The Battle for the Soul of Antitrust

Eleanor M. Fox†

There is, today, a battle for the soul of antitrust. On one side is the Chicago School, which asserts that the law should be derived from and explained by economics. Chicagoans believe that business has a strong tendency to produce efficiency when unconstrained by positive law. On the other side is what I call the New Coalition, which believes that law is essentially different from economics; economics is one of the tools used to carry out the spirit of the law. Members of the New Coalition believe that law can be derived from the statutory text, informed both by its legislative roots and by its evolving judicial construction. Judges Bork, Easterbrook, and Posner are widely identified with the Chicago School, and I refer to their scholarship and jurisprudence as examples of Chicago School thinking. Professor Sullivan is a member of the more diverse New Coalition, and I treat Professor Sullivan's Article1 as representative of the challenge to the Chicago School.

I address two questions: (1) Which of the two alliances better describes the history of antitrust and the current state of the law? (2) Which better predicts the future of antitrust? It is a human tendency to interweave our vision of the way the world should be with our description of things past and our prediction of things future. We tend to see what confirms our vision, which is in turn a product of our values. Accordingly, before evaluating the descriptive or predictive work of either school, I summarize the normative orientations of each.

I

THE NORMATIVE CONCEPTIONS

Members of the Chicago School commonly assert their preference for freedom from government interference in the economy. They see government as arbitrary, inefficient, and heavy-handed. It infringes, they believe, on rights to property and freedom to trade, and suppresses individuality, initiative, and creativity. Correlatively, they assume—or being so disposed, they perceive—that competition in markets untouched by positive law is robust, that the natural tendency of firms is to be efficient,

† Professor of Law, New York University School of Law. B.A. 1956, Vassar College; LL.B. 1961, New York University.

and that the progressive, industrious entrepreneur is likely to succeed.2

Members of the New Coalition have a different orientation. Pointing to an abundance of real world evidence, they challenge the belief in the natural efficiency of business acts.3 Some would describe themselves as faithful interpreters of the law, with a sense of history and tradition as well as a regard for the will of Congress and the principles embedded in the law.4 Others worry about private as well as government power, the coercion and exclusion of the weak by the powerful, and the distribution of power and opportunity. They take seriously the imperfections of free market competition. In their vision, the best hope for a dynamic and progressive economy is to provide incentive and opportunity for the less well established and to trust in a pluralistic marketplace.5

Each alliance asserts that its approach helps consumers. Each can make a reasonably good case that its approach to economics advances the interests of consumers. Indeed, in most of the interesting cases, economics is indeterminate. The real battle is not about where correct economics leads. Rather, it is about fundamentally different views concerning law and society.6

II

THE SCHOLAR AS HISTORIAN

Chicagoans assert an ahistorical view of antitrust. They rationalize the history of antitrust to fit their economic model. They declare that the only significant goal of the Congress that passed the Sherman Act was to enhance consumer welfare (a term that they then misdefine).7 Otherwise, Chicagoans ignore the historical goals of antitrust, claiming that


4. Such a description would seem to apply to scholars such as Professors Milton Handler and Stanley Robinson. See, e.g., Handler, Where Do We Go From Here—An Overview (forthcoming in 9 CARDOZO L. REV. (1988)); Handler, Reforming the Antitrust Laws, 82 Colum. L. Rev. 1287 (1982); Handler & Robinson, A Decade of Administration of the Celler-Kefauver Antimerger Act, 61 Colum. L. Rev. 629 (1961).

5. See, e.g., Sullivan, supra note 1, at 841 & n.30.


7. Chicagoans define "consumer welfare" as the sum of producers' and consumers' welfare, on the theory that consumers will be better off if producers make more money because producers
Congress, by framing the statutes as vague prescriptions, thereby delegated power to the courts to use Chicago's efficiency model.  

There is no contest as to which alliance is more faithful to legislative history. The members of the New Coalition take account of the real history of antitrust: concern for consumers; concern for the "little man"; interest in access, diversity, and pluralism; and condemnation of coercion and exploitation. 9 Chicagoans ignore legislative history.

One who sets out to describe the evolution and state of antitrust law has the more focused task of perceiving how the courts have synthesized the antitrust inquiry. For Chicagoans, that task is quickly done. They dismiss as no longer law all pre-1980 cases that found violations based on something other than output limitation. To describe current antitrust law, they cite only language that either condemns output limitation or extols restraints designed to prevent inefficiencies, such as the perceived or imagined drain on efficiency produced by free riders. 10

As the New Coalition has shown, however, the true picture of the law is neither so simple nor so antiseptic. The Chicago description is wrong. 11 By contrast, Professor Sullivan, in one of the most powerful parts of his Article, faithfully describes the emerging synthesis of the law, evolving as it has from a dual respect for facts and for existing law and its underpinnings. While the Supreme Court has limited the per se rule and has given structure to the rule of reason, 12 the modern synthesis is not an

will invest that money in things consumers want. See R. BORK, supra note 2, at 90-117. The consumer interest protected by Congress did not include producers' interests. See infra note 9.


9. See H. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1954) (presenting a detailed history of American antitrust). See also 21 CONG. REC. 2457-60 (1890) (Senator Sherman stated that combinations threaten to exacerbate inequality of wealth and opportunity, that cost savings cannot be justified if the savings go into the pockets of the producers, and that "[i]f we would not submit to an emperor, we should not submit to an autocrat of trade"); id. at 4098 (Representative Taylor characterized the trust as a "monster" that "robs the farmer on the one hand and the consumer on the other"); id. at 4100 (Representative Mason stated that even lower prices cannot "right the wrong" of "driving honest men from legitimate business enterprises"); 51 CONG. REC. 15,867 (1914) (Senator Reed lauded the virtues of permitting "all men, big and little," the liberty and opportunity to engage in the economic enterprise); 95 CONG. REC. 11,486 (1949) (Representative Celler called for a halt to the dangerous trend toward industrial concentration; he argued for preserving "small, independent, decentralized business," and thus saving the country from a fate like Nazism).


11. See Fox, Politics of Law and Economics, supra note 6, at 562-76; Hovenkamp, supra note 3, at 255-83. The Chicago description bears no resemblance to the cases.

epiphany; it does not reflect a sudden awareness that business freedom enhances efficiency or that only output limitation merits condemnation. Rather, as Professor Sullivan observes in Part I of his Article, the modern synthesis reflects the Court's increased sophistication in distinguishing that which is competitively desirable from that which is anticompetitive, and in doing so on the basis of a truncated record. The Court has developed gateways,\textsuperscript{13} allocated burdens,\textsuperscript{14} and developed practical rules of administration.\textsuperscript{15} It is not always necessary, as Chicagoans wish it were, for plaintiffs to prove market power, let alone durable market power. Nor is it always necessary for plaintiffs to prove output restraint.

\textit{Federal Trade Commission v. Indiana Federation of Dentists}\textsuperscript{16} is an excellent illustration of Professor Sullivan's synthesis and a symbolic rejection of claims that the law has become Chicago School economics.\textsuperscript{17} In the \textit{Dentists} case, to monitor provisions of dental services and thus contain costs, insurance companies requested that dentists provide their patients' x-rays along with their claims for reimbursement. Fearing that the provision of x-rays would threaten the profession, the Indiana dentists combined to refuse the request.\textsuperscript{18} The FTC sued and the Commission found a violation of law, but as the dentists noted on appeal, the FTC complaint counsel had not proved the relevant market, and had not proved that the combining dentists held market power or that their action had restrained output. Indeed, output restraint was an unlikely effect.\textsuperscript{19}

\begin{itemize}
\item \textsuperscript{13} For example, even if a horizontal restraint is output limiting, the defendant might nonetheless successfully pass through a narrow gateway if it proves that the restraint was necessary to get the goods to market. \textit{See NCAA}, 468 U.S. at 115-17.
\item \textsuperscript{14} For example, when a merger of competitors with large market shares produces a high degree of concentration and a significant increase in concentration, the burden normally shifts to the defendant to prove that the merger is not anticompetitive. \textit{See United States v. General Dynamics Corp.}, 415 U.S. 486, 496-98 (1974) (dictum). When a monopolist excludes competitors by means that require the monopolist to forego short-term profits and that deprive consumers of what they want, the exclusionary conduct is illegal unless the monopolist meets the burden of proving that the act increased efficiency and thereby increased competition. \textit{Aspen Skiing}, 105 S. Ct. at 2859-62.
\item \textsuperscript{15} For example, maximum price fixing by competitors, which is normally harmful, is illegal, even though it could sometimes be benign. \textit{See Maricopa County}, 457 U.S. at 346-47.
\item \textsuperscript{16} 106 S. Ct. 2009 (1986).
\item \textsuperscript{17} Other examples include \textit{Aspen Skiing Co. v. Aspen Highlands Skiing Corp.}, 105 S. Ct. 2847 (1985); \textit{NCAA v. Board of Regents}, 468 U.S. 85 (1984); \textit{Arizona v. Maricopa County Medical Soc'y}, 457 U.S. 332 (1982).
\item \textsuperscript{18} 106 S. Ct. at 2014. The dentists argued that mere provision of the x-rays would not give useful information to the insurers and indeed could mislead them. As an alternative to providing the x-rays, the dentists invited the insurance agents to come to their offices, where they promised to give the insurance agents the relevant information. As the Supreme Court observed, this was a costly alternative. \textit{Id.} at 2017.
\item \textsuperscript{19} The Court of Appeals for the Seventh Circuit vacated the FTC's order, holding that the dentists combined to provide quality dental care, that the market was not properly proved, and that
The Supreme Court unanimously reversed the appellate court judgment vacating the order. By denying the x-rays to the insurers (who stood in the place of the insured patients), the dentists had concertedly refused their patients' request. Properly declining to apply a rigid per se rule, the Court nonetheless quickly and easily took the measure of the restraint and condemned it. Thus it said:

Application of the Rule of Reason to these facts is not a matter of any great difficulty. The Federation's policy takes the form of horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire—the forwarding of [x-rays] to insurance companies along with claim forms. . . . Absent some countervailing procompetitive virtue—such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services . . . —such an agreement limiting consumer choice by impeding the "ordinary give and take of the market place" cannot be sustained under the Rule of Reason.20

In a telling passage, the Court refused to be swayed by the dentists' contention that the x-rays were useless or even misleading information. Even if this contention were true, the Court said, protection of the market process was preferable to trust in the providers' judgment. Thus:

[Even] if the desired information were in fact completely useless to the insurers and their patients in making an informed choice regarding the least costly adequate course of treatment . . . the Federation would still not be justified in deciding on behalf of its members' customers that they did not need the information . . . . The Federation is not entitled to preempt the working of the market by deciding for itself that its customers do not need that which they demand.21

While Chicagoans would insist on detailed proof of the market and convincing evidence that the dentists' combination raised the price of dental care, and they would find appealing the dentists' claims that their concerted action was necessary to preserve quality dental care, the Supreme Court was neither troubled by the truncated record nor impressed by defendants' justifications. First, the Court said, the dentists' concerted action was at least akin to the kinds of combinations that are condemned outright. Second, even if the restriction "is not sufficiently naked" to dispense with market analysis, "the Commission's failure to engage in detailed market analysis is not fatal to its finding of violation of the Rule of Reason."22 Since the federation dentists com-

---

21. Id. at 2019-20.
22. Id. at 2019.
prised heavy majorities in two Indiana localities, and in these areas the insurers were unable to obtain compliance with their requests, the combination had the power to restrain competition, and the record showed that it had done so. Bare bones facts were sufficient to condemn the conduct.

*Indiana Federation of Dentists* is thus a perfect example of Professor Sullivan's description of the evolution of the law. The Court is indeed "fine tun[ing] the emerging integration of discretion and rule."23

III

THE SCHOLAR AS PREDICTOR

In Part II of his Article, Professor Sullivan looks into the future. He anticipates critical problems, involving, among other things, technology, joint ventures, and foreign competition. His main search is for administrable rules and feasible balances that are likely to contain market power, to enhance competitiveness, and to spur progress, while safeguarding access and opportunity for the small firm.

I select three examples offered by Professor Sullivan to illustrate his tailored approach. In one case, he deals with integrative cooperation among competitors, for which he suggests structured screens. He defines the market with readily available data, makes questionable calls in ways that narrow the market, and calculates participants' shares. If the inquiry suggests no market power, the inquiry ends. If the inquiry suggests market power, analysis proceeds down specified paths, with opportunities for the jurist or other analyst to assess purpose, structure, competitive impact, and efficiency.24

While this first comment is general, my next examples are specific. Japanese competitors enter the United States and want to divide U.S. markets in order to concentrate their efforts. In theory, efficiencies might result and market power might not. Nonetheless, Sullivan's background analysis suggests that the costs of jettisoning the per se rule would be much greater than the benefits of doing so, and he predicts that the per se rule will be retained.25

In a third example, small American firms want to enter into specialization agreements that will reduce costs and help them to compete with competitors from Japan, where all members of the industry have entered a combination to share their technology. Here the virtues of a rule of reason inquiry outweigh the virtues of the per se rule, and the rule of reason is applied.26

Chicago School predictions of the future of antitrust stand in sharp

---

24. See *id.* at 885-90.
25. See *id.* at 875-76.
26. See *id.* at 874-75.
contrast to this eclectic, pragmatic, fact-oriented, and flexible approach. Chicago School envisions screens that would put beyond the reach of antitrust all conduct that is not demonstrably output limiting, and it predicts that antitrust will all but self-destruct.

Let us, now, consider the probable course of antitrust, contemplating as alternative guides the textured Sullivan synthesis and the simple Chicago model. We must consider that history runs deep and that the law tends to be stable. We must remember, as the Supreme Court recently remarked in *Square D Co. v. Niagara Frontier Tariff Bureau*, that the Court is virtually bound by the established judicial interpretations of statutory law. Congress can change the essence of the law, but we can hardly expect that Congress will revolt against judicial interpretation in the tradition of Justices such as Brennan, Powell, Stevens, and White, who so recently have contributed so much to our antitrust jurisprudence.

Which approach is the more likely blueprint for the second century of antitrust? The answer is clear. The Sullivan synthesis alone captures reality. The Sullivan synthesis captures the pulse of the law.

---

27. See, e.g., Easterbrook, *supra* note 2, at 14-39 (presented in terms of what courts should do).
30. Id. at 1930-31 ("'[I]t is more important that the applicable rule of law be settled than that it be settled right."") (quoting Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).
35. I am not speaking of marginal change, which may be made. I am asking whether Congress will supplant antitrust with Chicago philosophy.