

ABSTRACT:
**THE CHICAGO SCHOOL TRAP IN TRADEMARK: THE CO-
EVOLUTION OF CORPORATE, ANTITRUST, And TRADEMARK
LAW**

By Deven R. Desai

The central claim of this article is that, as a descriptive matter, trademark legislation and court interpretation is a close normative match with the Chicago School approach of scholars such as Robert Bork and Richard Posner. The organizing intellectual structure of modern trademark law, as developed in the law, has been freedom of action for the owner of the mark, not minimizing search costs as repeatedly stated in academic writing. This article thus reveals that modern trademark law is a subset of the Chicago School's approach to the firm, deference to management, and competition. That view is not interested in limiting firms or trademarks; its goals lie in the opposite direction.

Understanding this reality dramatically changes the normative project of trademark scholars and reformers. Instead of chastising judges for their mistaken understanding of search costs, potential reform must recognize the reigning intellectual structure and shape recommendations in light of it. As a normative matter, challenging current trademark law becomes essentially the same debate as challenging the Chicago School approach to antitrust and corporate law.

This Article thus frees trademark scholarship to mount a clearer critique and deeper attack on what truly drives trademark law. This approach allows discussions of social costs in trademark policy to focus on other aspects of welfare rather than serving total wealth maximization. In addition, the approach shows that behavioral economics—which has mounted an effective critique on antitrust and corporate law—should also be marshaled to question the now identified core of trademark law. As a question of trademarks' function in the marketplace, the approach offers a way to reclaim the term, information, and recast trademarks as information devices that serve all in the marketplace rather than mainly producers. In short, I offer that this Article's diagnosis of trademark law explains how trademark law works and its current foundation, which in turn provides a way out of its current conceptual trap and towards normative outcomes that current critics desire.