

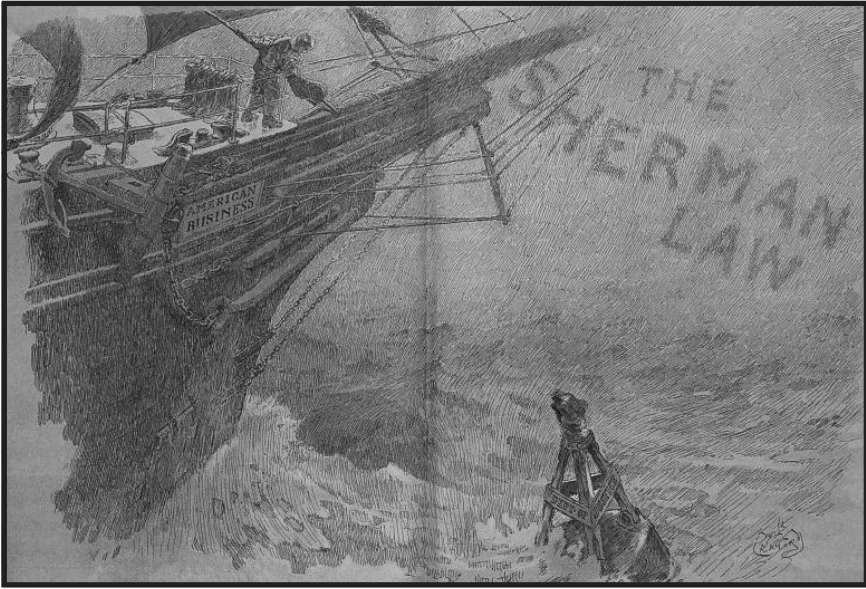
Chicago-Kent College of Law

From the Selected Works of David J. Gerber

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U.S. Antitrust: From Shot in the Dark to Global Leadership

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"The fog," Puck cartoon by Will Crawford, 1911, Library of Congress.

U.S. ANTITRUST: FROM SHOT IN THE DARK TO GLOBAL LEADERSHIP

David J. Gerber

When the United States Congress enacted the first "antitrust" law in 1890 it was taking a shot in the dark. At the time there was no concept of "antitrust law"—i.e., a general legal regime intended to combat restraints on competition. Today more than 100 countries have such laws, including all significant participants in the global economy. Competition law has become a major factor in economic life throughout much of the world. U.S. antitrust law has played a central role in this remarkable evolution, and it is generally acknowledged to be the most important of

these laws. It is the touchstone and frame of reference for international discussions, and it is often used as a model or at least a major source of guidance by other countries in developing their own competition laws. The story is extraordinary, interwoven with the roles of power and ideas and intertwined with the evolution of the U.S. and its role in the world. This brief essay sketches its trajectory. Chicago-Kent's role as an educational institution tracks that trajectory.

I. A Shot in the Dark

This new type of legislation was a “shot in the dark” in the sense that few, if any, of the legislators had any way of knowing what consequences the legislation would have. They were “shooting” at something, but they didn’t know what they might actually hit. So what were they trying to do and why?

Antitrust law was, above all, a response to social turbulence and tensions. The United States in the 1880s presented a complex mixture of hope, fear and resentments. The terrible Civil War was a memory, but not a distant one. Rapid industrialization was creating great wealth for a few and jobs for many. Immigration was bringing millions from Europe to take those jobs and to find land to farm in the Midwest and the West. Yet the rapid changes also generated sectional conflicts and social tensions, and political and legal institutions strained to respond effectively to them.

This mixture of pressures, conflicts and resentments led Congress to enact what came to be known as antitrust law. One key background factor was the resentment that many felt towards the new super rich and their lavish and ostentatious lifestyles. Located primarily in New York and other cities on the East Coast, these groups had achieved great wealth quickly, often through control of large manufacturing busi-

nesses. These firms often dominated specific industries, and this dominance allowed them to exclude new entrants from those industries. It also allowed them to extract what many viewed as unfair prices and conditions on their suppliers as well as their employees. This led to anger at the power of these so-called “trusts” and often combined with anger at the power of their owners to control the destinies and stifle the possibilities of others, especially those in other parts of the country. A specific catalyst for antitrust law was rising anger among Midwestern farming communities at what they saw as rapacious and monopolistic conduct by railroad companies and others whom they believed were manipulating prices paid to farmers for their grain and livestock. Groups representing these interests pressured their representatives in Congress to do something about the “trusts” that were amassing fortunes for a few, but exploiting vast numbers of hard-working farmers and tradesmen.

Congress responded to this pressure by enacting the Sherman Antitrust Act in 1890. The name that soon attached to the legislation—“anti-trust”—reflected its goals. It was a tool to be used to combat the monopolistic abuses of very large enterprises. There was, however, no model for Congress to use in doing what it wanted to do—or wanted to appear to be doing. So Congress

“punted”—it simply federalized two barely used legal principles. It took two concepts from the common law that had been used for quite different purposes, first in England and then to a limited extent in the U.S., and it made them enforceable under federal law. The statute was very short, and its basics have not changed since 1890. The first concept was “restraint of trade.” This concept had been used primarily in civil cases to combat overly restrictive provisions in contracts. The second basic idea was “monopolization.” It had also been part of the English common law, but for centuries it had been little used in either England or the U.S. The legislation contained virtually no guidance as to the substantive content of the provisions, leaving issues of content to the federal courts.

The Sherman Act transformed the role of these private law concepts by providing that the federal government could enforce them. Congress appears to have given little thought to how this was to take place. It did not create specific procedure for the enforcement of the antitrust provisions. It merely authorized the U.S. Justice Department to file claims in the regular courts, using the normal rules for civil proceedings. Given that the federal government was still very small in 1890, the legislators could hardly have envisioned extensive federal administrative application of the provisions. Some assumed that private actions could be brought on

the basis of the legislation, and this was confirmed a few years later.

This was the “shot in the dark!” The U.S. Congress was responding to specific domestic pressures. The legislators just took common law concepts and gave the federal government authority to use them in the federal courts. The legislators paid little, if any, attention to how others in the world had dealt with similar issues or what, if anything, they might think about the U.S. experiment. They just experimented, basically relying on judges to sort out the issues and develop the law.

II. An Antitrust System Develops

Prior to the Second World War the system evolved slowly and fitfully according to a pragmatic, court-based process—typical of U.S. legal development generally. The judges were solving the conflicts before them, and there is little evidence that they thought about their decisions as creating a “system” of antitrust law. They relied on accumulated practical experience, domestic conceptions of the judicial role, and often on ideologies about the role of markets as they shaped the content and roles of antitrust in the U.S. There were relatively few cases, and other than in a few large companies there was relatively little interest in this area of the law.

After the war the roles and importance of antitrust law expanded

greatly. One factor was transnational. Antitrust came to be seen in the U.S. as a part of a global "mission" to provide an antidote to fascism and to support freedom. Many believed that the concentrations of economic power in Germany and Japan were at least in part responsible for the horrors of the Second World War, and they saw antitrust as a means of preventing such concentrations or at least curbing the resulting abuses. This led U.S. government officials and others actively to promote antitrust in Europe. A European version of antitrust law had begun to develop in the 1920s, but it had not gained much status in most European countries, and thus U.S. antitrust became a symbol of restructuring in Europe, both in individual countries and in connection with the process of European integration. At the same time, the economic and political dominance of the U.S. in the so-called "free world" allowed the U.S. to apply its antitrust law to conduct outside its own territory and thus further support the antitrust mission.

This heightened political, symbolic and economic importance of antitrust on the international plane combined with the *de facto* protection of the U.S. market encouraged rapid growth in the perceived importance of antitrust within the U.S. and the expansion of antitrust principles. By the early 1970s antitrust had become a very important part of the

legal environment of business and as such it attracted strong interest from lawyers. The growing importance of antitrust meant that law schools increased their offerings in the area. According to Ralph Brill, antitrust was first taught at Chicago-Kent College of Law in 1973. This also meant, however, that antitrust represented a major cost for many U.S. businesses. These costs were tolerated as long as economic factors (especially currency and regulatory obstacles) buffered U.S. firms from international competition.

In the 1970s the international economic picture changed markedly, and these changes in global economic conditions generated a fundamental change in U.S. antitrust law. The "oil shocks" of the early 1970s and the concomitant international currency restructuring led to increased awareness in the U.S. business community of the need for U.S. businesses to compete internationally. Antitrust now began to appear as a burden on the U.S. economy, and this led scholars to examine ever more carefully the intellectual justification for such burdens. Economists and law professors increasingly argued that the courts had expanded antitrust law too far and that the entire edifice of antitrust law should be viewed from the perspective of its economic impact. This perspective quickly won favor in the courts and law faculties, and within a few years it led to a radical revision of standards for antitrust law in the U.S. The central substantive

law questions were now to be judged by economists according to economic criteria.

III. Global Competition Law Leadership

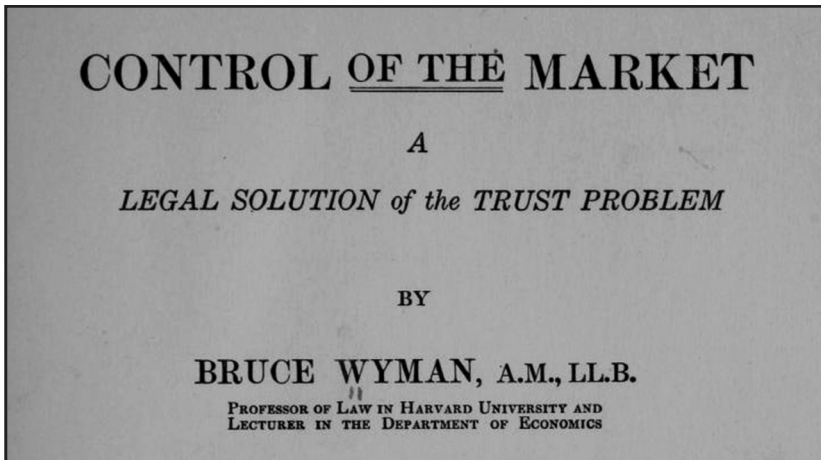
The “shot in the dark” that was the U.S. antitrust law system is today no longer solely a domestic field of law. It is now also a critically important component of global economic policy! The system that U.S. judges had evolved to deal with purely domestic problems and that relied on little more than confidence in the capacity of courts to develop reasonable responses to conflicts has been transformed into the central player in efforts to respond effectively to economic and other forms of globalization. It is now a U.S. export product, and the stakes are enormous. What directions and forms will the rules of competition take? Treatment of these issues will be a factor in the future of many countries, including the U.S., and for more than two decades Chicago-Kent has brought transnational competition law to our students, and Chicago-Kent faculty have contributed to the international discussion of these issues.

A. Foreign Interactions and Perceptions

U.S. antitrust now plays on a global stage, and much will depend

on how foreign experts, lawyers, government officials and business leaders see U.S. antitrust. They will make decisions about what to do in their own countries and on the international level. This means that their perspectives on the U.S. system are critical to its roles both at home and abroad, and foreign images of U.S. antitrust have changed radically. Prior to the Second World War, those in Europe who knew anything about U.S. antitrust law (and they were few) generally considered it a mistake. They tended to see it as a failure that actually created more harm than good by forcing companies to merge rather than cooperate. This view predominated in large measure until after the Second World War. The Europeans were developing a different concept of competition law that emphasized administrative control of dominant firms. This conception of competition was spreading rapidly in Europe in the 1920s, but depression and war led to its virtual abandonment.

After that war ended, however, U.S. antitrust law became associated with U.S. economic dominance in the “free world.” The real and imagined connections between economic concentration and military expansion in both Germany and Japan convinced many that U.S.-style antitrust law should be used to combat such concentrations. U.S. occupation forces in Germany and Japan imposed U.S. antitrust ideas during



Title page of Control of the Market, by Bruce Wyman, 1911, Library of Congress.

the occupation period, and the U.S. insisted that both countries either enact or maintain competition law after the occupation. This increased awareness of these ideas abroad. Perhaps more important, however, was the perception that antitrust was a source of strength for the U.S. economy and thus a potential spur to growth that other countries could employ.

U.S.-style antitrust did not, however, always fit well with European legal traditions and institutions, and in most European countries skepticism toward the U.S. model limited progress in protecting competition. In Germany, however, a separate set of ideas about how to protect competition developed in the 1930s and 1940s in the underground, and after the war it became the basis for German antitrust law. From here it spread to the European level and became part of the process of European integration. The basic idea of

U.S. antitrust law—i.e., protecting the competitive process from restraints—was part of this model of competition law, but the model itself was conceptually and institutionally quite distinct. European scholars and officials in these areas often looked to U.S. antitrust for comparisons and insights into problems, but there was relatively little interaction between U.S. and European forms of competition law until the 1990s.

In the 1990s these relationships became far closer and more important for both the U.S. and Europeans. Moreover, the fall of the Soviet Union precipitated widespread interest in market-based approaches around the world and revived the messianic tenor of the U.S. antitrust law community. Many countries that had socialist or other command-based approaches to the organization of economic activity now introduced antitrust laws or significantly increased their investment in

the enforcement of such laws. Often they looked to U.S. antitrust officials, lawyers and scholars for help in implementing or evaluating their new activities.

B. Policy Issues and Obstacles

This has raised a critically important issue: How will/should competition law on global markets be implemented? Globalization has shown the limitations and distortions of the traditional jurisdictional system—e.g., differing rules and procedures for different parts of the same economic market. Many in the U.S. and elsewhere believe that the best response to these problems is to encourage all countries to follow at least the basic substantive law approach of the U.S. antitrust law system. This would generate convergence among competition law systems around the world and reduce the harms caused by current jurisdictional arrangements. Many others are, however, skeptical that the U.S. model should be the focus of convergence. They often see some form of coordination (perhaps at the World Trade Organization level) as the best response.

How these foreign decision makers and decision shapers understand and evaluate U.S. antitrust law is critical to this set of decisions. It is important, therefore, that they understand as clearly as possible how U.S. antitrust law works and what the guiding ideas are behind the law.

Only then will they be in a position adequately to evaluate it, compare it with their own systems and make informed choices in relation to it. There are many obstacles—linguistic, comparative, political and economic—to achieving an adequate understanding of the U.S. system and of the implications of various policy choices for the global system and for individual components of it. Moreover, it is critical that U.S. lawyers, officials and scholars acquire a better understanding of the competition law elsewhere and thus of the potential bases for convergence and coordination on the global level.

IV. Concluding Comments

A former U.S. antitrust official not long ago wrote that U.S. antitrust is (or could be) the “light of the world.” That might be a bit strong, but U.S. antitrust certainly does play a key role in the development of the global economy and its many components. Now the big question is whether U.S. legal thinking and the creative and pragmatic impulses that have been so much a part of U.S. antitrust law will continue to provide the leadership that can make the most of these opportunities.

These changes have important implications for U.S. legal education. At Chicago-Kent College of Law, we are doing our part. Here, and at some other leading law schools, these issues have generated increas-

ing attention. Since the 1980s, and even more so since the early 1990s, I and others have included transnational issues in the domestic antitrust course and included an antitrust focus in courses such as international business transactions. I have also long offered a seminar in international and comparative antitrust law that tackles these issues directly. These efforts have two central objectives. One is to educate U.S. lawyers to perform more effectively in this new global context. The other is to educate foreign lawyers about U.S. antitrust law and provide them with tools for understanding and evaluating it and its global roles.

One fact stands out in 2013 at the celebration of Chicago-Kent's 125 years of teaching law. The U.S. will have to earn its leading role in antitrust law on the global level. Effective legal education in this area will be a key element in whether it will be successful in achieving that goal. ♦

Sources and Further Reading

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David J. Gerber teaches antitrust law, comparative law and more specialized seminars such as international and comparative competition law. He has been a member of the Chicago-Kent faculty since 1982. After graduating from the University of Chicago Law School, Professor Gerber practiced law in New York City and then spent several years working in a German law firm and in several universities in Europe. He frequently lectures and teaches in various universities and other institutions in Europe, Asia and elsewhere. His most recent book is *Global Competition: Law, Markets and Globalization* (Oxford Univ. Press, 2010, pbk. 2012).