

## REVIEWS

### Chicago, Post-Chicago, and Neo-Chicago

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*How the Chicago School Overshot the Mark:  
The Effect of Conservative Economic Analysis on U.S. Antitrust*  
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#### INTRODUCTION

Of all of Chicago's law and economics conquests, antitrust was the most complete and resounding victory. Chicago, of course, is a synecdoche for ideological currents that swept through and from Hyde Park beginning in the 1950s and reached their peak in the 1970s and 1980s.<sup>1</sup> From early roots in antitrust and economic regulation, the Chicago School branched outward, first to adjacent fields like securities regulation, corporate law, property, and contracts, and eventually to more distant horizons like sexuality and family law.<sup>2</sup> Predictably, the Chicago School exerted its greatest influence in fields closely tied to commercial regulation. But never did Chicago trounce its ideological opponents as plainly and lastingly as it did in the field of its early conquests—antitrust.

The Chicago School enjoyed its heyday in the late 1970s as the Supreme Court began to uproot interventionist antitrust precedents from the 1950s and 1960s and to replace them with more permissive

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In light of the subject of this Review, it is perhaps relevant to disclose that the author received his JD at the University of Chicago and wrote this Review while a visiting professor at the University of Chicago. I am grateful to Jonathan Baker, Eleanor Fox, and Josh Wright for helpful comments. All errors are my own.

<sup>1</sup> See, for example, Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U Pa L Rev 925, 925–28 (1979).

<sup>2</sup> See, for example, Richard A. Posner, *Sex and Reason* 2–3 (Harvard 1992). For a discussion of the Chicago School's historical trajectory, see Michael Ansaldi, Book Review, *Gossip and Metaphysics: The Personal Turn in Jurisprudential Writing*, 94 Mich L Rev 1517, 1536–37 (1996), reviewing Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon 1995); John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill 1995) (chronicling the transformation of the “old” Chicago School of the 1940s to “new” Chicago School of the 1960s).

rules.<sup>3</sup> Then, Ronald Reagan appointed Bill Baxter to head the Antitrust Division, and the antitrust agencies began to follow suit. Baxter was thoroughly Stanford—undergraduate, law degree, and law professor—and not Chicago, but it has become conventional to lump Baxter into the Chicago School.<sup>4</sup> Under his direction, the Justice Department veered away from interventionist stances on vertical restraints and mergers, monopolization, and even horizontal mergers.<sup>5</sup> Reagan complemented Baxter's appointment by placing a conservative University of Virginia (but "Chicago School" nonetheless) economist, James Miller, to chair the Federal Trade Commission (FTC).<sup>6</sup> Although slightly more interventionist policies would reemerge in the agencies during the Clinton Administration, Baxter and Miller's revolution set the agencies on a durable new path.<sup>7</sup>

As the antitrust agencies were turning rightward, the Supreme Court also continued its antitrust retrenchment. As the 1980s became the 1990s, the Court jettisoned a wide swath of Warren Court precedents. Predatory pricing became a disfavored legal theory;<sup>8</sup> maximum resale price maintenance became subject to the rule of reason and hence de facto legal;<sup>9</sup> vertical resale price maintenance became diffi-

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<sup>3</sup> See, for example, *Continental TV, Inc v GTE Sylvania, Inc*, 433 US 36, 59 (1977) (overturning Warren Court precedent and subjecting nonpricevertical constraints to the rule of reason); *United States v General Dynamics Corp*, 415 US 486, 509–10 (1974) (rejecting the use of structural presumptions based on post-merger concentration and allowing the merger of coal mining companies).

<sup>4</sup> See John E. Lopatka and William H. Page, *Economic Authority and the Limits of Expertise in Antitrust Cases*, 90 Cornell L Rev 617, 634 (2005) (describing Baxter as a "Chicago-oriented scholar" and detailing how Justice Lewis Powell wrote the words "Posner, Baxter, Bork" in his preconference notes in *Continental TV*).

<sup>5</sup> See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 Antitrust L J 377, 431 n 178 (2003) (collecting sources describing diminished merger control during the Reagan administration); Abbott B. Lipsky, Jr and J. Gregory Sidak, *Essential Facilities*, 51 Stan L Rev 1187, 1188 (1999) (describing Baxter's termination of the IBM monopolization case and his general approach to antitrust enforcement), citing *In re IBM Corp*, 687 F2d 591 (2d Cir 1982).

<sup>6</sup> See Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 Colum Bus L Rev 359, 388 (describing Miller's appointment and attitude toward antitrust).

<sup>7</sup> See J. Thomas Rosch, *Antitrust Regulation of Innovation Markets* 5–9 (Feb 5, 2009), online at <http://www.ftc.gov/speeches/rosch/090205innovationspeech.pdf> (visited Oct 20, 2009).

<sup>8</sup> See, for example, *Brooke Group Ltd v Brown & Williamson Tobacco Corp*, 509 US 209, 227–30 (1993) (holding that predatory pricing schemes are particularly improbable when there is no proof of cooperation between firms); *Matsushita Electric Industrial Co v Zenith Radio Corp*, 475 US 574, 588–89 (1986) (holding that predatory pricing schemes are generally implausible and that in this case no evidence of financial gain suggests that there was no conspiracy).

<sup>9</sup> See, for example, *State Oil Co v Kahn*, 522 US 3, 15–19 (1997) (holding that vertical maximum price fixing is not subject to the per se rule because it does not harm consumers). See also Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U Chi L Rev 1, 14 (1977) ("[T]he content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability.").

cult to prove;<sup>10</sup> and summary judgment became a favored procedural device in antitrust cases.<sup>11</sup> Still, more work remained to be done in the 2000s, and the Chicago School continued to wreak its vengeance. Away went the presumption of market power in patent tie-ins,<sup>12</sup> the duty of a monopolist to deal with competitors,<sup>13</sup> liberal pleading rules for cartel cases,<sup>14</sup> and, most recently, the ninety-six-year-old rule of per se illegality for vertical resale price maintenance.<sup>15</sup>

Chicago had its critics all along, but for decades they were overwhelmed by the tidal wave of pro-Chicago sentiment in the antitrust agencies and the courts. As early as the mid-1980s, however, there began to be talk of a “post-Chicago” school that would wrench antitrust from Hyde Park.<sup>16</sup> Over the intervening years, scholars have attacked the Chicago School’s ostensible excesses in an emerging body of post-Chicago critique.<sup>17</sup> Until recently, however, there was almost no consolidated body of work summarizing the post-Chicago critiques.<sup>18</sup>

Now there is, thanks to efforts of antitrust powerhouse Bob Pitofsky, a Georgetown law professor and former Chair of the FTC. In *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, Pitofsky has assembled an all-star cast of economists and law professors to muster the case

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<sup>10</sup> See, for example, *Business Electronics Corp v Sharp Electronics Corp*, 485 US 717, 723–36 (1988) (holding that a vertical restraint of trade is not per se illegal unless it includes some agreement on price levels).

<sup>11</sup> See, for example, *Matsushita*, 475 US at 595–98 (requiring unambiguous evidence of the alleged conspiracy in order to survive summary judgment).

<sup>12</sup> See *Illinois Tool Works Inc v Independent Ink, Inc*, 547 US 28, 42–43 (2006), overruling *Morton Salt Co v G.S. Suppiger Co*, 314 US 488 (1942) (holding that tying arrangements, such as true-monopoly or market-wide conspiracy involving patented products, must be supported by proof of power in the market rather than by presumption).

<sup>13</sup> See *Verizon Communications Inc v Law Offices of Curtis V. Trinko*, 540 US 398, 410–11 (2004) (holding that traditional antitrust principles do not create a duty for monopolists to aid their competitors).

<sup>14</sup> See *Bell Atlantic Corp v Twombly*, 550 US 544, 556–57 (2007) (requiring more than a mere allegation of parallel business conduct to state a claim under the Sherman Act).

<sup>15</sup> See *Leegin Creative Leather Products, Inc v PSKS, Inc*, 127 S Ct 2705, 2714–15 (2007) (holding that because vertical agreements to fix minimum resale prices can have a procompetitive effect, a per se rule is unwarranted).

<sup>16</sup> Herbert Hovenkamp seems to have been the first scholar to apply the phrase “post-Chicago” to antitrust law. See Herbert Hovenkamp, *Antitrust Policy after Chicago*, 84 Mich L Rev 213, 225 (1985) (discussing the flaws of the Chicago School and predicting its eventual demise to a post-Chicago school of thought).

<sup>17</sup> For example, Bob Pitofsky himself led the charge against the Chicago School’s focus on purely economic objectives for antitrust law in an influential essay in 1979. See generally Robert Pitofsky, *The Political Content of Antitrust*, 127 U Pa L Rev 1051 (1979) (arguing that using an exclusively economic approach to antitrust law is bad policy and that political values should also be considered).

<sup>18</sup> One post-Chicago collection presents post-Chicago critiques from a European perspective. See generally Antonio Cucinotta, Roberto Pardolesi, and Roger Van den Bergh, eds, *Post-Chicago Developments in Antitrust Law* (Edward Elgar 2002).

against Chicago. Broadly speaking, *How Chicago* argues that Chicago has vastly overstated its anti-interventionist case and reduced antitrust to near nothingness. Many of the chapter authors darkly hint that lurking behind the Chicago School arguments is not so much objective economics as right-wing political ideology.

If nothing else, Pitofsky has succeeded in putting together a valuable single volume reference guide to the leading critiques of the Chicago School by some of the most prominent voices in antitrust today. How valuable a contribution the book will make beyond that depends in large part on the spirit in which it is taken. There is much insightful, nuanced, and rigorous substance in this volume that is certainly worth presenting in composite form. Alas, there is also a fair amount of overstatement, invective, and polemic. It is as if the book has two intended audiences—antitrust professionals evaluating technical details of Chicago School arguments in order to understand where Chicago may have overreached, and a lay audience that needs to be convinced that the Chicago School is one more cabal in the vast right-wing conspiracy trying to overthrow American political institutions and create a completely unregulated free-market state. One fears that, for all of the book's many virtues, the latter propensity could come to predominate—particularly for those who adopt the book's cover, introduction, and interchapter introductions as a gestalt for the entire work. After all, if Senator Herb Kohl's backcover blurb is to be believed, the book reveals "the excesses of Chicago School economic theory that has led to an overly hands-off and lifeless approach to antitrust enforcement." Or, if Pitofsky's introduction is to be believed, the Chicago School represents "extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of the facts)" and has caused antitrust in the United States to "head[] in a profoundly wrong direction" (p 6).

I doubt that many of Pitofsky's authors believe that antitrust today is "lifeless" or that US antitrust is "headed in a profoundly wrong direction." Based on their writings both in this volume and elsewhere, one would reach the conclusion that the Chicago School has been an overwhelmingly positive development for antitrust law but that, as with many paradigmatic movements, it somewhat overstated its case and needs some correction. Still, it is easy to come away from this book with a very different impression. Despite many measured and balanced critiques, ideologically motivated readers (or nonreaders) will doubtlessly take a composite of the book's shriller turns as a representation of the entire book and the book itself as a turning point in the ideological struggle against "conservative economics." Chicago and post-Chicago deserve a richer dialogue than that.

In this Review, I engage *How Chicago* as a reader skeptical of its ideological message but receptive to its constructive suggestions for

refinements to Chicago School insights. In my skeptical capacity, I argue that *How Chicago* overstates the movement's conservatism, influence, and failures. In my receptive capacity, I accept that many of the chapter authors offer insightful critiques of Chicago School positions that should be taken into account in constructing the relevant legal doctrines and enforcement priorities.

Part I addresses the Chicago School itself. I argue that the book exaggerates Chicago's conservatism, often ignores the coincident impact of other influences (particularly the "Harvard School"), and makes unsubstantiated claims that the Chicago School has made a radical, ideologically motivated attempt to undermine the very existence of antitrust law.

Part II addresses the post-Chicago School, or at least the post-Chicago School implicit in the book. It argues that post-Chicago has largely failed to turn the tide because it has attacked Chicago as excessively theoretical and speculative without offering any empirical basis for believing that Chicago theories result in suboptimal market performance. Post-Chicago tries to one-up Chicagoan theories with even more attenuated theories of its own, thus announcing the emperor's nudity while wearing clothes cut of the same purportedly invisible cloth. Further, although darkly hinting that Chicago is little more than right-wing ideology masquerading as economics, *How Chicago* proposes no normative countertheory of antitrust.

Finally, Part III turns to the possibility of a more constructive dialogue between Chicago and post-Chicago perspectives. Specifically, it considers the possibility of a "neo-Chicago School," one sensitive to the identified failings of the Chicago School yet faithful to its core tenets.

## I. CHICAGO

Intellectual "schools" tend to be "Protestant" rather than "Catholic," meaning that there is no central creedal authority to delimit orthodoxy and heresy. This is particularly true of a "school" like Chicago, which is only loosely tied to a geographical locus, spans decades temporally, and involves a score or more of major contributors. Hence, the first step in reprimanding the Chicago School's overreach is to demarcate its boundaries and define its essential characteristics.

*How Chicago* is organized into six chapters with brief introductions by Pitofsky. The first chapter—Conservative Economic Analysis and Its Effects—is intended to serve the demarcation function, to tell us what Chicago was and what it did. The chapter begins with an essay by economist Richard Schmalensee that is generally laudatory of Chicago. Economist Irwin Stelzer follows with an explanation of how he is generally conservative but critical of conservative antitrust. Next, F.M. Scherer locates Chicago's intellectual primogenitors, Tom Kauer appraises the influence of conservative economic analysis on the

development of antitrust law, and Dan Rubinfeld attempts to define “conservative economics.” Rubinfeld nominally rounds out the demarcatory essays, but efforts to define Chicago continue throughout the subsequent chapters. In Chapter 2, Eleanor Fox explains that conservative economics, not efficiency considerations, lurk behind many recent Supreme Court decisions. Jack Kirkwood and Bob Lande reprise Lande’s landmark critique of Robert Bork’s economic efficiency interpretation of the Sherman Act’s legislative history.<sup>19</sup> Chapter 3 tackles monopolization law, with essays by Herbert Hovenkamp and Harvey Goldschmid. Chapter 4 addresses vertical arrangements, with essays by Steve Salop and Steve Calkins. In Chapter 5, Warren Grimes and Marina Lao come to the aid of Chicago’s favorite bogeyman—the freerider. The book closes in Chapter 6 with an essay (and proposal) on merger policy by Jon Baker and Carl Shapiro. Throughout, the authors progressively sculpt an image of the Chicago School and its influences.

The composite portrait that emerges is by and large unattractive. In an introduction echoed by subsequent voices, Pitofsky asserts that Chicago manifests

preferences for economic models over facts, the tendency to assume that the free market mechanisms will cure all market imperfections, the belief that only efficiency matters, outright mistakes in matters of doctrine, but most of all, lack of support for rigorous enforcement and willingness of enforcers to approve questionable transactions if there is even a whiff of a defense (p 5).

He then adds that the Chicago School “finds a way of ensuring that the pro-antitrust position always loses” (p 5).

Two primary propositions about Chicago emerge from the chorus of voices—*first*, that it is entirely theoretical and divorced from facts, and *second*, that it uniformly favors nonintervention. I reserve judgment on the first proposition for now and tackle the second.

#### A. Chicago’s Noninterventionism

Chicago’s noninterventionism is greatly overstated. To be sure, the strong trend of the Chicago School was to pull back from what virtually every author in the book would admit were the excesses of the previous generation. But to say, as Pitofsky does in the introduction, that “in the 1980s, antitrust enforcement virtually disappeared”

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<sup>19</sup> See Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 50 *Hastings L J* 871, 892–910 (1999) (“[N]o evidence has ever been found to suggest that any legislator understood that monopoly pricing causes allocative inefficiency.”).

(p 5) or, as Goldschmid does, that today “[a]lmost nothing is happening at the Antitrust Division, at the FTC, or in the courts in the section 2 area [of the Sherman Act]” (p 127),<sup>20</sup> or, as many of the authors assume, that Chicago is uniformly hostile to antitrust interventions, is a very significant exaggeration.

To be sure, support can be found among individual Chicago School adherents for various views, which, if taken in composite, would equate to near-total nonintervention. But this is much like taking a composite of the views of Senators Bob Casey on abortion, Jim Webb on gun control, and Ben Nelson on a federal marriage amendment and hence characterizing Senate Democrats as anti-abortion, pro-guns, and anti-gay. A “school” should not be characterized by its outliers but by its center. The broad current of the Chicago School advocated judicious intervention, but intervention nonetheless.

If one wants to identify a Chicago School centrist, there is no more representative scholar than Richard Posner. Although the general trend of Posner’s antitrust work has been less interventionist than the views of the previous epoch, in important ways Posner’s work has supported *enhanced* intervention. Posner has advocated finding cartel violations from mere “conscious parallelism,”<sup>21</sup> argued for a long-run marginal-cost test for predatory pricing (more favorable to plaintiffs than the short-run test proposed by Harvard Schoolers Phillip Areeda and Donald Turner),<sup>22</sup> rejected using restrictive predatory-pricing rules to govern bundled discounts,<sup>23</sup> articulated concerns over vertical foreclosure,<sup>24</sup> rejected a “free riding” argument that Grimes and Lao claim

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<sup>20</sup> For example, the FTC brought a high-profile monopolization enforcement action against Rambus over the latter’s alleged deception of a Standard Setting Organization (SSO) with respect to its patents and patent applications. See *Rambus, Inc v FTC*, 522 F3d 456, 459 (DC Cir 2008). It settled by consent decree a similar action concerning SSOs and patent rights. See *In re Negotiated Data Solutions*, 2008 WL 258308, \*6 (FTC). The FTC recently launched a monopolization investigation of Intel concerning its marketing tactics with respect to microprocessors. See Joe Nocera, *A.M.D. and Its War with Intel*, NY Times C1 (June 21, 2008).

<sup>21</sup> See Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan L Rev 1562, 1575 (1969).

<sup>22</sup> See Richard A. Posner, *Antitrust Law* 217–23 (Chicago 2d ed 2001) (describing how a short-run marginal-cost test is not a useful remedy against predatory pricing), citing Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 Harv L Rev 697, 716–18 (1975).

<sup>23</sup> Richard A. Posner, *Vertical Restraints and Antitrust Policy*, 72 U Chi L Rev 229, 239–40 (2005) (suggesting that bundling discounts can be explained by nonexclusionary measures such as price discrimination).

<sup>24</sup> See *JTC Petroleum Co v Piasa Motor Fuels, Inc*, 190 F3d 775, 778–79 (7th Cir 1999) (Posner) (noting that a cartel could injure a rogue competitor by preventing upstream producers from selling to those outside the cartel).

Chicagoans reflexively accept,<sup>25</sup> and argued that price discrimination may be, on average, output reducing.<sup>26</sup> Surely, these are not the views of an antitrust abolitionist.

At times, the *How Chicago* authors try to minimize Chicago's antitrust commitment by belittling those enforcement schemes that Chicagoans do support. For example, Scherer complains that Chicagoans only support intervention to correct market structure when governmental intervention has created market dislocations (pp 36–37). Baxter's breakup of AT&T is an example of such an influence. But surely the fact that the Chicagoan Baxter accomplished the most far-reaching structural remedy in history counts against the view that Chicago seeks to abolish antitrust—even if Chicago's reasons for intervention center on the evils of the government's regulatory role in telecommunications.

A similar overstatement relates to the levels of enforcement by Chicago-oriented enforcement agencies. For example, Pitofsky repeats the oft-made claim that “in the 1980s, antitrust enforcement virtually disappeared” (p 5). In a recent study, I showed that Department of Justice antitrust case filings, adjusted for GDP, were roughly constant during the Ford, Carter, Reagan, Bush, and Clinton administrations.<sup>27</sup> Critics complain that the total number of case filings during the Reagan administration is misleading, since the Reagan Justice Department “piled on” by filing repetitive cartel cases and ignored other aspects of enforcement.<sup>28</sup> But it is one thing to disagree with Chicago's enforcement priorities and another thing altogether to pretend that Chicago has none.

## B. Chicago and Harvard

One of the book's recurrent themes is to blame the Chicago School for the Supreme Court's antitrust retrenchment in recent decades. To be sure, no plaintiff has won an antitrust case in the Supreme Court since 1992.<sup>29</sup> But to “blame” this unqualifiedly on “conservative economics” is a gross overstatement. As scholars have shown (and, to be fair, a few of Pitofsky's authors acknowledge), recent antitrust de-

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<sup>25</sup> See *General Leaseways, Inc v National Truck Leasing Association*, 744 F2d 588, 593–94 (7th Cir 1984) (Posner) (rejecting the freerider argument because the members of National Truck Leasing charge each other for their services).

<sup>26</sup> Posner, 72 U Chi L Rev at 235 (cited in note 23) (“The effect of price discrimination on economic welfare may be generally negative.”).

<sup>27</sup> Daniel A. Crane, *Technocracy and Antitrust*, 86 Tex L Rev 1159, 1174–77 (2008).

<sup>28</sup> See *id* at 1176 n 77.

<sup>29</sup> The last time a plaintiff won was in *Eastman Kodak Co v Image Technical Services, Inc*, 504 US 451, 462–63 (1992) (holding that plaintiffs had presented enough evidence of a tying arrangement to survive a summary judgment motion).



cisions on the Supreme Court have been at least as much influenced by the Harvard School as by the Chicago School.<sup>30</sup>

As FTC Chair Bill Kovacic has written regarding single-firm conduct but with application to antitrust as a whole,

the intellectual DNA of U.S. antitrust doctrine governing single-firm conduct today is not exclusively or predominantly a single strand of Chicago School ideas. Rather, the intellectual DNA of modern U.S. antitrust doctrine is chiefly a double helix that consists of two intertwined chains of ideas, one drawn from the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other drawn from the Harvard School (HS) of Phillip Areeda, Donald Turner, and Stephen Breyer.<sup>31</sup>

Whereas the Chicago School tends to argue for the robustness of markets and hence for minimal need for regulatory interventions, the Harvard School tends to focus on the institutional limitations of governmental actors—regulators, judges, and juries—to correct even real market failures. Conjectively, the two schools often tend toward similar noninterventionist results.

Consider Stephen Breyer. Before joining the Court, Breyer worked in the Antitrust Division of the Department of Justice, taught antitrust at Harvard, and decided several pro-defendant and highly influential antitrust cases as a First Circuit judge.<sup>32</sup> Since Breyer joined the Court in 1994, the Supreme Court has decided fourteen antitrust cases. In those cases, there have been 108 votes for the majority position and only 14 votes in dissent. Breyer has only been on the losing side twice, as often as Clarence Thomas. In all fourteen cases, the defendant won. Surely, a “conservative” breeze is wafting on the Court. But from Hyde Park?

The best explanation for Breyer’s voting pattern is an institutionalist perspective on comparative competence in decisionmaking.

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<sup>30</sup> See Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?*, 3 *Comp Policy Intl* 59, 60 (2007) (discussing how the recent Supreme Court antitrust decisions were influenced by the more moderate Harvard School approach as opposed to the Chicago School).

<sup>31</sup> William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum Bus L Rev* 1, 13–14 (characterizing each school of thought as working in conjunction, with Chicago contributing “substantive theories . . . involving dominant firm conduct” and Harvard cautioning “about the administrability of legal rules and the capacity of the institutions entrusted with implementing them”).

<sup>32</sup> See, for example, *Town of Concord v Boston Edison Co*, 915 F2d 17, 22 (1st Cir 1990) (rejecting a price squeeze claim where utility was regulated at both the primary and secondary level); *Barry Wright Corp v ITT Grinnell Corp*, 724 F2d 227, 235–36 (1st Cir 1983) (rejecting predatory-pricing and exclusive-dealing claims).

Breyer leans toward technocracy,<sup>33</sup> and probably brings other justices with him. In two much-criticized cases in which Breyer joined (or authored) the majority opinion, one could plausibly understand the decision to withdraw antitrust intervention as a preference for regulatory decisionmaking by administrative agencies—by the FCC in *Verizon Communications Inc v Law Offices of Curtis V. Trinko*<sup>34</sup> and by the SEC in *Credit Suisse Securities (USA) v Billing*.<sup>35</sup> In the two cases in which Breyer dissented, his reasons may have had less to do with a belief that the Chicago School majority had excessive confidence in markets than a conviction that the majority approach would entrust decisionmaking to comparatively less competent decisionmakers. In *California Dental Association v FTC*,<sup>36</sup> Breyer's dissent leaned on the comparative advantage of the FTC in ascertaining what kinds of advertising were false or misleading.<sup>37</sup> In *Leegin Creative Leather Products, Inc v PSKS, Inc*,<sup>38</sup> Breyer advocated the use of rules rather than standards on the ground that juries may have difficulty applying open-ended, economically dense standards.<sup>39</sup>

Chicago School thinking has had a considerable impact on the Supreme Court, but it is only one part of the story. Perhaps the most significant predictor of antitrust outcomes today—the most accurate bellwether of Supreme Court sentiment—is the Areeda-Hovenkamp antitrust treatise, which is currently in the sole custody of Herbert Hovenkamp.<sup>40</sup> If one is to criticize the recent pro-defendant turn in Supreme Court jurisprudence, one might as well write a book entitled, *How the Neo-Harvard School Overshot the Mark*.

### C. Chicago's Radical Agenda?

As noted at the outset, there is a significant tension within *How Chicago* between Pitofsky's apparent goal—of providing a systematic, ideological case against radical Chicago overreaching—and what his au-

<sup>33</sup> See Ken I. Kersch, *Justice Breyer's Mandarin Liberty*, 73 U Chi L Rev 759, 760–61 (2006) (describing Justice Breyer's technocratic outlook).

<sup>34</sup> 540 US 398, 411–12 (2004) (maintaining that because there was already a regulatory scheme in place, any additional benefit provided by antitrust laws would “tend to be small”).

<sup>35</sup> US 264, 275 (2007) (holding that where a regulatory scheme is in place, courts must determine whether it is clearly incompatible with antitrust law).

<sup>36</sup> 526 US 756 (1999).

<sup>37</sup> Id at 787 (Breyer dissenting).

<sup>38</sup> 127 S Ct 2705 (2007).

<sup>39</sup> Id at 2730 (Breyer dissenting) (“One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes.”).

<sup>40</sup> See Daniel A. Crane, *Antitrust Modesty*, 105 Mich L Rev 1193, 1208–09 (2007) (noting that Hovenkamp's theories on patents and tying, the essential facilities doctrine, and possibly, per se illegality for minimum retail price maintenance have become popular in the Supreme Court).

thors are actually willing to say. Many of his authors are willing to articulate specific points of disagreement with Chicago School tenets but are unwilling to sound the alarm bells that the book advertises. Sometimes, Pitofsky uses the introductory blurbs between chapters to hint at the exposé to come, only to have the exposé fall considerably short of its billing.

At times the mismatch between the introductory blurbs and chapters becomes absurd. For example, the introduction to Chapter 3 asserts that “Hovenkamp next turns to the question of whether there can be a ‘general theory’ of monopolization, an obsessive recent concern of conservative antitrust officials” (p 107). To be sure, in recent years there has been an active—perhaps even “obsessive”—search for a unifying theory of monopolization law of which I, among others, have been critical.<sup>41</sup> But there is no basis for claiming that this obsession is part of the conservative plot, and Hovenkamp certainly does not say so. One of the leading “unifying theory” articles was written by Harvard law professor Einer Elhauge, the head of Barack Obama’s Antitrust Advisory Committee during the 2008 presidential campaign and the author of an article attacking the Chicago School perspective on tying and price discrimination.<sup>42</sup> Steve Salop, who critiques Chicago’s approach to vertical exclusion in Chapter 4, has written another “unifying theory” article proposing a “consumer welfare” test.<sup>43</sup> The Hovenkamp chapter that follows the “obsessive recent concern” introductory blurb rejects any “single test” for monopolization but then proposes a unifying test with two parts, three subparts, and an additional consideration (p 118). The “unifying theory” bug has bitten scholars and practitioners across the ideological spectrum.

A brief anecdote illustrates the irony of the “obsessive recent concern” comment. During the summer of 2004, an antitrust symposium was held at (where else?) the University of Chicago. Hovenkamp presented a paper entirely devoted to defining a general test for monopolization.<sup>44</sup> During the discussion period, Richard Posner asked,

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<sup>41</sup> See Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 Emory L J 423, 463–64 (2006) (analyzing the shortcomings of verbal formulations as applied to mixed bundling).

<sup>42</sup> See Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan L Rev 253, 320 (2003) (characterizing the antitrust doctrine as relying “on a market *process* that allows monopolists to reap whatever gains they can by efforts to improve their own efficiency, while subjecting them to the constant counter-pressure that their rivals will be trying to do the same”). The article critiquing the Chicago School perspective on tying and price discrimination is Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv L Rev (forthcoming 2009).

<sup>43</sup> See Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-sacrifice Standard*, 73 Antitrust L J 311, 314 (2006) (claiming that the “consumer welfare” standard leads to decreased overdeterrence and underdeterrence, relative to its competitors).

<sup>44</sup> See generally Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U Chi L Rev 147 (2005) (summarizing the shortcomings of current generalized formulations of exclusionary conduct).

roughly, why everyone was so intent on articulating a general theory of monopolization and suggested that a case-by-case approach to monopolization offenses might be satisfactory. Pitofsky was also in attendance. It now seems that he concurs with Posner's assessment of the unifying theory obsession, for which Pitofsky blames . . . the Chicago School, relying for support on a chapter written by Hovenkamp (which provides no such support).

In fact, while Hovenkamp articulates various thoughtful disagreements with Chicago School tendencies, it would be very difficult to take his neo-Harvard School perspective as a broad-based repudiation of the Chicago School.<sup>45</sup> For example, it is conventional wisdom that there has been one—and only one—“post-Chicago” antitrust decision in the Supreme Court.<sup>46</sup> In *Eastman Kodak Co v Image Technical Services, Inc.*,<sup>47</sup> the Court allowed a claim by independent service organizations (ISOs) that Kodak illegally tied its monopoly over Kodak-branded parts to service for Kodak copy machines.<sup>48</sup> Kodak made a “Chicago School” argument that since the primary market—the market for copy machines—was admittedly competitive, it was impossible for there to be anticompetitive effects in the service aftermarket.<sup>49</sup> The Supreme Court disagreed, finding that Kodak might have been able to exploit customer lock-in and failures of perfect information in purchasing decisions to obtain monopoly power in the aftermarket even though it lacked such power in the primary market.<sup>50</sup>

There has been no more vociferous critic of this post-Chicago ruling than Hovenkamp, who asserts that “*Kodak* was a failed experiment in a type of economic engineering where antitrust has no place.”<sup>51</sup> Significantly, Hovenkamp's argument against *Kodak* was not merely that the Court erred in some technical detail but that the entire enterprise of using antitrust to police post-contract market power attributable to consumer lock-in is misguided. Indeed, much of Hovenkamp's recent book (in the tradition of Posner and Bork) argues for continued curtailment of antitrust law. Consider the following summary statement: “At all times we must remember that if we be-

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<sup>45</sup> I have referred to the neo-Harvard School as “Chicago lite.” Crane, 105 Mich L Rev at 1194 (cited in note 40) (categorizing the “new Harvard” school as “Chicago lite” because it “accepts the essential theoretic insights of the Chicago School but acts cautiously in applying them to real cases because of skepticism over the predictive power of theoretic models in litigation”).

<sup>46</sup> See Herbert Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 98 (Harvard 2005).

<sup>47</sup> 504 US 451 (1992).

<sup>48</sup> Id at 455, 477.

<sup>49</sup> Id at 467.

<sup>50</sup> Id at 473–77.

<sup>51</sup> Hovenkamp, *The Antitrust Enterprise* at 310 (cited in note 46) (arguing that the Supreme Court should overrule *Kodak*).

lieve that markets generally work well when left alone, then intervention is justified only in the relatively few cases where the judiciary can fix the problem more reliably, more cheaply, or more quickly than the market can fix itself.”<sup>52</sup> This could easily have been the summation for Posner’s 1976 *Antitrust Law* or Bork’s 1978 *The Antitrust Paradox*.<sup>53</sup>

It is difficult to understand why Pitofsky has included a chapter by Hovenkamp in a book that is supposedly testifying to the “profoundly wrong” direction of current US antitrust law. Despite some disagreements at the margin, Hovenkamp believes that “the Supreme Court and the circuit courts are generally about where they should be in defining [section] 2 standards” (p 112). Even Goldschmid, who provides a comment on Hovenkamp’s essay, acknowledges that the “current permissiveness” may have as much to do with a “chastised Harvard School” (p 123)—for example, Hovenkamp and Breyer—as it does with “the conservatives.” Where, then, is the support for the statement in Pitofsky’s chapter introduction that “[o]ne of the most remarkable developments in recent years is hostility to section 2 enforcement by conservative scholars and in language in judicial decisions” (p 107)? Anyone wanting to cite *How Chicago* as a searing indictment of the Chicago School or “conservatives” had better read not only the introductions and cover blurbs, but also the chapters.

## II. POST-CHICAGO

Beyond the suggestion that Chicago represents a right-wing power grab rather than sound economic thinking, the major criticism emerging from *How Chicago* is that Chicago is too theoretical, simple, speculative, and unempirical. Thus, Kauper complains of the “disparity between Chicago’s model and provable facts” and suggests that *Kodak* involves a case of “provable facts” trumping Chicagoan speculation (p 47).<sup>54</sup> Fox argues that Chicago speculated that predatory pricing could happen rarely, if ever, whereas “[s]cholarship establishes, to the contrary, that selective price predation is a recurring phenomenon” (p 82). Calkins argues that “[t]here is a lot of speculating about the effects of exclusive dealing but not nearly enough empirical research” (p 167).

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<sup>52</sup> Id at 124.

<sup>53</sup> See generally Richard A. Posner, *Antitrust Law: An Economic Perspective* (Chicago 1976); Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978).

<sup>54</sup> Again, in conflict with the ideas of Harvardian Hovenkamp, who believes that *Kodak* “turns antitrust into a free-ranging engine for repair of any contract that either deceives or has not taken every possible contingency into account” and “is not merely legally incorrect” but also “extremely dangerous as a policy matter.” Hovenkamp, *The Antitrust Enterprise* at 99, 101 (cited in note 46).

So Chicago is unempirical. What does post-Chicago offer to take its place? The answer is: not much so far.

### A. Post-Chicago Empiricism?

Empiricism has roughly three lives in *How Chicago*. The first is a recognition by several authors that the paleo-Harvard, pre-Chicago “structure, conduct, performance” paradigm of the 1960s was highly empiricist and ultimately a failure (pp 13, 54, 237). The second life is actually a death—the absence of empiricism in Chicago School scholarship. The third life is the vague suggestion that post-Chicago—or whatever it is that is now supposed to replace Chicago—has more realistic, worldly insights to offer.

This third life is kept vague because post-Chicago’s empiricism is thin. For all of the complaining about Chicago’s armchair speculation, post-Chicago offers precious little empirical demonstration that Chicago School theories have led to underperforming markets, enhanced market power, or consumer harm. Take, for example, Fox’s previously cited assertion that “[s]cholarship establishes, to the contrary, that selective price predation is a recurring phenomenon” (p 82). The support for this assertion is an article that relies primarily on *game theory* to claim that predation could be plausible under specified conditions.<sup>55</sup> There is little “demonstration” that predatory misbehavior leads to monopoly pricing; instead, there is mostly hypothesizing over how this *could* happen given idiosyncratic assumptions and case studies that provide illustrations for the theoretical models without robustly establishing the existence of predation.<sup>56</sup> Nonetheless, this hypothesizing was enough for the United States Court of Appeals of the Tenth Circuit to say that, notwithstanding the Supreme Court’s adoption of a skeptical Chicago School approach about predatory pricing in the

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<sup>55</sup> See Patrick Bolton, Joseph F. Brodley, and Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 Georgetown L J 2239, 2262 (2000).

<sup>56</sup> Patrick Bolton, Joseph Brodley, and Michael Riordan mention a clash between two empirical studies: Richard O. Zerbe, Jr and Donald S. Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 Tex L Rev 655, 699–708 (1982), and Roland H. Koller, II, *The Myth of Predatory Pricing: An Empirical Study*, Antitrust L & Econ Rev 105, 112 (Summer 1971). They then provide various theoretical models of reputational or financial-market predation and illustrate their theories with several case studies. However, the case studies do not establish that predation actually happened—only that it could have happened. For example, their report on a case study regarding a cable system monopolist in Sacramento notes that the incumbent monopolist engaged in “drastic” price-cutting in response to new entry, Bolton, Brodley, and Riordan, 88 Georgetown L J at 2292–93 (cited in note 55), but that is exactly what we would expect a monopolist would do in response to new entry. The authors acknowledge that “the case study does not analyze the issue of below-cost pricing,” and therefore can only speculate as to the critical liability issue in the case. Id at 2298–99.

1980s and 1990s, it would not approach predatory pricing claims “with the incredulity that once prevailed.”<sup>57</sup>

Perhaps the most detailed empirical work on predatory pricing was done by a Chicagoan, John Lott (of *More Guns, Less Crime*<sup>58</sup> fame) who took the assumptions posited by the game theoreticians as necessary for predation to work and analyzed whether those assumptions were present in cases of alleged predation.<sup>59</sup> Lott concluded that they were not.<sup>60</sup> Although Lott’s methodologies and findings have been subject to criticism,<sup>61</sup> post-Chicago has not rushed in to provide a systematic empirical demonstration that predation works. Overall, Easterbrook’s observation continues to stand: theories about predatory pricing are so variegated “for the same reason that 600 years ago there were a thousand positions on what dragons looked like.”<sup>62</sup>

Another case in point is Baker and Shapiro’s concluding chapter on merger policy. Baker and Shapiro devote three pages to criticizing the Department of Justice’s 2006 clearance of Whirlpool’s acquisition of Maytag (pp 248–50). But while they offer a persuasive theoretical case for concerns over the merger, they do not offer any evidence of actual anticompetitive effects resulting from this merger or any other. To be sure, merger review under the Hart-Scott-Rodino Act’s premerger notification system is almost all prospective, and its analytical tools must therefore be predictive rather than actual.<sup>63</sup> But for a school of thought that criticizes Chicago for being overly theoretical and speculative, post-Chicago offers little empiricism. Where is the rigorous empirical demonstration that Chicago School thinking has led to excessive laxity in antitrust controls and therefore to competitively underperforming markets?

For instance, one would expect to see the ostensibly empiricist post-Chicago Schoolers offering a systematic body of merger retrospectives linking increased prices and reduced innovation or quality to overly permissive merger-control theories at the antitrust agencies or the courts. In fact, it is the “Chicago School” agencies themselves that

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<sup>57</sup> *United States v AMR Corp.*, 335 F3d 1109, 1115 (10th Cir 2003).

<sup>58</sup> See generally John R. Lott, Jr, *More Guns, Less Crime: Understanding Crime and Gun-Control Laws* (Chicago 2d ed 2000).

<sup>59</sup> See John R. Lott, Jr, *Are Predatory Commitments Credible? Who Should the Courts Believe?* 59–60 (Chicago 1999).

<sup>60</sup> See generally *id.*

<sup>61</sup> See generally, for example, David E.M. Sappington and J. Gregory Sidak, Review, *Are Public Enterprises the Only Credible Predators?*, 67 U Chi L Rev 271 (2000), reviewing Lott, *Are Predatory Commitments Credible?* (cited in note 59).

<sup>62</sup> Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U Chi L Rev 263, 264 (1981).

<sup>63</sup> See 15 USC § 18a(a) (explaining the premerger notification and waiting period requirements).

are increasingly conducting such retrospectives. On Whirlpool's acquisition of Maytag, the Department of Justice conducted a two-year retrospective and found that residential washer and dryer prices had trended downward since the deal closed even though the input costs of materials had skyrocketed and quality (as measured by energy efficiency) had increased.<sup>64</sup>

The methodology used in the Whirlpool-Maytag retrospective has been subject to criticism, and it would be an overstatement to claim that the retrospective proves that the merger was pro-competitive. As a general matter, great care has to be taken with such retrospectives. Senior Justice Department officials have cautioned that such analyses need to consider both agency predictions and market outcomes in order to be effective.<sup>65</sup> Baker and Shapiro's criticisms might be considered predictively accurate in the sense that there was a high probability of anticompetitive effects and yet those anticompetitive effects never materialized due to intervening events. Neither Chicagoans nor post-Chicagoans have the right to say "I told you so" based on the outcome of any single merger. Nonetheless, post-Chicago critiques would be much more powerful if they were tied to empirical showings of systemic failure in Chicago School predictions. Otherwise, accusations that Chicago is overly theoretical and speculative seem like the pot calling the kettle black.

*How Chicago* offers one compelling empirical study (or group of studies) in possible conflict with a Chicago tenet. As Marina Lao notes, between 1937 and 1975, Congress allowed states to opt into "fair trade" laws effectively legalizing vertical resale price maintenance (RPM) (p 210). Empirical studies showed that retail prices tended to be higher in "fair trade" states than in states where RPM continued to be illegal (p 210). This does not necessarily prove that RPM is harmful to consumers—the higher prices in "fair trade" states could be attributable to enhanced quality or service at retail (the free-riding story that Grimes and Lao reject). But it is the kind of evidence that one would expect the post-Chicago School to adduce in order to

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<sup>64</sup> See Thomas O. Barnett, *Current Issues in Merger Enforcement: Thoughts on Theory, Litigation Practice, and Retrospectives* (June 26, 2008), online at <http://www.usdoj.gov/atr/public/speeches/234537.htm> (visited Apr 7, 2009) (noting that consumers likely benefited from the Maytag-Whirlpool merger, but that merger retrospectives are difficult to conduct ex post).

<sup>65</sup> See Dennis W. Carlton, *The Need to Measure the Effect of Merger Policy and How to Do It* (DOJ working paper No EAG 07-15 2007), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1075707](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1075707) (visited Apr 7, 2009). At the time he wrote this article, Dennis Carlton was Deputy Assistant Attorney General in charge of economics at the Antitrust Division. And, yes, Carlton is an economics professor at the University of Chicago, Booth School of Business.



advance its case for a more empirically founded, interventionist anti-trust. Post-Chicago will have to do better than a few thirty-year-old studies about RPM to make its case convincing.

### B. Nonintervention as the Default

Post-Chicago's failure to demonstrate that Chicago School reasoning has actually made things worse for consumers, or that some alternative vision would make things better, is an important reason that post-Chicago theories have gained so little traction thus far. One can understand why this is frustrating to post-Chicagoans. Chicago offers a theoretical model, post-Chicago offers a countermodel that is just as elegant, and Chicago persistently wins the duel. Why do all of the bounces go Chicago's way?

The answer is that, for now at least, nonintervention is the default rule. If pro-intervention and anti-intervention models duel one another into a stalemate, very few judges or enforcement officials will side with intervention. Enforcement is costly and there is a general sense that market dislocations are more quickly corrected than legal dislocations. The Chicago School has the advantage of offering solutions that are not only simple theoretically, but simple practically. Doing nothing is much easier than constructing the remedy to a complex and contested liability finding.

Much of *How Chicago* has a flavor of "Chicago says  $x$  but  $y$  could be true." As long as this remains the case, post-Chicago will have trouble gaining traction. Ties go to the status quo, particularly if the status quo is nonintervention.

For example, Salop explains how vertical integration can be efficiency enhancing because it eliminates double marginalization, but that such integration can also "be anticompetitive by reducing or eliminating the potential for entry" (p 149). Indeed, the efficiencies may be the very source of the anticompetitive effect. If firms eliminate double marginalization through vertical integration and therefore offer lower prices, it may become necessary for rival firms to vertically integrate in order to remain price-competitive—and this condition creates an entry barrier by requiring costly simultaneous entry at two levels of the market. This may all be perfectly true, but it is not the sort of argument that is likely to turn courts or enforcers against Chicago because Chicago is overly theoretical. Without any sense of how much weight to put on either side of the scale—which requires some empirical showing—courts and agencies will likely continue to default to nonintervention.

### C. "Conservative Economics" as Covert Ideology

One can easily come away from portions of *How Chicago* with the impression that the Chicago School's "conservative economics"

are not so much an honest mistake on the merits as a cover for a right-wing deregulatory political agenda. In this view, conservative ideologues co-opted the vocabulary of economics in order to justify noninterventionist policies, which explains why the movement's economics are so shallow and misapplied. "Conservative economics" thus becomes to antitrust what "the Framers's intent" is to some perspectives on constitutional law—an ostensibly neutral and objective methodology used to disguise the proponent's political preferences.

Let us assume for a moment that this view has some merit and that *How Chicago* has exposed portions of "conservative economics" as a fraud. What then? *How Chicago* does not suggest a counterideology as a candidate for replacing Chicago.

To the antitrust outsider, this may appear inconsequential. Chicago advanced an anti-interventionist agenda, and rejection of Chicago could simply lead back to more intervention. The problem with this view is that not one of the *How Chicago* authors wants to pick up where we left off pre-Chicago. As Pitofsky acknowledges in the introduction, "Virtually all [of his authors] share the view that U.S. antitrust enforcement, as a result of conservative economic analysis, is *better* today than it was during the Warren years" (p 5). He later adds that "[i]t is unanimous that conservative economic analysis . . . demolished some aspects of the antitrust approach of the 1950s and 1960s (Warren Court period) and eventually displaced it with a more rigorous approach" (p 7). Going back is not an option.

The ultimate failure of *How Chicago* (and the post-Chicago School more generally) is the absence of a unified normative vision to contend with Chicago's implicit ideological assumptions. If Pitofsky is right to sound the alarm bell—to call out Chicago's covert right-wing agenda—it will not do to publish a book that takes technical pot-shots at Chicago School policy positions and darkly hints that radical Chicagoans favor complete abolition. What is needed is an expression of a strong normative position on why antitrust law should exist and what its limits are, who its intended beneficiaries are, how conflicts between different stakeholders should be mediated, how more vigorous enforcement is consistent with broader political values, and how antitrust should be implemented given political and institutional constraints.<sup>66</sup> In short, a comprehensive normative vision needs to be arti-

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<sup>66</sup> To be sure, many of the authors in the post-Chicago camp—including many of the *How Chicago* authors—have offered answers to some of these questions. For instance, Pitofsky and Baker have written two of the leading papers arguing that antitrust analysis should explicitly factor in political considerations. See Robert Pitofsky, *The Political Content of Antitrust*, 127 U Pa L Rev 1051, 1051 (1979) (arguing that it is "bad history, bad policy, and bad law to exclude certain political values in interpreting antitrust laws"); Jonathan B. Baker, *Competition Policy as*

culated and defended. If post-Chicago has thus far failed to gain traction, it is because its major contribution has been to grouse about Chicago rather than to articulate a clear and appealing vision about what antitrust should do and why.

### III. NEO-CHICAGO

Despite my previously identified disagreements with *How Chicago's* ideological tenor and many of its specific assertions, there is no doubt that post-Chicago views have provided valuable criticisms and refinements of Chicago School positions. An example not discussed in the book is a pair of amicus curiae briefs by prominent economists and law professors addressing the regulation of contractual tie-ins using patents and the related problem of second-degree price discrimination.<sup>67</sup> Although the briefs ultimately failed to persuade the Supreme Court to retain its pre-Chicago presumption of market power for patent tie-ins,<sup>68</sup> the briefs provided targeted critiques of Chicago's "one monopoly" argument on tie-ins and its sometimes undifferentiated embrace of price discrimination. As such advocacy and scholarship continues, it is likely to provide an increasing challenge to Chicagoan positions, even if it fails to offer a broad ideological riposte to the Chicago School writ large.

In this Part, I provide a brief roadmap for a Chicago School response to this increasing drumbeat of dissent. Already, there is talk of a neo-Chicago School, one that accepts Chicago's basic premises as refined by the emerging body of criticism.<sup>69</sup> The success of this neo-Chicago School depends critically on replenishing Chicago's intellectual stock, providing empirical support for Chicago School theories, and renewing the case for Chicago's "articles of faith."

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*Political Bargain*, 73 Antitrust L J 483, 484 (2006) (advocating that antitrust should be viewed as a political bargain between courts, consumers, and producers). What is lacking, however, is a unified post-Chicago normative account of antitrust law and a roadmap for its implementation.

<sup>67</sup> See Brief of Professor F.M. Scherer as *Amicus Curiae* in Support of Respondent, *Illinois Tool Works, Inc v Independent Ink, Inc*, No 04-1329, \*2-3 (Fed Cir filed Sept 28, 2005) (available on Westlaw at 2005 WL 24276420); Brief of Professors Barry Nalebuff, Ian Ayres, and Lawrence Sullivan as *Amici Curiae* in Support of Respondent, *Illinois Tool Works, Inc v Independent Ink, Inc*, No 04-1329, \*2-4 (Fed Cir filed Sept 28, 2005) (available on Westlaw at 2005 WL 2427646).

<sup>68</sup> See *Illinois Tool*, 547 US at 46 (holding that a plaintiff alleging unlawful tying must prove that a defendant had market power in the tying market and may no longer rely on presumption that presence of a patent in the tying market confers market power).

<sup>69</sup> See David S. Evans and A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U Chi L Rev 73, 75 (2005) (defining a "neo-Chicago" approach that "accepts the Chicago tenet that legal rules" should be assessed "in terms of efficiency," but also makes use of "post-Chicago insights in designing these rules").

### A. Replenishing the Intellectual Stock

This is a propitious time to be a post-Chicago scholar. Chicago's intellectual edifice is in a state of neglect. Its erstwhile paladins are largely dead, bored with the field, or complacent. Some, like Posner and Easterbrook, continue to offer the occasional, infrequent antitrust intervention, but without the zeal of their earlier years. By and large, the view seems to be that what needed to be said was said and the field is by and large where it should be.<sup>70</sup> Others, most notably Bork, appear to have been seduced by the "dark side." In 1998, Bork became a paid mouthpiece for Netscape in its war with Microsoft, explaining that "[o]nly a knee-jerk conservative would say that there's never a case for antitrust."<sup>71</sup> The fire has gone out of the Chicago School.

Meanwhile, post-Chicago is lean, hungry, and spoiling for a fight. Post-Chicagoans realize that Chicagoans and their neo-Harvard allies will continue to dominate the Supreme Court for some time. But there are plenty of opportunities to score points in the antitrust agencies and in the lower courts. Over the past few decades the Supreme Court has shown relatively little interest in antitrust cases, granting certiorari in about one case a year (many of which raise relatively unimportant technical matters such as whether the Post Office can be sued under the Sherman Act<sup>72</sup>). The Supreme Court has refused to review a number of controversial pro-plaintiff lower court decisions,<sup>73</sup> thus allowing a body of post-Chicago lower court law to incubate.

Perhaps more importantly in the long run is the drumbeat of post-Chicago academic literature, of which *How Chicago* will probably be the rallying point. Further, despite the Chicago School's general academic influence, law students—the future crop of judges, politicians, academics, and enforcers—are increasingly being exposed to post-Chicago views without much of a current Chicago counterpunch. Of the eight major antitrust casebooks, only Posner and Easter-

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<sup>70</sup> In the preface to the 2001 second edition of *Antitrust Law*, Posner notes that contemporary antitrust law is "largely though not entirely congruent with the principles set forth in the first edition" of his book and that antitrust law has been "normalized" and "domesticated." Posner, *Antitrust Law* at viii (cited in note 22). He characterizes the disputes between post-Chicago and Chicago as niggling disagreements over emphasis. *Id.* at vii–viii.

<sup>71</sup> Ellen Frankel Paul, *Hayek on Monopoly and Antitrust in the Crucible of United States v. Microsoft*, 1 NYU J L & Liberty 167, 201 (2005).

<sup>72</sup> *United States Postal Service v Flamingo Industries (USA) Ltd*, 540 US 736, 748 (2004).

<sup>73</sup> A partial list of recent, controversial, pro-plaintiff lower court decisions in which the Supreme Court denied certiorari includes *Dentsply International Inc v United States*, 546 US 1089 (2006); *Visa USA, Inc v United States*, 543 US 811 (2004); *3M Co v LePage's Inc*, 542 US 953 (2004); *United States Tobacco Co v Conwood Co*, 537 US 1148 (2003); *C.R. Bard, Inc v M3 Systems, Inc*, 526 US 1130 (1999).

brook's, which is in the process of revision,<sup>74</sup> is identifiably Chicago School in its orientation.

Chicago's challenge is to revitalize its ideas and reenergize its constituents given these background conditions. At present, Chicago's strongholds are the Supreme Court, the enforcement agencies, and antitrust practitioners. In the long run, it cannot hold the fort without attracting a new generation of scholars to defend and refine its central ideas in the academy and present them to the next generation of judges, enforcers, and practitioners.

## B. Empiricism

Neo-Chicago is unlikely to succeed by merely bolstering Chicago School tenets on theoretical grounds. Sooner or later, post-Chicago will have to supply the empirical evidence that is assumed in, but largely absent from, its attacks on Chicago. For the reasons previously identified, post-Chicago will continue to make only minor dents in Chicagoan dogma so long as it continues to engage Chicago in a theoretical tit-for-tat. When post-Chicago begins to put more muscle into an empirical attack, Chicago will need to respond in kind.

The dominant trend in the legal academy is toward empirical legal studies. Antitrust cannot stay on the sidelines for long. At the first three annual conferences on empirical legal studies (held at Texas, NYU, and Cornell in 2006, 2007, and 2008, respectively) antitrust was completely absent from the programs.<sup>75</sup> Neither Chicago nor post-Chicago seems eager to join the empiricist bandwagon. There is an opportunity for entrepreneurial scholars from either camp to begin serious programs of empirical work on antitrust.

There is no lack of promising empirical projects awaiting a champion. The Supreme Court's recent jettisoning of the rule of per se illegality for vertical resale price maintenance<sup>76</sup> opens the door to study modern RPM, particularly given changes in the rules of distribution brought about by retail consolidation and the Internet. Similarly, the abrogation of the rule of per se illegality for patent tie-ins,<sup>77</sup> the continu-

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<sup>74</sup> Frank H. Easterbrook, Richard A. Posner, and Andrew M. Rosenfield, *Antitrust: Cases, Economic Notes and Other Materials* (West forthcoming).

<sup>75</sup> First Annual Conference on Empirical Legal Studies, Texas, online at [http://www.utexas.edu/law/news/2005/112805\\_black.html](http://www.utexas.edu/law/news/2005/112805_black.html) (visited Apr 7, 2009); Second Annual Conference on Empirical Legal Studies, NYU, online at <http://www1.law.nyu.edu/cels> (visited Apr 7, 2009); Third Annual Conference on Empirical Legal Studies, Cornell, online at <http://www.lawschool.cornell.edu/cels2008/Schedule.cfm> (visited Apr 7, 2009).

<sup>76</sup> See *Leegin*, 127 S Ct at 2725 (2007) (holding that vertical price restraints should be judged by the rule of reason, not the per se rule), overruling *Dr. Miles Medical Co v John D. Park & Sons Co*, 220 US 373 (1911).

<sup>77</sup> See note 68.

ing battle over pharmaceutical patent settlements,<sup>78</sup> and the purposes and effects of allegedly exclusionary distribution strategies (like bundling, tying, and exclusive dealing) all provide fodder for interesting empirical projects. The fields are ripe but the laborers few. Both Chicago and its detractors have an opportunity and a need to fill this void.

### C. Renewing the Articles of Faith

Empiricism has its limits in antitrust, as it does everywhere else. Many antitrust judgments are not Popperian—they cannot be falsified or proven.<sup>79</sup> Instead, they rest on informed intuitions about the comparative success and failure rates of markets and courts. At its core, the Chicago School espoused two articles of faith: (1) markets are robust when it comes to competition; and (2) courts are infirm when it comes to policing competition. Post-Chicago has largely concentrated its attack on the first article, assuming that the comparative superiority of courts will become evident if the depth of market failure can be demonstrated.

Chicago is likely to find a world increasingly disinclined to accept its articles of faith. The nerve-rattling financial crisis triggered in 2008 has made even erstwhile libertarians and rabid anti-antitrusters like Alan Greenspan<sup>80</sup> reconsider their priors.<sup>81</sup> Richard Posner's hastily written post-mortem—*A Failure of Capitalism*—blames the recent depression (as he styles it) on under-regulation.<sup>82</sup> Never mind that the financial crisis had little to do with competition policy. If the relevant category is “faith in markets,” Chicago faces a tremendous challenge maintaining adherents in the coming years.

This suggests that Chicago is most likely to succeed if it spends the immediate future rearticulating its second article of faith. Some competitive practices that cause harm cannot be controlled without

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<sup>78</sup> Some of the little empirical work that is being done today in antitrust is being conducted on patent settlements between branded and generic drug manufacturers. See generally C. Scott Hemphill, *Drug Patent Settlements between Rivals: A Survey*, online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=969492](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=969492) (visited April 7, 2009) (analyzing thirty settlements involving drug companies and concluding that (1) antitrust activity has increased, (2) repeat players have emerged, and (3) settlements have become more sophisticated).

<sup>79</sup> See Karl Popper, *The Logic of Scientific Discovery* chs 3–4 (Routledge 2002) (Karl Popper, et al, trans).

<sup>80</sup> See Alan Greenspan, *Antitrust*, in Ayn Rand, ed, *Capitalism: The Unknown Ideal* 56, 58 (New American Library 1967) (characterizing antitrust as “reminiscent of Alice’s Wonderland” and “utter nonsense”).

<sup>81</sup> Patrice Hill, *Congress Rips Greenspan for Crisis*, Wash Times A1 (Oct 24, 2008) (reporting that the former Federal Reserve chairman testified before Congress that his former faith in self-regulation had been “flawed”).

<sup>82</sup> See generally Richard A. Posner, *A Failure of Capitalism: The Crisis of '08 and the Descent into Depression* (2009).

doing damage to similar competitive practices that do good.<sup>83</sup> Further, Chicago might argue, the good that would be chilled through aggressive antitrust enforcement is often greater than the bad that would be prevented. In this sense, regulating competitive behavior is much like regulating speech. There is no doubt that some words break bones every bit as much as sticks and stones, but ceding censorial authority to the government poses a danger to valuable speech as well. It is in forms of rhetoric like this that Chicago is mostly likely to preserve some of its momentum in the challenging environment ahead.

#### CONCLUSION

*How Chicago* arrives at an opportune time. President Barack Obama (a Chicago Law School professor but hardly a “Chicagoan”) campaigned on a platform of renewed antitrust enforcement,<sup>84</sup> and the financial crisis will prompt greater scrutiny of free-market positions. One hopes that the book will be taken as a correction of Chicago’s errors rather than a wholesale abandonment of Chicago’s legacy. As most of the book’s authors assume or overtly say, Chicago left anti-trust enforcement far better off than it found it. If Chicago’s successor cannot say the same, it will be counted a failure.

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<sup>83</sup> See *Brooke Group Ltd v Brown & Williamson Tobacco Corp.*, 509 US 209, 223 (1993) (observing that above-cost predation may be “beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting”).

<sup>84</sup> See Jeff Mason, *Obama Eyes Media with Promise of Antitrust Push*, Reuters (May 18, 2008) (reporting that presidential candidate Obama stated on the campaign trail: “We’re going to have an antitrust division in the Justice Department that actually believes in antitrust law. We haven’t had that for the last seven, eight years.”).