ANTITRUST AND REGULATION: CHICAGO'S CONTRADICTORY VIEWS

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> If you propose an antitrust law, the only people who should be opposed to it are those who hope to become monopolists, and that's a very small set of any society. So it's a sort of public-interest law in the same sense in which I think having private property, enforcement of contracts, and suppression of crime are public-interest phenomena.
>
> —George Stigler[1]

Introduction

For decades, theorists known collectively as the "Chicago school" have defined the intellectual agenda of antitrust. Inspired by the ideas of Aaron Director, the Chicago school approach has been advanced by scholars like Robert Bork, Yale Brozen, Harold Demsetz, Frank Easterbrook, Richard Posner (often joined by William Landes), and George Stigler. So powerful has been their collective influence on antitrust thinking that the phrase "the Chicago revolution in antitrust" has become a platitude in the antitrust literature.

Will this intellectual dominance—salutary in so many ways—continue? In seeking to answer that question, this article presents and develops two points about the Chicago school. First, although correct on many issues, Chicago has mistakenly concluded that it has won the antitrust war, and so has withdrawn its forces from the fray. Yet the withdrawal is premature: unopposed hostile forces remain on the battlefield.

Cato Journal, Vol. 10, No. 3 (Winter 1991). Copyright © Cato Institute. All rights reserved.

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[1]"*Reason* Interview: George Stigler" (1984, p. 46).

Chicago's views of antitrust face a second, and fundamentally more difficult, challenge. Much of the normative economic analysis on which Chicagoans relied in proclaiming victory is manifestly inconsistent with more fundamental positive notions of economics developed by Chicagoans themselves. In particular, Chicago's positive approach to antitrust, viewing it as public-interest government intervention intended to correct market failure, squarely contradicts the now-dominant economic theory of regulation that Chicago itself popularized. The Chicago school of antitrust regulation, that is, runs counter to the Chicago school of regulation more generally.

An underlying theme of this article is that the two basic phenomena under discussion have produced a more complicated intellectual agenda for antitrust in the 1990s. From 1960 until recently, the intellectual battle in antitrust was easy to characterize: it pitted Chicago revisionism against a coalition of anti-Chicagoans (often identified with Harvard) defending more traditional antitrust policies. But the future debate will be multifaceted. On one side, traditionalists will continue to challenge Chicago conclusions that certain practices (such as predatory pricing and vertical arrangements) are not worrisome. On the other side, public choice theorists working within the economic theory of regulation will increasingly challenge Chicago's public-interest view of antitrust. Outside Chicago, antitrust is increasingly seen as another form of regulation. If so, the debate must include recognition of the politics of antitrust—a subject Chicagoans have persistently downplayed or ignored.[2]

Declaring Victory and Going Home: The Withdrawal of the Chicago School

After a century of experience with antitrust, almost no one would disagree that it has developed in thoroughly undesirable ways. Two defects stand out.

First, much of antitrust jurisprudence is economic nonsense. Everyone has a favorite example. Some like the case where per se liability was imposed on a group of competitors for acts that resulted

[2]To avoid misunderstanding, it should be noted that those adopting a public choice approach generally agree with the Chicago welfare-economic analysis of particular business practices. Chicago's contributions in this area have been enormous. The disagreement arises as to the political economy of the antitrust statutes. In that respect, the Chicago approach has been less helpful, as explained herein. Of course, all Chicagoans may not subscribe to all facets of what is described here as the Chicago school of antitrust and of regulatory analysis. I believe, however, that the views presented here are typical of the authors discussed and of the Chicago perspective generally.

in "stabilizing prices downward";[3] others prefer the case where per se liability was imposed for maximum-price agreements because (according to the Court) such contracts are no different economically from minimum-price fixing.[4] After reviewing a number of Supreme Court opinions, one former head of the Antitrust Division (Kauper 1986) chose as his favorite aberration the *Von's Grocery* decision.[5] There, the government successfully blocked a merger between two grocery firms having a combined market share of 7.5 percent, in a market with 3,818 single-store and 150 chain-store competitors.[6] The rationale against the merger was stopping incipient concentration in the grocery market. As Kauper writes (pp. 2–3):

> Never has analysis been crisper, logic more refined. Confronted with a practical problem—the departure of mom and pop's from the Los Angeles grocery market—the Court quickly perceived that the solution was simply to close the exit. The reaction was similar to that of Attorney General Kleindienst when, on receipt of a bomb threat, he ordered all the Justice Department doors closed and everybody kept *in*.

The second, related, defect is that the courts' blessing of economic nonsense has given private plaintiffs much ammunition for meritless (but trebly lucrative) antitrust actions. Antitrust has thereby become a weapon wielded against competition, not for it. The facts and figures on the private antitrust explosion have been presented elsewhere (e.g., Hazlett 1986). The phenomenon has caused previous partisans of antitrust (e.g., Baumol and Ordover 1985) to question its overall role in a competitive order. Many big-name "liberals" like John Kenneth Galbraith, Robert Reich, and Lester Thurow have written that it may have no role.[7]

Into this system of jumbled jurisprudence and meritless private actions, beginning in the 1950s, stepped the Chicagoans. Their contributions have been numerous, valuable, and well discussed elsewhere. The subject of interest here is the Chicago perception of the purposes of the antitrust laws. The Sherman Act, they maintain, was intended to maximize consumer welfare (e.g., Bork 1966; 1978, pp. 56–66). The principal problems with antitrust, they believe, are due to courts' misunderstanding of how the competitive process

[3]U.S. v. Container Corp., 393 U.S. 333 (1969).

[4]Albrecht v. Herald Co., 390 U.S. 145 (1968).

[5]U.S. v. Von's Grocery Co., 384 U.S. 270 (1966).

[6]"In fairness, there was a concentration trend in *Von's*—the top four went from 24.4% to 28.8%. Try that in a Herfindahl!" (Kauper 1986, p. 3).

[7]This point is discussed by McChesney (1986, pp. 381–82) and by Hazlett (1986, pp. 278–79).

actually works in maximizing consumer welfare (Bork 1978; Demsetz 1982, 1989; Posner 1976). If courts departed from the rigid "perfect competition" model and recognized real-world problems like information and transaction costs, courts then would recognize that consumer welfare is increased by practices previously deemed undesirable under antitrust law (for example, vertical arrangements). And in fact, courts have moved closer and closer to Chicago positions on these issues.[8]

But the Chicago victories, evident on several fronts, have by no means been complete. Three pockets of resistance remain. First, Chicago's intellectual sorties have not been able to stem the tide of meritless private actions. Until relatively recently (Easterbrook 1984), private actions typically did not require separate analysis in Chicago. Judges who understood the consumer-welfare origins of the antitrust statutes and the true nature of competition would have all they needed to separate good from bad actions, private or public. It is apparent, however, that this just has not happened; Chicagoan suggestions for improvement in this domain (e.g., Easterbrook 1984) have been ignored.

Moreover, while commentators may agree that the reasoning of the old cases is frequently wrong, the courts have not been so quick to agree. Per se rules against agreements that limit, rather than raise, prices are still per se illegal.[9] So is the per se rule against resale price maintenance, against which Chicagoans have inveighed for a generation. Courts continue to impose liability for tying (Sims and Lande 1986, pp. 307–8), despite Chicago's repeated demonstrations that tying is economically benign, even beneficial. Other Supreme Court decisions consistent with the Chicago approach have relied on reasoning so fragile that their durability is questioned, even in Chicago (Wood Hutchinson 1984).

Finally, antitrust partisans (e.g., Hovenkamp 1985) have been indefatiguable in thinking up new, more sophisticated theories for antitrust liability. The current rage seems to be "raising rivals' costs," an old notion newly repackaged that is getting close attention from commentators (e.g., Krattenmaker and Salop 1986) and, perhaps, from

[8]Chicagoans have proclaimed intellectual victory on the basis of courts' change of position. The reasoning has struck some as *post hoc ergo propter hoc*. Some (Kaplow 1987) believe that the change in antitrust attitudes has been driven by politics, not economics, and thus would have happened with or without Chicago. That debate is not discussed directly here, although portions of the analysis in the third section of the paper may bear on it. See also Page (1989).

[9]Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982). For a discussion of this decision within the Chicago school paradigm, see Gerhart (1982).

the courts.[10] In addition, sophisticated models of strategic predatory pricing have replaced the older ones refuted by Chicago some time ago.

A historical perspective is helpful. The antitrust wheel of fortune has spun many times since 1890. As the wheel turns, periods of relaxed enforcement give way to renewed enforcement vigor, relying in part on new antitrust theories (Baker 1985, Sims and Lande 1986). This constant change in antitrust thinking is reflected in the waxing and waning of courts' respect for key antitrust precedents (Steuer 1985).

In other words, no one outside Hyde Park believes that with the Chicago victories of recent years the war has reached the end, or even the beginning of the end. With the war still raging, however, Chicago has declared victory and gone home. The newer theories of liability remain largely unaddressed. Large numbers (arguably a majority) of commentators and courts remain to be persuaded by the Chicago approach. Yet Landes (1985, p. 652) declares that the economics of antitrust have been "uncontroversial for many years." With his declaration that we are all Chicagoans now ("it is no longer worth talking about different schools of academic antitrust analysis"), Posner (1979, p. 925) has largely abandoned the field for remoter terrain like law and literature, theories of justice, and law and feminism.[11] But even at the time, Nelson (1979, p. 949) commented that the economics Chicago thought it had vanquished had already been supplanted by a "newer" price theory that "is more consistent with old Harvard than the new Chicago." Nelson's point is even truer today.

The belief that by the late 1970s it was time to declare victory is evident from the Chicago antitrust writings appearing subsequently. These fall into two camps. The first reemphasizes the correctness of the Chicago approach to antitrust as a set of consumer-welfare statutes, and expresses beliefs and hopes that in the many areas where courts have not come around to appreciating Chicago's wisdom they will do so soon. Its most prominent practitioner has been Robert

[10]While the Supreme Court has yet to consider a case with allegations of "raising rivals' costs," prior decisions have imposed liability on antitrust defendants for actions that in effect amounted to the same thing. See, for example, Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). As to whether the theory is actually different from more traditional notions of monopolization, see Brennan (1988). As to whether the practices even constitute monopoly, see Liebeler (1987) and Wiley (1986).

[11]Posner (1979, pp. 939–40) recognizes that the Chicago view of some practices does not dispose of opponents' claims that certain practices involving strategic behavior are anticompetitive. But as noted, there has been little attempt either to integrate those claims into the Chicago approach or, alternatively, to refute them.

Bork (1978), but he has had help. Brozen (1986 pp. 355–56), while admitting that "the antitrust laws have been used to frustrate efficiency and competition," cautions against despair; a "few halting steps" of improvement have been made, he says, and "one can only hope that there will be more to come." The same message can be said to describe Demsetz' work (1982, 1989): antitrust has proceeded from a flawed definition of competition, but if redirected to attack real (government-created) monopolies would be a useful policy.

A second camp has moved on to other areas altogether. With the important issues of substantive liability (as they perceive them) already disposed of, this second group of Chicagoans has been increasingly interested in using economics to "fine tune" antitrust procedures and damage calculations. For example, articles have appeared on optimal sanctions for antitrust violations (Landes 1985), contribution among antitrust violators (Easterbrook, Landes and Posner 1980), standing under the antitrust laws (Landes and Posner 1979), and economic definitions of market power (Landes and Posner 1981). In these sorts of articles, Chicagoans have joined other fine-tuners (e.g., Blair 1985) who maintain in effect that the antitrust laws are fundamentally useful but could be enforced more efficiently.

Thus, the Chicagoan attitude toward antitrust today appears to be guarded optimism, based on a blend of complementary beliefs that the basic issues of antitrust liability have been resolved, that courts are slowly but surely getting it right, and that in the meantime non-liability issues can usefully be refined by welfare economics. Nowhere is Chicago's basically positive attitude toward the supposed goal and the future (if not past) performance of antitrust better manifested than in Stigler's statement, "I like the Sherman Act."[12]

A House Divided against Itself: Chicago Views of Antitrust and Regulation

Antitrust is economic regulation. Its essence is the regulation of certain kinds of economic relationships: horizontal agreements to fix prices, agreements between competitors to combine (by merger or otherwise), and so forth.[13] Antitrust thus regulates the same things that other forms of regulation have traditionally covered. Congress established the Interstate Commerce Commission and the Civil Aeronautics Board specifically to regulate competitors' prices; the

[12]"*Reason* Interview" (1984, p. 46).

[13]Obviously, the antitrust laws cover much more than just those sorts of agreements. I mention those specifically, however, as they are generally thought to be the most problematic for competition. See Demsetz (1982, pp. 50–53).

Securities and Exchange Commission regulates various aspects of corporate combinations. Even the procedural aspects of antitrust and those of related forms of regulation are similar. The Hart-Scott-Rodino Act requires a waiting period to get antitrust clearance for proposed mergers from either the Antitrust Division or the Federal Trade Commission; the Williams Act, administered by the SEC, requires a waiting period before similar corporate transactions can be completed.

Given that antitrust is a form of regulation, one would think that Chicagoans would analyze it using the "economic theory of regulation." That theory was given its earliest formal statement in Stigler (1971) and further developed by other Chicagoans (Peltzman 1976, Becker 1983). Under the economic model, regulation is explained by the benefits it provides to well-organized interest groups and the politicians who represent them, rather than in terms of government officials acting altruistically to benefit the populace at large by solving market failure.

Development of the economic theory of regulation has included significant contributions by Posner (1975), quantifying the extent of the welfare losses due to politically driven regulation; and by Landes and Posner (1975), explaining the role of a constitutionally guaranteed independent judiciary in the economic theory of regulation. Posner's thesis that the common law is generally efficient while statutory law is not (1986, pp. 340, 491–507) is an offshoot of the economic theory of regulation. Intellectual recognition of the economic approach to regulation has entailed development of other ancillary theorems, as explained below.

The economic theory of regulation has resulted in an intellectual revolution among economists and lawyers. As a recent report on Chicago political economy (Tollison 1989, p. 295) stated, "the primary alternative to Stigler's theory of economic regulation was the Pigovian or public-interest theory of government, which was already under heavy assault from earlier contributions to public choice theory by Buchanan, Tullock, and others. Today, virtually no one thinks in such terms. The [Chicagoan] interest-group theory of government has accumulated widespread recognition."

That antitrust is in fact regulatory is of course recognized in Chicago. Posner (1970, p. 389) lists 109 "regulatory decreases" in DOJ antitrust cases up until 1969, almost all of them handed down since 1945.[14] Regulatory decrees are ones that establish ongoing

[14]See also Easterbrook (1984, p. 35, n. 72), who observes that "many antitrust suits are regulatory. . . . Approximately 53 antitrust decrees entered through 1979 are regulatory in character. This substantially exceeds the number of industries regulated by statute." See also Sullivan (1986).

governmental supervision of defendants. These decrees are "disturbing," because they are anticompetitive, "tantamount to a confession that antitrust action has not succeeded in restoring competitive conditions." Moreover, Posner says, "in view of persistent and serious questions that have been raised concerning the wisdom and efficacy of formal systems of regulation in the transportation, public utility, and other industries, the creation of new schemes of regulation on an ad hoc basis is a questionable expedient."

It is interesting in itself that Posner does not refer to all of antitrust as a form of regulation, since it clearly is. Nevertheless, his admission that "regulatory" decrees have made up "a significant fraction" of all civil antitrust decrees would suggest that Posner would begin to analyze antitrust using the economic theory of regulation. Yet his major work (1976) on antitrust contains no such analysis; nor is it developed anywhere else in his writings.[15] Instead, Posner joins Bork in claiming that the Sherman Act is a government attempt to improve efficiency. "Since efficiency is an important, although not the only, social value, this conclusion establishes a prima facie case for having an antitrust policy" (Posner 1976, p. 4). Easterbrook (1984, p. 1) says simply, "The goal of antitrust is to perfect the operation of competitive markets."[16]

Nowhere is the Chicago distinction between antitrust and regulation more evident than in Bork's discussion of "predation through governmental processes" (1978, pp. 347–64). Recognizing that other forms of regulation are used routinely to restrict rather than enhance competition, Bork (p. 364) touts antitrust as a way to attack such behavior: "Predation through the misuse of governmental processes appears to be a common but little-noticed phenomenon. . . . In this area, antitrust cannot only perform a valuable service to consumers but, as a by-product, can also contribute to the integrity and efficiency of administrative processes." Demsetz (1989, p. 27) likewise expresses hope that "our antitrust laws can be marshaled to attack

[15]In the successive editions of *Economic Analysis of Law*, for example, Posner has never included antitrust in his discussion of regulation. See, for example, Posner's summary of antitrust (1986, pp. 265–97). It is interesting also that in discussing Aaron Director's influence on the development of Chicago antitrust, Posner (1979, p. 928) states that Director's work was not motivated by "antipathy to government in the economy," but simply by a desire to correct erroneous welfare-economics views concerning firms' behavior.

[16]Easterbrook's stance on antitrust is all the more curious, given his oft-stated belief that in takeovers target-firm management should be legally prohibited from resisting a hostile bidder. See, for example, Easterbrook and Fischel (1981). One of the ways that management has found useful for repelling unwanted bidders has in fact been the filing of an antitrust action. See Jarrell (1985).

government sponsored protectionism."[17] Antitrust is not to be analyzed as harmful economic regulation; indeed, it should be viewed as the antidote for such regulation.

It should be noted also that Posner's belief that the Sherman Act was basically intended to increase consumer welfare is apparently inconsistent with his view that typically the common law is efficient while statutory law is not. There was, of course, a common law of trade restraints, which the Sherman Act supplanted. Chicagoans have resolved the inconsistency by claiming that the Sherman Act merely codified the common law (Bork, 1978, p. 20), even though the Supreme Court's earliest antitrust decision specifically held that "the common law cases on restraint of trade would not be precedents in Sherman Act cases" (Grady 1990, p. 6). Likewise, Demsetz says, subsequent antitrust enforcement just reflects what would have happened under the common law.[18]

Such a public-interest (Pigovian) presumption in favor of antitrust regulation is the exact opposite of the economic theory of regulation. In effect, the Chicago view of the Sherman Act maintains that antitrust is the exception to the regulatory rule—it is part of the solution, not the problem. Given the unique position that antitrust occupies in Chicago, it is useful to explore the reasons advanced for its favored status.

Legislative History

Bork (1978, p. 63) claims that the legislative history of the Sherman Act supports a public-interest interpretation, displaying "the clear and exclusive policy intention of promoting consumer welfare." Such a justification has three problems, each seemingly fatal in itself.[19]

[17]A related public-interest argument made for antitrust is that, properly implemented at the federal level, it can be used to override state-sponsored anticompetitive arrangements. See Wiley (1986); for objections, see Spitzer (1987) and Page (1987); for a reply to the objections, see Wiley (1988).

[18]According to Demsetz (1989, p. 26), "If the Sherman Act had not been adopted, common law procedures would have guided our policy toward competition. Would this have yielded a very different policy? Because the standard of reasonableness has played such a large role in court proceedings over the first century of the Sherman Act, the modus operandi of our antitrust policy has not differed as much as might be supposed from that which would have been used by the common law." Demsetz notes two differences between the statutory antitrust and the common law, public enforcement and the illegality of certain mergers, but believes neither of these changes has been very significant.

[19]A point not considered here is the objection that it is economically meaningless to ascribe "intent" to a legislative body monolithically. Its members may vote the same way, but ordinarily do so for very different reasons. For a response to this objection, see Bork (1978, pp. 56–57).

First, almost all other inquiries into the passage of the antitrust statutes have disagreed with Bork's reading of the legislative history (e.g., Lande 1982; Hazlett, forthcoming). The supposed monopoly and cartel problems that "necessitated" the Sherman Act were apparently nonexistent (DiLorenzo 1985). There is considerable evidence that interest-group pressures explain much of the Sherman Act (Benson et al. 1987; Hazlett, forthcoming; Libecap 1990). In its first Sherman Act opinion, the Supreme Court found that "it would be impossible to say what were the views" of the politicians voting as to the meaning of the act. As one commentator put it recently, Bork's interpretation of the legislative intent underlying the Sherman Act "is unique to Judge Bork" (Flynn 1988, p. 264).[20]

Second, the public-interest approach is internally inconsistent. It treats private individuals as maximizing their own welfare in attempting to cartelize or monopolize, but it treats government legislators and bureaucrats as disinterested public servants. As Shughart and Tollison (1985, p. 39) note, "In one setting individuals are assumed to be selfish; in another they are selfless. The analyst cannot have it both ways. A decision about how individuals behave in general must be made." A consistent approach to antitrust must begin by asking what politicians and bureaucrats maximize and how antitrust furthers their goals. (This point is discussed further below.)

Perhaps most important, Bork's reliance on legislative history runs afoul of a major corollary of the economic theory of regulation. If legislation is presumptively driven by interest-group politics, it is costly for politicians to tell voters, consumers, and other victims of regulation the true motivation behind regulation. Political motivation cannot be inferred from statutory preambles, committee reports, or "speeches" never made but printed in the *Congressional Record.* Motivation is only to be inferred from the way regulation works, not what politicians say about it. As Stigler (1975a, p. 140) put it, "The announced goals of a policy are sometimes unrelated or perversely related to its actual effects, and the *truly intended effects should be deduced from the actual effects.*" In the case of antitrust specifically, the fundamental statutes (the Sherman Act, the Clayton Act, the Federal Trade Commission Act) have been in existence for 100 years, with almost no important changes. Since Congress can always change the law if it wants, it must "intend" (accepting *arguendo* Bork's

[20]According to Flynn (1988, p. 267), "Everyone who has made a considered study of the legislative history of the major antitrust laws flatly rejects Judge Bork's assertion that 'consumer welfare' was the only goal Congress had in mind."

notion of institutional intent) the results that antitrust has produced for a century: bad jurisprudence and anticompetitive suits.

Lack of Economic Guidance

Chicagoans have also justified their public-interest view of antitrust by mistake theories. Allegedly, politicians and judges have wanted to do the right thing economically, but economists have failed to provide the requisite guidance (e.g., Demsetz 1982, 1989). If economists were better able to define what competition truly was, and had done so, then politicians would have responded with an antitrust law that mirrored economics. According to Bork (1978, pp. 63–64): "It is not at all clear that the congressmen who voted for the [Robinson-Patman Act] knew that they were sacrificing consumers for the benefit of small merchants. Indeed, there is evidence ... that many congressmen thought the law would serve consumers.... Today we know better." Similarly, Demsetz (1989, p. 20) ascribes the "instability of antitrust enforcement" to a "lack of clarity as to what a crime is and as to what constitutes evidence of its perpetration." The fact that economists failed to enlighten legislators, bureaucrats, and judges (and so left the way open for the bad antitrust observed today) hardly means that antitrust was not a public-interest regulatory scheme when it was inaugurated in 1890, Chicago maintains. With greater economic understanding will come better jurisprudence, better enforcement, and fewer meritless suits. Once provided adequate economic guidance, the Chicago argument concludes, the law will conform to economics.[21]

These claims cannot be squared with the economic theory of regulation. Politicians, bureaucrats, and judges have no incentive to adopt efficient laws, and thus should not be presumed to do so. Unless it can be shown how government officials gain by seeking and using better economic information, one should not presume that they will do so. Chicago has not shown how any such incentives operate in the world of antitrust.

Moreover, the contention that the law has tried, but failed, runs afoul of another important corollary of Chicagoans' economic theory of regulation. Confronted with evidence (such as bad law and meritless suits) that regulation has not worked, public-interest partisans frequently fall back on "mistake" theories to explain why the public interest has not been served. Mistake theories fail on two counts.

[21]The view that antitrust is fundamentally benevolent but flawed by economists' inability to provide the requisite guidance is well established outside Chicago. See, for example, Asch (1970, pp. 401–2).

They cannot explain why Congress has failed to correct a century of errors, as noted above. More important, a mistake theory is an intellectual *deus ex machina;* it is offered, not to explain, but to obscure an inability to explain. As Stigler (1982, p. 10) says, a mistake theory for real-world regulation that deviates from promised public-interest objectives is "profoundly anti-intellectual."[22] Elsewhere (1975a, p. 140) he writes:

> Policies may of course be adopted in error, and error is an inherent trait of the behavior of men. But errors are not what men live by or on. If an economic policy has been adopted by many communities, or if it is persistently pursued by a society over a long span of time, it is fruitful to assume that the real effects were known and desired. Indeed, an explanation of a policy in terms of error or confusion is no explanation at all—anything and everything is compatible with that "explanation."

Chicago's dismissal of antitrust's dismal century as prolonged—but ameliorable—error is thus unconvincing and unacceptable.

Lack of Evidence on Effects of Antitrust

A third reason frequently offered why antitrust should be viewed as beneficial is the lack of evidence to the contrary. While many evils have admittedly arisen from antitrust, they must be offset against the good: whatever mischief antitrust has caused must be balanced against the economically undesirable things it has deterred. In the end, this third claim goes, we simply do not know whether antitrust has caused more harm than good, or vice versa. Stigler's (1966) initial study of the effects of antitrust set the tone, presenting bits of evidence very diffidently and concluding that the results were "meager" and so not much could be said one way or the other about antitrust's effects. Until more conclusive evidence is available, it is said, antitrust cannot be proven to operate like other forms of regulation.

This approach is remarkable for three reasons. First, the presumption that antitrust is a good thing runs directly contrary to the typical Chicago approach that long-term problems of cartels and monopoly are unlikely theoretically and minimal empirically (Harberger 1954). As Reder (1982, p. 17) notes, "Chicago concedes that monopoly is possible but contends that its presence is much more often alleged

[22]In Stigler's view (1982, p. 10):

> Whether one accepts or rejects the high hopes that some of us now entertain for the economic theory of politics, the assumption that public policy has often been inefficient because it was based upon mistaken views has little to commend it. . . . [A] theory that says that a large set of persistent policies are mistaken is profoundly anti-intellectual unless it is joined to a theory of mistakes.

than confirmed, and receives reports of its appearance with considerable scepticism. . . . Normatively, Chicago economics says monopoly is bad; positively, it says it is of infrequent occurrence and limited impact." If so, antitrust can have few benefits. Yet Stigler (1968, p. 297) states confidently that "the history of the American economy in the twentieth century testifies that a modest program of combating monopoly is enough to prevent any considerable decline in competition." This "fundamental empirical truth" is propounded without a shred of substantiation.

Second, the Chicago approach to empirical evidence presumes that antitrust regulation is benign and puts the burden on others to show that antitrust is economically malignant. Antitrust is innocent until proven guilty. If no one comes forward with sufficient evidence, antitrust goes free. That approach is contrary to the presumption ordinarily applied to regulation under the economic model. Consider Reder's (1982, p. 31) summary of the Chicago position:

> The state is considered an agent, and one that is exceedingly difficult to monitor or to control. Therefore the state is to be shunned as an inefficient instrument for achieving any given objective—it is better sought privately—and objectives that cannot be achieved except through the state are to be scrutinized carefully and sceptically. Either the political process will frustrate the achievement of the goals altogether, or will drastically alter them in the process of achievement and, in any case, waste resources.
>
> The argument of the prceding paragraph is sufficient basis for a generally adverse view of government intervention. Any reformer must either refute it, or minimize its importance.

Obviously, this characterization of the Chicago approach to regulation generally does not apply to antitrust specifically.

The final curiosity in the Chicago position toward empirics is the fact that there is ample statistical evidence that antitrust has *not* had any appreciable benefits. Repeated empirical investigations of the criteria on which antitrust enforcement has depended find no evidence that consumer welfare drives enforcement. For example, Long et al. (1973, p. 361) find that welfare loss has "played a minor role in explaining antitrust activity." Siegfried concludes (1975, p. 573) that "economic variables have little influence on the Antitrust Division."

Empirical studies of certain kinds of enforcement likewise report unanimously an absence of welfare benefits. This is notably true in the two areas where Chicagoans maintain antitrust has its most beneficial role to play: price-fixing and horizontal mergers. The available evidence (Marvel et al. 1987, Asch and Seneca 1976) indicates that government antitrust actions target either firms that were not

attempting to fix prices, or were doing so unsuccessfully. Likewise, actions to block horizontal mergers have concentrated on mergers that were not anti-competitive, or were even pro-competitive (Eckbo and Wier 1985). Moreover, studies of antitrust remedies (Hay and Kelley 1974, Elzinga 1969, Rogowsky 1987) note that they systematically fail to achieve their supposed welfare goals.

Admittedly, each of these pieces of empirical work only disproves the existence of certain kinds of benefits; the empirics cannot refute the claim—often offered—that antitrust's benefits lie elsewhere. So, for example, it is frequently claimed that even if enforcement is ineffective or targets firms that actually were not violating the law, the mere presence of antitrust scrutiny will force others in the industry to abandon any anticompetitive notions they might harbor.[23] If so, the benefits of antitrust would only be found by investigations of the entire industry, or even the national economy. Until very recently, such broader inquiries had not been undertaken.

Two recent papers, however, fill this gap. Miller et al. (1990) examine the effects of antitrust enforcement by the DOJ and FTC from 1955 to 1988. For each industry where enforcement actions were brought, the effects of enforcement were measured in terms of output, capital formation, and investment in research and development. Antitrust negatively affected each of them, ceteris paribus. An additional antitrust case reduced output by about 0.5 percent the next year, and the effect continued for a second year; it reduced capital spending by 1.45 percent, and research and development spending by 3 percent in the first year and by 0.78 percent in the next year.

Bittlingmayer (1990) presents complementary evidence from an earlier period, 1890–1914. Measured by different performance aggregates, the effects of antitrust enforcement during that time were consistently negative, holding other factors constant. Antitrust cases brought during the relevant period lowered real income, real output, stock prices, and other measures. The strongest negative impact was that produced by cartel cases, an area of enforcement that is thought particularly useful under the public-interest view of antitrust. As Bittlingmayer notes (p. 27), "the actual—as opposed to the black-

[23]As two non-Chicagoans (Asch and Seneca 1989, p. 261) have recently stated, "The problem is, of course, that neither the precedent nor deterrent effects of antitrust cases can be measured precisely. Among policymakers it is an article of faith that such effects are significant, and they well may be. It is quite possible that deterrence alone produces greater social benefits than any other antitrust result, but there is no reliable way to determine whether this is so. Lacking such knowledge, any assertion about the quantitative economic impact of policies contains an inevitable element of uncertainty." The papers by Bittlingmayer (1990) and Miller et al. (1990) discussed below go a long way toward removing that uncertainty.

board—effects of antitrust" run demonstrably counter to the public-interest view of antitrust.

In short, the developing statistical evidence on the effects of antitrust is considerably stronger than before. Antitrust is clearly costly—in enforcement budgets, wrongly decided cases, and private strike suits. The earliest work tended simply to show that, in the areas investigated, antitrust had not delivered any benefits. But the many studies failing to find any antitrust benefits did not make an appreciable impact on Chicagoans, who have continued to talk—hypothetically—about antitrust's supposed ability to deter price fixing and anticompetitive mergers. That such benefits truly exist now seems very unlikely. The available evidence indicates that antitrust *reduces* output and wealth.

Antitrust's Inability to Benefit Particular Industries

A fourth reason offered by Chicagoans for their basically benevolent views of antitrust is their perception that antitrust cannot systematically benefit producers in any given industry. The focus on industry-wide producer benefits stems from the earliest (Stigler 1971) Chicago formulation of the economic theory of regulation, which models regulation as benefitting producers in a particular industry at the expense of consumers. As Stigler summarized his original model (1971, p. 3): "regulation is acquired by the industry and is designed and operated primarily for its benefit."

For Chicagoans, antitrust has never seemed to offer producers in most industries particular advantages, because its effects apparently are the same for all industries. Hence, it has not been seen as special-interest regulation: "The captive theory of regulation is not easily extended to antitrust since antitrust authorities do not supervise a single industry, firm or small group of these, as do most other regulatory agencies. These authorities, therefore, are not very susceptible to being manipulated by an identifiable constituency over which their power extends" (Demsetz 1989, p. 19). At times, Chicago school analysis has mentioned political influences on antitrust,[24] but Chicagoans' attempts to locate those influences empirically have failed.[25]

[24]Posner (1969, p. 54) refers briefly to the "politicization of antitrust policy" in the FTC as part of the agency's "dependence on Congress" (p. 82), but does not investigate further.

[25]Posner (1970, pp. 411–13) suggested that levels of antitrust activity might depend on which political party was in power, but found no evidence to support that hypothesis. See also Stigler (1985), who examines evidence that agrarian and small-business interests were responsible for the Sherman Act, but rejects that hypothesis empirically.

Thus, given the burden of proof invoked in favor of antitrust, it continues to be characterized in public-interest terms.

There are several objections to the conclusion that a regulatory regime that cuts across industries is not likely subject to special-interest politics. First, politicians themselves clearly care for antitrust, as enforcement officials invariably learn (Baker 1985). Congressmen regularly exhort DOJ and FTC enforcers to bring ever more cases; the National Association of Attorneys General (NAAG) agitates for greater enforcement as well. Congress staunchly resisted Reagan-era initiatives to reduce enforcement, at both the FTC and DOJ. Jim Miller's attempts to close FTC regional offices and to reduce his budget were successfully rebuffed on the Hill. DOJ's attempts to change the per se rule against resale price maintenance were scuttled, its horizontal merger guidelines opposed, and its vertical guidelines condemned (both by Congress and by NAAG). The FTC's ill-fated *Exxon* case to break up the eight largest oil companies was instigated in response to blatant Congressional pressure.[26] As rational maximizers of their own welfare, politicians must find something valuable about antitrust, because they spend considerable resources to obtain more of it.[27]

Moreover, one observes that, outside antitrust, regulation cutting across industries is nonetheless driven by special-interest politics. FTC regulation of advertising has been shown to benefit some industry subgroups at others' expense (Higgins and McChesney 1986). There are well-organized pressure groups with demonstrated political power, such as unionized labor, whose affiliations span different industry groups. Finally, regulatory agencies whose responsibilities cover multiple industries have nevertheless been shown to respond systematically to political pressure. The Federal Trade Commission is an oft-studied example (Mackay et al. 1987, Weingast and Moran 1983).

Thus, the fact that antitrust is not industry-specific, and that it is administered by agencies with general jurisdiction that may not be captured by particular industries, is largely irrelevant. Neither aspect of antitrust necessarily alters the fundamental insights of the economic theory of regulation. It remains only to specify how antitrust

[26]Exxon Corp., 98 F.T.C. 453 (1981) (dismissing complaint). For a discussion, see McChesney (1986, pp. 372–73).

[27]Demsetz notes (1989, pp. 23–24) that politicians expend resources to influence patterns of enforcement. But he apparently does not view antitrust as just another form of regulatory redistribution, because he does not believe that antitrust enforcers can be "captured" and because he sees the real problem as a lack of understanding of what competition really is. Both these points are discussed above.

can be used politically to benefit some groups at others' expense. Admittedly, the types of regulation imposed by antitrust are varied, meaning that each variant must be approached individually: the winners from blocked mergers and from prohibitions on resale price maintenance are most likely different groups. But this does not mean that one cannot identify the likely beneficiaries and victims, and test for antitrust's effects.

Horizontal mergers, to take one of the principal areas where Chicagoans would admit a role for antitrust, are an example. Mergers are a phenomenon that cuts across different industries; at first glance, therefore, regulation of mergers might not seem to have the potential for rewarding politically powerful groups at the expense of politically weak ones. But one must recognize antitrust's essential similarity to the regulation of securities markets.[28] It is now well understood that well-organized groups, such as workers, will often oppose mergers, takeovers, and other changes in corporate control. While not always organized before the fact, managements of particular firms have shown that they can effectively organize *ad hoc* for political purposes, such as lobbying for passage of state and federal statutes to block takeovers that threaten their jobs. Management and labor thus join often in pressing politically to stop takeovers.

Antitrust is a valuable political weapon in stopping mergers that are economically desirable but politically repugnant. Coate et al. (1990) show empirically that, other things equal, Congressional pressure does in fact affect FTC merger enforcement. Pressure is reflected particularly in the various antitrust oversight and budget hearings at which FTC commissioners and senior political appointees for antitrust are called to testify. As that pressure intensifies, the likelihood increases that the FTC will move to block more mergers.

The trans-industry political benefits of antitrust have been identified in other contexts. While a politician's constituents may want antitrust used to stop mergers, the same groups will oppose other sorts of antitrust enforcement. Government actions opposing practices like price discrimination and vertical restraints merely reduce firm wealth. But these enforcement actions are useful to politicians, because they control the agencies that file the cases. The filing of an enforcement action causes the demand to rise for the services of

[28]This similarity appears to have been recognized first by Henry Manne (1965). His seminal piece identifying "the market for corporate control," a fundamental notion in today's financial economics and securities regulation, explained why antitrust treatment of control transactions did not reflect the true economic reasons for changes in control.

politicians, who can wield their control over the agency to pressure bureaucrats to drop the action. As Faith, Leavens, and Tollison (1982) note, therefore, antitrust enforcement would predictably be biased geographically to favor firms operating in the jurisdictions of politicians with budgetary or oversight responsibility for antitrust. Empirically, they find that FTC cases brought against firms located in important committee members' districts are more likely to be dismissed than matters involving firms located elsewhere. The increased demands for such constituent service make antitrust valuable to politicians.

In short, the empirical evidence indicates that politicians, particularly those on committees with oversight or budgetary power over antitrust enforcement, find antitrust useful. It allows politicians to block mergers adversely affecting key interest groups in legislators' home districts; particular enforcement actions also increase the demand for politicians' services to intervene with enforcement authorities. This private-interest approach to antitrust, based on the ways that antitrust benefits legislators personally, can explain antitrust far better than public-interest models can. The special-interest model has been validated empirically, while attempts to validate the public-interest approach (Long et al. 1973, Siegfried 1975, Asch 1975) have all failed. The special-interest approach is also more consistent with the dictates of treating all actors—private and governmental—as maximizers of their own welfare.

Conclusion

The persistence of the public-interest view of antitrust is not limited to Chicago.[29] But its persistence at Chicago is remarkable, given the special-interest approach taken toward regulation more generally. The two approaches are seemingly irreconcilable. The current intellectual situation thus is not a stable equilibrium. Either the Chicago view of antitrust or the Chicago approach to regulation is wrong; both cannot be right. Strictly as a matter of internal consistency, therefore, one view or the other must yield.

In view of the empirical evidence, as well as the larger body of theory and evidence validating the economic theory of regulation, one would like to think that it is the Chicago school of antitrust that will defer to the Chicago school of regulation. That is a normative

[29]In discussing what Eastern Europe will need as it shifts to a market economy, the *Wall Street Journal*, on December 1, 1989, included antitrust: "Monopolies, state or private, must be broken up to allow price competition to do its vital work" ("Death and Life in Germany" 1989, p. A14).

proposition, however. As a positive matter, *will* Chicagoans begin to alter their antitrust views? Lacking a model of intellectual conversion, one cannot answer the question rigorously. But one suspects that a conversion will not come quickly, for several reasons.

First, the public choice approach may seem irrelevant to Chicagoans. Those who have declared victory and gone home may simply ignore the mounting challenges to Chicago orthodoxy. For others, there may be no perceived inconsistency. The more recent Chicago analysis using economics to discuss issues like antitrust standing and damages may seem unrelated to the public choice problems presented by the wider Chicago approach to regulation. True, current discussions of standing and damages presume that antitrust is welfare-maximizing. But even if antitrust is not in the public interest (as the evidence indicates it is not), that just means that standing and damages should be considered in a second-best model. Such models are notoriously inconclusive; while not demonstrably correct in a second-best world, the existing analyses of various procedural facets of antitrust are not demonstrably wrong.

Moreover, a paradigm switch would require going outside Hyde Park. From the frequent citations made here, readers will appreciate the number of those who have disagreed with the Chicago approach. Yet for the most part, Chicagoans have simply ignored the criticisms and carried on in their public-interest analysis. Demsetz (1989, p. 26), for example, notes that antitrust enforcers "are never fully insulated from politics," but states as well that this fact is "of small significance." None of the empirical work showing that politics *is* a significant factor is cited or discussed.

This characteristic has drawn comment. Nelson (1979, p. 950) suggests that Posner "has been talking mainly to his friends" in claiming that the Chicago approach is now accepted by all. Mitchell (1989, pp. 290–91) comments as well on Chicagoans' treatment of those working outside the Chicago paradigm as "irrelevant." So, for example, Stigler states (1982, p. 52) that "it would be embarrassing" today to encounter the argument among economists that predatory pricing is used to achieve monopoly. He can only be speaking of economists in Chicago; elsewhere (including in the courts), economists discuss it frequently with no apparent discomfort (e.g., Salop 1981).

In sum, there is little reason at this point to expect a conversion from public interest to public choice in the Chicago approach to antitrust.

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