

Michigan Law Review

Volume 84 | Issue 8

1986

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Recommended Citation

Herbert Hovenkamp, *Rhetoric and Skepticism in Antitrust Argument*, 84 MICH. L. REV. 1721 (1986).

Available at: <https://repository.law.umich.edu/mlr/vol84/iss8/6>

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Rhetoric and Skepticism in Antitrust Argument

Herbert Hovenkamp*

The adherents of the Chicago School of antitrust policy were once an embattled minority, by their own admission perceived as a “lunatic fringe”¹ by the mainstream, regarded as having little useful to say to practical institutions like the courts. Under such conditions the protagonists of the Chicago School felt compelled to listen to the opinions of the other side, take them seriously enough to understand them, and then explain patiently why these views were wrong.² The other side often had little to offer except rhetoric (“fairness,” “entrenchment,”³ “Magna Carta of free enterprise”⁴).

The tables have turned, and the Chicago School now floats in the mainstream of antitrust policy. But in a liberal society the duty to defend a position is not dissolved merely because the position has achieved prominence. On the contrary, positions that are no longer defended lose their vitality — or, to put it another way, the best of-fense is an ironclad defense.⁵

The most troublesome sign that an advocate is no longer defending his position is the substitution of rhetoric for argument. To be sure, language without rhetoric is impossible. Furthermore, rhetoric itself is an important type of argument. Nevertheless, rhetoric much too easily becomes a way of avoiding argument. For example, when a court dismisses an antitrust complaint about a vertical restraint by saying that “restricted dealing is a way to compete,”⁶ it has substituted rhetoric for argument. Those are very well chosen words. They are both con-

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1. See Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931 (1979).

2. See, e.g., Bowman, *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pt. 2), 75 YALE L.J. 373 (1966); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

3. E.g., *United States v. International Tel. & Tel. Corp.*, 324 F. Supp. 19, 24 (D. Conn. 1970), *appeal dismissed*, 404 U.S. 801 (1971); see also R. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 253-55 (1978).

4. *United States v. Topco Assoc.*, 405 U.S. 596, 610 (1972).

5. For a discussion of one theory that has managed to stay alive and healthy only because its supporters have continued to be innovative and diligent, see R. CLARK, *THE SURVIVAL OF CHARLES DARWIN: A BIOGRAPHY OF A MAN AND AN IDEA* (1984).

6. *Westman Commn. Co. v. Hobart Intl., Inc.*, 796 F.2d 1216, 1227 (10th Cir. 1986) (McKay, J., quoting Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J.

clusive and expansive — but they prove nothing in themselves and are not a description of exhaustive empirical work verifying an hypothesis; in fact, they are nothing more than an expression of one opinion about the competitive effects of vertical restraints.⁷ Their ability to convince lies in their aesthetic appeal rather than their empirical or analytic force.⁸

In his essay on *Workable Antitrust Policy*⁹ Judge Easterbrook professes an extraordinary skepticism about economic models in general, and particularly about the ability of courts to use economic models to distinguish the competitive from the anticompetitive. But a profession of skepticism is itself a very powerful rhetorical device; it creates a perception of tough-mindedness, of refusal to yield real-world observations to analytic models or other abstractions, of extreme reluctance to accept any proposition that has not been clearly proven. Further, it is always very easy to be a skeptic, because every position ever taken — except perhaps for a few tautologies — is capable of being doubted. In that case being a skeptic means that one knows the outcome the instant the burden of proof is assigned.

Skeptical About What?

Judge Easterbrook argues that although the members of the Chicago School have many different viewpoints they share an extreme (and healthy) skepticism about (1) the usefulness of economic models, particularly novel models that suggest anticompetitive explanations for firm behavior; and (2) the ability of courts to use models to distinguish competitive from anticompetitive activity.¹⁰ This skepticism, he argues, is based on many years of empirical research (“grubbing about in the data”),¹¹ which casts doubt on older theories about why a myriad of business practices were anticompetitive.¹² Judge Easterbrook exaggerates both the empirical nature and the unanimity of the work

135, 140 (1984)). Judge McKay also developed several arguments drawn from published analyses that the vertical restrictions in this instance were efficient and not harmful to competition.

7. An opinion, incidentally, which I share, subject to only a few reservations. See H. HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* §§ 9.1-9.4 (1985).

8. A reading of D. McCLOSKEY, *THE RHETORIC OF ECONOMICS* (1985), should disabuse anyone of the notion that scientists, whether hard or soft, and including economists, are above the use of rhetoric. They use it constantly, sometimes as an alternative to evidence, but more often merely to conclude more than they have in fact established.

9. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986).

10. *Id.* at 1700-01.

11. *Id.* at 1698.

12. These include, among other things: (1) resale price maintenance, Telser, *supra* note 2; Goldberg, *The Free Rider Problem, Imperfect Pricing, and the Economics of Retailing Services*, 79 NW. U. L. REV. 736 (1984); (2) vertical nonprice restraints, Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981); R.

he cites, and he does not cite everything relevant on the subject;¹³ but those subjects should be taken up in a different article. Here I am much more interested in the nature of that professed skepticism.

Only an oddly selective skepticism about economic theory concludes that "restricted dealing is a way to compete,"¹⁴ that predatory pricing never occurs,¹⁵ that in the "long run" monopolies always correct themselves,¹⁶ that apparently "naked" restraints should be pre-

BORK, *supra* note 3, at 280-309, 365-81; and (3) exclusive dealing, Marvel, *Exclusive Dealing*, 25 J.L. & ECON. 1 (1982). Other citations appear in Easterbrook, *supra* note 9, at 1699 n.9.

13. Very little of the work cited by Easterbrook, *supra* note 9, at 1699 nn.8-9, is empirical. The two studies of resale price maintenance done under the auspices of the Federal Trade Commission, T. OVERSTREET, *RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE* (1983), and *IMPACT EVALUATIONS OF FEDERAL TRADE COMMISSION VERTICAL RESTRAINT CASES* (R. Lafferty, R. Lande & J. Kirkwood eds. 1984), are empirical, but they are also much less conclusive than the others. The Overstreet study concludes that in many situations resale price maintenance is inefficient, although it may be efficient for some firms initially trying to establish themselves in a market. Judge Easterbrook cites G. STIGLER, *The Economics of Information*, in *THE ORGANIZATION OF INDUSTRY 171-90* (1968), which itself is not an empirical study, although Stigler did some empirical work on information economics. See G. STIGLER, *THE THEORY OF PRICE 1-4* (3d ed. 1966). That empirical work was consistent with the hypothesis that as the price of a product increases relative to search costs, price variation decreases.

The work on concentration and profits is more empirical; however, it is considerably less conclusive, and it points in different directions. See Kaplow, *Antitrust, Law & Economics, and the Courts*, 50 LAW & CONTEMP. PROBS. (forthcoming); see also Carlton, *The Rigidity of Prices*, 76 AM. ECON. REV. 637 (1986) (concluding that the duration of price rigidity increases as market concentration increases).

Likewise, Judge Easterbrook exaggerates the "overthrow" he describes of the "structure-conduct-performance" paradigm. Conceded, perhaps few economists now accept all the implications of the "old" structure-conduct-performance paradigm. See Easterbrook, *supra* note 9, at 1698. On the other hand, just as few entertain substantial doubts that there is a positive correlation between concentration and likelihood of collusion, whether tacit or express.

Even with respect to the empirical research that Judge Easterbrook cites, too much of it "proves" its conclusions by tests that are altogether too undemanding. Positive economics generally tests hypotheses by attempting to falsify them, and thus a hypothesis is successful if it survives repeated, diverse attempts at falsification. However, the standard for success of a hypothesis in a particular study is merely that it be consistent with the particular data examined by the tester. See the empirical study of information cited above in G. STIGLER, *THE THEORY OF PRICE*, *supra*, at 1-4. This is good scientific methodology if its limitations are fully understood and kept in mind. However, a single examination of data that fails to falsify an hypothesis does not establish the truth of the hypothesis, but only that the hypothesis is consistent with the data examined. The data might equally be consistent with other, conflicting hypotheses. An hypothesis becomes credible — particularly to a skeptic — only after it has survived many such tests and all reasonable conflicting hypotheses have been eliminated. See generally D. McCLOSKEY, *supra* note 8. This criticism applies equally to studies based on empirical data and to the econometrics and statistical methods applied to the data. See McCloskey, *The Loss Function Has Been Mis-laid: The Rhetoric of Significance Tests*, 75 AM. ECON. REV. 201 (1985).

Finally, Judge Easterbrook, just like others in the Chicago School (and, I suppose, practically everyone else), cites things that support his observations and fails to cite things that do not. On this point, see Kaplow, *supra*.

14. See note 6 *supra* and accompanying text.

15. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

16. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1, 2 (1984); see also Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 264 & n.249 (1985) (criticizing the view that short-run considerations should generally be ignored).

sumed legal unless the defendant's market power can be established¹⁷ — in spite of substantial evidence, some of it from Chicago School sources,¹⁸ that market power is extremely difficult to assess.¹⁹

"Skepticism" in this context refers to doubts about the ability of courts to identify anticompetitive behavior as defined by a particular economic theory.²⁰ Such skepticism is indeed healthy, and it explains the great difficulty that courts have had with vertical restraints, predatory pricing, and other forms of ambiguous single-firm exclusionary behavior. But, doubts notwithstanding, the court must decide on the basis of the best information it has, including statutes, precedents, models, and facts. The court, unlike the academic, cannot defer judgment until all the evidence is in.²¹

17. Easterbrook, *supra* note 16, at 21 ("The market power inquiry *logically* precedes the question of whether a restraint is 'naked' and thus within the scope of the per se rule.") (emphasis added).

18. See Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981); see also Pindyck, *The Measurement of Monopoly Power in Dynamic Markets*, 28 J.L. & ECON. 193 (1985).

19. A "naked" restraint is one for which the defendant has offered no plausible efficiency explanation. Why would a true skeptic about the court's ability to decide difficult economic questions refuse to evaluate such a restraint until after it had assessed the defendant's market power? See Kaplow, *supra* note 13.

20. As Professor Fox observes in this issue, Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714, 1719 (1986), it is not the amount of skepticism, but rather its nature, that distinguishes the Chicago School from its critics.

One cannot even conclude that Chicagoans are more skeptical than most about the ability of courts to distinguish competitive from anticompetitive behavior. For example, see Judge Easterbrook's proposal that courts evaluate the competitiveness of vertical restrictions by determining whether the restrictions increased or decreased the firm's sales, or perhaps its market share. Easterbrook, *supra* note 6, at 163-64. For critiques arguing that no court is up to this task, see Hovenkamp, *supra* note 16, at 258-59; Krattenmaker & Salop, *Anticompetitive Exclusion: Raising Rivals' Costs To Achieve Power over Price*, 96 YALE L.J. 209 (1986). Judge Easterbrook may be changing his views on the subject. In *Workable Antitrust Policy*, *supra* note 9, at 1699 n.9, he concedes that thus far it has been very difficult to test various theories about vertical restraints because of difficulties in defining or measuring output.

Likewise, given the great difficulties attending market definition, and the continuing controversy about whether product differentiation can facilitate supracompetitive pricing even in markets defined as "competitive" under accepted criteria, the reason why a "skeptic" such as Judge Easterbrook would want market power to be measured in virtually all antitrust cases escapes me. See T. Campbell, *Spatial Predation and Competition in Antitrust* (Stanford Law & Economics Working Paper No. 27, Aug. 1986). The question of how to measure market power in product-differentiated markets is extremely complicated, and thus far no unambiguous answers have been forthcoming. For criticism of the 1984 merger guidelines' approach to assessing market power in product-differentiated markets, see P. AREEDA & H. HOVENKAMP, *ANTITRUST LAW* § 919' (Supp. 1986).

21. Judge Easterbrook appears to disagree. He concludes in the sixth proposition of his "profession," discussed briefly below, that "[n]o question should be answered without adequate data. The best data and answers come from a study of the practice. The next-best answers come from extrapolations and interpolations from existing data." Easterbrook, *supra* note 9, at 1701. In fact, courts are forced daily to provide answers without having adequate data. For example, they decide death-penalty cases without knowing about the deterrent effects of capital punishment, and nuisance cases without knowing the optimal amount of air or water pollution. In most such cases, where it is relevant, the court decides by deferring to a legislative judgment. The

Judge Easterbrook sees an antinomy²² in the arguments of the new critics of Chicago School antitrust jurisprudence. On the one hand, the critics fault the neoclassical market-efficiency model for being too simple to account for certain kinds of strategic conduct. On the other, they sometimes proclaim that the model is indeterminate, because it gives only ambiguous answers to certain problems. Thus the model is both too simple and too complex — or, at least, too simple and too difficult for a court to use. The unstated premise in this argument appears to be that no model can simultaneously be too simple to account for the data and too difficult to be applied in real world situations.

In fact, the history of science has proved this premise wrong countless times; its path is strewn with the corpses of proposed models or theories that did not “fit” because they did not account for the data *and* because they failed to make relevant distinctions. Comprehensiveness as to the available data and the ability to distinguish in particular situations are two quite independent attributes of a good model — and often models fail on both scores.

But no model is perfect. As a result a certain amount of trading off takes place. Sometimes we adopt a model that we know to be too simple, because it is the only one we can manage. Other times we adopt a model that is difficult to use but that seems to explain the data better than a simpler alternative. More often, we simultaneously work with multiple models — applying the simpler ones when precision must give way to economy, but the more complex ones when we have other priorities.²³

Judge Easterbrook’s professed skepticism about models leads him to conclude that a skeptic will adopt the simplest model that accounts for all the data.²⁴ That conclusion is good science, and I have no quarrel with it; but it makes my point as well as his. “Accounting for the data” is a relative idea. Sometimes the older model explains the rele-

Chicago School appears to believe that the federal antitrust laws should be an exception to this rule. See Hovenkamp, *supra* note 16, at 249-55. In any event, the fact that courts do not know all they would like to know about a certain phenomenon is generally not a good reason for giving automatic judgments to defendants.

22. “These are odd and inconsistent critiques.” Easterbrook, *supra* note 9, at 1700.

23. Newton’s and Einstein’s models for motion and gravity — an example given by Judge Easterbrook, *id.* at 1706 — reveal the latter. Einstein’s model did not replace the Newtonian model in most applications. On the contrary, the Newtonian model is probably “applied” far more often than Einstein’s. The engineer building an automobile or bicycle or even an airplane has little need for concern about Einstein’s critique of Newton. But the engineer building a communications satellite or the astronomer bouncing radio signals off distant planets must know it well.

24. *Id.*

vant data quite well and the new, more complex model is unnecessary. At other times, however, the older model fails to account for all the data in a satisfactory way, and a more complex model must be devised.²⁵

Courts and antitrust policymakers constantly adopt relatively simple or more complicated models depending on the issue, the relevant policies and the information at hand. In fact, as Judge Easterbrook notes, even an extreme neoclassicist occasionally sees fit to discard the classical model when it fails to account for the data.²⁶ To give just one illustration, the classical model expressed no concern about the "conditions of entry" for new firms — or, in modern parlance, barriers to entry. Several conclusions flow from the premise that barriers to entry are irrelevant. Some of these, ranging from the relatively narrow to the extremely broad, are: (1) predatory pricing is irrational because as soon as the predator drives out a rival and increases price the market will be flooded with competitors; (2) the law against horizontal mergers is unnecessary, for new entrants will always be around to discipline any attempt by the postmerger firm to charge monopoly prices; and (3) the law against explicit cartelization is unnecessary, for any attempt to fix prices will be met with large-scale new entry by competitors, who will undermine the cartel.

At the risk of overgeneralization, very few antitrust scholars, Chicago School or any other variety, have accepted all three of these consequences of the classical model. In fact, proposition three, stated as it is here, is broadly rejected. Proposition two is rejected by most in the form in which it is stated; on the other hand, consideration of barriers to entry has inspired many people — Chicago School as well as others²⁷ — to become much more tolerant of mergers. Finally, a great deal of skepticism and debate exists about the merits of predatory pricing, with some Chicago School scholars coming very close to assenting to proposition one in its stated form.²⁸ Courts or enforcement agencies dealing with these three phenomena also take three quite different approaches to the concept of barriers to entry. They may be highly concerned that entry barriers be established in predatory pricing cases,²⁹ somewhat less concerned in horizontal merger cases,³⁰ and relatively unconcerned in cases involving naked price fixing.

25. Judge Easterbrook agrees. *Id.* at 1706-07.

26. *Id.* at 1699 (discussing development of the economics of information).

27. *E.g.*, P. AREEDA & H. HOVENKAMP, *supra* note 20, at ¶ 917.1; H. HOVENKAMP, *supra* note 7, at §§ 11.1-11.6.

28. *E.g.*, Easterbrook, *supra* note 15; R. BORK, *supra* note 3, at 144-60.

29. *See* International Tel. & Tel. Corp., 104 F.T.C. 280 (1984); General Foods Corp., 103 F.T.C. 204 (1984). Actually, the Federal Trade Commission has been more concerned about

Likewise, as Judge Easterbrook notes — in apparent contradiction to his own profession of skepticism — Chicago School writers have often created their own complex models that provide competitive justifications for practices condemned by courts as anticompetitive. However, these models themselves do not account for all the data, as a court must. Telser's famous article on resale price maintenance³¹ explained why certain instances of resale price maintenance are almost certainly competitive: suppliers need to control free rider problems in the delivery of point-of-sale services. However, that theory does not explain the use of resale price maintenance for fungible products or products where the delivery of point-of-sale services is unnecessary. McGee's pathbreaking article on predatory pricing³² concentrated largely on a single judicial decision,³³ and Judge Easterbrook's follow-up³⁴ considered some kinds of strategic behavior but ignored others.³⁵ A court cannot wait for the next Chicago School explanation of why these variations are also harmless. It must look at all the relevant information available — which in the case of resale price maintenance includes ambiguous economic theory, but a relatively unambiguous congressional mandate that resale price maintenance be held illegal per se.³⁶ The problem facing the court in a predatory pricing case is concededly more difficult. As a result, the limited capacity of the judiciary to determine difficult facts and resolve conflicts between complicated theories may require, at least for the time being, some per se rules about strategic pricing behavior.³⁷

I personally cannot take issue with very much in the eight statements in the "confession of faith" of Judge Easterbrook's Workable

entry barriers in predatory pricing cases than have most courts. See P. AREEDA & H. HOVENKAMP, *supra* note 20, at ¶¶ 711.2-711.3.

30. Or at least there is more variety of opinion here. Compare the approach taken by the Justice Department's 1984 Merger Guidelines, 49 Fed. Reg. 26,823 (1984), and in *United States v. Waste Management, Inc.*, 743 F.2d 976 (2d Cir. 1984), with that taken in 4 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 917 (1980), and P. AREEDA & H. HOVENKAMP, *supra* note 20, at ¶ 917.1.

31. Telser, *supra* note 2.

32. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958).

33. *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

34. Easterbrook, *supra* note 15.

35. See Williamson, *Antitrust Enforcement: Where It's Been, Where It's Going*, 27 ST. LOUIS U. L.J. 289, 299-309 (1983) (noting that traditional studies of predatory strategies were concerned largely with predation by a dominant firm against an established rival, not with price reductions as an anticompetitive entry-deterrence device); see also Salop, *Strategic Entry Deterrence*, 69 AM. ECON. REV. (Papers & Proceedings) 335 (1979).

36. See H. HOVENKAMP, *supra* note 7, at § 9.1.

37. For example, the rule that a price above average cost is legal per se. See *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 231-36 (1st Cir. 1983).

Antitrust Policy school,³⁸ although I believe my own list to be more descriptive of the Chicago School position.³⁹ I would add two propositions to Judge Easterbrook's list. First, I believe that any such confession in a democratic country must make some attempt to acknowledge that the legislature has a hand in making policy, and that this requires deference to the legislature even if its policy is inconsistent with the economic model espoused by the judge.⁴⁰ Second, I note that there is no *necessary* connection between the social wealth produced by competition and the private wealth produced by the firm seeking profits. I agree heartily that the "desire to make a buck leads people to undermine monopolistic practices";⁴¹ but the same desire leads people to undermine competitive practices as well. In short, I am far *more* skeptical than Judge Easterbrook about the notion that the interaction of firms seeking profits will (almost) always yield a competitive outcome.

These qualifications aside, Judge Easterbrook's eight statements are good starting points, but they explain why antitrust is difficult, not why it should not exist. Granted, competition is robust and antitrust is a form of "regulation";⁴² however all of law is a form of regulation. We don't rely on competition to enforce contracts,⁴³ and in the final analysis we don't rely on it to define the proper boundaries of competitive behavior.

A truly healthy skepticism about alleged antitrust violations is appropriate. It requires a court to be careful to adopt rules and presumptions that circumspectly reflect every relevant consideration — necessarily giving greater emphasis to those things it understands most clearly and about which less skepticism is appropriate, such as the legislative history of the statute it is enforcing (political content and all),

38. Easterbrook, *supra* note 9, at 1700-01. *But see* note 21 *supra*.

39. *See* Hovenkamp, *supra* note 16, at 226-29.

40. For my objections to the way the Chicago School abuses the legislative history of the antitrust laws, see *id.* at 249-55. Judge Easterbrook's characterization of the antitrust laws as a "blank check," Easterbrook, *supra* note 9, at 1702 — another rhetorical device — is simply an excuse for preempting Congress. Even conceding that the Sherman Act can be construed as a "blank check" — and I make no such concession — I am baffled that anyone could make that assertion about the Clayton Act, the Celler-Kefauver Amendments, or the Robinson-Patman Act. *See* Kaplow, *supra* note 13.

41. *See* Judge Easterbrook's third proposition. Easterbrook, *supra* note 9, at 1701.

42. The conclusion that antitrust is a form of regulation is another use of rhetoric to suggest that antitrust undermines the competitive nature of a market by substituting something "regulatory" instead, and today no one likes regulation.

43. In a competitive market only firms that complied with contracts would continue to receive business, for customers would not purchase from and suppliers would not sell to firms that breached them. As a result, firms that honored their contracts would grow while those that did not would wither. Under Judge Easterbrook's reasoning, judicial intervention to enforce contracts or order damages for breaches should be the exception rather than the rule.

and relatively less weight to those things that are much more controversial and indeterminate, such as the choice to be made among conflicting economic theories.