

The Chicago Obsession in the Interpretation of US Antitrust History

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INTRODUCTION

Discussions about the evolution of the US antitrust system since the early 1970s often dwell upon the influence of the Chicago School in shaping substantive rules and enforcement policy.¹ Many commentators attribute to Chicago School scholars—most notably, Judge Robert Bork—the decisive role in gaining broad acceptance for permissive standards governing mergers, vertical restraints, and dominant firm behavior.² In numerous treatments, the Chicago School is seen to be the intellectual foundation

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¹ See, for example, Patrice Bougette, Marc Deschamps, and Frédéric Marty, *When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law*, 16 *Enterprise & Socy* 313, 316–17 (2015); Neil Duxbury, *Patterns of American Jurisprudence* 348–64 (Oxford 1995); Ryan R. Stones, *The Chicago School and the Formal Rule of Law*, 14 *J Competition L & Econ* 527, 527–29 (2018).

² See, for example, Jonathan Baker, *The Antitrust Paradigm: Restoring a Competitive Economy* 1–3, 43–52 (Harvard 2019); A. Douglas Melamed, et al, *Antitrust and Trade Regulation, Cases and Materials* 2 (Foundation 7th ed 2018) (describing “a sharp turn in antitrust analysis in the 1970s with the rise of the so-called Chicago School”); Jonathan Tepper, *The Myth of Capitalism: Monopolies and the Death of Competition* 155 (Wiley 2019) (“We would not have highly concentrated industries if it were not for Robert Bork and the Chicago School.”); Tim Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* 17, 83–92 (Columbia Global Reports 2018); Robert Pitofsky, *Conservative Economic Analysis and Its Effects*, in Robert Pitofsky, ed, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* 7, 7 (Oxford 2008); Timor Ergen and Sebastian Kohl, *Varieties of Economization in Competition Policy: Institutional Change in German and American Antitrust, 1960–2000*, 26 *Rev Intl Polit Econ* 256, 272 (Jan 2019); Maurice E. Stucke and Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, *Harv Bus Rev* 4 (Dec 15, 2017) (“[A]ntitrust policy and enforcement declined during [the late 1970s to the mid-2010s] with the rise of the Chicago School of Economics in the late 1970s, which the Reagan administration endorsed with its enforcement priorities, judicial appointments, and amicus briefs to the Supreme Court.”); Lina

for US antitrust policy, including its acceptance of a “consumer welfare” standard that is said to focus exclusively on efficiency considerations to the exclusion of other policy objectives.³

M. Khan, *Amazon’s Antitrust Paradox*, 126 Yale L J 710, 717–22 (2017); Mark Glick, *Antitrust and Economic History: The Historic Failure of the Chicago School of Antitrust* 56–58 (Institute for New Economic Thinking Working Paper No 95, May 2019), archived at <https://perma.cc/V8UP-ZVJT>; Sandra Marco Colino, *The Antitrust F Word: Fairness Considerations in Competition Law* 3, 18–19 (The Chinese University of Hong Kong Faculty of Law Research Paper No 2018-09), archived at <https://perma.cc/5Y4C-CSC2> (noting that “to this day US antitrust policy remains largely premised upon [Robert Bork’s] assumptions” but there remains “vigorous debate stemming from the visible consequences of four decades of Chicago School-guided US enforcement history”); Robert Levine, *Antitrust Law Never Envisioned Massive Tech Companies like Google* (Boston Globe, June 13, 2018), online at <https://www.bostonglobe.com/ideas/2018/06/13/google-hugely-powerful-antitrust-law-job/E1eqlQ01g11DRM819FxxO/story.html> (visited Oct 20, 2019) (Perma archive unavailable). After publication of Robert Bork’s *Antitrust Paradox* in 1978, “[t]he Supreme Court soon adopted Bork’s approach, which has dominated US legal thinking ever since.” Id. See also Elizabeth Warren, *Anti-Monopoly and Competition Restoration Act § 2(a)(12)* (draft legislation on file with author) (“[A]ntitrust laws were not created exclusively to enhance the narrowly defined concept ‘consumer welfare’ as articulated by academics such [as] Robert Bork.”).

³ Professor Carl Bogus has summarized the reason for the change in modern antitrust policy as follows: “In a nutshell, it is because the Chicago School—and especially Robert H. Bork—persuaded the antitrust fraternity that its field should be exclusively concerned with consumer welfare.” Carl T. Bogus, *The New Road to Serfdom: The Curse of Bigness and the Failure of Antitrust*, 49 U Mich J L Ref 1, 14 (2015). In another article, Bogus explains the importance of this adjustment: “Under the current paradigm, antitrust is concerned exclusively with consumer welfare: What causes consumer prices to rise is bad, and what causes them to fall is good. Everything else is largely ignored.” Carl T. Bogus, *Books and Olive Oil: Why Antitrust Must Deal with Consolidated Corporate Power*, 52 U Mich J L Ref 265, 269 (2019). Bogus adds that “[t]his paradigm—heavily influenced by the Chicago School of law and economics—prefers logic to experience.” Id at 270. See also Rana Fordooar, *America’s New Antitrust Agenda* (Fin Times, Feb 3, 2019), online at <https://www.ft.com/content/c27a517a-2631-11e9-8ce6-5db4543da632> (visited Oct 20, 2019) (Perma archive unavailable) (“[M]onopoly policy in America is currently driven by ‘Chicago School’ thinking, which espouses the idea that as long as consumers aren’t paying too much for a good or service, all is well.”); Editorial, *An Overdue Look at Monopoly Distortion* (Fin Times, Sept 13, 2018), online at <https://www.ft.com/content/26ea63ea-b5c9-11e8-bbc3-ccd7de085ffe> (visited Oct 20, 2019) (Perma archive unavailable) (“Since the 1980s antitrust law in the US has been predicated on the notion that as long as consumer prices were falling there was no monopoly problem. This ‘consumer welfare’ approach was an ideology popularised by Robert Bork and other University of Chicago school academics.”); Eric Johnson, *We Have to Rewrite Antitrust Law to Deal with Tech Monopolies, Says “Positive Populism” Author Steve Hilton* (Recode, Oct 24, 2018), archived at <https://perma.cc/8TZ4-ZGZW> (interviewing Steve Hilton, who argues that “we’ve got to really rethink our whole antitrust approach to be much more aggressive, where at the moment the whole approach is based on this notion that was really introduced by Robert Bork”); Eric Johnson, *Why Amazon Is a ‘Bully’ and Facebook and Google Are ‘the Enemies of Independent Thought’* (Recode, Dec 3, 2018), archived at <https://perma.cc/32ND-3VLK> (interviewing Franklin Foer, who argues that antitrust “has to just revert back to what it was before the 1960s, when Robert Bork bastardized it. . . . The standard right now is consumer welfare, which means that if they don’t jack up prices, . . . [t]hen there’s nothing

A large literature regards these developments as menacing. In many accounts, the Chicago School's leading figures and their followers are portrayed as ideological extremists,⁴ religious zealots,⁵

we can do about these companies"); Khan, 126 Yale L J at 737–46 (cited in note 2); Stacy Mitchell, *The Truth About Big Business* (Wash Monthly, July/Aug 2018), archived at <https://perma.cc/BS6X-K9UZ>:

For much of the twentieth century, one of the goals of antitrust law was to preserve the ability of entrepreneurs to enter and compete in a given sector. But that began to change in the late 1970s, as Robert Bork and other Chicago School economists successfully argued that the only legitimate goal of antitrust policy was efficiency. They further insisted that larger companies are naturally more efficient, and that mergers are therefore almost always justified, while the loss of small firms is both welcome and inevitable. These ideas proved highly influential, and they led to a radical change in both regulatory policy and Supreme Court doctrine.

See also Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice* *3, 5–6 (Competition Policy International Antitrust Chronicle, Apr 2018), archived at <https://perma.cc/7PQD-RKMS>; Russell Brandom, *The Anti-Monopoly Case Against Google—A Conversation with Open Markets' Barry Lynn* (The Verge, Sept 5, 2017), archived at <https://perma.cc/6HTZ-DSUR> (interviewing Barry Lynn, who argues that "in the late 1970s and 1980s, the Chicago School came along and said all those political considerations are very wasteful, and what we should really do is remake monopoly law so it focuses on serving the welfare of the consumer"); David Streitfeld, *To Take Down Big Tech, They First Need to Reinvent the Law* (NY Times, June 20, 2019), archived at <https://perma.cc/9NEE-TUT5> ("If the populists gain more momentum, they have a ways to go to unseat the antitrust establishment, which still hews to the consumer welfare standard developed by Robert Bork, the influential legal scholar and judge, and scholars at the University of Chicago beginning in the 1970s.").

⁴ See, for example, Willard F. Mueller, *Market Power and Its Control in the Food System*, in Robert L. Willis, Julie A. Caswell, and John D. Culbertson, eds, *Issues After a Century of Federal Competition Policy* 23, 35 (Lexington 1987) (explaining that Chicago School-oriented appointees to the federal antitrust agencies during the Reagan presidency had a "blind faith in the efficacy of competitive rivalry"); Eleanor M. Fox and Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 NYU L Rev 936, 945 (1987) ("It is often said that extremists are necessary to move tradition a short step. This is, perhaps, what [William] Baxter and the Chicago School have done.").

⁵ See, for example, Eliot G. Disner, *Antitrust Law: The Chicago School Meets the Real World*, 25 LA Lawyer 14, 14 (2002) ("With a kind of religious fervor, the Chicago School intoned a mantra and used a language all its own to vivify, then empower, its world view."); John J. Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw U L Rev 335, 344 (1981) (likening the Chicago School to a "church," and calling its ideas a "theology . . . out of touch with its own empirical and moral roots, detached from present-day realities").

cult-like fanatics,⁶ or carriers of a disease.⁷ In these and other accounts, the Chicago School's influence on antitrust and economic regulatory policy is said to be pernicious. Chicago School perspectives are claimed to have fostered lax doctrines and flawed analytical techniques that undermined effective implementation of the US antitrust laws and subverted the political and social aims that inspired them.⁸ In its wake, the Chicago School is said to have left vast wreckage: a damaged economy featuring high and growing industrial concentration,⁹ and democratic institutions

⁶ See, for example, Stephen D. Susman, *Business Judgment vs. Antitrust Justice*, 76 Georgetown L J 337, 337 (1987) ("We have sold the soul of competition to the devil, no question about that. As for the devil, there are several to choose from: the Chicago School, certain opinions of the Supreme Court, and [the Reagan] Administration's antitrust policies are chief among them."); Steven Pearlstein, *Is Amazon Getting Too Big?* (Wash Post, July 28, 2017), online at https://www.washingtonpost.com/business/is-amazon-getting-too-big/2017/07/28/ff38b9ca-722e-11e7-9eac-d56bd5568db8_story.html (visited Nov 23, 2019) (Perma archive unavailable) (quoting Steven Salop, who observes that "[t]he Chicago School runs deep, and the courts still partake of the Borkian Kool-Aid").

⁷ See Mitchell, *The Truth About Big Business* (cited in note 3) (describing how the Chicago School-inspired thinking "infected far more than antitrust policy"); Spencer Weber Waller, *The Law and Economics Virus*, 31 Cardozo L Rev 367, 379 (2009) (describing the way in which "the Chicago School virus has spread from one body of law to another").

⁸ In a collection of essays published in 2008, Professor Robert Pitofsky observed: "Because extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of facts) have come to dominate antitrust, there is reason to believe that the United States is headed in a profoundly wrong direction." Robert Pitofsky, *Introduction: Setting the Stage*, in Pitofsky, ed, *How the Chicago School Overshot the Mark* 3, 6 (cited in note 2). The title of the volume in which this short essay appears, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust*, suggests that Pitofsky equated "conservative economic theory" with the Chicago School. See also Frank Pasquale, *When Antitrust Becomes Pro-Trust: The Digital Deformation of U.S. Competition Policy* *5–6 (Competition Policy International Antitrust Chronicle, May 2017), archived at <https://perma.cc/G5HR-KS7D> ("Neoliberal technocrats portray antitrust as, at bottom, a realm of economic models occasionally informed by econometric analysis. While a pluralistic technocracy would be open to input from many forms of social science and schools within economics, neoliberal technocrats in antitrust primarily rely on Chicago School theory."); Cass Sunstein, *A New View of Antitrust Law That Favors Workers* (Bloomberg Opinion, May 14, 2018), online at <https://www.bloomberg.com/opinion/articles/2018-05-14/antitrust-law-gets-a-chicago-school-makeover> (visited Oct 19, 2019) (Perma archive unavailable) ("Under the influence of the Chicago School, antitrust law seemed to run out of steam over the last few decades. It seemed to be regulation's madwoman in the attic.").

⁹ See Tepper, *The Myth of Capitalism* at 155 (cited in note 2); Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust* *3 (Roosevelt Institute Working Paper, Nov 2018), archived at <https://perma.cc/6LE6-2R23> ("Robert Bork's goal of consumer welfare has led antitrust jurisprudence astray and has resulted in misguided policy that has done economic damage to the American economy.").

endangered by unaccountable corporate leviathans and their internal puppets at the federal enforcement authorities.¹⁰ Thus, an indispensable predicate for a needed redirection of antitrust law is repudiation of Chicago School precepts about the goals and rules of competition policy.¹¹

The Chicago School–centric interpretation of US antitrust experience correctly acknowledges that the School has played a powerful role in the US antitrust regime. The Chicago School has influenced modern US antitrust policy profoundly,¹² and Robert Bork did more than anyone to give shape and power to the Chicago School body of thought.¹³ The Chicago School–centric explanation for the evolution of the US antitrust system is alluring. At times I have embraced it as a roughly accurate way to simplify the often-tangled doctrinal and intellectual underpinnings of the American antitrust system.¹⁴ In my time at the Federal Trade Commission (FTC) in the 2000s, the attraction of this readily available

¹⁰ See Barry C. Lynn, *Cornered: The New Monopoly Capitalism and the Economics of Destruction* ix–x (2010) (“Consolidation of power by financiers over the basic institutions of our political economy has resulted in the derangement not merely of our financial systems but also of our industrial systems and political systems.”); Jonathan Tepper, *Why Regulators Went Soft on Monopolies* (The American Conservative, Jan 9, 2019), archived at <https://perma.cc/LHR2-NH39> (“Antitrust authorities once fought against monopolies, but for the past four decades they have given a green light to merger after merger. The guardians who were meant to protect competition have become the principal cheerleaders for monopolies.”).

¹¹ See Tepper, *The Myth of Capitalism* at 165 (cited in note 2) (“Max Planck once said, ‘Science progresses one funeral at a time.’ Any reform of antitrust laws will likely have to come when those influenced by Bork die away.”).

¹² See Duxbury, *Patterns of American Jurisprudence* at 349 (cited in note 1) (“[T]here exists very little in the way of contemporary antitrust theory which has not been inspired to some degree by Chicago economic analysis.”); Joshua D. Wright, *Abandoning Antitrust’s Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 *Antitrust L J* 241, 241, 243–45 (2011); Bruce H. Kobayashi and Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 *Antitrust L J* 147, 147–54 (2012); Daniel A. Crane, Book Review, *Chicago, Post-Chicago, and Neo-Chicago*, 76 *U Chi L Rev* 1911, 1911–13 (2009); Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 *Antitrust L J* 645, 655 (1989) (“Over the past fifteen years, the courts and enforcement agencies have created Robert Bork’s antitrust paradise. Antitrust has adopted the Chicago School’s . . . conclusions about the effects of business practices.”).

¹³ See Adam J. Di Vincenzo, *Editor’s Note: Robert Bork, Originalism, and Bounded Antitrust*, 79 *Antitrust L J* 821, 821 (2014); George L. Priest, *The Abiding Influence of The Antitrust Paradox*, 31 *Harv J L & Pub Pol* 455, 456 (2008); William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern U.S. Antitrust Policy*, 36 *Wayne L Rev* 1413, 1415 (1990).

¹⁴ See William E. Kovacic and Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 *J Econ Perspectives* 43, 52–58 (2000); William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 *Econ Inquiry* 294, 303–04 (1992).

explanation waned. As the FTC's General Counsel and as a member of the Commission (and for one year the agency's Chair), I examined how the FTC might develop its antitrust law enforcement program, especially cases to address improper dominant-firm behavior.¹⁵ I also participated in numerous discussions abroad about why US doctrine governing dominant firms had become, since the 1970s, more permissive than standards prevailing in the European Union and in other parts of the world.¹⁶

My FTC experiences led me to conclude that the Chicago School–centric explanation for what motivates US law and policy is badly incomplete and provides an unreliable guide to policy making. The Chicago School–centric interpretation either ignored the significant influence of non–Chicago School ideas entirely, or dismissed them quickly as, at most, secondary forces in guiding the US system.¹⁷ In doing so, the Chicago School–centric interpretation obscured obstacles to the healthy development of US policy (including challenges to improper exclusion by dominant firms) and diverted attention away from measures needed to surmount these obstacles. I also saw how the popularization of the Chicago School–centric interpretation, especially its tendency to depict leading Chicago School scholars as unthinking fanatics, degraded the US antitrust system's reputation abroad and diminished America's ability to help develop sound international norms regarding what antitrust systems should do and how they should do it.¹⁸

The greatest omission in Chicago School–centric interpretations of US antitrust policy is the failure to recognize the significant influence of the modern Harvard School and its formative scholars: Professors Phillip Areeda, Donald Turner, and now-Justice Stephen Breyer. Harvard School perspectives today guide

¹⁵ See generally William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property Law*, 30 *Seattle U L Rev* 319 (2007).

¹⁶ See William E. Kovacic, *Competition Policy in the European Union and the United States: Convergence or Divergence?*, in Xavier Vives, ed., *Competition Policy in the EU: Fifty Years After the Treaty of Rome* 314, 314–42 (Oxford 2009).

¹⁷ While a member of the Commission, I expressed doubts about the Chicago School–centric interpretation. See William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 *Colum Bus L Rev* 1, 6–12.

¹⁸ See William E. Kovacic, *The United States and Its Influence on Global Competition Policy*, 22 *Geo Mason L Rev* 1157, 1171–83 (2015).

key elements of US antitrust doctrine and enforcement policy,¹⁹ so much so that American case law more strongly reflects the Harvard School's ideas than the Chicago School's.²⁰ Among other contributions, modern Harvard School scholars supplied analytical frameworks that inspired important doctrinal refinements of the rule of reason.²¹ Areeda and Turner provided vital support to the view that courts and enforcement agencies should reject a broadly egalitarian view of the proper aims of antitrust policy.²² The Harvard School's proposals inspired retrenchment of core areas of doctrine and enforcement policy, particularly in the adoption of permissive rules governing the behavior of dominant firms.²³ Despite these significant contributions, modern commentary about US antitrust policy often gives no hint that Areeda and

¹⁹ See Wu, *Curse of Bigness* at 103–05 (cited in note 2); Herbert J. Hovenkamp, *The Antitrust Enterprise: Principle and Execution* 37–38 (Harvard 2005); Crane, Book Review, 76 U Chi L Rev at 1919 (cited in note 12); Kovacic, 2007 Colum Bus L Rev at 13–14 (cited in note 17); William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 Antitrust Bull 909, 910 (1996).

²⁰ See Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 Notre Dame L Rev 583, 600 (2018) (“The Chicago School has had a considerable influence on both antitrust decisionmaking and scholarship. Nevertheless, at the level of specific rulemaking, the course pursued was most generally that proposed by the Harvard school. That remains true to this day.”); Herbert J. Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, in Pitofsky, ed., *How the Chicago School Overshot the Mark* 109, 112 (cited in note 2) (“In sum, antitrust law as produced by the courts today comes much closer to representing the ideas of a somewhat chastised Harvard School than of any traditional version of the Chicago School.”); Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the Law of Antitrust*, in Pitofsky, ed., *How the Chicago School Overshot the Mark* 40, 42 (cited in note 2):

To the most vocal critics of “Conservative Economic Analysis,” the Chicago School is akin to the “Grinch Who Stole Christmas.” . . . The “Grinch” view assumes that it is the villains of the Chicago School alone who have done us in, taking us away from happier times in the antitrust valley. . . . If there is a Grinch at all, . . . it is a collective Grinch, a Chicago-Harvard Grinch and perhaps a good Grinch besides.

See also Crane, Book Review, 76 U Chi L Rev at 1919–20 (cited in note 12) (“If one is to criticize the recent pro-defendant turn in Supreme Court jurisprudence, one might as well write a book entitled, *How the Neo-Harvard School Overshot the Mark*.”); Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions?*, 3 Competition Policy Intl 59, 59 (2007).

²¹ See Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S Cal L Rev 733, 753–57 (2010) (discussing the impact of Areeda's scholarship on the Supreme Court's interpretation of the rule of reason).

²² See notes 60–69 and accompanying text (discussing Areeda's and Turner's criticism of the application of antitrust law to accomplish varied economic, political, and social objectives).

²³ See notes 71–77, 93–101 and accompanying text (describing the influence of Areeda and Turner on the modern development of legal standards governing dominant firm conduct).

Turner ever lived, much less that they reshaped basic elements of antitrust doctrine.²⁴ In light of the formative role that Areeda and Turner played in shaping the debate about US competition policy from the mid-1950s onward, and their deep imprint on basic elements of modern antitrust doctrine,²⁵ their disappearance from so many contemporary discussions about the US antitrust regime is astonishing.

This Essay examines the obsession with the Chicago School as the source of what is good and bad about the US antitrust system.²⁶ The term “obsession” captures the tunnel vision of observers who contend that Chicago School concepts designed, built, and ultimately corroded modern US antitrust policy, while overlooking or slighting other important intellectual influences. This Essay recognizes but qualifies the Chicago School’s role as a catalyst for the redirection of antitrust policy since the mid-1970s. It highlights the role of the modern Harvard School as a formative, complementary source of antitrust ideas. In doing so, it discourages the assumption that a single, dominant pattern of thought has shaped the modern evolution of the US antitrust system.²⁷ By underscoring the limits of the Chicago School–centric interpretation of US antitrust history, the Essay illuminates the institutional challenges that critics of existing law and policy must surmount to replace the consumer welfare standard with an egalitarian goals structure and to reset controls on dominant firm conduct.

The Essay first discusses two landmark publication events in 1978—one from the Chicago School and one from the Harvard School. Robert Bork published *The Antitrust Paradox*,²⁸ and Phillip

²⁴ See, for example, William A. Galston and Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy* (Brookings Institution, Jan 5, 2018), archived at <https://perma.cc/2UGV-U4NM> (attributing to the Chicago School the conservative reformulation of the goals of antitrust law and doctrine governing predatory pricing and making no mention of the Harvard School’s contributions to these developments).

²⁵ On the significance of Areeda and Turner, see note 56 and accompanying text.

²⁶ I borrow the expression “Chicago Obsession” from Professor Joshua Wright, a former FTC Commissioner whose law review article in 2012 examined the limitations of a Chicago School–centric interpretation of US antitrust experience. See generally Wright, 78 *Antitrust L J* 241 (cited in note 12).

²⁷ In this respect, the Essay is influenced by the approach taken by Professor Neil Duxbury in his study of law and policy in the United States. Duxbury concludes that “a variety of ideas,” rather than a single pattern of thought, explains the development of specific areas of jurisprudence, or the body of US law as a whole. Duxbury, *Patterns of American Jurisprudence* at 1–7 (cited in note 1).

²⁸ See generally Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books 1978). Bork republished the book in 1993. Robert H. Bork, *The Antitrust*

Areeda and Donald Turner published the first three volumes of their treatise, *Antitrust Law*.²⁹ More than any other sources of ideas, these volumes anchor modern US antitrust policy. They have guided its conception of antitrust's proper purposes and informed its choice of substantive standards. These texts are necessary reading to understand the US system or predict its future development.

The second Part reviews the impact of Bork, Areeda, and Turner. *Antitrust Paradox* has eclipsed *Antitrust Law* in explanations about the evolution of modern US law and policy. In scholarly discourse and popular commentary, Bork's masterpiece exemplifies the Chicago School's consumer welfare orientation and its narrow view about antitrust policy's appropriate content. Commentators who endorse a broader conception of antitrust's goals and a bolder enforcement program often point to Bork and the Chicago School as what ails the US system. In their view, antidotes to Bork's vision will cure what afflicts US antitrust policy.

The third Part of the Essay explores the significance of the complementary contributions of the Chicago and Harvard Schools for the future of US antitrust law and policy. Here the Essay considers why the Chicago obsession is so prevalent in how academics, journalists, and practitioners interpret the US antitrust experience. It suggests that efforts to reformulate antitrust's goals and expand enforcement will fail if they do not account for how the modern Harvard School has influenced the US doctrinal and policy status quo.

Four preliminary comments about the Essay's approach are in order. First, there have been two "Chicago Schools" of competition policy—a pro-deconcentration body of scholarship from the 1930s into the early 1950s (most notably associated with the work of Professor Henry Simons), and a skeptical view of antitrust intervention that arose in the 1950s and today is linked most closely to Robert Bork.³⁰ The Harvard School likewise encompasses two

Paradox: A Policy at War with Itself (Free Press 2d ed 1993). The 1993 volume contained an amended conclusion that took a more favorable view of the US antitrust system than Bork had presented in 1978.

²⁹ Phillip Areeda and Donald F. Turner, 1–3 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Little, Brown 1978).

³⁰ See, for example, Duxbury, *Patterns of American Jurisprudence* at 330–39 (cited in note 1) (presenting a history of "Chicago Before Chicago"); Bougette, Deschamps, and Marty, 16 *Enterprise & Socy* at 330–38 (cited in note 1) (describing the two Chicago Schools). To highlight this distinction, Professors Patrice Bougette, Marc Deschamps, and

periods of thought—the intervention-friendly structure-conduct-performance thinking from the 1930s into the 1960s, and a more cautious perspective, anchored in institutional considerations popularized by Phillip Areeda, which emerged from the 1970s onward.³¹ In speaking of the Chicago School or the Harvard School, this Essay ordinarily refers to the second phase of each school’s development. The Essay uses the term “modern Chicago School” or “modern Harvard School” to underscore this distinction.

The second comment deals with the Chicago School’s membership. This Essay emphasizes Robert Bork’s scholarship. This emphasis might suggest, inaccurately, that the Chicago School is a single-minded, Bork-led monolith. Scholars have documented important differences among the Chicago School’s leaders.³² For example, Judge Richard Posner stands apart from Bork in his view that antitrust should police some forms of predatory pricing.³³ I focus on Bork because he is the main subject for criticism about how the Chicago School derailed the US antitrust regime, not because he speaks for all Chicago School-oriented scholars.

Third, the emphasis on the modern Chicago and Harvard Schools overlooks scholars who do not fit neatly into either camp. In this respect, the Essay may display some of the same tunnel vision (a Chicago-Harvard Obsession?) that it criticizes in examining the Chicago School-centric interpretation of modern US antitrust policy. A proper antitrust intellectual history would discuss scholars such as Professor Oliver Williamson, whose papers

Frédéric Marty refer to the latter period of the Chicago School’s intellectual history as the “Second Chicago School.” Id at 315.

³¹ This evolution in Harvard School thought is recounted in Hovenkamp, *Antitrust Enterprise* at 35–38 (cited in note 19). Professor Herbert Hovenkamp calls the second period the era of a “somewhat chastised Harvard School.” Hovenkamp, *Harvard and Chicago Schools* at 112 (cited in note 20).

³² F.M. Scherer, *Conservative Economics and Antitrust: A Variety of Influences*, in Pitofsky, ed, *How the Chicago School Overshot the Mark* 30, 32–36 (cited in note 2); Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 *Antitrust L J* 43, 44 (2012):

Intellectual ‘schools’ tend to be ‘Protestant’ rather than ‘Catholic,’ meaning that there is no central creedal authority to delimit orthodoxy and heresy. It is difficult enough to draw the lines around the Chicago School, whose titans, such as Richard Posner, Frank Easterbrook, Aaron Director, and Robert Bork, are associated with the University of Chicago.

See also Kobayashi and Muris, 78 *Antitrust L J* at 149 (cited in note 12) (“The current popular understanding of the Chicago School of Antitrust as a narrow and uniform ideological approach to antitrust is inaccurate.”).

³³ See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 *U Pa L Rev* 925, 940–41 (1979). For Judge Posner’s approach to predatory pricing, see Richard A. Posner, *Antitrust Law* 207–23 (Chicago 2d ed 2001).

on transaction costs supported the relaxation of legal restrictions on vertical contractual restraints (which Bork applauded), but who also endorsed scrutiny of predatory pricing and no-fault monopolization (both ideas that Bork abhorred).³⁴ Williamson and others provide another reason to resist the idea that all antitrust roads originate in the Chicago (or Harvard) School.

Finally, one must be cautious in claiming that a school of commentary, or specific articles or books, caused courts to decide cases in specific ways. Myriad forces—among them, formal education, professional employment, personal acquaintances, and the preferences of law clerks—can form a judge’s attitude about the law.³⁵ In a published antitrust decision, citations to secondary literature, by themselves, do not indicate whether the commentary in question led the court to endorse a specific result or line of reasoning, or whether the commentary merely complemented or reinforced a worldview that the judges already possessed.³⁶ For example, Justice Lewis Powell came to the Supreme Court in the early 1970s after decades of counseling companies in private practice.³⁷ Chicago School literature probably did not make him a market-oriented, antitrust skeptic, nor did it inspire him to mobilize the Supreme Court majority that decided *Continental T.V., Inc v GTE Sylvania, Inc*.³⁸ Justice Powell quite possibly acquired his doubts about antitrust and other forms of economic regulation

³⁴ See Kovacic, 2007 Colum Bus L Rev at 14 n 36 (cited in note 17) (discussing Williamson’s scholarship).

³⁵ See, for example, Marc Winerman and William E. Kovacic, *Learned Hand, Alcoa, and the Reluctant Application of the Sherman Act*, 79 Antitrust L J 295, 305–24 (2013) (describing the formation of Judge Learned Hand’s views about antitrust law and government intervention in the economy); William E. Kovacic, *Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers*, 42 Antitrust Bull 93, 95, 102, 112 (1997) (describing the role that Justice Thurgood Marshall’s law clerk played in persuading Justice Marshall to switch his vote and join what became the majority opinion in *Matsushita Electric Industrial Corp v Zenith Radio Corp*, 475 US 574 (1986)).

³⁶ See Camden Hutchison, *Law and Economics Scholarship and Supreme Court Jurisprudence, 1950–2010*, 21 Lewis & Clark L Rev 145, 156–62, 169 (2017) (“The voting data for individual Justices indicate that while certain Justices’ antitrust views did evolve over time, most Justices arrived on the Court with stable, preexisting antitrust views.”).

³⁷ John C. Jeffries Jr, *Justice Lewis F. Powell: A Biography* 121–30 (Fordham 2001) (recounting Powell’s private-practice career at Hunton & Williams from 1946 through his appointment to the Supreme Court in 1971).

³⁸ 433 US 36 (1977). Justice Powell’s crucial role in persuading the Court to accept certiorari in *Sylvania* and designing the majority opinion in the case is analyzed in Andrew I. Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, 17 Antitrust 8, 9–10 (2002).

independently before he joined the bench.³⁹ *Sylvania* prominently cites Chicago School scholars such as Bork and Posner,⁴⁰ and Justice Powell embraced their view that the Court should repudiate its earlier holding that a vertical allocation of territories always be subject to per se condemnation.⁴¹ Chicago School scholars appear to have provided instrumental arguments that Justice Powell employed to support the result that his own philosophy likely predetermined.⁴²

In some instances, we can make more confident judgments about the influence of specific commentary from archival materials about individual cases. Here again, Justice Powell's opinion for the *Sylvania* majority provides an example. Justice Powell's private papers suggest that a brief codrafted by notable Harvard School scholar Donald Turner exerted the deepest influence on how Justice Powell framed the issues and organized the majority opinion.⁴³ Similarly, Justice Thurgood Marshall's private papers reveal the significant impact that a Phillip Areeda article had in shaping his opinion for a unanimous Court in *Brunswick Corp v Pueblo Bowl-O-Mat, Inc.*⁴⁴ In still other cases, archival materials show that the text and cited authorities of a judicial opinion may

³⁹ Hutchison, 21 Lewis & Clark L Rev at 205 (cited in note 36) ("For judges such as Powell, voting decisions in antitrust cases were shaped by deep-seated political attitudes regarding the role of business in American society and the proper scope of government regulation.").

⁴⁰ *Sylvania*, 433 US at 48 n 13, 51 n 18, 53 n 21, 55–56, 56 n 24 (collecting secondary literature).

⁴¹ Gavil, 17 Antitrust at 11–12 (cited in note 38) (using archival papers to reconstruct Justice Powell's decision-making in *Sylvania*). A decade earlier, in *United States v Arnold Schwinn & Co*, 388 US 365 (1967), the Court had ruled that vertical agreements to allocate sales territories were illegal per se.

⁴² Professor Camden Hutchison's extensive study of Supreme Court antitrust decisions from 1950 to 2010 concludes that for Justice Powell, "academic scholarship was a means of justifying predetermined ends." Hutchison, 21 Lewis & Clark L Rev at 205 (cited in note 36). He explains: "The evidence suggests that [deep-seated political attitudes regarding the role of business in American society and the proper scope of government regulation] 'primed' conservative Justices to be receptive to economic arguments. It does not suggest that economic arguments determined their fundamental policy views." Id.

⁴³ See Gavil, 17 Antitrust at 11–12 (cited in note 38) (using Justice Powell's papers to discuss the impact of Turner's brief). See also Mark J. Niefer, *Donald Turner, Vertical Restrictions, and the Inhospitability Tradition of Antitrust*, 82 Antitrust L J 389, 418–24 (2019) (discussing the importance of Turner's advocacy in *Sylvania*); Stephen Calkins, *The Antitrust Conversation*, 68 Antitrust L J 626, 632 n 37, 640–41 (2001).

⁴⁴ 429 US 477 (1977). On Areeda's influence upon the Supreme Court's deliberations in *Brunswick*, see Kovacic, 2007 Colum Bus L Rev at 56–62 (cited in note 17).

give a misleading impression about the beliefs of the judge who authored the decision.⁴⁵

I. 1978: CHICAGO AND HARVARD SCHOOL PUBLICATION LANDMARKS

In 1978, Robert Bork published *Antitrust Paradox*, and Professors Phillip Areeda and Donald Turner released the first three volumes of their treatise, *Antitrust Law*. These works immediately became intellectual pillars of the US antitrust system.⁴⁶ Bork, Areeda, and Turner distilled and extended themes that they had presented in earlier works. In doing so, they presented visions of antitrust law and policy that helped propel a realignment whose beginnings were evident in judicial decisions that foreshadowed a reconstruction of antitrust's aims and its substance.⁴⁷

A. *Antitrust Paradox*

In *Antitrust Paradox*, Bork excoriated the US antitrust regime, especially as it had developed since the mid-1940s. Bork offered three principal critiques. First, the courts and public enforcement agencies unwisely had sought to foster an egalitarian business environment that viewed large enterprises suspiciously and preserved opportunities for smaller firms to prosper.⁴⁸ Bork advocated adoption of a consumer-oriented welfare standard that focused on whether challenged conduct promoted or retarded economic efficiency.⁴⁹ He anchored his argument for an efficiency-oriented antitrust policy with arguments based on the text and legislative history of the antitrust laws.⁵⁰

⁴⁵ For example, Judge Learned Hand's letters and other personal papers reveal that he disdained the US antitrust laws and lamented their application to solve the difficult issues of industrial organization that he and his colleagues addressed in *United States v Aluminum Co of America*, 148 F2d 416 (2d Cir 1945) (*Alcoa*). See Winerman and Kovacic, 79 Antitrust L J at 333–45 (cited in note 35) (recounting the distaste of Judge Hand and his colleagues for the *Alcoa* case and the antitrust laws).

⁴⁶ For several examples of the immediate scholarly reactions to these two foundational pieces, see generally Ernest Gellhorn, Book Review, 92 Harv L Rev 1376 (1979) (reviewing *Antitrust Paradox*); Oliver E. Williamson, Book Review, 46 U Chi L Rev 526 (1979) (same); Louis B. Schwartz, Book Review, *On the Uses of Economics: A Review of the Antitrust Treatises*, 128 U Pa L Rev 244 (1979) (reviewing Areeda and Turner's treatise).

⁴⁷ In the previous year (1977) the Supreme Court released its landmark rulings in *Brunswick*, 429 US 477, *Sylvania*, 433 US 36, and *Illinois Brick Co v Illinois*, 431 US 720 (1977).

⁴⁸ Bork, *Antitrust Paradox* at 201–10 (cited in note 28).

⁴⁹ *Id* at 55–66.

⁵⁰ *Id* at 61–66.

Second, Bork attacked doctrinal developments that encouraged strict scrutiny of dominant firm conduct, distribution practices, and mergers. The misshapen conception of goals had led courts to sacrifice important efficiencies and ban practices that served consumer interests. Bork proposed an antitrust program that would intervene only to ban collusive arrangements among direct rivals, horizontal mergers that left three or fewer firms in a relevant market, a handful of dominant firm exclusionary practices, and business efforts to misuse government regulatory processes to forestall competitors.⁵¹

Third, *Antitrust Paradox* broadsided the public institutions responsible for the formation and implementation of antitrust law: Congress, the courts, and the federal enforcement agencies—the Antitrust Division of the Department of Justice (DOJ) and, especially, the FTC. Bork portrayed Congress as an advocate for reckless antitrust intervention and destructive legislation to attack industrial concentration.⁵² According to Bork, federal judges routinely overlooked important economic justifications for business behavior and wrote vacuous opinions about economic decentralization as a way to safeguard small firms, promote local community control over business, and protect democracy itself.⁵³ The federal enforcement agencies were bent upon acquiring power for its own sake and promoted doctrines that gave them ever-greater control over commerce.⁵⁴ Abetting the government's antitrust manifest destiny were timid business officials who offered feeble resistance to each new DOJ or FTC attempt to intensify antitrust scrutiny.⁵⁵

⁵¹ Id at 405–07.

⁵² Bork, *Antitrust Paradox* at 3–7, 163–64, 175–78 (cited in note 28).

⁵³ Id at 164–75, 280–309, 365–81, 419–20.

⁵⁴ Id at 48, 198–216, 252, 280–309, 382–401, 415.

⁵⁵ Id at 415–16.

B. *Antitrust Law*

Like Bork, Areeda and Turner were towering antitrust scholars before 1978.⁵⁶ Areeda and Turner's 1975 article⁵⁷ on predatory pricing already had spurred a basic reassessment among judges and commentators of the standards for predatory pricing.⁵⁸ *The Treatise*,⁵⁹ as Areeda immodestly described it in public lectures, synthesized earlier writings and presented a comprehensive vision about the design and implementation of antitrust rules.⁵⁹

Like *Antitrust Paradox*, *Antitrust Law* confronted the basic question of which aims antitrust law should seek to achieve. Areeda and Turner shared Bork's scorn for a multidimensional, egalitarian goals framework; they urged courts and enforcement agencies to focus single-mindedly on how challenged conduct affected economic performance.⁶⁰ The two Harvard School scholars wrote that "populist goals should be given little or no independent weight in formulating antitrust rules and presumptions."⁶¹ They criticized advocates of a populist goals framework for the "peculiar and perverse" dismissal of "the right to develop and practice new and more efficient methods of doing business or to provide consumers with better products and services."⁶² They added that "[t]hose who have espoused the primacy of [populist] goals have either indulged in euphemism, mistakenly assumed that one man's entrepreneurial initiative would rarely if ever limit the options of others, or simply failed to think their concepts through."⁶³

⁵⁶ On Areeda, see Stephen Breyer, *In Memoriam: Phillip F. Areeda*, 109 Harv L Rev 889, 889–91 (1996); Andrew I. Gavil, Book Review, *Teaching Antitrust Law in Its Second Century: In Search of the Ultimate Antitrust Casebook*, 66 U Pa L Rev 189, 201 (1991) (discussing how Areeda's "impact on the direction of antitrust is at least comparable to that of the Chicago School"). On Turner, see generally Niefer, 82 Antitrust L J 389 (cited in note 43). See also Kovacic, 2007 Colum Bus L Rev at 31–33 (cited in note 17); Kovacic, 36 Wayne L Rev at 1414–15 (cited in note 13).

⁵⁷ See generally Phillip Areeda and Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 Harv L Rev 697 (1975).

⁵⁸ Kovacic, 36 Wayne L Rev at 1427–28 & n 60 (cited in note 13).

⁵⁹ In his public speaking and writing, Areeda sometimes suggested that the volumes of *Antitrust Law* were the alpha and omega of antitrust commentary. See Kovacic, 2007 Colum Bus L Rev at 40 & n 119 (cited in note 17); Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 Cal L Rev 959, 959 (1987).

⁶⁰ Areeda and Turner, 1 *Antitrust Law* ¶¶ 103–13 at 7–33 (cited in note 29).

⁶¹ *Id.* ¶ 105 at 13.

⁶² *Id.* ¶ 110 at 24.

⁶³ *Id.* In some passages of *Antitrust Law*, Areeda and Turner seem to hesitate to exclude consideration of populist goals entirely. *Id.* ¶ 103 at 7. They suggest that an efficiency-oriented competition policy ordinarily will achieve many of the goals associated with populism. *Id.* ¶ 110 at 23; Areeda and Turner, 2 *Antitrust Law* ¶ 401 at 267–68 (cited in note

Areeda and Turner offered a different basis for their economics-only conception of antitrust law. Bork argued that his efficiency precept was the only sensible reading of the antitrust statutes' texts and legislative history.⁶⁴ Areeda and Turner acknowledged that Congress and the courts had sought to achieve varied goals beyond efficiency, yet they contended that consideration of these noneconomic goals in the routine resolution of cases presented impossible "administrability" challenges and imposed "unacceptable burdens on the courts."⁶⁵ Areeda and Turner dwelled extensively on whether courts and enforcement agencies had the institutional capacity to apply specific concepts, and whether rules gave business managers adequate guidance about how to conduct their affairs.⁶⁶ An antitrust system premised on the application of multiple, egalitarian-minded goals was at best a formula for impressionism in the resolution of individual cases and, at worst, a faintly unconstitutional delegation of legislative power from Congress to the judiciary.⁶⁷

In works that appeared after the first volume of *Antitrust Law*, Areeda and Turner returned repeatedly to the question of antitrust's appropriate goals. In Volume 1 of *Antitrust Law*, the two scholars had written: "As a goal of antitrust policy, 'fairness' is a vagrant claim applied to any value that one happens to favor."⁶⁸ In a 1987 law review article, Turner elaborated that the pursuit of "populist goals" in the formulation of antitrust rules "would broaden antitrust's proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved."⁶⁹

29). In all cases, however, they revert to the principle that populist goals deserve no distinctive consideration in formulating antitrust rules or presumptions and ought not be balanced against efficiency. See, for example, Areeda and Turner, 1 *Antitrust Law* ¶ 112 at 29–31 (cited in note 29) (The caption for ¶ 112 reads "Populist Goals Inappropriate as Antitrust Standards even if no Conflict with Efficiency.").

⁶⁴ Bork, *Antitrust Paradox* at 61–66 (cited in note 28).

⁶⁵ Areeda and Turner, 1 *Antitrust Law* ¶¶ 103–13 at 7–33 (cited in note 29). In particular, the application of a multidimensional goals framework would force courts to "weigh the interests of the efficient firms, and the consumers they represent, against those of the inefficient or unneeded firms and the populist goals for which they are the alleged proxies." *Id.* ¶ 111c at 27.

⁶⁶ *Id.* ¶ 111c at 29.

⁶⁷ *Id.*

⁶⁸ *Id.* ¶ 109a at 21.

⁶⁹ Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 Cal L Rev 797, 798 (1987).

Concern for the administrability of proposed antitrust goals, as noted above, was one aspect of a larger concern that Areeda and Turner had for the institutional capacity of the antitrust system. Antitrust rules should account for limits on the ability of courts and enforcement agencies to apply them and on the ability of business managers to understand and comply with them.⁷⁰ Another institutional concern was that antitrust private rights of action—with mandatory trebling of damages, jury trials, joint and several liability, plaintiff-friendly rules on fee-shifting, and the availability of extensive discovery and class actions—posed a serious threat of overdeterrence in cases where the conduct at issue presented a mix of anticompetitive dangers and procompetitive justifications.⁷¹

To address this perceived overreaching of the US private-rights regime, Areeda and Turner encouraged courts to devise two cures. First, courts should create evidentiary and procedural screens to filter out weaker private cases and ensure that the private plaintiff's interests were largely aligned with the interests of consumers.⁷² Second, courts should elevate the liability tests that plaintiffs must satisfy to prevail under the Sherman and Clayton Acts.⁷³ The broad language of the US antitrust laws gives federal judges a pivotal role in their interpretation and assigns judges the task of upgrading operational tests over time in light of developments in economics and law.⁷⁴ Areeda and Turner urged courts to use this discretion—especially in cases challenging dominant-firm conduct—to impose greater demands on plaintiffs lest excessively strict rules deter firms from competing aggressively in ways that benefit consumers.⁷⁵

⁷⁰ Areeda and Turner, 3 *Antitrust Law* ¶ 711 at 150–54 (cited in note 29). See also Areeda, 75 *Cal L Rev* at 965–70 (cited in note 59) (discussing the importance of administrability in devising predatory pricing standards).

⁷¹ Kovacic, 2007 *Colum Bus L Rev* at 51–64 (cited in note 17).

⁷² *Id* at 43–51.

⁷³ *Id* at 51–54, 78 (“Despite occasional plaintiff successes in reported opinions, the evolution of predatory pricing doctrine since publication of the 1975 Areeda and Turner article has made it especially difficult for plaintiffs to establish liability for predatory pricing—a rough, but not complete, equivalent to a no rule result.”).

⁷⁴ Andrew I. Gavil, et al, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 59–62, 1299–1300 (West 3d ed 2017) (describing the open texture of US antitrust statutes and the significant role given to courts to interpret key operational provisions).

⁷⁵ Areeda and Turner, 3 *Antitrust Law* ¶¶ 625, 710–22 at 71–73, 148–94 (cited in note 29). See also Areeda, 75 *Cal L Rev* at 965, 971–73 (cited in note 59).

C. *Antitrust Paradox* and *Antitrust Law* Compared

In style, *Antitrust Paradox* and *Antitrust Law* diverged sharply. *Antitrust Paradox* is a scathing critique born of its author's evident deep-seated frustration with antitrust policy and the institutions entrusted with its formation. Bork seems to have approached the preparation of the manuscript (a project he had begun in the 1960s) with such a dismal view of the US antitrust system that he largely overlooked developments in Congress, in the courts, and in the enforcement agencies that belied his thesis that American policy was destined to sink ever more deeply into an abyss.⁷⁶

Antitrust Law was not nearly so flamboyant or apocalyptic in its assessment of the US regime. Its authors were more subdued and professorial in analyzing the US system and proposing refinements.⁷⁷ In this way, *Antitrust Law* is more measured and moderate than *Antitrust Paradox*. This difference in tone and attitude may account for why, today, *Antitrust Paradox* is the more memorable text and more frequently the focus of attention in contemporary debates.

A Venn diagram of *Antitrust Paradox* and *Antitrust Law* would reveal important areas of commonality and difference. A vital area of agreement among Bork, Areeda, and Turner is that the egalitarian goals framework set out in cases such as *United States v Aluminum Co of America*⁷⁸ (*Alcoa*) served antitrust law badly. *Antitrust Paradox* and *Antitrust Law* took different analytical paths to this conclusion, but they reached largely the same destination. In doing so, they provided a formidable consensus—across the philosophical spectrum from antitrust's right to its moderate center—that an economics-oriented methodology focused on consumer interests was the proper basis for judges to decide cases and for DOJ and the FTC to exercise their enforcement powers.

⁷⁶ William E. Kovacic, *Out of Control? Robert Bork's Portrayal of the U.S. Antitrust System in the 1970s*, 79 *Antitrust L J* 855, 866–78 (2014).

⁷⁷ In his review of the first volumes of *Antitrust Law* in 1979, Professor Louis Schwartz wrote that the “pedagogical experience and orderly minds” of Areeda and Turner were apparent “in the luminous introductions to each new problem; in the careful unraveling of every thread of the skein; . . . in the rigorous pursuit of each idea until it is pinned down.” Schwartz, 128 *U Pa L Rev* at 246 (cited in note 46).

⁷⁸ 148 F2d 416 (2d Cir 1945).

A second important similarity in *Antitrust Paradox* and *Antitrust Law* consists of proposals that would narrow the application of the antitrust statutes to certain forms of business conduct. The treatment of dominant firms provides the most important example. Bork's prescriptions were the most sweeping. *Antitrust Paradox* suggested that the sole appropriate bases for finding liability for monopolization or attempted monopolization were limited instances in which the incumbent dominant firm had used exclusive dealing arrangements to deny a rival access to an input needed to compete, and the denial of access was supported by no procompetitive justifications.⁷⁹ Bork also endorsed the application of § 2 of the Sherman Act to challenge the misuse of government processes by incumbent firms to suppress new entry.⁸⁰

Areeda and Turner articulated their concerns about over-deterrence in private enforcement in the context of discussing monopolization and attempted monopolization cases. They spelled out their apprehensions about the use of private treble damage suits to police single-firm behavior in their pathbreaking 1975 paper on predatory pricing.⁸¹ The Areeda-Turner rule, which generally deemed a dominant firm's price cuts above average variable cost to be valid, said that certain price reductions should be prohibited.⁸² In *Antitrust Paradox*, Bork said the Areeda-Turner proposal traveled in the right direction, but he regarded their suggestion to be too timid.⁸³ Both proposals—Bork's no-rule and the Areeda-Turner price/cost rule—repudiated the more expansive controls that courts had established through the 1960s and early 1970s.⁸⁴

Antitrust Paradox and *Antitrust Law* diverged notably in their evaluation of the ability and motives of the federal enforcement agencies. Save for the DOJ efforts since the late nineteenth century to prosecute price-fixing cartels, Bork had little good to say about the two federal agencies. Not only had they mindlessly encouraged improvident extensions of antitrust law, they had done so mainly to increase their own power, without regard for the common good.⁸⁵ Supported by expansionist judicial rulings

⁷⁹ Bork, *Antitrust Paradox* at 344–46, 405–06 (cited in note 28).

⁸⁰ *Id.* at 347–64.

⁸¹ See Areeda and Turner, 88 *Harv L Rev* at 699 (cited in note 57).

⁸² *Id.* at 732–33. Areeda and Turner refined their proposal in the third volume of their treatise. See Areeda and Turner, 3 *Antitrust Law* ¶¶ 710–22 at 148–94 (cited in note 29).

⁸³ Bork, *Antitrust Paradox* at 154–55 (cited in note 28).

⁸⁴ Gavil, et al, *Antitrust Law in Perspective* at 566–69, 586–92 (cited in note 74).

⁸⁵ See note 54 and accompanying text.

and undisciplined by effective advocacy from the business community and their external advisors, the agencies systematically sought and conquered new ground.⁸⁶ *Antitrust Paradox* suggested that the DOJ and FTC had free rein to condemn ever-broader categories of business conduct.⁸⁷

Areeda and Turner criticized the private enforcement mechanism severely, but they were considerably more sanguine about the contributions of the federal enforcement agencies.⁸⁸ *Antitrust Law* lacks any suggestion that the public agencies wielded power for its own sake or craved greater control over business. Instead, Areeda and Turner offered proposals—such as the recognition of a no-fault monopolization cause of action—that presumed the capability of the public agencies to handle difficult analytical tasks competently and in the public interest.⁸⁹ No commentator could advocate for the establishment of a no-fault cause of action without faith in the ability of the public enforcement agencies to perform sophisticated analytical tasks and faith in their good judgment to choose cases wisely.

II. INFLUENCE UPON MODERN US COMPETITION POLICY

Since *Antitrust Paradox* and *Antitrust Law* appeared over forty years ago, US antitrust law and policy have retreated substantially from the philosophical and analytical framework that animated judicial decision-making and public enforcement policy from the mid-1940s through the mid- to late-1970s. Beginning with *Brunswick* and *Sylvania* in 1977, the Supreme Court abandoned the egalitarian vision that had guided its jurisprudence since the 1940s.

With its distillation of Chicago School views, *Antitrust Paradox* is a powerful force in US antitrust law, yet only part of the story. In *Antitrust Law*, Areeda and Turner consolidated and extended ideas that comprise the modern Harvard School. The Harvard School's contribution to the retrenchment of the US

⁸⁶ See notes 53–55 and accompanying text.

⁸⁷ Bork, *Antitrust Paradox* at 415–16 (cited in note 28).

⁸⁸ Professor Daniel Crane has explored how this attitude has reflected the more sanguine view of Areeda, Turner, and their Harvard School colleague, Justice Breyer, about the capacity of public authorities to implement the antitrust laws and other economic policy statutes. Daniel A. Crane, linkLine's *Institutional Suspicions*, 2008–2009 Cato S Ct Rev 111, 122–29.

⁸⁹ Areeda and Turner, 3 *Antitrust Law* ¶¶ 614–23 at 35–67 (cited in note 29).

antitrust system—particularly its emphasis on institutional considerations—is illustrated in *Brunswick*, in which the Court emphasized that antitrust law protects “*competition, not competitors*.”⁹⁰ As amplified in later decisions, this phrase suggests that antitrust law is indifferent to the fate of individual firms unless their demise is linked to some consumer detriment. Proponents of a rediscovery of antitrust’s egalitarian aims regard the “*competition, not competitors*” aphorism as a major distortion, yet its roots in the modern Harvard School’s scholarship are unseen.⁹¹ The Areeda-Turner treatise imparted considerable force to the idea that economic effects upon consumers, and not a wider egalitarian vision of antitrust law, should guide doctrine and policy. Areeda and Turner endorsed a broader range of intervention than Bork, but they narrowed antitrust’s reach by urging courts to encumber private treble damage plaintiffs.

The cautions built into the US system largely applied and extended precepts from *Antitrust Paradox* and *Antitrust Law*. Both works pushed the US system to the right. Notwithstanding Bork and the Chicago School’s important contribution to this development, the shift could not have taken place so substantially without the modern Harvard School of Areeda and Turner. Among other effects, the two Harvard School scholars played a central role in building a broad-based consumer welfare consensus. Bork inspired the right, and Areeda and Turner brought along centrists and somewhat left-of-center academics, enforcement officials, judges, and practitioners.⁹² By themselves, Chicago School adherents would not have generated a critical mass of support for the US antitrust system to abandon its egalitarian roots.

In substance, the courts have loosened controls on business conduct, with the major exception of agreements among rivals to set prices, curb output, allocate geographic sales territories or customers, or set other terms of trade.⁹³ Once viewed with decided

⁹⁰ *Brunswick*, 429 US at 488.

⁹¹ See Lina M. Khan, *The Ideological Roots of America’s Market Power Problem*, 127 *Yale L J F* 960, 973 (2018) (“Perhaps the clearest example of how neglecting structural concerns in competition analysis handicaps enforcement is the refrain that the antitrust laws are meant to ‘protect competition, not competitors.’ . . . [I]n practice, the ‘competition, not competitors’ refrain is often used to tarnish enforcement action and justify inaction.”).

⁹² See Wu, *The Curse of Bigness* at 105 (cited in note 2) (noting that “it was the Harvard School that quietly made mainstream the premise that ‘consumer welfare’ should be the measure of all things antitrust”).

⁹³ Alison Jones and William E. Kovacic, *Identifying Anticompetitive Agreements in the United States and the European Union: Developing a Coherent Antitrust Analytical Framework*, 62 *Antitrust Bull* 254, 268–69 (2017).

hostility and often condemned as illegal per se, nearly all vertical contractual restraints today are judged by a rule of reason.⁹⁴ Merger doctrine in the lower courts and enforcement policy at the DOJ and the FTC have retreated dramatically from principles embraced by the Supreme Court in its merger cases of the 1960s.⁹⁵ Despite occasional setbacks, dominant firms enjoy considerably more freedom to choose pricing, marketing, and product development strategies as they wish without incurring antitrust liability.⁹⁶ In a series of decisions beginning with *Brunswick*, the Supreme Court has imposed increasingly demanding tests that private plaintiffs must satisfy to establish liability or their entitlement to relief.⁹⁷ In area after area of antitrust law, the size of the target that plaintiffs, public or private, must hit to prevail is notably smaller than it was in the mid-1970s.

How did this happen? As some commentators have documented, prevailing doctrine involving vertical restraints and dominant firm conduct more closely approximates the preferences of the modern Harvard School than the Chicago School.⁹⁸ The Harvard School exercised its influence in several ways. During his lifetime, Phillip Areeda taught thousands of students, judges, and practitioners. He was the most renowned antitrust lecturer and scholar of his time.⁹⁹ Whereas some listeners might dismiss Bork and his famous Chicago School colleagues (for example, Judges Frank Easterbrook and Richard Posner) as right-wing antitrust extremists, Areeda was seen as the wise centrist.¹⁰⁰ His prosaic writing style and his formidable erudition may have

⁹⁴ Id at 270–72.

⁹⁵ Gavil, et al, *Antitrust Law in Perspective* at 715–22 (cited in note 73).

⁹⁶ See generally Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 *Antitrust L J* 3 (2004). See also Kovacic, 2007 *Colum Bus L Rev* at 18–21 (cited in note 17).

⁹⁷ Stephen Calkins, *Reflections on Matsushita and “Equilibrating Tendencies”: Lessons for Competition Authorities*, 82 *Antitrust L J* 15, 31 (2018) (“Thus, the line of U.S. cases applying a relaxed standard to proof of damages in competition cases, which might have seemed a boon to plaintiffs, helped trigger the more demanding approach applied to the fact of damages and the requirement that the plaintiff prove ‘antitrust injury.’”).

⁹⁸ See note 20 and accompanying text.

⁹⁹ Breyer, 109 *Harv L Rev* at 889 (cited in note 56). See also David Binder, *Phillip Areeda, Considered Top Authority on Antitrust Law, Dies at 65*, *NY Times* B7 (Dec 27, 1995).

¹⁰⁰ Areeda’s views on dominant firm behavior illustrate the point. He stood to the right of many antitrust traditionalists in his criticism of antitrust’s populist goals and his adoption of a relatively permissive test for controlling predatory pricing. See notes 61–63 and accompanying text. He stood to the left of commentators, such as Bork, who disfavored any controls on dominant firm price reductions and rejected Areeda’s proposal to apply a “no-fault” theory of liability for certain firms that enjoyed a long-standing position of dominance. See note 51 and accompanying text.

masked the decidedly noninterventionist implications of his work—especially his admonition that courts should approach private cases with wariness and should subject private plaintiffs to demanding evidentiary and substantive tests.¹⁰¹ Maybe more importantly, Areeda and Turner provided powerful arguments to cast antitrust’s egalitarian vision aside. The broad acceptance of this perspective bears their imprint as much as it does Bork’s.

The Harvard School’s influence remains powerful through the contributions of judges and scholars who have embraced many of its central themes and continue to integrate them into judicial decisions and commentary. Justice Stephen Breyer was a colleague of Areeda and Turner on the Harvard Law School faculty, and he espouses their philosophy.¹⁰² As a judge on the First Circuit, he wrote influential opinions that reflected the Areeda-Turner cautions about policing predatory pricing¹⁰³ and about relying on subjective expressions of the intent of top company officials to draw inferences about liability.¹⁰⁴ In *Town of Concord, Massachusetts v Boston Edison Co.*,¹⁰⁵ he foreshadowed the approach that the Supreme Court would take in *Verizon Communications, Inc v Law Offices of Curtis V. Trinko LLP*¹⁰⁶ in deciding when antitrust oversight was an appropriate supplement to public utility regulation.¹⁰⁷

On the Supreme Court, Justice Breyer’s opinions for the Court in *NYNEX Corp v Discon, Inc*¹⁰⁸ and *Credit Suisse Securities (USA) LLC v Billing*¹⁰⁹ resonate with cautionary themes from Areeda and Turner. Though Justice Antonin Scalia wrote the

¹⁰¹ Kovacic, 2007 Colum Bus L Rev at 51–56 (cited in note 17).

¹⁰² See generally Breyer, 109 Harv L Rev 889 (cited in note 56). See also Kovacic, 2007 Colum Bus L Rev at 34–35, 48–51 (cited in note 17).

¹⁰³ Then-Judge Breyer’s opinion in *Barry Wright Corp v ITT Grinnell Corp*, 724 F2d 227 (1st Cir 1983) applies the analytical approach suggested by Areeda and Turner for analyzing predatory pricing and echoes the concerns about administrability that anchored the Areeda-Turner predatory pricing rule. Kovacic, 2007 Colum Bus L Rev at 48–49 (cited in note 17). In a later article, Areeda described *Barry Wright* as a “perceptive opinion” and quoted extensively from passages that largely tracked the Areeda-Turner prescriptions. Areeda, 75 Cal L Rev at 768–69 (cited in note 59).

¹⁰⁴ See, for example, *Ocean State Physicians Health Plan, Inc v Blue Cross & Blue Shield of Rhode Island*, 883 F2d 1101, 1113 (1st Cir 1989).

¹⁰⁵ 915 F2d 17 (1st Cir 1990).

¹⁰⁶ 540 US 398 (2004).

¹⁰⁷ *Id* at 412, quoting *Town of Concord*, 915 F2d at 25 (“The regulatory framework that exists in this case demonstrates how, in certain circumstances, ‘regulation significantly diminishes the likelihood of major antitrust harm.’”).

¹⁰⁸ 525 US 128 (1998).

¹⁰⁹ 551 US 264 (2007).

Court's *Trinko* opinion, Justice Breyer joined the majority. Reflecting on Justice Breyer's First Circuit opinion in *Town of Concord* and analyzing Justice Scalia's citation of authority in *Trinko*, it is fair to conclude that Justice Breyer approved its result and its logic.¹¹⁰

Since Areeda's death in 1995, the modern Harvard School's ideas live on in the work of various leading scholars. Preeminent among these scholars is Professor Herbert Hovenkamp, who authors the new editions of the *Antitrust Law* treatise.¹¹¹ Hovenkamp has added his own refinements over time, but the Areeda-Hovenkamp treatise remains true to the philosophy and analytical method of its early creators. Among other features, Professor Hovenkamp has preserved *Antitrust Law*'s emphasis on institutional considerations, including the capacity of courts and enforcement agencies to apply rules in practice. The durability of the original Areeda-Turner vision, elaborated by Professor Hovenkamp, is evident in the federal judiciary's habit of treating the Treatise as the preeminent commentary on antitrust matters.¹¹²

III. THE CHICAGO OBSESSION'S POLICY SIGNIFICANCE

The Chicago School-centric view is the dominant interpretation of modern US antitrust experience. The Chicago School-centric interpretation appears frequently in scholarly and popular accounts about why the US antitrust system moved to the right since the mid-1970s.¹¹³ The modern US antitrust era is said to be a time when the Chicago School recast antitrust goals from an egalitarian perspective to a cramped concern with economic effects, especially prices paid by consumers.¹¹⁴ The Chicago School often receives sole credit for retrenching controls upon dominant

¹¹⁰ See Kovacic, 2007 Colum Bus L Rev at 66–71 (cited in note 17). See also Crane, 2008–2009 Cato S Ct Rev at 122–29 (cited in note 88) (describing how Justice Breyer's concurring opinion in *Pacific Bell Telephone Co v linkLine Communications, Inc*, 555 US 438 (2009), reflects the modern Harvard School emphasis on institutional design and capability).

¹¹¹ On Hovenkamp's extraordinary scholarship and influence on the US antitrust regime, see generally Hillary Greene and D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 Iowa L Rev 2039 (2015).

¹¹² See Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 Iowa L Rev 1919, 1920 (2015).

¹¹³ See notes 2–11 and accompanying text.

¹¹⁴ See, for example, Galston and Hendrickson, *A Policy at Peace with Itself* (cited in note 24) (attributing the realignment of US antitrust goals in the late 1970s and onward to Robert Bork and *Antitrust Paradox*).

firm behavior (such as predatory pricing) by warning that stringent antitrust intervention posed a serious risk of deterring behavior that benefitted consumers.¹¹⁵

A relative minority of scholarship on the US antitrust experience accords the modern Harvard School a central role in the development of American law and policy. Instead, the mainstream interpretation of modern US antitrust history is Chicago School–centric. Most writing on American antitrust history does not mention the possibility that modern Harvard School scholars and others not ordinarily deemed to be Chicago School adherents had a major impact in shaping the trends of the past four decades, or collectively exerted an influence equal to the Chicago School’s.¹¹⁶ In a number of other instances, commentary that embraces a Chicago School–centric view briefly (often in a fleeting mention in the text or a footnote) acknowledges the possible influence of non–Chicago School thinking, but dismisses non–Chicago School ideas as lesser influences that do not weaken the Chicago School–centric interpretation.¹¹⁷ Other accounts mention the diversity of intellectual influences in the modern US antitrust system and set non–Chicago School views aside as complications with the implication that further study of their impact might be warranted.¹¹⁸

The discussion presented below considers why the Chicago School–centric view of antitrust policy predominates today, and it explores how the Chicago Obsession could affect the future development of the US system. By overlooking how non–Chicago School perspectives have retrenched the American antitrust regime, advocates of more intervention diminish their prospects for success. The Chicago Obsession that fuels the campaign for expansion also deadens awareness of Harvard School–inspired institutional obstacles to more aggressive enforcement and obscures strategies that, if applied over time, have promise to extend the reach of US competition law. By fostering the impression that US doctrine and enforcement policy swing wildly between extremes

¹¹⁵ See, for example, *id.* (describing Chicago School’s influence on modern Supreme Court analysis of predatory pricing and the Court’s increased concern with enforcement “false positives”); Khan, 126 *Yale L J* at 726–30 (cited in note 2) (discussing modern trends in predatory pricing doctrine as a function of the Chicago School’s influence).

¹¹⁶ Kovacic, 2007 *Colum Bus L Rev* at 29–31 (cited in note 17).

¹¹⁷ See, for example, Baker, *The Antitrust Paradigm* at 46 & n 95 (cited in note 2); Khan, 127 *Yale L J F* at 970 & nn 43–44 (cited in note 91).

¹¹⁸ See Bougette, Deschamps, and Marty, 16 *Enterprise & Socy* at 316 & n 12 (cited in note 1).

without thoughtful reflection and adjustment, the Chicago Obsession diminishes confidence in the legitimacy of the US antitrust system and reduces its capacity, today and tomorrow, to make constructive contributions to the development of sound global competition policy norms.

A. The Chicago Obsession's Enduring Power

Students of US antitrust law properly credit the Chicago School with a major role in shaping modern doctrine and enforcement policy since the mid-1970s. A failure to acknowledge this formative influence would be a stunning omission. It is an equally serious error to attribute the developments of the past forty years solely or chiefly to the Chicago School. The Chicago Obsession ignores or slights how other sources of thought—most notably, the modern Harvard School—have shrunk the target that antitrust plaintiffs (public or private) must strike to establish liability and obtain remedies under US antitrust law. Nonetheless, leading figures in the modern debate about antitrust law and economics often accord the Chicago School the decisive role in determining the modern course of US antitrust doctrine and policy.¹¹⁹

¹¹⁹ Many commentaries that attack the US antitrust status quo give the Chicago School complete, or nearly complete, responsibility for the intervention skepticism embedded in existing doctrine. From its introduction to its conclusion, Professor Jonathan Baker's recent volume calling for an expansion of antitrust enforcement is anchored in a critique of the Chicago School. Baker, *The Antitrust Paradigm* at 1–7, 209 (cited in note 2). The Stigler Center's study of digital platforms lays the blame for the noninterventionist attitude of US jurisprudence mainly at the feet of the Chicago School. Stigler Center for the Study of the Economy and the State, *Committee for the Study of Digital Platforms: Market Structure and Economic Performance* 72–73 (May 15, 2019). The report does not discuss the contributions of the modern Harvard School to this development. There is no mention of Areeda, Turner, or Breyer, save for a footnote parenthetical that indicates Breyer authored the court of appeals decision in *Barry Wright Corp v ITT Grinnell Corp*. Professor Bogus's call for bolder efforts to attack industrial concentration attributes the state of US policy to the Chicago School and makes no mention of Areeda or Turner. Bogus, 49 U Mich J L Ref at 15–37 (cited in note 3) (summarizing the Chicago School as the sole influencer of antitrust law, and noting that “Bork's influence on antitrust law was so enormous that [it] is reasonable to focus on him exclusively”). Professor Mark Glick's historical analysis of US antitrust law focuses heavily on the Chicago School and does not mention Areeda, Turner, or Breyer. See generally Glick, *Antitrust and Economic History* (cited in note 2). Professor Naomi Lamoreaux's survey of US antitrust policy toward dominant firms emphasizes Chicago School perspectives and omits the modern Harvard School in describing the rightward movement of the US system in the late 1970s and into the 1980s. Naomi R. Lamoreaux, *The Problem of Bigness: From Standard Oil to Google*, 33 J Econ Perspectives 94, 109–10 (2019).

Why is the Chicago Obsession so strong? Some Chicago School—centric interpretations of US antitrust experience—especially from scholars outside the United States—simply seem to be unaware of the modern Harvard School.¹²⁰ Another group of commentators acknowledges the presence of a distinctive modern Harvard School of analysis, but concludes that its impact is at most secondary.¹²¹ While the Harvard School may have made contributions at the margins of the US system, the Chicago School supplied the core principles. A related interpretation is that modern Harvard School scholars in many ways absorbed important Chicago School precepts and their work largely restates Chicago School positions. In other words, the Harvard School's contributions are important, but derive their content from the Chicago School.¹²²

The explanations described above may not be the main reason for the breadth and power of the Chicago Obsession. The deeper causes may involve strategic behavior. At a high level, blaming a Bork-led Chicago School for what ails the US antitrust system may be seen as the most effective message to rally support for a modest or drastic reformulation. The Chicago School supplies an easily recognized villain, and Robert Bork is its sinister mastermind. The argument for sweeping antitrust reform draws

¹²⁰ I base this observation on my reading of antitrust books and papers published by non-US competition law scholars, and the many occasions I have seen presentations abroad in which the speaker analyzed the US regime solely in terms of its fidelity to Chicago School precepts. See Kovacic, 2007 *Colum Bus L Rev* at 28–29 (cited in note 17) (collecting references to work by scholars outside the United States). See also generally Colino, *The Antitrust F Word* (cited in note 2) (discussing fairness as a policy objective in antitrust analysis and describing modern US enforcement policy solely in terms of Chicago School influence, and making no mention of modern Harvard School scholars). Rana Foroohar gives this explanation for the failure of contemporary antitrust policy to mount modern equivalents to earlier government challenges to AT&T, Standard Oil, and Microsoft: “Because of a forty-year shift in the economic thinking around antitrust policy. Or, more concisely, because of one man: Robert Bork.” Rana Foroohar, *Don't Be Evil: The Case Against Big Tech* 24 (Currency 2019).

¹²¹ See note 117 and accompanying text.

¹²² Tracing the foundations for a scholar's ideas can be an uncertain journey. I doubt that Areeda and Turner essentially accepted and restated Chicago School positions. Kovacic, 2007 *Colum L Rev* at 39–43 (cited in note 17). I share the assessment of Professors William Page and Daniel Crane that, compared to the Chicago School, Areeda and Turner applied a distinctive, institution- and process-based perspective to the analysis of antitrust rules and policymaking. See Page, 41 *Antitrust Bull* at 912–14 (cited in note 19); Crane, *Book Review*, 76 *U Chi L Rev* at 1919–20 (cited in note 12).

power from depicting intellectual and policy adversaries as “lunatics.”¹²³ The message blurs if the problem stems from more complex influences that include seemingly reasonable people from the modern Harvard School. By contrast, a Chicago School–centric interpretation that accentuates the decay of the status quo builds the case for tearing it down and rebuilding a system true to the law’s original egalitarian aims.

Another, related explanation for the Chicago Obsession is that the menace of a Bork-led Chicago School helps academics and government officials to frame their policy proposals as sensible.¹²⁴ The framing depends on juxtaposing one’s wise, well-measured views against law or policy grounded in the Chicago School’s extremism and irrationality. The framing loses some of its force if policy developments said to have illegitimate Chicago School origins instead stem from ideas created or shared by sensible analysts. Justice Breyer, for example, fits awkwardly in accounts that blame the extremist Bork-led Chicago School for the US antitrust system’s permissiveness. Justice Breyer espouses Harvard School ideas, and he has pushed important elements of antitrust doctrine in permissive directions.¹²⁵ He is widely regarded as an eminently sensible jurist and not extremist. The Chicago Obsession sidesteps this complication.

B. The Chicago Obsession’s Significance for the US Antitrust System

Commentators often portray the Bork-led Chicago School as the chief intellectual obstacle to needed change in the US antitrust system. The preoccupation with the Chicago School has at least three major consequences for modern US doctrine and policy. First, for those who desire modest or sweeping extensions of enforcement beyond existing levels, arguments and strategies that vanquish Bork and the Chicago School without coming to grips with the modern Harvard School and its distinctive institutional concerns substantially diminish their prospects for success. Second, the portrayal of the US regime as captive to Bork-led Chicago School extremism suggests to foreign authorities that the American system is illegitimate; this erodes the ability of the

¹²³ Tepper, *The Myth of Capitalism* at 165 (cited in note 2) (“Not only have the lunatics taken over the Department of Justice, but they have completely taken over the courts.”).

¹²⁴ This phenomenon is discussed in William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 *Antitrust L J* 687, 693–98 (2014).

¹²⁵ Kovacic, 2007 *Colum Bus L Rev* at 48–51 (cited in note 17).

United States to play a constructive role in shaping international competition policy norms. Third, the repeated claim that Bork-led, Chicago School–inspired pathologies now pervade the US antitrust system—especially the federal enforcement agencies—creates pressure, as part of a future reform program, to undertake a wholesale makeover of the enforcement system, a purge of all personnel guided by Chicago School precepts. It also creates pressure to pursue a new agenda whose demands will dramatically exceed the ability of public enforcement agencies to complete projects successfully.

1. The weakness of Chicago School–centrism as a diagnostic tool.

Two sets of reform proposals figure prominently in modern debates about the future of antitrust policy. One group might be described as seeking to do more within the existing doctrinal and enforcement framework.¹²⁶ They propose a more ambitious enforcement program toward mergers and single-firm conduct.¹²⁷

The second group calls for a basic overhaul of enforcement and the adoption of new legislation. Suggested reforms include (a) new legislation to bar owners of large information services platforms from selling their own goods through the platforms, and (b) antitrust lawsuits to unwind previously completed mergers involving, among other firms, information services giants such as Amazon, Facebook, and Google and agricultural products firms such as Bayer and Monsanto.¹²⁸

¹²⁶ This is the philosophy of the essays published in *Collection: Unlocking Antitrust Enforcement*, 127 Yale L J 1916 (2018). The introduction to this collection observes: “The nine Features in this Collection primarily focus on the efforts that can be undertaken by the federal antitrust agencies. . . . Together, these Features lay the foundation for an overarching enforcement agenda, one written in the long, but receding, shadow of the Chicago School.” Jonathan B. Baker, Jonathan Sallet, and Fiona Scott Morton, *Unlocking Antitrust Enforcement*, 127 Yale L J 1916, 1917 (2018).

¹²⁷ See, for example, Herbert Hovenkamp and Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale L J 1996, 1997 (2008) (suggesting broader applications of the structural presumption employed in merger decisions); C. Scott Hemphill and Philip J. Weiser, *Beyond Brooke Group: Bringing Reality to the Law of Predatory Pricing*, 127 Yale L J 2048, 2073 (2018) (considering application of the Court’s predatory pricing test within the bounds of existing precedent).

¹²⁸ See Elizabeth Warren, *Here’s How We Can Break Up Big Tech* (Medium, Mar 8, 2019), archived at <https://perma.cc/BUN2-TJCP>; William E. Kovacic, *Competition Policy in Its Broadest Sense: Michael Pertschuk’s Chairmanship of the Federal Trade Commission 1977–1981*, 60 Wm & Mary L Rev 1269, 1325–32 (2019) (describing proposed policy reforms); James Hohmann, *Monopolies, Mergers Emerge as Major Issues for Democrats*,

For those who want more sweeping or more modest extensions, the Chicago Obsession deflects attention away from an important source of modern antitrust conservatism. Blaming the Chicago School for the state of US antitrust policy overlooks how the Harvard School facilitated the result. In doing so, Chicago School-centrism obscures what needs to be done to realign policy. Repudiating the Chicago School will not undo the broad acceptance of the consumer welfare perspective that the Harvard School encouraged, nor will it address how the Harvard School's administrability concerns have made single-firm conduct standards more permissive. For example, these administrability concerns place pressure on advocates for a return to a polycentric, egalitarian-goals structure to explain how the tension among goals will be reconciled, and how agencies and courts are to apply the multiple-goals framework in practice.

As General Counsel and an FTC commissioner in the 2000s, I tested proposals for new antitrust cases by asking whether the agency would win the vote of Justice Breyer. Proponents of expanded enforcement will need the votes of jurists who embrace Harvard School ideas. Bolder cases will founder without the support of jurists such as Justice Breyer and like-minded colleagues who share the Harvard School's preferences; they are unlikely to abandon the economic effects-oriented framework endorsed by Areeda, Turner, and Hovenkamp and restore primacy to an egalitarian-goals framework.¹²⁹ Nor will such jurists casually abandon the intervention skepticism the Harvard School has urged them to apply to dominant firm behavior. Advocates of fundamental change through more robust antitrust enforcement will have to do considerably more than discredit the Chicago School.

The Chicago Obsession overlooks the distinctive Harvard School-inspired institutional concerns that confine antitrust doctrine. Chicago School-centrism ignores how the Harvard School's concerns about private litigation have caused courts to establish standing, evidentiary, and substantive barriers that shrink the

Wash Post A16 (Apr 2, 2019) (reporting a proposal by Senator Elizabeth Warren to undo the merger that combined Bayer and Monsanto).

¹²⁹ The intervention skepticism encouraged by the Chicago and Harvard Schools since the early 1970s enjoys significant support among federal judges appointed by Democrats and Republicans alike. In his study of Supreme Court decision-making from 1950 to 2010, Professor Hutchison concludes that "[b]y the 1990s, the market-based approach to antitrust law had transcended partisan divisions, characterizing the Court's liberal wing as well as its conservatives." Hutchison, 21 *Lewis & Clark L Rev* at 181 (cited in note 36).

zone of liability. Overcoming these concerns requires efforts either to demonstrate that private rights of action are not the threat that the Harvard School has said them to be,¹³⁰ or to devise litigation strategies that emphasize the distinctiveness of government agency lawsuits and their fidelity to the public interest. The latter approach might involve more recourse to § 5 of the FTC Act, which bans “unfair methods of competition,”¹³¹ or legislating new policy tools that public agencies can apply without collateral effects in private litigation.¹³²

As suggested above, many federal judges take a cautious approach to antitrust intervention. Changing judicial preferences will require years of appointments of individuals with stronger preferences for antitrust and other forms of regulatory intervention. The advocates for a sweeping makeover of the US system seem not to have the patience for this gradual process of change.

2. Diminished role for the United States in international affairs.

The Chicago Obsession engenders the view that extremists have disabled the US antitrust system. This feeds into a separate, related interpretation in which US policy lurches about in erratic, pendulum-like swings that coincide with electoral outcomes.¹³³ Periods of severe overenforcement or underenforcement are interrupted only by lucid intervals where the system reaches a sensible (but only temporary) equilibrium. Thus, the Chicago Obsession depicts the US regime since the late 1970s as dominated by Chicago School ideas grounded in “extreme interpretations and misinterpretations of conservative economic theory (and constant disregard of facts).”¹³⁴

¹³⁰ For example, Professors Joshua Davis and Robert Lande have strived to rebut the view that antitrust private rights of action over-deter desirable business behavior and therefore warrant judicial equilibration to aid defendants in defeating private actions. See, for example, Robert H. Lande and Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 *USF L Rev* 879, 904–08 (2008) (presenting the results of an empirical survey that underscores contributions of private rights of action to effectiveness of US antitrust system).

¹³¹ 15 USC § 45(a).

¹³² See generally William E. Kovacic, *Commercial Innovation and Innovative Regulatory Agencies: An Enhanced Markets Regime for the United States*, (manuscript on file with author) (proposing US adoption of the market investigation mechanism employed by the United Kingdom’s Competition and Markets Authority).

¹³³ Kovacic, 22 *Geo Mason L Rev* at 1171–83 (cited in note 18).

¹³⁴ Pitofsky, *Introduction: Setting the Stage* at 6 (cited in note 8).

No reasonable observer, inside or outside the United States, should trust a system so given to extremism and irrationality. There is an important difference between a system that sometimes errs in good faith and one gone mad. The representatives of a system thought to be deranged will struggle to participate effectively in global discussions about antitrust norms, and their proposals, good or bad, will be ignored.

3. Pressure to carry out a destructive “revitalization” of enforcement.

One important variant of the modern critique of a Bork-led takeover of the US antitrust regime is that the Chicago School has reduced the federal enforcement agencies to shambles. In a number of critiques, Borkian ideas have corrupted the agencies and the elected officials who appoint their leaders. Large corporate interests are said to have captured the DOJ and the FTC, which serve as puppets for their corporate masters.¹³⁵ Lulled by the Chicago School into thinking that good policy consists of doing nothing, the leaders and the staff of the agencies are do-nothing saboteurs¹³⁶ who passively watch calamitous mergers and other anticompetitive conduct take place.¹³⁷ The sole aim of agency personnel is said to be to land an attractive position with an economic

¹³⁵ Tepper, *The Myth of Capitalism* at 162 (cited in note 2) (“[T]he Department of Justice now essentially works to serve the interests of companies.”).

¹³⁶ Tepper, *Why Regulators Went Soft on Monopolies* (cited in note 10) (“Antitrust law is not so much dormant as it is actively sabotaged by the very people who should enforce it. The DOJ and FTC’s policies today are best described as aggressive do-nothingism.”); Asher Schechter, *US Regulators Have Essentially Become Do-Nothing Institutions* (ProMarket, Dec 6, 2018), archived at <https://perma.cc/XH92-7HFW> (quoting Jonathan Tepper, who remarks that “US regulators have essentially become do-nothing institutions”).

¹³⁷ Jonathan Tepper observes:

Merger enforcement is dead. At this stage the FTC is a highly paid employment agency for economists and lawyers as they move in and out of government. . . . The process of merger reviews is a scene where lawyers and economists argue with future colleagues in a revolving door of money and influence peddling.

Tepper, *The Myth of Capitalism* at 163–64 (cited in note 2). In another passage, Tepper hammers the two federal agencies with a salvo of innuendo:

Dozens of industries are so egregiously concentrated that it begs the question as to what the authorities are doing with their time. We don’t know. We know for a fact that workers at the Securities and Exchange Commission spent their time watching porn while the economy crashed during the Financial Crisis. We would hate to speculate about the Department of Justice and Federal Trade Commission.

Id. at 116.

consulting firm, a law firm, or a corporation nominally subject to antitrust oversight.

The implication of this critique is that nothing short of a complete makeover of the federal enforcement system will restore the antitrust system to perform its intended role. Essential to this endeavor will be new leaders and staff fully committed to an expansive enforcement program and guided by a broad conception of the goals of antitrust. There will be no room in the new regimes for those tainted by previous association with the private sector, through employment or consulting relationships. In all cases, the agencies will be headed by individuals with the courage to do the job that previous generations of timid, captured officials failed to do.

In making their case for fundamental change, some advocates for a transformation of the US system today use a technique that Robert Bork employed effectively in *Antitrust Paradox*. To underscore the urgent need for reform, Bork portrayed the federal enforcement agencies as decrepit—incompetent in their analysis of business behavior and grasping for more power.¹³⁸ In making this claim, Bork ignored significant signs that the DOJ and the FTC had retreated from a number of substantive policies that he scorned and had reshaped their enforcement agendas to incorporate approaches that *Antitrust Paradox* called for.¹³⁹

By contrast, the modern Harvard School never used this strategy in offering its vision of an ideal antitrust system. Areeda, Turner, and Breyer never supported their policy proposals by summoning the specter of torpid agencies, subservient to business interests and controlled by self-aggrandizing managers and staff. The modern Harvard School displayed confidence in the capacity of public institutions—antitrust agencies and sectoral regulators—to carry out ambitious antitrust programs. To improve the house, the modern Harvard School did not feel impelled to burn it down. This may be the most important priority for reformers—to build a program focused on government initiative and grounded in the Harvard School theme that public institutions are suited to the task of expanding the reach of the antitrust system with skill and effectiveness.

As much as some commentators berate Bork for endangering the US antitrust system, they have adopted his tactics. They

¹³⁸ Kovacic, 79 *Antitrust L J* at 872–75 (cited in note 76).

¹³⁹ *Id.*

make the case for reform by discrediting the public institutions entrusted with policy implementation. This poses at least two major risks. By suggesting that the DOJ and the FTC are illegitimate and inept, the advocates for change ignore valuable contributions that the agencies have made to policymaking over the past four decades. New leadership at the agencies will feel an imperative to denounce all previous programs, regardless of the benefits such programs have yielded for society. A second possible unfortunate consequence is to create unattainable expectations about what the federal agencies must do. The demands for immediate and dramatic action run a serious risk of creating destructive mismatches between commitments and capabilities.¹⁴⁰

CONCLUSION

By itself, the Chicago School could not have transformed the US system over the past forty years. The Harvard School was necessary to create a broad-based consensus to abandon an egalitarian-goals framework and forswear certain forms of intervention. The Chicago and Harvard Schools were complements. At a minimum, the Harvard School's views are a vital load-bearing structure (an essential buttress) that supports the edifice of Chicago School ideas. One cannot explain the modern US antitrust experience without acknowledging this.

The Chicago Obsession distorts understanding about US antitrust in three major ways. First, it obscures the intellectual coalition that supported the reformulation of the US system from the early 1970s onward. The Chicago School galvanized the center-right to endorse a narrowing of the antitrust system; the Harvard School brought along the center-left to create a broader, more stable support among academics, enforcement officials, judges, and practitioners than the Chicago School alone could achieve. The modern Harvard School's ideas are deeply embedded in the US regime.

The Chicago Obsession also obscures obstacles to the expansion of US enforcement. The Chicago Obsession ignores the institutional considerations that led the Harvard School to reject a

¹⁴⁰ In the 1970s, the FTC initiated an ambitious program of cases to restructure concentrated industries and to extend the frontiers of antitrust jurisprudence. The program responded to demands from commentators and legislators that drastic new measures were necessary to save the agency. The program faltered in many respects because it created a serious mismatch between the FTC's commitments and its capability to carry out the ambitious agenda successfully. Kovacic, 60 *Wm & Mary L Rev* at 1307–25 (cited in note 128).

pluralistic-goals framework and urge courts to hinder private plaintiffs. The private-rights phobia explains why courts have hesitated to absorb the modern literature that proposes more aggressive antitrust intervention. One can demolish the Chicago School's philosophical defense of consumer welfare and noninterventionist rules (for example, for dominant firms), but the Harvard School's institutional fortifications will continue to shape doctrine and enforcement policy. The US system will resist a pro-intervention makeover unless the Harvard School's institution-based cautions are addressed and overcome. This should be a matter of special concern for those who seek to reestablish an egalitarian-goals framework, bolster merger control, and dissolve significant industrial concentration. The modern Harvard School's more sympathetic view of the capacity and motives of public agencies also suggests that strategies for an expansion of the US antitrust system should focus foremost on applying the special capabilities of the federal antitrust agencies and other regulators with competition policy mandates.

Finally, the Chicago Obsession damages the US antitrust system by promoting the view that reckless extremists sent American antitrust policy off the rails in the 1980s. Chicago School critiques often portray Chicago School ideas as reflecting an unthinking ideology unsupported by rigorous theoretical analysis or empirical study. By presenting Bork and similar scholars as fanatics, commentators seek to discredit the Chicago School's success in order to persuade policy-makers and judges to bolster enforcement. To foreign observers, this gives the US system an aura of irrationality and illegitimacy and diminishes the capacity of the United States to make constructive contributions to the development of sound international competition policy standards. The irrationality narrative loses some of its force if the modern US system is seen to rely substantially on contributions from scholars (for example, Areeda, Breyer, and Turner) not ordinarily viewed as unthinking ideologues.

A proper assessment of modern US antitrust experience requires attention to the Chicago School, the Harvard School, and, indeed, other strands of thought that collectively form the existing framework of law and policy. Knowing where these strands originated—and what each has contributed to the existing antitrust structure—is the necessary foundation for choosing the future direction of the US antitrust regime, whether one believes that the best future consists of continuing the status quo, doing

more with what we already have, or carrying out a sweeping redesign of the institutional framework and a basic redirection of policy. For proponents of an expansion of the US system, a better understanding of the modern Harvard School's contributions suggests important preconditions for reform: to restore confidence in private rights of action, and to build programs and structures that rely upon public enforcement institutions and place confidence in their ability to carry out a demanding new agenda.