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Old lady charm: explaining the persistent appeal of Chicago antitrust

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Abstract

The paper deals with the mysterious persistence of the Chicago approach as the main analytical engine driving antitrust enforcement in American courts. While the approach has been almost completely replaced in contemporary industrial economics by the so-called Post-Chicago view, Chicago arguments still permeate antitrust case law at all judicial levels. Chicago's rise to dominance was allegedly due to the superiority of its economic analysis. Why did the Post-Chicago approach, which is supposed to have a clear analytical edge, fail to do the same? The paper offers a series of explanations: though none is completely exhaustive, each may account for a bit of the story. More generally, the current situation of antitrust case law offers valuable methodological insight on themes such as how economists persuade (i.e., how economic arguments come to be accepted and applied by policy- or law-makers) or the impact of the different professional practices in the diffusion of economic ideas.

Keywords::

antitrust law | industrial economics | Chicago School | Post-Chicago antitrust | diffusion of economic ideas | Supreme Court

Jel Classification::

B21 | K21 | L41 | L42

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Notes

1. It may not be necessarily so within other policy arenas where antitrust law is enforced. When dealing with mergers and acquisitions both the Federal Trade Commission and the Department of Justice seem more ready to apply modern game-theoretic analysis. This may have to do with the role of technocracy within non-judicial enforcement (see Crane, 2011). In any case, the rest of the paper will focus on antitrust law as administered by federal courts.

2. It is of course a big ‘if,’ methodologically speaking, that I will accept for the argument's sake. The rest of the paper offers several insights to doubt about it.

3. For a different policy and theoretical context (see Mankiw, 2006).

4. See for instance Hovenkamp (2001), Cucinotta, Pardolesi, and Van den Bergh (2002), Pitofsky (2008), Crane (2009); and the special issue of the 2012 Antitrust Law Journal

(vol. 78, n.1).

[5.] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[6.] The debate about the legislative intent behind the Sherman Act is still far from settled, but authors as diverse as Letwin (1965), Bork (1978), Freyer (1992), Peritz (1996), or Hovenkamp (2005) all agree that, whatever it might have been, it was not only that envisaged by Chief Justice Warren in Brown Shoe.

[7.] United States v. Aluminum Co. of America, 148 F.2d 416 (2nd Cir. 1945).

[8.] The alternative to per se rules is the rule of reason approach, which requires the court to examine all the specific circumstances surrounding the practice under scrutiny, including possible justifications for it and the existence of less anti-competitive alternatives. This in order to strike a balance as to whether the conduct is pro- or anti-competitive.

[9.] See e.g. Jacobs (1995, p. 220). The term Modern Populism, when applied to ALE, was coined by White (1992, pp. 1055–1057).

[10.] Mason (1939) is traditionally considered the SCP manifesto. Another landmark work was Bain (1956).

[11.] See Peritz (1996, pp. 227–228).

[12.] See Davies (2010, p. 65). The controversy refers to the two possible measures of allocative efficiency: consumer welfare or total welfare (i.e., the sum of consumer and producer welfare). Often the former is only nominally pursued by antitrust enforcers, their implicit goal being actually the latter.

[13.] See Medema (2011), Hammond, Medema, and Singleton (2013b). Note that other prominent Chicago economists, first and foremost George Stigler, gave much greater role to individual behavior. The three-volume set edited by Hammond, Medema, and Singleton (2013a) provides encyclopedic coverage of Chicago price theory in its different versions.

[14.] See Kobayashi and Muris (2012, p. 152); Wright (2012, p. 246).

[15.] See Kauper (2008, p. 47).

[16.] See Easterbrook (1984).

[17.] Leegin Creative Leather Products v PSKS, Inc., 127 S.Ct. 2705 (2007). The prohibition had gone unchallenged since Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911).

[18.] As I show later in the paper, the power of legal status quo may however be invoked to explain why Chicago principles are so difficult to overcome. Many of my tentative explanations actually show that the Post-Chicago alternatives are never so clearly superior to do the trick – especially because enforcers who are aware of their own knowledge limitations always tend to take non-intervention as the default rule, thereby favoring Chicago-based precedents. See Crane (2009, p. 1927) for a similar argument. It may also be argued that when the standard approach in antitrust becomes the rule of reason, then the default position is that any given business conduct be legal. This means the plaintiff has to prove illegality. Given that for the Chicago School only price fixing and few other practices are illegal, then it is not surprising that Chicago views almost always prevail: the default burden of proof allocation clearly bends in Chicago's favor. I thank Giorgio Monti for this remark.

[19.] Tirole (1988) and Schmalensee and Willig (1989) may be taken as the works that officially established the game-theoretic approach to industrial economics.

[20.] See Giocoli (2005, 2009b).

[21.] See Hovenkamp (2008); Salop (2008). RRC involves conduct to raise the costs of competitors with the purpose of causing them to raise their prices (or reduce their output), thereby allowing the excluding firm to profit by setting a supra-competitive price. A typical example are exclusivity arrangements that raise rivals' distribution costs. Note that the RRC idea was already present in the manifesto of the Chicago approach: see Director and Levi (1956, p. 293).

[22.] Eastman Kodak Co. v. Image Technical Services Inc., 504 U.S. 451 (1992).

[23.] Kodak is frequently quoted, but never really followed (see Goldfine & Vorrasi, 2004).

[24.] Think e.g. of Leegin and RPM: see note 17.

[25.] Posner (1979) is usually taken as the pioneering work in this kind of interpretation.

[26.] On the evolution of Director's own thought about antitrust, including the influence of another Chicago giant like Henry Simons, see van Horn (2010).

[27.] Demsetz (1974) showed that if large firms have higher profits in concentrated markets but small firms do not, the correlation between profitability and market concentration reflects the superior efficiency of large firms, not the exercise of market power. His result turned upside-down the SCP claim that market power drives profits.

[28.] On this story, see Giocoli (2011).

[29.] For the latter point see Martin (2007).

[30.] Also see Elhauge (2007).

[31.] Matsushita Elec. Indus. Co v. Zenith Radio Corp., 475 US 574 (1986); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 US 209 (1993).

[32.] The monumental Antitrust Law treatise by Phillip Areeda and Donald Turner bears witness to this statement (see Hovenkamp 1996).

[33.] As one of the referees observed, if we consider the kind of microeconomics done in the last decades by Harvard faculty it looks a lot like Chicago stuff. One could then argue that Harvard microeconomics in general, not only antitrust, has moved towards Chicago. Even more generally, the same referee noted that, while there are plenty of industrial economists doing game-theoretic IO, there are far more economists doing applied microeconomics grounded in Becker-style price theory, i.e., the modern incarnation of Chicago economics. So the pattern of modern ALE would just conform to the wider trend whereby the economists' language for most applied discussions is closer to Chicago than to Bayesian games.

[34.] Many of the papers in Pitofsky (2008) seem to share this view.

[35.] It may be worth noting here that even one of the founders of Chicago law and economics, Henry Simons, would embrace the latter view. See e.g., Simons (1948) and Medema (2011).

[36.] Note that in the Post-Chicago world there may well be multiple theories among which the judge is required to choose. More on this below, Section 10.

[37.] A vast literature exists on this distinction. See e.g., McNulty (1968); Backhouse (1991), Blaug (1997).

[38.] As underlined long ago by Paul McNulty (1968), classical competition entered economics as a series of actions and reactions that later neoclassical economists would almost invariably consider monopolistic. The very essence of classical competition was to undersell your rival; the power to set or cut prices was the main competitive weapon. Other examples of classical competitive actions were entering a market, expanding capacity, etc.

[39.] This dynamic view of competition – the idea of real world markets as dynamic producers of information for buyers and sellers, not necessarily related to the perfect competition ideal – may be considered a Hayekian heritage on Chicago economics. On Hayek's influence on the evolution of Chicago antitrust (see van Horn & Klaes, 2011).

[40.] This view descends from the Ordoliberal foundations of European competition law (see Giocoli, 2009a).

[41.] See e.g., the proposals by the UE Economic Advisory Group in Economic Advisory Group on Competition Policy (EAGCP, 2005).

[42.] The power of legal status quo, which we mentioned above (see note 18), may play a key supporting role here.

[43.] Behavioral antitrust is subject to the same criticism (see Wright & Stone, 2012). Dan Hammond reminded me that Milton Friedman was highly critical of those approaches to economics where elegance was bought at the expense of applicability, i.e., where the analysis consisted of ‘formal models of imaginary worlds, not generalizations about the real world’ (Friedman, 1946, p. 618).

[44.] Note however that not all Chicago doctrines that have met success in courtroom partake of the generalizing character. This is surely not the case with the famous free riding argument suggested by Telser (1960) to prove that RPM has a pro-efficiency rationale. The argument is a clear instance of exemplifying theory. While the Post-Chicago approach offers a (more) generalizing account of RPM, the Supreme Court eventually endorsed the Chicago free riding ‘fable’ in Leegin. For a different view, see Wright (2009).

[45.] Indeed, the necessity of proving intent was the major obstacle against the courts' straightforward adoption of a purely structuralist approach, as suggested by the most radical SCP supporters like, say, Rostow (1947).

[46.] Barry Wright v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir., 1983).

[47.] For a closer look at Justice Breyer's antitrust doctrine (see Greenfield & Matheson, 2009).

[48.] See Teles (2008, pp. 112–114). The effect of this training in basic price theory may have been reinforced by a kind of self-referential effect. Some of the judges who have exercised the greatest impact in affirming Chicago principles within antitrust case law happened to be among the very same scholars who had promoted Chicago ideas while still in the academy. Bork, Posner, and Easterbrook are obvious examples here.

[49.] Daubert v. Merrell Dow Pharm. Inc., 509 US 579 (1993).

[50.] That science just means falsifiability is of course very debatable from a methodological viewpoint. Yet, this is the notion that American judges endorse in their daily practice. As Andrew Jewett suggested me, the famous Kitzmiller case about so-called ‘intelligent design’ offers another example of US courts' naïve definition of science: see TammyKitzmiller, et al. v. Dover Area School District, et al., 400 F. Supp. 2d 707 (M.D. Pa. 2005).

[51.] Langenfeld and Alexander (2011) provide some data on the ‘survival rate’ of economists' expert testimonies in antitrust cases when challenged according to the Daubert doctrine.

[52.] Bell Atlantic Corp v Twombly, 550 US 544 (2007).

[53.] These were the words the Eight Circuit Court used to reject the testimony of no less than Stanford professor and future AEA President Robert Hall, following a successful Daubert challenge in Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039 (8th Cir. 2000).

[54.] See the survey in Einav and Levin (2010).

[55.] See the proposals in Crane (2011) and Wright (2012).

Additional information

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