

# WHEN ECONOMICS MET ANTITRUST: THE SECOND CHICAGO SCHOOL AND THE ECONOMIZATION OF ANTITRUST LAW

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**WHEN ECONOMICS MET ANTITRUST: THE SECOND CHICAGO SCHOOL AND  
THE ECONOMIZATION OF ANTITRUST LAW**

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Abstract: In this article, we use a history of economic thought perspective to analyze the process by which the Chicago School of Antitrust emerged in the 1950s and became dominant in the US. We show the extent to which economic objectives and theoretical views shaped antitrust laws in their inception. After establishing the minor influence of economics in the promulgation of US competition laws, we then highlight US economists' very cautious views about antitrust until the Second New Deal. We analyze the process by which the Chicago School developed a general and coherent framework for competition policy. We rely mainly on the seminal and programmatic work of Director and Levi (1956) and trace how this theoretical paradigm was made collective, i.e. the “economization” process took place in US antitrust. Finally, we discuss the implications, if not the possible pitfalls, of such a conversion to economics-led competition law enforcement.

Keywords: Antitrust; Chicago School; Consumer welfare; Efficiency; Monopolization

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The Chicago School of antitrust analysis pioneered by Judge Richard Posner<sup>1</sup> has played a major role both in the US and in the EU– through its normative prescriptions in favor of a “*more economic approach*”<sup>2</sup>. The preliminary ruling of the EU Court of Justice in *Post Danmark* might be interpreted as a first step in a process of convergence of its jurisprudence toward such a more economic approach.<sup>3</sup> The apparent rallying by the Court to such an approach, the adoption of which has been advocated by the European Commission since its 2009 guidance on exclusionary abuses, might be considered a self-emancipation of its old-case law built in the 1970s and analyzed as one of the main obstacles to the modernization of EU competition law. If the judgment cannot be interpreted as an implementation of an “effects-based” approach, since this was a request for a preliminary ruling concerning the interpretation of Article 102 and therefore was not a decision on the merits, it might nevertheless lay the foundation for a better integration of an economic reasoning within the decision-making process. In brief, the judgment seems to indicate that the activation of the principle of the dominant undertaking’s special responsibility – according to which such a firm “has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market”<sup>4</sup> – might shift from a *formalist approach* (i.e., the importance of market structures) to a *rule of reason* approach. The Court prescribes assessing the practice according to its actual or potential exclusionary effects on an equally-efficient competitor standard<sup>5</sup> and recognizes the legitimacy of a net-efficiency-gains-based defense for the dominant undertaking.

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<sup>1</sup> The foundations of the Chicago School dated back to the work of Aaron Director and Edward Levi in the 1950s (Van Horn, 2009). The School has always advocated for a limited intervention of regulators and competition authorities in markets. See Posner (1979) for further details on the School’s enforcement recommendations. Commonly, two successive waves of Chicago scholars are distinguished. The first – more interventionist – is embodied by Herbert Simons and the second by his disciples Director and Levi (Van Horn, *op. cit.*)

<sup>2</sup> See, e.g., on the “more-economic approach” the report of the Economic Advisory Group on Competition Policy (EAGCP, 2005). This approach aims at grounding competition policy on economic reasoning.

<sup>3</sup> Case C-209/10, 27 March 2012.

<sup>4</sup> European Commission (2009), Communication from the Commission – Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, *Official Journal* C 045 , 24/02/2009 P. 0007 – 0020.

<sup>5</sup> The first occurrence of this concept can be found in Posner (1973). Nonetheless, this standard is not used in antitrust case-law but it is currently implemented by the European Commission (2009).

Taking into consideration the net welfare balance of a dominant undertaking's market practice to evaluate its compliance with respect to competition laws is undoubtedly aligned with the Chicago normative views (Posner, 2001). The influence of the school of economic thought— we will define it as the Second Chicago School— seems more than ever noticeable. In the US, the 2008 Department of Justice (DoJ) report on single firm conduct, withdrawn in 2009 by the Obama Administration, personified such a Chicago-style model. The same influence was manifested in the June 2013 proposed policy statement regarding *Unfair Methods of Competition* under Section 5 of the Federal Trade Commission (FTC) Act of 1914 (Wright, 2013). The Federal Trade Commission proposed to define an unfair practice as a market strategy that harms or is likely to harm significantly competition and lacks cognizable efficiencies.

The first principle of the above June 2013 policy statement stems from a 1994 US Congress codification<sup>6</sup> that prohibits the FTC from considering any “public policy” rationale as a primary basis to prosecute “unfair” practices. In other words, considerations about public morals or about the protection of small businesses are not to be considered (Wright, 2013). In addition, as Commissioner Wright stated, the FTC assesses the market impact of the practice not on the basis of the prejudice caused to competitors but considering its effect— actual or potential— on the competitive process, and, in turn, on consumer welfare.<sup>7</sup>

The second principle promoted by the FTC is the consideration of cognizable efficiency gains, a principle first integrated in the revised 1997 Horizontal Merger Guidelines (US DoJ and FTC, 2010). The agency has to consider the net effect of a given practice as soon as efficiency claims are not vague, speculative, and can be verified by reasonable means. Adopting as a sole criterion the effect on consumer welfare and accepting efficiency defense claims constitute two of the main requirements of the Chicago School theory relating to antitrust enforcement (Posner, 2001). This approach imposes to ground precisely the the case on facts (Hovenkamp, 1985). The first requirement of the Chicago School theory is the exclusive focus on economic efficiency. More precisely, Chicago scholars consider the allocative efficiency as the sole purpose of the competition policy at the expense of any

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<sup>6</sup> 15 USC § 45 (n).

<sup>7</sup> As seen later, the definition of “consumer harm” proposed by the Chicago School is by far more restrictive than the one proposed by the FTC. The Commission adopts a multidimensional definition of consumer harm encompassing price increasing, output reduction, quality alteration or innovation to innovate lessening (Wright, 2013). Its definition is unquestionably closer to the European one than the Chicago School theoretical views.

consideration of productive efficiency. The second requirement relies on the view according to which a very large proportion of markets remains competitive, whatever the actual number of competing firms.

The third principle is a corollary: a monopoly situation is rarely perennial. In other words, markets are seen as spontaneously self-correcting. The fourth principle relates to barriers to entry. According to Chicago School scholars as Milton Friedman (1999), these are mainly artificial and often created by government regulations that are subject to capture by private interests. The fifth principle disputes the validity of the once dominant structuralist School of Antitrust by establishing that a high level of concentration is often necessary to achieve economies of scale and scope that are beneficial to consumers. The sixth underlying principle consists of the economic agents' profit-maximizing behavior, especially with respect to undertakings. According to this view, firms behave only regarding the maximization of their outcomes. The seventh principle relies on the fact that "false positive" decisions are more deleterious in terms of welfare than "false negative" decisions. Namely, dismissing a well-grounded claim would be soon corrected by market forces because of the signal provided by the dominant undertaking's profitability to potential entrants. Conversely, a false positive claim would have deterring effects only on the incentives both of the dominant firm and of its competitors aspiring to become dominant in turn. Finally, the eighth principle identifying this school of thought is that enforcing antitrust laws only according to efficiency considerations is the cornerstone of an apolitical enforcement.

The Chicago School influence on a more economic approach appears unquestionable. Nevertheless, it might, at the same time, appear as quite paradoxical. Indeed, the equation between the Second Chicago School of Antitrust and the economization of the competition law enforcement may be discussed. Moreover, the scientific validity of its normative views has been sharply debated in the economic literature since the 1980s.

First, relationships between competition law enforcement and economics began long before the 1950s. As Hovenkamp (1985) underlined, economic theory had irrigated antitrust debates at least since the thirties with, for example, the monopolistic competition school during the New Deal or the workable competition theory due to Clark (1940). The rupture produced by the Chicago School is not to conclude that economics matters but to consider that economic efficiency constitutes the exclusive purpose of competition law enforcement (Bork, 1978). Competition law policymakers did not discover economics with the Chicago School;

they just changed their theoretical framework for one that prescribes reliance only on economic concerns.

Secondly, the Chicago School influence might be put into question when analyzing the current shift in the European competition policy enforcement. First, the real influence of the Chicago School on the US antitrust enforcement itself was always debated (Kovacic, 2007). The US Supreme Court rulings on antitrust cases seem more to adopt a hybrid view between the Chicago and Harvard School's prescriptions<sup>8</sup> than an unconditional conversion to the Chicago dogma. Secondly, the Chicago normative results far from meet consensus within antitrust law and economic scholars. In 1985, Hovenkamp noticed two prominent weaknesses in the Chicago model. The first was its static nature, and the second was its inability to grasp strategic behaviors. Chicago School normative views have been in an awkward position with industrial organization models that have constituted the mainstream in economics for about thirty years. Such game theory-based models do not support clear-cut statements as the Chicago School does.

Therefore, is there still any interest in looking into the influence of this School on the current shift in competition law enforcement in the EU and in trying to draw a parallel with its progressive diffusion among US antitrust enforcers since the late 1970s and the early 1980s? Do the theoretical statements and the empirical prescriptions of this school of thought belong to the past, and have they lost their influence on US antitrust enforcement or on the implementation of the EU's more economic approach to competition laws? In this paper, we aim to demonstrate that the responses to these questions are in the negative for two main reasons. Firstly, Chicago-inspired competition law enforcement still exists and remains dominant. The persistence of the Chicago influence among antitrust practitioners may be explained by its capacity to provide clear-cut rules (Baye and Wright, 2011). Secondly, competition decisional practices rely on precedents that are shaped by then-dominant economic ideas. Case law therefore depends on the dominant theoretical paradigms of the time, on the circumstances of time and space, and on the specific facts of the litigation.

Indeed, the Chicago School is still predominant for the US antitrust law enforcement. As Nicola Giocoli (2012a) states: "Yet, surprisingly enough, Chicago-style ALE [Antitrust Law and Economics] still dominates case-law. Like an old-lady, whose allure defies age and physical decay, Chicago's charm looks almost intact among antitrust enforcers." Among the

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<sup>8</sup> For a history of antitrust schools of thought, see, e.g., Soven (2012).

qualities of such a theoretical framework figures prominently the *administrability* of its prescriptions, against which industrial organization-based models cannot compete. This competitive advantage is also reinforced by the *Daubert* criteria<sup>9</sup> that require both relevancy and reliability of scientific expertise. This standard puts in awkward position Post-Chicago models that are significantly dependent on their underlying assumptions (Coate and Fisher, 2001). In other words, the persistence of the influence of the Chicago School normative views is not only the fruit of their past crystallization and their current fossilization in case law through the rule of precedent. As Giocoli (2012b) states: “Post-Chicago analysis has been able to win the day in classrooms, but not in courtrooms.” Additionally, the current shift toward a more economic approach is commonly presented as a means to fill in the gap between US and EU enforcement of competition law regarding single-firm exclusionary practices. Consequently, the Chicago School reasoning plays a major role in the economization process.

For our purposes, we use a history of economic thought perspective to analyze the process by which the Chicago School of antitrust emerged in the 1950s and became dominant in the US after the 1977 *GTE Sylvania* Supreme Court decision. We first show the extent to which economic objectives and theoretical views have shaped antitrust laws in their inception. After establishing the minor influence of economics in the promulgation of US antitrust laws, Section II highlights US economists’ very cautious views of antitrust until the Second New Deal.<sup>10</sup> In Section III, we analyze the process by which the Chicago School has developed a general and coherent framework for competition policy. We rely mainly on the seminal and programmatic work of Director and Levi (1956). In Section IV, we trace how this theoretical paradigm was made collective, i.e. the “economization” process occurred in US antitrust. Finally, in Section V, we discuss the implications, if not the possible pitfalls, of such a conversion to economics-led competition law enforcement.

## **I. ECONOMIC ANALYSIS AND ANTITRUST LAWS: TWO WORLDS APART**

Since their beginning, antitrust laws have pursued economic purposes. Yet, they were firstly multidimensional and allowed a large place to the limitation of private coercive powers

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<sup>9</sup> US Supreme Court, *Daubert v. Merrell Dow Pharm. Inc.*, 509 US 579 (1993).

<sup>10</sup> For an analysis of the antitrust policy during the second term of President Roosevelt’s Administration (1937-1941), see Miscamble (1982).

resulting from market power. It might appear as paradoxical to consider that economic assessment of economic-oriented law enforcement started only in the late 1970s (if we consider the Supreme Court's decisional practice reversal<sup>11</sup>). In fact, what we call "economization", after the Chicago School, does not concern the economic consequences of antitrust decisions. The economization of antitrust conceived as recognizing the primacy of the economic reasoning in the judicial decision might be attributed to the Second Chicago school of thought (Mercuro and Medema, 2006), even though economic concerns were crucial in the enactment of the Sherman Act. What may be meant by economization or by the implementation of the more-economic approach consists in limiting the antitrust law objectives to a sole criteria: the actual effect of the considered practices on prices and therefore on consumer welfare, admitting that this welfare might be defined only in monetary terms and does not integrate more qualitative dimensions, such as freedom of choice. In this sense, the more economic approach is an archetypal manifestation of the Chicago School economic analysis of law perspective (Posner, 2010). Our purpose in this first section is to investigate the extent to which such a perspective might explain the historical dynamic of US antitrust law.

The main point to emphasize in order to understand the US antitrust specificities is undoubtedly the very complex history of the enactment of the legislation. This cannot be explained by a clear purpose, except that "something ought to be done about the trusts" (Dewey, 1964). The Sherman Act's difficult legislative "delivery" (e.g., Kolasky, 2009) explains the absence of any clear-cut definition to the legislative intent, which left the door open to many controversies about its core meaning. In addition, its enforcement by federal courts favored significant reversals in its interpretation and induced the implementation of by-pass strategies with, for example, the Clayton Act and the FTC Act of 1914 and their later amendments.

The crucial point is the interpretation of the legislative intent in the Sherman Act. This intent has been debated by legal, economic and history scholars since its enactment.<sup>12</sup> In a

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<sup>11</sup> The economization had begun with the ruling in *Continental TV, Inc. v. GTE Sylvania Inc.*, 433 US 36 (1977). Two years later, the Supreme Court stated that Congress designed the Sherman Act as "a consumer welfare prescription". *Reiter v. Sonotone Corp.*, 442 US 330, 343 (1979). As a consequence, "antitrust would no longer serve multiple masters; economic goals would be exclusive" (Wright and Ginsburg, 2013).

<sup>12</sup> We do not discuss the extent to which the Sherman Act addressed its contemporary economic problems. Some scholars consider that its promulgation cannot be explained by consumer welfare protection, since the

striking article, Judge Robert Bork (1966, p. 10) admitted “that many of the legislators who voted for the Sherman Act may have had values in mind in addition to or other than consumer welfare.” Nevertheless, he added, “not only was the consumer welfare the predominant goal expressed in Congress but the evidence strongly indicates that, in case of conflict, other values were to give way before it.” Consequently, consumer welfare considerations must impose themselves in the judicial decision.<sup>13</sup> In the introduction to his 1966 paper, Judge Bork wrote: “For a judge to give weight to other values, therefore, can never assist in the correct disposition of a case and may lead to error. In short, since the legislative history of the Sherman Act shows consumer welfare to be decisive value, it should be treated by a court as the only value” (*Ibid*, p. 11).

As Bork acknowledged, the problem is that the interpretation of the underlying fundamental value of the US antitrust laws varied throughout more than a century (Kovacic and Shapiro, 2000). Judge Learned Hand’s views in *Alcoa* or *Associated Press*<sup>14</sup> in 1945 were not obviously based on the consumer welfare criterion. As Judge Hand wrote in the *Alcoa* decision, the Sherman Act aims to preserve a situation of effective competition without regard to cost considerations. Thus, antitrust laws are interpreted as a tool at judges’ disposal to prevent or to correct excessive concentrations of market power.<sup>15</sup>

The history of enactment of the Sherman Act explains such conflicting interpretations and its remarkable plasticity over time. First, Sherman’s proposal is closely linked to the late 1880s debates between Republicans and Democrats (Kolasky, 2009). The Republicans

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targeted trusts were expanding output and reducing prices in their market more than the average level recorded in US industry at that time (DiLorenzo and High, 1988).

<sup>13</sup> In *The Antitrust Paradox*, Bork (1978) again insisted on this point: “[...] conventional indicia of legislative intent overwhelmingly support the conclusions that the antitrust laws should be interpreted as designed for the sole purpose of forwarding consumer welfare”.

<sup>14</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416, 428, (2<sup>nd</sup> Cir. 1945); *Associated Press v. United States*, 326 U.S. 1 (1945).

<sup>15</sup> “We have been speaking only of the economic reasons which forbid monopoly: but... there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. In the debates in Congress, Senator Sherman himself... showed that among of the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them [...]. Throughout the history of these statutes (the antitrust laws including the Sherman Act), it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other”. *United States v. Aluminum Co. of America*, *ibid*.

advocated a protective tariff policy to defend domestic industries. At the same time, price increases might be also explained by the consolidation of the US industry. The Republicans' fear was that the Democrats would benefit from the public antipathy toward trusts. It was a challenge to avoid both excessive government interventions against firms and the lowering of tariffs barriers. The legislative story of the Act is very complex. Its wording by Sherman was already vague (promoting a free and full competition to guarantee increased production and lower prices), but it was entirely rewritten by the Judiciary Committee of the Senate, which put Sherman outside of the legislative process. Consequently, Senator Sherman himself sharply criticized the law to which he gave his name (Thorelli, 1955).

Second, the specificity of the enactment of the Sherman Act could explain its very specific enforcement regime in terms of the role given to courts regarding its enforcement. Debates were particularly heated regarding the Congress' competence to regulate commerce. According to Kolasky (2009), to defuse the conflict, Sherman argued that antitrust laws do not constitute a real novelty and may be integrated within the principles of the US common law. Therefore, its enforcement must be attributed to federal courts.

Two major difficulties have stemmed from this tactical choice. The first is the issue of delegating to federal courts the choice among conflicting values. The second is that the courts can thwart this legislative activism because of their conservatism during the late nineteenth century.

Differently put, the legislator provided very vague provisions and no guidance to judicial authorities in charge of enforcement. Consequently, the core meaning of the Sherman Act provisions is determined by their enforcement practice. Judges from 1890 to 2012 have had to define admissible markets strategies. In other words, the delegated task was to elaborate a "working definition of competition." (Bork, 1978) The close connection between decisional practice and theory can be seen as a consequence of this inner nature of US antitrust. Even if there is a political cycle (e.g., Baker, 2006), particularly in terms of public enforcement, as the first years of our century demonstrate, a longer cycle also exists that can be explained by the percolation of an economic idea within the legal system. A dominant economic conception of what competition means irreversibly plays on judges' conceptions, as Justice Oliver W. Holmes described in *The Common Law* (1881). However, the US antitrust history demonstrates that theoretical economic debates are not by far the driving force in the antitrust evolution, and, if a growing influence has been undisputable since the 1970s, a significant gap might be put into evidence between the time of academic controversies and the

reversal in case law. If such delays may be explained by the specificities of the antitrust enforcement (the US Supreme Court composition<sup>16</sup>), it may also reveal to some extent a not-so-dominant position of economics in the shaping of competition policy.

## **II. ECONOMICS AND ANTITRUST LAW ENFORCEMENT: A LATE MARRIAGE**

After demonstrating in the first section that economics did not shape antitrust laws, we aim to establish in the second section that even economic matters are always seen as crucial in their enforcement. US scholars in the field of economics for a long while have considered antitrust law with circumspection.

The choice of the judicial nature of the Sherman Act enforcement was a means to limit government interference in the economy. Such an institutional device needs to be analyzed in the light of the US debates from the 1880s to the 1930s opposing legal realists and institutional economists to *laissez-faire* promoters. The legal realists that we may name as progressive considered that the State has a role to play in order to control market transactions and to promote an economic welfare oriented view of the common good (Fried, 1998).

The main opposition to this interventionist program came from the judicial arena, as Justice Holmes (1897) stated in its seminal article *The Path of the Law*. The treatise of Christopher Tiedeman (1886) laid the foundations of the principle according to which a legislative majority must be constrained in its decisions by the individual rights protected by the US Constitution. The Due Process of Law clause and the Fourteenth Amendment are interpreted as severe limitations of the government's policy power. From this constitutional based conception of a limited government stems numerous court decisions limiting the scope of state intervention in the name of the principles of the freedom of contracts and of the protection of private property.<sup>17</sup>

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<sup>16</sup> Critics of the US Supreme Court's "conservatism" (see Breyer, 2009) or the inertia effect of its jurisprudence could be transposed in European cases (Geradin and Petit, 2011).

<sup>17</sup> The main stumbling blocks were undoubtedly the Fifth Amendment to the US Constitution according to which "no person shall be ... deprived of life, liberty, or property, without due process of law" and the Fourteenth Amendment, promulgated just after the Civil War, that prohibits state laws the effects of which might lead to depriving citizens of these rights. With its 1872 Slaughter-House Cases, the US Supreme Court adopted a very extensive view of such a clause. The term "person" was thereafter interpreted in a very large way,

The legal realists and the institutional economists polarized their criticisms on the Court's conservatism that was rationalized by the *Classical Legal Thought* doctrine. This doctrine leads to justify the hurdles set against the legislature's decisions by the logical functioning of the common law and the principles of the US Constitution. In contrast, realists – like Justice Holmes in his dissent opinion in *Lochner*<sup>18</sup> – consider that “general propositions do not decide concrete cases.” In other words, rulings must be based also on an assessment of their economic and social implications and on the “felt necessities of the time.”<sup>19</sup>

Despite these determined contestations, State interventionism toward market practices (both limiting anticompetitive practices and regulating tariffs or contractual conditions) was defeated by the Supreme Court. From the 1905 *Lochner* decision to the 1937 *West Coast Hotel Co. v. Parrish*<sup>20</sup> decision, the two pillars of the constitutional *laissez-faire*, i.e. the freedom of contract and the protection of private property, thwarted regulation policies and antitrust enforcement.

The US economists' mistrust of antitrust enforcement did not fail until the Second New Deal in 1936 (see Stigler 1982). This view was not specific to the profession. Legal scholars and politicians were also dissatisfied about the Sherman Act's institutional framework and about the conditions of its enforcement by the courts, as the enactment of the Clayton Act and the Federal Trade Commission Act in 1914 demonstrated.

However, if their criticisms against court rulings were based on their lack of consideration of their economic impact, because of the prevalent legal dogmatism of judges, we cannot say that these criticisms were founded on an argument of consumer welfare maximization. Indeed, the main theoretical concept of the institutional economists was the transaction. Analyzing transactions supposes to consider the distribution of property rights. These transactions create both vertical relationships among individuals and the things they

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encompassing firms. In addition, the liberty was assimilated to the notion of freedom of contract. Each firm is free to decide to contract or not to contract and to set the contractual terms, e.g. prices, without restriction.

<sup>18</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>19</sup> “Life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.” (Holmes, 1881).

<sup>20</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

owned and horizontal relationships among people through contracts. Significant coercive powers between contractors stem from these relationships. Parties can no longer be considered purely independent. In addition, they cannot benefit from equivalent negotiation powers, since property rights are not equally distributed among people. Consequently, in some transactions, only one of the counterparts may benefit from the capacity to refuse to contract or to withdraw from the transaction. Since such market power may be exerted, it implies a coercive effect on the second party to the transaction, whose freedom of choice is constrained. Antitrust intervention is not grounded for old institutional economists on consumer welfare maximization but on a freedom of choice conception, not so far from the *complete competition theory* of German ordo-liberals such as Walter Eucken (Giocoli, 2009).

As Barbara Fried (1998) noted, if a firm had a *de facto* monopoly on necessary goods, it could refuse to sell the goods or to threaten to not sell them except on payment of an extortionate amount. We find here some definitions of both exclusionary and exploitation abuses that are not grounded on consumer welfare maximization categories but in terms of coercive powers, e.g. of market powers. Institutional economists (as ordo-liberals advocate as well) consider that such behaviors threaten competition, as government intervention may do. In their views, courts do not have to protect such powers on the basis of constitutional principles and to censor at the same time government interventions that aim to correct their effects.

Coercive powers do affect transactions between individuals and consequently other constitutional rights. As for institutional economists, the proper arbiter is the legislature, not courts. Government intervention— as the Freiburg School promoted after the Second World War— is grounded on a positive theory of freedom through law (accessing the market, benefiting from fair price conditions). Put differently, US economists consider antitrust law enforcement as one of the tools, with legislation and public utilities regulation, of the necessary “social control” on economic activities. According to these scholars, contemporary economic problems can be managed through a legislative “intelligent handling” (Hamilton, 1919). Nevertheless, antitrust was considered with great suspicion as long as its enforcement was made by courts.<sup>21</sup> As already highlighted, the legal interpretation by the Supreme Court

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<sup>21</sup> The antitrust law enforcement regime was not the sole source of concern for institutional economists. Some, such as Walton Hamilton in its earlier works, tended to consider that the Sherman Act was not correctly fitted to the realities of the US economy as shaped by the second industrial revolution. For him, two pitfalls could put antitrust laws at risk. The first was the vagueness of its terms (conspiracies in restraint of trade) that

of the scope of government intervention (e.g., price regulation) was so restrictive that institutional economists were doubtful about the possibility to control the exercise of coercive power through the Sherman Act.

The mistrust toward antitrust may be illustrated by the debates during the progressive era that led to the enactment of the Federal Trade Commission Act in 1914. The statutes of the Federal Trade Commission allow avoiding judicial enforcement of its decisions, contrary to Sherman Act based-cases that are enforced by courts (Kovacic and Winerman, 2010). US scholars and decision makers were all the more reluctant vis-à-vis the Sherman Act's judicial enforcement that the public debate was then "monopolized" by the concept of "new competition". The latter advocated for inter-firm cooperation through information exchanges regarding prices and output decisions to stabilize the market process. For example, the American Fair Trade League, personified by the future Justice Brandeis, ran a campaign in favor of undertakings' coordination aimed at fostering market stability and eliminating 'cut-throat competition' (Tadajewski, 2009). According to these views, the best system would be a "private self-regulation by industrial associations coupled with public oversight" (Phillips, 2011) following the example of the War Industries Board established in July 1917. Such a technocratic view of "managed competition" was nothing other than a negation of antitrust principles, especially in their future Chicago orientation.

This tendency found its highest praise with the First New Deal through the National Industry Recovery Act (NIRA) promulgated by the Roosevelt administration. The NIRA sought to protect - and even to promote - coordinated practices and was initially well accepted by scholars, because they considered that such organizations favor a monitoring system of business practices in the public interest (Rutherford, 2011). The antitrust prosecution was nearly entirely suspended until the reversal imparted by the Second New Deal (Gressley, 1964).

The failure of the NIRA constituted a breaking point for US economists' views on antitrust laws. The renewal of the public enforcement with the appointment in 1938 of Thurman Arnold as head of the Antitrust Division of the DoJ gave a new start, favored by a

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could impair the implementation of economic reasoning. The second –perhaps more insightful– deals with the difficulties associated with the attempts "to enforce competition based on the textbook model of competitive markets" (Rutherford, 2011).

“progressive” shift in the Supreme Court.<sup>22</sup> Such a turn was amplified by two convergent movements. The first was the hitherto unseen support of institutionalist economists for the antitrust laws (Mayhew, 1998), and the second was the shift of former *laissez-faire* champions abandoning traditional English-style liberalism for a neo-liberal model, accepting government interventions aimed at preserving the competitive process (Clavel, 2005).

The First Chicago School, the figureheads of which were Frank Knight, Jacob Viner, and Henry Simons, considered that the concentration of economic power also had to be thwarted to ensure both its dispersion and the political decentralization (Van Horn, 2010).

Indeed, the institutional economists’ point of view on government intervention and antitrust enforcement was paradoxically more or less accepted by the first Chicago School in the late 1930s. Despite its reaffirmed liberalism, as Frank Knight’s critics on the institutional economists’ concept of social control testified (Knight, 1932), Chicago scholars accepted a stronger enforcement of antitrust laws to correct market dynamics (Simons, 1934). The first Chicago School took positions very close to those of late US institutional economists and German *ordo-liberals*, advocating for formal rules at the expense of the implementation of the rule of reason.<sup>23</sup> They also support the prevention and – at the extreme – the prohibition of the acquisition of substantial monopoly power “regardless of how reasonably that power may appear to be exercised” (Simons, 1934). Concisely, until the 1950s, the Chicago School supported anti-monopoly policies to thwart the concentration of economic power (Simons, 1948) and to “ensure that no single corporation dominates an industry” (Van Horn, 2010). Recognizing the legitimacy of a positive state action to preserve the market process against deleterious effects of the economic power concentration was one of the basic features of the neoliberalism of the First Chicago School in line with classical economists’ views, such as those of Adam Smith (Viner, 1960).

Antitrust legitimacy rapidly evolved toward a more structuralist approach that assimilated the issue of economic power with market concentration. Indeed, US antitrust enforcement took on a structuralist dimension distant from both the current European view of

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<sup>22</sup> Bork (1966) emphasized that, for forty years, the US Supreme Court counteracted the tendencies of the Congress to use antitrust laws as a lever for social reforms.

<sup>23</sup> On the views of neoliberal movements of the late 1930s on antitrust and their possible (limited) convergence with the old institutional economics tradition in the US, see Clave (2005) describing the debates initiated by Walter Lippmann’s contribution (1937).

abuse of dominant position and the effects-based approach.<sup>24</sup> The major issue was about market concentration. Antitrust enforcement aims “to preserve a diverse and pluralistic society hospitable to small business and the entrepreneur” (Fox, 1986). Even though US antitrust took on a more structuralist approach (the *ordo-liberal* parsimoniously advocated for asset divestitures and preferred behavioral remedies, as the *as-if* rule), the definitions of competition as an effective situation of rivalry among firms were at least convergent.<sup>25</sup>

The living profit theory used by Judge Learned Hand in his ruling in the *Alcoa* case in 1945 embodied this approach.<sup>26</sup> In this margin squeeze case, the vertically integrated “dominant” operator must set its contractual conditions in a way that avoids excluding competitors from the market (whatever their respective efficiency) and allows them to make a reasonable profit (Sidak, 2008). Such a conception sharply differs from the current US effects-based approach (Hovenkamp and Hovenkamp, 2008).

### **III. THE ECONOMIZATION DEFENSE OF THE SECOND CHICAGO SCHOOL**

If the reversal of the Supreme Court’s decisional practice concerning antitrust law enforcement can be dated back to the *GTE Sylvania* decision in 1977, and, as we will see, the breakpoint in the Antitrust Division of the DoJ in the late 1960s, from a theoretical point of view, the breakdown might be dated to 1946. The replacement of Henry Simons by Aaron Director led the Chicago School to consider differently the “monopoly issue” (Van Horn, 2009). The contestable market theory was already subjacent. Benefiting from monopoly rents was seen as the key to the incentives to invest -e.g., the leading force of the competitive process. The market process was in itself an equilibrating counterforce, as “competition, even if not visible, had the ability to undermine and destroy all forms of monopoly” (Rutherford,

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<sup>24</sup> Arnold’s view on the scope of antitrust laws sharply differs from the conventional interpretation of the Sherman Act and are hugely contradictory with Robert Bork’s interpretation (1966): “The Antitrust laws should be revised so that the government could strike at market domination, regardless of how the power over prices had been acquired and regardless of motive or intent” (Thurman, 1937).

<sup>25</sup> “Through these years, the Supreme Court defined ‘competition’ as a process of interaction among numerous buyers and sellers, none too large. The process of competition would, it was thought, provide a fair and impersonal system of governance and prevent exploitation, coercion, and exclusion” (Fox, 1986). Fox defined consumer interests in terms of “access to a variety of prices, quality, and service options”.

<sup>26</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416 (2nd Cir. 1945).

2011). Contrary to German neoliberals and the First Chicago School, this Second Chicago School prescribed a case-by-case approach based on the assessment of the effects of a considered practice on the market. Chicago scholars reject all judgment criteria grounded on intents or “fair market practices.” They promote an effects-based rule of reason logic that will become the basis of the more economic approach of antitrust enforcement.

The Chicago School’s great transformation cannot be understood without regard to Friedrich von Hayek’s influence and the support of the Volker Fund initiated with *The Road to Serfdom* (1944). The Volker Fund financed two successive programs within the University of Chicago, the Free Market Study (FMS) Project (1946-1952) and later the Antitrust Project (1953-1957), both codirected by Aaron Director and Edward Levi.

The beginnings of the FMS did not mark any rupture from the First Chicago School views. Evidence can be found in the consensual positions expressed at the Mont Pèlerin Society (hereafter MPS) first meeting in 1947. The lecture delivered by Aaron Director was in line with Simons’ arguments, and was consequently very close to the German ordo-liberals’ positions, such as Walter Eucken (Van Horn, 2009). However, the reversal was imminent. The issue of the concentration of economic power magnetized the FMS program (i.e., assessing successes and failures of the antitrust laws, reconsidering patent law). The rupture, following Van Horn’s expression (2009), relied on the discovery that “the monopoly is not the great enemy of democracy.” In other words, the dominant position, if not the monopolistic one, had no deleterious effects on the market process, since such a position was intrinsically precarious. The concentration of a given market was considered an inexorable result of economies of scale and scope. At the same time, barriers to entry were seen as mainly artificial and as fruits of government’s interventions deriving from capture phenomena. Additionally, any exclusionary practices implemented by dominant undertakings were assessed merely as short-term discrimination strategies.

The breaking point can be located in the two last two years of the FMS program. As Van Horn (2010) stressed, a first tremor was a book review of Aaron Director in the *University of Chicago Law Review* (1950). Director admitted that competition forces remained subjacent even if a single firm dominated a market, maintaining the incentives structure and leading to an optimal outcome. In the Antitrust Project framework, numerous studies were carried out on exclusionary practices, predatory pricing, resale price maintenance, tying arrangements, price discrimination, and vertical integration. This work concluded that many of these market strategies were often benign and were not to be sanctioned through *per se* rules (as Simons

recommended limiting judges' discretion) but were to be assessed on a case-by-case basis, e.g. according a rule of reason.

This theoretical shift is embodied in a manifesto published by Director and Levi in the *Northwestern Law Review*, entitled *Trade Regulation* (1956). The authors' claimed purpose was to defend competition and free enterprise principles against future NIRA type public policies. However, unlike Simons, such a goal does not lead to condemn unilateral abuse of market power, if not market power itself. Director and Levi did not advocate for stricter antitrust rules enforcement. Just the opposite, they aimed to reinstate the legitimacy of the individual dominant position.

The article consecrated a real rupture *vis-à-vis* the First Chicago School regarding antitrust concerns. One of the main reversals compared to Simons' views is undoubtedly the defense of the rule of reason against *per se* rules. The authors pointed out the friction between two opposing tendencies in the Common Law. As antitrust enforcement is based on Common Law principles, its implementation might be characterized by flexibility and ambiguity, on one hand, or by certainty and automaticity on the other hand. According to Director and Levi, the antitrust rulings during the 1950s belonged to the second tendency. Certain practices were seen as anticompetitive in themselves (e.g., the resale price maintenance since the 1911 Supreme Court decision<sup>27</sup>). Therefore, they might be sanctioned without considering any actual or potential effects. The Second Chicago School rejected the view according to which economic theory leads to consider on an *ex ante* basis a given market practice as anticompetitive in itself. It is always necessary to consider the specific circumstances of the case and to ground the decision on accurate and up-to-date economic theory. More economic approach principles, conceived as effects-based, have been established since 1956. According to Director and Levi, even the economic theory may structure the judge's decision. However:

The law indeed can have a life on its own. But in this field of law more than any other, the general presumptions are of such a character that they cannot be readily isolated from the corresponding presumptions which dominate economic theory.<sup>28</sup>

Nowadays, it might be considered a little bit surprising to see the now dominant Chicago School scholars such as Crane (2007) rejecting the conclusions of industrial

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<sup>27</sup> John D. Park & Sons Co., 220 U. S. 373 (1911).

<sup>28</sup> Director and Levi (1956, p. 296).

organization models advocating for safe harbors to benefit dominant firms. Contrary to its initial positions, the Chicago School now prefers the certainty and the automatic tendencies of the implementation of Common Law principles against what Director and Levi called the “changing fashion of economic theory.” Yet, the relative positions have changed; the Second Chicago School prescriptions have now been challenged for thirty years, and yesterday’s promoters of an effects-based approach are now denounced as defenders of a mechanical implementation of fossilized economic theory and normative views through the Common Law nature of US antitrust enforcement, creating a *Neo-Classical Legal Thought* and reinvigorating a *laissez faire* competition policy.

In our conclusion, we will consider such a paradoxical switch by which the advocacy for the more economic approach is theoretically founded on a paradigm that recommends a *per se* approach concerning unilateral practices. We propose to analyze the 1956 Director and Levi article in order to bring out the extent to which the roots of the Second Chicago School Antitrust enforcement approach may be found in this manifesto, embodying the conclusions of the FMS project and of the Antitrust Project.

The advocacy for the progressive lessening of the scope of antitrust law enforcement, except for the case of industrial combinations, found its confirmation in the 2008 US DoJ report on single firm practices that finds several arguments in this paper. The relevance of the notion of exclusionary abuse is debated, and the application of antitrust to dominant firms is called into question.

Following Director and Levi (1956), such a shift implies that sanctioning monopolistic behavior cannot always be legitimate. The judge has to consider the process by which such a position was acquired. According to the Chicago School, the monopoly position in itself need not be assimilated as a fruit of any monopolization strategies. A monopoly position acquisition based on merit need not be sanctioned, as the Supreme Court stated in *Grinnel*.<sup>29</sup> The enforcement of antitrust laws must pay attention to the need to provide safe harbors to firms whose “growth or development [is] a consequence of a superior product, business acumen, or historic accident<sup>30</sup>.”

Thus, Director and Levi’s (1956) theoretical views dispute the validity of the underlying principle of Judge Hand’s ruling in the *Alcoa* case. Judge Hand’s decision personified the

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<sup>29</sup> *US v Grinnel Corp.*, 384 US 563, 571 (1966).

<sup>30</sup> *Ibid.*

“populist” era of the US antitrust enforcement characterized by a strong mistrust *vis-à-vis* undertakings enjoying a dominant position. According to Chicago’s scholars, sanctioning dominant firms leads to depriving consumers from the gains proceeding from economies of scale and scope. Preferring a system of rather small producers may lead antitrust enforcers to privilege the maintaining of an organization of the industry in small units “in spite of possible cost” (*Alcoa* at 429). Director and Levi denounced the difficulty encountered by the accused firm to develop an efficiency defense in such antitrust cases. They also highlighted the fact that the *Alcoa* decision shifts the burden of proof to the defendant regarding the compliance of its practices with antitrust law provisions. Some of the major features of the modern US antitrust may have germinated from their interpretation of *Alcoa*.

One of the main dimensions of their 1956 manifesto is undoubtedly their analysis regarding the treatment of exclusionary abuses, especially their advocacy for a more economic approach. Firstly, the existence of leverage strategies by which a dominant undertaking might extend its monopoly power from one market to another is under a cloud of suspicion. Secondly, they reproached the 1950s US antitrust enforcers for their mechanical views of what can be defined as monopolization under the Sherman Act. Furthermore, they considered that subsequent legislation— such as FTC Act, the Clayton Act, and the Robinson-Patman Act— “have introduced a certain automaticity into the law; to some extent they preclude or make unnecessary separate inquiry in each of the cases as to effects, advantages, or disadvantages of the banned practices.” On the contrary, they promote an enforcement model based both on an analysis of “significant market data” and on an “incorporation of advances in economic teaching into the case law.”

In doing so, research launched within the FMS and antitrust program frameworks and also based on their two directors’ synthesis paper has led to the foundations of both the actual US antitrust theoretical framework and its enforcement practices. The withdrawn 2008 report of the Antitrust Division regarding single firm conduct embodied such an approach. The agencies have to assess all market practices with regard to their impact on economic efficiency and, more precisely, on consumer welfare. At the same time, to avoid false positive decisions (the most harmful in terms of welfare, as market process will not be able to correct their effects, unlike false negative decisions, see Easterbrook (1984)), the burden of proof had to be put on the complainant and no longer on the respondent, and its standard had to be significantly raised.

Almost all of the Supreme Court antitrust decisions since 1977 may be read according to these rules. Even if it is certainly an excessive simplification to consider that the Second Chicago School shapes US antitrust enforcement practices, the more-economic approach is rooted in its views about the welfare impacts of single dominant firm market practices. As Rutherford (2011) emphasized, such a shift toward a more economic approach could be explained as soon as the primary concern of antitrust law is no longer interpreted as the prevention of the abuse of coercive powers in market relationships and only as the maximization of consumer welfare (Bork, 1966). Discrimination among contractors and rent extraction through monopoly prices might be analyzed on a case-by-case analysis, as consumer welfare may be enhanced. *Per se* rules restricting market practices or competitors' market access protection might impair the welfare maximization (reinterpreted) purpose of antitrust laws.

The hallmark of the antitrust Chicago School, in its second version, is to promote the allocative efficiency – e.g. the consumer welfare maximization– as the only original and legitimate goal of the antitrust law. As seen earlier, it leads to consider the other antitrust statutes with strong suspicion, considering that these favor a *per se* approach and are primarily designed to protect the interests of specific economic operators– e.g., small and medium-sized firms– at the expense of final consumers (Hovenkamp, 1985). The Chicago School refuses to balance consumer welfare with other public policy objectives. The School relies only on a very simple and apparently clear-cut criterion, allocative efficiency. It therefore offers administrable rules of decision, unlike the industrial organization based-models that have won the race in the academic market but not in the judicial field. In addition, it presents itself as a non-partisan device. By adopting economic reasoning, the decision might be seen as a non-political one. By refusing to consider any public policy argument outside of consumer welfare maximization, it allows depoliticizing judicial decisions. No social preferences and no perceived necessities of the time have to be taken into account. The decision is seen as outside of the political arena. Economic expertise– outside of the legal profession– guarantees the objectivity of the decision.

However, this apparent neutrality must be discussed. Firstly, maximizing wealth does not imply that the result of the considered practices is Pareto-improving.<sup>31</sup> A Kaldor-Hicks

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<sup>31</sup> The Pareto criterion considers that a change in allocation of resources is welfare improving as soon as no one is made worse off.

criterion is subjacent.<sup>32</sup> The identity of the gainers and of the losers is outside the scope of antitrust laws. The hypothetical compensations have to be implemented (or not) by the government. This question is not relevant to antitrust law enforcement. Secondly, the apparently more economic approach is more the adhesion of a given economic theory—favorable to dominant firms— than a first junction between competition law and competition economics. This point is all the more important, because the Chicago School prescriptions have evolved toward *per se* rules.

Indeed, in the 1980s, the Chicago School approach led to paradoxical *per se* rules that conducted courts to consider, without any effect assessment, that some market practices were consubstantially pro-competitive. It was the case, for example, for exclusive clauses (see, e.g., Bougette et al., 2012). The industrial organization literature has rehabilitated a case-based evaluation. A given practice may have a net positive or negative effect on consumer welfare with regard to the time-and-place-specific market conditions. Yet, the influence of the Chicago School remains dominant as testified by the fourteen consecutive pro-defendant US court decisions (Elhauge, 2007) and also by the rallying of the new Harvard School to a more moderate practice (Crane, 2007).

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

#### **IV. THE LONG WALK TOWARD THE ECONOMIZATION OF US ANTITRUST**

The purpose of this section is to present the main steps of the process by which the Chicago School passed from theory to practice. Oliver Williamson (2003) dated back the initial shift of the antitrust economization to 1965-1968, when Donald F. Turner was Assistant Attorney General at the Antitrust Division of the DoJ. According to Williamson, the dominant theoretical framework of the Antitrust Division was the structuralist school that put the emphasis on barriers to entry (Bain, 1956). It encouraged monopoly explanations for all non-standard or unfamiliar market practices justifying strong antitrust remedies that were seen as

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<sup>32</sup> The Kaldor-Hicks criterion consists in a potential Pareto optimality in which the increase in welfare is sufficiently large that the losers can be potentially compensated (see, e.g., Posner 1981).

the basis of a “populist era” of US antitrust. Concisely, the limitations of the structure-conduct-performance (SCP) paradigm led to an over-enforcement of antitrust laws and a multiplication of decisions that we are accustomed to naming after Easterbrook (1984), false positives.<sup>33</sup>

From an institutional point of view, Williamson shows that the arrival of Donald Turner, first Ph.D. economist, to head the Antitrust Division led to a major breakdown in its policy despite the fact that Turner himself was one of the most influential economists of the antitrust Harvard School. In his textbook on antitrust co-written with Carl Kaysen and published in 1959, he admitted that the “limitation of market power, rather than consumer benefits, [has] to be the chief purpose of Antitrust.” Nevertheless, he initiated the movement toward a more-economic approach that characterized the US antitrust law enforcement from the 1980s. First, he re-equilibrated the influence between lawyers and economists within the Division. The purpose was no longer to win cases but to target practices that harmed consumers. With an amazing staff, which included the now Justice Breyer, Richard Posner, Oliver Williamson, William Commanor, and Kenneth Elzinga, he gave, according to Williamson, antitrust enforcement sounder economic foundations.<sup>34</sup>

Whatever the time of the shift, the diffusion of Chicago models first affected the enforcement agencies before the Supreme Court itself. Williamson (2003) particularly highlights the case of efficiency gains resulting from mergers. The legislative framework was at that time very restrictive (consider the Celler-Kefauver amendment to the Clayton Act). The debate arose from the proposed merger between Procter & Gamble and Clorox.<sup>35</sup> The Supreme Court sustained the FTC’s view that gave a strong importance to barriers to entry and neglected the arguments linked to the efficiency gains. The successive guidelines on mergers will increasingly put the emphasis on these barriers to entry. It was not entirely the case for the 1968 guidelines that were still influenced by the SCP paradigm and “scarcely invite an economies defense.” Things became different with the 1982 Merger Guidelines. First, they increased the market share levels at which the merger could be challenged. Second,

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<sup>33</sup> “One important result of this preoccupation with the monopoly problem is that if an economist finds something -a business practice of one sort or other- that he does not understand, he looks for a monopoly explanation. And, as in this field we are very ignorant, the number of un-understandable practices tends to be very large, and the reliance on monopoly interpretation frequent” (Coase, 1972).

<sup>34</sup> However, according to other scholars, economists remained in a subordinate position until the late 1970s (White, 2010).

<sup>35</sup> *Procter & Gamble Co*, 63 FTC 1465, 1580 (1963).

they accepted the efficiency defense, except in cases for which such gains were extremely difficult to assess. The logic was completely inverted by the 1984 Guidelines. From then on, mergers have been seen as efficiency-enhancers to the benefits of the competitiveness of the firms and of the consumers who may benefit from lower prices. The US antitrust authorities may challenge a project only if it presents a significant danger to competition, and the judicial decision will have to balance such a risk with the induced efficiency gains. The more-economic approach implies assessing efficiency gains on a case-by-case basis and balancing them with potential damages to competition. It also induces a reversal of presumptions compared to the interpretation made of the Sherman Act disposals by Judge Hand in 1945. The more economic approach is not only a matter of economic criteria used in the judicial decision but also embodies a reversal of views about the legitimacy and the long-term effects of the use of market power.

The subordinate position of economics in antitrust law enforcement– always noticeable in the 1970s (White, 2010) – no longer exists if one considers the US practice. If the Chicago program advocates the implementation of an economic-oriented reasoning in the whole legal practice, antitrust enforcement has progressively become an archetypical illustration of such an economization. In this sense, the Chicago School recommendations are applied to antitrust laws enforcement: economics has to be used by the judge as the most relevant toolbox with which to decide each case.

## **V. DISCUSSION**

Despite the critics about the relevancy of Chicago School recommendations, the influence of economics on antitrust enforcement is no longer questioned. White (2010) highlights three main reasons. The first is due to the real advances not only in theoretical developments but also in empirical studies (namely the New Industrial Organization). The second reason is that some economists have been involved in antitrust cases, either within the competition authority (e.g., its own chief economist, external experts) or within companies that have been plaintiffs or defendants in antitrust cases. Lastly, economists have been writing about specific antitrust cases, including those who participated in the proceedings (e.g., Kwoka & White, 2013; Lyons, 2009).

Two dimensions of the economization process will be discussed. The first concerns the current tendency of the Chicago School to advocate for *per se* rules—renewing the *laissez-faire* approach. The second deals with the risk of grounding a decision only upon economic models.

We have first to discuss the autonomy of the judicial decisions with respect to economic analysis. In other words, does economics take over judges' rulings? In the framework of the *Classical Legal Thought*, the judge must just apply the internal logic of common law principles to decide the case according to a logical deductive process. If one makes the hypothesis that the *Neoclassic Legal Thought* (Hovenkamp, 2011) may be interpreted as the substitution of an economics-led dogmatic for the *Classical Legal Thought*, as Bork<sup>36</sup> seemed to indicate in 1966, a close logical connection between these two models may be established. In the first case, the judge's decisions should be based on judicial logical deduction. In the second, the decision must be grounded on economic normative models. In both cases, the judge's discretion must be bound. Consequently, current debates on the conservative bias of the US antitrust (as the Crane (2007)'s "legal modesty" prescription) could be reconsidered in the light of Justice Holmes' dissenting opinion in *Lochner*: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."

As McChesney (1999) stated, the mistrust of antitrust enforcement—already noticeable in Easterbrook's works—paradoxically reached the Second Chicago School scholars. Even though they were very skeptical about government regulations, their associated misjudgments and risk of capture (see, e.g., Wiley, 1986), the argument for a minimal enforcement level came only in the 1990s, when the degree of "market failures" appeared to them to be smaller than the government failures (the 2008 report on single firm practices was the recognition of such a movement). Milton Friedman's (1999) views embody such a shift toward this revival of the *laissez-faire* approach, significantly different from the economic based rule of reason first promoted:

My own views about the antitrust laws have changed greatly over time. When I started in this business, as a believer in competition, I was a great supporter of antitrust laws... But as I watched what actually happened, I saw that, instead of promoting competition,

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<sup>36</sup> "A judge who feels compelled to a particular result regardless of the teachings of economic theory deceives himself and abdicates his delegated responsibility" (Bork, 1966, *op. cit.*, p. 48).

antitrust laws tended to do exactly the opposite, because they tended, like so many government activities, to be taken over by the people they were supposed to regulate and control. And so over time I have gradually come to the conclusion that antitrust laws do far more harm than good and that we would be better off if didn't have them at all.<sup>37</sup>

In fact, as Elhauge (2007) stated, antitrust enforcement is always on the razor's edge between a formalism that favors plaintiffs and another that rules for defendants. A sound economic analysis of cases, grounded on industrial organization models, may help to avoid both Charybdis and Scylla. Nevertheless, it would not give a clear-cut decision because of the plurality of the possible underlying models and the sensitivity of the conclusions about available data and underlying hypothesis. Already underlined by Eleanor Fox (1986), the choice of the models used is the Gordian knot of the more-economic approach implementation. Indeed, Wright (2012) insists on broadening the range of economic models available and therefore on the risks of discretionary rulings based on the model choice.<sup>38</sup>

Two main consequences might be inferred. First, a more economic approach of competition policy enforcement does not lead to more consistent decisions among the different competition agencies. Second, the certainty given by economic models is an illusion.<sup>39</sup> A judicial decision cannot be limited to a mechanical and neutral process. Opting for one model or even for some hypothesis is a choice. We must reject the hypothesis that a more economic approach is apolitical in itself (Drexler, 2011). As Eleanor Fox (1986) stated, economics cannot be seen as value-free.

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<sup>37</sup> Friedman (1999, p.7).

<sup>38</sup> “While the ratio of theoretical models to empirical evidence has soared over the past thirty years, antitrust institutions lack decision making protocols for choosing among competition models. Courts and enforcement agencies retain broad discretion in selecting theoretical models *ad hoc*, tailoring decisions to the arbiter's relative economic sophistication, intellectual priors, or even desired result.” (Wright, 2012, p. 241).

<sup>39</sup> Justice Oliver Wendell Holmes (1897) stated: “The danger of which I speak is not the admission that the principles governing other phenomena also govern the law, but the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct. [...]. The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose, which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form.”

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

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

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