Progressive Voices in Competition Law

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If the only thing one knew about US antitrust law were the decision of the United States Supreme Court, you would have a decidedly unbalanced view of the law. Defendants have won the vast majority of cases in that court since the early 1990s. The tone of the majority opinions of the Court has increasingly echoed that of the Chicago School. In addition to the increasingly permissive use of the US rule of reason to justify joint conduct and the increasing acceptance (and even praise) of unilateral conduct by dominant firms, the court has crafted new procedural barriers for antitrust plaintiffs, particularly in the class action area.

However, this view alone would give you a distorted vision of US antitrust law and policy. Economics continues to evolve beyond the Chicago School prescriptions of the 1970s and 1980s. Debate over proper antitrust policy has been renewed by the recent economic crisis, widening wealth inequality, financial firms deemed too big to fail or even criminally prosecuted, crony capitalism, and consolidation in key industries, such as telecommunications, finance, agricultural, and airlines.

Government enforcement, particularly in the criminal prosecution of cartels remains strong. Private cases continue to outnumber government cases by a factor of more than twenty to one. Many of the restrictions imposed by the Supreme Court have forced creative public and private enforcers to build stronger cases when they seek to go to court, but at the same time forego more marginal cases where the facts are not available prior to filing in court. What is unknown is to what

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extent meritorious cases are never brought into the judicial system or are wrongly dismissed at an early stage.

Lower courts often find for the government and private plaintiffs when the evidence warrants it. In addition, settlements (as in the recent landmark multi-billion dollar settlements against Visa-Mastercard and American Express in the payment cards industry) and government consent decrees provide a resolution for the vast majority of antitrust cases as they do in most other areas of the law in the United States. Equally importantly, there is a renewed focus on individual and corporate compliance to prohibit the unlawful behavior in the first place.

Antitrust law remains a field dominated by a debate over ideas. Much of the ideas at the heart of antitrust in any given era are economic in nature, but ever changing just as economics as a field develops. Each of the prevailing economic theories has deep normative and political underpinning. The protection of small dealers so prevalent in the early years of US competition policy had important economic, political, and social ramifications. So did the Structure-Conduct-Performance paradigm that tended to hold sway in the years after World War II. So too was the Chicago School a mixture of positive, normative, political, and social values beyond merely technical economics, despite the protestations of many associated with the movement who sought to portray their paradigm shift as purely positive in nature.

The Chicago School remains a formidable force to be reckoned with in the United States, particularly in the appellate courts and Supreme Court level. But the debate continues, particularly over the assertion that any type of economic analysis represents a purely positive analytical tool rather than a deep normative vision of

how markets should be organized and operated. The neo-classical economics that underlies much of the Chicago School Analysis argues for the fundamental efficiency of markets, the ability of markets to adapt quickly and cost effectively to information and to discipline attempted assertions of unilateral or joint market power.[1] While there is no single monolithic view or voice within the Chicago School, there is broad consensus among its adherents that cartels are short-lived and inherently unstable; dominant firms normally serve consumer interests or otherwise self-destruct; vertical restraints are inevitably pro-competitive or quickly forced out of existence by the market, and that the vast majority of mergers are pro-competitive for consumers and value creating for shareholders. Competition policy is viewed as driven by interest group politics and often competitors seeking to insulate themselves from competitive forces. Even well intentioned enforcement efforts are viewed as likely to produce costly errors by wrongly blocking procompetitive business conduct. In contrast, failing to take action (even if in error) is viewed as harmless and likely to be rectified by the market itself.

Most of these claims have shown to be false or wildly exaggerated. Cartels, particularly at the international level, have lasted undetected for decades and caused untold billions of damages to direct and indirect consumers.[2] Dominant firms have defied the inevitability of the oft-predicted waves of creative destruction and maintained their market position on a long-term basis. Certain types of

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1 Representative and important works illustrating the Chicago school *include Symposium: Neo-Chicago Antitrust*, 78 ANTITRUST L.J. 278 (2012); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. Pa. 925 (1979); Aaron Director & Edward H. Levy, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281 (1956).

2 See, e.g., John M. Connor, *Cartel Overcharges: Legal and Economic Evidence*, 22 RESEARCH IN LAW & ECON. 273 (2007); John M. Connor, *Global Antitrust Prosecutions of Modern International Cartels*, 4 J. INDUS., COMP. & TRADE 239 (2004).

mergers have been shown to predictable fail to benefit anyone other than perhaps the CEOs, management, and investment advisers who profit from them. [3]

Not surprisingly, the debate over the values of competition policy and the sources of wisdom to draw upon continues. New ideas emerge and find traction in the scholarly debate, the case law, and enforcement policy. These debates continue with scholars and policy makers offering post-Chicago economics and other theories grounded in game theory, behavioral economics, evolutionary biological, strategic management, marketing, and other disciplines, as the key to a more accurate, more predictive, and more progressive vision to the laissez faire view championed by the Chicago School.[4] What unites most of the progressive antitrust community in the United States and elsewhere is a core belief that markets serve a vital function in organizing economic activity, but have to carefully constructed, regulated, and policed to serve the ultimate beneficiaries of market activity – actual citizens. Moreover, for most progressive scholars and policy makers, the role of economics is to implement competition policy and not to dictate its fundamental goals or political and social objectives.[5] Few observers in Latin America, and particularly Chile, would fail to recognize the fundamental political ramifications of government policy making based on wholesale adoption of any single market economic theory.[6]

The continuing challenge is to articulate that progressive vision beyond opposition to the Chicago school, laissez faire, or libertarian political philosophy,

3 Spencer Weber Waller, *Corporate Governance and Competition Policy*, 18 Geo. Mason L. Rev. 833, 872-881 (2011).

4 *See generally* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed. 2008).

5 See generally MICHAEL J. SANDEL, WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS (2012).

6 JUAN GABRIEL VALDES, PINOCHET'S ECONOMISTS: THE CHICAGO SCHOOL OF ECONOMICS IN CHILE (2008).

and to operationalize that vision into rules that can enforced by agencies and courts. For me, the key is to focus on economic power and its abuse. By power, I mean more than size. Most countries have any number of companies that are enormous in size but utterly lacking in the power to subvert markets or injure consumers except through outright collusion with their competitors. In the United States, the car manufacturer Chyrsler and the retailer Sears come to mind. Size is not to be feared (except when it increases systemic risks or too big to fail problems), but power is, even if one does not fully embrace Lord Acton's maxim that "power corrupts, and absolute powers corrupts absolutely." Dictators and oligarchs are constrained through constitutional and political principles. Competition law similarly should constrain the monopolist, the oligopolist, and the cartelist lest they destroy markets, impoverish citizens, and bend governments to their wills. As I have written elsewhere:

> While Judge Learned Hand was undoubtedly correct when he wrote in United States v. Aluminum Co. of America that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins," it is equally important that we do not allow the current frontrunner in a race to declare permanent victory at the moment of his choosing. As Professor Timothy Wu has noted more recently, the government has too often "stood beside concentrated economic power against the underdog at the expense of economic dynamism." Both wise antitrust and regulatory policy may be needed to prevent markets from being won through innovation, but maintained through capture and predation. [7]

There is another important strain to competition law scholarship that is worth noting. Many scholars have sought to identify the essential nature, or underlying theory, that unifies all of US antitrust law or competition law more generally. Most seek to respond to Robert Bork's assertion that US antitrust law was, and should be,

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7 Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. REV. 1771, 1804 (2012) (footnotes omitted).

solely based on the promotion of consumer welfare in the form of wealth maximization.[8] Prominent counter arguments have come from Eleanor Fox who advocated economic notions of fairness and more overtly political values,[9] Robert Lande who articulated the prevention of wealth transfer and the promotion of consumer choice,[10] my own work on the importance of business theory as a source of wisdom for competition policy,[11] and others who focused on the promotion of innovation or additional goals. While I am suspicious that any unified field theory can fully explain or predict the continually evolving common law nature of US antitrust law,[12] or competition law in other legal systems,[13] I still applaud efforts to bring coherence to a field all too prone to the intellectual predispositions of five Supreme Court Justices with life tenure.

With this background in mind, the editors of this innovative competition law volume sought to bring together outstanding competition law scholarship from the United States and the European Union that highlights some of the recent work by prominent progressive voices in the field. There is no single theme that unites these works except for their quality and their conviction that there is more to

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8 ROBERT BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

9Eleanor Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1991); Eleanor M. Fox, The Battle for the Soul of Antitrust, 75 Cal. L. Rev. 917 (1987); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

10 Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L. J. 65 (1982); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175 (2007).

11 Spencer Weber Waller, *The Language of Law and the Language of Business*, 52 CASE WEST. L. REV. 283 (2001).

12 *See* Maurice E. Stucke, *Reconsidering Antitrust Goals*, 53 B.C. L. Rev. 551 (2012).

13 Spencer Weber Waller, *Neo-Realism and the International Harmonization of Law: Lessons from Antitrust*, 42 U. KAN. L. REV. 557 (1994).

competition law and policy than the Chicago school would have you believe. In short, markets are great, but they are not magic.

Accordingly, this collection begins with several articles on alternatives approaches and goals of competition law. In this connection, I greatly appreciate Thomas Nachbar's *The Antitrust Constitution.*[14] Professor Nachbar teaches antitrust, telecommunications, and constitutional law at the University of Virginia School of Law. He draws on this diverse background to present one of the truly original analyzes of antitrust law I have seen in recent years. Instead of focusing on the long running fairness versus efficiency debate, Professor Nachbar suggest that these two sides actually have more in common with each other that most commentators normally perceive. Both fairness and efficiency tend to focus on the market effects of the conduct under examination, albeit from very different perspectives of what effects should matter the most. Instead, Professor Nachbar suggests that the notion of private regulation provides a better historical and analytical tool to explain and predict the evolution of US antitrust law. He relies on the distinction between "proprietary" control of own's property which is normally permitted and the "regulatory" control of the property of others which is normally barred by the constitutional principle prohibiting private regulation.

Professor Maurice Stucke is another outstanding legal scholar with a substantial practice background at the Antitrust Division before entering teaching full-time at the University of Tennessee College Of Law. He has become the foremost voice in applying behavioral economic to the study of antitrust law and

14 99 IOWA L. REV. 57 (2013).

economics.[15] Behavioral economics seeks to take human beings as they exist in the real world rather than assume the perfect information, perfect rationality, and full willpower of neo-classical economic models. Looking at the systematic flaws in human decision making documented in empirical economics, Stucke and others have sought to apply these insights to the formulation of sound antitrust law and policy. In his article for this collection, *Should Competition Policy Promote Happiness?,*[16] Professor Stucke extends his long-standing interest in behavioral economics to tackle the extent to which the economic literature on the direct measurement of happiness can inform the goals and rules of competition policy. He argues that competition policy in a post-industrial wealthy country will likely get more bang (in terms of increased well-being) in promoting economic, social, and democratic values, rather than simply promoting a narrowly defined consumer welfare objective.

Professor Thomas Horton of the University of South Dakota School of Law bring a very different perspective to bear in his article *The Coming Extinction of Homo Economicus and the Eclipse of the Chicago School of Antitrust*.[17] Professor Horton entered academia after nearly a quarter century of practice in major Washington DC law firms and the Antitrust Division of the U.S. Department of Justice. His wide ranging scholarly interests are reflected in this article which focuses on how evolutionary biology can inform our understanding of competition

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15 Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J. 1527 (2011); Maurice E. Stucke, *Behavioral Economists at the Gate: Antitrust in the 21st Century*, *38 Loy. U. Chi. L. Rev*. 513 (2007).

16 81 FORD. L. REV. 2575 (2013).

17 42 LOY. U. CHI. L.J. 469 (2011).

law and policy.[18] However, he does not follow the Socialist Darwinist thought of the gilded age of the late 19th century which argued for survival of the fittest and laissez faire policies toward economic activity. Instead, he points to more modern and rigorous biological science which emphasizes the need for diversity and duplication of species in order to have a healthy ecosystem. In these studies, mere size and efficiency do little to create innovation and a healthy environment, either natural or economic. This is another fascinating and creative challenge to the Chicago School and its apology for size and power in the marketplace.

The next two articles deal more directly with the politics and democratic legitimacy of competition law. My own article for the collection, *Antitrust's Democracy Deficit,* was co-written with Professor Harry First of New York University School of Law.[19] In this piece, we explore the concept of democracy deficit which arose most prominently in European Union and international law to reflect concern over important social and legal policies being administered by politically unaccountable technocrats in a non-transparent manner. We suggest that US antitrust law is increasingly vulnerable to these criticisms and suggest different substantive rules and enforcement mechanisms which would lessen these concerns.

Dr. Frank Maier-Rigaud, a distinguished economist with appointments at the Max Planck Institute in Bonn, Germany and the Organization for Economic Cooperation and Development in Paris, addresses the politics and history of EU

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18 See also Thomas Horton, *Fairness and Antitrust Reconsidered: An Evolutionary Perspective*, 44 McGeorge L. Rev. 823 (2013); Thomas Horton, *Unraveling the Chicago/Harvard Antitrust Double Helix: Applying Evolutionary Theory to Guard Competitors and Revive Antitrust Jury Trials*, 41 U. Balt. L. Rev. 615 (2012).

19 Harry First & Spencer Weber Waller. *Antitrust's Democracy Deficit*, 81 Ford. L. Rev. 2543 (2013).

competition law in his essay *On the Normative Foundations of Competition Law*.[20] Dr. Maier-Rigaud examines the importance of ordoliberal thought as a key ingredient of both German and EU competition law. As Dr. Maier-Rigaud explains in greater detail, ordoliberalism was a body of thought that arose in Germany before, during, and after the Nazi era which sought to constrain both public and private economic power and create constitutional and statutory constraints on the exercise and abuse of this power in the public and private spheres lest democracy itself be threatened. This essay goes beyond the historical to focus on how the continuing influence of ordoliberalism affects contemporary EU competition law and efforts to introduce a more economic approach in EU law.

Finally, we conclude with two very different looks at decentralization and rule-making in competition law enforcement. Professors Robert Lande of the University of Baltimore School of Law and Joshua Davis of the University of San Francisco Law School have contributed an insightful empirical look at the importance of private antitrust enforcement in the United States.[21] This article summarizes and extends their previous ground breaking work in the field,[22] to argue that United States treble damage private litigation, often in the form of class actions, has produced benefits to consumer far in excess of government criminal enforcement including both imprisonment and criminal fines.[23] This article should

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20 THE GOALS OF COMPETITION LAW (Daniel Zimmer ed. 2012).

21 Joshua P. Davis & Robert H. Lande, *Towards an Empirical and Theoretical Assessment of Private Antitrust Enforcement*, 36 SEATTLE L. REV. 1269 (2012-13).

22 Robert H. Lande & Joshua P. Davis*, Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F.L. 879 (2008); Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement of the U.S. Antitrust Laws*, 2011 BYU L. Rev. 315 (2011).

be of particular interest to those in any jurisdiction contemplating the introduction of private damage rights or struggling with the implementation of such a regime.

We conclude with Professor C. Mantzvinos's essay on *The Institutional Evolutionary Antitrust Model.*[24] Like Professor Horton's earlier article in this volume, Professor Mantzavinos is no mere laissez faire Social Darwinist. Rather, he is interested in modeling competition policy as an evolutionary process that unfolds within legal rules providing the empirical foundation for the model. He is concerned with normative dimensions as well and builds on these foundations in developing his Institutional-Evolutionary Model and shows how it produces systematically different outcomes and conclusions than the current paradigm. He is critical of the current discretionary case-by-case rule of reason approach to much of competition policy and favors a rules based regime with greater use of per se rules that evolve over time to protect competition as a process.

Finally, I would like to thank Professor Raul Letelier Wartenburg of Alberto Hurtado University Law Faculty and Fernando Araya, who has just left a senior position at the Fiscala Nacional Economica to complete his doctoral dissertation, for organizing this project and including me as both an author and introducer for this important collection. They have worked tirelessly to select the authors and articles that follow and to translate them to make available more widely to a Spanish speaking audience. Like myself, they are committed to a progressive vision of

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23 Unlike most competition systems, the United States antitrust agencies cannot impose fines in civil antitrust. The Antitrust Division can seek fines in criminal cases equal to the greater of the statutory maximum of $100 million (for firms) or double the gain or loss from the unlawful conduct. The Antitrust Division can only seek injunctive relief in civil antitrust cases under the Sherman and Clayton Act. The Federal Trade Commission can only seek injunctive relief under the Federal Trade Commission and Clayton Acts.

24 Issue 2004/01(a), Bonn, Max Planck Institute for Research on Collective Goods, pp. 25, 2004.

competition law which works to limit the abuse of both public and private economic power in a democratic market economy.