

**University of South Dakota School of Law**

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# Teaching America's Antitrust Laws and Their Enforcement

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# Teaching America's Antitrust Laws and Their Enforcement

by THOMAS J. HORTON\*

## I INTRODUCTION

I have the great pleasure of teaching an interdisciplinary American Legal History seminar on "The History and Philosophy of America's Antitrust Laws and Their Enforcement." The course is designed to help students explore the historical, cultural, and philosophical underpinnings of America's antitrust laws while building their interdisciplinary research and writing, oral advocacy, and teamwork skills.

## II THE COURSE

Limited to sixteen students, the seminar requires students to participate actively in weekly discussions and lead one class, play the roles of famous historical figures, and serve as witnesses and attorneys in mock retrials of famous antitrust cases. Although students are assigned to read a few selected cases, we do not use a textbook. Instead, the readings are selected from a wide variety of historical and contemporary books and articles by such influential figures as historians Sean Dennis Cashman and Eric Foner;<sup>1</sup> authors Ted Nace and Barry Lynn;<sup>2</sup> economists Erick Beinhocker, Milton Friedman,

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<sup>1</sup> See SEAN DENNIS CASHMAN, *AMERICA IN THE GILDED AGE: FROM THE DEATH OF LINCOLN TO THE RISE OF THEODORE ROOSEVELT* (3d ed. 1993); ERIC FONER, *THE STORY OF AMERICAN FREEDOM* (1998).

<sup>2</sup> See TED NACE, *GANGS OF AMERICA: THE RISE OF CORPORATE POWER AND THE DISABLING OF DEMOCRACY* (2005); BARRY C. LYNN, *CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION* (2010).

Walter Adams, James Brock, and Paul Zak;<sup>3</sup> and legal antitrust scholars Louis Brandeis, Robert Pitofsky, Eleanor M. Fox, Harry First, Rudolph Peritz, and Maurice E. Stucke.<sup>4</sup>

The first three weeks of the course are dedicated to learning about the historical and cultural underpinnings of America's Sherman (1890), Federal Trade Commission (1914), and Clayton (1914; 1950) Acts. Each student is assigned to research the life of one of antitrust's historical figures, including John D. Rockefeller, Andrew Carnegie, J.P. Morgan, Ida Tarbell, Teddy Roosevelt, John T. Sherman, Estes Kefauver, Louis Brandeis, Philip Hart, Robert Bork, Bill Gates, and others. Students take on the persona of their figure for a presentation about their roles in the passage and enforcement of America's antitrust laws. Students also are divided into groups, asked to pick an industry, and form a conspiracy to violate the antitrust laws. The students inevitably show great creativity in choosing contemporary industries and formulating price-fixing, market allocation, or other competition-suppressing schemes. Students also are challenged to pick an industry they are interested in, and to research its interactions with America's antitrust laws.

The next three weeks are devoted to studying the conflicting philosophies and tensions surrounding America's antitrust laws. For example, students compare the widely divergent economic and political philosophies of Louis Brandeis and Estes Kefauver to Robert Bork and Milton Friedman. During this time, students write a five to seven page essay answering the purposely broad question: Why is it important (or unimportant) for America to have antitrust laws?

During the four following weeks, the students explore more recent and contemporary approaches to America's antitrust laws.

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<sup>3</sup> See ERIC BEINHOCKER, *THE ORIGIN OF WEALTH: EVOLUTION, COMPLEXITY, AND THE RADICAL REMAKING OF ECONOMICS* (2006); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (Fortieth Anniv. ed. 2002); WALTER ADAMS & JAMES W. BROCK, *THE BIGNESS COMPLEX: INDUSTRY, LABOR, AND GOVERNMENT IN THE AMERICAN ECONOMY* (2d ed. 2004); MORAL MARKETS: THE CRITICAL ROLE OF VALUES IN THE ECONOMY (Paul J. Zak ed. 2008).

<sup>4</sup> See LOUIS D. BRANDEIS, *THE CURSE OF BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS* (Osmond K. Fraenkel ed. 1935); *HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ANALYSIS ON U.S. ANTITRUST* (Robert Pitofsky ed. 2008); *REVITALIZING ANTITRUST IN ITS SECOND CENTURY: ESSAYS ON LEGAL, ECONOMIC, AND POLITICAL POLICY* (Harry First et al. eds. 1991); RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW* (1996); Maurice E. Stucke, *Reconsidering Antitrust's Goals*, 53 B.C. L. REV. 551 (2012).

Cutting-edge topics include behavioral economics, corporate governance and ethics, and my own recent articles applying evolutionary and biological theories and models to antitrust analyses.<sup>5</sup> Each student leads a class discussion, and writes a five to seven page essay, on that day's reading and discussion highlights. Students also begin researching and writing a fifteen to twenty-five page essay on a relevant antitrust topic of their choosing. Students have chosen a fascinating array of historical and contemporary topics, including agriculture (transgenic seeds; cattle), beer, health care (health insurance; hospital networks; pharmaceuticals), defense, the internet, and the Robinson-Patman Act and small businesses.

In the final four weeks of the course, we make a major shift and begin focusing on our final mock antitrust trials. Students are divided into four trial teams of four students. Two teams try the case of *United States v. Brown University*,<sup>6</sup> while two try the case of *United States v. Microsoft Corp.*<sup>7</sup> Each student plays the role of both an attorney and a witness for his or her respective client. The eight students not trying the case sit as jurors. Although we try the cases formally in our courtroom, we use very liberal rules of evidence, so that the students can focus on the substance of their case and their respective roles.

Without exception, even the shyest students love the final mock antitrust trials. They relish playing such figures as Bill Gates or Brown University's president. They also develop all kinds of creative demonstrative exhibits such as a home movie highlighting the uses of Microsoft's software throughout our campus. Occasionally, the trial atmosphere becomes heated and mirrors real life, as it did when two students (respectively playing the roles of the economists for the United States and Microsoft) got into a heated exchange during a cross-examination.

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<sup>5</sup> See Thomas J. Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 McGEORGE L. REV. (forthcoming 2013); Thomas J. Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. BALT. L. REV. 615 (2012); Thomas J. Horton, *The Coming Extinction of Homo Economicus and the Decline of the Chicago School of Antitrust: Applying Evolutionary Biology to Structural and Behavioral Antitrust Analyses*, 42 LOY. U. CHI. L.J. 469 (2011).

<sup>6</sup> 5 F.3d 658 (3d Cir. 1993).

<sup>7</sup> 253 F.3d 34 (D.C. Cir. 2001).

### III CONCLUSION

Students find "The History and Philosophy of America's Antitrust Laws and Their Enforcement" to be a rigorous and challenging change of pace. They love being pushed to "create their own limits and interpret the diverse interdisciplinary readings in their own way." They enjoy having to merge the diverse perspectives of history, philosophy, economics, political science, and evolutionary theory. And they are stimulated and inspired by the chance to write a research paper on a topic "they truly care about" that is also highly relevant to the modern economic world around them.

Playing the roles of historical figures and retrying famous antitrust cases are highlights of the course. Most importantly, at the end of the fourteen weeks, the students appreciate that studying and researching contemporary legal issues from an interdisciplinary historical, philosophical, and cultural perspective is an invigorating and inspirational way to learn about America's antitrust laws and their enforcement.