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# **When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law**

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**In this article, the authors interrogate legal and economic history to analyze the process by which the Chicago School of Anti-trust emerged in the 1950s and became dominant in the United States. They show that the extent to which economic objectives and theoretical views shaped the inception of antitrust law. After establishing the minor influence of economics in the promulgation of U.S. competition law, they highlight U.S. economists' caution toward antitrust until the Second New Deal and analyze the process by which the Chicago School developed a general and coherent framework for competition policy. They rely mainly on**

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the seminal and programmatic work of Director and Levi (1956) and trace how this theoretical paradigm became collective—that is, the “economization” process in U.S. antitrust. Finally, the authors discuss the implications and possible pitfalls of such a conversion to economics-led antitrust enforcement.

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Economic analysis has taken the lead in the texts and decisions of competition authorities, particularly in the United States, and references to “consumer welfare” are well dispersed in decisions and guidelines from competition authorities.<sup>1</sup> According to Justice Ruth Bader Ginsburg, the 1977 *GTE Sylvania* decision<sup>2</sup> dedicates the efforts of the Supreme Court to a conception of the Sherman Act as “promot[ing] consumer welfare, not the various sociopolitical aims that judges had to read into it.”<sup>3</sup> This represents an administrative legal norm and “no doubt lead[s] to more efficient allocation of scarce resources, thereby increasing the wealth of the nation.”<sup>4</sup> This market-centered approach is indicative of a process of “economization” of antitrust law. Economization can be interpreted in two ways. On one hand, the authorities’ decisions are made on an economic basis, sometimes involving economists directly. On the other hand, it refers to the process launched by the “Second” Chicago School of economics that originated with Aaron Director’s work in the late 1940s and early 1950s, and consisted of grounding antitrust decisions in economic efficiency.

Of course, the relationship between antitrust law enforcement and economics was forged long before the Second Chicago School. Economic theory had been a part of antitrust debates at least since the 1930s, with the monopolistic competition model during the New Deal<sup>5</sup> and J. M. Clark’s workable competition theory, for example.<sup>6</sup> However, the Chicago School did not always advocate economic efficiency as the sole criterion for antitrust authorities. The First Chicago School in the 1930s, which included economists such as Frank Knight, Jacob Viner, and Henry Simons, supported an interventionist antitrust policy to avoid excessive market concentration. For instance, Simons critiqued New Deal planning experiments such as the National Industry Recovery Act (NIRA) and advocated robust antitrust enforcement, including some de-concentration of

1. Orbach, “Was the Crisis in Antitrust a Trojan Horse?”

2. *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 38 (1977).

3. Ginsburg, “Originalism and Economic Analysis,” 223.

4. *Ibid.*, 231.

5. Chamberlin, *The Theory of Monopolistic Competition*, 1933.

6. Clark, “Toward a Concept of Workable Competition,” 241–256.

U.S. industry: “Here we see champions of free markets promoting antitrust and competition as preferable to government regulation, planning, or ownership.”<sup>7</sup>

The rupture produced by the Second Chicago School was not just to conclude that economics matters, but also to consider that economic efficiency was the exclusive purpose of antitrust law enforcement. Policy makers did not discover economics with the Chicago School; they merely adapted their theoretical framework to include the prescription of reliance only on economic factors. The Chicago School still predominates antitrust law enforcement. Nicola Giocoli states, “Yet, surprisingly enough, Chicago-style ALE [antitrust law and economics] ... still dominates case-law. Like an old lady, whose allure defies age and physical decay, Chicago’s charm looks almost intact among antitrust enforcers.”<sup>8</sup> Among the qualities of this theoretical framework, the administrability of its prescriptions is something with which post-Chicago models—also known as the “New Industrial Organization”—from the 1980s cannot compete. These theoretical advances, based mostly on game theory models, deliver more accurate results, but fail to provide general and unquestioned insights because their conclusions are case specific and highly dependent on the chosen parameters.<sup>9</sup>

This article addresses the following questions: How and to what extent the (Second) Chicago School has become dominant in U.S. antitrust law? How did the First Chicago School incorporate distributive concerns and eventually shift to a version of antitrust that presents itself as completely apolitical and “neutral”? Economic analysis as a scientific tool as well as the political and historical context, is the key. To contain the scope of analysis, we focus on Section 2 of the Sherman Act—that is, monopolization of the market. This refers to the capacity of the firm to exclude competitors from the market on a basis other than merit, which is a more emblematic illustration of antitrust policy and also more difficult for scholars and practitioners to characterize. The case of the controversial and quickly withdrawn report by the Department of Justice related to single-firm conduct in 2008 testifies to this vigorous debate.<sup>10</sup> This polarization contrasts

7. Kovacic and Shapiro, “Antitrust Policy,” 49.

8. Giocoli, “Old Lady Charm.”

9. See, e.g., the classic book *The Theory of Industrial Organization*, by the 2014 Nobel economics laureate Jean Tirole.

10. The report came to a climax in its very cautious (and therefore Chicagoan) approach to potential abuses by monopoly firms. In other words, the report advocated for the development of safe harbors for certain unilateral practices. The report was released after a series of joint hearings, involving more than 100 participants, including the most influent Chicago scholars. “Many panelists supported a market-share safe harbor in section 2 cases” (p. 24).

with cases of mergers and coordinated practices issues. Contrary to the 1960s and 1970s, the debate on the risks of overenforcement of antitrust law provision related to mergers is less accurate. In the same way, public enforcement of Section 1 of the Sherman Act has always been in place, whatever the political shift.<sup>11</sup> This contrasting treatment may be explained by the shared view that collusive agreements among competitors are inexorably harmful to the consumer. However, the dynamics of Section 2 may be generalized to other areas of regulatory policy. The cases of deregulation in network industries are other striking examples of such dynamics.

We limit our analysis to an endpoint in the early 1980s for both historical (the reversal of the U.S. Supreme Court relative to monopolization cases and the appointment of William Baxter as the head of Antitrust Division by President Reagan), and theoretical reasons (the rising influence from the 1980s onward of post-Chicago models, making Chicagoan clear-cut results more contestable). Thus, we do not address the Post-Chicago School's reliance (from the early 1980s) on firm strategy and game theory. We analyze the paradigm shift in U.S. antitrust enforcement but do not deal with the issue of whether the U.S. Supreme Court perfectly embraces the Chicago message or develops a synthesis between Harvard and Chicago prescriptions.<sup>12</sup>

As discussed later, the Chicago School has led to the economization of antitrust law. From a social perspective, the Chicago choice to frame efficiency as the exclusive goal of antitrust may have had some unexpected implications in terms of distributional aspects of wealth creation. Nonetheless, nowadays, despite critics of the underlying oversimplification of economic models used in antitrust litigation, the Chicagoan influence lies in its capacity to provide clear-cut conclusions about what is efficient and what is inefficient. Actually, the Chicago School in its origins bitterly criticized *per se* rules (an *ex ante* description of what is banned or allowed related to market strategies), which ultimately led to the 1977 *GTE Sylvania* decision that overturned a longstanding *per se* rule against vertical restraints and allowed for a *rule of reason* (an *ex-post* overall evaluation of the different consequences). We argue that the *tour de force* was the

11. See, e.g., Levenstein, "Escape from Equilibrium," 710–728.

12. The complexity of the economic literature and the diversity of the results of alternative models make it very difficult to trace a clear-cut influence of a given economic theory on legal ruling. Therefore, the actual and current effective influence of the Chicago School on U.S. Supreme Court case law is difficult to define. The economic literature provides different views about the dominant paradigm (Chicago, Harvard or both) (Kovacic, 2007), or contests the possibilities for and even the necessity of characterizing such a paradigm (Kobayashi and Muris, 2013).

School's success in simplifying its recommendations and, therefore, its reliance on per se rules, in terms not of unlawfulness but of lawfulness. In the end, the promotions of these new per se rules may be explained by the Chicagoan scholars' fear of ungrounded decisions.

The paper is organized as follows. The first section outlines the absence of economic analysis in the foundations of U.S. antitrust legislation, given the passage of the Sherman Act in 1890. The second section highlights U.S. economists' very cautious antitrust views until the Second New Deal. The third section analyzes the process by which the Chicago School developed a general and coherent framework for antitrust, and passed from theory to practice. The final section discusses the implications of Chicago School thinking, particularly the unexpected and spectacular tendency to advocate for per se rules, and then broadens the discussion on the long-run impact on economic and social inequalities of this polarization of economic efficiency.

### The (Almost) Noneconomic Sherman Act (1890–1936)

In this section, we demonstrate that the origins of the economization of antitrust, as defined earlier, are not rooted in the 1890 Sherman Act. This act is considered to be the first U.S. antitrust law.<sup>13</sup> Section 1 prohibits agreements about “restraints of trade” and Section 2 outlaws monopolization—that is, exclusion of competition.

What has come to be known as the first pillar of antitrust initially included very few elements related to economic analysis. What at first sight might seem surprising might be partly explained by the state of U.S. economic thinking in the 1890s.<sup>14</sup> Before we analyze the details of how the Sherman Act was created, it is important to note that economic analysis was in its infancy when Congress was debating it. A few years later, in 1897, Irving Fisher published the translation of Cournot's famous 1838 book on mathematical approaches to economic activity.<sup>15</sup> Only from that time forward was an analytical link between market shares and market power feasible. In 1890, the tools were not available.<sup>16</sup>

13. In the online appendix, we provide a timeline describing historical fact, legislative acts, and legal and economic schools of thought.

14. Orbach, “How Antitrust Lost Its Goal,” 2253–2277.

15. Cournot, Fisher. *Researches into the Mathematical Principles of the Theory of Wealth*.

16. Barak Orbach summarizes the general economic knowledge by adding that “when Congress debated the Sherman Act, economists sharply distinguished between trusts (monopoly) and competition. Some prominent economists, like John Bates Clark, defended the trusts and monopolies, expressing confidence in the effectiveness of potential competition and other theories. Overall, it is fair to state that, when Congress considered the Sherman Act, American

Indeed, “leading economists of the day had very little influence on the passage of the Act.”<sup>17</sup>

Although Judge Robert Bork<sup>18</sup>—one of the U.S.’s most influential legal scholars<sup>19</sup>—identified the defense of consumer welfare (“consumer welfare hypothesis”), there is also a large body of literature that pleads for the defense of small businesses against trusts (the “small-business hypothesis”). As Anne Mayhew argues, there is no doubt that output rose and prices fell with the development of the Standard Oil Trust during the 1870s and 1880s. Protest against Standard Oil originated not with consumers, but with less-efficient competitors. Finally, Robert Lande gives three reasons for the passing of the Sherman Act: preventing monopolistic transfers of wealth from consumers to trusts, enhancing productive efficiency to allow consumers also to benefit, and reducing the social and political power of large aggregations of capital and providing opportunities for small entrepreneurs.<sup>20</sup>

### *The Complex History of the Sherman Act*

The enactment of the Sherman Act has a very complex history, which is not traceable to any clear purpose other than the feeling at the time that “something ought to be done about the trusts.”<sup>21</sup>

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economists mostly held an intuitive understanding that monopolies lead to high prices, while competition in the form of a marketplace with many sellers drives prices down. With such intuitions, the protection of small businesses may seem to serve competition. Small businesses allegedly contributed to competition, as it was understood at the time” (Orbach, “How Antitrust Lost Its Goal,” 2263).

17. Lande, “Wealth Transfers as the Original and Primary Concern of Antitrust,” 88. In his 1982 Richard T. Ely Lecture, Stigler added a touch of humor in saying, “A careful student of the history of economics would have searched long and hard, on July 2 of 1890, the day the Sherman Act was signed by President Harrison, for any economist who had ever recommended the policy of actively combatting collusion or monopolization in the economy at large” (Stigler, “The Economists and the Problem of Monopoly,” 3).

18. Bork, “Legislative Intent,” 7.

19. Indeed, Robert Bork is fully representative of the Second Chicago School of antitrust. First, he was one of the first most productive young scholars associated with Director and Levi’s research program. In 1954, he published a striking case-based article criticizing the treatment of vertical integration under the Sherman Act (Bork, “Vertical Integration”). Second, according to Posner, his 1978 book *Antitrust Paradox* embodies “the most complete and most orthodox statement of the Chicago position” (Posner, “The Chicago School of Antitrust Analysis,” 926).

20. *Ibid.*

21. Dewey, “Antitrust: Science or Religion,” 414. The antitrust critique of big business flourished in the U.S. during the 1880s. See John, “Robber Barons Redux: Antimonopoly Reconsidered,” for placing the robber baron in his cultural and institutional context.

The Sherman Act's difficult legislative "delivery"<sup>22</sup> explains the absence of any clear-cut definition of its legislative intent, which left the door open to controversies over its core meaning.<sup>23</sup> In addition, its enforcement by the federal courts favored significant reversals in its interpretation, and encouraged implementation of bypass strategies such as the Clayton and the FTC Acts of 1914, and their later amendments.

The crucial point is interpretation of the Sherman Act's legislative intent, which has been debated by legal and economic scholars, as well as historians, ever since.<sup>24</sup> In a striking 1966 article, Judge Robert Bork admitted "that many of the legislators who voted for the Sherman Act may have had values in mind in addition to or other than consumer welfare."<sup>25</sup> However, he added that "not only was the consumer welfare the predominant goal expressed in Congress but the evidence strongly indicates that, in case of conflict, other values were to give way before it."<sup>26</sup> Consequently, consumer welfare considerations must impose themselves in judicial decision.<sup>27</sup> Judge Bork also wrote, "For a judge to give weight to other values, therefore, can never assist in the correct disposition of a case and may lead to error. In short, since the legislative history of the Sherman Act shows consumer welfare to be the decisive value, it should be treated by a court as the only value."<sup>28</sup> As Bork acknowledged, the problem is that the interpretation of the underlying, fundamental value of the U.S. antitrust laws varied throughout more than a century.<sup>29</sup> Judge Learned Hand's views in *Alcoa* or *Associated Press*<sup>30</sup> in 1945 were obviously not based on the consumer welfare criterion. Judge Hand wrote in the *Alcoa* decision that the Sherman Act aims to preserve a situation of effective competition with no regard for cost considerations. Thus, antitrust

22. See among others, Kolasky, "Senator John Sherman," 85–89.

23. Stigler, "The Sherman Act," 1–12.

24. We do not discuss the extent to which the Sherman Act addressed contemporary economic problems. Some scholars consider that its promulgation cannot be explained by consumer welfare protection since the targeted trusts were expanding output and reducing prices in their market at more than the average level recorded in U.S. industry at that time (DiLorenzo and High, "Antitrust and Competition," 423–435).

25. Bork, "Legislative Intent," 10.

26. *Ibid.*

27. In *The Antitrust Paradox*, Bork again insisted on this point: "conventional indicia of legislative intent overwhelmingly support the conclusions that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare" (Bork, *Antitrust Paradox*, 71).

28. Bork, "Legislative Intent," 11.

29. Kovacic and Shapiro, "Antitrust Policy," 43–60.

30. *United States v. Aluminum Co. of America*, 148 F.2d 416, 428, (2nd Cir. 1945); *Associated Press v. United States*, 326 U.S. 1 (1945).



laws are interpreted as a tool that judges may use to prevent or to correct excessive concentrations of market power.<sup>31</sup>

The history of the enactment of the Sherman Act explains these conflicting interpretations and its remarkable plasticity. First, Sherman's proposal was closely linked to the late 1880s debates between Republicans and Democrats.<sup>32</sup> The Republicans advocated a protective tariff policy to defend domestic industries. At the same time, price increases might be also explained by the consolidation of U.S. industry. The Republicans feared that the Democrats would benefit from the public antipathy toward trusts. They saw the challenge as avoiding excessive government interventions against firms and lowering tariff barriers. The legislative story of the act is complex. Sherman's wording was vague (promoting free and full competition to guarantee increased production and lower prices) and it was entirely rewritten by the Judiciary Committee of the Senate, which pushed Sherman outside the legislative process. One result was that Sherman was sharply critical of the law that bore his name.<sup>33</sup>

Second, the specificity of the enactment of the Sherman Act might explain its very specific enforcement regime in terms of the role given to the courts. Debate on the competence of Congress to regulate commerce was particularly heated. According to William Kolasky, to defuse the conflict, Sherman argued that antitrust laws did not constitute real novelty and could be integrated within the principles of U.S. common law.<sup>34</sup> Therefore, enforcement should be the responsibility of the federal courts. This tactical choice raised two major difficulties. The first relates to the issue of delegating to federal courts choice among conflicting values; the second relates to the room given to late-nineteenth-century Conservative courts to thwart this legislative activism.

31. "We have been speaking only of the economic reasons which forbid monopoly: but ... there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress, Senator Sherman himself... showed that among of the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them. ... Throughout the history of these statutes (the antitrust laws including the Sherman Act), it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other". *United States v. Aluminum Co. of America*, *ibid.* See Winerman and Kovacic, "Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act."

32. Kolasky, "Senator John Sherman," 85–89.

33. Thorelli, *The Federal Antitrust Policy*.

34. Kolasky, "Senator John Sherman," 85–89.

### *The Vague and Noneconomic Foundations*

The legislation provided very vague provisions and gave no guidance to judicial authorities responsible for its enforcement. The central terms, including “competition,” “unfair methods of competition,” “conspiracy in restraint of trade,” and “monopolize,” are not self-defining. Consequently, the core meaning of the provisions of the Sherman Act were determined in practice. In other words, the designated task was to elaborate a “working definition of competition.”<sup>35</sup> The close connection between decisional practice and theory can be seen as a consequence of this inner nature of U.S. antitrust. Although there is a political cycle,<sup>36</sup> particularly for public enforcement, the first years of the twentieth century demonstrate that there is also a longer cycle explained by the percolation of an economic idea throughout the legal system. A dominant economic conception of the meaning of competition played irreversibly on judges’ conceptions, as Justice Oliver W. Holmes described in *The Common Law* (1881).

However, U.S. antitrust history demonstrates that theoretical economic debate was not the driving force of antitrust evolution; its influence was present from the 1970s, but there is a significant gap between academic controversies and the reversal of case law. Although this delay might be explained by the specificities of antitrust enforcement (such as the composition of the U.S. Supreme Court),<sup>37</sup> it might also be indicative of a not-so-dominant position of economics in the shaping of competition policy. For example, Senator Sherman’s letters confirm that consumers were not among his priorities in formulating antitrust law.<sup>38</sup> Small oil businesses sent numerous letters to Senator Sherman asking him to take action against Standard Oil, complaining about the rebates Standard Oil received from the railroads. The corporation was able to take advantage of these rebates only because it shipped its oil in tank cars rather than in barrels. Small competitors asked the senator to introduce legislative regulations prohibiting tank car rebates. Sherman eventually did so, but was never able to secure their passage. Analyzing Sherman’s letters in historical context, Werner Troesken argues that “although small oil refiners were disappointed when Sherman failed to deliver an anti-tank car law, they were apparently quite satisfied when he secured passage of Sherman Antitrust Act in 1890.”<sup>39</sup>

35. Bork, *Antitrust Paradox*.

36. Baker, “Political Bargain,” 483–530.

37. Critics of the U.S. Supreme Court’s “conservatism” (see Breyer, “Economic Reasoning,” F123–F135).

38. Troesken, “The Letters of John Sherman,” 275–295.

39. *Ibid.*, 282.

This adds to the evidence that the Sherman Antitrust Act was probably never intended to increase social welfare.<sup>40</sup>

Another example of the lack of economic analysis is also supported by Sherman's correspondence. Even though he reasoned with small oil producers that were using less-advanced technology (barrels vs. tank cars), Sherman made no effort to help businesses that were harmed by vertical restraints. His antitrust proposals did not address such restraints in any way. His stance was in sharp contrast to the positions of other state and federal legislators who claimed that vertical restraints could have expressly anticompetitive effects.<sup>41</sup> Anne Mayhew notes insightfully, "Neither the economists nor the lawyers of the day lobbied for the Sherman Act as a way of preventing monopolistic pricing."<sup>42</sup>

### Economics and Antitrust Law Enforcement: A Late Marriage

Following this demonstration in the preceding section that economics did not initially shape antitrust laws, we now seek to show that economic matters were not always seen as crucial in antitrust law enforcement. U.S. economists had long been circumspect toward antitrust law. Interestingly, although economic theory had recently converged with the everyday reality of antitrust law enforcement, the dominant conception of the core purpose of the Antitrust Act evolved over time. Leading U.S. economists were cautious about antitrust legislation, seeing it as echoing classical theoretical economics models that appeared distant from the U.S. economic dynamics, yet they considered these laws relevant tools for sanctioning undue wealth transfers at the expense of consumers and market actors deprived of economic power, and for ensuring a desirable level of dispersion of economic power, to preserve both economic and political liberties.

We first analyze the initial distrust of antitrust among U.S. scholars, from its enactment to the first New Deal with the NIRA, and then examine the reversal induced by the renewal of antitrust law enforcement during the second New Deal. Finally, we highlight that such an evolution—broadly independent of any theoretical dispute—converged to a consensus among U.S. economists on the appropriate role of antitrust law.

40. DiLorenzo, "The Origins of Antitrust: An Interest-Group Perspective," 74.

41. Troesken, "The Letters of John Sherman," 287.

42. Mayhew, "The Sherman Act as Protective Reaction," 390.

### *A Long Mutual Ignorance*

The choice of judicial enforcement was a means to limit government interference in the economy. Such an institutional device needs to be analyzed in light of U.S. debates between the 1880s and the 1930s, opposing legal realists and institutional economists<sup>43</sup> and laissez-faire promoters. The legal realists we would describe as progressives considered that the state had a role to play in controlling market transactions and promoting an economic welfare oriented view of the common good.<sup>44</sup> The main opposition to this interventionist program came from the judicial arena, as Justice Holmes (1897) stated in his seminal article, “The Path of the Law.” The treatise by Christopher Tiedeman laid the foundations for the principle according to which a legislative majority must be constrained in its decisions by the individual rights protected by the U.S. Constitution.<sup>45</sup> The “Due Process of Law” clause and the Fourteenth Amendment are interpreted as severe limitations on government’s policy power. From this constitutionally based conception of limited government power stemmed numerous court decisions that limited the scope of state intervention to defend the principles of freedom of contracts and protection of private property.<sup>46</sup>

The opinions of the legal realists and the institutional economists were polarized in their criticism of the Court’s conservatism, which was rationalized by the doctrine of *classical legal thought*. This doctrine justifies constraining the legislature’s decisions through the

43. Institutional economists—whose figureheads were John Rogers Commons and Thorstein Veblen—focus directly on the role of institutions (e.g., the firm, the state, the market) in shaping economic behavior. For further details on institutional economics, see Dewey and Rutherford, “Institutionalism, old,” 374–381.

44. Fried, *The Progressive Assault on Laissez Faire*. See also Kitch, “The Fire of Truth,” on the influence, in the 1930s, of legal realism in shaping law departments to an economic approach. “It is clear that legal realism made people in law schools open to the social sciences. ... In the years that followed, American law schools were to try them all. That environment was receptive to the introduction of economics into a law school” (ibid., p. 165). This is part of a great discussion that took place in a 1981 conference in Los Angeles that gathered the most famous tenants of the Chicago School, such as Bork, Director, Friedman, Posner, and Stigler, among others.

45. Tiedeman, *A Treatise on the Limitations of Police Power*.

46. The main stumbling blocks were undoubtedly the Fifth Amendment to the U.S. Constitution according to which “no person shall be ... deprived of life, liberty, or property, without due process of law” and the Fourteenth Amendment, promulgated just after the Civil War, that prohibited State laws whose effects might lead to depriving citizens of these rights. With its 1872 Slaughter-House Cases, the U.S. Supreme Court adopted a very extensive view of this clause. The term “person” was thereafter interpreted very broadly to encompass firms, and liberty was assimilated to the notion of freedom of contract. Each firm is free to decide to contract or not to contract, and to set the contractual terms, e.g. prices, without restriction.

logical functioning of the common law and the principles of the U.S. Constitution. In contrast, realists, such as Justice Holmes, in his dissent in *Lochner*,<sup>47</sup> considered that “general propositions do not decide concrete cases.” In other words, rulings must also be based on an assessment of their economic and social implications and on the “felt necessities of the time.”<sup>48</sup> Despite these determined contestations, the Supreme Court defeated state interventionism toward market practices (both limiting anticompetitive practices and regulating tariffs or contractual conditions). From the 1905 *Lochner* decision to the 1937 *West Coast Hotel Co v. Parrish*<sup>49</sup> decision, the two pillars of constitutional laissez-faire—freedom to contract and the protection of private property—thwarted regulation policies and antitrust enforcement.

U.S. economists’ mistrust of antitrust enforcement did not falter until the Second New Deal in 1936.<sup>50</sup> In this, economists were not alone. Legal scholars and politicians were equally dissatisfied about the Sherman Act’s institutional framework, and the conditions of its enforcement by the courts, as demonstrated by the Clayton Act and the Federal Trade Commission Act (both 1914). However, if their critiques of court rulings were based on the lack of consideration of their economic impact because of the prevalent legal dogmatism of the judges, this is not to say that these criticisms were founded on the argument of consumer welfare maximization. Indeed, the main theoretical concept of the institutional economists was the transaction. Analyzing transactions assumes consideration of the distribution of property rights. Transactions create both vertical relationships among individuals and the goods they own, and horizontal relationships among people through contracts. These relationships produce significant coercive power among those contracting. The parties can no longer be considered purely independent. In addition, they cannot benefit from equivalent negotiating powers, as property rights are not equally distributed among people. Consequently, in some transactions, only one of the counterparts can benefit from the capacity to refuse to contract or to withdraw from the transaction. Demonstrating the existence of market power is possible,

47. *Lochner v. New York*, 198 U.S. 45 (1905).

48. “Life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become” (Holmes, *The Common Law*).

49. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

50. Stigler, *The Economist as Preacher*.

which implies a coercive effect on the second party to the transaction, whose freedom of choice is constrained. Antitrust intervention is grounded not in old institutional economists' views of consumer welfare maximization but on the notion of freedom of choice.<sup>51</sup>

As Barbara Fried notes, if a firm had a de facto monopoly on necessary goods, it could refuse to sell the goods or could threaten not to sell them except on payment of an extortionate amount.<sup>52</sup> This implies both exclusionary and exploitation abuses that are not grounded in consumer welfare maximization but in coercive power, such as market power. Institutional economists consider that such behaviors threaten competition, in the same way as government intervention might. In their views, courts do not have to protect such powers on the basis of constitutional principles, and at the same time censure government interventions that aim to correct their effects. Coercive powers affect transactions among individuals, and, consequently, other constitutional rights. For institutional economists, the proper arbiter is the legislature, not the courts. Government intervention—as the Freiburg School promoted after World War II—is grounded in a positive theory of freedom through law (accessing the market, benefit from fair price conditions). Put differently, U.S. economists considered antitrust law enforcement as one of the tools, together with legislation and public utilities regulation, for the necessary “social control” of economic activities. These scholars believed that contemporary economic problems could be managed through “intelligent handling” in legislation.<sup>53</sup> Nevertheless, antitrust was viewed with considerable as long as its enforcement was the responsibility of the courts. The Supreme Court's legal interpretation of the scope of government intervention (as in price regulation) was so restrictive that institutional economists were doubtful about the possibility to control the exercise of coercive power through the Sherman Act.

The progressive era debate that led to the Federal Trade Commission (FTC) Act in 1914 exemplifies the wide mistrust of antitrust. The FTC Act's statutes allow avoidance of judicial enforcement of its decisions, unlike Sherman Act-based cases, which are enforced by the courts.<sup>54</sup> Thus, U.S. scholars and decision makers were all the more reluctant vis-à-vis the Sherman Act's judicial enforcement for public debate to be “monopolized” by the concept of “new competition.” The latter advocated for inter-firm cooperation through information exchange

51. Giocoli, “Competition vs. Property Rights,” 747–786.

52. Fried, *The Progressive Assault on Laissez Faire*.

53. Hamilton, “The Institutional Approach to Economic Theory,” 312.

54. Kovacic and Winerman, “Competition Policy and the Application of Section 5,” 929–950.

regarding prices and output decisions to stabilize the market process. For example, the American Fair Trade League, personified by the future Justice Brandeis,<sup>55</sup> ran a campaign in favor of coordination of companies aimed at fostering market stability and eliminating “cut-throat competition.”<sup>56</sup> From these perspectives, the best system was regulated competition, following the example of the War Industries Board established in July 1917. Such a technocratic view of “managed competition” was nothing other than a negation of antitrust principles, especially in their future Chicagoan orientation. This view received its greatest recognition with the First New Deal within NIRA promulgated by the Roosevelt administration. The NIRA sought to protect—and even to promote—coordination of practices and was initially well accepted by scholars, because they considered that such an organization favored the monitoring of business practices in the public interest.<sup>57</sup> Antitrust prosecution was almost entirely suspended until the reversal imparted by the Second New Deal.<sup>58</sup>

### *The Second New Deal and the Rediscovering of the Sherman Act*

During the First New Deal, antitrust laws seemed to be permanently marginalized. However, President Roosevelt’s stance on economic policy was quite complex. His views on the relationships with big business were balanced by completely opposing tendencies, such as Theodore Roosevelt’s New Nationalism and the Woodrow Wilson’s New Liberty. New Nationalism favored significant regulatory powers for the federal government to counterbalance corporate power, whereas

55. Louis D. Brandeis’ support for the American Fair Trade League echoes with his advocacy for a “regulated competition” (see Berk, *Brandeis and the Making of Regulated Competition*). Berk demonstrates that Brandeis paved a third way between populist Democrats, according to whom the concentration of economic private powers endangered democracy, and Progressives, considering that large-scale corporations result from economic efficiency and must therefore be regulated. However, Brandeis argues that conventional tools of regulation are ineffective to address this issue; a third way of a “regulated competition” should be experimented with. The early FTC embodied such an approach, combining coercive interventions against predatory methods of competition and a “cultural governance,” consisting of the dissemination of best practices among firms and in the implementation of benchmarking tools (see also Childs, “Gerald Berk. Louis D. Brandeis,” 840). Brandeis refers to a Republican alternative produced by a “syncretic” view between a progressive faith in scientific expertise and a populist affinity with market discipline. According to Berk, the spirit of the cultural regulation survived to Supreme Court’s rulings and influenced the NIRA experience.

56. Tadajewski, “Competition, Cooperation and Open Price Associations,” 122–143. See also Childs, “Gerald Berk. Louis D. Brandeis,” 839.

57. Rutherford, “Walton Hamilton,” 1385–1407.

58. Gressley, “Thurman Arnold, Antitrust, and the New Deal,” 214–231.



New Liberty sought to strengthen antitrust laws to preserve economic liberty despite the concentration of private economic powers.<sup>59</sup>

The failure of the NIRA constituted a breaking point for U.S. economists' views of antitrust laws. Renewed public enforcement, with the appointment in 1938 of Thurman Arnold as head of the Antitrust Division of the Department of Justice, represented a new start, favored by a "progressive" shift within the Supreme Court.<sup>60</sup> Revived enforcement by the Roosevelt administration contrasted sharply with the NIRA, which the Supreme Court rejected. The First New Deal supported a quasi-suspension of antitrust laws to promote close cooperation among firms, labor unions, and government. The aim was to frustrate what appeared to be self-destructive competition that pushed down prices and deterred investment decisions and employment, ignoring what then appeared to be outdated liberal policies. It might be considered paradoxical that the impossibility of pursuing cooperation between government and firms and promoting close coordination among competitors had led the Roosevelt administration to revive inverse conditions.

Several factors might explain this reversal. First, the New Dealers were not a homogeneous group. As Hawley and Freyer underline,<sup>61</sup> some were still advocating for a reconstruction of the New Deal policies for cooperative planning, whereas others, such as Robert Jackson, who in January 1937 was appointed the assistant attorney general for the Department of Justice's Antitrust Division, proposed to renew it through an active antimonopoly campaign. Jackson's success in convincing President Roosevelt might be explained by the then current macro-economic situation and by the president's views on economic matters. According to Freyer, Franklin Delano Roosevelt "generally

59. See also Nachbar (2013) for an analysis of antitrust laws as a tool for depriving private economic powers of regulation power. Accordingly, the logic of *per se* rules in vertical restriction matters is not related exclusively to allocative efficiency concerns ("market harm"), but it also affects "regulatory harm." This latter corresponds to the restriction imposed by private economic powers in terms of freedom of choice and contractual liberties. In a nutshell, a monopolist's property rights might be considered regulation of the use of the product concerned (Brandeis, 1934).

Because these two dimensions cannot be balanced, the rule of reason should not be applied. To sum up, the logic of the 1977 *GTE Sylvania* decision, according to which the net effect of a vertical restriction on efficiency has to determine the ruling, is the exact opposite of the New Deal era decisions in *Fashion Originators Guild of America v. FTC*, 312 U.S. 457 (1941), in which the restrictions imposed by guild members on distributors in order to avoid model copying, were condemned *per se* although they might be welfare enhancing.

60. Judge Bork emphasized that, for forty years, the U.S. Supreme Court counteracted the tendencies of the Congress to use antitrust laws as a lever for social reforms (Bork, "Legislative Intent," 7–48).

61. Hawley, *New Deal*, 12–13; Freyer, *Antitrust*, 10.



conceived of economic issues in terms of rights and wrongs.”<sup>62</sup> In the case at hand, the failure of his initial policy and the economic context characterized by rising prices and concomitant stagnation of wages and employment may be imputed to lack of support from big business. In sum, the wage-price imbalance was seen simultaneously as a major obstacle to the recovery, and as fostering political support for more activist antitrust enforcement. Again, fifty years after the Sherman Act’s passage, the social consensus was that something must be done about the trusts. However, antitrust laws were challenged for seeming to be based on a perfect competition theory framework that took no account of either the economic realities of large firms enjoying economics of scale and scope, or the theoretical advances in understanding imperfect competition. Competition could no longer be considered effective rivalry among small units. At the same time, it seemed necessary not to ward off the effects of the concentration of economic power in light of the contemporary situation in Germany.

Assistant Attorney General Jackson patiently worked to pave the way for President Roosevelt’s 1938 antitrust speech by advocating that big business should be accountable and by reorganizing the Antitrust Division, putting the emphasis on economic advisors’ support to handle the increasing demand for economic data. The antimonopoly study committee created in October 1937 was another step toward a political inflection, preceding the president’s 1938 message to Congress, in which he announced that the Department of Justice should collate material on monopoly abuses and possible remedies.

The pro-antitrust tendency progressively prevailed over the promoters of a new NIRA policy. The renewal of a kind of cooperative approach with big business was no longer on the agenda, as the recession was blamed on “the lack of purchasing power of the lowest income classes”<sup>63</sup>—a result, to some New Dealers, of a “capital strike” against the government. Again, antitrust laws were not conceived as a tool to promote economic efficiency (as market concentration was considered to produce welfare gains), but rather as a means to sanction undue transfers of wealth among economic agents.<sup>64</sup> Such transfers not only raised distributional concerns within society, but also imperiled its growth potential by depressing effective demand. In addition, the question of the rise of private economic powers, and the risks this induced for the democratic system, were crucial to

62. Freyer, *Antitrust*, 10.

63. Freyer, *Antitrust*, 18.

64. This concern is seen as the same concern that led to enactment of the Sherman Act, as Robert Lande underlines, “if Congress primarily had cared about enhancing economic efficiency, it would have enacted ‘protrust’ laws, not ‘antitrust’ laws” (Lande, “A Traditional and Textualist Analysis,” 2360).

President Roosevelt's view. Although efficiency constraints demand concentration, they might well impair the consumer welfare of individuals and small firms' economic opportunities. In this respect, Robert Lande's views about the purpose of antitrust laws provide a more fruitful analytical lens to explain the Second New Deal's political shift than Bork's more polarized view of efficiency.<sup>65</sup>

The appointment of Thurman Arnold as head of the Antitrust Division might be seen as controversial, considering his initial views on the Sherman Act. Earlier, as a Harvard law professor, Arnold had been influenced by the legal realists, and consequently was doubtful about the classical theoretical framework that apparently shaped the Sherman Act, and about its judicial enforcement, considering the Supreme Court's long-standing conservatism. If Arnold initially saw monopolies as necessary public evils, the Great Depression led him to tackle the issue of private economic power. The coercive power of monopolies in economic transactions allowed them to exclude competitors from the market and to extract excessive rents at the expense of consumers and economic partners.

A convergence between the economic and legal fields, embodied in Mason's articles on adapting economic analysis of antitrust to imperfect competition theories and providing suitable economic tests with increasing budgetary resources, supported the Antitrust Division's actions.<sup>66</sup> Some simple data allow a quick overview of the strength of the political impulse. Freyer shows that in 1937–38, the Antitrust Division had instituted only eleven cases and fifty-nine “major” investigations, but by 1939–40 it had commenced ninety-two cases and 215 investigations and, in that same fiscal year, won thirty-one of its thirty-three concluded cases.<sup>67</sup> The *Socony-Vacuum Oil Co.* Supreme Court decision<sup>68</sup> constitutes a landmark that is fully

65. We could discuss the place of efficiency-related concerns in these two approaches (see, e.g., Lande, 2013; 2354). First, the wealth-transfer-centered approach cannot be seen as neutral in terms of its allocative efficiency. Indeed, any welfare transfer among economic actors has efficiency consequences since production, investment, and consumption choices are altered vis-à-vis a perfect competition setting. Second, the consumer welfare criterion is insufficiently discussed, as there is no reason why a producer enjoying a monopoly position will pass on gains to the final consumer. In other words, the balance between anticompetitive and efficiency enhancing effects is based on a purely hypothetical compensation scheme. As Lande (2013; 2360) claims, “the [Bork's] deceptive use of the term ‘consumer welfare,’ instead of the more honest term ‘total welfare,’ was a brilliant way to market the efficiency objective.”

66. These rose from \$200,000 before 1937, to \$440,000 for the fiscal year 1937–38, \$780,000 for 1938–39, reaching \$1,325,000 in 1939–40 and 1940–41 (see Freyer, 2006, p. 28).

67. Freyer, Antitrust, 27.

68. *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

representative of this policy shift. The decision of this firm to purchase the surplus produced by independent refiners made sense according to the values promoted by the NIRA. Such behavior led to stable prices and allowed the firm to recoup its fixed costs. However, its efficiency-based defense was rejected by the Supreme Court, based on the Antitrust Division's position that such an arrangement should be sanctioned as price fixing.

### *A Political Shift Finding Its Theoretical Foundations*

From a theoretical point of view, two converging movements amplified this turn. The first was the hitherto unseen support from institutional economists for the antitrust laws,<sup>69</sup> and the second was the shift made by former laissez-faire champions abandoning traditional English-style liberalism, to the neo-liberal model, accepting government interventions aimed at preserving the competitive process.<sup>70</sup>

The First Chicago School, whose figureheads were Frank Knight, Jacob Viner, and Henry Simons, considered that the concentration of economic power needed also to be restrained to ensure both its dispersion and political decentralization.<sup>71</sup> Indeed, the institutional economists' perspective on government intervention and antitrust enforcement, paradoxically was more or less accepted by the First Chicago School in the late 1930s. Despite its reaffirmed liberalism, to which Knight's criticism of the institutional economists' concept of social control testifies,<sup>72</sup> Chicago scholars accepted a stronger enforcement of antitrust laws to correct market dynamics.<sup>73</sup> The First Chicago School took a position very close to those of the late U.S. institutional economists, advocating for formal rules at the expense of implementation of the *rule of reason*.<sup>74</sup> They also supported the prevention and—at the extreme—the prohibition of acquisition of substantial monopoly power “regardless of how reasonably that power may appear to be exercised.”<sup>75</sup> In brief, until the 1950s the First Chicago School supported anti-monopoly policies to thwart the concentration of economic power and to “ensure that no single corporation

69. Mayhew, “Love the Sherman Antitrust Act,” 179–201.

70. Mirowski and Plehwe, *The Road from Mont Pèlerin*.

71. Van Horn, “Chicago's Shifting Attitude,” 1527–1544.

72. Knight, “The Newer Economics,” 433–476.

73. Simons, *A Positive Program for Laissez-Faire*.

74. On the views of neoliberal movements of the late 1930s on antitrust, and their possible (limited) convergence with the old institutional economics tradition in the United States, see Mirowski and Plehwe, *The Road from Mont Pèlerin*, describing the debates initiated by Walter Lippmann's contribution (Lippman, *An Inquiry into the Principles of the Good Society*).

75. Simons, *Economic Policy for a Free Society*, 58.

dominates an industry.”<sup>76</sup> Recognizing the legitimacy of positive state action to preserve the market process against the deleterious effects of the concentration of economic power was one of the basic features of its neoliberalism, and in line with the view of classical economists such as Adam Smith.<sup>77</sup>

Antitrust legitimacy rapidly evolved toward a more structuralist approach that assimilated the issue of economic power within market concentration. That was the Harvard School’s vision that emphasized the relationship between market power, business conduct, and market outcomes (the Structure-Conduct-Performance [SCP] paradigm). This school of thought emerged in the late 1930s when Harvard economists such as Edward Mason, Joe Bain, Carl Kaysen, and Donald Turner conducted empirical surveys into specific industries.<sup>78</sup> U.S. antitrust enforcement adopted such a structuralist dimension<sup>79</sup> “to preserve a diverse and pluralistic society hospitable to small business and the entrepreneur.”<sup>80</sup> The definition of competition converged toward an effective situation of rivalry among firms.<sup>81</sup> The living profit theory used by Judge Learned Hand in his ruling in the 1945 *Alcoa* case embodies this approach.<sup>82</sup> In this margin squeeze case,<sup>83</sup> the vertically integrated “dominant” operator was obliged to set its contractual conditions to avoid excluding competitors from the market (whatever their respective efficiencies) and allow them to make a reasonable profit.<sup>84</sup> This conception contrasted sharply with the then-current U.S. efficiency-centered approach.<sup>85</sup>

76. Van Horn, “Chicago’s Shifting Attitude,” 1532.

77. Viner, “The Intellectual History of Laissez Faire,” 45–69.

78. See, e.g., Kaysen and Turner, *Antitrust Policy* or Bain, “Barriers to New Competition.”

79. Thurman’s view on the scope of antitrust laws differs sharply from the conventional interpretation of the Sherman Act and definitely contradicts Robert Bork’s (1966) interpretation: “The Antitrust laws should be revised so that the government could strike at market domination, regardless of how the power over prices had been acquired and regardless of motive or intent” (Thurman, *The Folklore of Capitalism*).

80. Fox, “Antitrust as a Window,” 565.

81. “Through these years, the Supreme Court defined ‘competition’ as a process of interaction among numerous buyers and sellers, none too large. The process of competition would, it was thought, provide a fair and impersonal system of governance and prevent exploitation, coercion, and exclusion” (Fox, “Antitrust as a Window,” 554–588). Fox defined consumer interests in terms of “access to a variety of prices, quality, and service options.”

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

83. “A margin squeeze may occur when the dominant provider of an input is vertically integrated in retail activities that compete with its downstream customers.” Jullien, et al., “The Economics of Margin Squeeze.”

84. Sidak, “Abolishing the Price Squeeze,” 279–309.

85. Hovenkamp and Hovenkamp, “Antitrust Price Squeeze Claims,” 967.

## The Second Chicago School's Economization Defense

Economic theory provided significant support for a renewal of active antitrust enforcement. Whereas World War II had led to a more circum-spect approach than that of Thurman Arnold, the Truman administration found an equilibrium between the oligopoly structure of leading industries and an antitrust enforcement policy aimed at conciliating these private economic powers and preserving their accountability to the wider public interest and the economic opportunities of their competitors. Big business was accepted, but was also restrained by antitrust laws. Second Chicago School promoters initially challenged this middle course antitrust theoretically in the early 1950s, but their influence did not become significant until the Nixon presidency.

### *The Theoretical Construction of Pro-Trust Antitrust*

The reversal of the Supreme Court's decisional practice concerning antitrust law enforcement dates from the 1977 *GTE Sylvania* decision, and, as we will see, the late 1960s breakpoint in the Department of Justice Antitrust Division, from a theoretical point of view, might reach back to 1946. The replacement of Henry Simons by Aaron Director led the Chicago School to reconsider the "issue of monopoly."<sup>86</sup> Contestable market theory, according to which whatever the market concentration, the absence of barriers to entry is sufficient to produce a competitive environment,<sup>87</sup> was already subjacent. Benefiting from monopoly rents was seen as a key incentive to invest, which was the driving force of the competitive process. The market process was itself an equilibrating counterforce, as "competition, even if not visible, could undermine and destroy all forms of monopoly."<sup>88</sup> In contrast to its predecessor, the Second Chicago School prescribed a case-by-case approach based on assessment of the effects of a considered practice in the market. Chicagoan scholars rejected all judgment criteria grounded on intent or "fair market practices."

The Chicago School's great transformation cannot be appreciated without some understanding of Friedrich von Hayek's influence and the support of the Volker Fund, initiated by *The Road to Serfdom* (1944). The Volker Fund financed two successive programs within the University of Chicago, the Free Market Study (FMS) Project (1946–1952) and the Antitrust Project (1953–1957), both co-chaired by Aaron Director and Edward Levi. The FMS's startup did not mark

86. Van Horn, "Chicago's Shifting Attitude," 1539.

87. Baumol, et al., *Contestable Markets and the Theory of Industry Structure*.

88. Rutherford, "Walton Hamilton, Antitrust, and Chicago," 1403.

any rupture with the First Chicago School's views. There is evidence of consensual positions expressed at the Mont Pèlerin Society's (MPS's) first meeting in 1947.<sup>89</sup> The lecture delivered by Aaron Director was in line with Simons's arguments.<sup>90</sup> However, the reversal was imminent. The FMS program promoters focused on the issue of concentration of economic power (for example, in terms of assessing successes and failures of the antitrust laws, and reconsidering patent law). The rupture that followed Robert Van Horn's pronouncements, relied on the discovery that monopoly is not "the great enemy of democracy."<sup>91</sup> In other words, a dominant—if not a monopolistic—position had no deleterious effects on the market process, as such a position was intrinsically precarious. The concentration of a given market was considered the inexorable result of economies of scale and scope. At the same time, barriers to entry were mainly artificial and stemmed from government interventions deriving from capture phenomena. Additionally, any exclusionary practices implemented by dominant undertakings were represented merely as short-term discrimination strategies.

The breaking point can be pinned down to the last two years of the FMS program. As Van Horn stresses,<sup>92</sup> the first tremor was a book review by Aaron Director published in the *University of Chicago Law Review* in 1950. Director admitted that competition forces remained subjacent even if a single firm dominated the market, maintaining the incentive structure and leading to an optimal outcome. In the Antitrust Project, numerous studies were carried out on exclusionary practices, predatory pricing, resale price maintenance, tying arrangements, price discrimination, and vertical integration. These works concluded that many of these market strategies were benign and should not be restricted through per se rules (limiting judges' discretion, as Simons recommended) but should be assessed on a case-by-case basis, according to the rule of reason.

This theoretical shift is embodied in a manifesto published by Director and Levi in the *Northwestern Law Review*, titled "Law and the Future: Trade Regulation" (1956). The authors' avowed purpose was to defend the principles of competition and free enterprise against

89. The Mont Pèlerin Society constitutes one of the most important international groups of free-market intellectuals. In April 1947, Austrian economist Friedrich von Hayek organized the first meeting of the Society at the Hotel Park at Mont Pèlerin, near Vevey, Switzerland, including thirty-six participants, such as Milton Friedman, his brother-in-law Aaron Director, Frank Knight, and George Stigler representing the emerging Chicago School.

90. Van Horn, "The Roots of Chicago Law and Economics," 209.

91. *Ibid.*, 204.

92. *Ibid.*, 217.

future NIRA-type public policies. However, unlike what Simons had advocated, such a goal did not lead to condemning unilateral abuse of market power, if not market power itself. Director and Levi were not advocating for stricter enforcement of antitrust rules; rather, they felt the opposite. They wanted to reinstate the legitimacy of the individual dominant position. The article represented a real rupture with the First Chicago School. One of the main reversals was undoubtedly defense of the rule of reason over *per se* rules. Director and Levi pointed to the friction between two opposing tendencies in the Common Law. Because antitrust enforcement is based on Common Law principles, its implementation should be characterized by flexibility and ambiguity, or by certainty and automaticity. However, the 1950s antitrust rulings belonged to the second tendency. Certain practices were seen as themselves anticompetitive (for instance, resale price maintenance introduced by the 1911 Supreme Court decision in *Dr. Miles*).<sup>93</sup> Therefore, they might be sanctioned without consideration of any actual or potential effects. The Second Chicago School rejected the view that economic theory leads to consideration *ex ante* of a given market practice as anticompetitive. It is necessary always to consider the specific circumstances of the case, and to ground the decision in accurate and up-to-date economic theory. According to Director and Levi, even economic theory might structure the judge's decision. Still, "The law indeed can have a life on its own. But in this field of law more than any other, the general presumptions are of such a character that they cannot be readily isolated from the corresponding presumptions which dominate economic theory."<sup>94</sup>

It would be surprising to see now-dominant Chicago School scholars rejecting the conclusions of industrial organization models advocating safe harbors to benefit dominant firms.<sup>95</sup> Contrary to this 1950s positioning, the Chicago School now prefers the certainty and automatic tendencies of the implementation of Common Law principles over what Director and Levi called the "changing fashion of economic theory." However, the relative positions have changed; the Second Chicago School prescriptions have been challenged for thirty years, and yesterday's supporters of *per se* rules are now denounced as defenders of a mechanical implementation of fossilized economic theory and normative views through the Common Law nature of U.S. antitrust enforcement, creating a "neo-classical legal thought" and reinvigorating a *laissez-faire* competition policy.

93. *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U. S. 373 (1911).

94. Director and Levi, "Trade Regulation," 296.

95. Crane, "Antitrust Modesty," 1193.



In our conclusion, we consider this illogical switch, whereby the advocacy for economization is theoretically founded on a paradigm that recommends a per se approach concerning unilateral practices. We analyze the 1956 Director and Levi article to highlight the extent to which the roots of the Second Chicago School Antitrust enforcement approach can be traced to this manifesto, embodying the conclusions of the FMS and the Antitrust Projects. Support for a progressive reduction in the scope of antitrust law enforcement with the exception of industry combinations, was confirmed by the 2008 U.S. Department of Justice report on single-firm practices, which echoes several arguments in this paper. The relevance of the notion of exclusionary abuse is debated, and the application of antitrust to dominant firms is called into question.

Following Director and Levi (1956), such a shift implies that sanctioning monopolistic behavior cannot always be legitimate; the judge must consider the process through which such a position was achieved. According to the Chicago School, the monopoly position, in itself, need not be assimilated as the fruit of a monopolization strategy. The Supreme Court stated in *Grinnel*<sup>96</sup> that a monopoly position acquisition based on merit need not be sanctioned. The enforcement of antitrust laws must take account of the need to provide safe harbors for firms whose “growth or development [is] a consequence of a superior product, business acumen, or historic accident.”<sup>97</sup>

Thus, Director and Levi’s theoretical views<sup>98</sup> dispute the principle underlying Judge Hand’s ruling in the *Alcoa* case. Judge Hand’s decision personifies the “populist” era of U.S. antitrust enforcement, characterized by strong mistrust vis-à-vis undertakings enjoying a dominant position. According to the Chicago scholars, sanctioning dominant firms leads to consumers being deprived of the gains from economies of scale and scope. Preferring a system of multiple producers could lead antitrust enforcers to privilege maintenance of the organization of industry in small units “in spite of possible cost[s]” (*Alcoa*, at 429). Director and Levi denounced the difficulty encountered by the accused firm to develop an efficiency defense in such antitrust cases. They also asserted that the *Alcoa* decision shifted the burden of proof to the defendant regarding compliance in its practices with antitrust law provisions. Some of the major features of modern U.S. antitrust legislation may have been germinated by their challenge to *Alcoa*.

One of the main dimensions of Director and Levi’s 1956 manifesto is undoubtedly their analysis of the treatment of exclusionary abuses,

96. *U.S. v. Grinnel Corp.*, 384 U.S. 563, 571 (1966).

97. *Ibid.*

98. Director and Levi, “Trade Regulation,” 296.



and especially their advocacy for the economization of antitrust laws. First, the existence of leverage strategies that allow a dominant enterprise to extend its monopoly power from one market to another is under a cloud of suspicion. Second, they reproach the 1950s U.S. antitrust enforcers for their mechanistic views of what can be defined as monopolization under the Sherman Act. They consider also that subsequent laws—such as the FTC, Clayton, and Robinson-Patman acts—“have introduced a certain automaticity into the law; to some extent they preclude or make unnecessary separate inquiry in each of the cases as to effects, advantages, or disadvantages of the banned practices.” (p. 289). In contrast, they promote an enforcement model based on both an analysis of “significant market data” and on the “incorporation of advances in economic teaching into the case law” (p. 290).

Thus, research launched within the FMS and Antitrust Project program frameworks and based on their directors’ synthesis paper led to the foundation of the present-day U.S. antitrust theoretical framework and its enforcement practices. The withdrawn 2008 report by the Antitrust Division regarding single-firm conduct embodies this approach. It requires agencies to assess all market practices with regard to their impact on economic efficiency, and, more precisely, on consumer welfare. At the same time, to avoid false positive decisions (that is, to wrongly sanction a firm), the burden of proof is on the complainant and not the respondent, and its standard must be raised significantly. The Chicagoans consider that these decisions are more harmful than false negatives, as soon as the market process is unable to correct their effects.<sup>99</sup>

Almost all of the Supreme Court’s antitrust decisions since 1977 can be read according to these rules. The economization of antitrust enforcement is nonexclusively but predominantly rooted in Second Chicago School prescriptions. As Rutherford emphasizes,<sup>100</sup> such a shift toward a more economic approach to antitrust can be explained as soon as the primary concern of antitrust law is no longer interpreted as prevention of the abuse of coercive powers in market relationships, and as only the maximization of consumer welfare.<sup>101</sup> Discrimination among contractors, and rent extraction through monopoly prices, can be analyzed on a case-by-case basis, and consumer welfare might be enhanced. *Per se* rules restricting market practices or competitors’ market access protection might impair the welfare maximization (reinterpreted) purpose of antitrust laws.

99. Easterbrook, “The Limits of Antitrust,” 2–40.

100. Rutherford, “Walton Hamilton, Antitrust, and Chicago,” 1385–1407.

101. Bork, “Legislative Intent,” 7–48.

The hallmark of the antitrust Chicago School, in its second version, is to promote allocative efficiency—consumer welfare maximization—as the only, original, and legitimate goal of antitrust law. This leads to strong suspicion of the other antitrust statutes on the grounds that they favor a *per se* approach and are designed primarily to protect the interests of specific economic operators—chiefly small and medium-sized firms—at the expense of final consumers.<sup>102</sup> The Chicago School refuses to balance consumer welfare with other public policy objectives, relying only on a very simple and apparently clear-cut criterion—allocative efficiency. Therefore, unlike post-Chicago models that have won the race in the academic market but not in the judicial field, this approach offers feasible decision rules. In addition, it represents itself as a nonpartisan device. By adopting economic reasoning, the decision might be seen as nonpolitical; by refusing to consider any public policy argument outside consumer welfare maximization, it allows the depoliticization of judicial decisions. No social preferences or contemporary perceived necessities have to be taken into account. Economic expertise—outside the legal profession—guarantees the objectivity of the decision.

However, this apparent neutrality requires some discussion. First, maximizing wealth does not imply that the result of the considered practices is Pareto-improving.<sup>103</sup> A Kaldor-Hicks criterion is subjacent.<sup>104</sup> The identity of the gainers and of the losers is outside the scope of antitrust law. The hypothetical compensations must be implemented (or not) by government. This question is not relevant to antitrust law enforcement. Second, the apparently more economic approach to antitrust is adherence to a given economic theory—favorable to dominant firms—rather than a first junction between competition law and competition economics. This point is particularly important because the Chicago School prescriptions have evolved toward *per se* rules.

Indeed, in the 1980s, the Chicago School approach led to paradoxical *per se* rules that directed the courts to consider, without any effective assessment, that some market practices were consubstantially pro-competitive. This applied, for example, to exclusive dealing arrangements.<sup>105</sup> The industrial organization literature has rehabilitated the case-based evaluation. A given practice may have a net

102. Hovenkamp, “Antitrust Policy after Chicago,” 213–284.

103. The Pareto criterion considers that a change in the allocation of resources is welfare improving as soon as no one is made worse off.

104. The Kaldor-Hicks criterion consists of a potential Pareto optimality in which the increase in welfare is sufficiently large that the losers potentially can be compensated (see, e.g., Posner, *The Economics of Justice*).

105. See among others, Director and Levi, “Trade Regulation,” 292–293.

positive or negative effect on consumer welfare with regard to the time-and-place-specific market conditions. However, the influence of the Chicago School continues to dominate, as testified to by the fourteen consecutive pro-defendant U.S. court decisions<sup>106</sup> and the rallying of the new Harvard School to adopt more moderate practice.<sup>107</sup>

To some extent, the Second Chicago School renews classical legal thought by paradoxically advocating for per se rules to provide competing firms with antitrust safe harbors. Its prescriptions have become surprisingly convergent with those of the late nineteenth century's legal scholars who advocated for a laissez-faire policy.

#### *How Have Neoliberal Views on Antitrust Become Collective?*

The Second Chicago School manifesto was published in 1956; this pro-trust antitrust approach became dominant twenty years later (although many scholars contest the fact that the Supreme Court ever really espoused it). We want to suggest how this approach—initially marginal in terms of both political and theoretical influence—prevailed over Truman's middle-course strategy. To this end, we discuss the increasing debate around antitrust policy from the 1950s to the 1973 economic crisis, and then highlight how Chicagoan theory managed to shape a consensus on antitrust issues based on use of the rule of reason, aimed at focusing its enforcement only on efficiency consideration and the speed with which it evolved toward per se rules.

#### *An Increasingly Challenged Policy*

In 1952, Charles Sawyer, Commerce Secretary of the Truman administration, released a report on "effective competition." Freyer underlines that it was the department's Business Advisory Council, composed mainly of corporate executives, that prepared the report.<sup>108</sup> Although the antitrust enforcement policy was not criticized directly, the report insisted that it was necessary to reshape the definition of competition to take account of the transformation of the U.S. economy, which had led to higher levels of economic concentration. The report presents antitrust law enforcement as inducing risks and costs for large firms. Thus, it recommends the publication of guidelines and a broader use of the rule of reason to reduce the scope of per se prohibitions.

106. Elhauge, "Harvard, Not Chicago," 59–77.

107. Crane, "Antitrust Modesty," 1193.

108. Freyer, Antitrust, 105.

Alongside the Chicagoan critique in classrooms, antitrust policy was also challenged in public debate throughout the next twenty years. Antitrust laws were denigrated as anti-business, as depriving firms of the benefits of economies of scale, and constraining them to privilege conglomerate strategies and hindering their growth and competitiveness at the expense of U.S. consumers. Denunciation of the dark side of antitrust enforcement increased, whatever the commentators' respective tendencies, from Peter Drucker in 1946,<sup>109</sup> to Richard Hofstadter in 1964,<sup>110</sup> who described antitrust as mainly an ideology, and finally to Alan Greenspan, who, in 1967,<sup>111</sup> considered that the capital market alone can and ought to regulate competition without any activist intervention.

The middle-course antitrust policy relies on several social values and not on the single criterion of efficiency. As a consequence, the liberal inspired antitrust enforcement policy and its underlying theories, such as the workable competition approach,<sup>112</sup> could be criticized because they lead to a balance between conflicting and incommensurate values, such as consumer welfare and broader social benefits, such as the distribution or protection of small businesses. The accent on fairness, reflecting the notion of reasonableness of the tenants of institutional economics, was criticized bitterly as lacking any objective basis. It risked exposing firms to legal uncertainty and leaving excessive room for judges' discretionary decisions. According to Bork,<sup>113</sup> such pluralistic enforcement objectives rely on "a jumble of half-digested notions and mythologies" and deprive the enforcers of both objective decision rules and a unique criterion—consumer welfare.

This situation led to controversial decisions that have been denounced as emblematic of overenforcement of antitrust laws. This applies, for instance, to the case of the *Brown Shoe* U.S. Supreme Court decision.<sup>114</sup> The Court ruled against a merger (on the basis of the Celler-Kefauver amendment of 1950) because of its potential vertical and horizontal effects even though the project involved the fourth and the twelfth firms in the sector, whose cumulative share of the retail market was less than 8 percent. In the 1970s, the market-centered discourse began to shape public perceptions and policy prescriptions, and to supplant the liberal antitrust policies. The increasing difficulties involved in enforcing antitrust laws,

109. Drucker, *Concept of the Corporation*.

110. Hofstadter, "What Happened to the Antitrust Movement?"

111. Greenspan, "Antitrust."

112. Stocking, *Workable Competition and Antitrust Policy*.

113. Bork, *The Antitrust Paradox*.

114. *Brown Shoe v. United States*, 370 U.S. 294 (1962).

and the rise in private lawsuits during the 1960s, introduced additional risks for large U.S. firms. These firms denounced the unfair competition from Japanese and European firms in a context in which antitrust seemed to be the enemy from within, hindering their competitiveness and depriving them of the fruits of efficiency gains.

In a nutshell, the trauma of the post-1973 stagflation led to an effect similar to the 1937 Great Depression relapse in terms of antitrust enforcement. As Freyer states, “the dislocation of the business cycle in the 1970s was too disruptive, however, for the reliance upon liberal regulatory policy making to persist unchallenged.”<sup>115</sup> The 1977 U.S. Supreme Court *GTE Sylvania* ruling signaled a turning point by implementing, according to Chicagoan recommendations, a rule of reason analysis for a vertical restriction cases. Considering efficiency gains led to deviation from the old case law based on per se prohibitions. The Chicagoan period of the Antitrust Division undoubtedly began with the appointment of William Baxter by President Reagan, and possibly peaked with the single firm practice report of 2008. The first cracks in earlier practices began to appear at the end of the Nixon administration, and the reversal can be dated to the Carter administration and congressional opposition toward more stringent anti-merger regulations.

We might suggest also that the shift was the result of long-run movements in the federal administration. For instance, Oliver Williamson dates the initial entry of antitrust economization to 1965–1968, when Donald F. Turner was Assistant Attorney General in the Antitrust Division of the Department of Justice.<sup>116</sup> At the time, the dominant theoretical framework of the Antitrust Division was the structuralist school, which emphasized barriers to entry.<sup>117</sup> It encouraged monopoly explanations for all nonstandard or unfamiliar market practices, justifying strong antitrust remedies that were seen as the basis of a “populist era” of U.S. antitrust. However, the limitations of the structure-conduct-performance (SCP) paradigm led to overenforcement of antitrust laws and a multiplication of the decisions that customarily we name, following Easterbrook,<sup>118</sup> *false positives*.<sup>119</sup>

115. Freyer, Antitrust, 139.

116. Williamson, “Economics and Antitrust Enforcement,” 61–65.

117. Bain, *Barriers to New Competition*.

118. Easterbrook, “The Limits of Antitrust,” 2–40.

119. “One important result of this preoccupation with the monopoly problem is that if an economist finds something—a business practice of one sort or other—that he does not understand, he looks for a monopoly explanation. And, as in this field we are very ignorant, the number of un-understandable practices tends to be very large, and the reliance on monopoly interpretation frequent” (Coase, “Industrial Organization,” 59–67).

From an institutional viewpoint, Williamson shows that the arrival of Donald Turner, the first economist with a PhD to head the Antitrust Division, led to a major breakdown in its policy, despite his being one of the most influential economists in the Harvard antitrust school. In his textbook on antitrust (co-written with Carl Kaysen and published in 1959), Turner asserted that the “limitation of market power, rather than consumer benefits, [has] to be the chief purpose of Antitrust.”<sup>120</sup> Nevertheless, he initiated the movement toward a more-economics approach that characterized U.S. antitrust law enforcement from the 1980s. First, he re-equilibrated the influence between lawyers and economists within the Antitrust Division. Its purpose was no longer to win cases but to target practices that harmed consumers. With an outstanding staff that included the current Supreme Court Justice Stephen Breyer, as well as Richard Posner, Oliver Williamson, William Comanor, and Kenneth Elzinga, Turner gave antitrust enforcement sounder economic foundations.<sup>121</sup>

Whatever the timing, the diffusion of the Chicago models affected the enforcement agencies before the Supreme Court. Williamson<sup>122</sup> particularly highlights the case of efficiency gains resulting from mergers. The legislative framework at the time was very restrictive (consider the Celler-Kefauver amendment to the Clayton Act), yet its logic was completely reversed by the 1984 guidelines. From that time on, mergers have been considered efficiency enhancers, benefiting the competitiveness of firms and consumers who enjoy lower prices. The U.S. antitrust authorities can challenge a project only if it presents a significant danger to competition, and the judicial decision must balance this risk with the induced efficiency gains. The more-economic approach implies assessing efficiency gains on a case-by-case basis and balancing them with potential damage to competition. It also induces a reversal of the presumptions compared to the interpretations of the Sherman Act made by Judge Hand in 1945. The more-economic approach not only involves use of economic criteria in the judicial decision, but it also represents a reversal of views about the legitimacy and long-term effects of market power.

The subordinate position of economics in antitrust law enforcement, readily noticeable<sup>123</sup> in the 1970s, no longer exists in U.S. practice. The Chicago program advocates the implementation of an economic-oriented reasoning in the whole of legal practice, and antitrust

120. Williamson, “Economics and Antitrust Enforcement,” 62.

121. However, according to other scholars, economists remained in a subordinate position until the late 1970s (White, “The Growing Influence of Economics,” 26–63).

122. Williamson, “Economics and Antitrust Enforcement,” 61–65.

123. White, “The Growing Influence of Economics,” 26–63.

enforcement has progressively become an archetypical illustration of such an economization. In this sense, the Chicago School recommendations are applied to antitrust law enforcement: economics must be used by the judge as the most relevant tool for deciding each case.

## Conclusion

Despite the criticisms of the relevance of the Chicago School's recommendations, the influence of economics on antitrust enforcement is no longer questioned—the economization process is recognized more than ever. Lawrence White highlights three main reasons for this.<sup>124</sup> The first is due to the real advances, both theoretical and empirical developments (namely, the post-Chicago School). The second is that some economists have been involved in antitrust cases, either within the competition authority (such as its own chief economist and external experts) or within companies that were plaintiffs or defendants in antitrust cases. Third, economists have been writing about specific antitrust cases, including those in which they have participated.<sup>125</sup>

One of the risks induced by exclusive reliance on general economic models and derived per se rules can be assessed by considering the risks encountered in U.S. common law in the nineteenth century, such as classical legal thought.<sup>126</sup> Should economics take over judges' rulings? Consequently, current debate on the conservative bias of U.S. antitrust could be reconsidered in the light of Justice Holmes's dissenting opinion in *Lochner*: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise." The neutrality induced by economic models may be an illusion.<sup>127</sup> A judicial decision cannot be limited to a mechanical and neutral process. We must reject the hypothesis that the economization process

124. Ibid.

125. See, e.g., Kwoka and White, *The Antitrust Revolution*.

126. Crane, "Antitrust Modesty," 1193.

127. Justice Oliver Wendell Holmes (1897) stated: "The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. ... The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose, which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form."

itself is apolitical.<sup>128</sup> As Eleanor Fox stated, economics cannot be seen as value-free.<sup>129</sup>

The belief that economic theory debates have shaped judges' decisions might be purely conceit. If one reads Holmes attentively, one might wonder whether economics is not finally the unquestionable way to rationalize a given decision, to dress it in the "clothes of the Science"—that is, to implement the famous sentence, "We decide, and then we deduce." Donald Dewey's striking 1964 article quotes Chicago economists in a footnote illustrating the existence of debates on predation in modern economics. The views expressed are the same:

I have become increasingly skeptical of the economics arguments that the courts invoke to justify their rulings [...]. It is superfluous to the extent that judges are merely playing the antitrust game by offering economic arguments to justify decisions taken on other grounds. To criticize the courts for having the wrong antitrust goals is politics, not science.<sup>130</sup>

As Herbert Hovenkamp underlined in 1985, the paradigm shift toward an economic approach to antitrust since *GTE Sylvania* does not imply that antitrust practitioners started using economic-based or economic theory grounded rules of decision in the late 1970s.<sup>131</sup> The former antitrust paradigm (the Warren Era) cannot be described as isolated economic thinking. The influence of academics was effective from the Second New Deal period forward. Therefore, the rise of the Chicago School influence does not mark a late confluence between antitrust and economics, but rather can be interpreted as a shift between competing economic models. Indeed, the core implication of the Chicagoan moment is not the emergence of economic-centered thinking, and especially efficiency concerns, but the fact that lawyers are invited to ground their decisions *only* in economics, and that efficiency must be the only legitimate criterion for antitrust laws.

Such a paradigm shift cannot be explained only by academic debate. Two fundamental movements made this evolution possible. The first is the 1970s economic crisis and the increasing lack of confidence in the "liberal regulatory State."<sup>132</sup> On the one hand, the greater the difficulties encountered by firms, the stronger the pressure to relax competition laws and other regulation. On the other hand, the evolution we have

128. Drexler, "The (a)Political Character of the Economic Approach," 312–336.

129. Fox, "Antitrust as a Window," 554–588.

130. Dewey, "Antitrust: Science or Religion," 434.

131. Hovenkamp, "Antitrust Policy after Chicago," 218.

132. Freyer, *Antitrust and Global Capitalism, 1930–2004*, 118.



described in antitrust is just one facet of a more general movement in public policy: the deregulation wave. In a nutshell, the middle-course antitrust policy resulted in an equilibrium between a first tendency that emphasizes democratic participation and social justice, and a second tendency centered primarily on economic efficiency to improve living standards and foster economic growth.<sup>133</sup> If, before the 1980s, antitrust enforcers tried to reconcile these two aspects, “the Antitrust Chicago School revolution discarded talk of social and political goals and reframed antitrust to focus solely on economic concerns.”<sup>134</sup>

The origin of the second fundamental movement is rooted not in the economic situation or in political values, but inside the legal system. As seen earlier, the Warren Court had to manage a multivalued antitrust tradition that served several objectives whose nature might be economic, social, or political. As Sullivan underlined,<sup>135</sup> antitrust enforcers should be cautious not only about efficiency but also market access, dealer independence, and good faith in transactions, and should correct excessive asymmetries in bargaining powers. In other words, they need to balance efficiency, equity, and fairness. Decision rules are difficult to find and to implement in such situations. On the one hand, the influence of the legal realists deters judges from grounding their decisions only within the legal sphere.<sup>136</sup> On the other hand, the Structuralist School of Economics (e.g., Harvard) provides more insights into the dynamics of the industrial branches than operational guidelines, allowing assessment of a specific firm strategy.

The Second Chicago School, and especially its affiliated law professors and judges, such as Bork, Easterbrook, and Posner,<sup>137</sup> succeeded because the school had proposed objectives and manageable tools that provided solutions to both the social request for efficiency and the judicial need for decision rules. The school provides—for both judges and policy makers—a coherent system in a tractable language. However, the Chicago School moment led to use of “simplistic, short run, static theory to solve complex, long run, strategic problems.”<sup>138</sup> Progress in economic analysis tended to reject Chicago School views (noted already in 1985 by Hovenkamp).<sup>139</sup> Post-Chicago models based on game theory led to more complex

133. Baker, “Economics and Politics,” 2181.

134. *Ibid.*, 2182.

135. Sullivan, “Antitrust, Microeconomics, and Politics,” 4.

136. *Ibid.*, 9.

137. See, for instance, his book titled *Antitrust Law* and his article, “Chicago School of Antitrust.”

138. *Ibid.*, 3.

139. Hovenkamp, “Antitrust Policy after Chicago,” 225.

and more ambiguous results. Nevertheless, the Chicago message is still particularly influential despite these theoretical challenges. Its resilience lies in the same reasoning that underlies its success: its simplicity—its capacity to provide clear-cut conclusions about what is efficient and what is inefficient.

Underlining this characteristic might seem ironic. The Chicago School revolution began with very detailed and comprehensive case studies.<sup>140</sup> The school, in its origins, bitterly criticized per se rules, and its moment was confirmed by the *GTE Sylvania* decision, which overturned long-standing case law that prohibited per se vertical restraints and allowed a rule-of-reason approach.<sup>141</sup> However, the *tour de force* of this school was its success in simplifying and operationalizing its recommendations in very few prescriptions and conclusions, allowing judges and practitioners to ground their decisions on some very simple models and to rely on per se rules, not in terms of prohibitions but of acceptance. For example, consider the striking evolution of Posner's position on per se rules regarding vertical restraints just a few years after the *GTE Sylvania* ruling.<sup>142</sup>

The promotion of per se rules can perhaps be explained by the general distrust of government regulation, and, by extension, of judicial decisions. Chicagoan scholars increasingly highlight the risks of ungrounded decisions and advocate for the limitations of judicial discretion.<sup>143</sup> Milton Friedman's position embodies this shift toward revival of the laissez-faire approach, which is significantly different from the economic-based rule of reason first promoted:

My own views about the antitrust laws have changed greatly over time. When I started in this business, as a believer in competition,

140. Van Horn, "Reinventing Monopoly and the Role of Corporations," 224.

141. Posner, "The Rule of Reason and the Economic Approach."

142. Posner, "The Next Step in the Antitrust Treatment of Restricted Distribution."

143. We may observe a parallel trend between the rise of Chicagoan criticism against government regulations and of government distrust as it appears in public opinion polls. For instance, Nye et al. (1997) contrasts a rate of confidence of 75 percent in 1964 with a rate of 15 percent in 1995. According to the authors, this distrust concerns both the efficiency of public spending and the political choices themselves. These Chicagoan criticisms target the sector-specific regulations passed during the New Deal in the aftermath of the NIRA's collapse (Meese, "Competition Policy and the Great Depression," 308). More precisely, the monopoly is seen as irreversible only if protected by barriers to entry. However, according to the Chicagoans, most of them are produced by government regulations (Van Horn, "Reinventing Monopoly," 219). Furthermore, both for the Chicago School and the Public Choice one, public regulations cannot be only explained by a public interest theory but may be the result of capture and rent-seeking behaviors. Regulations may serve the interest of competitors, bureaucrats, politicians, or even judges (McChesney et al., "Competition Policy in a Public Choice Perspective").

I was a great supporter of antitrust laws. ... But as I watched what actually happened, I saw that, instead of promoting competition, antitrust laws tended to do exactly the opposite, because they tended, like so many government activities, to be taken over by the people they were supposed to regulate and control. And so over time I have gradually come to the conclusion that antitrust laws do far more harm than good and that we would be better off if didn't have them at all.<sup>144</sup>

Two final questions might be raised by this antitrust modesty, grounded in an apparently old-fashioned economic theory. The first deals with the reasons why its charms have not dissipated; the second is related to its consequences in terms of economic dynamics. The resilience of the Chicago School influence may be explained at least in part by its capacity to provide clear rules of decision. Meanwhile, as Nicola Giocoli underlines, its competitors are dominant in the classroom but not ready for the courtrooms because of their inability to provide tractable results.<sup>145</sup>

Is such a situation regrettable in economic terms? We might consider that the persistence of this "old lady charm" has the merit that it privileges economic efficiency. According to Chicago scholars, the induced risk of antitrust law underenforcement is less harmful in the long run, as markets are self-correcting as soon as the barriers of entry settle at their natural level. Under the Chicago research program, wealth transfers are considered as neutral. A market practice should be prosecuted only if it leads to a reduction in productive and allocative efficiency, whatever its distributional consequences.<sup>146</sup> However, these efficiency gains might be questionable and competition policy cannot be considered as neutral in terms of distribution. The doubts that Dewey cast on the use of economic analysis in antitrust have not been completely allayed fifty years later. Indeed, the Chicago School's rise has taken place at a time when inequality has never been greater in the United States.<sup>147</sup> Some arguments may plead for this linkage.

First, the main argument, developed earlier in this article, is about the goal of the Chicago School, privileging economic efficiency only. In other words, neither social preferences nor equality concerns are taken into account in the reasoning.<sup>148</sup> Economic analysis as a

144. Friedman, "Suicidal Impulse," 7.

145. Giocoli, "Old Lady Charm."

146. Page, "The Chicago School and the Evolution of Antitrust," 1238.

147. See the article by Lina Khan and Sandeep Vaheesan, "How America Became Uncompetitive and Unequal," *The Washington Post*, June 13, 2014.

148. Lande, "Chicago's False Foundation: Wealth Transfers (Not Just Efficiency)," 631–644.

scientific tool must guarantee the legislator's neutrality. Second, Chicago's less interventionist approach has resulted partly in the emergence of market power firms. The arrival of Frank Easterbrook, appointed by Ronald Reagan, to the U.S. Court of Appeals for the Seventh Circuit, was essential to curb competition policy. Any question of wealth distribution has been largely thrown out. Thus, the subsequent lack of competition may have caused growing economic and social inequalities in the long run. Although the empirical literature is rather scant on the subject, there are some studies that show wealth transfer from consumers to firms with market power.<sup>149</sup> Lax competition policy has strengthened industry consolidation. In practice, a series of merger waves has transformed the competitive environment into one often controlled by a few big players (e.g., such as energy, airlines, pharmaceuticals, large retailers, and so on). Third, lack of competition may also have increased inequality, by leading companies to drive down employees' wages. For instance, as the Department of Justice revealed in 2010, top executives made secret agreements not to recruit one another's employees in order to suppress wages, even as their profits were rising.<sup>150</sup> Nonetheless, the empirical economic literature shows that merger waves have not negatively impacted the level of employment, at least in the United States.

Thus, the ongoing debate on the bestselling book by Thomas Piketty, *Capital in the 21st Century*, echoes concerns about economic and social inequalities in the United States.<sup>151</sup> With regard to the rise of the Chicago School, economic reasoning, tax cuts, the decline of unions, and the importance of financial markets may not be the only determinants of the growing economic inequality. It may perhaps be "apolitical" policies based on the concept of "economic efficiency" that may explain part of the growing inequality.

Antitrust policy may be a relevant research field to analyze this great transformation of our economic system. The Chicagoan model has supplanted the former antitrust paradigm that could be considered a political compromise searching to conciliate efficiencies and the fairness of wealth distribution. Antitrust law enforcement must avoid chilling efficiency gains and loss of political and social support.<sup>152</sup> However, the Chicago School goes beyond the scope of

149. See, for instance, Comanor and Smiley, "Monopoly and the Distribution of Wealth." The authors find that "the presence of past and current monopoly has had a major impact on the degree of inequality in the current distribution of household wealth" (p. 189).

150. "Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements," U.S. Department of Justice, September 24, 2010.

151. Piketty, *Capital in the Twenty-First Century*.

152. Baker, "Economics and Politics," 2186.

economics with this kind of tradeoff by choosing to consider only the efficiency dimension. Promoting efficiency at the expense of control of wealth transfer is not only a distributional issue; it also affects the growth potential of the whole economy.

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