Book Review

Do You Really Know Antitrust's Past? A Review of Gregory Werden's *The Foundations of Antitrust*

Gregory J. Werden

The Foundations of Antitrust

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Reviewed by Steven J. Cernak

After you have lived with a subject for decades, there are certain things, whether big or trivial, that you just know. For instance, as a life-long Detroit Tigers baseball fan, I *know* that Al Kaline's 3000th career hit was a double to right field off Dave McNally in Kaline's hometown of Baltimore. I also *know* that in the magical World Series year of 1984, Willie Hernandez blew his only save during the last game of the year but still won the Cy Young and Most Valuable Player Awards.

Still, looking again at well-known topics can be helpful in several ways.[1] First, you can discover new facts that you did not know that can add to your knowledge. Second, you might be reminded of some fact that you had forgotten or be exposed to a new angle that helps increase your appreciation of the topic today. Finally, heaven forbid, your research might lead you to discover that your aging memory was not quite as accurate as you thought.[2]

The same is true with the foundations of today's antitrust law and policies. Sure, we all *know* John Sherman, *Standard Oil*, Teddy Roosevelt, Robert Bork, Chicago School, and the rule of reason. Can there be any value today in going back to these and similar foundational antitrust topics?

In short, the answer is yes, especially when you can do so by reading Gregory Werden's meticulously researched and delightfully written *The Foundations of Antitrust*. The recently retired longtime official in the U.S. Department of Justice Antitrust Division covers the law, history, economics, and people that established the anti-trust policies of the 19th century and that still inform the antitrust policy debates of today.

Werden divides his very readable book into three sections of bite-size chapters: historical events that shaped antitrust law; the intellectual history of antitrust policies; and antitrust doctrine that survives to this day. In each section, I discovered items that I did not know, had forgotten or not seen in the same way, or that I had wrong. My improved appreciation for antitrust's history helps put today's antitrust policy debates in perspective.

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[1] At least that is my excuse for all the time spent on www.Baseball-Reference.com.

[2] To learn the accuracy of my Tiger memories, please continue reading until the end.

Events Shaping Antitrust Law

As any book with that title must, *The Foundations of Antitrust* spends considerable time on the passage, meaning, and early results of the Sherman Act.[3] We are reminded that by 1888, both political parties and the popular press were dead set against the trusts. After Senator Sherman introduced his bill, no Senator spoke in favor of trusts. The main concerns with the bill were whether it was within Congress's constitutional powers and would be effective. Most antitrust practitioners today understand that the final legislation was a complete rewrite of Sherman's original bill. However, Werden goes on to provide further details on how Senators George Hoar and George Edmonds, separately, later claimed to have been the members of the Judiciary Committee who turned Sherman's bill into something closer to the Sections 1 and 2 we know today.

Perhaps more pertinent to later debates over the substance of the legislation, Werden discusses what the legislators who wrote and passed those two Sections might have intended. The meaning of Section 1 seems clearer because the language used—"restraint of trade"—was familiar from common law. Here and throughout the book, Werden emphasizes that the Act was meant to "protect the competitive process." The intended meaning of Section 2's "monopolize," however, is less clear because, as Werden details, that term was not used in common law nor found in any contemporaneous legal dictionary. The comments of Senators Hoar and Edmonds are dissected, and Werden makes a convincing case that Section 2 was aimed at the exclusionary acts then practiced by Standard Oil.

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Werden details the initial lackluster court results of the Sherman Act and then the renewed interest at the turn of the century in "doing something," especially after the record number of mergers in 1899. One of the results was the 1903 Congressional funding for the position of Assistant to the Attorney General for antitrust enforcement and the decision to litigate two eventual Supreme Court cases, *Northern Securities*[4] and *Swift & Co.*[5]

While Standard Oil is featured prominently throughout the book, I also learned much about the formation and life of the Whisky and Sugar Trusts. As a contemporaneous observer noted, when those trusts were formed in 1887, "Public attention was directed to them."[6] The *New York Times* alone ran over a hundred editorials and news stories on the trusts in 1888. Werden does not try to convert that old-fashioned content into a number of social media posts but implicitly makes the point that, then and now, antitrust sentiment bubbles up when seemingly anticompetitive activities affect popular products and services.

One historical misconception that Werden clears up in several parts of the book, especially in the chapter entitled "Not a Trust Buster," is Teddy Roosevelt's opinion of antitrust legislation in general and the Sherman Act in particular. Despite the impression left by the picture of TR wielding a big stick against some trusts in the picture on the wall behind me as I type,[7] he argued that "combination and concentration should be, not prohibited, but supervised and within reasonable limits controlled" by the federal government.[8] Werden does a spectacular job of concisely describing

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[3] 15 U.S.C. §§ 1–2.

[4] N. Sec. Co. v. United States, 193 U.S.197 (1904).

[5] Swift & Co. v. United States, 196 U.S. 375 (1905).

[6] Gregory J. Werden, The Foundations of Antitrust 13 (2020).

[7] On recent Zoom calls, some have noticed that picture. Fewer have noted the picture of Sparky Anderson directly below TR or the painting of Comerica Park next to him.

[8] Werden, *supra* note 6, at 79–80, (quoting annual message to Congress Dec. 3, 1901).

the different approaches to fencing in the trusts during the Progressive Era represented by TR, William Howard Taft, and Woodrow Wilson, especially during the 1912 election. Finally, Werden does give TR credit for planting two important antitrust seeds in his 1907 annual message to Congress: suggesting that "to be really effective," antitrust law must be "administered by an executive body" like what was to become the Federal Trade Commission several years later, and for first referring to "antitrust law" without the hyphen.[9]

Intellectual History of Antitrust

To me, the section of the book on the intellectual history of antitrust provided the most new discoveries and fresh angles on past learning. Sure, John Bates Clark has his name on an award for young economists,[10] but who was he, and what did he have to do with the foundations of antitrust? According to Werden, Clark was "the most prolific and most influential economist writing" about trusts in the period from before the Sherman Act through the Clayton Act. Through his descriptions of the work of Clark and some of his contemporaries, Werden traces the evolution of economic thought about antitrust policy during this period and describes the antecedents for concepts still in use today.

We see Clark and his contemporaries relatively unconcerned about the early rise of the trusts because they will end "ruinous competition" while maintaining the benefits of increased scale still policed by "potential competition" in and "contestability" of markets. By the turn of the century, Clark's concern about the efficacy of potential competition had increased as he recognized that natural "friction" might slow market reactions to industrial giants. Clark also worried more that acts by the trust or monopolist, especially targeted "ruinously low prices," might prevent potential competitors from becoming actual ones. By the time of his 1912 book, Clark was advocating "regulating competition" by "repressing the cutthroat operations by which the trusts often crush their rivals."[11] Werden gives Clark credit for "identifying the proper function of antitrust: It is to protect the competitive process by attacking the specific conduct that undermines the competitive process."[12]

Given his recent return to prominence, the chapter on Louis Brandeis is a must-read for all those participating in today's antitrust debates. Like Clark, Brandeis's writings prior to joining the Supreme Court showed a desire to "prohibit anticompetitive conduct" that "would lead to monopolies." Unlike Clark, Brandeis explicitly exhibited an antipathy toward large entities, claiming that "no existing industrial monopoly had resulted from 'natural growth' without 'ruthless practices.'"[13] As Brandeis put it in his 1914 *A Curse of Bigness*, "But size may, at least, become noxious by reason of the means through which it was attained or the uses to which it is put."[14] Or as Werden summarizes the Brandeisian philosophy, "Size was not a crime, but to Brandeis, it was proof of criminality."[15]

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[9] *See* Steven J. Cernak, *You Had Me at Hyphen: A Review of Daniel Crane's* Antitrust, Antitrust Source (Aug. 2014), https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug14_full_source.pdf.

[10] For more on the John Bates Clark Medal of the American Economic Association, see https://www.aeaweb.org/about-aea/honors-awards/bates-clark.

[11] Werden, *supra* note 6, at 151 (quoting J.B. Clark & J.M. Clark, The Control of Trusts v–vi (MacMillan Co. (1912)).

[12] *Id.* at 153.

[13] Werden, *supra* note 6, at 171 (citing Louis D. Brandeis, *Shall We Abandon the Policy of Competition?*, 18 *Case & Comment* 494, 495 (1912)).

[14] Louis D. Brandeis, *A Curse of Bigness*, Harper's Wkly., Jan. 10, 1914, at 18.

[15] Werden, *supra* note 6, at 173.

Brandeis's opinion in *Chicago Board of Trade*[16] gets its own chapter to help Werden flesh out the rule of reason. In the chapter devoted to Brandeis's antitrust philosophy more generally, Werden spends more time on the Brandeis dissent in *American Column & Lumber Co.*[17] According to Werden, Brandeis saw the extensive exchange of current and future price information by the parties in that case as "voluntary efforts by relatively small businesses to improve their profitability" that should not be condemned because none of the entities were large. In Werden's judgment, "Brandeis subordinated the public interest in competition, as well as the broader interests of consumers, to the profit interests of business."[18] Given Werden's interest in using antitrust law to protect the competitive process, no matter the size of the entities, he opines that "the People's Lawyer" did not "advocate for the people's interest in competition."[19]

As expected, Robert Bork plays a large role in Werden's chapter on the Chicago School, as well as elsewhere in the book. What I found intriguing is the prominent place Frank Easterbrook enjoys in the Chicago School chapter, not because it is unwarranted but because of the way many of today's commentators make Bork the sole face, for good or bad, of whatever anyone wants to call "Chicago School."

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It is Easterbrook whom Werden quotes for the Chicago School's general philosophy: a "profoundly skeptical program—skeptical of simple models, skeptical of simple analysis, skeptical of the ability of courts to make things better even with the best data."[20] According to Werden, while Bork and others might be interpreted to say that economics has it all worked out, the Chicago School philosophy since 1980 according to Easterbrook is that economics "does not have everything worked out, and antitrust should" stop a practice only when economics is confident that it "suppresses competition."[21] Of course, Easterbrook's article, *The Limits of Antitrust*,[22] is analyzed for its error-cost framework and influence on burdens of proof. Werden also quotes Easterbrook's later opinions as an appellate judge discussing key issues still live today, such as ancillary restraints,[23] antitrust's focus on output,[24] and competition for the contract.[25] None of Werden's references are surprising. But seeing Easterbrook's name and work pop up repeatedly is a reminder that the Chicago School movement was, and is, broader and deeper than one person yelling "consumer welfare."

Antitrust Doctrine

In the final section of the book, Werden uses the antitrust history that he has explained to illustrate the development of key antitrust doctrines. The chapters that rely most heavily on that history work well. However, the chapters on current "big tech" companies and antitrust's application to foreign

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[16] Bd. of Trade of City of Chicago v. United States, 246 U.S. 231 (1918).

[17] Am. Column & Lumber Co. v. United States, 257 U.S. 377 (1921).

[18] Werden, *supra* note 6, at 178–79.

[19] *Id.* at 179.

[20] *Id.* at 189 (citing Frank H. Easterbrook, *Workable Antitrust Policy*, 84 Mich. L. Rev. 1696, 1701 (1986)).

[21] *Id.*

[22] Frank Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984).

[23] Polk Bros., Inc. v. Forest City Enters., 776 F.2d 185 (7th Cir. 1985).

[24] Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 95 F.3d 593 (7th Cir. 1996).

[25] Menasha Corp. v. News Am. Mktg. In-Store, 354 F.3d 661 (7th Cir. 2004); Paddock Publ'ns, Inc. v. Chicago Trib. Co., 103 F.3d 42 (7th Cir. 1996).

trade do not seem as closely argued. The final chapter's detailed diagramming of the notoriously convoluted language of the Foreign Trade Antitrust Improvements Act,[26] however, is helpful.

The chapters on the development of the rule of reason and the per se standards are the longest in the book. They contain enough antitrust trivia for all antitrust geeks to use at some future Antitrust Law Section Spring Meeting cocktail party. For instance, I did not know that Justice Tom C. Clark, the author of the Court's opinions in both *Times-Picayune*[27] and *Tampa Electric*,[28] had once been both a staff attorney and then the Assistant Attorney General in charge of the Antitrust Division. Also, one of the leading defense attorneys for the companies involved in *Socony-Vacuum*[29] was Bill Donovan, who had overseen antitrust in the Coolidge Justice Department and went on to head the O.S.S. in World War II.

More substantively, those two chapters allow Werden to further defend his argument that the antitrust laws should focus on protecting the competitive process. In analyzing cognizable justifications under the rule of reason, Werden finds a "consistent theme" running through cases both old[30] and modern[31] that "a justification is not cognizable if it questions the desirability of competition." Similarly, in comparing the rule of reason and the per se rule, Werden quotes Justice Stevens from *NCAA*,[32] that "the essential inquiry remains the same—whether or not the challenged restraint enhances competition."

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Werden also wades into the "consumer welfare debate" and, using his decades of experience and knowledge of antitrust's history, illuminates this hot topic better than most commentators. He traces Bork's frequent and varied use of the term and concludes that Bork and others "jettisoned the plan of Congress by advocating that antitrust should promote welfare" rather than "protect the competitive process in the expectation that competition would promote the welfare of the people."[33] He has even harsher words for any opponents of the "consumer welfare standard" who are part of the New Brandeis Movement, calling it "nostalgia without memory" where any "claims . . . about antitrust enforcement in the old days are under-researched and over-romanticized."[34] He sees the New Brandeisians as more interested in "active de-concentration rather than aggressive antitrust enforcement."[35]

Summary

Certainly, Werden's book would be a great place for an antitrust beginner to discover "the foundations of antitrust" and get a clear-eyed understanding of the law and policy debates of the first few decades of the antitrust era that still shape the discussion today. I hope this review, however, convinces experienced antitrust practitioners that spending time with *The Foundations of Antitrust*

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[26] 15 U.S.C. § 6a.

[27] Times-Picayune Publ'g Co. v. United States, 345 U.S. 594 (1953).

[28] Tampa Elec. Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[29] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

[30] *See, e.g.,* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897).

[31] *See, e.g.,* Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1978).

[32] NCAA v. Bd. of Regents of Univ. of Okla. 468 U.S. 85, 104 (1984).

[33] WERDEN, *supra* note 6, at 323.

[34] *Id.* at 333.

[35] *Id.* at 334.

can jog your memories, refresh your perspectives, teach you something new, and even correct your mistakes. In short, you can be a better antitrust practitioner by reading and studying Werden's book.

So how did I do with those Tiger facts that I *know*? My memory of the details of Mr. Tiger's 3000th hit was correct, although I had not realized until I did the research that his parents were also in the stands that night.[36] As for Hernandez's magical 1984 season, he did blow only one save but it was on the Friday night of the last weekend of the season, not the final game, and came when he gave up a sacrifice fly.[37] And because nearly everything went right for the Tigers that season, they ended up winning the game in 12 innings anyway. Whether your prior beliefs are challenged or confirmed, you can learn a lot by revisiting something you *know*. ●

[36] *See* http://exhibits.baseballhalloffame.org/3000_hit_club/kaline_al.htm#:~:text=Kaline%E2%80%99s%20landmark%20hit%20came%20against,in%20attendance%20at%20the%20game.

[37] *See* https://www.baseball-reference.com/boxes/NYA/NYA198409280.shtml.