

The Chicago School and the Forgotten Political Dimension of Antitrust Law

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An economically oriented and technocratic view of antitrust has dominated the discipline's practice and scholarship for the last four decades. Under this view, attributed in large part to the rise of the Chicago School, questions of legality ought to be decided exclusively on the basis of supposedly objective economic analysis, which does not admit any consideration or insight other than those that economists and other experts trained in the field can analyze. Lately, prominent voices from both the political left and right have begun attacking this mainstream view and calling for an enhanced role for antitrust law in mediating a variety of social, economic, and political issues.

This Essay discusses the political dimension of antitrust. It shows that antitrust law (and its common-law predecessors) was always concerned not only with narrowly defined economic aspects of competition, but also with the connection between market competition and a set of classic liberal political values. The common law's aversion to monopoly, restraints of trade, and restraints on alienation, while involving economic considerations, were primarily concerned with constraining private actors' ability to exercise power and limit the rights of others without a clear legal mandate to do so. It recognized that unchecked private economic power may be as injurious to individual freedom and other liberal values as unchecked political power and that the two may be mutually constitutive.

The passage of antitrust law starting in the late nineteenth century both reflected and rekindled interest in these political ideas, many of which continued to inform courts' antitrust decisions until the rise of the Chicago School and its insistence that antitrust law could only be legitimately concerned with maximizing economic efficiency. But as I show in this Essay, that view not only departed from antitrust law's historical roots and doctrinal development, but also presented a radical, unexplained, and unacknowledged shift from the views of some of the early founders of the Chicago School.

In addition to bringing to light the Chicago School's shifting views on antitrust's political dimension, this Essay also addresses the possibility of reintegrating this dimension. It discusses the legitimacy of integrating political considerations into existing law, the desirability of such integration, and the feasibility of integrating such considerations in a coherent, intelligible, and predictable fashion. It shows that such reintegration is legitimate, feasible, and may even be desirable.

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INTRODUCTION

The Chicago School, said to have influenced antitrust analysis inescapably,¹ is associated today with a set of ideas and arguments about the goal of antitrust law. In particular, the Chicago School is known for asserting that economic efficiency is and should be the only purpose of antitrust law and that the neoclassical price theory model offers the best policy tool for maximizing economic efficiency in the real world;² that corporate actions, including various vertical restraints, are efficient and welfare-increasing;³ that markets are self-correcting and monopoly is merely an occasional, unstable, and transitory outcome of the competitive process;⁴ and that governmental cures for the rare cases where markets fail to self-correct tend to be “worse than the disease.”⁵ These ideas and arguments, which Chicago School lawyers and economists began developing in the 1950s and 1960s, reflect an ideological commitment to nonenforcement.⁶ Having gained prominence since the 1970s and 1980s, these ideas and arguments have led courts and regulators to adopt a restrained approach to the application of antitrust law.⁷

Related features of the Chicago School are the notions that firm size and levels of concentration should not be a concern for antitrust law, and that considering anything other than a narrow set of purely economic variables such as prices and output would “politicize” antitrust law, thereby undermining its efficacy and legitimacy.⁸ Some of these ideas and arguments, especially the rejection of all political considerations, at least inasmuch as they cannot be framed in purely economic terms, have become part of the modern antitrust mainstream. They have been embraced

¹ See Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 Duke L J 1014, 1020 (noting that “[n]o one, including myself, can escape [the Chicago School’s] influence on antitrust analysis”).

² See Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 Mich L Rev 213, 215 (1985).

³ See *id.* at 243.

⁴ See Steven G. Medema, *Chicago Law and Economics*, in Ross B. Emmett, ed., *The Elgar Companion to the Chicago School of Economics* 160, 165 (Edward Elgar 2010).

⁵ *Id.* at 165.

⁶ See Herbert J. Hovenkamp and Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U Pa L Rev *5 (forthcoming 2020), archived at <https://perma.cc/E3Y2-BQF5>.

⁷ See Medema, *Chicago Law and Economics* at 160–68 (cited in note 4).

⁸ See, for example, Geoffrey A. Manne, *Why US Antitrust Law Should Not Emulate European Competition Policy* *9 (International Center for Law and Economics, Dec 19, 2018), archived at <https://perma.cc/Z9J6-3Q99>.

even by some of those advocating a return to more activist antitrust enforcement⁹ or otherwise do not subscribe to the entire Chicago School agenda.¹⁰ Therefore one should not conflate the insistence that the determination of antitrust liability should be rooted solely in economic grounds with the particular economic theories that members of the Chicago School have espoused.¹¹

This contemporary economics-focused view of antitrust celebrates the field as a technocratic one. It regards antitrust as “an expertized, administrative enterprise focused on managing market structures and industrial practices”¹² in which questions of legality ought to be decided exclusively on the basis of supposedly objective economic analysis. It also claims to employ only “non-ideological, expertized, and problem-solving modalities,”¹³ and does not admit any consideration or insight other than those which economists and other experts trained in this field can analyze. This view criticizes and rejects earlier court decisions that embraced a range of a supposedly “interventionist, populist, Brandeisian, and vaguely Jeffersonian conception of antitrust law as a constraint on large-scale business power”¹⁴ and lauds the reorientation of the law toward providing only “a mild constraint on a relatively small set of practices that pose a threat to allocative efficiency.”¹⁵

Even the Call for Papers for this timely Symposium, while seeking to reassess “the validity of the Chicago School’s assumptions about competition” and to consider “whether a more aggressive approach to antitrust enforcement is now warranted,” refers to economics (“game theory, new sources of data, and sophisticated empirical methods”) as *the* valid prism for reassessing the Chicago School and the validity of many of the presumptions that the Chicago School’s ideas were based on.¹⁶

⁹ See generally Carl Shapiro, *Antitrust in a Time of Populism*, 61 *Intl J Indust Org* 714 (2018).

¹⁰ See generally, for example, William E. Kovavic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 *U Chi L Rev* 459 (2020).

¹¹ See, for example, Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 *Antitrust L J* 835, 852 (2014).

¹² Daniel A. Crane, *Technocracy and Antitrust*, 86 *Tex L Rev* 1159, 1160 (2008).

¹³ *Id.* at 1211.

¹⁴ Crane, 79 *Antitrust L J* at 835 (cited in note 11).

¹⁵ *Id.*

¹⁶ See *Call for Papers: Symposium on Re-Assessing the Chicago School of Antitrust Law* (*U Chi L Rev* 2018), archived at <https://perma.cc/6Q8D-RCX4>.

However, the excision of antitrust law's political dimension is puzzling. For one thing, in enacting the antitrust laws as ones of general application that apply to all industries (as opposed to specific industries), Congress put in place a set of long-lasting basic rules of the game for the entire economy. In enacting such laws, Congress made a *political* choice about the desirability of market competition, the undesirability of certain conduct harmful to it, and the need for legal and regulatory tools that protect the former and deter the latter. Indeed, in 1965 Professors Robert Bork and Ward Bowman wrote in one of the most influential Chicago School articles that antitrust law is "an expression of a social philosophy, an educative force, and a political symbol of extraordinary potency."¹⁷

Moreover, the choice to prefer the ideas and arguments associated with one school over another is *political* because it determines the direction of the law and fosters certain legal outcomes, which themselves affect the distribution of resources across individuals and firms. Put simply, if the Chicago School antitrust analysis would permit certain business conduct of which an alternative conception of antitrust would disapprove, then the choice to prefer one approach over the other is political.¹⁸

Furthermore, the claim that one can fully separate the maximization of total welfare through the pursuit of the most efficient allocation of resources (deemed merely a scientific and apolitical exercise befitting antitrust law) from questions about the distribution of those resources (considered political and thus befitting the use of other policy tools) rests on faulty and oversimplistic premises, as the separation between the pursuit of efficiency and distributive concerns is not as neat as it might seem.

For one thing, as Professor Herbert Hovenkamp noted, anti-trust policy concerned exclusively with efficiency might encourage the growth of some firms and disregard the detriment to their small competitors. While Congress can respond to the distributional detriment to small businesses by giving them low-interest loans or other transfer payments, such measures will diminish the efficiency advantage of being big and undermine the antitrust

¹⁷ Robert H. Bork and Ward S. Bowman Jr, *The Crisis in Antitrust*, 65 Colum L Rev 363, 364 (1965).

¹⁸ See Hovenkamp, 84 Mich L Rev at 233 (cited in note 2). See also Nicola Giocoli, *Old Lady Charm: Explaining the Persistent Appeal of Chicago Antitrust*, 22 J Econ Methodology 96, 108 (2015).

policy of encouraging efficiency.¹⁹ Therefore, “an antitrust policy of maximizing efficiency cannot be pursued with anything resembling consistency unless the government is willing to adopt a much more *general* policy of maximizing efficiency . . . [and] abandon[] its concern with how wealth is distributed.”²⁰

Second, the efficient allocation of resources in any particular society reflects the distribution of wealth within that society because the amount of resources available to individuals affects their preferences and priorities and hence impacts the demand for certain goods over others. “People with wealth, including wealth caused by monopoly, express different preferences than people who are poor. [Yet] [a]s far as allocative efficiency is concerned, however, one initial distribution is as good as another.”²¹ This is part of the allure of the supposedly objective and apolitical nature of the economics-focused approach of the Chicago School and its intellectual allies, but until we can explain why we should pursue a policy of maximizing satisfaction from a given starting point while being agnostic about how resources were distributed at the starting point (and how they will continue to be allocated in the future), “the notion of ‘allocative efficiency’ is, at best, a trivial guide to policymaking.”²²

But more importantly and apart from those general observations, there was a time when the political dimension of antitrust was openly acknowledged and discussed. Antitrust law was understood to protect a particular set of liberal-democratic and “small-c” constitutional values, which Professor Lisa Austin describes in another context, as the “the core ideas that law cannot confer the authority to exercise power arbitrarily and that law must be able to guide actions.”²³ To a large extent, antitrust law endeavored to extend and entrench this principle in the economic life of the nation—not only between public officials and those subject to their authority but also in the relations between private economic actors. As I discuss below, that specific political dimension was apparent to some of the key figures in the founding of

¹⁹ Hovenkamp, 84 Mich L Rev at 246 (cited in note 2).

²⁰ Id at 246–47.

²¹ Id at 248.

²² Id.

²³ Lisa M. Austin, *Technological Tattletales and Constitutional Black Holes: Communications Intermediaries and Constitutional Constraints*, 17 *Theoretical Inquiries* L 451, 452 (2016).

what would become the Chicago School, who in fact initially supported it before embarking on a systematic journey to reorient the law.

In Part I, I explain what I mean when I talk about the political dimension of antitrust and show how this political dimension reflected certain quasi-constitutional values that shaped the development of antitrust law until the rise of the Chicago School. In Part II, I show how the founders of the Chicago School were not only familiar with this political dimension but also endorsed it, examine how they later changed direction, and track their efforts to discredit it. In Part III, I consider the desirability and feasibility of reviving antitrust's political dimension.

I. THE POLITICAL DIMENSION OF ANTITRUST

As might be gleaned from the previous discussion, the distinction between economic, noneconomic, and political approaches to antitrust may obfuscate more than it reveals: antitrust can and indeed has accommodated more than one economic theory and any decision to apply one economic theory or another to a question of public policy is political. The choice to consider or ignore distributional effects is political, as is the decision to endorse or reject concerns about power, be it economic, political, or both. But if all antitrust is political, then talking about and contrasting the economic and noneconomic or political dimensions of antitrust only makes sense if we clarify what each of those labels means. Therefore, in the rest of this Essay I will use the term "economic" to refer to the view that the goals of antitrust law should only be concerned with economic efficiency, be it allocative, productive, or dynamic. By contrast, in using the term "political" I will largely follow Professor Robert Pitofsky's description of the following concerns: (a) "a fear that excessive concentration of economic power will breed antidemocratic political pressures"; (b) "a desire to enhance individual and business freedom by reducing the range within which private discretion by a few in the economic sphere controls the welfare of all"; and (c) an

overriding political concern [] that if the free-market sector of the economy is allowed to develop under antitrust rules that are blind to all but economic concerns, the likely result will be an economy so dominated by a few corporate giants

that it will be impossible for the state not to play a more intrusive role in economic affairs.²⁴

It is also useful to distinguish between the goals of antitrust, the conduct it makes actionable, and the procedures and methodology of adjudication. Since in many (if not most) cases the economic and political goals converge, it is conceivable to have antitrust law that openly acknowledges both types of goals while using only one lens to determine which conduct is actionable (for example, using only economic considerations even if that means in some cases the political goals will be sacrificed, or focusing on the political goals while recognizing that at times this would entail sacrificing some efficiency). Or we could have antitrust law that treats both types of harm as actionable, while creating different rules for adjudicating each type of harm or providing a rule for deciding which goal should override the other in cases of misalignment.

Pitofsky claimed that in enacting the antitrust laws, Congress (generally and in enacting Section 7 of the Clayton Act in the 1950s particularly) “exhibited a clear concern that an economic order dominated by a few corporate giants could, during a time of domestic stress or disorder, facilitate the overthrow of

²⁴ Robert Pitofsky, *The Political Content of Antitrust*, 127 U Pa L Rev 1051, 1051 (1979). See also Harlan M. Blake and William K. Jones, *Toward a Three-Dimensional Antitrust Policy*, 65 Colum L Rev 422, 422–40 (1965). Professors Blake and Jones described the political dimensions of antitrust in three parts. First, they outlined “the basic political objective of antitrust: that the bulk of business decisions shall be controlled by the market and *not* by governmental agencies (such as courts) or by private agencies exercising governmental prerogatives” (the political objective of self-policing markets). *Id.* at 425 (emphasis omitted). Second, they identified the importance of “employing the antitrust laws to assure that individual businessmen are not deprived of freedom and opportunity, even though the restriction in question may have no adverse impact upon consumers, the market, or economic efficiency” (the political objective of protecting individual freedom and opportunity). *Id.* at 431. Third, they maintained that

[o]ne of the reasons for supporting an economy of free markets is the belief that such a system will, in the long run, prove more efficient than an economy characterized by government regulation or private administration. So committed, we may be prepared to sacrifice some significant efficiencies in individual cases—as in the case of the hypothetical steel cartel—in order to prevent erosion of a policy deemed generally sound. And since the general antitrust policy rests more on faith than on empirical demonstration, we have required that any exceptions that are granted be made by the Congress rather than the courts.

Id. at 436–37 (emphasis omitted).

democratic institutions and the installation of a totalitarian regime.”²⁵ This postwar formulation reflects the role that monopolies, cartels, and high levels of concentration played in facilitating the rise and consolidation of power of Nazism in Germany in the 1930s and 1940s.²⁶

However, while the German experience provides the ultimate warning about the connection between lack of competition and democratic decline, it is arguable that current antitrust law (even at its historically high level of laxity towards market concentration) sufficiently guards against the rise of Nazi-like totalitarianism, and therefore this historical example cannot usefully justify calls to reform the current approach.²⁷ That may be true, but monopolies and restraints on trade may impinge on economic and political freedoms at levels that modern constitutional liberal democracies may consider objectionable even if they do not amount to a complete rise of tyranny and a collapse of the rule of law.

As I discussed in a previous article, since the early modern period, the common law’s aversion to monopoly, restraints of trade, and restraints on alienation, while involving economic considerations, was primarily concerned with rule-of-law considerations of constraining private actors’ abilities to exercise power and limit the rights of others without a clear legal mandate to do so.²⁸ To a large extent, these legal doctrines shared important historical origins and jurisprudential affinity with the development of the rule of law and the imposition of legal restraints on executive power.²⁹ In all of those cases, the common law provided a background of legal rules that prevent various types of encroachment upon the rights of individuals:

The common law was referred to as the “ancient constitution,” which guarantees the rights and liberties of the subjects. Those rights and liberties were the legal “inheritance” of every subject, which could not be limited, except under the law, and could not be modified or taken away except by an Act of Parliament.³⁰

²⁵ Pitofsky, 127 U Pa L Rev at 1054 (cited in note 24).

²⁶ Id at 1062. See also generally Daniel A. Crane, *Fascism and Monopoly*, 119 Mich L Rev (forthcoming 2020), archived at <https://perma.cc/Y24L-CXHQ>.

²⁷ Crane, 119 Mich L Rev at *39–43 (cited in note 26).

²⁸ Ariel Katz, *Intellectual Property, Antitrust, and the Rule of Law: Between Private Power and State Power*, 17 Theoretical Inquiries L 633, 635–36 (2016).

²⁹ Id at 658.

³⁰ Id at 659 (citations omitted).

Seventeenth-century lawyers already figured that not only can state-imposed restraints impinge on individuals' freedoms, but privately created ones may do the same. Even though the source of the restraint is different ("the first [] by patent from the King, the other by act of the subject, between party and party"), "both are equally injurious to trade and the freedom of the subject, and therefore equally restrained by the common law."³¹ Nevertheless, while legal doctrine and economic thinking found it easier to sustain hostility toward state-granted monopolies or restraints resulting from executive action because the interference with individual freedom was salient, privately imposed restraints proved more resistant to judicial attack because they involve a tension between two notions of freedom: freedom of trade and freedom of contract. Freedom of trade entails that individuals should be free to pursue their business affairs as they deem fit without external interference or constraint.³² Freedom of contract entails individuals' ability to enter into contracts and bargain about their property rights without any hindrance or constraint.³³ State-imposed restraints make it unlawful for certain individuals to pursue their desired trades and thereby prevent them from entering contracts that would be to their benefit and the benefit of other individuals. Hence, such restraints interfere with both types of freedoms and cannot be lawful without a valid legal basis.³⁴ By contrast, privately imposed restraints may interfere with individuals' freedom of trade, but they are also the product of the exercise of the freedom of contract and property of their proponents. Therefore, protecting freedom of trade from private interference entails limitation on freedom of contract and property, and legally unlimited protection of freedom of contract and property may result in a hindrance to freedom of trade.³⁵

"However, by the middle of the nineteenth century (and in the United Kingdom well into the twentieth century) the courts," influenced by laissez-faire attitudes, "would treat restraints imposed by public officials or by nonstate entities exercising regulatory

³¹ *Id.* at 661, citing a statement by Sir Francis Bacon, as quoted in Harold G. Fox, *Monopolies and Patents: A Study of the History and Future of the Patent Monopoly* 21 n 6 (Toronto 1947). See also Barbara Malament, *The "Economic Liberalism" of Sir Edward Coke*, 76 *Yale L J* 1321, 1345 (1967).

³² Nicola Giocoli, *Free from What? Classical Competition and the Early Decades of American Antitrust*, 25 *New Polit Econ* *2 (2020), archived at <https://perma.cc/U5SR-PZML>.

³³ *Id.*

³⁴ Katz, 17 *Theoretical Inquiries L* at 660 (cited in note 28).

³⁵ *Id.* at 660–61.

powers very differently from restraints imposed by private entities in commercial settings.”³⁶ Rule-of-law considerations and the protection of freedom of trade continued to play an important role in state-imposed restraints, but they have largely disappeared from decisions involving privately imposed restraints. In those cases, freedom of contract and property prevailed over freedom of trade.³⁷ This legal attitude also reflected the prevailing economic thinking of the time, which assumed that in the absence of state interference, markets are inherently competitive and therefore would sufficiently prevent any harmful private interference with freedom of trade.³⁸

US courts were initially inclined to follow the British approach, but around the turn of the twentieth century they began to reverse course. “The enactment of the Sherman Act in 1890 (and competition legislation in Canada, Australia, and New Zealand around that time) was one of the signals that the laissez-faire era was reaching its end.”³⁹ Technological and organizational changes contributed to a growing concentration of wealth and power during the Gilded Age. It became apparent that contrary to the assumption of classic economics, enduring private monopoly can result from the competitive process itself and undermine the very conditions of competition that were supposed to make it impossible. Laissez-faire and its focus on freedom of contract was no longer a guarantee for power dispersion, justice, and prosperity but threatened to hamper them.⁴⁰ These changes also contributed to the growth and sophistication of local and central government and revived political interest in rebalancing freedom of contract and freedom of trade. The legitimation of trade unions, the passage of legislation governing labor conditions, and the enactment of basic consumer protection legislation, food and drug regulation, and other reforms associated with the “Progressive Era” rekindled interest in questions surrounding the limitations on state power, private power, and delegated power.⁴¹

³⁶ Id at 661.

³⁷ Id at 661–62.

³⁸ Giocoli, 25 *New Polit Econ* at *6–9 (cited in note 32).

³⁹ Katz, 17 *Theoretical Inquiries L* at 662 (cited in note 28), citing Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* 29 (Toronto 1986).

⁴⁰ Giocoli, 25 *New Polit Econ* at *12 (cited in note 32).

⁴¹ Katz, 17 *Theoretical Inquiries L* at 662 (cited in note 28).

Despite the dominance of economic analysis and reasoning in contemporary antitrust law, constitutional—or rule-of-law—considerations shaped the development of antitrust law during its formative years. Such considerations, invoking similar concerns to those expressed by seventeenth-century jurists, permeate many of the seminal judicial decisions of the era—sometimes impliedly, but often explicitly.⁴² As Professor Thomas Nachbar has shown, economic efficiency analysis cannot explain some aspects of antitrust law.⁴³ Instead, far from being singularly focused on increasing output and efficiency, antitrust law has played the additional constitutional role of maintaining distinctions between public and private power.⁴⁴ Ensuring that private actors do not assume regulatory powers—the grant and exercise of which is the province of the state—has been an important goal of antitrust laws. According to Nachbar, antitrust law seeks to prevent two distinct types of harms: the familiar “market harm,” described and measured as “a harm to efficiency,” but also “regulatory harm,” a “harm to the freedom of choice felt by those participating in the market.”⁴⁵ Antitrust law is not merely a public rule of economic regulation, but also a rule against private regulation.⁴⁶

Indeed, in 1890, Senator John Sherman defined the problem that his proposed legislation sought to remedy as follows:

The sole object of [a trust] is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any heretofore invented, and, when it embraces the great body of all the corporations engaged in a particular industry in all of the States of the Union, it tends to advance the price to the consumer of

⁴² Thomas B. Nachbar, *The Antitrust Constitution*, 99 Iowa L Rev 57, 85 (2013).

⁴³ See id at 114.

⁴⁴ Id at 81.

⁴⁵ Id at 69.

⁴⁶ See Nachbar, 99 Iowa L Rev at 69 (cited in note 42).

any article produced, it is a substantial monopoly injurious to the public⁴⁷

This description of the problem invokes the conventional economic harm of collusion and monopolization. But Senator Sherman continued to emphasize the political aspect of the problem:

If the concentrated powers of this combination are [e]ntrusted to a single man, it is a kingly prerogative, inconsistent with our form of government, and should be subject to the strong resistance of the State and national authorities. If anything is wrong this is wrong. If we will not endure a king as a political power we should not endure a king over the production, transportation, and sale of any of the necessaries of life. If we would not submit to an emperor we should not submit to an autocrat of trade, with power to prevent competition and to fix the price of any commodity.⁴⁸

The following three examples illustrate this point clearly: *Addyston Pipe & Steel Co v United States*,⁴⁹ *Fashion Originators' Guild of America v Federal Trade Commission*,⁵⁰ and *United States v Colgate & Co*.⁵¹ *Addyston Pipe* involved a cartel among iron pipe manufacturers. Before reaching the Supreme Court, the Sixth Circuit had held that the agreement violated the Sherman Act.⁵² On appeal to the Supreme Court, the companies attacked the validity of the Act itself, arguing that the Commerce Clause did not empower Congress to prohibit *private* agreements but only to remove *state*-made barriers to interstate commerce.⁵³ The Court rejected the argument. It characterized the agreement between the companies as affecting the "regulation of commerce among the states," and added that such private regulation by contract, if sustained, could be just as effective as regulation by the state.⁵⁴ If, the Court reasoned, "a state, with its recognized power of sovereignty, is impotent to obstruct interstate commerce," then a fortiori a "mere voluntary association of individuals within the

⁴⁷ S 1, 51st Cong, 1st Sess, in 21 Cong Rec 2457 (Mar 21, 1890) (statement of Sen Sherman).

⁴⁸ *Id.*

⁴⁹ 175 US 211 (1899).

⁵⁰ 312 US 457 (1941).

⁵¹ 250 US 300 (1919).

⁵² See generally *United States v Addyston Pipe & Steel Co*, 85 F 271 (6th Cir 1898).

⁵³ *Addyston Pipe*, 175 US at 226–27.

⁵⁴ *Id.* at 230.

limits of that state [could not have] a power which the state itself does not possess.”⁵⁵ In other words, the vice of the agreement was not its impact on economic efficiency, but the arrogation by the participating companies of regulatory powers that only Congress could exercise.

Fashion Originators’ Guild involved an attempt by a large group of apparel and textile makers to create and enforce a private intellectual property protection system for their designs. To be effective, the system required that the guild members take measures preventing retailers from selling garments made by nonmembers.⁵⁶ The problem, Nachbar explains, “went beyond the obvious competitive harms (such as the reduction in the number of outlets for apparel).”⁵⁷ The real problem was that the Court viewed the Guild as “in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus ‘trenches upon the power of the national legislature and violates the statute.’”⁵⁸

In *United States v Colgate & Co*, the Court declined to follow its earlier decision in *Dr. Miles Medical Co v John D. Park & Sons*

⁵⁵ Id, quoting *In re Debs*, 158 US 564, 581 (1895).

⁵⁶ See *Fashion Originators’ Guild of America*, 312 US at 461–62.

⁵⁷ Nachbar, 99 Iowa L Rev at 93 (cited in note 42). While Professor Nachbar asserted that the competitive harms were obvious, not everyone seems to agree. Professor Rob Merges, for example, has criticized the Court’s uncompromising condemnation of the Guild. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 Cal L Rev 1293, 1364–66 (1996). Not only did he question the existence of market harm, but he also claimed that the Guild members’ private IP regime might have been efficient, and possibly even more efficient than formal IP systems. Id at 1364–65. In his view,

the Court should have bifurcated the issues in the *Fashion Originators’ Guild* case, condemning practices such as price fixing, but remanding the case with instructions to find facts regarding the efficacy and economic impact of the basic anti-copying arrangement. The Court should have considered whether the Guild tended to enhance economic efficiency, and whether it did so at a lower cost than a formal property right in dress designs.

Id at 1364. The point that the Guild’s practices could, from an economic perspective, be regarded as efficient but that the Court was more interested in political harm—namely that “combinations of private businessmen are not to be permitted to assume quasi-governmental functions, and, freed of the discipline of self-policing markets, dictate the terms upon which others may do business”—had been recognized earlier in *Blake and Jones*, 65 Colum L Rev at 430 (cited in note 24). See also Pitofsky, 127 U Pa L Rev at 1056 (cited in note 24).

⁵⁸ *Fashion Originators’ Guild of America*, 312 US at 465, quoting *Addyston Pipe & Steel Co*, 175 US at 242. See also Nachbar, 99 Iowa L Rev at 93 (cited in note 42).

Co.,⁵⁹ which, until its reversal in 2007,⁶⁰ declared resale price maintenance (RPM) illegal.⁶¹ The crucial difference was that *Dr. Miles* involved “unlawful combination . . . resulting from restrictive agreements between defendant and sundry dealers whereby the latter obligated themselves not to resell except at agreed prices”⁶² while in *Colgate*:

The retailer, after buying, could, if he chose, give away his purchase or sell it at any price he saw fit, or not sell it at all, his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer who could refuse to make further sales to him, as he had the undoubted right to do.⁶³

From an economic perspective, the *Colgate* holding appears to be based on a distinction without a difference. The legality of RPM should depend on whether it is economically efficient or whether it harms competition in any discernible market, not on whether the participants in the scheme *agreed* to be bound by it and cooperate in its implementation or merely abided by the manufacturer’s expressed desires to maintain the resale prices without ever undertaking to do so themselves. However, in the eyes of the Court, the distinction was important because “[t]he purpose of the Sherman Act [was] to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade.”⁶⁴ The Sherman Act’s key concern, according to the Court, was not the impact of RPM on economic efficiency but the extent to which the scheme interfered with and derogated from the freedoms of those traders.⁶⁵

⁵⁹ 220 US 373 (1911).

⁶⁰ *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877, 907 (2007).

⁶¹ See *Dr Miles Medical Co*, 220 US at 384–85.

⁶² *Colgate & Co*, 250 US at 306.

⁶³ *Id* at 305–06.

⁶⁴ *Id* at 307.

⁶⁵ Blake and Jones made a similar observation, 65 Colum L Rev at 433 (cited in note 24):

If the problem had been simply one of eliminating price-fixing elements, the Court could have invoked Section 1 of the Sherman Act to proscribe *all* efforts to achieve resale price maintenance: formal contracts, tacit understandings, refusals to deal, consignment arrangements, [and] even suggested resale prices which left the final decision in the dealer’s discretion.

The *Colgate* distinction might also seem dubious if one considers that in some instances, one might be coerced to abide by another's desires even without being formally compelled to do so. When in *The Godfather*, Don Vito Corleone said he would make the film producer "an offer he can't refuse," it was well understood that the producer would have no choice but to accept the offer, even if he had no obligation to accept it.⁶⁶ The Court in *Colgate* may not have been fully oblivious to such a possibility. It concluded:

In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell.⁶⁷

The proviso "in the absence of any purpose to create or maintain a monopoly" is instructive for two related reasons. When the producer is a monopolist and the retailer depends on continued supply of the monopolist's product, the monopolist's formally non-binding desire may resemble an offer that the retailer cannot refuse. Moreover, by emphasizing the "long recognized right of [a] trader or manufacturer *engaged in an entirely private business*, freely to exercise his own independent discretion as to parties with whom he will deal"⁶⁸—and by relying on its decision in *United States v Trans-Missouri Freight Association*⁶⁹ for that proposition—the Court invoked the long-held common law rule distinguishing between an entirely private business that is free to choose with whom to deal and a business "affected with a public interest,"⁷⁰ a category that includes legal or natural monopolies that may be subject to a duty to provide services on fair, reasonable, and nondiscriminatory terms.⁷¹

⁶⁶ *The Godfather* (Paramount Pictures 1972).

⁶⁷ *Colgate & Co*, 250 US at 307.

⁶⁸ *Id* (emphasis added).

⁶⁹ 166 US 290, 320 (1897). The distinction between the duties of a purely private business and one having a public character is further elaborated on in that decision. See *id* at 336.

⁷⁰ *Munn v. Illinois*, 94 US 113, 126 (1877).

⁷¹ Richard A. Epstein, *The History of Public Utility Rate Regulation in the United States Supreme Court: Of Reasonable and Nondiscriminatory Rates*, 38 J S Ct Hist 345, 346 (2013). See also Nicola Giocoli, *The (Rail)Road to Lochner: Reproduction Cost and the Gilded Age Controversy over Rate Regulation*, 49 Hist Polit Econ 31, 37 (2017).

These examples demonstrate that until the ascendancy of the Chicago School, or at least during the first half of the twentieth century, antitrust law was looked at and analyzed not only from an economic perspective but also from a rights-based perspective. Antitrust law was thus situated in the context of a particular political philosophy as a means to safeguard certain individual freedoms while mediating the tension between freedom of contract and property on the one side and other freedoms, such as freedom of trade, on the other. It also sought a way to safeguard the boundary between the legitimate exercise of regulatory power by the state and the illegitimacy of the exercise of (purported) regulatory power by private actors.

In some cases, this philosophy was subtle or implied, while in others it was explicit. In *United States v Motion Picture Patents Co.*,⁷² for example, the court began its analysis of the government's claims for violation of the Sherman Act by situating the case in a particular legal-political-constitutional context:

The beginnings of this controversy are found in the ages-long struggle "to secure the blessings of liberty," to obtain which is stated to be one of the objects of our Constitution. . . .

The liberty spoken of in our Constitution had more direct reference to this latter freedom from the "undue and unreasonable" exactions of constituted rulers. In the cycle of human effort, we have come back to the needs which moved men into constituting rulers over themselves, and the power of the law has been invoked for protection against what are declared to be evil practices. The particular phase of liberty with which this [antitrust] law concerns itself is the freedom or free flow of commerce. It is based upon the right of every individual to choose his own calling in life, and to follow the trade of his choice unhampered by any undue and unfair interference from others. It secures this "blessing of liberty" to all by making it unlawful for any to conspire to bring about "restraint of trade or commerce." This is the genesis and motive of the act of July 2, 1890.⁷³

⁷² 225 F 800 (ED Pa 1915).

⁷³ *Id* at 802.

These views were not limited to jurists. A related line of thought among liberal thinkers during the first half of the twentieth century and beyond⁷⁴ viewed monopoly as “inherently inimical to democracy because in their view it undermined a necessary condition for democratic politics to flourish, namely, a competitive market.”⁷⁵ For example, Henry Simons, “a respected University of Chicago professor and self-proclaimed classical liberal, described monopoly in all its forms—including large corporations—as ‘the great enemy of democracy.’”⁷⁶ In the face of growing attacks on liberalism from both communists and fascists following the Great Depression, Simons saw “naïve advocates of managed economy or national planning” as “the real enemies of liberty” in the United States. In 1934, Simons authored *A Positive Program for Laissez Faire*, in which he advocated for a robust enforcement of antitrust laws, which would include the “outright dismantling of our gigantic corporations and persistent prosecution of producers who organize, by whatever methods, for price maintenance or output limitation.”⁷⁷ He also called for the “explicit and unqualified repudiation of the so called ‘rule of reason,’” which he considered an impediment to antitrust enforcement, and argued that “[t]he Federal Trade Commission must become perhaps the most powerful of our governmental agencies.”⁷⁸ In a letter to Friedrich Hayek, Simons observed that “[a] distinctive feature of Chicago economics as represented recently by Knight and Viner, is its traditional liberal political philosophy, its emphasis on the dispersion of economic power, free markets, and a political decentralization.”⁷⁹ As the next Part shows, within less than two decades, the Chicago School would adopt the free market as the single policy goal of antitrust law and would not only abandon any interest in the dispersion of economic power and political decentralization but also delegitimize them as proper goals for antitrust.

⁷⁴ See generally Blake and Jones, 65 Colum L Rev 363 (cited in note 24); Pitofsky, 127 U Pa L Rev 1051 (cited in note 24).

⁷⁵ Rob Van Horn, *Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics*, in Philip Mirowski and Dieter Plehwe, eds, *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* 204, 204 (Harvard 2009).

⁷⁶ Id.

⁷⁷ Henry C. Simons, *A Positive Program for Laissez Faire: Some Proposals for a Liberal Economic Policy*, in *Economic Policy for a Free Society* 40, 41, 58 (Chicago 1948).

⁷⁸ Id.

⁷⁹ Medema, *Chicago Law and Economics* at 166 (cited in note 4).

II. CHICAGO'S CHANGING VIEWS ABOUT THE POLITICAL DIMENSION OF ANTITRUST

The year 1946 represents an important milestone in the common historiography of the law and economics movement (and of the University of Chicago). In that year, Walter Blum, Aaron Director, and Milton Friedman began teaching at the University of Chicago Law School.⁸⁰ Professor Simons from the Department of Economics, who had been involved in the Law School since at least 1933 and was cross appointed to the Law School in 1939, was influential in their hiring.⁸¹ Director was hired to lead the Free Market Study (FMS) project at the University of Chicago, a research project initiated by Hayek and funded by the Volker Fund. The FMS ran from 1946 to 1952 and, in addition to Director, included “Edward Levi (a law professor), Frank Knight (an economics professor), Garfield Cox (dean of the Business School), Wilber Katz (dean of the Law School), Theodore W. Schultz (chair of the Economics Department), and Milton Friedman (an economics professor).”⁸²

Also in that year, Director began teaching a course on price theory and antitrust at the Law School together with Levi, who had just returned to the Law School after serving as acting head of the War Division and First Assistant in the Antitrust Division during the Second World War.⁸³

Over the next several years, students participating in that course included such future law and economics scholars as Robert

⁸⁰ Robin I. Mordfin and Marsha Ferziger Nagorsky, *Chicago and Law and Economics: A History* (The University of Chicago Law School, Oct 11, 2011), archived at <https://perma.cc/N3WW-TUWA>.

⁸¹ *Id.*

⁸² Van Horn, *Reinventing Monopoly and the Role of Corporations* at 205 (cited in note 75). Simons would have been a central participant in the project but for his death by suicide on June 19, 1946. Originally, the University of Chicago's central administration had balked upon learning the proposal would grant Director tenure after five years during which his salary would be paid by the Volker Fund. The central administration later agreed to reconsider the proposal on the condition that Director agree to the five-year appointment with no guarantee of tenure. Rob Van Horn and Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, in Mirowski and Plehwe, eds, *The Road from Mont Pèlerin* 139, 153–54 (cited in note 75).

⁸³ George W. Liebmann, *The Common Law Tradition: A Collective Portrait of Five Legal Scholars* 17–18 (Transaction 2005). In that course, Levi and Director systematically explored the relationship and tensions between antitrust doctrine and economics. See also Bernard D. Meltzer, *The University of Chicago Law School: Ruminations and Reminiscences*, 70 U Chi L Rev 233, 248 (2003).

Bork, Henry Manne, Kenneth Dam, Ward Bowman, and Wesley J. Liebeler. As Liebeler reminisced:

For four days each week Ed Levi would develop the law and would use the traditional techniques of legal reasoning to relate the cases to each other and create a synthesis . . . and for one day each week Aaron Director would tell us that everything that Levi had told us the preceding four days was nonsense. He used economic analysis to show us that the legal analysis simply would not stand up.⁸⁴

Liebeler graduated from the Law School in 1957, so his experience must describe the course around that year,⁸⁵ but in 1946, the views of Director and Levi were far apart from the views they espoused in the following decade.

Consider, for example, the lecture “The Antitrust Laws and Monopoly” (and a subsequent article) that Levi delivered in 1946.⁸⁶ In discussing the history of antitrust and its traditions (including some of its internal confusions), Levi explicitly situated antitrust law within a particular tradition of political thought, not simply as a project of applied microeconomics.⁸⁷ His views were very much in line with those articulated by Judge Oliver Booth Dickinson in *United States v Motion Picture Patents* and with those of Simons. “[T]he fear of monopoly was not limited to a fear of high prices alone. The monopolizer, as opposed to the man who merely possessed a monopoly, was one who worked his abuses on the public,” he wrote.⁸⁸ The abuses included high prices, but they were not limited to them. An equally important mischief was denying others access to the market.⁸⁹ Accordingly, he explained, “it has been frequently urged that our heritage of an antipathy toward monopoly is really an heritage against the government grant which by conferring a property right in the exclusive possession of a field of business denied equality of opportunity.”⁹⁰

⁸⁴ Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J L & Econ 163, 183 (1983).

⁸⁵ Wesley Liebeler, 71, Wash Post C06 (Sept 29, 2002).

⁸⁶ See generally Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U Chi L Rev 153 (1947).

⁸⁷ See id at 153.

⁸⁸ Id at 154.

⁸⁹ Id.

⁹⁰ Levi, 14 U Chi L Rev at 154 (cited in note 86).

And from this hostility to the grant of exclusive rights by the government grew a more general hostility to “any control of the market no matter how secured.”⁹¹ In other words,

Our heritage against monopoly then is a heritage against exorbitant prices, unnaturally secured, and against the assertion of the exclusive right to do business based on a grant of government. But to these must be added also a belief in the rights of man. It is the right of every man to be free of restrictions except those recognized by law. It is the right of every man to engage in business and to seek his opportunity.⁹²

According to Levi, the Anglo-American antimonopoly tradition was based on three themes: “[t]he right of every man to engage in business free of restrictions not imposed by law, the necessity to guard against exorbitant prices, and opposition to governmental grants to favorites.”⁹³ To these, the American Framers added a fourth theme: opposition to foreign “monopolies and restrictions on trade imposed upon them from afar.”⁹⁴

The immediate concern that Levi addressed in his lecture and subsequent article was a growing concentration of the American economy and the concern that the United States was then in the midst of another giant merger movement.⁹⁵ He drew a connection between the concentration of government power and the concentration of economic power.⁹⁶ He noted that the Sherman Act’s primary aim was to counter that “‘alarming concentration of control’ and monopoly” and explained that “[t]he Sherman Act was passed at a time when it was felt that a new charter of freedom was required—freedom from the ‘insidious menace inherent in large aggregations of capital, particularly when held by corporations.’”⁹⁷

⁹¹ Id, quoting Louis L. Jaffe and Mathew O. Tobriner, *The Legality of Price-Fixing Agreements*, 45 Harv L Rev 1164, 1166 (1932).

⁹² Levi, 14 U Chi L Rev at 154 (cited in note 86) (citation omitted).

⁹³ Id at 155.

⁹⁴ Id.

⁹⁵ Id at 171.

⁹⁶ Levi, 14 U Chi L Rev at 161 (cited in note 88) (quoting Senator O’Mahoney’s assertion that one “cannot hope to decentralize government through the States and local communities if [one] do[es] not undertake to preserve free enterprise in the States and in the local communities”).

⁹⁷ Id at 163, quoting *Louis K. Liggett Co v Lee*, 288 US 517, 549 (1933).

Levi lamented that for almost all of its history, the Sherman Act had been more effective in addressing abuse of power and less effective in preventing the accumulation of power:

This has permitted an enormous and growing amount of concentration in economic power. It has permitted two great merger movements—each of which ended in a depression. We are now in the middle of a third great merger movement. It is doubtful if a free and competitive society can be maintained if the direction of concentration is to continue.⁹⁸

He was hopeful, however, that “a new interpretation of the act, closer probably to its original intention” would “give the act strength against monopolies as such, and also against control by three, four or five corporations acting together.”⁹⁹

In light of the views that members of the Chicago School took only a few years later, such an account of the goals of antitrust law—seeking to use antitrust law to address monopolies and oligopolies “as such”—expressed by a founding father of the Chicago School seems surprising.

However, until the Chicago School’s exclusive focus on economic efficiency and the excision of this political dimension became its hallmark, not only did Simons and Levi recognize and support the interconnectedness between antitrust law’s economic and political dimensions, but so did the other founding fathers of the Chicago School. Indeed, Director and Friedman, who regarded Simons as an enormous influence on their work,¹⁰⁰ between 1946 and the beginning of the 1950s advocated for the same positions—positions from which, in a few years, they would distance themselves to the greatest extent imaginable.

For example, in 1947 Director participated in the inaugural meeting of the Mont Pèlerin Society. In his address, he advocated heightened antitrust enforcement and additional policy measures to deal with the substantial extent of industrial monopoly.¹⁰¹ He argued that American antitrust cases revealed that patents for inventions had played an important role “in creating and maintaining industrial monopoly” and called for additional policy

⁹⁸ Levi, 14 U Chi L Rev at 183 (cited in note 86).

⁹⁹ Id.

¹⁰⁰ See Mordfin and Nagorsky, *Chicago and Law and Economics: A History* (cited in note 80).

¹⁰¹ Van Horn, *Reinventing Monopoly and the Role of Corporations* at 212 (cited in note 75).

measures to target them.¹⁰² He maintained that reforms beyond antitrust might be necessary to curtail the unlimited power of corporations:

Excessive size can be challenged through the prohibition of corporate ownership of other corporations, through the elimination of interlocking directorates, through a limitation of the scope of activity of corporations, through increased control of enterprise by property owners and perhaps too through a direct limitation of the size of corporate enterprise.¹⁰³

During the first years of the FMS, Friedman, too, shared similar “Simonsian” views on monopoly.¹⁰⁴ But this would soon change. Professor Rob Van Horn notes that at a meeting of the FMS in mid-November 1946 devoted to the issue of industrial concentration, Director offered two possible opposing views on concentration in the American economy:

Of course we could start from the position that existing concentration has already reached a point which makes it objectional from a political point of view, or again we may start from the position that the existing concentration results in the most efficient use of resources and does not eventuate in significant departures from competitive behavior.¹⁰⁵

The first view was consistent with the position shared by Director and his colleagues at the time;¹⁰⁶ the second view was a harbinger of the position they would embrace within a few years. Director’s review¹⁰⁷ of Charles Lindblom’s *Unions and Capitalism* from 1950 appears to be the first publication articulating the new Chicago School position. As Van Horn observes:

¹⁰² Id.

¹⁰³ Id.

¹⁰⁴ Id at 219. In 1983, however, Chicago School members labeled Simons as “interventionist,” and Friedman said: “I’ve gone back and reread [Simons’s] *Positive Program* and been astounded at what I read. To think that I thought at the time that it was strongly pro free market in its orientation!” Kitch, 26 J L & Econ at 178 (cited in note 84). See also J. Bradford De Long, *In Defense of Henry Simons’ Standing as a Classical Liberal*, 9 Cato J 601, 602 (1990).

¹⁰⁵ See Van Horn, *Reinventing Monopoly and the Role of Corporations* at 214 (cited in note 75).

¹⁰⁶ Robert Van Horn, *Corporations and the Rise of Chicago Law and Economics*, 47 Econ Soc 477, 483 (2018).

¹⁰⁷ See Aaron Director, Book Review, *Unions and Capitalism*, 18 U Chi L Rev 164, 166 (1950).

Director maintained that because of competitive forces emanating from the supply side of the market, competitors would supplant any monopoly that attempted to permanently restrict its own supply. According to Director, the market system through the “corroding influence of competition,” has the “effective tendency” to “destroy *all* types of monopoly.” Thus, competition became Director’s philosopher’s stone, and the only way the stone would lose its prodigious powers was whenever government intervened. Director maintained that history had demonstrated that without the intervention of government, “competitive tendencies have triumphed over the exclusive or restrictive tendencies.”¹⁰⁸

To a large extent, that short book review contains the essence of the Chicago School philosophy: monopoly is rarely a problem because markets are self-correcting and serious barriers to entry rarely exist; anticompetitive practices would be ineffective or self-defeating and therefore, what might superficially appear to be anticompetitive must in fact be efficient and procompetitive; and antitrust enforcement—in itself a form of government intervention—is more likely to do harm than good because it would tend to punish procompetitive practices that only superficially appear harmful.

Over the following years, Director’s attention would focus on developing these ideas, which stood in opposition to the Simonsian views he had held and promoted only a few years earlier.¹⁰⁹ The

¹⁰⁸ Van Horn, *Reinventing Monopoly and the Role of Corporations* at 217 (cited in note 75) (citations omitted).

¹⁰⁹ It is hard to tell whether this dramatic shift in opinion was based purely on intellectual grounds and what role corporate funding played in precipitating it. Robert Van Horn notes that the Volker Fund was displeased with Simon’s strong repudiation of big corporations and championing of vigorous antitrust enforcement (which they considered as “collectivist” or socialist), and that it became apparent that continuing to back Simon’s views would jeopardize the ability to obtain more funding for the Free Market Study from the Volker Fund or from other corporations. Van Horn, 47 *Econ Soc* at 484 (cited in note 106). Van Horn also mentions how the Cold War led to a wider acceptability of big business. *Id.* at 485. Two related factors might have also played a role: one is the Red Scare and the various actions of Senator Joseph McCarthy and his supporters against those suspected of being sympathetic to communism. It is not hard to imagine how Director, a Russian-born Jew, who, while a student at Yale in 1923 ran a satirical paper with a “socialist cloak and progressive cap” and later taught at the Newark Labor College and the Portland Labor College, might have had good reasons to fear being a target of “anti-Americanism” allegations. Moreover, when he returned to Chicago in 1946, Director was already forty-five, had not been able to obtain a permanent academic position in the past, and was only offered a five-year appointment without guarantee of tenure (meaning that his continued employment was wholly dependent on his ability to secure additional funding for the FMS

funding for the FMS project ended in 1952, but the Volker Fund continued to fund Chicago's next project, the Antitrust Project. Headed by Director and assisted by Levi, the Antitrust Project engaged postdoctorate and post-JD students, as well as visiting professors, who produced a series of articles and a book.¹¹⁰ Many of them acknowledged Director's involvement and influence in the writing of those works. Bowman, referring to his 1957 article on tying arrangements,¹¹¹ said that "[e]ighty percent of that article is Aaron Director."¹¹²

A central piece of the Antitrust Project was Director and Levi's article from 1957, *Law and the Future: Trade Regulation*, which to a large extent contained most of the ideas that would later be developed by their disciples.¹¹³ But unlike the zeal, one-dimensionality, and highly selective reading and understanding of legislative and legal antitrust history that could be found in some of their disciples' work, the 1957 Director and Levi article still offered a more nuanced and less dogmatic account of the Chicago School agenda. For example, they acknowledged that more than most fields of law, "the antitrust laws in their evolution have exhibited an explicit interdependence with economic and political thought."¹¹⁴ They recognized the existence of "uncertainty whether the dominant theme of the antitrust laws is to be the evolution of laws of fair conduct, which may have nothing whatever to do with economics, or the evolution of minimal rules protecting competition or prohibiting monopoly or monopolizing in an economic sense."¹¹⁵ They conceded that while they believed that "the conclusions of economics do not justify the application of the antitrust laws in many situations in which the laws are now being applied"¹¹⁶ and could result in a less efficient system of production, "[t]his would not necessarily be a decisive criticism of

project). Under such circumstances, Director might have had good reasons to distance himself from anything smacking of "collectivism" and redirect his reformist temperament and intellect in an opposite direction. See Robert Van Horn, *Aaron Director*, in Emmett, ed., *The Elgar Companion* 265 (cited in note 4); Robert Van Horn, *Harry Aaron Director: The Coming of Age of a Reformer Skeptic (1914-24)*, 42 *Hist Polit Econ* 601-30 (2010).

¹¹⁰ *Id.* at 221.

¹¹¹ Ward S. Bowman Jr., *Tying Arrangements and the Leverage Problem*, 67 *Yale L J* 19 (1957).

¹¹² Kitch, 26 *J L & Econ* at 200 (cited in note 84).

¹¹³ See generally Aaron Director and Edward H. Levi, *Law and the Future: Trade Regulation*, 51 *Nw U L Rev* 281 (1956).

¹¹⁴ *Id.* at 281-82.

¹¹⁵ *Id.* at 282.

¹¹⁶ *Id.*

the law” because, channeling Judge Learned Hand’s reasoning in *Alcoa*:

[T]he Sherman Act has other objectives. The Congress which passed the statute, [Judge Hand] reminds us, “was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.” And this maintenance of an organization of industry in small units was to be “in spite of possible cost.”¹¹⁷

Although Director and Levi did not acknowledge, let alone explain, the significant transformation of their views on antitrust and its underlying political philosophy from those they held only a decade earlier,¹¹⁸ they acknowledged that the law could legitimately prioritize goals other than efficiency maximization. They emphasized that they did not “mean to suggest that the law must of necessity conform to the prescriptions of economic theory, let alone move within the confines of changing fashions in such theory. The law indeed can have a life of its own.”¹¹⁹ Instead, they advocated for a better alignment between the law and economic

¹¹⁷ Director and Levi, 51 Nw U L Rev at 285 (cited in note 113), citing *United States v Aluminum Co of America*, 148 F2d 416, 427, 429 (2d Cir 1945) (*Alcoa*). Note, however, that Judge Hand was much more decisive than his somewhat paraphrased statements indicate. Judge Hand did not simply say that it was “possible, because of its indirect social or moral effect, to prefer a system of small [independent] producers . . . to one in which the great mass of those engaged must accept the direction of a few” but held that “the decisions prove [these noneconomic considerations] have been in fact its purposes.” *Alcoa*, 148 F2d at 427. And he went on to write that “[t]hroughout the history of these statutes 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,” not only that this was a possibility. *Id.* at 429.

¹¹⁸ The shift in their view of the *Alcoa* case is noteworthy. In 1946, Levi believed that the *Alcoa* decision was faithful to the Act’s original intention and hoped that it would “give the act strength against monopolies as such, and also against control by three, four or five corporations acting together.” Levi, 14 U Chi L Rev at 183 (cited in note 86). Ten years later, he and Director believed that while *Alcoa* might allow action against monopolies as such, they disfavored such a possibility and asserted that despite its language, “the *Alcoa* opinion attempts to carve out a place for the argument of efficiency as a defense.” Director and Levi, 51 Nw U L Rev at 285 (cited in note 113).

¹¹⁹ Director and Levi, 51 Nw U L Rev at 296 (cited in note 113). It has been suggested that this language was “almost certainly Levi’s and not Director’s.” Liebmann, *The Common Law Tradition* at 24 (cited in note 83).

theory, predicting that such better alignment might “lead to a re-evaluation of the scope and function of the antitrust laws.”¹²⁰

Regrettably, the work of many of their disciples was less nuanced and considerably less accurate in its treatment of the legal doctrine that it criticized.¹²¹ For example, while Director and Levi accepted Judge Hand’s abovementioned reasoning as defensible, eight years later, Bork and Bowman would declare it “questionable as a description of congressional intent, dubious as social policy, and impossible as antitrust doctrine.”¹²² But that very critique might be more suitable to the work of Bork, often considered to epitomize the Chicago School and its influence on antitrust law. For example, Professor Barak Orbach noted that Bork’s critique “rested on two flawed propositions: (1) Congress enacted the Sherman Act as ‘a consumer welfare prescription,’ a proposition lacking any factual support, and “(2) the economic concepts of ‘competition,’ ‘consumer welfare,’ and ‘allocative efficiency’ are largely equivalent”—which is clearly flawed.¹²³

The treatment of cases involving patents provides another example of the difference between Director and Levi’s nuance and sensitivity to legal and historical accuracy in their 1957 article and the absence of those qualities from subsequent influential Chicago School work.

In previous work, I discussed a series of Supreme Court decisions from 1908 to 1918 “concerning various attempts by owners of patents and copyrights to rely on their IP rights to impose downstream restrictions on the resale or use of copyrighted works or patented articles.”¹²⁴ In those decisions, which “gave rise to the

¹²⁰ Director and Levi, 51 *Nw U L Rev* at 296 (cited in note 113).

¹²¹ According to Liebmann, “Although Levi is popularly thought of as a founder of the Law and Economics movement, it is a mistake to think of him as an undeviating member of the Chicago School.” Liebmann, *The Common Law Tradition* at 17 (cited in note 83). Liebmann claims that the revolutionary impact of the Levi and Director antitrust course is owed to Director, not to Levi. *Id.* He notes that even though Levi softened his earlier views in favor of rigorous antitrust, “he never abandoned the political insights at the root of the antitrust movement.” *Id.* at 20. Levi lamented “the extent to which the law and economics movement had assumed a life of its own,” saying that “[t]he Constitution does not provide for a dictatorship of economists” and doubting the view that to be intellectually coherent, antitrust law must focus exclusively on economic efficiency, noting that “much of the ‘economics’ used in antitrust cases is meretricious.” *Id.* at 21–22.

¹²² Bork and Bowman, 65 *Colum L Rev* at 369 (cited in note 17).

¹²³ Barak Orbach, *Was the Crisis in Antitrust a Trojan Horse?*, 79 *Antitrust L J* 881, 882 (2014).

¹²⁴ Katz, 17 *Theoretical Inquiries L* at 668 (cited in note 28).

first sale doctrine (or exhaustion), formed the basis of the IP misuse doctrine, and . . . also influenced antitrust law’s approach to resale price maintenance and tying arrangements,” the Court construed the scope of IP rights narrowly and declined to interpret the IP statutes as conferring such powers to impose downstream restraints. This series of decisions attracted considerable criticism from Chicago School scholars. Their criticism, which has wielded enormous influence on the development of antitrust law and competition economics, accused the Court of employing bad economics and thereby condemning many efficient business practices.¹²⁵

One three-prong pillar of the attack has focused on courts’ repeated use of the term “monopoly” to describe intellectual property rights, such as patents or copyrights. The first prong of this attack deployed Chicago’s exclusive focus on microeconomics and price theory to assert that the term “monopoly” is fully synonymous with the concept of market power and then to insist that referring to IP rights as “monopolies” represents an “elementary but persistently repeated error[].”¹²⁶ IP rights, it was claimed, do not, in general, allow their owner to exercise any market power because they are no different from any other type of property right, and there is nothing special, in terms of the owner’s ability to exercise market power, about the existence of an IP right.¹²⁷ Denying any conceptual connection between IP and market power does not mean that no IP rights ever confer an economic monopoly. However, “[w]hether a particular right, or combination of rights, confers an economic monopoly is an empirical question.”¹²⁸ The second prong begins with the empirical observation that most

¹²⁵ See *id.*

¹²⁶ Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, 53 Vand L Rev 1727, 1729 (2000). See also Frank H. Easterbrook, *Intellectual Property Is Still Property*, 13 Harv J L & Pub Pol 108, 109 (1990):

Patents give a right to exclude, just as the law of trespass does with real property. Intellectual property is intangible, but the right to exclude is no different in principle from General Motors’ right to exclude Ford from using its assembly line, or an apple grower’s right to its own crop.

¹²⁷ Kitch, 53 Vand L Rev at 1730–31 (cited in note 126).

¹²⁸ *Id.* at 1731. I cite Kitch because he is identified as a Chicago School scholar, but this view is no longer associated with Chicago and has become conventional wisdom. See Ariel Katz, *Making Sense of Nonsense: Intellectual Property, Antitrust, and Market Power*, 49 Ariz L Rev 837, 839 (2007). See also *Illinois Tool Works Inc v Independent Ink, Inc.*, 547 US 28, 45 (2006) (noting that there is a “virtual consensus among economists” that tying arrangements may be consistent with a free market).

IP rights are seldom used or rarely have any economic value, and it then concludes that not only is it conceptually wrong to think about IP rights as monopolies or to presume that they confer market power, but also that it is more appropriate to presume that they do not.¹²⁹ Lastly, even if IP rights do confer market power (in the sense of the power to set prices higher than the marginal cost of production), that market power should not be of interest to antitrust because either it is not significant, or it only reflects the welfare-enhancing nature of innovation rather than the “bad” welfare-reducing market power that antitrust law should be concerned with.¹³⁰

The second pillar has consisted of the claim that various attempts by IP owners to impose downstream restraints, through tying or otherwise, do not deserve the antitrust condemnation that they have hitherto received. Even if the imposition of such restraints requires the existence of sufficient market power (otherwise, a downstream buyer wishing to avoid the imposition would simply turn to another supplier),¹³¹ more often than not these practices are economically efficient (in other words, welfare enhancing) and therefore should not deserve antitrust condemnation.¹³²

However, the first pillar, despite becoming mainstream, is built on a combination of conceptual errors, internal contradictions, and the conflation of distinct issues. As I have written elsewhere, claiming that the connection between an IP right and market power is the same as the connection between a property right in tangible assets and market power ignores the fact that “[w]ith tangible assets, scarcity is a given.”¹³³ “The assets are rivalrous in consumption (which means that they cannot be simultaneously used without being depleted),” hence, “the level of output that can be derived from them is finite.”¹³⁴ “The grant of property rights in such assets determines who is entitled to the output that can be derived from those assets,” but it does not determine the level of output and the price that can be charged for its sale.¹³⁵ “In contrast, IP rights are directly designed to affect the price and output

¹²⁹ Katz, 49 *Ariz L Rev* at 861 (cited in note 128).

¹³⁰ For a critical review of these various arguments, see *id.* at 837.

¹³¹ See Bowman, 67 *Yale L J* at 20 (cited in note 111) (making this argument).

¹³² See, for example, Katz, 49 *Ariz L Rev* at 845–46 (cited in note 128).

¹³³ *Id.* at 862.

¹³⁴ *Id.*

¹³⁵ *Id.* To use Judge Frank Easterbrook’s example, whether General Motors has the right to exclude Ford from using its assembly line does not change the number of cars that may be assembled there, and an apple grower’s right to its own crop has no direct impact

of intellectual assets” and reflect lawmakers’ conscious decision to create scarcity in intellectual goods in order to boost the economic returns to those who took the effort to create them.¹³⁶ While it may be true that the majority of patented inventions or copyrighted works have very low commercial value or are not even exploited, it is also likely that disputes would develop and litigation would concentrate on the more valuable among them—that is, those lacking close substitutes, which confer greater market power on their owners.¹³⁷

Finally, if one adheres to the standard economic definition of market power, that is, the ability to set prices above marginal cost, or even modifies it for antitrust purposes to apply only to setting prices *substantially* above marginal cost, it is very likely that in many instances involving IP any positive price above zero would indicate market power, precisely because the marginal cost of using the protected information approaches zero.¹³⁸ This should not be surprising at all because allowing the IP owner to prevent others from using the IP prevents the most intense form of competition and allows the owner to set prices above marginal cost. This is not an unforeseen consequence but the very purpose of granting the IP right.¹³⁹ However, recognizing that many IP rights do allow their owner to exercise market power does not result in antitrust liability because as a matter of antitrust law, charging monopoly prices, without something more, is not an antitrust violation. Even though the ability to charge those prices may depend on the IP owner’s exclusion of others, so long as the exclusion is limited to the subject matter of the IP, this mere exercise of the IP right does not constitute an antitrust violation.

As noted, the second pillar of the Chicago School attack consisted of criticizing the Court’s prohibition of various downstream restraints imposed by IP owners, arguing that the Court applied faulty economic theory and misunderstood or ignored the economic efficiency that those restraints often served. For example,

on the number of trees that can be grown and the amount of apples they yield. Easterbrook, 13 Harv J L & Pub Pol at 109 (cited in note 126). By contrast, a patent pertaining to the assembly of cars will allow GM to control any assembly line, not only its own, and thereby directly control the number of cars that may be assembled using that invention, and an apple grower’s patent over a variety of apples would allow her to control the number of apples from that variety, whether they grow on her orchard or on another.

¹³⁶ Katz, 49 Ariz L Rev at 862 (cited in note 128).

¹³⁷ Id at 864–65.

¹³⁸ Id at 857.

¹³⁹ Id at 842.

in a seminal article from 1957, Bowman argued that monopolists cannot generally extend or “leverage” their monopoly from one market to another through product tying, and that in many cases tying can actually be a socially efficient business practice that ought not to be condemned.¹⁴⁰ Bowman was building on Director and Levi’s paper, in which they introduced what has become known as the “single monopoly profit theory.”¹⁴¹ On the basis of that theory, Bowman criticized those rulings for having “been based upon an imprecise evaluation of the economic effects of tying practice in extending monopoly.”¹⁴²

My earlier analysis, however, showed that the criticism often misunderstood or misstated the Court’s reasoning. A careful reading of the Court’s decisions reveals that the Court did not attempt to apply microeconomic theory but rather based its decisions on legal, political, and constitutional considerations and values that animated the passage of the Sherman Act. “The Court did not invalidate the various practices because it perceived them as economically harmful, but because it considered the legal theories behind the attempts to impose and enforce the restraints as legally untenable.”¹⁴³

In his 1973 book, *Patent and Antitrust Law: A Legal and Economic Appraisal*, Bowman singled out Justice John Hessin Clarke’s reasons in *Motion Picture Patents Co v Universal Film Manufacturing Co*¹⁴⁴ from 1917 as the signpost that misdirected the development of the law.¹⁴⁵ He described the decision as having been based on a “leveraging fallacy” and lamented that the fallacy was accepted as gospel:

Were [the leveraging argument] true, as succeeding justices assumed, much of the subsequent law would have been unobjectionable. But by parlaying a leverage fallacy with an

¹⁴⁰ See Bowman, 67 Yale L J at 36 (cited in note 111).

¹⁴¹ See generally Director and Levi, 51 Nw U L Rev 281 (cited in note 113). As Professor Einer Elhauge explains in his critique of the single monopoly profit theory, it holds that, generally, “a firm with a monopoly in one product cannot increase its monopoly profits by using tying to leverage itself into a second monopoly in another product.” Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv L Rev 397, 403 (2009).

¹⁴² See Bowman, 67 Yale L J at 34 (cited in note 111).

¹⁴³ Katz, 17 Theoretical Inquiries L at 668 (cited in note 28).

¹⁴⁴ 243 US 502 (1917).

¹⁴⁵ See generally Ward S. Bowman Jr, *Patent and Antitrust Law: A Legal and Economic Appraisal* (Chicago 1973).

unproved, incipient monopoly hypothesis (arising from an assumed identity between effect on *competitors* and effect on competition) the Court has since 1917 consistently applied faulty economics leading to the wrong answers to the questions it has asked.¹⁴⁶

Except that the Court's decision was not based on any theory of leveraging market power from one market to another. The *Motion Picture Patents* case, the target of Bowman's criticism, was not even an antitrust case. The plaintiff in that case, the Motion Picture Patents Company, sought relief against the three defendants as joint infringers of one of its patents. The patent covered a part of the mechanism used in motion picture exhibiting machines that improved the feeding of film through the machine with a regular, uniform, and accurate movement, and reduced strain or wear.¹⁴⁷ The defendants were licensed users of those machines, and the allegation of infringement pertained to the use of the patented machine in breach of some of the terms of the license, which required the licensee to use the machine only with films leased from sources designated by the plaintiff.¹⁴⁸

Those terms were also stated in a plate affixed to every machine, which further stated that its removal or defacement would terminate the right to use the machine.¹⁴⁹ The Court framed the issue before it as "the extent to which a patentee or his assignee is authorized by our patent laws to prescribe by notice attached to a patented machine the conditions of its use and the supplies which must be used in the operation of it, under pain of infringement of the patent."¹⁵⁰ In other words, the Court framed the question purely as a legal one: What is the scope of the legal powers that the grant of a patent confers upon the patentee and that the court will enforce?

The Court did not ask, and therefore did not answer, whether it would be efficient to allow patentees to impose the particular restraints. The Court was not totally oblivious to the possible economic benefits of the tying restriction. The plaintiffs argued that the tying arrangement benefits the public because it allows them

¹⁴⁶ Id at 182.

¹⁴⁷ *Motion Picture Patents Co*, 243 US at 505.

¹⁴⁸ Id at 506.

¹⁴⁹ Id at 506–07.

¹⁵⁰ Id at 509.

to sell at cost and then profit from the sale of the tied supplies.¹⁵¹ However, the Court did not reject the argument because it disagreed with its economics, but because the argument only proved “that, under color of its patent, the owner intends to and does derive its profit, not from the invention on which the law gives it a monopoly,” but from controlling and raising the prices of the unpatented supplies over which it had no patents.¹⁵² The vice of the tying was the attempt to use the patentee’s legal power to control one specific area—its invention—to restrain trade in other products and interfere with freedom of trade in areas not covered by the patent. This attempt was invalid, not because it was inefficient, but because it lacked legal basis, as it purported, without statutory warrant, to control activities over which the plaintiff had never been granted a monopoly.¹⁵³ When the Court declined to allow the patentee to extend the scope of its monopoly, it did not talk about leveraging market power from one market to another and thereby establishing an economic monopoly in a second market, as Bowman contended, but rather about an attempt to exercise the patentee’s lawfully acquired power to interfere with others’ freedom of trade in one product (the patented invention) in a manner that interferes with others’ freedom of trade in another.¹⁵⁴

To the surprise of many antitrust observers, the Supreme Court has reaffirmed its holding regarding the first-sale doctrine in recent years,¹⁵⁵ thus showing that these noneconomic considerations have not been completely excised and that jurisprudence based on delineating limits on the exercise of private power still carries persuasive weight.

¹⁵¹ *Motion Picture Patents Co*, 243 US at 517.

¹⁵² *Id.*

¹⁵³ *Id.* at 518.

¹⁵⁴ Unlike Bowman, Director and Levi clearly recognized that nature of the Court’s reasoning in this and other cases involving patents, and noted that

[w]hen the courts speak of expanding a monopoly, or of attempting to secure a monopoly through various exclusionary means, the language used may point to matters about which economics has little to say. . . . Having conferred a monopoly in one area, the courts may feel that the incidents of that monopoly must be confined. Thus a restriction imposed on the use of products with a patented machine would have an effect upon the producers of the products. Moreover, even if the restriction does not bring a new monopoly into existence, it can be regarded as a restraint.

Director and Levi, 51 Nw U L Rev at 293–94 (cited in note 113).

¹⁵⁵ See *Impression Products, Inc v Lexmark International, Inc*, 137 S Ct 1523, 1535 (2017); *Kirtsaeng v John Wiley & Sons, Inc*, 568 US 519, 552 (2013).

III. A NEW (OLD) CHICAGO?

The relationship between monopoly and democracy has reentered popular and academic discourse in recent years, suggesting that the era of singularly minded economic orientation of antitrust law may have come to an end.¹⁵⁶ Among those calling for a greater appreciation of the political dimensions of economic concentration and antitrust law is Professor Luigi Zingales, a prominent University of Chicago economist.¹⁵⁷ Over the last two decades, Zingales notes, concentration levels in most industries have increased.¹⁵⁸ Higher concentration increases the ability to collect supracompetitive rents, and it also makes it easier to organize and lobby for laws and policies that will protect this rent collection capacity. This process not only distorts market outcomes, but also tends to corrupt government. Zingales has described this process as the “Medici vicious circle,” in which money is used to gain political power, and political power is then used to make more money, and which, in the case of medieval Italy, turned Florence from one of the most advanced and powerful cities in Europe to a marginal province of a foreign empire.¹⁵⁹

Like pre-1950s Chicagoans, Zingales advocates for more aggressive antitrust enforcement.¹⁶⁰ In line with Simons (until his successors decided to brand him an “interventionist”), Zingales recognizes the importance of antitrust law within the broader context of liberal democracy. He does not, however, discuss the doctrinal feasibility of his proposal or respond to the objections that it would likely generate among many antitrust lawyers, economists, and practitioners whose views were molded in the shape of the Chicago School.

In this Part, I wish to pick up where some University of Chicago scholars, such as Zingales and pre-1950s “Simonsians” left off. I briefly address three issues: (1) the legitimacy of integrating political considerations into existing law; (2) the desirability of such integration; and (3) the feasibility of integrating

¹⁵⁶ See, for example, Crane, 119 Mich L Rev at *2 (cited in note 26) (noting “[t]he recent revival of political interest in antitrust”); Barak Orbach, *The Present New Antitrust Era*, 60 Wm & Mary L Rev 1439, 1439 (2019) (arguing that “[t]he present new antitrust era is a product of growing tensions and contradictions among policy prescriptions”).

¹⁵⁷ See generally Luigi Zingales, *Towards a Political Theory of the Firm*, 31 J Econ Perspectives 113 (2017).

¹⁵⁸ *Id.* at 120.

¹⁵⁹ *Id.* at 114–15.

¹⁶⁰ *Id.* at 128–29.

such considerations in a coherent, intelligible, and predictable fashion. I also discuss why some of the objections commonly raised to such integration are misguided, while others are exaggerated.

A. Legitimacy

Notwithstanding the Chicago School's success in shaping conventional wisdom over the last few decades, its assertion that antitrust law's sole purpose was promoting economic efficiency is false as a matter of both legislative history and judicial doctrine. As others have previously shown, and as discussed above, political considerations motivated the passage of all major antitrust statutes.

Therefore, since political considerations motivated Congress to enact the antitrust laws, adhering to this legislative intent is not only legitimate, but ignoring it or pretending that there was no such intention is illegitimate.

The problem, however, as Professor Pitofsky has noted, is that key terms in the legislation, such as "restraint of trade" or "monopolize," were not defined; the legislative history includes a series of vague and not always consistent strands of legislative intent; and the statute itself does not provide guidance on how to handle potential tensions between its various goals, such as how to address trade-offs between efficiency and political effects.¹⁶¹ Such problems, however, do not affect the legitimacy of the exercise, nor are they insurmountable. And indeed, by using "restraint of trade" and "monopolize," Congress incorporated common-law terms with at least three hundred years of meaning. While this meaning has not always been clear or consistent, it does reflect foundational constitutional principles and values.¹⁶²

Still, even if Congress intended for political considerations to be part of antitrust, integrating those considerations into antitrust doctrine today might be seen as illegitimate if the consequences of doing so would be grave, or if it would be impossible to integrate them in a coherent, intelligible, and predictable way.¹⁶³

¹⁶¹ Pitofsky, 127 U Pa L Rev at 1060 (cited in note 24).

¹⁶² See, for example, Katz, 17 Theoretical Inquiries L at 651 (cited in note 28) (describing the opinion in *The Case of the Tailors of Ipswich*, a 1614 case that enunciated "the common law's aversion to monopolies and restraints of trade").

¹⁶³ Put differently, since legislators are presumed not to have intended absurd or irrational results, Congress could not have intended to enact antitrust laws that could not be implemented rationally or that would have absurd results.

B. Desirability

The desirability of integrating political considerations into antitrust analysis may, in large part, depend on the feasibility of doing that in a coherent, intelligible, and predictable fashion; if not, then antitrust might become a mess, with inconsistent rules attempting to promote myriad goals that may be at odds with each other. Rightly or wrongly, this was a major Chicago School critique of the law at the time. I deal with the feasibility question below, so in this Section, I wish to propose two justifications that are separate from the feasibility question.

The insights from microeconomics and industrial organization have been extremely helpful to the development of modern antitrust law, yet they often fail to produce the degree of certainty and predictability that their proponents of the economic, technocratic vision of antitrust law tend to ascribe to them. In particular, many antitrust cases—such as the cases discussed earlier—involve circumstances in which the economic impact of the impugned conduct is far from clear, despite the fact that in many such cases both parties are aided by equally well-trained economists presenting similarly valid yet opposing models, backed by similarly inconclusive evidence. Yet courts and regulators must reach a conclusion, and the outcome of the case might depend on the decisionmaker's political priors or on some default rules regarding burdens of proof, which are equally laden with political preferences. The fact that one can easily predict the outcome of antitrust cases in the United States based on the political leanings of the judges deciding them (and the identity of the president who nominated them) should also lead us to question whether contemporary antitrust is indeed technocratic rather than political or ideological.

Rather than pretending that antitrust law is apolitical or attempting to excise its underlying ideology (or ideologies), acknowledging the political dimension of antitrust law may improve it in various ways. For example, it may bring to the fore political priors that currently play out in an opaque and unaccountable way, hiding behind a veneer of technocratic decision-making. Merely acknowledging that economic analysis is not divorced from political ideology can make it more transparent and produce better economic analysis. Just as openly explaining, in choosing one course of action over another, why efficiency sacrifices are necessary for promoting a political goal, so too can describing why

the promotion of efficiency demands political sacrifices produce better policy making.

Moreover, in a democracy, the success of the antitrust enterprise depends on the public's continuing support. But, as Daniel Crane noted recently:

The bipartisan consensus that antitrust should solely focus on economic efficiency and consumer welfare has quite suddenly come under attack from prominent voices [from the political left and right] calling for a dramatically enhanced role for antitrust law in mediating a variety of social, economic, and political friction points, including employment, wealth inequality, data privacy and security, and democratic values.¹⁶⁴

Crane also describes how “the rising tide of calls for a radically different version of antitrust has led to a circling of [the bipartisan antitrust] establishment wagons around the consumer-welfare standard” despite major disagreements within this establishment on the meaning and implementation of that standard.¹⁶⁵

Such a response by the establishment may not be the most productive. If dissatisfaction with the current antitrust status quo becomes a shared view of the political left and the right in a period when they seem incapable of finding common ground on almost any issue, then insisting that the status quo is just fine and that the criticism is based on fundamental misunderstanding of existing antitrust's greatness may not be very persuasive. Put differently, if growing swaths of the public become concerned about the distribution of power and its exercise, then telling them that antitrust should only care about efficiency may cause them to abandon their support for the antitrust enterprise altogether.

Furthermore, there may be other costs to ignoring antitrust's political dimension. One of the motivations for adopting the antitrust laws (and the reasons why the antitrust enterprise also gained the support of business) was the realization that the ills of monopoly, not only high prices, but also the helplessness of those who have little choice but to depend on the monopoly, may lead to social unrest. In the worst case, this might lead to a loss of

¹⁶⁴ Daniel A. Crane, *Antitrust's Unconventional Politics*, 104 Va L Rev Online 118, 118 (2018).

¹⁶⁵ *Id.* at 120.

credibility for democratic governance and even to the rise of totalitarianism, or at least to excessive intervention of the government in the operation of markets, either by way of overregulation or central planning. Thus, the alternative to vigorously enforced competition laws is not the classic economist's liberal laissez-faire utopia, but a society that is neither free nor productive.

To the extent that the present crisis of liberal democracy and the rise of illiberal tendencies in many countries is connected, at least in part, to the reign of Chicago School economics (and other neoliberal prescriptions) and the frustration of those who found themselves waiting in vain for economic benefits to trickle down, then insisting on a business-as-usual approach to antitrust law and policy may come with a high price. In other words, however skeptical one might be about the desirability of acknowledging antitrust's political dimension, the alternative—ignoring it—might be worse.

C. Feasibility

Predictably, acknowledging antitrust law's political dimension and reintegrating it doctrinally gives rise to concerns about the use in judicial decision-making of political theories that may not be rigorous enough to yield testable and predictable outcomes, or to a concern that the law would be hijacked by partisan politics. As Professor Carl Shapiro noted:

[A]ntitrust institutions are poorly suited to address problems associated with the excessive political power of large corporations. The courts and the antitrust enforcement agencies know how to assess economic power and the economic effects of mergers or challenged business practices, but there are no reliable methods by which they could assess the *political* power of large firms. Asking the DOJ, the FTC to evaluate mergers and business conduct based on the political power of the firms involved would invite corruption by allowing the executive branch to punish its enemies and reward its allies through the antitrust cases brought, or not brought, by antitrust enforcers. On top of that, asking the courts to approve or block mergers based on the political power of the merging firms would undermine the rule of law while inevitably drawing the judicial branch into deeply political considerations.¹⁶⁶

¹⁶⁶ Shapiro, 61 *Intl J Indust Org* at 716 (cited in note 9).

While legitimate, these concerns about the institutional capacity of courts and enforcement agencies to assess the political power of firms involve two separate questions. The first is whether the courts and enforcement agencies are inherently incapable of making such an assessment. It may be conceded that even if we accept the premise that too much economic power leads to too much political power and that maintaining competition is an effective way to constrain firms' ability to exercise unacceptable levels of political power, we nonetheless do not currently have sufficiently developed analytical tools that would allow courts and enforcement agencies to decide whether any specific challenged conduct allows a firm to acquire or maintain an unacceptable degree of political power. But are courts and enforcement agencies inherently incapable of developing such tools?

The development of antitrust economics provides a useful point of comparison. Historically, antitrust law preceded antitrust economics. Indeed, when Congress enacted the Sherman Act, the basic (and now standard) economic models of competition and monopoly, as well as the field of industrial organization, were at their infancy,¹⁶⁷ and Congress's decidedly political move did not receive a warm welcome from the leading economists at the time.¹⁶⁸ Yet, the existence of antitrust laws generated demand for applicable economic theory and evidence. This demand fueled the supply of economic expertise, which, in turn, continued to inform the development of the law. For example, if the fate of a merger depends on evidence concerning its likely impact on prices and inputs, litigants and their experts would develop theoretical models and provide supporting evidence attempting to demonstrate those effects. Indeed, many antitrust economists honed their skills by analyzing the decisions and the court records of decided cases or by acting as experts for actual or potential litigants. As a result, "[l]aw shaped economic thinking about problems of industrial organization at least as often as economic industrial organization theory inspired law."¹⁶⁹

¹⁶⁷ See Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 *Tex L Rev* 105, 107 (1989).

¹⁶⁸ Nicola Giocoli, *British Economists on Competition Policy (1890–1920)*, in Jeff E. Biddle and Ross B. Emmett, eds, 31-A *Research in the History of Economic Thought and Methodology: A Research Annual* 1, 1 (Emerald Group 2013) (noting that "[i]t is rather well-known that most turn-of-20th-century US economists gave a rather cool welcome to the Sherman Act (1890) . . . [and] no major British economist favored the adoption of an American-style, statutory-based competition policy").

¹⁶⁹ Hovenkamp, 68 *Tex L Rev* at 105 (cited in note 167).

If economists have been capable of developing acceptable methodologies for assessing the economic effect of reviewed practices,¹⁷⁰ there is no a priori reason why political scientists, political economists, political philosophers, and jurists would not be able to provide scientifically valid models and evidence to answer questions such as the impact of market concentration on the political process, or the extent to which a contract in restraint of trade interferes unreasonably or disproportionately with the freedoms of those it seeks to govern. Their answers may be contentious or indeterminate at times, but so are the answers that economists have provided over time.¹⁷¹ If courts ask those questions, then litigants would provide them, and gradually the quality of such analysis may become just as good as the quality of the models and evidence that economists provide today.

But even if we insist that only the insights of economists can aid courts and enforcement agencies to decide antitrust questions, or that there are limits to antitrust courts' and enforcers' abilities to productively use noneconomic insights, issues still emerge concerning the relationship between competition and political power. Recognizing the existence of institutional limitations to solving certain problems does not compel us to conclude that those problems are not ones that the law is concerned about.

¹⁷⁰ The success of economics in developing such acceptable methodologies should not be overstated. Indeed, antitrust law has been more receptive to the economic insights of the Chicago School, developed over the 1960s and 1970s, and much less receptive to developments in economic analysis since then. See generally, for example, Giocoli, 22 *J Econ Methodology* 96 (cited in note 18); Hovenkamp and Morton, 168 *U Pa L Rev* (cited in note 6).

¹⁷¹ Crane's recent study is an example. See generally Crane, 119 *Mich L Rev* (cited in note 26). Crane examined business histories and archival material to assesses the role of industrial concentration in facilitating Nazism. He found compelling evidence that the extreme concentration of market power during the Weimar period enabled Hitler to seize and consolidate totalitarian power through a variety of mechanisms, and concluded that the German experience with Nazism lends support to the idea that extreme concentration of economic power enables extreme concentration of political power. The implications of this study for contemporary antitrust dilemmas are less clear. Crane notes that contemporary antitrust principles already safeguard against the conduct that created the radical economic concentration of the Weimar period. This, in his view, casts doubt on claims that a significant shift in antitrust enforcement is necessary to forestall antidemocratic forces. However, as I noted above, monopolies and restraints on trade may impinge on economic and political freedoms at levels that modern constitutional liberal democracies may consider objectionable even if they do not amount to a complete rise of tyranny and a collapse of the rule of law. My point here is not to resolve this question, but only to show that additional studies of this kind could help illuminate it. They might find that democratic degradation might begin at lower levels of concentration, or they might not. And the findings of such studies could help decide the level of economic concentration that we deem acceptable from a political-constitutional point of view.

Instead, recognizing such limitations might influence the law's course of action in resolving the problem.

For example, the economic rationale for antitrust typically begins by describing the allocative inefficiency or the deadweight loss associated with a monopolist's ability to charge supracompetitive prices by reducing output. Yet while collusion that allows competitors to set supracompetitive prices is considered the "supreme evil of antitrust,"¹⁷² no liability attaches to a monopolist's decision to reduce output and raise prices. This remarkably different legal treatment of conduct that results in the same economic harm is both a central tenet of antitrust doctrine as well as one of its most puzzling aspects.¹⁷³

A common explanation to this puzzle invokes institutional considerations: attaching liability to such unilateral conduct by a monopolist would require "antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited."¹⁷⁴ Even specific sector regulators, which might be better suited than courts to regulate monopolists directly, may not be able to do so as effectively as rigorous competition, which is precisely why antitrust law seeks to maintain competition to prevent a monopoly from emerging in the first place.

Put differently, in a perfect regulatory world there would be no need for antitrust law because the government could regulate monopolies and cartels directly. It could ensure that they do not charge supracompetitive prices, do not reduce their output below the level that maximizes efficiency, and continue to produce goods and services of desirable quality. In such a world, firms would grow to whatever size minimizes their cost of production and otherwise enter into agreements with other firms for that purpose. We would not need to worry about whether their actions indeed increase efficiency or are designed to acquire or maintain market power because regulators would be able to effectively trim any excessive market power. But it is precisely because we have good grounds to doubt the ability of regulators to effectively make such determinations with respect to prices, quantity, and quality that we choose a system that seeks to rely on self-policing markets.

¹⁷² *Verizon Communications Inc v Law Offices of Curtis V. Trinko, LLP*, 540 US 398, 408 (2004).

¹⁷³ See Nachbar, 99 Iowa L Rev at 65 (cited in note 42).

¹⁷⁴ *Trinko*, 540 US at 408.

However imprecise such a system is, it is based on a belief (backed by sound theory and experience) that prioritizes preventative care to the problem of monopoly (in the form of competition law designed to minimize the incidence of monopoly) over curative care (in the form of direct regulation of monopolists once they arise).

Therefore, just as recognizing that the difficulty of effectively remedying a monopoly problem once it exists does not require us to conclude that monopoly power is not a problem,¹⁷⁵ acknowledging the difficulties in remedying the problems of corporate political power does not require us to conclude that antitrust has no interest in this problem. Rather, it might justify resorting to tougher preventative measures, for example, maintaining competitive market structures even if a higher level of concentration may not result in any identifiable harm to efficiency or even promotes it. And we can rationally choose to do that, as Judge Hand reminded us, “in spite of possible cost.”¹⁷⁶

But more importantly, acknowledging antitrust law’s political underpinnings and reintegrating its political goals into modern doctrine need not result in turning every antitrust case into a parade of experts from across the social sciences. Rather than complicating antitrust law, the reintegration of political theory may actually simplify it. The paramountcy of economic analysis in contemporary antitrust forces litigants to frame their arguments in certain types of economic terms and to seek evidence of economically relevant harms, even if the harm they complain of may not be one that economic theory can effectively describe or demonstrate. In some cases, this drives complainants to abandon their claims, while in other cases it forces them to reframe their claims in terms that are more amenable to a certain type of economic analysis but less suitable for capturing the nature of their grievance.

In fact, the claim that “courts and the antitrust enforcement agencies know how to assess economic power and the economic effects of mergers or challenged business practices, but [lack] . . . reliable methods by which they could assess the *political* power of

¹⁷⁵ However, Justice Antonin Scalia’s majority opinion in *Trinko* came close to this. See *Trinko*, 540 US at 407 (noting that “[t]he mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system”).

¹⁷⁶ *Alcoa*, 148 F2d at 429.

large firms”¹⁷⁷ may be called into question. If assessing “the political power of large firms” refers to the degree to which such a firm has or may distort the political process, then this may be a type of macro-political economy question for which courts, at least at present, lack good enough analytical tools to answer, but as noted, there is no a priori reason to think that such tools cannot be developed, and that they would not be developed should courts ask the right questions.

But more importantly, in many past cases when courts have decided antitrust cases on the basis of noneconomic considerations, the political aspect referred to something else. It focused on whether the lack of competition had allowed defendants to exercise power over others (consumers, suppliers, competitors) and coerce them to choose a course of action that they would not have chosen under more competitive conditions, or whether the defendants engaged in practice that would or might create conditions amenable to the exercise of such power.

The political aspect lies in the conviction that a correlation exists between the degree of competition and the degree to which individuals and firms can freely and autonomously chart their own course without being dependent on the whims of others, and the corresponding belief that a lack of competition may reduce such freedom. These questions can be easily framed as a clash between the plaintiff/complainant’s freedom of trade and the antitrust defendant’s freedom of contract. Indeed, many legal disputes in areas other than antitrust involve mediating between conflicting rights (such as the degree to which the enjoyment of one person’s property unlawfully interferes with her neighbor’s enjoyment of her property) or concerns over the exercise of power. In these disputes, in private law and in public law, the court’s inquiry looks at questions such as the nature of the rights involved or the power exercised, the source of the right or power, whether they have been acquired lawfully, how they affected other parties’ rights, and whether under the circumstances their exercise has been justified (or reasonable, proportionate, etc.).

Answering such questions may be complicated, and the answers themselves may be contentious. Economists and economics, of course, may help in answering such questions by, for example, identifying the possible economic effects of one course of action over another or by assessing the plausibility of parties’ claims

¹⁷⁷ Shapiro, 61 *Intl J Indust Org* at 716 (cited in note 9).

about economic harms and benefits. But these are not the type of questions that courts are incapable of answering. In fact, these are the kinds of questions that jurists are trained to answer and that courts routinely answer and are institutionally well disposed to answer.

Arguably, the focus on efficiency or other strictly economic considerations, and the prescription that legality should depend solely on those considerations, thrusts upon courts a role that they are not particularly good at. Indeed, in the landmark case of *United States v Addyston Pipe & Steel Co*,¹⁷⁸ then-Judge William Howard Taft warned against the temptation to determine the legality of agreements in restraint of trade on the basis of the reasonableness of the price charged. Courts who attempted to do that, he charged, “have set sail on a sea of doubt, and have assumed the power to say . . . how much restraint of competition is in the public interest, and how much is not.”¹⁷⁹ And he further warned that “[t]he manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it.”¹⁸⁰ As Professors Blake and Jones have argued, requiring the courts to decide on the basis of purely economic considerations would compel them to pass judgment on the economic soundness of the various activities, “a function that is diametrically opposed to the basic *political* objective of antitrust: that the bulk of business decisions shall be controlled by the market and *not* by governmental agencies (such as courts) or by private agencies exercising [de facto] governmental prerogatives” without ever being lawfully authorized to exercise them.¹⁸¹

Moreover, reintegrating the political dimension may even simplify antitrust adjudication. It may provide a richer vocabulary for adjudicating complaints against dominant firms or other challenged business practices. In some cases, such vocabulary may be dispositive or may at least better circumscribe the role that economic analysis should play in resolving the case. For example, in an earlier article, Paul-Erik Veel and I discussed how many important US IP cases have had a parallel lesser-known antitrust history. We identified a pattern: even when the courts

¹⁷⁸ 85 F 271 (6th Cir 1898).

¹⁷⁹ *Id* at 283–84.

¹⁸⁰ *Id* at 284.

¹⁸¹ Blake and Jones, 65 *Colum L Rev* at 425 (cited in note 24).

seem to share the IP defendant's concerns about harm to competition, they tend to dismiss the antitrust counterclaims but then hold in favor of the IP defendant on IP questions by finding that no IP right existed or that it had not been infringed. We explained that the ability of IP defendants to bring antitrust counterclaims provides the court with a richer record and a more holistic perspective of what is at stake and suggested that even when the judges accept the IP defendant's narrative and share their concerns about the excessively anticompetitive impact of the IP plaintiff's claim, they prefer deciding the case through a narrow interpretation of the scope of IP rights. We also suggested that given modern antitrust's contentious and politically charged nature, they may find the IP route more appealing because it employs a more formalistic and traditional type of legal analysis that allows the courts to act as adjudicators of rights rather than deciding what's efficient or not. This way, the rights-oriented methodology makes it easy for judges with different political leanings to reach a consensus.¹⁸²

The same may be true of antitrust law that focuses on deciding between competing claims of conflicting rights and on delineating the limits of private power, instead of efficiency. A problem with the focus on efficiency is that it requires courts to decide what is efficient and what is not. Not only is this not a task that jurists are well trained in performing, but even when antitrust plaintiffs present a strong case, ruling in their favor may trigger anxiety, especially in conservative-leaning judges, about an overly interventionist state and judges assuming the role of social or economic planners. By contrast, deciding how one party's freedom of contract interfaces with another party's freedom of trade may not raise the same anxieties and therefore may be less polarizing. The fact that the singularly economic view of antitrust has lately attracted growing criticism from both the left and the right, both advocating for an enhanced role for antitrust law, suggests that a return to such a non- or less-economic approach might be able to generate a new consensus.

CONCLUSION

An economically oriented and technocratic view of antitrust has dominated the discipline's practice and scholarship for the

¹⁸² See Ariel Katz and Paul-Erik Veel, *Beyond Refusal to Deal: A Cross-Atlantic View of Copyright, Competition, and Innovation Policies*, 79 *Antitrust L J* 139, 182 (2013).

last four decades. Under this view, attributed in large part to the rise of the Chicago School, questions of legality ought to be decided exclusively on the basis of supposedly objective economic analysis, which does not admit any consideration or insight other than those that economists and other experts trained in the field can analyze. Lately, prominent voices from both the political left and right have begun attacking this mainstream view, “calling for a dramatically enhanced role for antitrust law in mediating a variety of social, economic, and political friction points, including employment, wealth inequality, data privacy and security, and democratic values.”¹⁸³ Suddenly, a possible reorientation of antitrust law from an exclusively economic field to one that takes into account noneconomic, or political, considerations has moved from the fringes to the mainstream.

This Essay has discussed the political dimension of antitrust. It has shown that antitrust law (and its common law predecessors) was always concerned not only with narrowly defined economic aspects of competition but also with the connection between market competition and a set of classic liberal political values. The common law’s aversion to monopoly, restraints of trade, and restraints on alienation, while involving economic considerations, were primarily concerned with rule-of-law considerations about constraining private actors’ ability to exercise power and limit the rights of others without a clear legal mandate to do so. It recognized that unchecked private economic power may be as injurious to individual freedom and other liberal values as unchecked political power, and that the two may be mutually constitutive.

The passage of antitrust law, starting in the late nineteenth century, both reflected and rekindled interest in these political ideas, many of which continued to inform courts’ antitrust decisions until the rise of the Chicago School and its insistence that antitrust law could only be legitimately concerned with maximizing economic efficiency. But as I show in this Essay, that view not only departed from antitrust law’s historical roots and doctrinal development, but also presented a radical, unexplained, and unacknowledged shift from the views of some of the early founders of the Chicago School, who had previously recognized and endorsed antitrust law’s political dimension.

¹⁸³ Crane, 104 Va L Rev Online at 118 (cited in note 164).

In addition to bringing to light this difference in how anti-trust's political dimension was approached by the early Chicago School and by its later adherents, this Essay has also addressed the possibility of reintegrating this dimension. It has discussed the legitimacy of integrating political considerations into existing law; the desirability of such integration; and the feasibility of integrating such considerations in a coherent, intelligible, and predictable fashion. It has shown that such reintegration is legitimate, feasible, and may even be desirable.