nor their legal status (see Letwin [1965]). Grady [1990] shows that common-law precedents allowed "reasonable" cartels to exist and, in some cases, to be enforceable by contract. This diverges sharply from the application of the Sherman Act in *U.S. v. Trans Missouri* [1897] and afterwards.

5. Nor was it a view, despite Hoar's claim, which found substance in common law, as noted above.

Copyright © 2001 All Rights Reserved

They flatly rejected Gray's suggested amendment to clarify the legislation on a simple voice vote.

The need to clear up any such confusion was made apparent by the overtly protectionist congressional sentiment which surfaced in support of the Sherman Act without objection from the bill's backers (some of the sentiment flowing *from* the bill's backers). Judiciary Committee member Senator George (Mississippi) spoke for the bill by attacking the "trusts":

> By use of this organized force of wealth and money the small men engaged in competition with them are crushed out, and that is the great evil at which all this legislation ought to be directed. (21 Cong. Rec. 3147)

Senator Edmunds attacked the trusts even though "for the time being the sugar trust has perhaps reduced the price of sugar, and the oil trust certainly has reduced the price of oil immensely" (21 Cong. Rec 2726). And Congressman Mason sang his praises of the Sherman Act thusly:

> Some say that the trusts have made products cheaper, have reduced prices; but if the price of oil, for instance, were reduced to one cent a barrel it would not right the wrong done to the people of this country by the 'trusts' which have destroyed legitimate competition and driven honest men from legitimate business enterprises. (21 Cong. Rec. 4100)

III. THE POLITICAL ECONOMY OF SENATOR JOHN SHERMAN

If Senator Sherman possessed any long-lived commitment to the alleged efficiency goals of his Act, he kept them to himself.[6] In a 382-page volume of his letters (sent between 1837 and 1891) to his renowned brother, General William Tecumseh Sherman, the subject of monopoly (or antitrust, cartels, pools, price-fixing, collusion, or industrial combinations) is raised not once. In *John Sherman* [1906], his biographer, Theodore E. Burton, spends just 12 of 429 pages on the trust question, all of it in reference to the Sherman Act. Most of this discussion concerns Sherman's legal and political views on the matter; what economic analysis there is involves Sherman's Senate speech on March 21, 1890 and one other item of interest: Sherman, writes Burton, "attacked the theory that such combinations reduced prices to the consumer by better methods of production. All experience showed, he said, that this saving of cost went to the pockets of the producer" (p. 360). Of course, the analysis is false: cost reductions lower output prices *and* (excepting the special case of perfectly elastic input supplies)[7] raise profits.

This reveals that Sherman's statement that the law "will distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade" (21 Cong. Rec. 2456), clarifies the issue a good deal less than Bork supposes: "Sherman could hardly have said more clearly that the law was to delegate to the courts the task of distinguishing between those agreements and combinations which increase efficiency and those that restrict output" [1966, 36]. An equally convincing interpretation would hold that Sherman was attacking even output-expanding combinations which, he claimed (erroneously) would not benefit consumers. To Senator Sherman, "combinations in aid of production" may have meant aid to small, beleaguered firms forming cartels as a defense against the gales of competition.

6. The views of Senator John Sherman (R-Ohio), are crucial to an understanding of the intent underlying the law that bears his name. "Sherman was the prime mover in getting antitrust legislation considered and pressed through the Senate. He was also by far the most articulate spokesman for antitrust in Congress" (Bork [1966, 14]).

7. This rules out market power in the output market and quasi-rents anywhere.

Copyright © 2001 All Rights Reserved

Sherman's class of inoffensive combinations may have simply been limited to localized corporations or some other ad hoc categorization unrelated to criteria of economic efficiency.

The latter view is also supported by comments on the trusts in Sherman's autobiography to which are devoted but five pages of 1216, mostly consumed again by his March 21 speech, a printing of the final bill, and a scant legislative history (in contrast, he devotes 77 pages to his discussion of the tariff). Sherman's sentiments regarding the control of "one man" and the profits accumulated by trusts, concomitant with his rejection of cost-efficiencies being realized in the form of lower prices, belies a nonefficiency concern for the combination issue. This concern was ably articulated in his March 21 Senate speech, his major public address on the issue:

> If the concentrated powers of this combination are intrusted to a single man, it is a kingly prerogative inconsistent with our form of government, and should be subject to the strong resistance of the state and national authorities. If anything is wrong, this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition, and to fix the price of any commodity. (Burton [1906, 359])

One interpretation of this passage is that Sherman is concerned with "noneconomic" (or nonefficiency) issues, such as the distribution of wealth and power. This is precisely the position Judge Leaned Hand took, in fact, in *Alcoa*. Hand's interpretation is disputed by Bork, who focuses on Sherman's allusion to the state-like power of combinations and the "power to fix the price of any commodity" [1966, 39]. This, deduces Bork, is synonymous with "the power, in short, to injure consumers" (ibid.). Yet it is not clear. In that the senator was not of the "Chicago School," his attack on price-fixing may have been motivated by distributional, and not efficiency, issues. Moreover, as an eloquent politician, Sherman's reference to prices may involve little more than aplomb. While Bork sees the price-fixing concern as key and the "noneconomic" rhetoric as gratuitous, an alternative perspective could easily reverse the shadings—as Learned Hand plainly did.

It is at just this point that we should seek out some evidence to separate these competing interpretations of Sherman. Fortuitously, Sherman and the 51st Congress provide just such an issue to serve as a test: "The most important measure adopted during this Congress," wrote Sherman in his autobiography, "was what was popularly known as the McKinley Tariff Law" (Sherman [1895, 1083]). Passed on October 1, 1890, the tariff was "a matter of constant debate in both houses" between 1883 and 1890 (ibid., 1085), as opposed to the monopoly law, which came and went with little discussion.[8] Whatever cross-currents were evidenced in the analysis of the trust question, the tariff was then well understood as a restriction of output resulting in dead-weight losses. Most conveniently, the tariff appears on a neat continuum in our consumer welfare analysis. Compared to a free-market cartel which restricts output and still manages to sustain itself against potential competitors, a tariff, which enjoys state-enforcement of output restrictions, is bound to create a clearly *more* objectionable interference with "free and full competition." Certainly, this was the prevailing, "orthodox" view; according to mainstream econ-

8. This line into congressional intent is entirely in the spirit of Bork's inquiry: "The terms of the agreements made in Congress as well as the *attitude of Congress toward efficiency* indicate that..." promoting efficiency was the intent of the Sherman Act (Bork [1966, 12]; emphasis added).

Copyright © 2001 All Rights Reserved

omists of the day, monopoly problems "would arise only if such groups or classes were permitted to appropriate the political powers of the state...and create... 'artificial' monopolies by tariff and other class legislation" (Thorelli [1955, 115]).

Contrary to the public interest hypothesis, not only was Senator John Sherman a Republican (high tariff) vote on Senate tax questions, he was one of the protectionist system's most vocal proponents.[9] Sherman went to some lengths, in fact, to differentiate his views from the "least burden" (pro-efficiency) approach in public finance:

> On the one hand, the Democratic party believes in a tariff for revenue only, sometimes they say, with incidental protection, but what they mean is a tariff intended solely to raise money to carry on the operations of the government. On the other hand, the Republican party believes that we should so levy the duties on imported goods that they not only yield us an ample revenue but that they do more; that they would protect, foster, and diversify American industry. We think that this tax ought to be put at such a rate as will give to our people here a chance to produce the articles and pay a fair return for the investment made and for the labor expended at prices higher in this country than in any country in the world. That is the first rule, and I believe that the rule has been carried out, and I think liberally, and so as to secure increased production at home and a larger market. (Sherman [1895, 1086])

Surely, any attempt to set this statement in a pro-consumer lexicon based upon Sherman's parting assurance that a tariff creates "increased production and a larger market" would be highly tenuous. In fact, Bork excuses Representative Taylor's (R-Ohio) anticonsumer position on such reasoning: "Even when defending the protective tariff...Taylor did so on the ground that it created lower prices beneficial to consumers. Despite the fallacy of his argument, this demonstrates that Taylor, like most other legislators, was not willing to argue for a policy of preferring producers to consumers" [1966, 20]. Exactly correct: he was unwilling to *argue* for it; he was only willing to vote, lobby, and politick for it.[10]

The senior senator from Ohio was, by all accounts, a polished political figure with staying power. As such, he was in the forefront of devising GOP strategy, often having to fight off zealous factions of the party who endangered long-term Republican success by seeking excessive industry protection. As big business became an issue of popular concern, "Senator Sherman thought and said frequently before 1889 that the trusts could only be reached through the revenue laws" (Tarbell [1912, 200]). Yet, radical Republican protectionists and particularly the formidable Senator Nelson Aldridge (R-R.I.) would have nothing to do with a lowering of tariffs in "trust-dominated" industries.

The Democratic president, Grover Cleveland, had effectively welded the tariff and trust questions together in a fa-

9. Ida Tarbell, who described Sherman as a brilliant legislative and political strategist, wrote that he "had begun his political life...with but two political tenets—hatred of the Democratic Party and belief in the protection of American industries" [1912, 4]. Sherman was also an adept special interest lobbyist, particularly in obtaining tariff protection for wool goods and Ohio pig iron (Tarbell [1912, 39-40, 44, 114-5]). Bradley [1990] ascribes personal motives to Sherman's push for an antitrust law—he had been stymied in his bid for the 1888 GOP presidential nomination by Russel Alger, head of the match trust.

10. Bork's analysis is particularly vulnerable on this count, as he limits his investigation to statements proffered on the record by office holders: "My conclusion, drawn from the evidence in the Congressional Record ..." (Bork [1966, 7]). It should also be noted that the disparity between political rhetoric and political intent is a common problem which Professor Stigler has previously ruled upon: "The announced goals of a policy are sometimes unrelated or perversely related to its actual effects, and the *truly intended effects should be deduced from the actual effects*" (Stigler [1975, 140], emphasis in original).

Copyright © 2001 All Rights Reserved

mous 1887 speech, and during the Sherman Act debate populists had charged that "Tariffs are the mother of trusts" (Telser [1987]). Hence, Senator Sherman's instant concern about conspiracies in restraint of trade *other* than those nurtured by the protective tariff was viewed as cynical. "At all events," wrote Tarbell of the Sherman Act, "the measure was passed ahead of the tariff bill. Thus, an answer was ready for the critics. As Senator Morgan said, 'The bill was a good preface to an argument upon the protective tariff'" [1912, 201].[11]

IV. THE MCKINLEY TARIFF AND THE SHERMAN ACT

> Lately, with a great shout and flourish of trumpets, you passed a bill against trusts. When your actions in this bill are considered it is impossible to believe you were in earnest in passing that measure. You now give the trusts everything they want. (Representative William Elliot [D-S.C.] debating the McKinley Tariff of 1890, 21 Cong. Rec. 291)

Tariff rates had been raised substantially during the Civil War, but had not been pared postbellum. Table I shows the persistence of a high tariff.

The goal of the 1890 tariff reform was to lower revenues—the U.S. federal budget in 1888-89 had run a $53 million, or 13.4 percent, surplus—and this, the Congressional leadership candidly proposed to accomplish via a perverse Laffer Curve effect. William McKinley, Sherman's Ohio colleague and Republican Speaker of the House, "accepted the principle...that the way to reduce revenue from customs is to make foreign goods which might compete with domestic products too dear to buy" (Tarbell [1912, 190]). In answering Democratic critics who charged that the McKinley bill would increase taxes and, thereby, revenues, the Congressman boldly responded:

> That statement is entirely misleading...[T]here is not a member of the House on either side, who does not know that the very instant you have increased the duties to a fair protective point, putting them above the highest revenue point, that very instant you diminish importation and to that extent diminish the revenue. (Tarbell (1912, 190])

Knowledge of the tariff's anticonsumer consequences was entirely common. The *New York Times*, for instance, made a near-crusade out of highlighting the pro-monopoly impact of protectionism, and in tying the trust question to the tariff. "In January of 1888, one month after Cleveland's tariff message, the *Times* ran 20 editorials denouncing combinations. The majority of these articles showed how specific combinations were fostered by the high protective system" (Gordon [1953, 120]). This was a point incessantly made by Democrats both in the Congress and out. Gordon [1953, 163] even cites an arresting passage from the Congressional Record (12 September, 1888, p. 8521), wherein Senator Hoar took issue with a Democratic senator (George from Mississippi) for limiting his political attacks *only* to trusts protected from competition by tariffs:

> Does it not occur to the Senator from Mississippi that it might be well to include some of these trusts...which, notably the Whisky, the Cotton-Seed and Cotton-Oil Trusts, the Anthracite Coal Trust, and the Standard Oil Trust are not protected by tariffs? Why does the Senator steer so carefully in his proposed legislation not to hit these great trusts...?

11. In this light, Bork's statement that, "The complete absence of any expression of values which conflict with consumer welfare among those urging antitrust legislation is itself compelling evidence that no such values were intended" (Bork 1966, p. 13), reveals the weakness in reading the Congressional Record without winks. The anticonsumerism of Sherman was apparent throughout the epoch; what Sherman's avoidance of anticonsumer rhetoric on the Antitrust Act (taking Bork's characterization of Senator Sherman's rhetoric without scrutiny) testifies to is his adept avoidance of indiscretion.

Copyright © 2001 All Rights Reserved

TABLE I
U.S. Tariff Rate Averages, 1857–1890

Year	Average Tariff Rate (as percent of import price)
1850	27
1857	18
1862–66	40
1883	41.63
1884	42.6
1885–89	47
1890 McKinley Bill	51

Source: Representative James McCreary (21 Cong. Rec. App. 292).

Indeed, Senator Gray was again quick to offer an amendment to the tariff, one which presumably promoted consumer welfare. It read, in part:

> That the President may suspend the rate of duty on any imported article when, in his judgment, the production, manufacture, or sale of such articles is monopolized...by any trust or combination. (21 Cong. Rec. App. 291)

Gray was clearly at loggerheads with the GOP leadership; his tariff amendment received healthy Democratic support, but only two Republican votes in the House (21 Cong. Rec. App. 291).

Critics of the tariff were only too eager to relate the problem of protectionism to the redistribution away from consumers *and* the deadweight losses from reduced trade. One Democratic senator noted that, "For the want of cheaper raw material, in the years 1888 and 1889 one hundred and twenty manufacturers of woolen goods and dealers in goods went into bankruptcy and the establishments which did not fail are to be kept going by duties on woolen goods which for the most part are prohibitory of foreign importations and are an unspeakable grievance to the consumers" (21 Cong. Rec. 7701). Representative Charles Tracey of New York complained that tariffs limited domestic markets (i.e., restricted output) by noting that "in my district, it is the manufacturers that are loudest in complaints of injury done by this too high tariff" (21 Cong. Rec. App. 292). He quotes the mayor of Albany, who testified:

> I am informed by the head of one of the largest manufacturing establishments in this city that the tariff taxes his establishment is required to pay annually from which it derives no benefit, but, on the contrary, injury in the curtailment of its market, are fully ten times larger than the entire amount of taxes it pays....(Ibid.)

The Tariff Vote

Robert Bork believes that evidence of the Sherman Act's single-minded concern for consumer welfare is to be gleaned from the public statements of the Senate Judiciary Committee which framed the Act. A more subtle reading of the disposition of these legislators vis-a-vis consumer welfare maximization would be to scrutinize their votes on the McKinley Tariff of 1890. We have seen that Senator Sherman was himself an outspoken backer of the measure. It is also interesting to note that

Copyright © 2001 All Rights Reserved

every Republican member of the Judiciary Committee voted for the tariff (21 Cong. Rec. 9113). The fact that each of the bill's important Senate backers registered an up-front anticonsumer vote brings the efficiency explanation of the Sherman Act into question.

A further gauge of protectionist sentiment can be constructed from the House of Representatives tariff vote. The state congressional delegation proportion which votes pro-McKinley Tariff is a proxy for that state's protectionist (anticonsumer) leanings. (Even where a state was represented by a small contingency, such congressional votes should be very suggestive of the influence of protectionist political constituencies, as the McKinley Act was hotly debated, was that session's key vote, and was of great interest to industry lobbyists and the popular press alike.) In Table II, we observe the House tariff vote by state delegation ranked in order of protariff sentiment. Each of the Republican senators on Judiciary hailed from a visibly "protectionist" state. Only Evarts' New York (at 57 percent pro) fell below 83 percent "protectionist".[12]

The vote in the House of Representatives, where a substantial anti-Sherman sentiment was recorded, supports the view that the Sherman Act and the McKinley Tariff were seen by the legislators as fundamentally related. Of the 62 House Democrats to vote "No" on the Sherman Antitrust Act, none voted "Yes" on the McKinley Tariff (see Table III). Conversely, of the 117 Republican congressmen to vote "Yes" on the Sherman Act, none voted "No" on the McKinley Tariff.

Examining the aggregate House vote for the two measures in a two-by-two matrix yields strong results. Table IV reveals that, among those congressmen who voted "Yes" or "No" on both bills (i.e., excluding those who abstained on either), 142 members voted identically on the bills, while only 17 crossed over (i.e., voted "Yes" on one and "No" on the other). The hypothesis that the votes on these laws were independent of each other can be dismissed at the 99.9 percent confidence level (χ^2=90.3). Adding abstentions into the "No" column for both votes waters down the results (as would be anticipated from inclusion of data which can be interpreted as half-yes, half-no), but independence can still be rejected at the 99.9 percent confidence level (χ^2=43.3). A similar pattern does not evidence itself in the Senate, where there was only one "No" vote on Sherman, and a close party line vote on the tariff. (This distribution is without proconsumer implications. The proconsumer thesis would be suggested by a high correlation between "Yes" votes on Sherman and "No" votes on the tariff.) Still, the clear pattern exhibited by Republican members of the Senate and by both parties in the House suggests that those who voted for the Sherman Act were likely to abandon the consumer welfare cause on the tariff, while those who promoted consumer welfare by opposing the tariff were highly likely to oppose the Sherman Antitrust Act. This is direct electoral evidence against the proconsumer hypothesis.

V. CONCLUSION

> Looking simply at the history of the bill from the time it was introduced in the Senate until the time it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act. All that can be determined from the debates and reports is that various members had various views.
> *United States v. Trans Missouri Freight Association* 1897, 318

A politically optimal distribution of rents is, a priori, the intent of legislation. For a law to be unicausal requires an

12. We are also seeing that Republican senators tend to come from Republican states. But, it does not weaken the point should the causality run the other way, with *Republican* states tending to be *protectionist.* The Republican Sherman Act is still suspect on consumer welfare grounds.

Copyright © 2001 All Rights Reserved

TABLE II
1890 McKinley Tariff Vote by State Congressional Delegation

State	For	Against	%For
*Kansas	5	0	1.00
Minnesota	5	0	1.00
Maine	3	0	1.00
Rhode Island	2	0	1.00
Nebraska	2	0	1.00
South Dakota	2	0	1.00
New Hampshire	2	0	1.00
*Vermont	2	0	1.00
Nevada	1	0	1.00
Montana	1	0	1.00
North Dakota	1	0	1.00
Oregon	1	0	1.00
Colorado	1	0	1.00
Washington	1	0	1.00
*Iowa	9	1	.90
*Massachusetts	10	2	.83
Michigan	9	2	.82
Wisconsin	7	2	.78
Pennsylvania	20	6	.77
Ohio	16	5	.76
Connecticut	3	1	.75
Illinois	12	5	.71
California	4	2	.67
W. Virginia	2	1	.67
New Jersey	4	3	.57
*New York	17	13	.57
Maryland	3	3	.50
Missouri	4	7	.36
Tennessee	3	6	.33
North Carolina	3	6	.33
Virginia	3	7	.30
Indiana	3	10	.23
Kentucky	2	9	.18
Delaware	0	1	0.00
Florida	0	1	0.00
Arkansas	0	5	0.00
Mississippi	0	5	0.00
Louisiana	0	5	0.00
South Carolina	0	6	0.00
Alabama	0	7	0.00
Georgia	0	10	0.00
Texas	0	10	0.00

Source: 21 Cong. Rec. 5112-3.
Note: Abstentions and Absent not included.
*Home State of Senator Judiciary Committee Republicans.

Copyright © 2001 All Rights Reserved

TABLE III
McKinley Tariff Vote

McKinley Vote	House	Senate	Total
(a) For Democrats who voted No on the Sherman Act			
Yes	0	0	0
No	35	1	36
Abstain	27	0	27
Total	62	1	63
(b) For Republicans who voted Yes on the Sherman Act			
Yes	103	22	125
No	0	2	2
Abstain	14	4	18
Total	117	28	145

overwhelming influence to dominate the legislative process. Given the numerous checks embedded in the American legislative process, multiple-purpose outcomes (or log-rolling) are likely to be the rule. The Sherman Act appears not to be an exception.

The evidence reveals that the Sherman Act was not part of a generally proconsumer campaign to remedy market power problems in the U.S. economy. Rather, it emerged as a political compromise with the following characteristics: (1) It provided incumbent Republican legislators (and their prevailing distributional coalition) with a cosmetic defense on the trust question, in anticipation of the upcoming consumer-to-industry transfers in the McKinley Tariff. (2) It gave advocates of small, localized firms some prospect of a buffer against the waves of creative destruction. (3) It did not augur to be a particularly consequential measure, as only twenty-two government actions were brought through 1904 (Posner [1970, 366]); indeed, it was not thought to do much more than codify and federalize the common law (Letwin [1965]). Senator Hoar believed *after* passage of the Sherman Act that cartels were still legal when "reasonable," and the actual enforcement of anticartel policy in *U.S. v. Trans Missouri* [1897] and *U.S. v. Addyston Pipe* [1898] was such a shock to the marketplace that the great merger wave was tripped (Bittlingmayer [1985]). (4) Hence, the prevailing distributional coalition got its legislative priority—higher tariffs—at what it took to be a good price. Populist critics of big business found it difficult to oppose the Sherman Act, while large scale corporate interests found it unnecessary, particularly as how it bought the GOP room to maneuver on its tariff hike.

The central anomaly in American antitrust legislation is that, were eliminating monopolistic distortions the aim of public policy, the late 19th and early 20th centuries would appear a strange moment for such concerns to emerge. The American economy was at just that point experiencing vigorous *expansions* of output, firms were aggressively lowering prices, bidding up real wages, introducing new products and industrial techniques, and drastically shifting cost curves downward (Baxter [1980]). Moreover, new-found technologies were causing dramatic structural changes in the U.S. economic landscape such that the exploitation opportunities of local monopolies were everywhere evaporating. It may well be said that the distinguishing economic characteristic of the activist antitrust legislative

Copyright © 2001 All Rights Reserved

TABLE IV
Correlation of House Votes on Sherman Act & McKinley Tariff

	Sherman: Yes	Sherman: No	Total	χ^2
McKinley: Yes	104	3	107	
McKinley: No	14	38	52	
Total	118	41	159	
				90.3

	Sherman: Yes	Sherman: No or Abstain	Total	χ^2
McKinley: Yes	104	43	147	
McKinley: No or Abstain	48	100	148	
Total	152	143	295	
				43.3

period (roughly 1880-1914), paradoxically, was a quantum leap in the cross-elasticities of substitution for American consumers.[13]

It would appear mysterious if the 51st Congress had attempted to legislate a late twentieth century analytical model into policy existence, any more than contemporary Congresses are motivated by the welfare implications of neoclassical price theory. And they would not have been shown the way to the Sherman Act by the economics profession. According to Sanford Gordon, "...a big majority of the economists conceded that the combination movement was to be expected, that high fixed costs made larger scale enterprise economical, that rivalry under these circumstances frequently resulted in cutthroat competition, that agreements among producers were a natural consequence, and the stability of prices usually brought more benefit than harm to the society. They seem to reject the idea that competition was declining or showed no fear of decline" ([1963, 166]; see also Wells [1889]; Gunton [1899]).

If the Sherman Act had been crafted in the spirit of minimizing allocative inefficiencies, it would have been a theoretical case of immaculate conception. There was not an economist eligible for paternity. As Stigler muses: "A careful student of the history of economics would have searched long and hard on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of actively combatting collusion or monopolization in the economy at large" [1982a, 3].

This paper, then, has questioned the unicausal efficiency explanation of the Sherman Act's origin with direct and indirect evidence of decisive anticonsumer elements in the 51st Congress. It points towards a more *economic* appraisal of the intent of this critical bill of public policy. "The world is full of mistaken policies," observes Stigler [1982b, 10], "but they are not mistaken for their supporters."

That "A bill to protect trade and commerce against unlawful restraints and monopolies" would have unquestionably been of greater benefit to U.S. consumers

13. DiLorenzo [1985] and Telser [1987] specifically find that the industries most commonly cited in congressional debate as monopolistic were expanding output and reducing prices relative to other sectors throughout the immediate pre-Sherman Act period. This adds substance to the impression that fundamental economic trends were provoking anti-consumer regulatory backlash.

Copyright © 2001 All Rights Reserved

had it been taken as a pro-efficiency mandate, is not, in itself, evidence that this is what Congress intended. Indeed, in light of our lengthy "Antitrust Paradox," the riddle may largely be solved by reflection *upon* congressional intent; a judicial legacy of hostility to efficiency and conflicting priorities in antitrust does not contradict the vision of the 51st Congress, but mirrors it.

REFERENCES

Armentano, Dominick. *Antitrust and Monopoly: Anatomy of a Policy Failure.* New York: Wiley, 1982.

Baumol, William J., and Janusz A. Ordover. "Use of Antitrust to Subvert Competition." *Journal of Law and Economics,* May 1985, 247–66.

Baxter, William F. *The Political Economy of Antitrust.* Lexington, MA: Lexington Books, 1980.

Bittlingmayer, G. "Did Antitrust Policy Cause the Great Merger Wave?" *Journal of Law and Economics,* April 1985, 77–118.

______. "Antitrust and the Economy: Lessons from the First Twenty-Five Years," in *A Century of Antitrust: The Lessons, The Challenges.* Cato Institute, forthcoming, 1992.

Bork, Robert H. "Legislative Intent and the Policy of the Sherman Act." *Journal of Law and Economics,* October 1966, 7–48.

______. *The Antitrust Paradox.* New York: Basic Books, 1978.

Bradley, Robert L., Jr. "On the Origins of the Sherman Act." *Cato Journal,* Winter 1990, 737-42.

Brozen, Yale. *Concentration, Mergers and Public Policy.* New York: Columbia University Press, 1982.

Burton, Theodore E. *John Sherman.* New York: Houghton Mifflin, 1906.

Chandler, Alfred D., Jr. *The Visible Hand.* Cambridge, MA: Harvard University Press, 1977.

Demsetz, Harold. "The Trust Behind Antitrust." International Institute for Economic Research Original Paper No. 10, Los Angeles, March 1978.

DiLorenzo, Thomas. "The Origins of Antitrust: An Interest Group Perspective." *International Review of Law and Economics,* December 1985, 73-90.

DiLorenzo, Thomas, and Jack High. "Competition and Monopoly, Historically Contemplated." *Economic Inquiry,* July 1988, 423–36.

Gilligan, Thomas W., William J. Marshall, and Barry R. Weingast. "Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887." *Journal of Law and Economics,* April 1989, 35–61.

Goldschmid, Harvey J., Michael H. Mann, and J. Fred Weston. *Industrial Concentration: The New Learning.* New York: Little Brown, 1974.

Gordon, Sanford. "The Significance of Public Opinion in the Passage of the Sherman Act." Ph.D. thesis, New York University, 1953.

______. "Attitudes Towards Trusts Prior to the Sherman Act." *Southern Economic Review,* October 1963, 156–67.

Grady, Mark F. "Toward a Positive Economic Theory of Antitrust: Return to the Sea of Doubt." Paper delivered at Western Economic Association meetings, San Diego, CA, June 1990.

Gunton, George. *Trusts and the Public.* New York: D. Appleton & Co., 1899.

Hazlett, Thomas W. "Is Antitrust Anticompetitive?" *Harvard Journal of Law and Public Policy,* Spring 1986, 277–336.

Hilton, George. "The Consistency of the Interstate Commerce Act." *Journal of Law and Economics,* October 1966, 87–113.

Johnson, M. Bruce. "Can Economic Analysis Give Better Guidance to Antitrust Policy?" *Economic Inquiry,* January 1983, 1–10.

Letwin, William. *Law and Economic Policy in America.* New York: Random House, 1965.

McCraw, Thomas K. "Rethinking the Trust Question," in *Regulation in Perspective,* edited by Thomas McCraw. Cambridge, MA: Harvard University Press, 1981, 1–55.

Posner, Richard A. "A Statistical Study of Antitrust Enforcement." *Journal of Law and Economics,* October 1970, 365–419.

Ross, Thomas. "Winners and Losers Under the Robinson-Patman Act." *Journal of Law and Economics,* October 1984, 243–71.

Schwartz, Maurius. "The Perverse Effects of the Robinson-Patman Act." *Antitrust Bulletin,* Fall 1986, 733–57.

Sherman, John. *Recollections of Forty Years,* vol. 2. Chicago: The Werner Company, 1895.

Sowell, Thomas. *Knowledge and Decisions.* New York: Basic Books, 1980.

Stigler, George J. "The Theory of Economic Regulation." *Bell Journal of Economics and Management Science,* Spring 1971, 3–21.

______. *The Citizen and The State: Essays on Regulation.* Chicago: University of Chicago Press, 1975.

______. "Economists and the Problem of Monopoly." *American Economic Review,* May 1982a, 1–12.

______. *The Economist as Preacher and Other Essays.* Chicago: University of Chicago Press, 1982b.

______. "Reason Interview: George Stigler." *Reason,* January 1984, 44–8.

______. "The Origins of the Sherman Act." *Journal of Legal Studies,* January 1985, 1–12.

Copyright © 2001 All Rights Reserved

Tarbell, Ida. *The Tariff in Our Times*. New York: MacMillan, 1912.

Telser, Lester G. *A Theory of Efficient Cooperation and Competition*. Cambridge, England: Cambridge University Press, 1987.

Thorelli, Hans. *The Federal Antitrust Policy*. Baltimore: Johns Hopkins Press, 1955.

United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).

United States v. Addyston Pipe and Steel Co., 85 Fed. 27 (6th Cir. 1898).

Wells, David A. *Recent Economic Changes*. New York: DeCapo Press, 1889.

Copyright © 2001 All Rights Reserved

Copyright of Economic Inquiry is the property of Wiley-Blackwell and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.