Michigan Law Review

Volume 84 | Issue 8

1986

Consumer Beware Chicago

Eleanor M. Fox
New York University School of Law

Consumer Beware Chicago

*Eleanor M. Fox**

Professor Hovenkamp's article, *Antitrust Policy After Chicago,*[1] reveals an important truth. Chicago School economics does not provide a superior roadmap to efficiency. I would take the critique one step further and assert: The main gap between Chicago and its critics is not even the design of the roadmap to efficiency. The main gap is social and political philosophy.

Judge Easterbrook has written an essay in defense of Chicago and in response to Hovenkamp, *Workable Antitrust Policy.*[2] Easterbrook attempts to rehabilitate the Chicago School by three main arguments. They are: (1) The "other" economic paradigm that has informed antitrust — high concentration means less competition — has been discredited, leaving Chicago's conception as the victor. (2) The members of Chicago School are not blind adherents to static models. They are the true skeptics who challenge unfounded presumptions. (3) Chicago School's critics, mired in complexities, herald an age of unworkable antitrust, while Chicago offers workable antitrust policy.

I deal briefly with each of Judge Easterbrook's three arguments and then state what I believe to be the core differences between Chicago School and its antitrust critics. Before I do, I wish to call attention to the one dominant thread of Chicago School economics. The thread must be seen against a background conception of law in general, and of antitrust law in particular: The function of most law is to promote efficiency.[3] To do so, the law should reprehend only that

---

* Professor of Law, New York University School of Law. — Ed.

The author thanks her colleague Harry First for helpful comments on a draft of this essay.

The author wishes to acknowledge a debt to Chicago School, this essay notwithstanding. Individuals such as William Baxter, Robert Bork, Frank Easterbrook, and Richard Posner have made significant contributions to the law, particularly at a time when antitrust law seemed to have no direction except to expand. One of the major contributions by these individuals, and others including Phillip Areeda and Oliver Williamson, has been to insist on asking why firms behave the way they do, and whether their behavior might not be explained as a legitimate response to consumers' demands.

1. 84 MICH. L. REV. 213 (1985).

2. 84 MICH. L. REV. 1696 (1986).

3. This is an easier claim for the Sherman Act than it is for most other law. Yet Chicagoans typically make the claim for most other law as well. *See* R. POSNER, THE ECONOMICS OF JUSTICE (1981); R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977). See also Judge Posner's opinions in Merritt v. Faulkner, 697 F.2d 761, 769-71 (7th Cir.) (Posner, J., dissenting in part)

which is inefficient.[4] In commercial enterprise, an act is inefficient only if it lessens "economic welfare," which is the sum of producers' and consumers' welfare.[5] For purposes of antitrust, inefficiency should be defined only in terms of artificial output limitation, which is inefficient by definition because it blocks the flow of resources to the production of goods that people want.[6] Everything that is not output-limiting is efficient and therefore is or should be lawful.

The dominant thread is this: The heart of Chicago School is not its model *for* finding a violation. The heart is everything else. Chicagoans state what the law reprehends in terms as narrow as possible. Chicago is not fighting a war against inefficiency. Chicago is fighting a war *for* private freedom of action. Chicago's critical contention and presumption that firms act efficiently is not a descriptive observation that produces the conclusion that almost everything is legal. It is sim-

---

(civil rights), *cert. denied,* 464 U.S. 986 (1983); United States Fidelity & Guar. Co. v. Jadranska Slobodna Plovidba, 683 F.2d 1022 (7th Cir. 1982) (torts).

The claim that law should be allocatively efficient is derived from a conception of all goals as either allocative or distributive. If we concentrate first on allocation — increasing the size of the pie — and only secondarily on how it is distributed, the claim goes, society will be wealthier and therefore all people will stand to gain; and if society is not satisfied with the resulting distribution of wealth, it can redistribute wealth in direct ways.

This is a value-laden set of claims. People *do* care about ends other than increasing their nation's wealth. People *are* willing to sacrifice the abstraction of prospective increased aggregate wealth for more personal benefits. People care about their opportunities, their relative rewards, interpersonal fairness, and mutual respect. *See* M. DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE 38-45, 50-58 (1985). Even the antitrust laws were designed more as rules of fairness, opportunity, and access than as a roadmap to efficiency. *See* Fox, *The Modernization of Antitrust: A New Equilibrium,* 66 CORNELL L. REV. 1140 (1981).

Moreover, many are skeptical of the claim that pursuit of nonallocative goals automatically undermines increased aggregate wealth (let alone other views of efficiency). And many know from experience that promises of curing unsatisfactory distributions directly are seldom met.

4. According to Chicago School, few private acts are inefficient; people and firms are presumed to act efficiently, because they will get more money if they do. The claim that the law should and does reprehend only inefficient private conduct, combined with the presumption that private conduct is not inefficient, assures that there is little role for law.

5. This definition — which is embraced by many economists, not just Chicago economists — is a neat trick when combined with the assertion that "economic welfare," defined as the sum of producers' profits and consumers' surplus, is exactly the same thing as the consumers' interests that Congress meant to protect by enacting the antitrust laws. Congress meant to protect consumers and others from exploitation and bullying. Congress did *not* value a dollar to producers equally with a dollar to consumers; nor did it value a dollar to exploiting producers equally with a dollar to striving entrepreneurs. Indeed, the whole outcome orientation reflected in the summing up of producers' and consumers' welfare is foreign to the dynamic process that Congress meant to foster through pluralism and diversity. *See* Fox, *supra* note 3.

6. By this step Chicago further arbitrarily narrows the scope of transactions that may be caught by the law. There are other ways in which transactions produce inefficiency, in the sense of making people as consumers worse off. For example, if the last two suppliers in the market should merge, consumers would lose an element of choice, and they would lose the benefits they could gain by playing off one supplier against the other. They would lose the dynamic benefits of competitors' interaction. But Chicagoans would say that as long as entry by other suppliers is feasible in a year or two, potential competition is a good constraint against output limitation, and "therefore" there is no harm.

ply argument supporting the normative claim that people (including firms) *should* be left free to act and that there is almost never a higher social interest.

I turn now to the three claims. First, Judge Easterbrook asserts that the previously popular economic conception — high concentration yields less competition — has been discredited and that the Chicago approach to efficiency stands as the victor. (Antitrust law protects competition, not efficiency, but Chicago School bridges the gap by asserting that competition is a process to produce efficiency; therefore competition must be defined in terms of efficiency.)

The association of higher concentration with lessened competition has not been discredited. It is true that, particularly in the 1960s, courts treated the association as tighter than in fact it is (but they did so to serve the will of Congress rather than the ends of economics).[7] It is also true that many economists concentrate more on entry conditions than they did in decades past, and they place more stress on easy entry as a check on incumbents' pricing behavior. But the important point is that there is widespread agreement that fewness of competitors (*i.e.,* high concentration) conduces to collaborative and noncompetitive behavior, and barriers to entry increase the extent to which producers can successfully exploit consumers. Even the Reagan Justice Department merger guidelines use this model.[8] The mainstream economic debate does not involve a challenge to these propositions but rather concerns what levels of concentration are troublesome and when barriers exist.[9]

Moreover, the Easterbrook argument implies that non-Chicago School antitrust economics rests entirely on the inverse connection between concentration and competition, so that if the relationship is sufficiently weakened all non-Chicago antitrust falls. Antitrust has a broader economic base. Antitrust law rests on the expectation that open markets and independent action (at least where integration is not needed for productive efficiency) are likely to produce the most dynamic change and the highest degree of responsiveness to consumers. Much of the law is based on this expectation. Indeed, as the record shows, we often discover concerted behavior to suppress competition in fragmented markets, where by definition there is not high

7. *See* United States v. Philadelphia Natl. Bank, 374 U.S. 321 (1963).

8. Merger Guidelines of Department of Justice (June 14, 1984), *reprinted in* 2 TRADE REG. REP. (CCH) ¶¶ 4490-4495.

9. *See* Fox, *Discovering an Economic Consensus,* in ANTITRUST POLICY IN TRANSITION: THE CONVERGENCE OF LAW AND ECONOMICS 107 (E. Fox & J. Halverson eds. 1984).

concentration.[10]

Second, Easterbrook sees Chicagoans as the realistic skeptics and the critics as the true believers. He denies the static quality of the Chicago model and cites instances in which Chicago defers to dynamics.

Chicagoans can properly see themselves as skeptics only if it is appropriate to be skeptical about the law itself. *Congress* did not like certain exploitative and exclusionary conduct.[11] *Congress* introduced a presumption into the merger law that mergers between large competitors in concentrated markets are bad for competition and for society.[12] Congress did not adopt a law that says: Thou shalt not engage in acts that frustrate the flow of resources to their most valued use in light of the existing distribution of wealth and buyers' ability and desire to pay, and thou shalt be free to engage in other commercial acts. Congress did not enact the law that Chicago insists exists.[13]

It is true, as Judge Easterbrook points out, that Chicagoans invoke dynamic effects and possibilities. But they do so only when reliance on the dynamic effect will lead to nonintervention. Thus, Chicagoans will rely on a free-rider effect to argue that producers should be able to fix resale prices.[14] But Chicagoans do not invoke dynamic effects (*e.g.*, preserving rivalrous interactions to enhance inventiveness) to support antitrust intervention.[15] Yet many economists and other observers suggest that dynamic interactions in a pluralist society are the hope for

---

10. *See, e.g.*, FTC v. Indiana Fedn. of Dentists, 106 S. Ct. 2009 (1986).

11. *See* H. THORELLI, THE FEDERAL ANTITRUST POLICY 164-232 (1955).

12. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 311-23 (1962).

13. Even if the "Chicago bill" had passed, skeptical economists, unlike Chicago "economists," would have found significant areas of the law wherein private acts do distort resource allocation. This is one of Professor Hovenkamp's main points: Because of Chicago School's presumptions of rationality and efficiency, Chicago economists find almost nothing illegal, while mainstream economists, willing to observe behavior and respectful of empirical research, find a significant role for antitrust.

14. *See* Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 10-11 (1981) [hereinafter cited as Posner, *Restricted Distribution*]; Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1, 6-10 (1977); Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86, 91-96 (1960).

Chicagoans ignore the dynamic effects that spring from the rule against resale price maintenance. The per se rule has given birth to discounting and to mail order houses. A flourishing discounting business has increased the competitiveness of retail markets and has brought many lower-price options to consumers.

15. To the contrary, Chicagoans see the dynamic effect as fully preserved and fostered by the free market. They see antitrust as frustrating dynamic interaction. *See, e.g.*, Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, esp. 304-12 (1981); *see also* Interview with Robert Tollison, then FTC's Chief Economist, 43 ANTITRUST & TRADE REG. REP. (BNA) No. 1083, at 609, 610-12 (Sept. 30, 1982) (proposing a "natural experiment" — let firms merge and see what will happen).

the future and that antitrust constraints should preserve them.[16]

Third, Judge Easterbrook charges Chicago's critics with unworkable antitrust policy and credits Chicago with workable antitrust policy. The difference between Chicago and its critics is not that Chicago offers administrable policy and that its critics offer concepts and balances so complex that antitrust cannot work. Both Chicago and its critics support some rules that are clear and support other rules and inquiries that are more complex. Chicago rejects some perfectly good simple rules. For example, the rule of *Indiana Federation of Dentists,*[17] where the dentists ganged up on the insurers to deny them x-rays in assessing the claims of their patients, is a simple one that does not require proof of market power. Chicago, however, *would* require proof of market power. Likewise, the rule of *Dr. Miles,*[18] holding resale price maintenance per se illegal, is clear and simple. Yet Chicago would overturn it in favor of a rule of reason.[19] Simplicity is not what drives Chicago, nor is complexity a hallmark of its critics (although it is the case that less law is simpler to enforce than more law).

In his essay, Judge Easterbrook sets forth a list which, he says, distinguishes Chicago School from its critics.[20] In my view, there is a different core of distinction. I think that the biggest differences between Chicago School and its critics are these:

(1) Chicago School would apply a worldview which, if held by the legislators, would have assured the defeat of *any* antitrust law (and almost all other statutory law). Its critics do not.

(2) Chicagoans believe that the most vital dynamic effects of business action are likely to flow from letting firms do what they choose. The critics believe that in many cases vital dynamic effects are likely to flow from preserving independence of significant, viable firms and clearing the path for the less-established firms' competition.

---

16. *See, e.g.,* Areeda, *Introduction to Antitrust Economics,* in ANTITRUST POLICY IN TRANSITION, *supra* note 9, at 45, 56; F.M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 407-38 (2d ed. 1980); *cf.* Dreyfuss, *Dethroning* Lear: *Licensee Estoppel and the Incentive to Innovate,* 72 VA. L. REV. 677, esp. 724-29 (1986); Hayes, *Too Much Dictating From the Top: Why Strategic Planning Goes Awry,* N.Y. Times, Apr. 20, 1986, at 2F, col. 3.

17. FTC v. Indiana Fedn. of Dentists, 106 S. Ct. 2009 (1986).

18. Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911), *applied in* Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984).

19. *See* Brief for the United States as Amicus Curiae in Support of Petitioner (May 1983) at 19-29, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (William F. Baxter, Jr., then Assistant Attorney General, on the brief); U.S. Department of Justice Vertical Restraints Guidelines §§ 1-4 (Jan. 23, 1985), *reprinted in* 48 ANTITRUST & TRADE REG. REP. (BNA) No. 1199, Supp. at 3-11 (Jan. 24, 1985).

Others associated with Chicago School would, however, apply a rule of per se legality or near per se legality to resale price-fixing. *See* Easterbrook, *Vertical Arrangements and the Rule of Reason,* 53 ANTITRUST L.J. 135 (1984); Posner, *Restricted Distribution, supra* note 14, at 22-26.

20. Easterbrook, *supra* note 2, at 1700-01.

(3) Chicago worries most about government power. Its critics worry equally about private power.

(4) Chicagoans believe that efficiency is justice. Their critics don't.

I stress point (3). Chicagoans are skeptical of the claim that busines power exists and endures, and they are skeptical of the view that government intervention can do good; their critics are skeptical of the view that business virtually always acts in society's interests. If various Chicagoans are not "true believers" in the efficacy of the free market, at least their anchor is: Keep the Government out. If various critics are not true distrusters of corporate bigness and high concentration, at least their anchor is: Be skeptical of very large size and very high concentration, and be vigilant to preserve opportunities for the nonestablished. Some critics rest their case on economics. Others rest on the spirit of Congress or their view of the good society.

The anchors are the touchstones. They are the key, in a world of indeterminate economics. No one knows which anchor will really produce the most efficient society. As Professor Hovenkamp shows, Chicagoans cannot prove that the Chicago anchor will bring us closer to efficiency even as that term is defined in Chicago's own Lex[i]con:[21] the maximum possible sum of consumer and producer welfare, or the maximum possible aggregate wealth of society.

It is useful to consult Chicago's Lexicon. In the version I find on my bookshelf, it reads as follows:

> *Good (economic)*: Also called "efficiency," "economic welfare," or "social welfare." Economic good is defined in terms of the aggregate wealth of society, because the bigger the pie the better off everyone is. In antitrust, good is defined in the negative. The only way in which firms can behave or perform in a way that will derogate from the good is to restrict output in the whole market — for only in this way will too few resources flow into the restricted market, misallocating resources and shrinking the size of the pie. (Of course [the Lexicon continues] firms cannot do this, because the free market is robust and if a firm tried to restrict output a new entrant or fringe expander would make more goods and spoil the game. Therefore it is fair to say that what is is good.)

The Lexicon also contains a second definition of "good." It reads:

> *Good (political)*: Also called "political freedom." Political good means freedom from government intervention. The less government, the more freedom. While some would argue that less government means more freedom only for the strong, and that more government is needed to help the weak and the unestablished and to provide an environment hospitable to their advancement, this is a false notion. There *are* no barriers to the advancement of the diligent and the meritorious, because those who provide what people want will be rewarded by the marketplace. There-

21. With apologies to Lexecon Inc.

fore there is no function for positive law, except to support the lazy and to glorify the mediocre. These — the lazy and the mediocre — are the real exploiters. *See* Ayn Rand, *Atlas Shrugged* (1957).

For those who share the Lexicon's definition of political freedom, *and* for those who are sure it is wrong, it *is* clear which anchor will produce the most good.