Chicago and Its Discontents

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This symposium began with a call for papers "reassessing the validity of the Chicago School's assumptions about competition and considering whether a more aggressive approach to antitrust enforcement is now warranted." That framing uncritically accepts the premises of antitrust's new populist movement: first, that "the Chicago School" marked an abrupt break from prior academic analysis of antitrust law, and second, that its adherents shared a common positive agenda fundamentally at odds with robust antitrust enforcement. Both of those premises are false. The Chicago School represented a logical continuation of the antitrust analysis developed over the preceding decades, and its members shared no positive doctrinal agenda. Instead, they shared a commitment only to promoting consumer interests by means of rigorous economics. Of course, that commitment influenced how the economics profession and antitrust policymakers thought, and progressive "post-Chicago" scholarship today shares the same commitment to consumer welfare and economic rigor. Such scholarship thus has far more in common with Chicago School scholarship of the 1960s and 1970s than with today's populist movement, which abandons any coherent framework altogether.

INTRODUCTION

Antitrust populists rally around two basic themes: big is bad, and "the Chicago School" is to blame for letting big companies do bad things. Here is how Barry Lynn of the Open Markets Institute describes the influence of that "School":

> A generation ago, when a small crew within the Reagan administration set out to clear the way for a radical reconcentration of power, they did so not by openly assailing our antimonopoly laws but by altering the intellectual frames that

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> guide how we enforce them. . . . [T]he new goal was "efficiency." Rather than protect the "opportunity" of the citizen producer, the new goal was to promote the "welfare" of the "consumer."[1]

The result? An "overthrow of our antimonopoly laws," leading America to become "an economic—hence political—autocracy."[2]

Taking such rhetoric at face value, this symposium originated with a call for papers "reassessing the validity of the Chicago School's assumptions about competition and consider[ing] whether a more aggressive approach to antitrust enforcement is now warranted."[3] Yet the very framing of that question is problematic because it uncritically accepts the populist movement's skewed historical narrative. As Lynn's quote illustrates, that movement assumes, first, that the Chicago School marked an abrupt shift from prior academic approaches to antitrust law, and second, that its adherents shared a common positive agenda fundamentally at odds with robust antitrust enforcement. In fact, both of those premises are false, and exposing them as such places today's populism in much-needed perspective.

Although the Chicago School of the 1960s and 1970s made critical contributions to the field, it represented a logical continuation of, not a radical break from, the modes of antitrust analysis developed by thoughtful scholars over the preceding decades. Consider some key principles that populists attribute to the Chicago School and accordingly vilify—that antitrust should address only "harm to competition" rather than mere "harm to competitors"; that "harm to competition" means harm to consumer interests; and that antitrust should thus narrowly circumscribe a large firm's liability for charging low prices, even if they drive smaller, less efficient businesses from the market.

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1 Barry C. Lynn, *No Free Parking for Monopoly Players: Time to Revive Anti-Trust Law* (The Nation, June 8, 2011), archived at https://perma.cc/6QZ5-EMTB.

2 Id. See also Mark Glick, *The Unsound Theory Behind the Consumer (and Total) Welfare Goal in Antitrust*, 63 Antitrust Bull 455, 456–58 (2018); Lina M. Khan, *The Ideological Roots of America's Market Power Problem*, 127 Yale L J F 960, 965–70 (2018); Marshall Steinbaum, Eric Harris Bernstein, and John Strum, *Powerless: How Lax Antitrust and Concentrated Market Power Rig the Economy Against American Workers, Consumers, and Communities* *16–17 (Roosevelt Institute, Feb 2018), archived at https://perma.cc/38K7-Q4Y9; Marc Jarsulic, et al, *Reviving Antitrust: Why Our Economy Needs a Progressive Competition Policy* *11–13 (Center for American Progress, June 2016), archived at https://perma.cc/7FKN-MUJA.

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

These hallmarks of the "consumer welfare" standard did not originate at Chicago. They all appeared prominently in critiques of the Robinson-Patman Act[4] in the 1950s and 1960s by such non-Chicago scholars as Frederick Rowe,[5] Professor Morris Adelman,[6] and Professor Robert Pitofsky.[7] The same principles also appeared in two 1949 articles attacking the government's successful Sherman Act prosecution of the giant A&P supermarket chain for decimating less efficient corner grocers through low prices and vertical integration. Those articles—one by MIT's Adelman[8] and the other by then–Yale Law student Donald Turner[9]—exposed the economic incoherence of the government's case and, in particular, its failure to show how harm to A&P's smaller rivals could possibly harm consumers. When Turner simultaneously identified the "potential contradiction" underlying the government's antitrust philosophy—that is, its tendency to suppress welfare-enhancing competition while purporting to promote it[10]—he foreshadowed Robert Bork's claim almost thirty years later that antitrust policy had become "a policy at war with itself."[11] And the Supreme Court's *Brooke Group Ltd v Brown & Williamson Tobacco Corp*[12] predatory pricing standard,[13] so widely condemned by populists today, essentially follows a proposal set forth in a 1975 law review article that Turner coauthored with his Harvard colleague Professor Phillip Areeda after returning from a stint as DOJ antitrust chief in an economically liberal Johnson Administration.[14]

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4 Pub L No 74-692, 49 Stat 1526 (1936), codified as amended at 15 USC § 13.

5 See Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum L Rev 1059, 1060 (1957); Frederick M. Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L J 929, 940–42 (1951); Part II.A.

6 See M.A. Adelman, *A&P: A Study in Price-Cost Behavior and Public Policy* 160–79 (Harvard 1959).

7 See *Report of the American Bar Association Commission to Study the Federal Trade Commission* 67–68 (1969) (Robert Pitofsky, ABA Commission Counsel).

8 See generally Morris A. Adelman, *The A&P Case: A Study in Applied Economic Theory*, 63 Q J Econ 238 (1949).

9 See generally Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A&P Case*, 58 Yale L J 969 (1949). See also Adelman, *A&P* at 18 & n 9 (cited in note 6) (identifying Turner as the author of the Yale Note).

10 Note, 58 Yale L J at 969–71 (cited in note 9).

11 Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 7 (Basic Books 1978).

12 509 US 209 (1993).

13 Id at 222–23.

14 See Phillip Areeda and Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv L Rev 697, 715 (1975). See also notes 95–99 and accompanying text.

Progressive "post-Chicago" scholarship today also has far more in common with Chicago School scholarship of the 1960s and 1970s than with today's populist movement. To appreciate this point, we must distinguish between two different types of antitrust criticism: (1) economically rigorous efforts to identify new contexts in which aggressive antitrust intervention is needed to promote consumer welfare and (2) populist movements to dispense with consumer welfare as the sole or even primary focus of antitrust concern. Initiatives in the first category include "raising rivals' costs" theories of harm, developed by Professors Steven Salop, Thomas Krattenmaker, and others starting in the 1980s.[15] Such theories rest on rigorous economic foundations and retain an appropriately sharp focus on consumer welfare. These proposals for increased antitrust intervention accordingly involve an *evolution* of thinking associated with the Chicago School, not a conceptual break from that thinking,[16] just as Chicago itself represented an evolution of pre–Chicago School antitrust analysis. In contrast, populist initiatives in the second category—that is, to dispense with consumer welfare as the primary focus of antitrust—have no clear conceptual objectives other than reining in large global companies that displace smaller, more local, and less efficient companies. This movement does indeed reject the Chicago School, but only in the same sense that it broadly rejects a more general commitment to consumer interests.

These are important points for antitrust authorities, scholars, and practitioners to understand today. They should help defuse political rhetoric about the Chicago School label and identify the true ideological fault line today's debates: between those who do and those who do not view consumer interests as paramount in antitrust doctrine.

I. "CHICAGO SCHOOL": AN EPITHET IN NEED OF HISTORICAL CONTEXT

The term "Chicago School" is typically associated with antitrust literature written by scholars who either taught at or had

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15 See Thomas G. Krattenmaker and Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L J 209, 253–55 (1986); note 124 and accompanying text (discussing the Chicago School antecedents of these theories).

16 Andrew I. Gavil, William E. Kovacic, and Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy* 70 (Thomson/West 2d ed 2008) ("Post-Chicago commentators generally propose qualifying rather than supplanting Chicago views.").

attended the University of Chicago from the mid-1950s through the 1970s. These included Professors Aaron Director and Edward Levi, who taught an enormously influential antitrust course there beginning in the 1950s, and Richard Posner and Frank Easterbrook, who began supplementing their teaching duties in the 1980s with service on the Seventh Circuit, where they influenced antitrust law more directly.[17] Ironically, the figure most commonly associated today with the Chicago School, Robert Bork, never taught there. But as a 1953 graduate of the Law School, he credited Director and Levi, among others, for shaping the early development of his antitrust philosophy.[18]

The Chicago School has had an undeniably important influence on how courts, practitioners, and scholars have viewed antitrust law for the past half century. But popular accounts have tended to misunderstand the nature of that influence. To dispel the confusion, we must distinguish among three types of questions:

(1) What are the ultimate objectives of antitrust—the promotion of consumer interests or some other goal/goals?

(2) What is the correct mode of analysis for measuring antitrust's success in meeting those designated objectives—economic/empirical analysis or something else?

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17 Richard A. Posner, *Antitrust: Cases, Economic Notes and Other Materials* xiii (West 1st ed 1974). In 1974, Posner described his new antitrust casebook as

> a successor to mimeographed materials first prepared by Edward H. Levi and used by him and Aaron Director in the course on antitrust law that they taught jointly at the University of Chicago Law School for many years. On the last class of each week of the course, Professor Director would present an economist's comments on the cases discussed during the week. The economics notes scattered throughout this casebook attempt to do what Professor Director's lectures did: expound the relevant economic concepts against the background of particular cases that illustrate the relevance of the concepts to the issues of antitrust law. . . . Much of the economic analysis expounded in these notes is based on ideas first proposed by Director. A number of these ideas were later developed and published by other economists whose work I do cite. These citations conceal Director's seminal role in the development of the economics of competition and monopoly presented in this book.

18 See Bork, *Antitrust Paradox* at ix–x (cited in note 11).

(3) What substantive antitrust rules would best ensure that antitrust serves its designated objectives?

When populist critics attack the Chicago School, they are often (though not invariably) attacking what they perceive as Chicago's answer to the third question, concerning antitrust *doctrine*. Populists routinely assume that Chicago School focused on, and favored "conservative" approaches to, the doctrinal content of antitrust law. There is of course a kernel of truth in that assumption. Some individual Chicago School scholars did indeed advocate broad limits on market intervention. In addition to Bork, these included Frank Easterbrook, who advocated a "profoundly skeptical program" that would limit antitrust enforcement to "little other than prosecuting plain vanilla cartels and mergers to monopoly."[19]

It is also true that scholars associated with the Chicago School challenged long-held but poorly tested assumptions supporting antitrust intervention in particular contexts. By the early 1970s, much of antitrust policy reflected the "simple market concentration doctrine," which held that even modest degrees of market concentration were inherently harmful, even in seemingly well-functioning markets.[20] Economists, enforcement agencies, and many in Congress had all invoked that doctrine to support several aggressive forms of antitrust intervention, such as suits to block mergers even in reasonably unconcentrated markets and emerging initiatives to hold companies liable under novel § 2 theories of "no-fault monopoly" and "shared monopoly."[21] The research of Professor Harold Demsetz and others associated with the Chicago School, commemorated in a 1974 volume of essays, helped defuse this movement by refuting the empirical premises of the simple market concentration doctrine.[22] This Chicago School–led scholarship ultimately led industrial organization economists and antitrust authorities to take a more nuanced view

19 Frank Easterbrook, *Workable Antitrust Policy*, 84 Mich L Rev 1696, 1701 (1986).

20 See 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, 167 (2012).

21 See generally Timothy J. Muris, *Economics and Antitrust*, 5 Geo Mason L Rev 303 (1997).

22 See Harold Demsetz, *Two Systems of Belief About Monopoly*, in Harvey J. Goldschmid, H. Michael Mann, and J. Fred Weston, eds, *Industrial Concentration: The New Learning* 164, 170–74 (Little, Brown 1974).

of market concentration in the modern economy, with critical implications both for merger-enforcement policy and for the novel § 2 theories of the 1970s.[23]

That said, populists are wrong to equate the Chicago School in general with advocacy for conservative antitrust doctrine. As one of us has written, the scholars associated with that School had no single affirmative program for antitrust; they were unified only in their rejection of the intellectual incoherence that had characterized so many mid-century antitrust decisions.[24] For example, while Frank Easterbrook proposed a rule of per se legality for all price cuts by monopolists,[25] Richard Posner not only rejected that position, but also criticized, as too permissive and pro-defendant, the mainstream predatory pricing test advocated by Harvard Professors Areeda and Turner.[26] And Chicago School scholars were all over the map on merger policy. Bork's then-permissive views came close to those of the Obama Justice Department decades later, whose 2010 guidelines effectively made four-to-three mergers the marginal case.[27] Posner advocated a policy far more restrictive than the Obama DOJ's; his approach would presumptively bar any merger leaving a four-firm concentration level greater than 60 percent.[28] And the Chicago School

23 The essays collected in *Industrial Concentration: The New Learning* summarized discussions at a seminal March 1974 conference at Virginia's Airlie House on the concentration issue. See Harvey J. Goldschmid, H. Michael Mann, and J. Fred Weston, eds, *Industrial Concentration: The New Learning* vii–viii (Little, Brown 1974). The conference was formatted as a debate between proponents of the simple concentration school, then constituting the vast majority, and its opponents, almost all associated with the Chicago School. The effect on policy and doctrine was profound, especially in tempering hostility to mergers, but also in undercutting the expansion of "no fault" and "shared monopoly" theories of Section 2 liability. The Chicago position succeeded not because it favored entrenched interests or big business, but because it rested on the types of sound economic analysis that those on both sides of the debate favored. See Jonathan B. Baker, Book Review, *Economics and Antitrust Policy*, 34 Antitrust Bull 919, 920 (1989). See also note 117 (addressing today's market-concentration controversies).

24 Kobayashi and Muris, 78 Antitrust L J at 167–68 (cited in note 20).

25 Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U Chi L Rev 263, 333–37 (1981).

26 See Richard A. Posner, *Antitrust Law: An Economic Perspective* 191–93 (Chicago 1976) (criticizing Areeda and Turner).

27 Compare Bork, *Antitrust Paradox*, at 221–22 (cited in note 11) (advocating for an interpretation that would make four-to-three mergers presumptively lawful but not three-to-two mergers), with Federal Trade Commission, *Federal Trade Commission Workshop on Horizontal Merger Guidelines Review Project* *23–24 (Jan 26, 2010), archived at https://perma.cc/WS2T-MJ5F ("The assumption there was sort of a six to five [merger] was the threshold where we would start getting concerned, it looks more like where we are today is five to four or four to three.").

28 See Posner, *Antitrust Law* at 112 (cited in note 26).

scholar with the greatest actual influence on merger policy—Reagan DOJ antitrust chief William Baxter—endorsed an approach that is highly restrictive by today's standards. His approach is reflected in the 1982 merger guidelines, which made six-to-five mergers the marginal case.[29]

In short, the animating spirit that unified the Chicago School related less to the third question above—How interventionist should antitrust doctrine be?—than to the first two: What is antitrust's objective, and how should we measure success in meeting it? The Chicago School's answers to these questions are well known. Chicago School scholars identified the interests of consumers as the paramount concern of antitrust and opposed "balancing" them against other, typically conflicting interests, such as the desire of small businesses to avoid price competition from larger, more efficient businesses.[30] And Chicago School scholars also chose rigorous economics as the preferred means of determining whether antitrust doctrine was actually serving consumer welfare.[31] As we next discuss, however, Chicago School scholars did not invent these approaches to antitrust. Instead, their insights built on the earlier insights of others, stretching back to the first half of the twentieth century, and coexisted with similar insights by non-Chicago contemporaries.

II. CHICAGO'S PRIOR ART

If the Chicago School had sought to patent its use of the consumer welfare standard and rigorous economic analysis, it would have confronted two formidable objections. The first, discussed immediately below, would have been the "prior art": scholars unassociated with the Chicago School had long advocated both the primacy of consumer interests and economic analysis. And the second objection, discussed in Part III below, would have been a problem of "obviousness." These non-Chicago scholars favored the same approach as the Chicago School not by coincidence, but because mid-century antitrust precedents had made it obvious that

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29 See United States Department of Justice Antitrust Division, Merger Guidelines, 47 Fed Reg 28493, 28497 (1982) ("Markets . . . having the equivalent of no more than approximately six equally sized firms [are considered to be highly concentrated]. Additional concentration resulting from mergers is a matter of significant competitive concern.").

30 See Bork, *Antitrust Paradox* at 89 (cited in note 11) ("[T]he case is overwhelming for judicial adherence to the single goal of consumer welfare in the interpretation of the antitrust laws.").

31 See Kobayashi and Muris, 78 Antitrust L J at 152 (cited in note 24) (discussing the Chicago School's use of theoretical and empirical economics to analyze antitrust law).

antitrust would remain an incoherent muddle until it refocused on consumer welfare and economics.

A. Robinson-Patman Criticism: Adelman, Rowe, and Pitofsky

Much of the pre–Chicago School scholarship[32] foreshadowing the modern consumer welfare standard appeared in response to the most important antitrust legislation of the interwar period: the Robinson-Patman Act of 1936, whose lessons are too often forgotten in antitrust commentary today.[33] The Act generally prohibits a supplier from selling "commodities of like grade and quality" at different prices to different buyers, except that (among other exceptions) the seller may offer special discounts to "meet" competition and may make "due allowance for differences in the cost of manufacture, sale, or delivery."[34] A Yale Law professor presciently observed a year after passage that the Act's prohibitions and arcane exceptions would elevate "arbitrariness and guesswork" over economic theory and that "[t]rial is to proceed by the ordeal of cost accountancy."[35]

More problematically, the Act was not only poorly written, but poorly conceived. Originally entitled the "Wholesale Grocers Protection Act,"[36] it was explicitly enacted to protect entrenched economic interests—wholesalers and small retailers—by keeping large chain stores such as the supermarket giant A&P from underselling their smaller rivals by acquiring goods at a discount, bypassing middlemen, and passing along the savings to consumers.[37] As Chief Judge Diane Wood (a liberal member of the Chicago Law faculty) explained for the Seventh Circuit in 2016,

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32 Our use of the phrase "pre-Chicago" denotes the period before the modern Chicago School's scholarship became widely known in the 1960s. Of course, the University of Chicago had important antitrust scholars before Professors Director and Levi, but they are not typically associated with the modern Chicago School.

33 See Timothy J. Muris and Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of* United States v. A&P, 54 Rev Indust Org 651, 666–67 (2019) (arguing that the Act was a result of "antitrust [being] divorced from an economically rigorous focus on consumer welfare" and that modern antitrust critics similarly fail to distinguish "between harm to *competitors* and harm to *competition*"); Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L Rev 1113, 1187–96 (1983) (discussing the harmful effects of the Act, including increased costs of doing business, price rigidity, and price fixing).

34 15 USC § 13(a), (b).

35 Walton H. Hamilton, *Cost as a Standard for Price*, 4 L & Contemp Probs 321, 323, 328 (1937).

36 Hansen, 51 Fordham L Rev at 1123 (quotation marks omitted) (cited in note 33).

37 See Muris and Nuechterlein, 54 Rev Indust Org at 656–58 (cited in note 33).

the Robinson-Patman Act's "'fit with . . . antitrust policy is awkward, as it was principally designed to protect small businesses' at the expense of consumers."[38]

The preeminent mid-century expert on the Robinson-Patman Act was Fred Rowe, who published the leading treatise on the subject.[39] In 1951, while still a law student, Rowe criticized the Act in the *Yale Law Journal* for harming welfare-enhancing competition in the name of promoting individual competitors.[40] As he noted, other scholars had rightly characterized the Act as "a part of the struggle between the older and newer organizations in distribution in which the older group sought protection from the state presumably because it was not prepared to rely on the outcome of competition."[41] Rowe illustrated the point by quoting a wholesaler lobbyist who complained to Congress that the federal antitrust agencies had acted with insufficient "zeal and loyalty for the Robinson-Patman Act" and had "seem[ed] to have gone off the reservation to follow the will-o'-the wisp of something termed 'hard competition.'"[42] Rowe observed that when the agencies applied the Act by its terms, as such rent-seekers demanded, "[n]eeded development of lower-cost distribution is impaired. Competitive public policy should not preserve wholesalers against the inroads of competition."[43]

Ultimately, Rowe concluded, the Robinson-Patman Act itself was "antithetical to [sound] antitrust policy."[44] He explained: "To cope with price discrimination as part of a coherent antitrust program, *law and economics must jibe*. Robinson-Patman's demonstrated blindness to economic consequences blocks the market analysis essential to this result."[45] Rowe also expressed concern that the Act had corrupted antitrust analysis in general and quoted others with the same view: "The philosophy of the

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38 Id at 658, quoting *Woodman's Food Market, Inc v Clorox Co*, 833 F3d 743, 746 (7th Cir 2016), cert denied, 137 S Ct 1213 (2017).

39 See generally Frederick M. Rowe, *Price Discrimination Under the Robinson-Patman Act* (Little, Brown 1962).

40 See Rowe, 60 Yale L J at 942–55 (cited in note 5).

41 Id at 949 n 136, quoting Arthur R. Burns, *The Effectiveness of the Federal Antitrust Laws: A Symposium*, 39 Am Econ Rev 689, 695 (1949).

42 Rowe, 60 Yale L J at 949 n 136 (cited in note 5), quoting *Functional Operation of the Federal Trade Commission, Hearings Before Select Committee on Small Business*, 81st Cong, 2d Sess 65–66 (1950) (statement of R.H. Rowe, United States Wholesale Grocers' Association).

43 Rowe, 60 Yale L J at 948–49 (cited in note 5) (footnote omitted).

44 Id at 974.

45 Id at 974–75 (emphasis added).

Sherman Act appears to be yielding to a policy of 'ethical competition,' which does not differentiate between the stability of the individual firm and the stability of the total economy."[46] Quoting a presidential economic advisor, he worried that this new populist tendency, "by depriving competition of its vigor, [would] deny the people those benefits of *larger production, lower costs and prices, and improved standard of living* which the Sherman Act was designed to promote."[47] All of these observations expressed the essence of the Chicago School's emphasis on consumer welfare and economic rigor—yet they came from a Yale law student in 1951, who was quoting economists in the Truman Administration.

Another prominent critic of Robinson-Patman was Robert Pitofsky, who, as an NYU professor, was the staff author of a widely publicized 1969 ABA report criticizing the FTC's institutional deficiencies.[48] Pitofsky, too, condemned the FTC's Robinson-Patman enforcement policies for protecting small companies against larger, more efficient firms and for "equat[ing] injury to a particular competitor with injury to the competitive process."[49] That approach, he observed, "has been *detrimental to the consumer* in its tendency to suppress price competition, deter experimentation with new and more efficient methods of distribution, and erect barriers to entry into new markets by highly competitive, geographically diversified firms."[50] And he thus urged the FTC to "focus enforcement . . . on instances in which *injury to competition* is clear, taking into account *the consumer interest* in vigorous price competition."[51]

These are positions that today's populists vilify and associate with the Chicago School. But like Rowe, Pitofsky was no Chicagoan. A future FTC Chairman in the Clinton Administration, he explicitly criticized the answers that various Chicago School figures gave to specific questions of antitrust doctrine.[52] As discussed

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46 Id at 974 n 290, quoting Council of Economic Advisers, *Third Annual Report to the President* 15 (1948), archived at https://perma.cc/LFB8-CX93.

47 Rowe, 60 Yale L J at 974 n 290 (cited in note 5), quoting *Hearings Before the Subcommittee on a Study of Monopoly Power of the Committee on the Judiciary, House of Representatives*, 81st Cong, 1st Sess 114 (1949) (statement of John D. Clark, Council of Economic Advisers) (emphasis added). Rowe returned to these themes six years later in a highly influential critique of the Act. See Rowe, 57 Colum L Rev at 1060 (cited in note 5).

48 See generally *Report of the ABA Commission* (cited in note 7).

49 Id at 67.

50 Id (emphasis added).

51 Id at 68 (emphasis added).

52 See note 121 and accompanying text.

below, however, he and his fellow "post-Chicago" scholars still focused on an economic analyses of consumer welfare—precisely the orientation that the populists reject. They simply disagreed with individual Chicago scholars about the welfare effects of certain types of conduct, about what rules antitrust should design for such conduct, and about the institutional competence of courts and enforcement agencies to promote consumer welfare through greater antitrust intervention.

Before the mid-1970s, no one could call himself a competent antitrust lawyer unless he could advise clients on the intricacies of Robinson-Patman doctrine. Indeed, a nearly two-thirds majority of the FTC's nonmerger antitrust agenda consisted of Robinson-Patman cases and investigations—hundreds of them in the 1950s and 1960s.[53]

Over the very long term, decades of withering criticism from Rowe, Pitofsky, Adelman, and others led the government to suspend Robinson-Patman enforcement activities[54] and led courts to find creative ways to limit the Act's applicability.[55] In the near to medium term, however, the Act had a highly pernicious effect on antitrust law—not only because it was aggressively enforced in its own right, but also because its big-is-bad modes of reasoning infected how enforcers and courts conceptualized antitrust law in general. For example, Adelman described DOJ's prosecution of A&P in the 1940s (discussed below) as a successful "attempt . . . to infuse the Robinson-Patman Act into the Sherman Act," along with all of its "hostility to price competition, the yearning for secure entrepreneurial status, [and] the envy and hate of the small businessman for big business."[56] Indeed, the district court in

53 See D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo Wash L Rev 2064, 2071–73 (2015).

54 See id at 2074–76 (noting that "[b]y the mid-1970s, DOJ unilaterally stopped its Robinson-Patman enforcement"); United States Department of Justice, *Report on the Robinson-Patman Act* 250 (1977). Chicago's Richard Posner deserves some credit for discouraging aggressive federal enforcement of the Robinson-Patman Act. See Richard A. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 52–53 (American Enterprise Institute 1976) (advocating for the repeal of the Act). Still, most of the credit for suspending such enforcement goes to non-Chicago critics such as Rowe and Pitofsky and, as discussed below, MIT's Morris Adelman. Another non-Chicagoan, FTC Commissioner Philip Elman, was another important Robinson-Patman critic during the 1960s. See also Muris and Nuechterlein, 54 Rev Indust Org at 659 (cited in note 33) (discussing how growing criticism from Rowe, Adelman, Pitofsky, Posner, and Elman led to the de facto end of federal Robinson-Patman enforcement by the 1980s).

55 See, for example, *Volvo Trucks North America, Inc v Reeder-Simco GMC, Inc*, 546 US 164, 180–81 (2006).

56 Adelman, *A&P* at 17 (cited in note 6).

United States v New York Great Atlantic & Pacific Tea Co[57] (*A&P*) expressed "doubt whether we ever needed the Robinson-Patman law," given that "the Sherman Act, properly interpreted and administered, would have remedied all the ills meant to be cured."[58]

The academic criticism presented by Rowe, Adelman, and Pitofsky, along with the ensuing demise of Robinson-Patman enforcement, marked critical milestones in reorienting antitrust toward economic rationality. Although largely forgotten, this story carries important lessons today. The Robinson-Patman objectives Adelman identified at the root of the A&P prosecution are precisely the objectives that animate today's populist movement: a condemnation of bare-knuckle "price competition" and its "envy and hate" of large companies for upsetting the "secure [ ] status" of "the small businessman."[59] We do not even have to imagine what the triumph of populism would mean for twenty-first-century antitrust. We need only revisit the twentieth century's experience with Robinson-Patman and with the A&P prosecution to which we now turn: consumers and rationality lost, while inefficiency and intellectual incoherence prevailed.

B. Criticisms of the A&P Prosecution: Adelman and Turner

In the late 1940s, DOJ successfully prosecuted A&P and its senior executives under the Sherman Act for using the company's then-unprecedented scale and scope to disintermediate wholesalers and undersell less efficient grocery stores.[60] It argued, in effect, that A&P should be held criminally liable for favoring the interests of its consumers over those of displaced middlemen and undersold retail competitors.[61] In the words of one prosecutor, "A&P sells food cheaply [to consumers] in its own stores because it is a gigantic blood sucker, taking its toll from all levels of the food industry."[62] The district court endorsed that theme in a

57 67 F Supp 626 (ED Ill 1946), affd 173 F2d 79 (7th Cir 1949).

58 *A&P*, 67 F Supp at 676.

59 Adelman, *A&P* at 17 (cited in note 6). Compare Steinbaum, Bernstein, and Strum, *Powerless* at 38 (cited in note 2) (criticizing competition policy for holding that "[a]s long as the consumer came out ahead . . . any negative ramifications for small business . . . could be tolerated").

60 See Muris and Nuechterlein, 54 Rev Indust Org at 655–57, 660–63 (cited in note 33).

61 See id at 662 ("Ultimately, the government's case had nothing to do with any genuine theory of *consumer* harm and everything to do with protecting companies at all levels of the grocery business from A&P's disruptive efficiency.").

62 Marc Levinson, *The Great A&P and the Struggle for Small Business in America* 229 (Hill and Wang 2011).

fifty-four-page opinion that was long on "fairness" rhetoric and sensory metaphors but short on economic analysis and limiting principles.[63] For example, it found that A&P's business model was "odorous" and "t[ook] on a polluted colored light," though only when "considered as a whole."[64]

The reaction of economically trained antitrust scholars was swift and harsh. Writing in 1949, MIT's Adelman observed that DOJ had won the case on the basis of "economic fallacies" that "should be quickly obvious to any trained and competent economist."[65] DOJ, he added, had "confused the maintenance of competition with the protection of particular competitors. But the two are usually (though not always) antithetical: no strong competitor, . . . however beneficent his achievements, could avoid affecting adversely other competitors and even putting some of them out of business."[66] Adelman later noted, in an influential and highly regarded book on the *A&P* case, that "the government lawyers, although competent in their profession, were so sadly illiterate in economic facts and economic analysis that they simply did not realize what they were saying."[67] For example, he observed, neither DOJ's prosecutors nor the district court articulated any economically coherent basis for distinguishing between "predatory" price cuts and permissible price competition.[68]

Beyond that, Adelman explained, it was economically incoherent to predicate any prosecution of a grocery store chain on a theory of predatory pricing in the first place, given low barriers to entry in the relevant markets: "No reasonable and prudent A&P management would have incurred losses to drive out competition because it would have been impossible to claim the pay-off," given that "[e]ntry into the food trade was so cheap and easy that any attempt to raise prices would immediately have resurrected competition."[69] Adelman thus anticipated by several decades the recoupment analysis that the Supreme Court embraced in its 1993

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63 See Muris and Nuechterlein, 54 Rev Indust Org at 660–63 (cited in note 33) (discussing the district court decision). See generally *A&P*, 67 F Supp 626.

64 *A&P*, 67 F Supp at 658, 678.

65 Adelman, 63 Q J Econ at 256 (cited in note 8).

66 Id.

67 Adelman, *A&P* at 16 (cited in note 6).

68 See id at 14–15.

69 Id at 14.

Brooke Group decision, which today's populists condemn and misattribute to the Chicago School.[70]

The *A&P* case was also the topic of a 1949 *Yale Law Journal* Note written by a young Donald Turner, who had received an economics doctorate from Harvard and was earning his law degree at Yale while teaching economics there.[71] Like Adelman, Turner explained that the prosecution had made no serious effort to "draw the line between 'predatory' and 'competitive' price-cutting," and thus its "general broadside against A&P's reduction of gross profit rates is a direct attack on the competitive process. . . . Does the Government or the court feel that business should never risk a loss for the sake of ultimate gain? If so, a good share of competition must be consigned to limbo."[72] Likewise, Turner explained, the court's attacks on A&P's strategic use of corporate affiliates "approach saying that vertical integration is illegal *per se*."[73]

In these and other respects, Turner condemned what he saw as a "serious contradiction" in the prevailing antitrust regime illustrated by the *A&P* case: a misguided effort toward applying the Sherman Act to attack the very competitive forces it was meant to promote.[74] He explained:

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70 See *Brooke Group*, 509 US at 225 ("[P]laintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it."). See also Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L J 710, 727–30 (2017) (arguing that the Chicago School shaped Supreme Court doctrine on predatory pricing, including the recoupment test announced in *Brooke Group*).

71 See generally Note, 58 Yale L J 969 (cited in note 9).

72 Id at 977.

73 Id at 978. The Chicago School is often credited (or blamed, in the case of modern populists) with changing the antitrust perception of vertical restraints and mergers. Chicago economics was indeed important, although one of the most influential "Chicago School" articles on vertical restraints was written by a Yale professor who never earned a Chicago degree. See generally Ward S. Bowman, *Tying Arrangements and the Leverage Problem*, 67 Yale L J 19 (1957) (arguing for a reexamination of tying law). See also note 90 (discussing Bowman's association with the Chicago School). And economists with no connection to Chicago were also highly influential. These included Nobel Laureate Oliver Williamson, who persuasively opposed the general hostility toward vertical integration that had prevailed in mid-century antitrust. See Oliver E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 82–131 (Free Press 1975). Williamson explained that vertical integration is often necessary to reduce transaction costs, including those involving "post-contractual opportunism," and his views are now widely accepted in both law and economics. Id at 104. See also 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, 14 n 36 (noting that Williamson "is not easily described as being [ ] a Chicago School . . . commentator").

74 Note, 58 Yale L J at 970 (cited in note 9).

> The lure of temporary monopoly profits is an important impetus to the introduction of new products and new techniques, which rudely upset the peaceful, profitable existence of long-entrenched business firms. This constant change to the new, the more efficient, is the very heart of the process of effective competition.
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> . . .
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> But in [the *A&P* case] . . . the defendant corporation represented the forces of competition, efficiency and change. The potential contradiction in the New Sherman Act is sharply exposed."[75]

The young Turner might just as well have described the prevailing antitrust regime, as Robert Bork did, as a paradox—"a policy at war with itself."[76] Yet Turner never studied or taught at Chicago and was no Bork. To the contrary, he went on to lead the Antitrust Division during the Johnson Administration and co-found the so-called Harvard School of antitrust, which, as discussed below, influenced modern antitrust jurisprudence as much as Chicago scholars did.[77]

C. Criticism of 1960s Antitrust Precedents: Handler and Kauper

While the modern Chicago School was approaching maturity in the 1960s, the Warren Court was disrupting American antitrust jurisprudence with a series of poorly reasoned decisions that, in the words of venerable Columbia Professor Milton Handler, "exalted [form] over substance to a degree unparalleled in the history of antitrust" and invoked ever "more hoary rules . . . to the utter exclusion of a consideration of economic needs and effects."[78] Handler was speaking here of *United States v Arnold, Schwinn & Co*,[79] an inscrutable 1967 decision on vertical restraints that was unceremoniously overruled ten years later.[80] Incoherent though it

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75 Id at 969–71.

76 Bork, *The Antitrust Paradox* at 7 (cited in note 11).

77 See Kovacic, 2007 Colum Bus L Rev at 33–43 (cited in note 73).

78 Milton Handler, *The Twentieth Annual Antitrust Review—1967*, 53 Va L Rev 1667, 1684, 1686 (1967).

79 388 US 365 (1967), overruled by *Continental T.V., Inc v GTE Sylvania Inc*, 433 US 36 (1977).

80 See *Schwinn*, 388 US at 379 (announcing the per se rule); *Continental T.V.*, 433 US at 58. See also Earl E. Pollock, *Alternative Distribution Methods After* Schwinn, 63 Nw U L Rev 595, 595 (1968) ("[T]he teaching of *Schwinn* is that in antitrust cases form is more important than substance.").

was, *Schwinn* had several strong rivals for "worst antitrust decision of the 1960s," and another candidate that drew Handler's criticism was *Utah Pie Co v Continental Baking Co*,[81] also decided in 1967.[82]

The defendants in that case were several national frozen pie companies that had selectively lowered their prices in Salt Lake City to compete more effectively against plaintiff Utah Pie, a local company that controlled nearly two-thirds of the Salt Lake City pie market.[83] None of these defendants plausibly hoped to gain more than a minority share of the relevant market; still less could any of them expect to drive all other competitors from that market and then raise its own prices to monopoly levels. Indeed, Utah Pie retained more than 45 percent of that market despite years of competition from national corporations.[84] The Supreme Court nonetheless upheld jury verdicts against the national pie companies because it was troubled that they had selectively lowered prices in Utah and not elsewhere.[85] That tactic, the Court believed, was unduly hard on the local incumbent, which was family operated and had "only 18 employees."[86] The Court held that antitrust should protect such small companies, even those with high local market shares, from "the financial pinch" they feel when selective price-cutting by larger competitors forces them to "reduce [their] price[s] to a new all-time low in a market of declining prices."[87]

No one needed to wait for a Chicago scholar to identify the problem with this logic. Handler remarked:

> *Isn't the ultimate goal of antitrust a competitive economy with lower consumer prices?* Of course, if a seller lowers prices and *then raises them to higher levels after driving his competitors out of business*, a classic antitrust violation has occurred. The [*Utah Pie*] opinion's implication that discrimination leading to a general price decline may, alone, suffice to spell illegality is troublesome.[88]

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81 386 US 685 (1967).

82 See Handler, 53 Va L Rev at 1692–98 (cited in note 78).

83 *Utah Pie*, 386 US at 689–91.

84 Id at 689.

85 Id at 694–701.

86 Id at 689.

87 *Utah Pie*, 386 US at 700.

88 Handler, 53 Va L Rev at 1697 (cited in note 78) (emphasis added).

In this single passage, Handler both (1) encapsulated the consumer-welfare approach that today's populists identify with the Chicago School and (2) like Adelman, endorsed the "recoupment" standard later adopted in *Brooke Group* and also vilified by the populists as a creature of the Chicago School.[89] But also like Adelman, Turner, and Pitofsky, Handler was no Chicagoan; he was a Columbia professor who had earned his LLM at Columbia in 1926. Justice Potter Stewart was no Chicagoan either, yet he made much the same point in his *Utah Pie* dissent:

> [T]he Court has fallen into the error of . . . protecting competitors, instead of competition. . . . [The] cases [on which defendants relied] are said [by the majority] to be inapposite because they involved "no general decline in price structure," and no "lasting impact upon prices." But *lower prices are the hallmark of intensified competition*.[90]

Michigan Professor Thomas Kauper, who later served as DOJ antitrust chief under Presidents Nixon and Ford, likewise criticized 1960s-era antitrust in a 1968 article entitled *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*.[91] Kauper observed that the Court's antitrust decisions "often seemed less concerned with the economically necessary level of rivalry within the market than with what may be described as the 'rights' of the individual firms which comprise the market"

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89 The *Brooke Group* Court dismissed *Utah Pie* as an "early judicial inquiry" and effectively overruled it. *Brooke Group*, 509 US at 221.

90 386 US at 705–06 (Stewart dissenting) (emphasis added). Yale Professor Ward Bowman likewise observed that *Utah Pie* exemplified the Court's "disregard for the central purpose of antitrust, the promotion of consumer welfare through the promotion of a competitive market process." Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 Yale L J 70, 70 (1967). A decade earlier, Bowman had also been instrumental in using economic analysis to challenge the widespread assumption that tying arrangements were inherently problematic. See Bowman, 67 Yale L J at 33–34 (cited in note 73). Although Bowman spent his career teaching at Yale and appears never to have earned a Chicago degree, he is often associated with "the Chicago School," apparently because he worked as a research associate at Chicago in the mid-1950s and had fruitful discussions there with Aaron Director and John McGee. See id at 19 n †. See also Richard Epstein, *Bork's Bowman: "Not Gone, but Forgotten*," 79 Antitrust L J 903, 904 (2014). In fact, Bowman can equally well be characterized as yet another non-Chicagoan who embraced the consumer welfare standard and who strongly influenced younger scholars later associated with the Chicago School—particularly Robert Bork, whom Bowman recruited to Yale. See id at 916 ("[A]nyone who looks closely at the earlier Bowman writings will see in an instant how much *The Antitrust Paradox* is dependent on the earlier work by Bowman to which Bork, of course, gave ample credit.").

91 See generally Thomas E. Kauper, *The "Warren Court" and the Antitrust Laws: Of Economics, Populism, and Cynicism*, 67 Mich L Rev 325 (1968).

and that each firm's "independence and right to be treated as other firms are treated have become values to be protected as ends in themselves."[92] He expressed concern that if those ends are "achieved at the cost of economic efficiency, the price may be too great."[93] The same criticisms could equally well be directed at today's populists.

D. The "Harvard School": Areeda, Turner, and Breyer

Professor William Kovacic has cogently observed that today's attacks on the Chicago School almost invariably ignore the equal if not greater influence of the Harvard School—Areeda, Turner, Breyer, and others—on the development of modern antitrust law. As he notes, these scholars, "more than any other commentators, catalyzed the retrenchment of liability standards and motivated a more general and fundamental reassessment of US doctrine governing dominant firms."[94]

For example, Areeda and Turner's landmark 1975 article on predatory pricing—building on Turner's insights from his 1949 student Note—helped delimit for generations of antitrust courts and practitioners the narrow economic circumstances in which price cuts could harm consumers and thus should be prohibited.[95] The article not only set forth economically rigorous accounts of "cost" for determining when a price can be said to fall "below cost," but also reaffirmed the observations of Adelman and others that "predation in any meaningful sense cannot exist" without a serious risk of recoupment—that is, without "a very substantial prospect that the losses [the defendant] incurs in the predatory campaign will be exceeded by the profits to be earned after [its] rivals have been destroyed."[96] Few law review articles have shaped legal doctrine as decisively as this one did. For example, it strongly influenced the First Circuit's *Barry Wright Corp v ITT Grinnell Corp*[97] decision in 1983[98]—authored by then-Judge Stephen

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[92] Id at 333.

[93] Id at 334.

[94] Kovacic, 2007 Colum Bus L Rev at 7 (cited in note 73). See also generally William E. Kovacic, *The Chicago Obsession in the Interpretation of US Antitrust History*, 87 U Chi L Rev 459 (2020).

[95] Areeda and Turner, 88 Harv L Rev at 699–700 (cited in note 14). See also Kovacic, 2007 Colum Bus L Rev at 7 (cited in note 73).

[96] Areeda and Turner, 88 Harv L Rev at 698 (cited in note 14).

[97] 724 F2d 227 (1st Cir 1983).

[98] See id at 231–32 ("[T]here is general agreement that a profit-maximizing firm might . . . engage in predatory pricing . . . if it knows (1) that it can cut prices deeply

Breyer—and ultimately the Supreme Court's decision in *Brooke Group* a decade later.[99] More generally, no serious account of US antitrust law can ignore the enormous influence of the definitive antitrust treatise that Areeda and Turner first issued in 1978, which now, in its fourth edition, is authored by Professor Herbert Hovenkamp.[100]

Breyer himself was an antitrust professor at Harvard when he was appointed to the First Circuit in 1980, and his subsequent judicial role presents something of an embarrassment to antitrust's populist critics. Under the usual populist narrative, "a small crew within the Reagan administration" reshaped antitrust by installing Bork and other Chicago School conservatives in the federal judiciary.[101] But a review of judicial decisions tells a more interesting story. Kovacic writes that in the late 1980s and early 1990s he "read all of the antitrust decisions of the federal courts of appeals in which judges appointed by Presidents Jimmy Carter, Ronald Reagan, or George H.W. Bush participated . . . to assess whether the Reagan and Bush appointees voted more 'conservatively' than Carter appointees in antitrust cases."[102] Although Republican appointees did generally vote more conservatively than Democratic ones,

> no judge voted more consistently for defendants or authored opinions with greater impact in narrowing the zone of antitrust liability than Stephen Breyer, a Carter appointee and former colleague of Areeda and Turner at Harvard. As a court of appeals judge, Justice Breyer was instrumental in setting

enough to outlast and to drive away all competitors, and (2) that it can then raise prices high enough to recoup lost profits."), citing Areeda and Turner 88, Harv L Rev at 698–99 (cited in note 14). See also Kovacic, 2007 Colum Bus L Rev at 48–49 (cited in note 73) (discussing Areeda and Turner's influence on *Barry Wright*).

99 *Brooke Group*, 509 US at 224, citing Areeda and Turner, 88 Harv L Rev at 708–09 (cited in note 14). See also Kovacic, 2007 Colum Bus L Rev at 46 n 139 (cited in note 73) (noting the article's influence on *Brooke Group*, and adding that Areeda and Turner were the most cited scholars in the opinion).

100 See generally Phillip Areeda and Donald F. Turner, 1–3 *Antitrust Law: An Analysis of Antitrust Principles and Their Application* (Little, Brown 1978). See also generally Herbert Hovenkamp, *The Areeda-Turner Treatise in Antitrust Analysis*, 41 Antitrust Bull 815 (1996); Hillary Greene and D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 Iowa L Rev 2039 (2015).

101 Lynn, *No Free Parking for Monopoly Players* (cited in note 1). See also Steinbaum, Bernstein, and Strum, *Powerless* at 17 (cited in note 2).

102 Kovacic, 2007 Colum Bus L Rev at 7–8 (cited in note 73).

doctrinal trends often ascribed to the influence of the Chicago School.[103]

Breyer's role in this story is instructive in several respects. First, he is yet another major figure whom no one would associate with the Chicago School but who has been no less committed than card-carrying Chicagoans to the centrality of consumer welfare and rigorous economics in antitrust analysis. Second, current populist condemnation of antitrust doctrine virtually never mentions him, presumably because it is politically more expedient for many populists to demonize a conservative such as Bork than a liberal such as Breyer. Third, Breyer's jurisprudence reminds us that antitrust defies easy partisan labels. Rigorous analysis can lead "liberal" judges such as Breyer to oppose antitrust intervention in close cases. So too can it lead conservatives to support antitrust intervention in ways that surprise nonlawyer pundits, as when DOJ antitrust chief and Chicago Professor Bill Baxter successfully pursued the breakup of AT&T in the early Reagan Administration[104] and when law-and-economics Reagan appointees such as Judges Douglas Ginsburg and Stephen Williams voted to find Microsoft liable for monopolization offenses in 2001.[105] By the same token, antitrust *populism* also transcends party lines, as President Donald J. Trump's antitrust rhetoric often illustrates.[106]

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103 Id at 8. See also id at 8 n 23 (citing scholarship analyzing Justice Breyer's antitrust jurisprudence). Kovacic cites *Barry Wright* and *Town of Concord v Boston Edison Co*, 915 F2d 17 (1st Cir 1990), as particularly influential Breyer decisions as a court of appeals judge. Kovacic, 2007 Colum Bus L Rev at 8 (cited in note 73). On the Supreme Court, Justice Breyer has often voted with the Court's "conservatives" in antitrust cases and sometimes against them, but he has remained a stalwart champion of consumer welfare as the fundamental objective of antitrust. See id at 68–69 (describing the Court's majority opinion in *Verizon Communications Inc v Law Offices of Curtis V. Trinko*, 540 US 398 (2003) as "unmistakably [ ] the product of a Scalia-Breyer [ ] collaboration").

104 See *United States v American Telephone and Telegraph Co*, 552 F Supp 131, 170 (DDC 1982), affd *Maryland v United States*, 460 US 1001 (1983); Jonathan E. Nuechterlein and Philip J. Weiser, *Digital Crossroads: Telecommunications Law and Policy in the Internet Age* 16–17, 42–48 (MIT 2d ed 2013) (discussing "Baxter's Law").

105 See *United States v Microsoft Corp*, 253 F3d 34, 44, 51 (DC Cir 2001) (en banc).

106 See John Micklethwait, Margaret Talev, and Jennifer Jacobs, *Trump Says Google, Facebook, Amazon May Be "Antitrust Situation"* (Bloomberg, Aug 30, 2018), online at https://www.bloomberg.com/news/articles/2018-08-30/google-under-fire-again-on-search-as-hatch-calls-for-ftc-probe (visited Jan 26, 2020) (Perma archive unavailable); Brian Stelter, *Donald Trump Rips into Possible AT&T-Time Warner Deal* (CNN Business, Oct 22, 2016), archived at https://perma.cc/35CH-UNM6 (quoting candidate Trump: "As an example of the power structure I'm fighting, AT&T is buying Time Warner and thus CNN, a deal we will not approve in my administration"); note 112 and accompanying text (discussing Trump's positions on the Sinclair-Tribune and Comcast-NBCUniversal mergers);

III. THE OBVIOUSNESS OF PUTTING CONSUMERS FIRST

This Essay has focused on the many influential non-Chicagoans from the 1940s to the present who embraced the same foundational principles associated with the Chicago School today: that consumer welfare is antitrust's ultimate objective and that economics is critical to meeting it. Why did all of these scholars in and out of Chicago gravitate toward those same principles? One explanation is sheer coincidence: these intellectually rigorous scholars happened to favor what became regarded as the Chicago School approach to antitrust, but there are alternative, equally workable approaches to antitrust they could have chosen. The other explanation is that America's long history of experimentation with alternative approaches—as exemplified by Robinson-Patman enforcement, the A&P prosecution, and the Supreme Court's 1960s-era precedent—confirms that the alternatives are not workable in the first place because they have no coherent means of resolving competing policy objectives.

The latter explanation is far more persuasive. Antitrust takes the form it does today because we have learned from hard experience that an economically rigorous focus on consumer welfare is essential to coherent antitrust policy. As Bruce Hoffman, until recently Director of the FTC's Bureau of Competition, observed:

> [T]he consumer welfare standard that is currently the touchstone for antitrust enforcement in the United States . . . is the result of decades of experience in the United States with failed standards, such as protecting competitors at the expense of consumers. This prolonged experiment is somewhat unique to [the] United States, largely because we've had antitrust laws on the books and actively enforced them for so long that we've had lots of opportunities to get our approach wrong—opportunities that we have often taken. But having made those mistakes, we want to make sure we don't repeat them.[107]

To see this point—the "obviousness" of making consumer welfare *the* fundamental goal of antitrust—consider the available

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Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement* (The American Conservative, Sept 19, 2017), archived at https://perma.cc/2FDJ-N8DK; Robert Verbruggen, *Google, Facebook, Amazon: Our Digital Overlords* (National Review, Dec 12, 2017), archived at https://perma.cc/LJG6-8GC4.

107 Remarks of D. Bruce Hoffman, *Competition Policy and the Tech Industry—What's at Stake?* *2 (CCIA, Apr 12, 2018), archived at https://perma.cc/FVN7-JRWL.

alternatives. Those alternatives do *not* include a regime that excludes consumer welfare altogether; essentially everyone agrees that consumer interests must play *some* role in antitrust analysis. For example, to our knowledge, even hard-core populists do not argue that *every* large company should be held liable *whenever* it offers discounts, free shipping, or other consumer-friendly terms that smaller companies cannot match and that may thus drive some of them from the market. In Barry Lynn's terms, this means that the "opportunity of the citizen producer" must *sometimes* yield to "the welfare of the consumer."[108]

But when, and by what formula? The problem is not simply one of creating two fundamental objectives for antitrust when before there was only one. As Professor Adelman observed in 1949, the deeper problem is that these particular objectives—"the maintenance of competition [and] the protection of particular competitors"—are typically "antithetical: no strong competitor, . . . however beneficent his achievements, could avoid affecting adversely other competitors and even putting some of them out of business."[109] Antitrust populists never articulate how courts should "weigh" these two antithetical goals. Nor do populists explain how a corporate executive, contemplating an innovative competitive strategy, could possibly predict how a court will rule

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[108] Lynn, *No Free Parking for Monopoly Players* (cited in note 1) (quotation marks omitted).

[109] Adelman, 63 Q J Econ at 256 (cited in note 8). A similar problem arose in the merger context after the Supreme Court issued the following schizoid holding in *Brown Shoe Co, Inc v United States*, 370 US 294, 344 (1962):

> [S]ome of the results of large integrated . . . operations are beneficial to consumers. Their expansion is not rendered unlawful by the mere fact that small independent stores may be adversely affected. It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.

The contradiction is palpable: "No matter how many times you read it, that passage states: Although mergers are not rendered unlawful by the mere fact that small independent stores may be adversely affected, we must recognize that mergers are unlawful when small independent stores may be adversely affected." Robert H. Bork and Ward S. Bowman, *The Crisis in Antitrust*, 65 Colum L Rev 363, 373 (1965). The Supreme Court later resolved the contradiction *sub silentio* by embracing, without qualification, the supervening proposition that "[t]he antitrust laws . . . were enacted for the 'protection of *competition*, not *competitors*.'" *Brunswick Corp v Pueblo Bowl-O-Mat, Inc*, 429 US 477, 488 (1977), quoting *Brown Shoe*, 370 US at 320. Kovacic persuasively attributes that holding, authored by Justice Thurgood Marshall for a unanimous Court, to Areeda and the Harvard School rather than the Chicago School. Kovacic, 2007 Colum Bus L Rev at 55–61 (cited in note 73).

when aggrieved competitors argue that the strategy offers consumers not only a good bargain, but *too* good a bargain. That executive would almost certainly pull competitive punches lest she guess wrong and expose her company to antitrust liability. The ultimate victims of such chilled competition and innovation would be consumers and the economy as a whole.[110]

The problem would become even worse if we started adding further objectives into the mix. For example, Professor Tim Wu proposes that antitrust enforcement decisions should turn in part on whether "the complained-of conduct or merger tend[s] to implicate important non-economic values, particularly political values"; for example, "Might it tend to preserve a long-standing, politically influential oligopoly?"[111] No creativity is needed to imagine the parade of horribles that would follow from this idea; the White House has already supplied it. President Trump tweeted in 2018 that it was "So sad and unfair" that "the Sinclair Broadcast merger with Tribune" was blocked because it "would have been a great and much needed Conservative voice for and of the People," whereas it was "Disgraceful" that "Liberal Fake News NBC and Comcast gets approved."[112] Presumably Wu does not wish to legitimate threats to use antitrust as a means of suppressing "liberal Fake News" and elevate "much needed Conservative voice[s]"—but that is what his proposal does.

Challenges to the consumer welfare standard might be more understandable if, as its critics sometimes contend, it focused myopically on "short-term effects on price and output" and ignored other values important to consumers, such as "product quality,

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110 See Herbert Hovenkamp, *Antitrust Policy and Inequality of Wealth*, CPI Antitrust Chron 1, 5 (Oct 2017)

> Should antitrust condemn every practice that reduces the defendant's prices or costs, or improves the quality of its product when rivals are injured or suppliers are worse off? That policy would rather quickly drive the economy back into the Stone Age, imposing hysterical costs on everyone. To be sure, there might be ways of limiting the rule. For example, we might say that lower prices or higher quality ought to be condemned only when it creates or threatens to create a monopoly. That approach might not be quite as bad, but it would be a strong barrier to innovation, and particularly to market shifting innovations that result in dominant firms. There would go Ford, Bell, IBM, Kodak, Polaroid, Xerox, Microsoft, Google, Apple and numerous others.

111 Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI Antitrust Chron 1, 9 (Apr 2018).

112 Donald J. Trump (@realDonaldTrump) (Twitter, July 24, 2018), archived at http://perma.cc/VMP5-BQP8. See also note 106 (noting some of Trump's other antitrust positions).

variety, and innovation."[113] But in fact the consumer welfare standard is not so myopic, and populists claiming otherwise are attacking a straw man. Properly applied, the consumer welfare standard analyzes both short-term and long-term price effects and views "price" and "quality" as two sides of the same coin—"quality-adjusted prices."[114] The consumer welfare standard also takes due account of "variety" and "innovation"; indeed, the 2010 *Horizontal Merger Guidelines* include an entire subsection entitled "Innovation and Product Variety."[115] And despite criticisms based on a literalistic misunderstanding of the term, the "consumer welfare standard" prevents inefficient allocation of social resources by shielding suppliers against market-power abuses by purchasers, which can inefficiently suppress output.[116]

None of this is to say that the "consumer welfare standard" prescribes a simple and determinate mode of analysis or that it is always straightforward in application. Scholars and practitioners can adhere to that standard but disagree vigorously about what types of conduct threaten consumer welfare over the long term,

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113 Khan, 126 Yale L J at 716, 737 (cited in note 70). See also Marshall Steinbaum and Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U Chi L Rev 595, 610 (2020) (proposing an amendment to the Clayton Act to require consideration of a merger's effects "[n]ot only on prices, but other parameters of competition, including quality, choice, innovation, and privacy").

114 See Joshua D. Wright and Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 Fordham L Rev 2405, 2410 & nn 29–31 (2013).

115 United States Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* § 6.4 (Aug 19, 2010).

116 See, for example, Complaint, *United States v Danone S.A.*, No 1:17-cv-00592, *28 (DDC filed Apr 3, 2017) (challenging a merger between dairy-product manufacturers that, without conditions, would "result [in] a likely lessening of competition in the purchase of raw organic milk from farmers"); Competitive Impact Statement, *United States v Lucasfilm Ltd*, No 1:10-cv-02220, *2–3 (DDC filed Dec 21, 2010) (addressing a "no poach" agreement among competitors concerning highly skilled employees). "If [consumer welfare] is understood as total welfare or trading partner welfare, it encompasses buy-side or monopsony issues to the same extent as sell-side or monopoly issues." A. Douglas Melamed and Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, 54 Rev Indust Org 741, 753 (2019). Commentators disagree about whether "consumer welfare" (narrowly construed) or "total welfare" (including buy-side harms that may not affect ultimate consumers) is technically the more appropriate formulation of antitrust's ultimate objectives, but that distinction has very limited significance in real-world practice. See Thomas O. Barnett, *Substantial Lessening of Competition—The Section 7 Standard*, 2005 Colum Bus L Rev 293, 297 (stating that divergence between consumer welfare and total welfare standards is "rare [ ] in practice"); J. Thomas Rosch, *Monopsony and the Meaning of "Consumer Welfare": A Closer Look at* Weyerhaeuser, 2007 Colum Bus L Rev 353, 354–55 (citing scholarship).

what "long term" means for those purposes, when market concentration is and is not a problem for consumer welfare,[117] how the risks of false positives should be weighed against the risks of false negatives,[118] the appropriate mix of bright-line and nuanced rules,[119] and the competence of generalist courts and antitrust agencies in formulating and applying such rules.[120]

Consider the essays that former FTC Chairman Pitofsky collected in the widely cited 2008 book entitled *How the Chicago School Overshot the Mark*. The "post-Chicago" scholars featured in this collection acknowledge the primacy of consumer welfare and the singular importance of economic analysis in promoting it.[121] Although many of these scholars advocate moving antitrust doctrine in a pro-enforcement direction, they acknowledge the need to support those proposals with valid economics.

For example, Professor Steven Salop has used sophisticated economic models to argue that certain conduct, by "raising rivals' costs," can harm consumer welfare even though it would survive scrutiny both under existing doctrine (such as the *Brooke Group* standard) and under the rules favored by specific Chicago School

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117 Populists often cite various statistics as basis for contending that "[c]onsolidation and concentration are on the rise in sector after sector" and that "today, in America, competition is dying." Elizabeth Warren, *"Reigniting Competition in the American Economy": Keynote Remarks at New America's Open Markets Program Event* *1 (June 29, 2016), archived at https://perma.cc/ZV8S-8B3D. See also Council of Economic Advisors, *Benefits of Competition and Indicators of Market Power* *4 (Apr 2016), archived at https://perma.cc/CC9P-ZGCY. For incisive critiques of this position, which ignores the role of scale economies in the modern economy and basic principles of market definition, see Carl Shapiro, *Antitrust in a Time of Populism*, 61 Intl J Indust Org 714, 742 (2018); Gregory J. Werden and Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, 33 Antitrust 74, 76–78 (2018).

118 Compare Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L J 1, 2 (2015) ("[The] assumptions [of today's antitrust conservatives] systematically overstate the incidence and significance of false positives, understate the incidence and significance of false negatives, and understate the net benefits of various rules by overstating their costs."), with Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex L Rev 1, 2 (1984) ("If the court errs by condemning a beneficial practice, the benefits may be lost for good. . . . If the court errs by permitting a deleterious practice, though, the welfare loss decreases over time.").

119 See note 122 and accompanying text (addressing Salop's rule-of-reason approach for raising-rivals'-costs claims).

120 See Kovacic, 2007 Colum Bus L Rev at 73–74 (cited in note 73) (addressing interplay between Chicago School and Harvard School regarding "concerns about institutional design and capacity").

121 See Robert Pitofsky, *Introduction: Setting the Stage*, in Robert Pitofsky, ed, *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* 3, 5–6 (Oxford 2008).

figures such as Bork and Posner.[122] Yet Salop challenges those doctrinal choices only because, in his view, they inadequately account for real-world economic scenarios and thus *disserve consumer welfare*. As he concludes, those choices "do not hold up to careful economic analysis," and "the better legal standard would be the rule of reason with its focus on consumer harm."[123] Again, that is precisely the consumer welfare focus rejected by today's populists. And it marks a logical evolution of, not a conceptual break from, the broader insights of the Chicago School itself. Indeed, although they used different terminology, Professors Director and Levi foreshadowed Salop's scholarship in 1956 by identifying raising rivals' costs as a potential basis for antitrust liability.[124]

In short, so-called post-Chicago scholarship has far more in common with traditional Chicago School scholarship than with present-day populism, with its proposals for radical antitrust intervention unhinged from any economic analysis of the effects on consumer welfare. This point supplies a needed antidote to populist rhetoric. The true divide in antitrust thought today is not between "liberals" and "conservatives," and not between Chicago and post-Chicago theory. It is instead between those who favor and those who disfavor a rational, economics-based approach to competition policy in America.

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[122] See Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, in Pitofsky, ed, *How the Chicago School Overshot the Mark*, 141, 142–44 (cited in note 121); Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 Antitrust L J 371, 373 (2017); Krattenmaker and Salop, 96 Yale L J at 214 (cited in note 15).

[123] Salop, *Economic Analysis* at 155 (cited in note 122). Like Salop, post-Chicago scholar Professor Carl Shapiro, a leading antitrust economist in the Obama and Clinton administrations, remains a champion of the consumer welfare standard, urging policymakers to reject the "'big is bad' mentality" associated with contemporary populism because "[w]e learned long ago that proper antitrust enforcement is about protecting consumers, and protecting the competitive process, not about protecting competitors. We must not forget that guiding principle." Shapiro, 61 Intl J Indust Org at 742 (cited in note 117).

[124] See Kobayashi and Muris, 78 Antitrust L J at 161–62 (cited in note 20), discussing Aaron Director and Edward H. Levi, *Law and the Future: Trade Regulation*, 51 Nw U L Rev 281, 293 (1956).