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VIEWPOINT:

THOUGHTS ON THE CHICAGO LEGACY IN U.S. ANTITRUST

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Thoughts on the Chicago Legacy in U.S. Antitrust

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In preparation for writing this paper, I re-read Robert Bork's *The Antitrust Paradox*,¹ and I thoroughly enjoyed doing so. Not because I agree with everything in it, though there is much with which to agree. And not only because I enjoy Judge Bork's writing, though it is always a pleasure to see a sledgehammer used with such precision. The main reason I enjoyed going through *The Antitrust Paradox* again was nostalgia: I was reminded how much fun it was to teach antitrust policy to economics students in the 1970s. Then-recent decisions and ongoing policy debates provided enough sharp disagreements and economic howlers that it was easy to keep students interested and amused – and even, on good days, outraged. A clearly negative aspect of the conservative economic or, as I prefer, Chicago School, legacy in U.S. antitrust policy is that most of this fun has been taken away.²

Nonetheless, I think it is now widely – though surely not universally – accepted that the Chicago legacy in antitrust has on balance been strongly positive. In this essay I will take a look back at some decisions and issues that were in the antitrust mainstream around 1970 through the lens of *The Antitrust Paradox*, with occasional use of Richard

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¹ Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, (New York: Basic Books, 1978). As its Preface makes clear, most of the work on this book was done in the late 1960s and early 1970s.

² Despite the usage of “conservative” in recent US political discourse, it seems to me an inappropriate label for those seeking fundamental change, and the Chicago School did seek fundamental change in antitrust policy. Moreover, because of recent U.S. political discourse, “Chicago” carries much less emotional baggage than “conservative.” On the Chicago School generally, see Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago: 1932-70*, 26 J.L. & ECON. 163 (1983).

Posner's roughly contemporaneous *Antitrust Law*.³ My goal is to review some of the aspects of U.S. antitrust policy that outraged Chicago School lawyers and economists in the 1970s and some of Chicago's subsequent victories that are now generally accepted as positive changes. I will also argue that some of Chicago's lost battles also constitute positive aspects of its legacy.

This essay is rather more of a hymn of praise than I would have written if I had attempted a finely balanced treatment, but my assignment was to praise Chicago, not to attempt to bury it. Moreover, I have no doubt that other contributors to this conference will tell the other side of this interesting story well. To keep this essay reasonably brief, I focus on four broad issues: the objectives of antitrust, policy toward "no-fault" concentration, the treatment of productive efficiency, and the evaluation of non-standard business conduct.

ECONOMIC WELFARE

Can anyone who has ever studied antitrust forget Chief Justice Warren's dictum on legislative intent in the 1962 *Brown Shoe* decision?

But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.⁴

Lawyers and economists of the Chicago School strongly attacked this formulation of the law's objectives, making two main arguments.⁵ First, they questioned the Chief

³ Richard A. Posner, *Antitrust Law* (Chicago: University of Chicago Press, 1976).

⁴ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

⁵ See, e.g., Bork, *supra* note 1, chs. 2 and 3 and Posner, *supra* note 3, ch. 2.

Justice's assertion of legislative intent. It is, they argued, impossible to find Congressional statements recognizing the existence of tradeoffs between the welfare of small business and that of consumers, let alone instructions that such tradeoffs should be always resolved in favor of small business.

Second, and to me more important, Chicago argued that antitrust could not aspire to the consistency or predictability required of a policy that necessarily functioned primarily by deterrence rather than regulation if it were tasked to pursue two diametrically opposed objectives, with no useful guidance as to which was to be more important under what conditions. For instance, it is hard to believe that Congress intended to bar all mergers involving small businesses, since that would discourage small business formation by making it harder for entrepreneurs to capture the value they create. (It must be admitted, though, that the 1966 *Von's Grocery* decision is consistent with exactly that intention.)⁶ On the other hand, if encouraging small business is a critical goal of antitrust, perhaps mergers between large firms seeking to obtain market power should be actively encouraged, since the predictable result of such mergers is an increase in price and an easing of competitive pressure faced by smaller rivals.

As of 2007, Chicago has decisively carried the day as regards the objective of antitrust. As Ken Heyer has recently put it,

Over the past several decades, there has emerged a rough consensus among professional antitrust practitioners ... that the "competition" referred to in our antitrust statutes is not to be interpreted simply as pre-merger rivalry among entities. Rather it is best viewed as a process, the

⁶ *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

outcome of which is welfare, with welfare—not rivalry—being the object of interest.⁷

There remains a persistent ambiguity as to whether “welfare” refers to the welfare of consumers only or to total welfare: that of consumers plus producers.⁸ Classic Chicago texts typically ignore this distinction. While the enforcement agencies seem to have chosen consumer welfare,⁹ I believe there is a good theoretical case for using total welfare instead. On the other hand, while theory shows that the choice can be very important in some situations, my sense is that it is rarely critical in practice.

This victory may be the most important component of the Chicago legacy. This is of course not because economic welfare is the only worthy policy objective, though Chicago School writers sometimes seem to believe this. In any case, there are plenty of other instruments that can be used at least as efficiently to promote small business, ameliorate income inequality, or pursue other goals that have sometimes been associated with antitrust. Antitrust is particularly well suited to pursue the broad objective of economic efficiency.

Having only a single objective at least *permits* the consistency and predictability needed to make a deterrence-based policy effective. (Of course, as the current state of U.S. antitrust policy plainly illustrates, it does not compel either.) Moreover, having consumer or total economic welfare as the single objective of antitrust policy gives economic analysis (or, in Chicago language, price theory) a significant role in policy debates and the analysis of most particular cases. Before Chicago, economic input into

⁷ Ken Heyer, *Welfare Standards and Merger Analysis: Why Not the Best?* 2 COMP. POL. INTL. 29 (2006).

⁸ Compare Ken Heyer, *Id.*, and Joseph Farrell and Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 COMP. POL. INTL. 3 (2006).

⁹ See Richard Schmalensee, *Sunk Costs and Antitrust Barriers to Entry*, 94 AMER. ECON. REV. PAP. & PROC. 471 (2004).

antitrust was based heavily on empirical work, particularly industry case studies, in the Chamberlin-Mason-Bain Harvard tradition.¹⁰ As efficiency emerged as an objective, price theory emerged as a more appropriate tool. This, I believe, does more for consistency and predictability than would exclusive reliance on statutory language and interpretation of precedent, even if tempered by generalizations from case studies. Economic theory, informed by relevant evidence, can be used to make informed judgments about the likely effects of particular policies and decisions. And in the broad areas in which precedent does not rule out analysis, competition between economic models necessarily turns on alternative views of the broad public interest, drawing policy away from the service of special interests of various sorts.

I think the thoroughness of the Chicago victory on this fundamental point is at least one important reason why the 1967 *Utah Pie* decision,¹¹ which was great fun to teach in its day, now seems to have been handed down on another planet. As some may still recall, Utah Pie, a regional producer of frozen fruit pies, cut prices, and its national rivals responded. During the relevant period Utah Pie was the market leader, grew, and was profitable, and the market as a whole expanded. Nonetheless, Utah Pie's rivals were found to have injured competition (and thereby violated the Robinson-Patman Act) by responding to its price cuts because at some times they charged lower prices in Utah than in other regional markets. Most observers would now agree with Bork that “[d]efendants were convicted not of injuring competition but, quite simply, of competing.”¹² While the

¹⁰ See Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

¹¹ *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

¹² Bork, *supra* note 1, at 387

Robinson-Patman Act remains on the books,¹³ *Utah Pie* has become something of a curious antique.

DECONCENTRATION

In 1959, Carl Kaysen and Donald Turner published an influential book on antitrust policy that proposed “no-fault” deconcentration legislation.¹⁴ The basic idea was that some industries were more concentrated than productive efficiency required and that leading firms in such industries should be broken up to reduce concentration and thereby enhance competition. A similar proposal was made in 1968 by the White House Task Force on Antitrust Policy, chaired by then Dean of the University of Chicago Law School, Phil C. Neal.¹⁵ This proposal was endorsed by 11 of the 13 members of the task force, including the three economist members, who hailed from MIT, Vanderbilt, and the State University of New York at Buffalo. Judge Bork was one of the two lonely dissenters. In 1972 and 1973, Senator Philip A. Hart introduced legislation that would have set in motion a broad, economy-wide program of no-fault deconcentration. These bills received serious attention and debate.¹⁶

All these proposals were made by well respected individuals, and they were taken quite seriously at the time. The White House Task Force could cite no less a Chicago pillar than George Stigler in support of its analysis.¹⁷ Nonetheless, I think it is fair to say that before the Reagan administration took office the antitrust mainstream had shifted so

¹³ Though the Antitrust Modernization Commission has recently called for its repeal. See Antitrust Modernization Commission, *Report and Recommendations*, Washington, DC: April 2007.

¹⁴ Carl Kaysen and Donald F. Turner, *Antitrust Policy* (Cambridge: Harvard University Press, 1959), at 265-272.

¹⁵ “Report, Comments, and Separate Statements,” reprinted in 2 ANTITRUST L. & ECON. REV. 11 (Winter 1968-69). Dean Neal’s affiliation makes it clear that “Chicago” is an imperfect label.

¹⁶ S. 3832, 92nd Congress, 2nd Session (1972) and S. 1167, 93rd Congress, 1st Session (1973).

¹⁷ George J. Stigler, *A Theory of Oligopoly*, 72 J. POLIT. ECON. 44 (1964).

as to leave no-fault deconcentration proposals outside it. It is hard to imagine that such proposals will be taken seriously again anytime soon. What happened in the 1970s to cause this change?

I cannot pretend to provide a definitive answer to this question in this brief essay, and I think the causes clearly extend beyond Chicago. For instance, declining faith in government, itself in part a product of the Vietnam debacle, surely played a major role. The deregulation movement, led to an important extent in the 1970s by now-Justice Breyer, Senator Kennedy, and Alfred Kahn – hardly a Chicago cabal – seemed to reflect rising faith in markets. Strong faith in markets is a distinguishing feature of the Chicago School, of course.¹⁸ In any case, during the 1970s Chicago did contribute by significantly weakening two of the intellectual buttresses supporting the deconcentration movement.

The first of these was the belief that there is an economically significant positive, causal relationship between seller concentration and collusive, anti-competitive behavior. This belief was based largely on a few pioneering industry-level cross-section statistical studies using profitability as the dependent variable, since economic theory had (and has) few definite predictions regarding the impact of changes in concentration on behavior. During the 1970s many more studies of this general sort were performed and critiqued, however, and the empirical support for a strong concentration-profitability relationship diminished.¹⁹ While most studies found a positive correlation, it tended to be relatively weak, and the implied economic effects of changes in concentration tended to be small.

¹⁸ See, for instance, Kitch, *supra* note 2.

¹⁹ For a survey of this literature, see Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in HANDBOOK OF INDUSTRIAL ORGANIZATION, VOL. 2 951 (R. Schmalensee and R.D. Willig, eds.; Amsterdam: North-Holland, 1989).

Moreover, Harold Demsetz, a card-carrying member of the Chicago School in residence at UCLA, argued persuasively in the early 1970s that even if there were a strong *correlation* between concentration and profitability, one could infer nothing about *causation*.²⁰ He advanced an alternative explanation for the observed correlation. Suppose there is no collusion anywhere but that there are economically significant and persistent efficiency differences among sellers in some industries. Then, in those industries, both concentration and industry-average profitability will be high, as more efficient firms have large market shares and earn rents on the sources of their efficiency, even in a world with no collusion anywhere. To the extent that this mechanism operates,²¹ concentration that arises by internal growth should be applauded as reflecting innovation, which would surely be discouraged by systematic no-fault deconcentration.

If concentration also facilitates collusion, of course, as most economists still seem to believe, one might in principle be able to enhance welfare by no-fault deconcentration, but in practice the task would be beyond formidable. On the other hand, a belief that concentration does affect behavior under some conditions rationalizes taking changes in concentration seriously in evaluating proposed horizontal mergers.

The Demsetz critique also implicitly attacked a second buttress that supported the deconcentration movement: the notion that intra-industry differences in cost and productive efficiency mainly reflect differences in scale. The extent of economies of scale, particularly in manufacturing, had been a major research focus in the 1950s and

²⁰ Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J. L. & ECON. 1 (1973), and *Two Systems of Belief about Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (H. Goldschmidt, H.M. Mann, and J.F. Weston, eds.; Boston: Little-Brown, 1974).

²¹ This turns out not to be easy to assess; see Richard Schmalensee, *Intra-Industry Profitability Differences in U.S. Manufacturing: 1953-1983*, 37 J. IND. ECON. 337 (1989).

1960s. This work generally took an engineering-economic approach, focused mainly on production, and sought to identify industry-specific minimum efficient scales, beyond which *the* long-run average cost curve was generally found to be roughly flat. Other sources of intra-industry differences were not much studied, and observed efficiency differences among firms above minimum efficient scale were generally treated as transitory departures from *the* industry-specific long-run average cost curve. All the no-fault proposals mentioned above allowed deconcentration to be avoided if it could be shown to result in a substantial loss of efficiency, but the emphasis was clearly on scale-determined efficiency. Indeed the White House Task Force proposal mentions only “substantial loss of economies of scale” as a potential defense against deconcentration.

The Demsetz critique, in contrast, assumed that productive efficiency differences unrelated to scale were both important and persistent over time. This assumption rested on a broad definition of productive efficiency, one that went well beyond engineering considerations. As Bork put it:

The relative efficiency of firms is therefore measured by their success in the market. Attention must be focused on this definition of productive efficiency rather than on the wide variety of factors that contribute to it. Economies of scale, specialization of function, ability to obtain capital, management skill—all of these and many more are elements that contribute to the firm’s ability to please consumers, but they are causes rather than manifestations of efficiency. Efficiency is at bottom a value concept, not a description of mechanical or engineering operation.²²

For the definition in the first sentence to correspond to the normal meaning of “efficiency,” it must be assumed that rivalry is at least reasonably vigorous. With that assumption, this statement is an elaboration of George Stigler’s “survivor principle.”²³

²² Bork, *supra* note 1, at 105.

²³ George J. Stigler, *The Economies of Scale*, 1 J. L. ECON. 54 (1958).

If the sources of firm-specific productive efficiency are in fact diverse and complex, it is hard to imagine how the impact on efficiency of splitting firms in the name of deconcentration could be reliably assessed. It is thus hard to imagine how a systematic deconcentration program could be carried out without risking substantial losses of productive efficiency. And as time has gone on, it has become clearer as an empirical matter that intra-industry profitability differences not easily attributed to scale are important and persistent in at least some industries.²⁴ Toyota's design and production systems have been studied in great depth over the years, for instance, but firms that were once much larger than Toyota have been unable even to copy them effectively, let alone surpass them. Much effort is devoted in business schools to studying the sources of differences in firm performance.

While no doubt there are some who lament the passing of the no-fault deconcentration movement, I believe I join most observers in the view that the Chicago victory on this front (with much help from various allies) was a good thing for both consumers and total economic welfare.

PRODUCTIVE EFFICIENCY

Once one accepts either consumer welfare or total welfare as *the* objective of antitrust policy, productive efficiency, broadly defined as above and including innovation as well as production, logically becomes at least as important a concern as allocative efficiency in most contexts. Thus Chicago's focus on welfare as *the* objective of antitrust did much more than blunt the no-fault deconcentration movement. It eventually made

²⁴ For an excellent overview, see Nancy Beaulieu, Robert Gibbons, and Rebecca Henderson, *Microeconomic Evidence of Persistent Performance Differences among Seemingly Similar Enterprises*, working paper, MIT Sloan School of Management, April 2007.

productive efficiency count as a virtue rather than a vice in most antitrust decision-making.

This was not a small thing. If inter-firm rivalry were the objective of antitrust, rather than economic welfare, making a leading firm more efficient would generally be a bad thing. It would generally benefit consumers and increase total welfare, but it would also generally make less efficient firms less effective rivals. Perhaps the high-water mark of the “efficiency at the top is bad” view is Learned Hand’s classic 1946 *Alcoa* decision.²⁵ After accepting that Alcoa had committed “no moral derelictions after 1912,” Judge Hand nonetheless found it to have monopolized because

It was not inevitable that it should always anticipate increases in the demand for ingot and be prepared to supply them. Nothing compelled it to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel.²⁶

Had Alcoa not done these things, had it been slow to add capacity and not built a strong, efficient organization—in short, had it been less efficient—its customers and society as a whole would have been worse off, but it might have prevailed in court.

By the 1970s, *Alcoa* was an old case, and there had been no subsequent monopolization cases in which the pursuit of efficiency had been similarly condemned. But the notion that it was undesirable to make a leading firm more efficient and thus harder to compete with was clearly alive and well in antitrust. In its 1967 *Procter &*

²⁵ *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

²⁶ *Id.* at 431.

Gamble decision,²⁷ the Supreme Court blocked P&G's acquisition of Clorox, the leading producer of liquid bleach, a product P&G did not produce, in part because the record showed that the post-acquisition Clorox would be more efficient in production, sales, distribution and, especially, advertising. Justice Douglas, writing for the majority, issued a *Brown Shoe*-like dictum:

Possible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies, but it struck the balance in favor of protecting competition.²⁸

“Competition” here clearly means active rivalry, not, as it generally means now, consumer or total welfare.

The 1968 Department of Justice *Merger Guidelines* reflected this same lack of concern for productive efficiency:

Unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies (i.e., improvements in efficiency) because...²⁹

Among the reasons that followed was the claim that “there usually are severe difficulties in accurately establishing the existence and magnitude of economies claimed in a merger.” The *Merger Guidelines* also echoed the *Procter & Gamble* decision directly by expressing concerns about conglomerate mergers “which may enhance the ability of the merged firm to increase product differentiation in the relevant markets” – presumably markets in which differentiating firms' products was an important form of competition.

²⁷ *Federal Trade Commission v. Procter & Gamble Co.*, 386 U.S. 568 (1967). The merger was also condemned on that grounds that it would have removed P&G as a potential entrant into the liquid bleach market. It may be worth noting that in the subsequent 40 years, P&G has not entered that market.

²⁸ *Id.* at 580.

²⁹ 1 CCH Trade Reg. Rep. ¶ 4430 (1968).

In sharp contrast, the current DOJ/FTC *Horizontal Merger Guidelines* commit the agencies to give a positive weight to merger-specific gains in productive efficiency by considering “whether cognizable efficiencies likely would be sufficient to reverse the merger’s potential to harm consumers in the relevant market, e.g., by preventing price increases in that market.”³⁰

Two further points seem worth noting. First, the idea that increasing productive efficiency is generally a good thing has yet not made a complete trans-Atlantic crossing. The European Union blocked the General Electric – Honeywell merger in part because it concluded that the merged firm would be a more formidable competitor.³¹ Second, while Chicago authors such as Bork and Posner generally stressed the positive value of productive efficiency, both argued that the sort of case-specific analysis of economies that Oliver Williamson urged be made in merger analysis, and that the agencies are now committed to making, simply could not be done reliably.³² They argued instead for looser standards as regards concentration based on a presumption that mergers generally enhance efficiency. Thus one can read the treatment of efficiency in current merger policy as in part a defeat for Chicago.

INHOSPITALITY

Donald Turner is quoted as having said during the 1960s that, “I approach territorial and customer restrictions not hospitably in the common law tradition, but

³⁰ Section 4, p. 31, as revised April 8, 1997.

³¹ The Commission’s decision was *Case No. COMP/M.2220-General Electric/Honeywell*, March 7, 2001. The Court of First Instance affirmed the substance of this decision in Cases T-209/01 *Honeywell v. Commission* and T-210/01 *General Electric v. Commission*, December 14, 2005.

³² Compare Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Trade-off*, 58 AMER. ECON. REV. 18 (1968), with Bork, *supra* note 1, at 124-9 and Posner, *supra* note 3, at 112-3.

inhospitably in the tradition of antitrust law.”³³ This “inhospitality tradition” applied more broadly to non-standard or unfamiliar contracting practices – those that did not appear in textbook descriptions of perfectly competitive markets. By establishing welfare as the sole objective of antitrust and thus economic theory as a primary engine of analysis, Chicago has effectively destroyed this tradition in academic circles, though the power of precedent has kept it alive in the courts in some contexts.

In an influential early paper, Aaron Director and Edward Levi argued that a monopolist could not use tying to “leverage” monopoly from one market to another, because it had only a single monopoly profit available to it.³⁴ Chicago scholars went beyond this influential “single monopoly profit theorem” to show how, in theory at least, various practices traditionally accorded inhospitable treatment could enhance efficiency. Some commentators in this tradition took the next step and argued that these practices should be *per se* legal because they could never be anti-competitive.³⁵

Few observers would now go that far, in important part because “post-Chicago” economic analysis, making liberal use of non-cooperative game theory, has shown that the “single monopoly profit theorem” rests on rather strong assumptions and that some traditionally suspect practices, such as tying and exclusive dealing can indeed play an exclusionary role under some circumstances.³⁶ On the other hand, I think it is now accepted by most economists that if a contracting practice, no matter how odd it seems on

³³ The source usually cited for this quotation is Stanley Robinson, New York State Bar Association, Antitrust Symposium, 1968, p. 29.

³⁴ Aaron Director and Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

³⁵ See, e.g., Bork, *supra* note 1, ch. 21.

³⁶ See, e.g., Antonio Cucinotta et al, eds., *Post-Chicago Developments in Antitrust Law* (Edward Elgar, 2003).

the surface, is regularly used by firms without market power or hope of obtaining it, that practice plays a pro-competitive, efficiency-enhancing role in at least those contexts and thus does not deserve condemnation there. When market power is present, most commentators now seem to think that the rule of reason in some form should generally be employed to analyze non-standard contracting practices. In terms used in recent EU debates regarding Article 82 of the Treaty of Rome, this represents movement from a “form-based” to an “effects-based” mode of analyzing seller conduct³⁷ – movement that has been blocked in some situations by the enduring power of some pre-Chicago precedents. While rule of reason or effects-based analysis compromises predictability to some extent, it seems much more likely to enhance welfare on average than virtually *per se* condemnation of practices that are demonstrably efficiency-enhancing in some instances.

The remainder of this section briefly reviews Chicago’s attempts to move policy from “form-based” to “effects-based” analysis of horizontal restraints, vertical mergers, vertical restraints, and tying arrangements

Horizontal Restraints

In the 1967 *Sealy* decision,³⁸ the Supreme Court struck down the market-division agreement entered into by a set of mattress manufacturers without inquiring into the effects of that agreement. In the 1972 *Topco* decision, the Court similarly struck down the market division agreement employed in the private label program of an association of supermarket chains even though only about 10 percent of the goods sold by its members

³⁷ See Jordi Gual et al, *An Economic Approach to Article 82*, 2 COMP. POL. INTL. 111 (2006).

³⁸ *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

bore the Topco name.³⁹ The *Topco* Court held simply that “...the restraint in this case is a horizontal one, and, therefore, a *per se* violation...”⁴⁰

As Bork argued persuasively, these decisions make no economic sense: “Absent the power to restrict output, the decision to eliminate rivalry can only be made in order to achieve efficiency.”⁴¹ And beginning with the Supreme Court’s 1979 *BMI* decision,⁴² antitrust policy has retreated significantly from *per se* condemnation of all horizontal restraints. Indeed, the current DOJ/FTC *Antitrust Guidelines for Collaborations Among Competitors* states that “If ... participants in an efficiency-enhancing integration of economic activity enter into an agreement that is reasonably related to the integration and reasonably necessary to achieve its procompetitive benefits, the Agencies analyze the agreement under the rule of reason, even if it is of a type that might otherwise be considered *per se* illegal.”⁴³ Judge Bork could hardly have wished for more.

Vertical Mergers

In the 1962 *Brown Shoe* decision, Chief Justice Warren asserted that the adverse impact of vertical mergers on competition “results primarily from a foreclosure of a share of the market otherwise open to competitors.”⁴⁴ He went on to condemn the merger before him because the upstream partner had been found to intend to “force” the downstream partner to take around one percent of total US shoe output. This form-based analysis lacks any economic support, particularly when market power is nowhere to be

³⁹ *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972).

⁴⁰ *Id.* at 608.

⁴¹ Bork, *supra* note 4, at 278.

⁴² *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

⁴³ Washington, DC, April 2000, Section 3.2

⁴⁴ *Supra* note 4 at 328-29.

seen.⁴⁵ Nonetheless, the 1968 *Merger Guidelines* dutifully followed the Court and asserted that vertical mergers, at least those involving market shares above the single digits, would ordinarily be challenged because they raise entry barriers by “foreclosing equal access” to potential customers and/or suppliers.

In contrast, the current DOJ *Non-Horizontal Merger Guidelines*, originally issued in 1984,⁴⁶ mention neither “foreclosure” nor specific critical market shares and instead outline how the Department will analyze whether any particular vertical merger is likely to raise barriers to entry. This is a clear shift in the Chicago direction, from concern about form to concern about effects.

Vertical Restraints

The vertical restraints story is more complex. The courts have long been hostile to non-price restraints such as exclusive territories but never quite condemned them *per se*. In the 1967 *Schwinn* decision, however, the Supreme Court flirted with the idea.⁴⁷ It found exclusive territories *per se* illegal if the goods in question were sold to retailers but subject to rule of reason treatment if the goods were instead sent on consignment. This distinction obviously makes no economic sense, of course, and during the 1970s failure to make economic sense came to matter more. The Court’s 1977 *Sylvania* decision overruled *Schwinn* and made territorial exclusivity subject to rule of reason analysis in

⁴⁵ This sort of “foreclosure” does reduce the demand for the output of other manufacturers – while also reducing the supply with which they compete by an exactly equal amount. For more problems with “foreclosure” theory, see Bork, *supra* note 1, at 211-14.

⁴⁶ The Non-Horizontal Merger Guidelines were initially issued as part of *U.S. Department of Justice Merger Guidelines, June 14, 1984*. The Non-Horizontal Merger Guidelines are available online at: <http://www.usdoj.gov/atr/public/guidelines/2614.htm>.

⁴⁷ *United States v. Arnold Schwinn & Co.*, 388 U.S. 365.

general.⁴⁸ This is not quite a definitive end to the inhospitality tradition in this area, but it seems pretty close.

As to vertical restraints involving price, Chicago has clearly won – but only in the seminar room. A broad coalition of economists has recently asked the Supreme Court to overturn the *per se* rule against resale price maintenance that dates to the 1911 *Dr. Miles* case and to subject these arrangements to the rule of reason.⁴⁹ But as this is written, it seems unlikely that the Court will heed this advice.

Tying Arrangements

Here, too, Chicago has clearly won in the seminar room but has made essentially no headway in the courts. Justice Frankfurter’s famous 1949 *Standard Stations* dictum that “tying arrangements serve hardly any purpose beyond the suppression of competition” has cast an amazingly long shadow, even though, as Bork noted, “This remarkable assertion has never been supported either theoretically or empirically...”⁵⁰ Ward Bowman showed in 1957 that tying could simply be a method of price discrimination in some circumstances, and recent theoretical work has made clear that tying can be harmful only under a limited range of market conditions.⁵¹

Nonetheless, the Supreme Court’s 1969 *Fortner Enterprises* decision, which deservedly makes Judge Bork’s short list of truly bad antitrust decisions, managed to

⁴⁸ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

⁴⁹ Brief of Amici Curiae Economists in Support of Petitioner, Leegin Creative Leather Products, Inc. v. PSKS, Inc., (S. Ct. 2007) (No. 06-480); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁵⁰ *Standard Oil of California and Standard Stations, Inc. v. United States*, 337 U.S. 293, 305 (1949); Bork, *supra* note 1, at 367.

⁵¹ Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957). On recent theoretical work, see Dennis W. Carlton and Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002).

construe the granting of credit on favorable terms by a competitively insignificant seller of homes as a potentially dangerous tie-in sale.⁵² The Supreme Court's latest venture into this arena, its 1984 *Jefferson Parish* decision,⁵³ did serve to clarify the immunity of sellers with absolutely no market power, but otherwise the *per se* rule remained intact. Justice Stevens, writing for the majority, simply relied on the age of the relevant precedents: "It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and are therefore unreasonable *per se*."⁵⁴ To an economist, this echoes the medieval preference for Aristotle over experiment based on Aristotle's antiquity. Particularly noteworthy is the Supreme Court's refusal thus far even to follow some lower courts and treat "technological ties" differently than ties based on contract terms alone, thus leaving in perpetual doubt the legality of WordPerfect's incorporation of a spell-checker into its then-dominant word processor.⁵⁵

SUMMATION

I have tried to show that the work of lawyers and economists associated with the Chicago School, particularly in the 1970s, had a strongly positive effect on US antitrust policy by defanging judicial decisions and policy proposals that could have had substantial economic costs. Chicago's major intellectual victories, now widely accepted, include fixing economic welfare as the sole objective of antitrust policy, rejecting no-

⁵² *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969); Bork, *supra* note 2, at 210.

⁵³ *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984)

⁵⁴ *Id.* at 14.

⁵⁵ See, e.g., Davis S. Evans and Richard Schmalensee, *Some Aspects of Antitrust Analysis in Dynamically Competitive Industries*, in *INNOVATION POLICY AND THE ECONOMY*, VOL. 2 (A. Jaffee, J. Lerner, and S. Stern, eds.; Cambridge: MIT Press, 2002) 1, 28-31, and the references there cited.

fault deconcentration as a plausible policy option, placing the positive value on productive efficiency implied by the economic welfare objective, and recognizing that business practices not found in textbook treatments of perfect competition may nonetheless be efficiency-enhancing. I believe that consumers and overall economic efficiency have benefited substantially from these changes in antitrust policy.

One plausible response to all this praise is that many of these positive developments were the work of many hands, some of which had never been to Hyde Park. I would agree, though I think it is nonetheless fair to say that the bulk of the leadership, particularly early on, came from the Chicago School. Recall Bork's lonely dissent from the 1968 White House Task Force report.

Another plausible response is that if the most extreme Chicago proposals had been adopted, particularly those involving *per se* legality, the costs would have been substantial, so that one must give appreciable credit for change that is on balance positive to those who resisted Chicago's cutting edge. Again, I would agree: Chicago did not always prevail, and some of its 1970s proposals sound extreme even today. For instance, Bork argued that the law "should abandon its concern with such beneficial practices as small horizontal mergers, all vertical and conglomerate mergers, vertical price maintenance and market division, tying arrangements, exclusive dealing and requirements contracts, 'predatory' price cutting, price 'discrimination,' and the like."⁵⁶ Bork seems to have wrongly concluded that business practices that could be shown to be pro-competitive sometimes could therefore never be anticompetitive ever and should be *per se* legal. Similarly, Richard Posner asserted that, "I would like to see the antitrust

⁵⁶ Bork, *supra* note 1, at 406.

laws other than Section 1 of the Sherman Act repealed,”⁵⁷ a position with few adherents today.

Nonetheless, I believe that even the extreme Chicago proposals that have failed to gain even seminar-room acceptance have also had a positive effect on antitrust policy; they have forced more mainstream scholars to provide economic justifications for their alternative policy positions. The resulting debate has had the broad effect of shifting antitrust’s intellectual center of gravity from no-fault liability and *per se* illegality to rule of reason, “effects-based” analysis. Pointing out that the Emperor has no clothes may raise local sartorial standards either by driving him from the scene or by compelling him to dress.

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⁵⁷ Posner, *supra* note 3, at 212. On the other hand, Posner did propose to use Section 1 to prosecute tacit collusion; *Id.* at 71.