

# THE INTELLECTUAL DNA OF MODERN U.S. COMPETITION LAW FOR DOMINANT FIRM CONDUCT: THE CHICAGO/HARVARD DOUBLE HELIX

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## I. INTRODUCTION

The appropriate design of rules governing the behavior of dominant firms commands extensive attention within the world's competition policy community today. In Europe, the Directorate General for Competition ("DG Comp") is conducting an extensive review of law and policy governing abuse of dominance under Article 82 of the Treaty of Europe.<sup>1</sup> In the United States, the Antitrust Modernization Commission (AMC) is considering standards for single-firm exclusionary conduct,<sup>2</sup> and the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are conducting hearings on dominant firm behavior.<sup>3</sup> On the global stage, the International Competition Network (ICN) has begun to examine dominance and dominant firm conduct through its Working Group on Unilateral Firm Conduct.<sup>4</sup>

Directly or indirectly, U.S. antitrust experience informs all of these deliberations. Judgments about distant and recent applications of the Sherman Act<sup>5</sup> and the Federal

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<sup>1</sup> See DG Competition, European Commission, *DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses* (Dec. 2005), <http://www.ec.europa.eu/comm/competition/antitrust/others/discpaper2005.pdf> (presenting possible principles for treatment of dominant firm exclusionary conduct).

<sup>2</sup> See Staff, Antitrust Modernization Commission, *Exclusionary Conduct Discussion Memorandum* (July 11, 2006), <http://www.amc.gov/pdf/meetings/ExclCond%20DiscMemo060711fin.pdf> (summarizing testimony and written comments received by Antitrust Modernization Commission on exclusionary conduct standards).

<sup>3</sup> See Federal Trade Commission, News Release, *Federal Trade Commission/Department of Justice Hearings on Single-firm Conduct to Begin June 20* (June 6, 2006), <http://www.ftc.gov/opa/2006/06/section2.htm> (describing FTC/DOJ proceedings).

<sup>4</sup> See International Competition Network, News Release, *Fifth Annual International Competition Network Conference Sends Clear Signal To Step Up And Improve The International Fight Against Cartels* (May 5, 2006), <http://www.internationalcompetitionnetwork.org/index.php/en/newsroom/2006/05/5/26> (working group on unilateral conduct).

<sup>5</sup> 15 U.S.C. § 2 (2006). Section 2 of the Sherman Act forbids monopolization, attempted monopolization, and conspiracies to monopolize.

Trade Commission Act<sup>6</sup> to dominant firm conduct are central to the proceedings of the AMC and the two U.S. federal antitrust agencies. For DG Comp, the ICN, and other competition policy bodies outside the United States, the U.S. system is a useful point of comparison and stimulus for discussion.<sup>7</sup>

For observers at home and abroad, an examination of U.S. antitrust experience with dominant firms reveals significant changes over time. Since the mid-1980s, developments in U.S. antitrust doctrine and enforcement policy have narrowed the range of dominant firm conduct that is subject to condemnation.<sup>8</sup> As a result, dominant firms today face fewer risks of incurring liability for the offenses of monopolization and attempted monopolization<sup>9</sup> than their predecessors did from the 1940s through the early 1970s.<sup>10</sup>

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<sup>6</sup> 15 U.S.C. § 45 (2006). Section 5 of the Federal Trade Commission Act proscribes “unfair methods of competition.”

<sup>7</sup> See DAVID J. GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS 6 (1998) (recounting history of competition law in Europe and noting that “many European scholars, judges, and administrators have paid close attention to United States antitrust law experience”).

<sup>8</sup> The modern retrenchment of antitrust standards in the United States in the courts and the public enforcement agencies is reviewed in William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

<sup>9</sup> The offenses of monopolization and attempted monopolization can be prosecuted under Section 2 of the Sherman Act or can be challenged by the Federal Trade Commission as unfair methods of competition under Section 5 of the Federal Trade Commission Act. Since at least the late 1940s, it has been settled doctrine that Section 5 of the FTC Act permits the FTC to bar conduct, such as monopolization or attempted monopolization, that would violate the Sherman Act. See *Fed. Trade Comm. v. Cement Inst.*, 333 U.S. 683, 690-95 (1948) (Section 5 of FTC Act encompasses violations of Sherman Act); see also Neil W. Averitt, *The Meaning of “Unfair Methods of Competition” in Section 5 of the Federal Trade Commission Act*, 21 B.C. L. REV. 227, 239-40 (1980) (describing application of the principle of *Cement Institute* to FTC antitrust cases brought under Section 5 of FTC Act).

<sup>10</sup> This is not the case for dominant firms that form or join cartels. The dangers to cartel members under U.S. law have increased greatly since the early 1970s. New statutes and policy adjustments have bolstered means for detecting and punishing cartels. See WILLIAM E.

Before the changes of recent decades, the U.S. antitrust treatment of dominant firms generally was more intervention-minded than the competition systems of the European Union (EU) and many other jurisdictions.<sup>11</sup>

Why has U.S. antitrust law grown more tolerant in its treatment of dominant firm behavior? In tracing the intellectual stimulus for this development, I often have ascribed the U.S. retreat from intervention-oriented policies chiefly to the influence of the “Chicago School”<sup>12</sup> and have treated Chicago School ideas as the principal intellectual foundation of modern U.S. doctrine and policy. I also have presented the “Post-Chicago School,” which prefers more expansive antitrust intervention, as the major alternative intellectual framework for antitrust policy and have explained the future of U.S. antitrust policy as a function of how much and when Post-Chicago perspectives will supplant Chicago School views.<sup>13</sup> The tendency to describe the

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KOVACIC, COMPETITION POLICY AND CARTELS: THE DESIGN OF REMEDIES, IN CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT 41 (Katalin J. Cseres, Maarten Pieter Schinkel & Floris O.W. Vogelaar eds., 2006) (describing enhancement of U.S. anti-cartel measures since 1970).

<sup>11</sup> For example, no jurisdiction outside the United States has attained the intensity of public enforcement effort that the DOJ and the FTC devoted to dominant firm matters from the late 1960s through the 1970s. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 448-52 (2003) [hereinafter *Enforcement Norms*] (discussing federal government enforcement programs in the late 1960s and 1970s in the United States). The only notable respect in which some foreign jurisdictions have established more expansive doctrinal and policy frontiers than the United States created from 1945 through 1980 is the prohibition of excessive pricing as an abuse of dominance. See VALENTINE KORAH, AN INTRODUCTORY GUIDE TO EC COMPETITION LAW AND PRACTICE 165-68 (8th ed. 2004) (discussing restrictions under EC competition law upon excessive pricing by dominant firms); RICHARD WHISH, COMPETITION LAW 179-80 (6th ed. 2006) (same). U.S. competition law does not contain a similar prohibition.

<sup>12</sup> See ERNEST GELLHORN, WILLIAM E. KOVACIC & STEPHEN CALKINS, ANTITRUST LAW AND ECONOMICS IN A NUTSHELL 105-08 (5th ed. 2004); Kovacic & Shapiro, *supra* note 8, at 52-58; William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 303-04 (1992).

<sup>13</sup> See Gellhorn et al., *supra* note 12, at 589-98; Kovacic & Shapiro, *supra* note 8, at 55-58.

antitrust world this way is not mine alone. Discussions of the contest between Chicago School (CS) and Post-Chicago School (PCS) ideas abound in discussions about U.S. competition policy among academics, practitioners, and enforcement officials.<sup>14</sup>

The Chicago School/Post-Chicago School dialectic can help in analyzing events even if it is not a completely precise portrayal of the intellectual history of U.S. antitrust law. Nonetheless, when I have explained events in terms of a Chicago School/Post Chicago School contest, I have felt

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<sup>14</sup> See, e.g., JOHN KWOKA & LAWRENCE WHITE, *Introduction, in THE ANTITRUST REVOLUTION: ECONOMICS, COMPETITION AND POLICY 1* (John Kwoka & Lawrence White eds., 1999) (framing modern development of antitrust economics as a contest between Chicago School and Post-Chicago School views); Jonathan B. Baker, *Competition Policy as a Political Bargain*, 73 ANTITRUST L.J. 483, 505-15 (2006) (examining “[a]ntitrust’s Chicago School revolution” in the 1970s and 1980s and interpreting its significance in the development of modern U.S. competition policy); Malcolm B. Coate & Jeffrey H. Fischer, *Can Post-Chicago Economics Survive Daubert?*, 34 AKRON L. REV. 795 (2001) (discussing capacity of Chicago School and Post-Chicago School models of economic analysis to withstand scrutiny under standards established for the admissibility of expert testimony in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)); Reza Dibaaj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 749-72 (2004) (describing “Chicago’s Ascendancy” and discussing how “Post-Chicago Fights Back”); David S. Evans & Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 76-80 (2005) (contrasting Chicago and Post-Chicago perspectives on treatment of unilateral conduct); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257 [hereinafter *Review and Critique*] (describing and evaluating Post-Chicago School antitrust perspectives); Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985) (analyzing Chicago School of antitrust analysis and discussing influence of Post-Chicago perspectives on antitrust policy); Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219 (1995) (analyzing debate between Chicago School and Post-Chicago School visions of antitrust economics); Marina Lao, *Aspen Skiing and Trinko: Antitrust Intent and “Sacrifice”*, 73 ANTITRUST L.J. 171, 177-80 (2005) [hereinafter *Antitrust Intent*] (comparing “Chicago” and “post-Chicago” views of appropriate standards for dominant firm conduct); John E. Lopatka, *Exclusion Now and in the Future: Examining Chicago School Orthodoxy*, 17 MISS. C. L. REV. 27 (1996) (discussing Chicago School and Post-Chicago School views of exclusionary conduct).

somewhat uneasy in doing so. The uneasiness does not stem from uncertainty over whether Chicago School scholarship has deeply influenced U.S. antitrust law; Chicago's influence is unmistakably profound.<sup>15</sup> As one commentator put the point over 20 years ago, "we are all, to some extent, Chicagoans."<sup>16</sup> Rather, the basis for my doubt is a growing sense that the habit of analyzing modern U.S. antitrust experience as a Chicago School/Post-Chicago School struggle obscures a critical intellectual foundation for the U.S. system and, by diminishing our understanding of the sources of doctrine and enforcement policy, clouds our view of how the system might change in the future.

One source of my discomfort has been the awareness that two Harvard School scholars, Phillip Areeda and Donald Turner, spurred the rethinking of modern predatory pricing doctrine with their proposal in 1975 that a dominant firm can ordinarily be presumed to be acting legally under the antitrust laws when it sets its prices at or above its average variable costs.<sup>17</sup> Chicago School figures—among them, Robert Bork, Frank Easterbrook, and John McGee—have helped inspire the courts to raise the standards that plaintiffs must satisfy to prevail with predatory pricing claims. Nonetheless, a reading and re-reading of the

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<sup>15</sup> For an assessment of the impact of one of the Chicago School's foremost scholars, see William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36 WAYNE L. REV. 1413 (1990); see also Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 ANTITRUST L.J. 645, 655 (1989) [hereinafter *Recent Developments*] ("Over the past fifteen years, the courts and enforcement agencies have created Robert Bork's antitrust paradise. Antitrust has accepted the Chicago School's conclusions about the effects of business practices.").

<sup>16</sup> Bruce M. Owen, *The Evolution of Clayton Section 7 Enforcement and the Beginnings of U.S. Industrial Policy*, 31 ANTITRUST BULL. 409, 409-10 n.1 (1986). See also NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 349 (1995) ("[T]here exists very little in the way of contemporary antitrust theory which has not been inspired to some extent by Chicago economic analysis.").

<sup>17</sup> Phillip Areeda & Donald F. Turner, *Predatory Pricing and Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) [hereinafter *Predatory Pricing*].

predatory pricing cases decided from the 1970s onward<sup>18</sup> has underscored how Areeda and Turner, more than any other commentators, catalyzed the retrenchment of liability standards and motivated a more general and fundamental reassessment of doctrine governing dominant firms. Conversations with my casebook co-authors have provided many occasions to consider how Areeda and Turner have affected policy developments in this and other areas of antitrust law.<sup>19</sup>

Another source of disquiet is a project that led me in the late 1980s and early 1990s to 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.<sup>20</sup> I sought to assess whether the Reagan and Bush appointees voted more “conservatively” than Carter appointees in antitrust cases. By my definition of what constituted a “liberal” or “conservative” vote, the Reagan and Bush appointees displayed more conservative antitrust preferences than their Carter counterparts, and

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<sup>18</sup> These include James D. Hurwitz, William E. Kovacic, Thomas Sheehan & Robert Lande, *Current Legal Standards of Predation*, in STRATEGY, PREDATION AND ANTITRUST ANALYSIS 101 (Steven Salop ed., Federal Trade Commission, 1981); Susan S. DeSanti & William E. Kovacic, *Matsushita: Its Construction and Application by the Lower Courts*, 59 ANTITRUST L.J. 609 (1991); James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982); Alexander Larson & William E. Kovacic, *Predatory Pricing Safeguards in Telecommunications Regulation: Removing Impediments to Competition*, 35 ST. LOUIS U. L. J. 1 (1990).

<sup>19</sup> In our casebook’s discussion of the role of ideology in competition policy, Professors Baker, Gavil, and I focus on three significant bodies of antitrust analysis: Chicago School, Harvard School, and Post-Chicago School. ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 62-69 (West Group 2002). We call the Harvard School, including Professors Areeda and Turner, a “moderating influence” on the Chicago School and observe that “their influence has been great and is also likely to endure.” *Id.* at 66.

<sup>20</sup> The results of this research are published in William E. Kovacic, *Judicial Appointments and the Future of Antitrust Policy*, 7 ANTITRUST 8, 10 (1993) [hereinafter *Judicial Appointments*]; William E. Kovacic, *Reagan’s Judicial Appointees and Antitrust in the 1990s*, 60 FORDHAM L. REV. 49, 95-96 (1991) [hereinafter *Reagan’s Judicial Appointees*].

judges associated with the Chicago School (for example, Judge Easterbrook) helped establish this pattern.<sup>21</sup> Yet 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.<sup>22</sup> As a court of appeals judge, Justice Breyer was instrumental in setting doctrinal trends often ascribed to the influence of the Chicago School.<sup>23</sup>

More recent developments in trans-Atlantic competition policy have accentuated my doubts about the conventional Chicago School/Post-Chicago School framework. In reading the work of foreign scholars<sup>24</sup> and participating in international conferences, I have become convinced that the Chicago School/Post-Chicago School framework seriously distorts discussions about U.S. abuse of dominance policy and its relationship to EU competition policy. The tendency to explain U.S. experience in terms of a Chicago/Post-

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<sup>21</sup> See Kovacic, *Judicial Appointments*, *supra* note 20, at 9-12 (comparing voting by Reagan and Bush appointees with voting by Carter appointees); *Id.* at 10 (discussing votes of Judge Easterbrook in antitrust cases).

<sup>22</sup> See Kovacic, *Judicial Appointments*, *supra* note 20, at 10 (discussing court of appeals voting record of Judge Breyer in antitrust cases); Kovacic, *Reagan's Judicial Appointees*, *supra* note 20, at 95-96 (same). President Carter appointed Breyer to the U.S. Court of Appeals for the 1st Circuit in 1980.

<sup>23</sup> Court of appeals decisions by Stephen Breyer that have played a major part in shaping antitrust doctrine include *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) (rejecting Sherman Act claims of illegal monopolization based on alleged price squeeze); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 277 (1st Cir. 1983). For detailed analyses of Stephen Breyer's antitrust opinions as a court of appeals judge, see Edward O. Correia, *Antitrust and Liberalism*, 40 ANTITRUST BULL. 99 (1995); Edward A. Fallone, *The Clinton Court is Open for Business: The Business Law Jurisprudence of Justice Stephen Breyer*, 59 MO. L. REV. 857 (1994); John E. Lopatka, *Stephen Breyer and Modern Antitrust: A Snug Fit*, 40 ANTITRUST BULL. 1 (1995); Stephen F. Ross, *Justice Breyer and the Fault Lines of Antitrust*, 40 ANTITRUST BULL. 169 (1995).

<sup>24</sup> See *infra* notes 81 and 83 and accompanying text (discussing perceptions of foreign scholars about intellectual foundations for modern U.S. antitrust law and policy).



Chicago dialectic and the subsequent preoccupation with branding ideas with Chicago or Post-Chicago labels prevents Americans and Europeans from understanding why the U.S. system developed as it did and from seeing more accurately why their systems differ.

Four specific problems undermine the validity of interpretations that portray the intellectual history of modern U.S. competition law simply or mainly in terms of the ascent of the Chicago School and its contest with Post-Chicago ideas. The first problem is the implication that Chicago and Post-Chicago perspectives have little in common. The frequently-voiced suggestion that the Chicago School and the Post-Chicago School are antonyms overlooks important connections between the two bodies of thought. Many Post-Chicago School scholars build upon theoretical or empirical propositions advanced by Chicago School exponents.<sup>25</sup> Some Chicago School scholars appear to acknowledge the value of Post-Chicago ideas, at least so far as finding similarities between the modern Post-Chicago scholarship and early Chicago School views on antitrust policy.<sup>26</sup> The tendency to focus on differences between these schools obscures how developments in competition policy, both in theory and in practice, often are incremental and cumulative, with significant borrowings across bodies of

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<sup>25</sup> See GAVIL ET AL., *supra* note 19, at 68 (“Post-Chicago commentators generally propose qualifying rather than supplanting Chicago views.”); Baker, *Recent Developments*, *supra* note 15, at 646 (discussing “new developments in economics that qualify or limit traditional Chicago School conclusions”); Coate & Fischer, *supra* note 14, at 813 (Post-Chicago School economic models “start with the Chicago school’s proposition that economics controls antitrust, but then they add complexity to the microeconomic analysis that seeks to generate a collection of special case results.”).

<sup>26</sup> See Richard A. Posner, *Keynote Address: Vertical Restrictions and “Fragile” Monopoly*, 50 ANTITRUST BULL. 499, 500 (2005) [hereinafter *Keynote Address*] (seeking to “dispel[] the widespread impression that there is a deep schism between the Chicago School and a ‘post-Chicago’ school about the significance of single-firm abuses or . . . vertical practices”).

thought that sometimes, or often, are depicted as being distinct and self-contained.<sup>27</sup>

A second problem with explaining modern U.S. antitrust experience chiefly as a Chicago School/Post-Chicago School contest is the suggestion that each school is monolithic and single-minded. Neither body of literature features such a uniformity of preferences. In the 1970s, for example, Robert Bork and Richard Posner offered notably different approaches for addressing allegations of predatory pricing. Bork urged courts and enforcement agencies to simply ignore allegations of predatory pricing.<sup>28</sup> Though sometimes taken as a proxy for Chicago School thinking on the issue, Bork's "no rule" standard contrasts with Judge Posner's proposal that below-cost pricing sometimes warrants condemnation as improper exclusion.<sup>29</sup> Compared to other Chicago School scholars, Judge Posner also approves a broader view of when proof of parallel, interdependent pricing among oligopolists would support a finding that the firms in question have formed an agreement within the meaning of Section 1 of the Sherman Act.<sup>30</sup>

A third problem with framing the modern policy debate in terms of a Chicago School/Post-Chicago School dialectic is that it incorrectly attributes antitrust perspectives to a

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<sup>27</sup> See Kovacic, *Enforcement Norms*, *supra* note 11 (emphasizing connections across eras of U.S. competition policy).

<sup>28</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 144-60 (Basic Books 1978); *see also* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 263-64 (1981) (proposing that antitrust law ignore claims of predatory pricing).

<sup>29</sup> Judge Posner offered his test for defining and prosecuting predatory pricing in 1976 in the first edition of his treatise on antitrust law. *See* RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 184-96 (University of Chicago Press 1976). On Judge Posner's disagreement with Bork over predatory pricing, *see* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 940-41 (1979). Judge Posner restated and refined his proposal in the second edition of his treatise. *See* RICHARD A. POSNER, *ANTITRUST LAW* 207-23 (University of Chicago Press 2d ed. 2001).

<sup>30</sup> For a discussion of how Judge Posner's views about the treatment of tacit collusion are more interventionist than typical Chicago School perspectives, *see* Nikolai G. Levin, *The Nomos and Narrative of Matsushita*, 73 *FORDHAM L. REV.* 1627, 1674-76 (2005).

single source when they instead stemmed from more complex and diverse intellectual influences. The perceived origins of ideas can affect views about whether the ideas are legitimate. One way to discredit an idea is to depict its brand and the originators of the brand as violating norms of reasonable thought. In modern discourse about competition policy, commentators sometimes depict Chicago School advocates as extremists, close-minded fanatics, or mere “ideologues.”<sup>31</sup> If one agrees that Chicago School views are unduly extreme, it is a short step to conclude that a competition policy system assumed to be guided chiefly by Chicago School views is itself extremist, unsoundly ideological, and unworthy of emulation.

What happens if the ideas in question instead have more diverse and “balanced” origins? If well-respected figures not ordinarily associated with the Chicago School helped foster the policy adjustments that sometimes are attributed mainly or entirely to Chicago “extremists,” then one might conclude that modern U.S. policy is not the product of a crude, transient ideology. Policies that stem from a more widely-

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<sup>31</sup> See, e.g., Eliot G. Disner, *Antitrust Law: The Chicago School Meets the Real World*, 25 L.A. LAWYER 14, 14 (2002) (“With a kind of religious fervor, the Chicago School intoned a mantra and used a language all its own to vivify, then empower, its world view . . .”); Albert A. Foer & Robert H. Lande, *New Antitrust Institute Envisions a Post-Chicago Future* (Nov. 2, 1998), <http://www.antitrustinstitute.org/recent/10.cfm> (“How long will it be before the Joel Kleins and Bob Pitofskys are replaced by faceless, comparatively passive enforcers—or even worse, by Chicago School ideologues?”); John J. Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 SW. U. L. REV. 335, 344 (1981) (depicting Chicago School as a “church” and calling its analysis a “theology . . . out of touch with its own empirical and moral roots, detached from present-day realities”); Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936, 944 (1987) (discussing how William Baxter, the first appointee of Ronald Reagan to head the Antitrust Division of the Department of Justice, helped alter federal antitrust enforcement: “It is often said that extremists are necessary to move tradition a short step. This is, perhaps, what Baxter and the Chicago School have done.”); Thomas M. Melsheimer, *Economics and Ideology: Antitrust in the 1980s*, 42 STAN. L. REV. 1319, 1335 (1990) (“In the hands of Chicago School proponents, economics has become an engine for an ideology hostile to the operation of antitrust law.”).

shared body of thought instead may be seen as worthy of respect and are less likely to be brushed aside as intellectually illegitimate. It may be, as one commentator has suggested, a long way from Chicago to Brussels,<sup>32</sup> but it is a shorter distance from Belgium to, say, Eastern Massachusetts.

A fourth reason to distrust the Chicago School/Post-Chicago School interpretation of the U.S. experience is that it can be a harmful distraction. The Chicago School/Post-Chicago School framework deflects attention away from important questions about institutional capacity and design whose resolution is essential to the effectiveness of existing forms of U.S. competition policy intervention and to possible future extensions of enforcement. The intellectual core of modern U.S. policy has been formed by the contributions of commentators—both inside and outside the Chicago School—who have questioned the capacity of U.S. competition policy institutions to intervene skillfully to address dominant firm conduct. To see the widely-shared concern about institutional capacity and design clearly is to better understand that improvements in institutional capacity will determine whether competition policy systems can pursue effective programs to correct dominant firm misconduct, as well as to preserve their role in addressing other economic phenomena, such as mergers.

This Article seeks to improve upon the Chicago-centric interpretation of the foundations of modern U.S. competition law and its emphasis upon the intellectual contest between Chicago and Post-Chicago perspectives. A more accurate view of the intellectual forces that have shaped the modern U.S. antitrust system can illuminate future developments in ideas and institutional arrangements that might adjust the doctrinal principles and enforcement norms that guide U.S. competition policy today. The Article complements the work of antitrust scholars who have previously identified important elements of consensus across different schools of thought or have highlighted how researchers outside of the

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<sup>32</sup> William J. Kolasky, *Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels*, 10 GEO. MASON L. REV. 533 (2002).

Chicago School promoted a retreat from the more interventionist approaches that prevailed from the 1940s through the early 1970s.<sup>33</sup> In particular, this paper reinforces the insights of scholars such as Herbert Hovenkamp and William Page who have emphasized the contributions of the modern Harvard School—especially Phillip Areeda and Donald Turner—to developments in doctrine and policy that retrenched the U.S. antitrust system and often are said to derive chiefly or solely from the Chicago School’s influence.<sup>34</sup>

I argue that the intellectual DNA of U.S. antitrust doctrine governing single-firm conduct today is not exclusively or predominantly a single strand of Chicago School ideas. Rather, the intellectual DNA of modern U.S. antitrust doctrine is chiefly a double helix<sup>35</sup> that consists of

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<sup>33</sup> See, e.g., Andrew I. Gavil, *Teaching Antitrust Law in Its Second Century: In Search of the Ultimate Antitrust Casebook*, 66 N.Y.U. L. REV. 189, 201 (1991) (Phillip Areeda’s “impact on the direction of antitrust is at least comparable to that of the Chicago School”).

<sup>34</sup> See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 35-38 (Harvard University Press 2005) [hereinafter *ANTITRUST ENTERPRISE*] (laying out Professor Hovenkamp’s most recent and complete presentation of this interpretation). Professor Hovenkamp’s review of the second edition of Richard Posner’s *ANTITRUST LAW* (2001) also highlights important similarities between the modern Chicago School and the modern Harvard School. See also Herbert Hovenkamp, *Book Review: The Rationalization of Antitrust*, 116 HARV. L. REV. 917 (2003) [hereinafter *Book Review*]. For an extensive treatment by Professor Page that examines the influence of Areeda and the Chicago School, see William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909 (1996) [hereinafter *Areeda, Chicago, and Antitrust Injury*].

<sup>35</sup> The double helix imagery used in this paper draws from the story of Francis Crick’s and James Watson’s discovery of the structure of DNA. See JAMES D. WATSON, *DNA THE SECRET OF LIFE* (Arrow Books 2003); JAMES D. WATSON, *THE DOUBLE HELIX* (Penguin Books 1999). Other metaphors serve to make a similar point about the centrality of modern Chicago and Harvard School views to U.S. antitrust law and policy. Professor Page has written that “Areeda’s body of scholarship and that of the Chicago school are the twin pillars of contemporary antitrust.” Page, *Areeda, Chicago, and Antitrust Injury*, *supra* note 34, at 910. I prefer the double helix metaphor because, instead of positing two independent pillars of intellectual support for antitrust policy, it suggests more strongly the interconnected and evolutionary nature of the modern body of dominant

two intertwined chains of ideas, one drawn from the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook, and the other drawn from the Harvard School (HS) of Phillip Areeda, Donald Turner, and Stephen Breyer. In the combination of Chicago School and Harvard School perspectives, one sees shared prescriptions about the appropriate substantive theories for antitrust enforcement involving dominant firm conduct (Chicago's main contribution to the double helix) and cautions about the administrability of legal rules and the capacity of the institutions entrusted with implementing them (Harvard's main contribution to the double helix). Scholars not affiliated with the modern Chicago or Harvard schools influence modern antitrust analysis in the courts,<sup>36</sup> but the

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U.S. antitrust ideas. Professor Page's scholarship has underscored the element of interconnection in analyzing how Areeda helped establish the antitrust injury doctrine. Professor Page shows how Areeda provided an important process-related conduit for inserting Chicago School theory into the routine litigation of antitrust disputes. *See supra* note 34 and accompanying text.

<sup>36</sup> Saying that the Chicago/Harvard double helix is the *chief* element of the intellectual DNA of the U.S. antitrust system acknowledges the influence of other ideas and recognizes that few bodies of law or policy owe their intellectual structure solely to a few easily identifiable sources. An effort to assess the effect of law and economics scholarship generally on antitrust law would have to account for how "[v]arious schools of thought compete in this rich marketplace of ideas, including the Chicago approach to law and economics, public choice theory, institutional law and economics, and the new institutional economics." NICHOLAS MERCURO & STEVEN G. MEDEMA, *ECONOMICS AND THE LAW* 1 (Princeton University Press 2d ed. 2006). For example, Oliver Williamson has produced some of the most important antitrust scholarship of the past 40 years, and he is not easily described as being either a Chicago School or Post-Chicago School commentator. One major part of Williamson's writing shares the Chicago School view that antitrust generally should not intervene to disturb vertical contractual restraints or vertical mergers. *See* OLIVER WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 82-131 (1975). Williamson's scholarship involving dominant firm conduct has been sympathetic to the Post-Chicago view that proposes a broader scope of antitrust effort to address single-firm exclusionary behavior. *See* Oliver Williamson, *Delimiting Antitrust*, 76 *GEO. L.J.* 271 (1987). My claim is that the Chicago/Harvard double helix is the dominant influence in the U.S. system and that the double helix is powerful because contributions from both schools created it.

Chicago/Harvard double helix provides the basic intellectual framework for U.S. antitrust jurisprudence today and, by shaping doctrine, constrains the enforcement choices of antitrust agencies. The double helix of ideas does not preclude enforcement, but it has supported the creation of presumptions that elevate the hurdles that antitrust plaintiffs must clear to prevail in the courts.

To examine the role of the Chicago/Harvard double helix in modern U.S. competition law, the Article first sketches trends in U.S. antitrust doctrine and enforcement policy that govern dominant firm conduct and reviews the use of the Chicago School/Post-Chicago School narrative to explain these trends. This section discusses problems created by reliance on the Chicago School/Post-Chicago School narrative and argues that the views often attributed to the Chicago School reflect major contributions from Harvard School scholars. The Article then describes the Chicago/Harvard double helix that constitutes the intellectual DNA of modern U.S. competition policy toward dominant firms. The Article then traces how the Chicago/Harvard double helix has inspired the adoption of presumptions about the competitive significance of single-firm behavior and about the institutions of private and public enforcement that tend to discourage antitrust intervention to control the conduct of dominant enterprises. The final section of the Article examines the implications of the Chicago/Harvard double helix for the future development of U.S. competition policy.

For the most part, the paper focuses on the influence of the Chicago/Harvard double helix on court decisions. The emphasis on the courts reflects the role of judicial decisions in defining the boundaries within which public enforcement agencies exercise their discretion to prosecute. When enforcement agencies desire to initiate new dominant firm cases, they must reconcile possible theories of liability with doctrinal principles that view intervention warily and rest extensively on a combination of Chicago School/Harvard School thinking.<sup>37</sup> Although the paper focuses on the

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<sup>37</sup> On the shared skepticism of the Harvard and Chicago schools toward antitrust intervention, *see* HOVENKAMP, *ANTITRUST ENTERPRISE*,

analysis of dominant firm conduct, its observations apply to other areas of antitrust policy, as well.

In mapping out what I consider to be the intellectual DNA of the U.S. antitrust system today, I acknowledge that the composition of ideas that guide doctrine and policy will change over time. The Chicago/Harvard double helix already incorporates ideas associated with Post-Chicago scholarship, and a mapping of the intellectual framework twenty years hence may feature significant differences from today's status quo. The intellectual history of the U.S. competition policy system is marked by the continuous reformulation, refinement, and adaptation of antitrust concepts in light of changes in economic and legal learning.<sup>38</sup> By describing more clearly and accurately the sources and nature of the presumptions that guide the operation of the U.S. antitrust system today, this paper tries to indicate what developments would serve to adjust the treatment of dominant firm behavior in the future and to suggest where such adjustments might lead.

## II. DOMINANT FIRMS AND THE CHICAGO/POST-CHICAGO NARRATIVE OF U.S. ANTITRUST POLICY

From the 1940s through the mid-1970s, the United States developed an intervention-minded body of legal doctrine and enforcement policy toward dominant firms that no system of competition law has matched. Judicial decisions adopted an exceptionally expansive view of abuse. For a time in the 1940s, in decisions such as *United States v. Aluminum Co. of America*,<sup>39</sup> *American Tobacco Co. v. United States*,<sup>40</sup> and

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*supra* note 34, at 38 ("Today the Harvard School is modestly more interventionist than the Chicago School, but the main differences lie in details.").

<sup>38</sup> See William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 295-96, 303-05 (1992) (discussing evolutionary character of U.S. competition policy since adoption of Sherman Act in 1890); Kovacic & Shapiro, *supra* note 8, at 43-44, 58-59 (same).

<sup>39</sup> *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

<sup>40</sup> *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946).



*United States v. Griffith*,<sup>41</sup> the courts seemed poised to dispense with the requirement of abusive conduct and endorse a no-fault theory of monopolization.<sup>42</sup> Although Section 2 cases in this period continued to insist on some element of bad acts, the courts defined the concept of wrongful behavior so broadly that a wide range of conduct sufficed to create liability for dominant firms.<sup>43</sup>

Public enforcement policy toward dominant firms in this period was no less far-reaching. Accustomed as we are today to envisioning Section 2 infringements as civil offenses, it is easy to forget that, as late as the mid-1960s, the Department of Justice sometimes prosecuted monopolization or attempted monopolization as crimes. Three times in the early 1960s, the Justice Department indicted companies for Section 2 violations.<sup>44</sup> In one case, where the wrongful conduct consisted of oversupplying the Los Angeles metropolitan area with bananas, the Department also indicted individuals.<sup>45</sup> From 1969 through the early 1980s,

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<sup>41</sup> *United States v. Griffith*, 334 U.S. 100 (1948).

<sup>42</sup> See GAVIL ET AL., *supra* note 19, at 597-99, 603-05 (describing how, to some commentators, *Alcoa*, *American Tobacco*, and *Griffith* seemed to foreshadow abandonment of the improper conduct element of the monopolization); see also JOEL B. DIRLAM & ALFRED E. KAHN, *FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY* 64 (1954) (referring to “Judge Hand’s virtual per se condemnation of *Alcoa* as a monopolist”).

<sup>43</sup> See GAVIL ET AL., *supra* note 19, at 597-99 (discussing development of Section 2 jurisprudence after *Alcoa* and *American Tobacco*).

<sup>44</sup> See *United States v. Gen. Motors Corp.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,061, at 52,424 (S.D.N.Y., filed Apr. 12, 1961) (indictment for monopolization of the manufacture and sale of railroad locomotives); *United States v. United Fruit Co.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,063, at 52,528 (C.D.Ca., filed July 16, 1963) (indictment for monopolization of the banana market in Los Angeles); *United States v. H.P. Hood & Sons, Inc.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,063, at 52,519 (D.Mass., filed Mar. 15, 1963) (indictment against largest wholesaler of milk in New England for violations of Robinson-Patman Act and Section 2 of the Sherman Act; among other counts, the indictment accused the defendant of attempted monopolization by illegally cutting prices).

<sup>45</sup> See *United Fruit Co.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,063, at 52,528 (indictment against United Fruit company and

the Justice Department and the Federal Trade Commission undertook a singularly ambitious program of civil cases. Many of these sought to restructure the affected industries through divestitures or the compulsory licensing of intellectual property.<sup>46</sup> The swath of affected commerce included the automobile tire, bread, breakfast cereal, computer, instant coffee, petroleum, photocopier, and telephone industries.<sup>47</sup>

The trend of U.S. antitrust doctrine over the past thirty years has been to give dominant firms greater freedom to select pricing, product development, and distribution strategies.<sup>48</sup> The progression toward greater doctrinal permissiveness has not been unbroken. For example, in *Eastman Kodak Co. v. Image Technical Services*<sup>49</sup> in 1992, it appeared that the Supreme Court might endorse more expansive applications of monopolization law.<sup>50</sup> This development has not come to pass, even though some recent decisions of the courts of appeals and the Federal Trade Commission have shown that the discretion of firms with substantial market power is not unbounded.<sup>51</sup> Lower court

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individual employees for monopolization of the banana market in Los Angeles).

<sup>46</sup> The program of government suits in this period is documented in William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 IOWA L. REV. 1105, 1106-08, 1119-20 (1989).

<sup>47</sup> See *id.* at 1106-08 (describing and compiling government cases involving requests for divestiture or compulsory licensing of intellectual property).

<sup>48</sup> See Kovacic & Shapiro, *supra* note 8, at 54-58 (summarizing developments in modern U.S. doctrine governing conduct of dominant firms).

<sup>49</sup> *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451 (1992).

<sup>50</sup> Articles that analyzed possibilities for the application of *Kodak* to expand the application of the antitrust laws include Jonathan B. Baker, *Promoting Innovation Competition Through the Aspen-Kodak Rule*, 7 GEO. MASON L. REV. 495 (1999); Robert H. Lande, *Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST L.J. 193 (1993).

<sup>51</sup> The plaintiff established the defendant's liability for monopolization or attempted monopolization in *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005), *cert. denied*, 126 S. Ct. 1023 (2006); *LePages, Inc.*

decisions since *Kodak* generally “have bent over backwards to construe *Kodak* as narrowly as possible,”<sup>52</sup> and the Supreme Court’s post-*Kodak* decisions have emphasized principles that discourage intervention. In *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*<sup>53</sup> and *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*,<sup>54</sup> the Supreme Court ignored or expressly downplayed the expansive possibilities of *Kodak* and earlier decisions such as *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*<sup>55</sup> and imposed significant burdens on plaintiffs—especially private treble damage claimants—seeking to challenge dominant firm conduct. Since 1970, dominant firms generally have faced less exposure at the end of each decade (and in the current decade, from 2001 through 2006) than they did at its beginning.

Several characteristics of modern Section 2 jurisprudence stand out. First, the courts have relied almost exclusively on their assessment of whether challenged behavior reduces economic efficiency or is likely to do so.<sup>56</sup> The definition of

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v. 3M Co., 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 542 U.S. 953 (2004); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002); *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 2001); *In re Rambus*, No. 9302 (F.T.C. July 31, 2006), *available at* <http://www.ftc.gov/os/adjpro/d9302/060802commissionopinion.pdf>. *See also* *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F. 3d 917 (6th Cir. 2005) (denying defendant’s motion for summary judgment on plaintiff’s predatory pricing claims).

<sup>52</sup> Hovenkamp, *Review and Critique*, *supra* note 14, at 286.

<sup>53</sup> *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1992).

<sup>54</sup> *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2003).

<sup>55</sup> *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585 (1985). The Court in *Trinko* said “*Aspen Skiing* is at or near the outer boundary of § 2 liability.” *Trinko*, 540 U.S. at 409.

<sup>56</sup> *See* GAVIL ET AL., *supra* note 19, at 38 (discussing how modern U.S. antitrust law and policy focus on economic effects); Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL’Y INT’L 225, 230 (2006) (tracing “the Supreme Court’s endorsement of allocative efficiency as the fundamental value underlying the antitrust laws”); Lopatka, *supra* note 23, at 23-45 (noting Supreme Court’s acceptance of an economic efficiency orientation in antitrust analysis); Lawrence A. Sullivan, *Antitrust*,

liability standards and the analysis of specific claims of unlawful exclusion focus overwhelmingly on efficiency consequences. Section 2 decisions do not consider how the defendant's conduct might effect the attainment of an economic environment more conducive to the success of smaller enterprises or the pursuit of related objectives that animated competition policy at various times from the 1940s to the early 1970s.<sup>57</sup>

The second trait is wariness of rules that might discourage dominant firms from pursuing price-cutting, product development, or other strategies that generally serve to improve consumer welfare. This wariness reflects respect for the economic contributions of large firms and fear that overly restrictive rules will induce a harmful passivity.<sup>58</sup> Implicit in this perspective is confidence in the resilience of the U.S. economic system and the capacity of the dominant firm's rivals, suppliers, and customers to adopt effective counterstrategies to blunt exclusionary strategies.

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*Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CAL. L. REV. 1, 2 (1980) ("The Supreme Court is increasingly committed to a conception of competition that emphasizes efficiency as a dominant social value. This tendency is even more noticeable in lower court cases. Efficiency is not the only interest to which antitrust courts respond. But is the primary one. Preoccupation with efficiency is changing the law.").

<sup>57</sup> See Terry Calvani & Craig Sibarium, *Antitrust Today: Maturity or Decline*, 35 ANTITRUST BULL. 123 (1990) (reviewing growing importance of efficiency and related economic goals in Supreme Court antitrust decisions since mid-1970s); Geoffrey A. Manne & E. Marcellus Williamson, *Hot Docs vs. Cold Economics: The Use and Misuse of Business Documents in Antitrust Enforcement and Adjudication*, 47 ARIZ. L. REV. 609, 613-16 (2005) (discussing the declining role of non-economic, non-efficiency considerations in modern U.S. antitrust law and policy).

<sup>58</sup> See *Trinko*, 540 U.S. at 414 ("The cost of false positives counsels against an undue expansion of § 2 liability."); *Brooke Group*, 509 U.S. at 226-27 ("It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[C]utting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect.").

A third characteristic is concern for the limitations of antitrust courts and enforcement agencies to ensure that analytical approaches which are conceptually sound are applied sensibly in practice. Decisions such as *Trinko*, for example, focus directly on the relative capabilities of antitrust courts and sectoral regulators and view sectoral oversight more favorably than antitrust decisions did in the 1970s and early 1980s.<sup>59</sup>

#### A. The Chicago School/Post-Chicago School Dialectic

Discussions of U.S. competition policy from the early 1970s to the present often emphasize the ascent of Chicago School perspectives in guiding doctrine and enforcement policy.<sup>60</sup> In this narrative, Chicago School views ordinarily endorse what Frank Easterbrook has called a “profoundly skeptical program” that consists of “little other than prosecuting plain vanilla cartels and mergers to monopoly.”<sup>61</sup> Such an approach generally would disregard vertical

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<sup>59</sup> *Trinko*, 540 U.S. at 411-17.

<sup>60</sup> See TONY A. FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930-2004 6 (2006) (From the 1970s through the end of the 20<sup>th</sup> Century, “advocates of the Chicago School of Economics remade antitrust” in the United States.); Fox & Sullivan, *supra* note 31, at 945; Eleanor M. Fox, *What Competition Law Standards are Most Appropriate for Efficient Economic Development*, 6 REGULETTER 17 (Issue No. 4, 2005) (“There is a lesson to be drawn from US antitrust, 1970s to 1980s. What we sometimes call Chicago School called major attention to the ignored efficiencies, and presented a clear paradigm and clear rules and standards. It spoke with one voice, papering over differences in market philosophies. Chicago School won the debate.”); Jacobs, *supra* note 14, at 220 (noting that “by the end of the 1980s Chicago’s position had proved persuasive to federal administrative agencies and most courts”); Helen Jenkins & Beatriz Yemail, *Economics at the Heart of Competition Policy*, in INTRODUCTION TO EU COMPETITION LAW 19, 35 (Peter Willis ed. 2005) (“US anti-trust law follows an effects-based approach, following the ideas of the so-called ‘Chicago School’ of the 1970s.”); Lao, *Antitrust Intent*, *supra* note 14, at 177 (“Beginning in the late 1970s . . . , as the influence of the Chicago School grew, the role of intent evidence [in Sherman Act Section 2 cases] was greatly diminished.”).

<sup>61</sup> Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1701 (1986). On the content on Chicago School antitrust perspectives, see GAVIL ET AL., *supra* note 19, at 62-64.

contractual restraints, vertical and conglomerate mergers, and most claims of illegal monopolization or attempted monopolization.<sup>62</sup> Chicago School scholars typically propose that the attainment of economic efficiency be the exclusive basis for the design and application of antitrust rules.

In the most common form of the narrative, the Post-Chicago School offers the principal intellectual alternative to the Chicago School.<sup>63</sup> The Post-Chicago literature generally defines a broader zone for antitrust intervention.<sup>64</sup> One body

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<sup>62</sup> In his ANTITRUST PARADOX, Robert Bork endorsed the use of Section 2 of the Sherman Act to challenge efforts to manipulate government processes as means for attaining or preserving monopoly power. See BORK, ANTITRUST PARADOX, *supra* note 28, at 349-64. Bork also applauded the result in at least one Section 2 case, *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), that involved no allegations of misuse of government processes. *Id.* at 344-46.

<sup>63</sup> See Christian Ahlborn et al., *Bridging the Transatlantic Divide? The Reform of Europe's Policy Regarding Dominant Firms*, in RETHINKING ARTICLE 82, at 90, 91-92 (Bill Allan et al. eds., 2006) ("Over the last 30 years, the interpretation of Section 2 has undergone significant changes since the high watermark of intervention by the Supreme Court in the 1960s. This change was triggered by the 'Chicago School' which led to a more rigorous and economics-based antitrust approach. This approach was challenged in the last two decades by so-called 'post-Chicago' theories."); Baker, *Recent Developments*, *supra* note 15, at 651-53 (presenting major analytical challenges posed by Post-Chicago economic literature to Chicago School perspectives); Coate & Fischer, *supra* note 14, at 811-37 (contrasting Post-Chicago School and Chicago School interpretations of business conduct); GAVIL ET AL., *supra* note 19, at 67-69 (describing content and significance of Post-Chicago views); Jacobs, *supra* note 14, at 240-50 (discussing "The Post-Chicago Challenge to Chicago's Supremacy"); Kovacic & Shapiro, *supra* note 8, at 55-58; Lao, *Antitrust Intent*, *supra* note 14, at 179 ("Beginning in the mid-to-late 1980s, a post-Chicago movement emerged to challenge certain Chicago paradigms that were viewed as invalid or unrealistic."). Professors Lawrence Sullivan and Warren Grimes offer a different classification scheme. They identify three groups of commentators: "free market theorists (the 'Chicago School'), traditionalists, and post-Chicago theorists." LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 9-10 (2d ed. 2006). The "traditionalists" in their framework "recognize a range of goals for antitrust and are more likely to envision a more vigorous role for antitrust that may include some expansion." *Id.* at 9.

<sup>64</sup> See *Post-Chicago Analysis After Kodak: Interview with Professor Steven C. Salop*, 7 ANTITRUST 20, 20 (1992) ("Post Chicago analysis does

of Post-Chicago commentary describes how, in some circumstances, exclusive dealing, tying, and other vertical restraints can facilitate the acquisition or maintenance of market power on grounds other than efficiency.<sup>65</sup> Other Post-Chicago commentators have suggested how firms can use a mix of price and non-price strategies to diminish economic performance by deterring entry and expansion by rivals.<sup>66</sup> Some Post-Chicago commentators accept the primacy of an efficiency framework,<sup>67</sup> while others say that antitrust policy should serve distributional and other objectives.<sup>68</sup> Post-Chicago observers generally express greater faith than do their Chicago School counterparts in the capacity of government institutions to make wise choices about when and how to intervene.<sup>69</sup>

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not unskeptically attribute efficiency properties to conduct and it is more open to the possibility of anticompetitive effects. Thus, it is more open to intervention by policy makers.”). The Post-Chicago literature is reviewed and analyzed in Hovenkamp, *Review and Critique*, *supra* note 14.

<sup>65</sup> The most influential treatment of this idea, and perhaps the most important contribution to the Post-Chicago literature, is Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209 (1986) [hereinafter *Raising Rivals’ Costs*]. See also GAVIL ET AL., *supra* note 19, at 634-41 (describing raising rivals’ costs theory and noting contributions of Professors Krattenmaker and Salop to the Post-Chicago literature).

<sup>66</sup> See Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000) (discussing possible bases for challenging predatory pricing strategies).

<sup>67</sup> See Jacobs, *supra* note 14.

Despite their differences, post-Chicago and Chicago scholars share a common metric. They agree that wealth maximization should be the exclusive goal of antitrust policy, and antitrust enforcement should strive to achieve the highest practicable level of consumer welfare. They eschew the multivalent inquiries informing the Modern Populists’ approach in favor of the single-minded pursuit of allocative efficiency.

*Id.* at 242.

<sup>68</sup> See Robert H. Lande, *The Rise and (Coming) Fall of Efficiency in Antitrust Analysis*, 33 ANTITRUST BULL. 429 (1988).

<sup>69</sup> See Hovenkamp, *Review and Critique*, *supra* note 14, at 267 (arguing that Post-Chicago School “has relatively less confidence in

As a matter of positive analysis, commentators widely accept the centrality of the Chicago School in shaping modern U.S. antitrust policy and treat the tension between Chicago School and Post-Chicago School ideas as the intellectual contest that will determine the future course of U.S. policy.<sup>70</sup> Some accounts trace the ascent of Chicago School preferences to the 1980s and attribute the broad acceptance of Chicago School ideas by courts and enforcement agencies to Ronald Reagan's presidency.<sup>71</sup> Others see the origins of a "Chicago Revolution" in judicial decisions of the 1970s and in a mix of policy and institutional adjustments in the Antitrust Division of the Department of

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markets as such, is more fearful of strategic anticompetitive behavior by dominant firms, and has a significantly restored faith in the efficacy of government intervention").

<sup>70</sup> See Ross H. Patterson, *How the Chicago School Hijacked New Zealand Competition Law and Policy*, 17 N.Z.U. L. REV. 160, 163-66 (1996) (depicting emergence of Chicago School influence and development of Post-Chicago School counterweight in U.S. competition policy); Robert A. Skitol, *What Should We Call the "New Antitrust?"* 1 (June 7, 2002), available at <http://www.antitrustinstitute.org/recent2/188.cfm> (development of U.S. antitrust thinking moved "from the ultra-intrusive 'Populist School' of the 1960s and 1970s to the ultra-minimalist 'Chicago School' of the 1980s to the newly invigorated and fresh-thinking 'Post-Chicago School' of the 1990s").

<sup>71</sup> KATALIN JUDIT CSERES, COMPETITION LAW AND CONSUMER PROTECTION 46 (2005) ("From 1980 onwards, when Ronald Reagan was elected president, the federal enforcement agencies had encompassed much of [Robert] Bork's antitrust policy perceptions."); TONY A. FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930-2004, at 139 (2006) (the "Chicago School's pro-market theories were ascendant" after 1980, and "Reagan's reliance on Chicago economic efficiency theories dominated the deregulation movement of the 1980s"); BARRY J. RODGER & ANGUS MACCULLOCH, COMPETITION LAW AND POLICY IN THE EC AND UK 17 (3d Ed. 2004) ("[W]ith the inauguration of President Reagan in 1981, the Chicago school approach was adopted by the US Government with Reagan's promise to curtail the Government's role in business."); Ahlborn et al., *supra* note 63, at 92 ("under the influence of the Chicago School, the US agencies and courts have progressively narrowed the interpretation of Section 2"); Albert A. Foer, *About Markets and States: Five Twenty-First Century Perspectives* 1 (Dec. 10, 2004), available at <http://www.antitrustinstitute.org/recent2/357.cfm> ("The microeconomic paradigm known as the Chicago School . . . has controlled federal antitrust policy since the election of Ronald Reagan.").



Justice and in the Federal Trade Commission in the same decade.<sup>72</sup> Chicago School views are seen to provide the chief basis for judicial analysis from the late 1970s to the present, although interpretations vary about how much public enforcement policy in the 1990s departed from Chicago School perspectives.<sup>73</sup>

As a matter of normative analysis, commentators disagree about whether the Chicago School views have improved the U.S. competition policy system. Some observers generally endorse judicial decisions and public enforcement choices that have embraced Chicago School views.<sup>74</sup> Those sympathetic to Chicago School principles differ in their definition of what constitutes a program that is faithful to Chicago School ideas.<sup>75</sup> Some Chicago School commentators have suggested that some Post-Chicago proposals should be treated as consistent with longstanding Chicago School perspectives.<sup>76</sup>

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<sup>72</sup> See MARC A. EISNER, *ANTITRUST AND THE TRIUMPH OF ECONOMICS* 119-83 (1991) (discussing how institutional changes at the U.S. federal antitrust agencies in the 1960s and 1970s gave economists a greater role in the agencies' decision making); Marc A. Eisner & Kenneth J. Meier, *Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust*, 34 AM. J. POL. SCI. 269, 282-84 (1990) (same; concluding that "the Reagan antitrust record is little more than an extension of well-established trends which predated the elections of 1980"). Compare SULLIVAN & GRIMES, *supra* note 63, at 7 ("By the mid-1970s, a sense that some court decisions had suppressed conduct that was efficient and the contemporaneous growth in influence of the Chicago School of Economics began tempering enforcement policy.").

<sup>73</sup> See Kovacic, *Enforcement Norms*, *supra* note 11, at 382-93, 407-67 (describing "pendulum narrative" of modern antitrust history and critiquing interpretation that depicts federal enforcement in 1990s as being a decisive departure from enforcement policy in 1980s).

<sup>74</sup> See Easterbrook, *Workable Antitrust Policy*, *supra* note 61, at 1698-99.

<sup>75</sup> See Fred S. McChesney, *Be True to Your School: Conflicting Chicago Approaches to Antitrust Regulation*, 10 CATO J. 775 (1991) (describing variations among Chicago School scholars about the value and appropriate scope of antitrust policy).

<sup>76</sup> See Posner, *Keynote Address*, *supra* note 26, at 500 ("[E]ven the early versions of Chicago school thinking recognized that there could be cases in which single-firm abuses would give rise to a serious antitrust concern.").

A second body of observers prefers that doctrine and policy adopt a Post-Chicago agenda.<sup>77</sup> Commentators in this group vary in their assessments of the Chicago School. Some accept the soundness of many Chicago School concepts and propose to modify the presumptions of existing doctrine and enforcement policy by incorporating the insights of Post-Chicago analysis.<sup>78</sup> As noted earlier,<sup>79</sup> the “Post-Chicago” label imperfectly describes these commentators if “Post-Chicago” is taken to mean a complete or substantial repudiation of Chicago School ideas. By contrast, a separate body of commentary that is sympathetic to Post-Chicago ideas portrays the Chicago School as the source of extremist views that endanger U.S. and foreign competition policy.<sup>80</sup>

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<sup>77</sup> See Foer & Lande, *supra* note 31, at 3 (“Today we are participating in a post-Chicago reconstruction that may finally give antitrust a broad institutional base that it so desperately needs.”); Lande, *Chicago Takes It on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST L.J. 193 (1993). Compare Lao, *Antitrust Intent*, *supra* note 14, at 208 (“While theoretically logical and elegant, Chicago models do not resemble real-world markets, and often cannot be easily applied because of the lack of useful data. Post-Chicago theories, though more realistic, are very nuanced and indeterminate, and their application would benefit greatly from the consideration of intent.”).

<sup>78</sup> See Baker, *Political Bargain*, *supra* note 14, at 512 n.109 (“Post-Chicago criticisms of current antitrust doctrine largely accept the economic approach, and call for modifications to existing rules based upon the application of game theoretic tools and new empirical economic methods.”). See also SULLIVAN & GRIMES, *supra* note 63, at 9-10 (“Post-Chicago thinkers focus on two goals—maximizing efficiency and assuring that wealth is not shifted from consumers to firms with power; they, like Chicagoans, rely on microeconomic analysis but try to work inductively on the basis of rigorous inquiry into particular market facts.”).

<sup>79</sup> See *supra* notes 77 and 78 and accompanying text (discussing how some Post-Chicago views build upon Chicago School insights).

<sup>80</sup> See Stephen A. Susman, *Business Judgment in Antitrust Justice*, 76 GEO. L.J. 337, 337 (1987) (“We have sold the soul of competition to the devil, no question about that. As for the devil, there are several to choose from: the Chicago School, certain opinions of the Supreme Court, and [the Reagan] Administration’s antitrust policies are chief among them.”); Institute for Consumer Antitrust Studies, *Loyola University Chicago School of Law, A Mid-Term Report Card on Antitrust in the Bush Administration* (October 7, 2002) (conference transcript) (remarks of Spencer Weber Waller) (“. . . I am being told that the [International Competition Network], at least under the table, is being designed as a

The Chicago School/Post-Chicago School framework has considerable influence outside the United States. Many foreign commentators attribute the non-interventionist character of many areas of U.S. competition law, including the treatment of dominant firms, to the Chicago School's influence.<sup>81</sup> In a representative assessment, two European scholars observe that “[t]he many shifts in American competition policy in the 1970s and 1980s can, without doubt, be attributed to the economic insights of the Chicago School.”<sup>82</sup> To some foreign scholars, U.S. doctrine and policy toward practices such as dominant firm behavior should be viewed skeptically because the animating Chicago School ideas are extreme and based on raw ideology rather than sound reasoning.<sup>83</sup> In many accounts, Post-Chicago views

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carrier for the Chicago School virus to bring it abroad to as many people and as many understaffed, underresourced agencies as there are . . . .”); see also Albert A. Foer, *Playing Monopoly 2* (Apr. 12, 1999), <http://www.antitrustinstitute.org/recent/28.cfm> (public antitrust enforcement in the United States “is tempered both by an obvious lack of resources and by the constraints of an antitrust system that is still too much in the intellectual debt of Chicago”).

<sup>81</sup> See, e.g., ALISON JONES & BRENDA SUFRIN, *EC COMPETITION LAW* 22 (2d ed. 2004) (“In the USA the ascendancy of Chicago during the 1970s and 1980s led to a change of direction in the application of antitrust law . . . .”); CSERES, *supra* note 71, at 45-55; MASSIMO MOTTA, *COMPETITION POLICY* 8-9 (Cambridge University Press 2004); PIET JAN SLOT & ANGUS JOHNSTON, *AN INTRODUCTION TO COMPETITION LAW* 311-12 (2006) (Chicago School “has been very influential in the shaping of US antitrust policy since the 1980s. It emphasizes the role of market forces and is generally reluctant to attribute an important role to competition policy.”).

<sup>82</sup> ROGER J. VAN DEN BERGH & PETER D. CAMESASCA, *EUROPEAN COMPETITION LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE* 55, 57 (2d ed. 2006). Professors Van den Bergh and Camesasca add that “the change of direction of decisions from the US Supreme Court during the Reagan and Bush eras was clearly a response to the emergence of the Chicago School.” *Id.* at 57.

<sup>83</sup> A theme of some commentary is that foreign jurisdictions should be wary of U.S. jurisprudence and policy lest their own systems be “hijacked” by the same extremist Chicago School impulses that captured the U.S. antitrust regime. See Patterson, *supra* note 70, at 192 (“In practice, the Chicago School’s ‘minimalisation of antitrust’ has become a reality. The Commerce Act was designed to protect competition in markets in New

offer a desirable antidote to the Chicago School's influence.<sup>84</sup>

With striking frequency, the emergence of a modern Harvard School and the contributions of its key members (Areeda, Turner, and Breyer) to the development of the U.S. antitrust system are overlooked or understated by antitrust scholars at home and abroad. The leading histories by American academics of U.S. antitrust policy tend to ignore the modern Harvard School or treat its main exponents as peripheral figures.<sup>85</sup> Even when analyzing materials that highlight the distinctive role of the modern Harvard School,

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Zealand; the risk is that it will end up destroying the very thing it was intended to promote.”)

<sup>84</sup> See, e.g., CSERES, *supra* note 71, at 56-63; compare MARK FURSE, COMPETITION LAW OF THE EC AND UK 12 (Oxford University Press 4th Ed. 2004) (“The Chicagoan assumption that real-world behaviour will tend to march that forecast by the perfect competition model is now being subject to increasingly rigorous challenges with the emergence of the new (or ‘modern’) industrial economics, which is informed in part by the empirical evidence provided in various antitrust actions.”).

<sup>85</sup> The work of Tony Freyer and Rudolph Peritz, two of the foremost U.S. experts on the history of American antitrust policy, illustrates the point. In one highly regarded history, Professor Peritz examines the influence of the Chicago School upon the U.S. antitrust system from the 1970s to the early 1990s. RUDOLPH J.R. PERITZ, COMPETITION POLICY IN AMERICA 1888-1992, at 258-62, 282-84 (1996). He does not mention Areeda, Turner, or Breyer in his discussion of this period. Professor Freyer has published two important historical volumes that dwell extensively on the development of modern U.S. antitrust policy. TONY A. FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930-2004 (2006); TONY FREYER, REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA, 1880-1990 (1992). Professor Freyer's comparison of antitrust law in the United Kingdom and the United States discusses the influence of the Chicago School upon modern U.S. jurisprudence and policy, see FREYER, REGULATING BIG BUSINESS, at 278-79, 320-23, 332-33. Professor Freyer does not mention Areeda or Breyer, and he discusses Turner only in connection with Turner's work involving mergers as an academic and an enforcement official in the 1960s. *Id.* at 278-79, 307-10. Professor Freyer's more recent study of the global development of antitrust policy highlights the influence of the Chicago School on U.S. policy from the 1970s onward. See FREYER, ANTITRUST AND GLOBAL CAPITALISM, at 146-54. This volume does not mention Areeda or Breyer, and, like Professor Freyer's earlier text, its discussion of Turner only addresses Turner's work in the 1960s involving mergers. *Id.* at 113, 133.

American scholars often revert to saying that contemporary U.S. antitrust policy is grounded in Chicago School ideas whose durability depends on the effectiveness of challenges from the Post-Chicago School.<sup>86</sup>

The neglect of the modern Harvard School's impact on U.S. antitrust policy is still more pronounced in foreign commentary. Some foreign scholars do not mention how Areeda, Turner, and Breyer have helped shape U.S. doctrine and policy since the early 1970s.<sup>87</sup> When commentators abroad discuss the Harvard School, they usually equate Harvard with the body of more interventionist-minded research in the two decades after World War II by economists such as Joe Bain and Edward Mason.<sup>88</sup> To the extent that foreign scholars identify and discuss a modern

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<sup>86</sup> One example is Randal C. Picker, *Review of HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION*, 2 COMPETITION POL'Y INT'L 183 (2006). Professor Hovenkamp's *ANTITRUST ENTERPRISE*, *supra* note 34, emphasizes how Areeda and Turner fostered acceptance of substantive rules and analytical methods that curtailed the scope of the U.S. antitrust system. *See supra* note 34 and accompanying text (recounting Hovenkamp's discussion of the emergence of the modern Harvard School and its influence on U.S. antitrust policy). Professor Hovenkamp observes that the "new Harvard position" espoused by Areeda and Turner "is the one most consistently advocated in this book." HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 34, at 37. Professor Picker's review does not mention Hovenkamp's account of the book's intellectual lineage and, after summarizing Hovenkamp's main policy prescriptions, calls Hovenkamp "something of a Chicago School apologist." Picker, *supra*, at 185.

<sup>87</sup> For example, in her book on the links between competition policy and consumer protection policy, Professor Cseres mentions neither Areeda nor Breyer, except to list two of Areeda's books in the bibliography. CSERES, *supra* note 71. In a similar vein, Professors Slot and Johnston discuss the influence of Chicago School commentators in limiting the application of the U.S. antitrust laws, *see* SLOT & JOHNSTON, *supra* note 81, at 24, 311-12, but do not discuss the contributions of Areeda, Turner, or Breyer.

<sup>88</sup> This is an organizing theme of Professor Van den Bergh's and Professor Camesasca's survey of European Competition Law and Economics. In juxtaposing the influence of the Chicago School and the Harvard School on U.S. antitrust law, Van den Bergh and Camesasca focus entirely on the Harvard School of Bain and Mason. *See* Van den BERGH & CAMESASCA, *supra* note 82, at 59-85.

Harvard School of thought established by Areeda, Turner, and Breyer, its influence on the U.S. courts and antitrust agencies is severely understated. In the typical book or article, Areeda and Turner appear briefly in connection with their work on predatory pricing.<sup>89</sup> Their larger role in developing a formative philosophy about the scope and operation of antitrust policy is ignored. In foreign commentary, Breyer's impact as a scholar and jurist and his role with Areeda and Turner in formulating a distinctive, influential body of legal thought are undetectable.

#### B. The Harvard School in the Conventional Chicago School/Post-Chicago School Dialectic

In the 1970s and early 1980s, before the emergence and recognition of the Post-Chicago School as a distinct body of thought and alternative to the Chicago School, debates about the intellectual basis of U.S. competition policy focused on the contest between Chicago School views that first emerged in the 1950s and 1960s and the post-World War II views of what was called the Harvard School. As Chicago School perspectives began to gain acceptance in the 1970s, a common subject of discussion was how much the Chicago School would and should displace the framework of the more intervention-minded antitrust economics associated with Harvard economists such as Bain<sup>90</sup> and Mason.<sup>91</sup> The most influential law and economics synthesis of post-World War II Harvard School views appeared in 1959 in Carl Kaysen's and

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<sup>89</sup> For examples of foreign texts in which the modern scholarship of Areeda and Turner makes a brief appearance in connection with predatory pricing and then disappears, see FURSE, *supra* note 84, at 272; JONES & SUFRIN, *supra* note 81, at 389-91; MOTTA, *supra* note 81, at 447-49; Van den BERGH & CAMESASCA, *supra* note 82, at 290-93; Ahlborn et al., *supra* note 63, at 111.

<sup>90</sup> See JOE S. BAIN, BARRIERS TO NEW COMPETITION: THEIR CHARACTER AND CONSEQUENCES IN MANUFACTURING INDUSTRIES (1956); Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-40*, 65 Q. J. ECON. 293 (1951).

<sup>91</sup> See EDWARD S. MASON, ECONOMIC CONCENTRATION AND THE MONOPOLY PROBLEM (1964).

Donald Turner's volume on *Antitrust Policy*.<sup>92</sup> Kaysen and Turner proposed a range of measures to prevent further concentration in American industry and advanced policies to de-concentrate many significant industrial sectors.<sup>93</sup> When commentators speak of the Harvard School, they often are referring to the collection of ideas generated by Bain, Kaysen, Mason, and Turner in the 1940s, 1950s, and 1960s.<sup>94</sup> As mentioned above,<sup>95</sup> the habit of equating the Harvard School with this earlier era of industrial organization scholarship is particularly noteworthy in commentary outside the United States.<sup>96</sup>

By the end of the 1970s, some commentators began to observe that the Harvard School so frequently featured in the dialectic of the 1960s and 1970s with the Chicago School was changing. In a paper published in 1979, Richard Posner documented substantial convergence in the ideas of many leading Chicago School commentators and the ideas of modern Harvard School scholars such as Areeda and Turner.<sup>97</sup> Posner emphasized how Turner, in his collaboration with Areeda in a 1975 law review article on predatory pricing<sup>98</sup> and in the first volumes of a treatise on antitrust law,<sup>99</sup> had retreated from positions taken in his 1959 book with Kaysen and to a large degree had endorsed

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<sup>92</sup> CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* (1959).

<sup>93</sup> *Id.* at 110-19, 266-72.

<sup>94</sup> See Jacobs, *supra* note 14, at 227 ("Chicago scholars rose to prominence in the late 1960s, offering a theory of business behavior that ran counter to the views of the then-dominant Harvard School of industrial organization. The Harvard School was distrustful of large firms and concentrated industries.").

<sup>95</sup> See *supra* note 89 and accompanying text.

<sup>96</sup> See CSERES, *supra* note 71, at 42-45, 102-03; Doris Hildebrand, *The European School in EC Competition Law*, 25 *WORLD COMPETITION* 3, 3-4 (2002); FURSE, *supra* note 84, at 11-18, 223; RODGER & MACCULLOCH, *supra* note 71, at 17, 301; VAN DEN BERGH & CAMESASCA, *supra* note 82, at 54-85.

<sup>97</sup> Posner, *Chicago School of Antitrust Analysis*, *supra* note 29.

<sup>98</sup> Areeda & Turner, *Predatory Pricing*, *supra* note 17.

<sup>99</sup> I PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1978); II PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1978).

views that mirrored Chicago School prescriptions regarding dominant firm conduct and vertical integration.<sup>100</sup> After noting differences between the two schools in some areas, Posner accurately concluded that the Chicago School and the new Harvard School of Areeda and Turner had much in common in their assessment of dominant firm conduct. In doing so, Posner provided a first map of what is now more clearly recognizable as the intellectual DNA of U.S. competition policy: the Chicago/Harvard double helix.

### III. THE CHICAGO/HARVARD DOUBLE HELIX

The formative intellectual DNA of U.S. competition law and policy today toward dominant firms is a double helix that intertwines the contributions of scholars from the Chicago School and the Harvard School. Figure I below is a simplified representation of the Chicago/Harvard double helix. The figure presents some of the individuals who have been major sources of the ideas that have defined the two schools in roughly the past 40 years. To speak of a “Chicago School” from the 1930s through the mid-1950s or to speak of a “Harvard School” from the 1930s through the 1960s would have conjured images of a more intervention-minded literature associated with the work of scholars such as Bain, Mason, and Henry Simons and with the early work of George Stigler (Chicago) and Donald Turner (Harvard), both of whom embraced more cautious policy prescriptions as their careers progressed.<sup>101</sup> Both schools are similar in that their

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<sup>100</sup> Posner, *Chicago School of Antitrust Analysis*, *supra* note 29, at 933-44. Posner observed that the “new Areeda-Turner treatise . . . does not explicitly acknowledge the modification or abandonment of many of Professor Turner’s earlier views.” *Id.* at 934.

<sup>101</sup> See DUXBURY, *supra* note 16, at 330-48 (recounting the change from the 1930s through the 1950s in the orientation of economic thought at the University of Chicago); Walter Adams, James W. Brock & Norman P. Obst, *Pareto Optimality and Antitrust Policy: the Old Chicago and the New Learning*, 58 SOUTHERN ECON. J. 1, 1-5 (1991) (discussing how the “old Chicago School” of Frank Knight, Henry Simons, and George Stigler in the 1930s, 1940s, and 1950s “advocated a strong, structurally-oriented antitrust policy, with the objective of dissolving dangerous and, in their view, unnecessary concentrations of private economic power”). From the 1930s through the mid-1950s, several economists at the University of



views moved substantially from left to right over time, and each school included key figures (Stigler and Turner) who spanned the two eras and whose views underwent a similar transformation.

### Figure I: The Chicago/Harvard Double Helix

Chicago School	Harvard School
Bork	Areeda
Posner	Turner
Easterbrook	Breyer

One strand of the double helix presents three of the Chicago School's leading figures: Bork, Posner, and Easterbrook. All three individuals are important for their work as academics and as judges on the U.S. Courts of Appeal. The judicial role is important because it has given all three scholars an opportunity to write opinions that integrated central themes of Chicago School teaching into contemporary antitrust jurisprudence.

The second strand of the double helix is the Harvard School. Figure I focuses on the contributions of Areeda, Turner, and Breyer. All three individuals have made major contributions to the literature on competition policy. Like Judges Posner and Easterbrook, Stephen Breyer, first as a

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Chicago endorsed expansive application of the antitrust laws. One major exponent of this view was Henry Simons, who argued that a program of deconcentration was necessary to ensure the economic and political welfare of the United States. HENRY C. SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* 87-88 (1948). George Stigler's memoirs recount his own support during this period for such policies and note that it was not until the late 1950s that he and other economists at the University of Chicago changed their minds on this issue. GEORGE J. STIGLER, *MEMOIRS OF AN UNREGULATED ECONOMIST* 166-70 (1988). The shift within the Chicago academic community in the 1950s and 1960s to a more skeptical view of antitrust intervention is attributable to the influence of Aaron Director, who taught on the University of Chicago Law School faculty and helped shape the thinking of Robert Bork and many others who become associated with the modern Chicago School. See James May, *Redirecting the Future: Law and the Future and the Seeds of Change in Modern Antitrust Law*, 17 *MISS. C. L. REV.* 43, 44-46 (1996) (discussing Director's role).

judge on the U.S. Court of Appeals for the First Circuit and later as an Associate Justice of the U.S. Supreme Court, has played a crucial role in integrating Harvard School concepts into the judiciary's formulation of antitrust rules.<sup>102</sup> Had Chicago School scholars been the only source of ideas that discourage antitrust intervention, the retrenchment of U.S. antitrust policy since the 1970s would have been less dramatic and pervasive. By themselves, the Harvard School's intellectual contributions would have spurred a retreat from the more expansive doctrines that prevailed from the 1940s through the early 1970s.

The intermingling and mutual reinforcement of many Chicago School and Harvard School views impart considerable power to the wide array of doctrinal and enforcement policy presumptions that guide the application of current U.S. antitrust law to dominant firm conduct. Three presumptions embedded in the Chicago/Harvard double helix stand out in the treatment of dominant firms. The first concerns the proper goals of competition policy. Both schools generally embrace an economic efficiency orientation that emphasizes reliance on economic theory in the formulation of antitrust rules.<sup>103</sup> Although Chicago School and Harvard School scholars do not define efficiency identically,<sup>104</sup> the two schools discourage consideration of non-efficiency objectives such as the dispersion of political

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<sup>102</sup> See *supra* note 23 and accompanying text (discussing influence of Justice Breyer's opinions involving antitrust cases).

<sup>103</sup> See I AREEDA & TURNER, ANTITRUST LAW, *supra* note 99, at paras. 103-13; BORK, ANTITRUST PARADOX, *supra* note 28, at 69-89; POSNER, ANTITRUST LAW, *supra* note 29, at 8-23; Phillip Areeda, *Introduction to Antitrust Economics*, 52 *Antitrust L.J.* 523, 535-36 (1983). See also Robert H. Lande, *Wealth Transfers as the Original and Primary Goal of Antitrust: the Efficiency Interpretation Challenged*, 34 *HASTINGS L.J.* 65, 86-87 & 86 n.89 (1982) (noting general agreement among Bork, Areeda, and Turner that the aim of U.S. antitrust law is to promote economic efficiency).

<sup>104</sup> See Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *CORNELL L. REV.* 1140, 1177 (1981) (comparing views of Bork, Posner, Areeda, and Turner).

power and the preservation of opportunities for smaller enterprises to compete.<sup>105</sup>

The second presumption endorses the elements of economic theory that favor giving individual firms broad freedom to select product development, pricing, and distribution strategies. Among other policy implications, this presumption generally disfavors intervention to control the conduct of dominant enterprises.<sup>106</sup> In this regard, Chicago School and Harvard School commentators tend to share the view that the social costs of enforcing antitrust rules involving dominant firm conduct too aggressively exceed the costs of enforcing them too weakly.<sup>107</sup>

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<sup>105</sup> In one passage of ANTITRUST LAW, Areeda and Turner said, “As a goal of antitrust policy, ‘fairness’ is a vagrant claim applied to any value that one happens to favor.” 4 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW 21 (1980). In a subsequent law review article, Turner warned that the pursuit of “populist goals” in to the formulation of antitrust rules “would broaden antitrust’s proscriptions to cover business conduct that has no significant anticompetitive effects, would increase vagueness in the law, and would discourage conduct that promotes efficiencies not easily recognized or proved.” Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CAL. L. REV. 797, 798 (1987). See also Herbert Hovenkamp, *The Areeda-Turner Treatise in Antitrust Analysis*, 41 ANTITRUST BULL. 815, 824 (1996) [hereinafter *Areeda-Turner Treatise*] (discussing Areeda’s and Turner’s views on goals of antitrust law; noting that “over the last two decades *Antitrust Law* has moved fairly consistently to an ‘economics only’ approach to antitrust analysis”). Areeda’s 1983 paper in the ANTITRUST LAW JOURNAL indicated that we should not disregard wealth transfer effects in deciding whether specific practices reduced “consumer welfare.” *Id.* at 536. See also Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33 ANTITRUST BULL. 429, 435, 455 (1988) (tracing Areeda’s views over time on whether wealth transfer effects warranted consideration in antitrust analysis).

<sup>106</sup> See BORK, ANTITRUST PARADOX, *supra* note 28, at 163-97; Areeda & Turner, *Predatory Pricing*, *supra* note 17, at 704-12; Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

<sup>107</sup> See Walter Adams & James W. Brock, *Areeda/Turner on Antitrust: A Hobson’s Choice*, 41 ANTITRUST BULL. 735, 741-42 (1996) (noting similarity of views of Easterbrook, Areeda, and Turner of relative dangers of overinclusive and underinclusive enforcement of restrictions on dominant firm behavior).

The third presumption demands that courts and enforcement agencies pay close attention to considerations of institutional design and institutional capacity in formulating and applying antitrust rules. Although Chicago School scholars have emphasized such considerations,<sup>108</sup> the insistence that competition policy take account of the limitations of the institutional arrangements of the U.S. antitrust system is perhaps the Harvard School's main contribution to the Chicago/Harvard double helix. A hallmark of the volumes of the antitrust treatise authored by Professors Areeda and Turner is the recurring attention to institutional factors and the precept that antitrust rules should not outrun the capabilities of implementing institutions.<sup>109</sup> Among other points, Areeda and Turner argued that antitrust rules and decision-making tasks must be administrable for the central participants in the antitrust system (courts, enforcement agencies, the private bar, and business managers),<sup>110</sup> that special substantive and procedural screens should be used to ensure that suits initiated by private antitrust plaintiffs were consistent with larger social

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<sup>108</sup> See Easterbrook, *Workable Antitrust Policy*, *supra* note 61, at 1700, 1709-12; Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEXAS L. REV. 1 (1984). See also Hovenkamp, *Review and Critique*, *supra* note 14, at 269 (one of Chicago School's "foundational principles" is that "the government tribunals and agencies are frail and imperfect decisionmakers"); Thomas W. Ross, *Some Thoughts on "Chicago" and "Post-Chicago" Antitrust and Their Lessons for Canada 4-5* (Oct. 3-4, 2002) (paper presented at the Canadian Bar Association's Annual Fall Conference on Competition Law) (describing Chicago School view that "[e]ven if a practice may be socially inefficient and therefore undesirable, we have to recognize that enforcement officials and courts are not the perfect social planners we might like them to be").

<sup>109</sup> See I AREEDA & TURNER, ANTITRUST LAW, *supra* note 99, at 31-33 (discussing institutional limitations of courts and enforcement agencies).

<sup>110</sup> See III AREEDA & TURNER, ANTITRUST LAW, *supra* note 99, at 150-53 (discussing weaknesses in previous judicial efforts to define illegal predatory pricing and presenting normative criteria); Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 965-70 (1987) (discussing importance of administrability as a factor in determining antitrust rules for predatory pricing).

aims;<sup>111</sup> and that remedies should be carefully linked to the harm caused by the specific practices found to have constituted improper behavior.<sup>112</sup>

In mapping out the Chicago/Harvard double helix, one might ask whether the two strands (Chicago and Harvard) have independent intellectual origins or whether the similarities in perspectives simply reflect the influence of one school in reshaping the views of the other. Some commentators have suggested that Chicago School and Harvard School views converged because Chicago School preferences pulled leading Harvard School researchers into the orbit of Chicago's thinking. In a review of Herbert Hovenkamp's *Antitrust Enterprise*, Professor Spencer Weber Waller observes that Hovenkamp's book "has unfortunately validated an emboldened vision of the Chicago School approach to antitrust that is very much in vogue, but still contested by proponents of post-Chicago and non-Chicago approaches."<sup>113</sup> Noting that "Hovenkamp himself is normally identified with the Harvard School of antitrust," Professor Waller expresses dismay that Hovenkamp (and the Harvard School generally) has aligned himself with Chicago School thinking:

It is not as if contemporary antitrust is some fearsome beast that is ravaging the economy and destroying all plausible efficiencies in its path. If

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<sup>111</sup> A wariness of the U.S. system of private rights of action—which includes mandatory trebling of damages, asymmetric fee-shifting, and jury trials—is a recurring theme of Areeda's and Turner's writing. Their concern for overly expansive private enforcement guided their proposals concerning substantive antitrust standards and for the creation of procedural screens relating to standing and injury. *See, e.g.,* Areeda & Turner, *Predatory Pricing*, *supra* note 17, at 699 (in framing rules for predatory pricing, it is necessary to use "extreme care . . . lest the threat of litigation, particularly by private parties, materially deters legitimate, competitive pricing").

<sup>112</sup> *See* Hovenkamp, *Areeda-Turner Treatise*, *supra* note 105, at 826-28 (describing how Areeda and Turner recommended that evidentiary requirements be varied as a function of the remedy sought).

<sup>113</sup> Spencer Webber Waller, *Book Review of The Antitrust Enterprise 2* (2006), [http://www.luc.edu/law/academics/special/center/antitrust/antitrust\\_enterprise.pdf](http://www.luc.edu/law/academics/special/center/antitrust/antitrust_enterprise.pdf).

anything, it is already a toothless tiger outside the realm of cartel cases. To have a reasonable and eminent critic like Professor Hovenkamp seek to further tame it in the name of simplicity and institutional competencies is unfortunately the thinking man's death sentence for a field of law that was intended to play, and has played until recently, a far more robust role in the history and jurisprudence of the United States.<sup>114</sup>

Seen this way, the modern intellectual DNA of U.S. antitrust law is not a double helix, but instead is a single strand of Chicago School thinking which has absorbed and assimilated the previously independent and more interventionist Harvard School.

Commentators sometimes have suggested that Areeda and Turner consciously borrowed some of their most important ideas from Chicago School scholars. Some observers have said, without explanation, that Chicago School scholars influenced the writing of their counterparts in the modern Harvard School.<sup>115</sup> Others point to personal interactions in which Harvard School scholars displayed their awareness of policy positions associated with the Chicago School.<sup>116</sup> It is difficult to prove or disprove the

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<sup>114</sup> *Id.*

<sup>115</sup> See Sullivan, *supra* note 56, at 9 ("Indeed, Posner and Bork have . . . influenced scholars who for a time were contributing to an alternative view of antitrust. Recently, shortrun price theory has been proposed as an adequate basis for examining predation by Donald Turner who, in his early career, contributed significantly to industrial organization theory.").

<sup>116</sup> One observation along these lines was offered during a roundtable discussion conducted in 1981 about the University of Chicago's role in promoting the use of economics to analyze the law. See *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J. L. & ECON. 163 (1983). Jesse Markham made the following comment about the influence of Aaron Director, an economist and member of the University of Chicago Law School faculty:

I think Aaron Director's views on predatory pricing did spread to Don Turner, and perhaps Phil Areeda, in this regard. Don Turner and I used to have lunch about every two weeks, and our opening question to each other was, "Have you found any predatory pricing recently?" And I told him I had been searching for thirty years and hadn't

presence of Chicago School influences in the writings of scholars of the modern Harvard School. Good researchers ordinarily read widely in their fields and reflect carefully upon the work of other scholars. Even with the most self-assured scholars, some degree of absorption, even by unconscious osmosis, is inevitable. In their co-authored works, Areeda and Turner seldom acknowledged intellectual debts to other commentators.<sup>117</sup> Their joint work contains few direct statements or indirect signs (e.g., citation patterns) that indicate significant borrowings from Chicago School scholars or other researchers.<sup>118</sup> On the many occasions that I heard him speak at conferences or seminars, Professor Areeda relied almost exclusively on self-citation for authority. One of his favorite admonitions to audiences was “Read the Treatise!” In more than a few instances, I saw him react irritably to the mention of commentary that

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found any. That could have been due to the deficiencies in my search.

When Don and Phil published that article on the test for predatory pricing, their underlying reason was that it is so seldom found and so much effort has been spent looking for it or accusing industries of engaging in it that you ought to set a test—as a managerial rule for the courts—so stiff that you would never find it anyway. That would settle it once and for all. You can’t really imagine firms selling or pricing below marginal cost, and if you use that as a test, then there is no predatory pricing. You define it for judicial reasons out of existence.

*Id.* at 209.

<sup>117</sup> In a rare departure from this practice, the preface to the first volume of the Areeda-Turner treatise states that the authors “greatly profited from a number of discussions with Professor Richard Caves of the Harvard Economics Department.” I PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW XVII* (1978). Areeda and Turner usually cited other authors only to rebut them or to cite the agreement of other commentators with their own work.

<sup>118</sup> One example is the 1975 Areeda and Turner predatory pricing article, which seems to have relied to some extent on the work of John McGee, a Chicago School economist. Areeda & Turner, *Predatory Pricing*, *supra* note 17, at 699 n.6.

purported to offer new, more informative models of analysis that Areeda had not anticipated in his own work.<sup>119</sup>

The hypothesis that Chicago merely assimilated Harvard slights important evidence that the modern Harvard School scholars arrived at their intervention skepticism independently. No obvious textual basis negates the possible impact of Chicago School views on modern Harvard School scholars, but there is good reason to believe that Areeda, Turner, and Breyer did considerably more than simply react to and absorb Chicago's perspectives. In his examination of Areeda's scholarship, Professor Page demonstrates that the Chicago School and Harvard School arrived at often similar policy prescriptions by way of different analytical paths.<sup>120</sup> The approach of the Chicago School scholars was "conceptual" and relied "on an accepted set of economic models of practices and on strong generalizations about the relative efficacy of courts and markets in eroding anticompetitive behavior."<sup>121</sup> Areeda's technique was "more contextual" and reflected "the influence of legal process jurisprudence, with its emphasis on institutional competence

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<sup>119</sup> At the annual meeting of the Association of American Law Schools in Los Angeles in January 1987, the Association's Section on Antitrust and Economic Regulation convened a session to discuss Thomas Krattenmaker's and Steven Salop's raising rivals' costs article, which had appeared late in 1986 in the *YALE LAW JOURNAL*. See Krattenmaker & Salop, *Raising Rivals' Costs*, *supra* note 65. Areeda was one of several academics who served as discussants for the paper. My notes of the event capture Areeda in a state of annoyance. He complained about Krattenmaker's and Salop's choice of colorful labels for their scenarios of improper exclusion (the authors called one scenario the "Frankenstein Monster," *id.* at 240); said what was good in the article largely had been foreshadowed in the work of others, including himself; and, leveling a criticism that was a certifying mark of his method of antitrust analysis, cautioned that the Article's truly novel proposals posed serious administrability challenges for courts and enforcement agencies. I was in only my first year of teaching and was unfamiliar with the norms of behavior at academic conferences. I nevertheless sensed that I had just seen a dominant incumbent scholar pour cold water on ideas that could contend seriously for attention with his own.

<sup>120</sup> Page, *Areeda, Chicago, and Antitrust Injury*, *supra* note 34, at 912-16.

<sup>121</sup> *Id.* at 912.



and reasoned judicial decision making.”<sup>122</sup> The modern Chicago School and Harvard School scholars emphasized similar considerations—e.g., limits on the capacity of implementing institutions—and reached generally common policy conclusions while using different analytical perspectives.

A chronology of the writings of modern Chicago School and Harvard School scholars also indicates that Harvard figures such as Areeda and Turner were the first to introduce extensive treatments of ideas that the Chicago School and Harvard School now share. In 1976, Professor Areeda was the first to introduce the powerful idea that courts should refuse to award damages to private plaintiffs unless the asserted injury stemmed from a reduction in competition.<sup>123</sup> In 1978, with the publication of the first three volumes of ANTITRUST LAW, Areeda and Turner provided original, formative treatments of institutional considerations that became intimately associated with their work. In these texts, Areeda and Turner emphasized the need for “administrability” in the formulation of antitrust rules and underscored the interdependence of liability rules and remedies in determining the impact of the antitrust system.<sup>124</sup> Chicago School views did not guide the modern Harvard School scholars to the idea that the scope of antitrust intervention should be limited by reference to these and other institutional considerations. The modern Harvard School got there on its own.

Suppose, instead, that Chicago School and Harvard School views are similar today because Chicago assimilated Harvard. Even if this were true, the assimilation itself would be important. One might dismiss Bork, Easterbrook, and Posner on the ground that their ideas are dangerously extreme and that their extremism makes them inherently untrustworthy sources of antitrust thought. But what if the same or similar ideas have gained the approval of seemingly

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<sup>122</sup> *Id.* at 912-13.

<sup>123</sup> *See infra* note 139 and accompanying text (discussing Areeda’s role in the establishment of the antitrust injury test in private litigation).

<sup>124</sup> *See infra* notes 110 and 119 and accompanying text.

“reasonable” experts in the field—e.g., Areeda, Turner, and Breyer? If a significant number of seemingly respectable scholars embrace the “extremist” ideas in question, how extreme and unreasonable can the ideas truly be?

Professor Waller’s review of the *Antitrust Enterprise* expresses regret that a “reasonable and eminent” figure such as Herbert Hovenkamp would endorse what are posited to be unduly permissive Chicago School views. By casting his lot with Chicago School or near-Chicago School ideas, Professor Hovenkamp is said to have imposed “the thinking man’s death sentence” upon the U.S. antitrust system. Professor Waller’s review of Hovenkamp’s book and his analysis of its intellectual currents lead one to ask why the modern Harvard School converged upon the Chicago School. If Professor Hovenkamp and other reasonable people have endorsed various Chicago School perspectives, perhaps something other than an unthinking commitment to an “extreme” ideology explains the attractiveness of such ideas.

#### IV. THE DOUBLE HELIX AND THE EVOLUTION OF RULES FOR DOMINANT FIRMS

The modern evolution of U.S. doctrine and policy toward dominant firms provides an informative context in which to see the operation and influence of the Chicago/Harvard double helix. The discussion below sketches the status quo of doctrine governing dominant firm conduct and underscores the role of modern Harvard School scholars in shaping a doctrinal status quo whose intellectual foundations often are attributed only to the Chicago School. Rules governing predatory pricing, private rights of action, and access to essential facilities provide the chief illustrations.

##### A. The Evolution of Modern U.S. Predatory Pricing Doctrine and Policy

Dominant firms today enjoy great flexibility under U.S. law to cut prices without incurring antitrust liability for

predatory pricing.<sup>125</sup> U.S. antitrust law and policy toward predatory pricing was not always so forgiving. The progression in the United States toward greater permissiveness in antitrust's treatment of predatory pricing allegations since the mid-1970s illustrates the influence of the Chicago/Harvard double helix.

To appreciate the magnitude of the adjustment in law and policy, it is useful to first consider how an antitrust lawyer would have counseled a dominant firm about price-cutting when the 1960s drew to a close. The most recent Supreme Court decision on the question, *Utah Pie Co. v. Continental Baking Co.*,<sup>126</sup> had appeared in 1967 and had suggested that pricing below average total cost could be unlawful predation.<sup>127</sup> The Court also endorsed the view that evidence of the defendant's subjective intent is relevant to the analysis of liability.<sup>128</sup> Effects on the well-being of rival firms, rather than effects on consumers, also seemed paramount. One passage in *Utah Pie* emphasized, as a factor favoring a finding of liability, that the market in question had featured a "drastically declining price

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<sup>125</sup> See Hovenkamp, *Review and Critique*, *supra* note 14, at 311 ("The current antitrust law of predatory pricing gives defendants a great deal of latitude and probably approves anticompetitive pricing behavior in at least some circumstances.").

<sup>126</sup> *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967).

<sup>127</sup> *Id.* at 698 (recounting the evidence of defendant's predatory conduct and noting that the defendant's prices were "less than its direct cost plus an allocation for overhead").

<sup>128</sup> *Id.* at 696-97 n.12. The Court said:

Chief Justice Hughes noted in a related antitrust context that the "knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences," *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372, and we do not think it unreasonable for courts to follow that lead. Although the evidence in this regard against Pet seems obvious, a jury would be free to ascertain a seller's intent from surrounding economic circumstances, which would include persistent unprofitable sales below cost and drastic price cuts themselves discriminatory.

*Id.*

structure” as a consequence of the defendant’s pricing tactics.<sup>129</sup>

Counselors in the 1960s and 1970s also would have had to warn their clients that the federal enforcement agencies were willing to police dominant firm price cuts aggressively. In 1963, the Department of Justice brought criminal charges under the Sherman Act and the Robinson-Patman Act against a dairy in New England for selling milk below its cost.<sup>130</sup> In 1963 the Justice Department obtained an indictment under Section 2 of the Sherman Act against a firm and several of its executives for oversupplying the market in Los Angeles with bananas.<sup>131</sup> The possibility that the Justice Department would use criminal enforcement to attack predatory pricing persisted well into the 1970s. In a speech in 1977, Griffin Bell, the Attorney General of the United States, warned:

Predatory pricing is another subject toward which I expect to direct more criminal enforcement. Persistent below-cost pricing designed to destroy competitors, to coerce suppliers or customers of competitors, or to enforce systematic boycotts to drive a competitor out of the market, are *per se* violations. As such, they are well within the boundaries of traditional criminal antitrust enforcement.<sup>132</sup>

In the years to come, the Justice Department did not bring a criminal case of the type Attorney General Bell described in his 1977 speech. At that time, however, one could not idly disregard the promise of the chief law enforcement officer of the United States to prosecute predatory pricing as a crime. Antitrust counselors also had to advise clients that the possibilities for government civil cases were genuine.

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<sup>129</sup> *Id.* at 703.

<sup>130</sup> *United States v. H.P. Hood & Sons, Inc.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,063, at 52,519 (D. Mass., filed Mar. 15, 1963).

<sup>131</sup> *United States v. United Fruit Co.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,063, at 52,528 (C.D. Cal. filed July 16, 1963).

<sup>132</sup> Griffin B. Bell, Attorney General of the United States, *Address Before the Harvard Law Review* 6-7 (Boston, Mass., Mar. 19, 1977) (emphasis in original).

The Justice Department's monopolization lawsuit against IBM included a claim of predatory pricing,<sup>133</sup> and the Federal Trade Commission in the 1970s initiated predatory pricing lawsuits against ITT-Continental (bread),<sup>134</sup> Borden (lemon juice),<sup>135</sup> and General Foods (instant coffee).<sup>136</sup>

The doctrinal environment changed dramatically in the 1970s, and the motivation for the adjustment was an intellectual revolution significantly inspired by the Harvard School. The principal stimulus was a paper by Areeda and Turner that has a strong claim to be the most influential law review article ever written on an antitrust topic. In 1975, Areeda and Turner published a proposal that courts use the relationship of the dominant firm's prices to its variable costs to determine the legality of a challenged pricing strategy.<sup>137</sup> Within months of the article's publication, two courts of appeals relied heavily on the paper to dismiss predatory pricing allegations.<sup>138</sup> In the decades to follow, the article became the starting point for judicial analysis of below-cost pricing claims.<sup>139</sup> Although many decisions declined to

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<sup>133</sup> *United States v. Int'l Bus. Mach. Corp.*, [1961-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 45,069 (S.D.N.Y. filed Jan. 17, 1969) (complaint alleging monopolization and attempted monopolization).

<sup>134</sup> *In re Int'l Tel. & Tel.*, 104 F.T.C. 280, 284-85 (1984) (complaint alleging attempted monopolization).

<sup>135</sup> *In re Borden, Inc.*, 92 F.T.C. 669, 671-72 (1978) (complaint alleging monopolization and maintenance of noncompetitive market structure).

<sup>136</sup> *In re Gen. Foods Corp.*, 103 F.T.C. 204, 206-08 (1984) (complaint alleging attempted monopolization).

<sup>137</sup> Areeda & Turner, *Predatory Pricing*, *supra* note 17. Compare with *supra* notes 28-29 and accompanying text (presenting views of modern Chicago scholars on predatory pricing).

<sup>138</sup> See *Hanson v. Shell Oil Co.*, 541 F.2d 1352, 1358-59 (9th Cir. 1976) (endorsing application of Areeda-Turner rule and dismissing plaintiff's predatory pricing allegations); *Int'l Air. Indus., Inc. v. Am. Excelsior Co.*, 517 F.2d 714, 723-25 & n.21 (5th Cir. 1975) (same).

<sup>139</sup> See Herbert Hovenkamp, *The Law of Exclusionary Conduct*, 2 COMPETITION POL'Y INT'L 21, 22 (2006) (discussing the "revolution in the antitrust law of exclusionary pricing" set in motion by the publication of Areeda's and Turner's 1975 article and their proposal that courts condemn price cutting by a dominant firm only when the defendant fails to recover its average variable costs). Professor Hovenkamp observes that "[w]hile the U.S. Supreme Court has never passed judgment on the correct

endorse all facets of the Areeda-Turner test, the article transformed the way that federal judges analyzed predatory pricing allegations.<sup>140</sup> The 1975 article, whose proposal Areeda and Turner incorporated and refined in 1978 in the second edition of their treatise,<sup>141</sup> also set off an academic debate about predatory pricing that continues to this day.<sup>142</sup>

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price/cost test for predatory pricing, the U.S. Circuit Courts have generally agreed that either marginal cost or average variable cost is the correct number.” *Id.* at 22. Although the Supreme Court has not specifically endorsed the Areeda-Turner average variable cost rule, the Court’s predatory pricing opinions have relied extensively on the 1975 Areeda-Turner law review article and the Areeda-Turner treatise to analyze predatory pricing allegations. *See Brooke Group*, 509 U.S. at 221, 222, 224, 233, 238, 239 (citing 1975 Areeda-Turner law review article or Areeda-Turner treatise); *Matsushita*, 475 U.S. at 585 n.9, 589, 591 (same). In *Brooke Group* and *Matsushita*, Areeda and Turner are the most frequently cited commentators.

<sup>140</sup> *See* Richard O. Zerbe, Jr. & Michael T. Mumford, *Does Predatory Pricing Exist? Economic Theory and the Courts After Brooke Group*, 41 ANTITRUST BULL. 949, 950-51 (1996) (noting influence of the Areeda-Turner predatory pricing proposal in the courts; observing that “the legacy of the Areeda-Turner rule continues to inform the debate about predatory pricing, making standards of evidence more objective and rigorous”). The formative influence of the Areeda-Turner proposal upon predatory pricing doctrine is not universally recognized by commentators. Some observers attribute the modern transformation of predatory pricing law entirely to the Chicago School. *See* Albert A. Foer, *The American Antitrust Institute: The First Five Years of a Virtual Public Interest Network 5* (Oct. 13, 2003), <http://www.antitrustinstitute.org/recent2/275.pdf>. Albert Foer writes that, in the late 1990s, “predatory pricing was one of the foremost issues separating a Chicago School from a post-Chicago approach to antitrust.” He goes on to observe: “Chicago School Analysis had rendered the doctrine of predatory price, in the sense of melting it down to the disappearing point.” *Id.*

<sup>141</sup> III PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶¶ 710-22 (1978).

<sup>142</sup> The catalytic effect of the Areeda-Turner predatory pricing proposal within academia was immediate and powerful. In 1981, in the introduction to a book that collected papers presented at an FTC conference on business strategy and predatory conduct, Steven Salop commented:

Any modern discussion of predatory conduct must begin with Areeda and Turner’s seminal article. Few scholarly works have had so much influence on such a diverse group of researchers and practitioners in so short a time. More

Stephen Breyer's opinions were a major conduit for bringing the Areeda-Turner proposal into the mainstream of antitrust jurisprudence. Breyer taught with Areeda and Turner on the Harvard Law School faculty before joining the First Circuit in 1980. In 1983, Breyer's opinion for the court in the *Barry Wright Corp. v. ITT Grinnell Corp.*<sup>143</sup> case drew heavily from the technical details and philosophy of the Areeda-Turner predatory pricing article and *Antitrust Law* treatise.<sup>144</sup> "[A]ntitrust laws," Breyer wrote, "very rarely reject...beneficial 'birds in the hand' for the sake of more speculative (future low price) 'birds in the bush.'"<sup>145</sup> This passage endorsed the policy trade-off between short-term and long-term effects that animated the Areeda-Turner test—letting consumers take the short-term benefits of price-cutting now, and worrying about potential longer-term harms later.<sup>146</sup> Consistent with Areeda's and Turner's

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than any other article, it has led courts to begin taking an economic view of predation, either by actually adopting the rule or by using it as a starting point. Indeed, the progress the courts have made in the past 6 years in increasing their own economic sophistication has been dramatic. The Areeda and Turner article has also been a strong source of stimulation for economists, spawning a variety of commentary and further research . . . . Although all the economists contributing to the debate take some exception either to Areeda and Turner's static, nonstrategic mode of analysis, all have benefited from the path they have provided.

STEVEN C. SALOP, STRATEGY, PREDATION, AND ANTITRUST ANALYSIS: AN INTRODUCTION, IN STRATEGY, PREDATION, AND ANTITRUST ANALYSIS 1, 10-11 (Steven C. Salop ed., Federal Trade Commission, Sept. 1981).

<sup>143</sup> *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983).

<sup>144</sup> The passage of the Breyer opinion in *Barry Wright* that deals with the plaintiff's predatory pricing claims contains a total of 14 citations to either the Areeda-Turner predatory pricing article or to the *Antitrust Law* treatise. In a subsequent discussion of *Barry Wright*, the Areeda-Turner treatise called Breyer's opinion "perceptive." Phillip E. Areeda et al., *Antitrust Law* ¶ 714.6c, at 715 (Supp. 1993).

<sup>145</sup> 724 F.2d at 234.

<sup>146</sup> III AREEDA & TURNER, *supra* note 99, at 166-68 (courts and firms will face insurmountable difficulties in accurately predicting long-run effects of a dominant firm's price cuts in response to entry); *see also* John

concerns regarding administrability, *Barry Wright* also warned that “[r]ules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counterproductive, undercutting the very economic ends they seek to serve.”<sup>147</sup>

*Barry Wright* proved to be influential. The Supreme Court’s decision in 1986 in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*<sup>148</sup> prominently cited Breyer’s *Barry Wright* opinion and echoed its philosophy.<sup>149</sup> The Court endorsed the scrutiny of the relationship between the defendant’s prices and its costs and approved the further requirement that the plaintiff show how the defendant, after excluding the plaintiff, could recoup the sacrifice of short-term profits that the below-cost pricing strategy entailed.<sup>150</sup> Although other commentators had proposed a recoupment test as an alternative or supplement to the Areeda-Turner rule,<sup>151</sup> Areeda and Turner had anticipated such a test and had noted it in their 1975 article.<sup>152</sup>

One of Areeda’s and Turner’s aims in developing a cost-based test for predatory pricing was to alter the focus of

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B. Kirkwood, *Comments from the Federal Trade Commission*, 49 ANTITRUST L.J. 953, 954-57 (1981) (discussing how the Areeda-Turner predatory pricing rule accounts for dynamic, long-run considerations).

<sup>147</sup> *Barry Wright*, 724 F.2d at 234. Professor Howard Latin has noted that *Barry Wright* displays Justice Breyer’s “sensitivity to administrative considerations.” Howard Latin, *Legal and Economic Considerations in the Decisions of Judge Breyer*, 50 L. & CONTEMP. PROBS. 57, 65 (1987). Justice Breyer’s primary arguments in *Barry Wright*, Professor Latin explains, “did not pertain to the economic circumstances of the parties, but rather to broad global efficiency questions of administrability, consistency, and the possible effects of judicial mistakes.” *Id.* at 69.

<sup>148</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>149</sup> *Id.* at 594.

<sup>150</sup> *Id.* at 590-91.

<sup>151</sup> Among the most influential treatments is Kenneth G. Elzinga & David Mills, *Testing for Predation: Is Recoupment Feasible?*, 34 ANTITRUST BULL. 869 (1989), which *Brooke Group* cited in the course of establishing the recoupment requirement in predatory pricing cases. *Brooke Group Ltd. v. Brown & Williamson Tobacco Co.*, 509 U.S. 209, 226 (1992).

<sup>152</sup> Areeda & Turner, *Predatory Pricing*, *supra* note 17, at 698.



judicial analysis in evaluating claims of improper exclusion. The two Harvard scholars criticized previous court decisions for placing considerable emphasis on the evaluation of the defendant's subjective purpose in choosing the challenged tactics.<sup>153</sup> Too often, Areeda and Turner noted, earlier decisions emphasized general expressions of the defendant's desire to get more business or crush its opponents.<sup>154</sup> Areeda and Turner encouraged courts to disregard highly general statements of intent, especially the exuberant outbursts of marketing personnel.<sup>155</sup> By contrast, the evidence of intent that deserved attention was the high-level document on which the firm relies to make decisions and which dispassionately analyzes how particular business tactics might help achieve improper exclusionary aims.<sup>156</sup>

Here, also, Stephen Breyer's court of appeals opinions played a major part in bringing this perspective into the judicial mainstream. In *Ocean State v. Blue Cross & Blue Shield*<sup>157</sup> in 1989, Breyer vividly described how courts ought to weigh subjective expressions of the firm's intent:

[T]here was testimony that Blue Cross's president had expressed, in none too polite terms, a desire to emasculate Ocean State . . . . Under these circumstances, Blue Cross is no more guilty of an antitrust violation than a boxer who delivers a perfectly legal punch—hoping that it will kill the opponent—is guilty of attempted murder.<sup>158</sup>

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<sup>153</sup> *Id.* at 699. See also Hovenkamp, *Areeda-Turner Treatise*, *supra* note 105, at 817-19 (discussing Areeda's and Turner's views on treatment of intent evidence).

<sup>154</sup> Hovenkamp, *supra* note 104, at 817-19.

<sup>155</sup> *Id.*

<sup>156</sup> See Phillip E. Areeda, *Predatory Pricing* (1980), 49 ANTITRUST L.J. 897, 899-90 (1981) (describing circumstances in which courts should consider evidence of "subjective intention"; proposing that courts "refuse to consider intent, unless the party relying upon it gives the tribunal reason to believe that his evidence is unusually probative").

<sup>157</sup> *Ocean State v. Blue Cross & Blue Shield*, 883 F.2d 1101 (1st Cir. 1989).

<sup>158</sup> *Id.* at 1113.

Earlier in the decade in *Barry Wright*, Judge Breyer had cautioned that an “‘intent to harm’ without more offers too vague a standard in a world where executives may think no further than ‘Let’s get more business,’ and long-term effects on consumers depend in large measure on competitors’ responses.”<sup>159</sup> He added that in predatory pricing cases “most courts now find their standard, not in intent, but in the relation of the suspect price to the firm’s costs.”<sup>160</sup>

## B. Private Rights of Action

Areeda and Turner devoted extensive attention to what they perceived to be flaws in the institutions of the U.S. antitrust system. To the Harvard School scholars, the most serious imperfections resided in the U.S. system of private rights of action. Scholarship that discredits private actions has great significance in the U.S. antitrust system. This is especially so for the application of standards governing dominant firm conduct. In recent decades, private cases have played a crucial role in the development of standards involving dominant firms. The Supreme Court has not interpreted Section 2 in a case involving the federal government as plaintiff since 1973 in *Otter Tail Power Co. v. United States*.<sup>161</sup> Since *Otter Tail*, each Supreme Court decision that has addressed standards for dominant firm conduct has been a private case.

Several aspects of the U.S. system of private rights of action received repeated criticism from Areeda and Turner. More than any other aspect of the U.S. regime of private rights, Areeda and Turner attacked the mandatory trebling of damages, particularly in cases involving claims of monopolization or attempted monopolization.<sup>162</sup> Perhaps more than any other U.S. commentators, Areeda and Turner fostered skepticism about the motives for and effects of private treble damage suits. Areeda and Turner called treble damages “punitive” and feared that mandatory

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<sup>159</sup> *Barry Wright*, 724 F.2d at 232.

<sup>160</sup> *Id.*

<sup>161</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

<sup>162</sup> III AREEDA & TURNER, ANTITRUST LAW, *supra* note 99, at ¶ 625.

trebling of damages in cases presenting competitively ambiguous dominant firm conduct threatened to deter legitimate business behavior.<sup>163</sup> The Harvard scholars also doubted that treble damages were generally necessary to induce private parties to attack Sherman Act Section 2 violations.<sup>164</sup>

In their discussion of private rights of action, Areeda and Turner emphasized the connection between the standard of liability applied to challenged conduct and the remedy imposed for infringements of the standard. “The causal connection between conduct and power,” Areeda and Turner wrote in the context of discussing government equity actions, “can be relatively modest when the only remedy sought is an injunction against the continuation of that conduct.”<sup>165</sup> By contrast, “[i]f the courts are to define exclusionary conduct broadly, which is desirable in the context of equitable relief, they must keep criminal sanctions and treble damages within reasonable bounds.”<sup>166</sup> To a striking degree, Areeda and Turner treated criminal sanctions and treble damages as warranting comparable levels of care in their application. Thus, the two scholars observed that “[t]reble damages are inherently punitive, and there is much reason to subject them to limitations similar to those confining criminal actions.”<sup>167</sup> The likening of treble damages to criminal punishment is a bold and jarring comparison in an antitrust system that has come to view criminal sanctions as appropriate for cartel offenses only.

A second prominent focal point for criticism by Areeda and Turner was the availability of jury trials in private

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<sup>163</sup> *Id.* at 95-99.

<sup>164</sup> *Id.* at 96-97 (“[M]andatory treble damages are not necessary to assure ‘ample recompense,’ which is aided by liberal proof of damages, other procedural and substantive rules favorable to plaintiffs, and awards of substantial attorneys’ fees.”).

<sup>165</sup> *Id.* at 72.

<sup>166</sup> *Id.* at 73.

<sup>167</sup> *Id.* See also Turner, *supra* note 105, at 812 (“[M]andating treble damages over the whole range of antitrust law is inconsistent with the customary standards for punitive damages, which are similar to those applied to criminal sanctions.”).

antitrust cases. The inadequacies of juries constituted a recurring justification for the restrictions that Areeda and Turner wished to impose on the prosecution of Section 2 theories of liability. The Harvard scholars discouraged reliance on evidence of subjective intent in large part because consideration of intent evidence too often served to mislead juries.<sup>168</sup> In a paper that discussed the treatment of essential facilities arguments during the trial in *Aspen*, Areeda said “[t]he major infirmity of the broad language of the jury instruction in *Aspen* is that it leaves to the jury unstated policy decisions as to privileged resources and legitimate business purposes.”<sup>169</sup> Areeda concluded that the “courts’ general willingness to leave policy decisions of this sort to the jury on the basis of vague and general instructions displays one aspect of the law of monopolization that can interfere with efficient operation of business enterprises and that, by creating enormous uncertainty, burdens a firm and the legal system with unnecessary costs.”<sup>170</sup> Areeda and Turner also justified their objective, price-cost test for predatory pricing as a way to avoid the habit in older predatory pricing cases where “claims were usually left to juries that had been instructed vaguely to look for ‘exclusionary’ or ‘predatory’ intent.”<sup>171</sup>

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<sup>168</sup> See Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and Future*, 75 CAL. L. REV. 959, 963-65 (1987) (discussing jury-related problems associated with the use of intent evidence to evaluate conduct in monopolization cases).

<sup>169</sup> *Id.* at 965.

<sup>170</sup> *Id.* In discussing the law of attempted monopolization, Areeda observed that “both impropriety and substantial market position have been defined so loosely—leaving so much policy discretion to vaguely instructed juries—as to generate inconsistent results, foster uncertainty about outcomes, and threaten to transform Sherman Act Section 2 into a federal prohibition of business torts.” *Id.* at 971. He added that “[e]ven when intent is used in a manner favorable to the defendant—inviting the jury to find no specific intent to monopolize when the defendant intended to achieve a legitimate purpose—the jury speculates about the defendant’s soul.” *Id.* at 972-73.

<sup>171</sup> *Id.* at 965. See also *supra* note 139 and accompanying text (discussing how perceived excesses in operation of private rights led Areeda and Turner to propose the permissive cost-based test for predatory pricing).

Concerns about over-deterrence led the Harvard School scholars to propose various approaches that would restrict the operation and reduce the power of private antitrust suits. Some proposals would have required legislative reforms. In an article published in 1987, Turner urged the abandonment of the statutory requirement that all damages be trebled and argued that trebling be limited to cases in which “the law was clear at the time the conduct occurred” and “the factual predicates for liability are clear.”<sup>172</sup> The rule of mandatory trebling “has adverse effects, not only encouraging baseless or trivial suits brought in hopes of coercing settlements, but also discouraging legitimate competitive behavior in the gray areas covered by the rule of reason.”<sup>173</sup> Turner also recommended that jury trials for private cases be eliminated.<sup>174</sup> The resolution of most antitrust disputes, even in cases involving allegations of per se illegal misconduct, required “an analysis of economic and business factors beyond the competence of most jurors.”<sup>175</sup> The limited capacity of the typical juror created “a high likelihood that jury decisions will be influenced by emotional and other irrational factors.”<sup>176</sup>

The Harvard School scholars also advanced measures that courts could take to constrain private actions without awaiting legislative intervention. The most important and influential of these was the concept that would gain judicial acceptance under the rubric of antitrust injury. In 1976, Areeda authored a 13-page law review comment that urged courts to require private plaintiffs to link their treble damage claims to conduct that actually reduced competition.<sup>177</sup> Areeda prepared the comment to address two court of appeals decisions for which the Supreme Court

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<sup>172</sup> Turner, *supra* note 105, at 812.

<sup>173</sup> *Id.* at 811-12.

<sup>174</sup> *Id.* at 812-14.

<sup>175</sup> *Id.* at 813.

<sup>176</sup> *Id.*

<sup>177</sup> Phillip Areeda, Comment, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976). For an extensive analysis of Areeda’s proposals and their effect on U.S. antitrust policy, see Page, *supra* note 35.

recently had granted certiorari: *NBO Industries Treadway Cos. v. Brunswick Corp.*<sup>178</sup> and *Fortner Enterprises, Inc. v. United States Steel Corp.*<sup>179</sup> In *Brunswick*, the court of appeals had recognized the availability of treble damages to compensate for harm allegedly suffered as a result of an illegal merger.<sup>180</sup> In *Fortner*, the court of appeals had affirmed a finding of liability for illegal tying.<sup>181</sup>

Professor Areeda attacked the lower court decisions in *Brunswick* and *Fortner* and argued that the plaintiff in each case should be denied damages even if a violation of antitrust liability standards had been established.<sup>182</sup> He advanced the general principle that “an antitrust damage assessment cannot be divorced from thoughtful attention to the rationale for liability and the internal logic of the liability holding.”<sup>183</sup> Proof of antitrust liability should entitle the plaintiff to damages unless the asserted harm resulted from the “illegal nature” of the challenged conduct.<sup>184</sup> In *Brunswick*, the plaintiff bowling alley operator had sought damages consisting of the additional profits it would have earned if the bankrupt acquired firm in the merger had exited the relevant market and the plaintiff had become the sole remaining service provider. In the following passage, Areeda criticized the Third Circuit for endorsing this theory:

It is the Court, not the defendant, that has “confuse[d] injury to the public with injury to competitors.” As the Supreme Court said in *Brown Shoe*, section 7 [of the Clayton Act] was enacted for “the protection of *competition*, not *competitors*.” Thus, as long as there is no anticompetitive activity, the fact of injury to a competitor is not a concern of

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<sup>178</sup> *NBO Indus. Treadway Cos. v. Brunswick Corp.*, 523 F.2d 262 (3d Cir.), cert. granted sub nom. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 96 S. Ct. 110 (1976) (No. 75-853).

<sup>179</sup> *Fortner Enters., Inc. v. U.S. Steel Corp.*, 523 F.2d 961 (6th Cir. 1975), cert. granted, 96 S. Ct. 1100 (1976) (No. 75-853).

<sup>180</sup> *Brunswick*, 523 F.2d at 268-75.

<sup>181</sup> *Fortner*, 523 F.2d at 964-67.

<sup>182</sup> Areeda, *supra* note 177, at 1136, 1138.

<sup>183</sup> *Id.* at 1139.

<sup>184</sup> *Id.* at 1133.

the antitrust laws. To argue as the court does is to stand the public interest on its head and to suggest that the public would be better off if the plaintiff found itself without competition.<sup>185</sup>

Areeda went on to observe that “[t]here is no harmful economic effect from vigorous competition” and, with a citation to Areeda’s and Turner’s 1975 predatory pricing article and its relatively permissive conception of illegal exclusion, added that “harm arises only from predatory competition.”<sup>186</sup>

Professor Areeda’s law review comment helped catalyze one of the most important developments in U.S. antitrust policy of the 20th century—the judicially-created requirement that private plaintiffs prove “antitrust injury” in order to obtain damages or injunctive relief. The foundation for this jurisprudence was set in January 1977 in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,<sup>187</sup> where the Supreme Court reversed the Third Circuit’s decision to allow the plaintiff to pursue its damages claim.<sup>188</sup> The form of Areeda’s proposal—a short “comment” rather than an “article”—suggests that Areeda wanted to achieve publication as soon as possible after the Supreme Court’s grant of certiorari in February 1976 to permit the Court to consider the paper in its deliberations on the case.

If this were his goal, it appears that Areeda succeeded. The paper caught the attention of the Court’s law clerks. For example, the introduction to the bench memorandum prepared on October 29, 1976 by Justice Harry Blackmun’s law clerk for the oral argument in *Brunswick* on November 3, 1976 said, “It should be noted at the outset that the decision below has already drawn stinging criticism from a distinguished commentator.”<sup>189</sup> Areeda’s paper also seems to

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<sup>185</sup> Areeda, *supra* note 177, at 1134.

<sup>186</sup> *Id.* at 1135.

<sup>187</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

<sup>188</sup> *Id.* at 489-91.

<sup>189</sup> Robert Meserve, Bench Memo, No. 75-904, *Brunswick Corp. v. Pueblo Bowl-O-Mat Paramus Operations and Holiday Bowl-O-Mat, Inc.* (Oct. 29, 1976), produced from Box 242, Folder 8, Papers of Justice Harry Blackmun, Manuscript Division, Library of Congress (citing Areeda,

have influenced the thinking of the justices, as well. In an opinion authored by Justice Thurgood Marshall, a unanimous Court cited Areeda's article<sup>190</sup> and did so in the context of restating the core proposition of the piece. The ruling below, the Court said, would make all merger-related dislocations actionable in damages "regardless of whether those dislocations have anything to do with the reason the merger was condemned."<sup>191</sup> The Third Circuit's rule "would authorize damages for losses which are of no concern to the antitrust laws."<sup>192</sup>

Not only did it absorb Areeda's reasoning, the Court also seems to have copied a rhetorical device that Areeda's law review comment had used to make the case for disallowing damages attributable to an increase in, rather than the suppression of, competition. As noted above,<sup>193</sup> Areeda's paper had quoted the Supreme Court's decision in *Brown Shoe Co. v. United States*<sup>194</sup> for the proposition that Congress had enacted the Clayton Act's antimerger provision (Section 7) for "the protection of *competition*, not *competitors*."<sup>195</sup> Areeda's use of the quotation was selective; it recast the philosophy of *Brown Shoe* from what previously had been seen to be a position of acute concern for the well-being of individual firms to a position of indifference to their fate. The majority opinion in *Brown Shoe* had used the "competition, not competitors" phrase in two places. *Brown Shoe*'s first mention of the phrase—the passage that Areeda quoted in his law review comment—appeared in a passage in which the Court seemed to interpret the legislative history of Section 7 as showing solicitude for the process of competition and disregarding the well-being of individual competitors.<sup>196</sup>

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*Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1130-36 (1976).

<sup>190</sup> *Brunswick*, 429 U.S. at 487 n.11.

<sup>191</sup> *Id.* at 487.

<sup>192</sup> *Id.*

<sup>193</sup> See *supra* note 177 and accompanying text.

<sup>194</sup> *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

<sup>195</sup> *Id.* at 320 (emphasis in original).

<sup>196</sup> The first use of the "competition, not competitors" phrase appears midway through Court's majority opinion, which observed: "Taken as a



Areeda's law review comment did not mention *Brown Shoe's* second and, at the time, more important and carefully studied use of the phrase. The second mention of "competition, not competitors" came toward the end of the *Brown Shoe* majority opinion. After using the phrase in this instance, the Court went on to say that Congress nevertheless intended that concern for individual competitors should trump the protection of competition as the goal of merger analysis, and that the Court was obliged to effectuate that purpose.<sup>197</sup> Until Areeda's comment appeared in 1976, this second passage, with its strongly protectionist message, was seen to express the true spirit of *Brown Shoe*. Commentators focused on and debated this passage intensely, for *Brown Shoe* had seemed in the end to endorse

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whole, the legislative history [of the 1950 amendment to the Clayton Act] illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe*, 370 U.S. at 320 (emphasis in original).

<sup>197</sup> The relevant section of the *Brown Shoe* majority opinion reads as follows:

A third significant aspect of this merger is that it creates a large national chain which is integrated with a manufacturing operation. The retail outlets of integrated companies, by eliminating wholesalers and by increasing the volume of purchases from the manufacturing division of the enterprise, can market their own brands at prices below those of competing independent retailers. Of course, some of the results of large integrated or chain 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. We must give effect to that decision.

*Brown Shoe*, 370 U.S. at 344.

the view that it is competitors, not competition, that merger law protects.<sup>198</sup>

The Supreme Court in *Brunswick* replicated the subtle, significant reinterpretation of *Brown Shoe* that Areeda had undertaken in his law review comment. Justice Marshall showcased the “competition, not competitors” language and quoted it from the earlier passage in *Brown Shoe* that did not proceed immediately to repudiate the concept. Whether Justice Marshall consciously modeled this part of *Brunswick* upon Areeda’s law review comment is unknown. It is nonetheless striking that Justice Marshall framed and analyzed the issue in a manner that Areeda had pioneered. He quoted the same segment of *Brown Shoe* that Areeda had quoted, and, like Areeda, he invoked it to support the argument that private plaintiffs could not recover damages attributable to an increase in competition. Marshall’s opinion for the Court in *Brunswick* said:

The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for “the protection of *competition*, not *competitors*,” *Brown Shoe Co. v. United States*, 370 U.S. at 320. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.<sup>199</sup>

The choice of words here resembles Areeda’s phrasing, except that Marshall stated the principle in question still

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<sup>198</sup> In a famous critique of *Brown Shoe*, Robert Bork and Ward Bowman scorned what they believed to be the ominous message of passage that includes the second mention of the “competition, not competitors” phrase. “No matter how many times you read it,” Bork and Bowman wrote, “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 & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 373 (1965).

<sup>199</sup> *Brunswick*, 429 U.S. at 488 (emphasis in original); see also *Cargill, Inc. v. Monfort of Colo.*, 479 U.S. 104, 116 (1986) (“*Brunswick* holds that the antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws.”).

more expansively. The purpose of protecting “competition, not competitors” was not ascribed, as Areeda’s law review comment had put the point, to Section 7 of the Clayton Act. In Justice Marshall’s phrasing, it motivated “the antitrust laws” generally.

*Brunswick*’s antitrust injury requirement gradually migrated beyond damage actions in merger cases to constrain the ability of private plaintiffs to obtain relief (including injunctions) in a broad range of merger and non-merger disputes.<sup>200</sup> The decision’s admonition that antitrust protects “competition, not competitors” has become one of the most heavily quoted aphorisms in the field of competition law. Incessant, often mechanical repetition by commentators, corporate defendants, and public officials has made it an antitrust cliché. Even so, the phrase still serves as a succinct reminder of the fundamental change in U.S. doctrine and policy that *Brunswick* inspired. Whether one enjoys or detests the “competition, not competitors” phrase, the magnitude of the antitrust injury doctrine it heralded is indisputable. Nor can one doubt Areeda’s formative role in supplying the Court with the analytical content and packaging that made *Brunswick* memorable.

Taken with other Supreme Court antitrust decisions issued in the same year, *Brunswick* vividly illustrates the Chicago/Harvard double helix at work. 1977 was a great pivot in modern history of U.S. antitrust policy. In addition to *Brunswick*, the Supreme Court issued its decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*,<sup>201</sup> which relied heavily on Chicago School commentary in mandating the use of the rule of reason to evaluate nonprice vertical

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<sup>200</sup> The powerful modern impact upon private antitrust litigation of the doctrine of *Brunswick* is analyzed in Joseph P. Bauer, *The Stealth Assault on Antitrust Enforcement: Raising the Barriers for Antitrust Injury and Standing*, 62 U. PITT. L. REV. 437 (2001); Ronald W. Davis, *Standing on Shaky Ground: The Strangely Elusive Doctrine of Antitrust Injury*, 70 ANTITRUST L.J. 607 (2003); Jonathan M. Jacobsen & Tracy Greer, *Twenty-One Years of Antitrust Injury: Down the Alley with Brunswick v. Pueblo Bowl-O-Mat*, 66 ANTITRUST L.J. 273 (1998).

<sup>201</sup> *Cont’l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

restraints.<sup>202</sup> Beyond its technical holding, *Sylvania* signaled the Court's determination to anchor antitrust rules in microeconomic analysis and to insist on proof of anticompetitive effects as a condition to subjecting business conduct to per se condemnation.

The perspectives of *Sylvania* can be attributed chiefly to the Chicago School.<sup>203</sup> Just as *Sylvania* can be said to have originated in Chicago, *Brunswick* came from Harvard. In the decades to come, a strong symbiosis developed between the two decisions. As Professor Page has observed, *Brunswick's* antitrust injury doctrine became a highly effective practical instrument for injecting Chicago School theories, whose consideration the Supreme Court had welcomed in *Sylvania*, into the routine consideration of many private antitrust cases.<sup>204</sup> To ask whether the plaintiff had demonstrated injury from conduct that reduced competition, *Brunswick* invited arguments about the actual or likely competitive effects of specific challenged practices, including conduct that nominally was subject to per se condemnation. The ideas that anchored *Sylvania* were only part of the supply of perspectives that Chicago had to offer. In effect, *Brunswick* provided a high capacity procedural conduit through which Chicago School content entered U.S. antitrust jurisprudence. It is the combination of content and conduit that would prove so powerful in the subsequent decades. This is the essence of the intertwined contributions of the Chicago/Harvard double helix.

Following *Brunswick*, Areeda and Turner refined the ideas that Areeda had introduced in his 1976 law review comment and developed new concepts of causation and

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<sup>202</sup> *Sylvania*, 433 U.S. at 56 (citing works of Robert Bork and Richard Posner).

<sup>203</sup> Even if Chicago scored the goal in *Sylvania*, Harvard arguably earned an assist. Using the papers of Supreme Court justices who participated in *Sylvania*, Professor Gavil has documented how Donald Turner affected the thinking of *Sylvania's* author, Justice Lewis Powell, by preparing an amicus brief that amassed arguments favoring the application of a rule of reason to nonprice vertical restraints. Andrew I. Gavil, *A First Look at the Powell Papers: Sylvania and the Process of Change in the Supreme Court*, 17 ANTITRUST 8 (2002).

<sup>204</sup> See Page, *Areeda, Chicago, and Antitrust Injury*, *supra* note 34.

injury for private cases alleging improper single-firm conduct. In 1978 in the third volume of *Antitrust Law*, the two Harvard scholars offered the following recommendation to limit treble damage awards to private plaintiffs in monopolization cases:

[T]he normal prerequisites to private damages should be applied with sensitive attention to the nature of exclusionary acts. That is, some acts are held to be exclusionary notwithstanding a low probability of harm to competition. Such an act would not justify any damages. Furthermore, an injured plaintiff is not entitled to have damages based on the excess of the monopoly price over the competitive price but only to the price increment reasonably attributable to actionable behavior.<sup>205</sup>

Using this approach, courts should tie the award of damages directly to the effects of the specific practices that are found to be unreasonably exclusionary, and damages should be denied for practices from which the court or the jury finds no unreasonable exclusion. In other passages, Areeda and Turner expressed sympathy for the view that courts should exercise discretion to award single damages for some Section 2 violations.<sup>206</sup>

The subtext of concern about possible over-deterrence through mandatory trebling appears, among other places, in Justice Breyer's opinion for a unanimous Supreme Court in *NYNEX Corp. v. Discon, Inc.*<sup>207</sup> The opinion focused on the appropriate liability standard and did not directly concern damages.<sup>208</sup> In one passage, Justice Breyer cautioned against a liability standard that would permit private litigants to convert single-damage business tort claims into treble damage antitrust claims.<sup>209</sup> *Discon* is one of a number

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<sup>205</sup> III AREEDA & TURNER, *ANTITRUST LAW*, *supra* note 99, at 73.

<sup>206</sup> *Id.* at 97-99.

<sup>207</sup> *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128 (1998).

<sup>208</sup> *Id.* at 136-37.

<sup>209</sup> *Id.* (“To apply the per se rule here . . . would transform cases involving business behavior that is improper for various reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases.”).

of cases in which a fear that mandatory treble damages could provide excessive compensation and create over-deterrence may have induced the courts to design and apply liability standards in a manner that diminishes the private litigant's prospects for success.<sup>210</sup> The Harvard-inspired forms of judicial "equilibration"<sup>211</sup> to constrain private plaintiffs—the adjustment by the courts of the malleable features of the U.S. antitrust system to offset perceived excesses in characteristics (e.g., mandatory trebling of damages and availability of jury trials) not subject to judicial alteration—can have the far-reaching consequences well beyond the resolution of private antitrust cases. This is certainly the case where the method of equilibration is to alter liability rules. The establishment of more permissive substantive liability rules has systemwide effects. The non-intervention presumptions of liability standards that constrain the prosecution of private antitrust cases encumber public authorities alike.

### C. Refusals to Deal and Access to Essential Facilities

One of the modern Harvard School's most influential contributions has been to prompt a reassessment of doctrine governing refusals to deal and demands for access to physical assets or services under the essential facilities doctrine. By the early 1970s, in a series of decisions beginning with *United States v. Terminal Railroad*<sup>212</sup> in 1912

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<sup>210</sup> See WILLIAM E. KOVACIC, *Private Participation in the Enforcement of Public Competition Laws*, in II CURRENT COMPETITION LAW 167 (Mads Andenas et al. eds. 2004) (offering hypothesis that U.S. courts in private antitrust cases have imposed tougher standards for establishing liability to offset perceived excesses in system of mandatory treble damages).

<sup>211</sup> See Stephen Calkins, *Summary Judgment, Motions to Dismiss, and Other Examples of Equilibrating Tendencies in the Antitrust System*, 74 GEO. L.J. 1065 (1986) (applying concept of equilibrating tendencies to antitrust system's treatment of private treble damage claims); Kovacic, *supra* note 210, at 173-77 (describing interdependencies among characteristics of U.S. antitrust system, including links between private remedies and development of liability standards).

<sup>212</sup> *United States v. Terminal R.R.*, 224 U.S. 366 (1912).

and concluding with *Otter Tail*<sup>213</sup> in 1973, the Supreme Court had defined conditions in which an incumbent dominant firm could be compelled to provide access to its facilities. Though the Supreme Court never spoke of “essential facilities” or an “essential facilities doctrine,” by the 1980s the lower courts used these terms in opinions that mandated access under Section 2 of the Sherman Act.<sup>214</sup> The relationship between antitrust rules and the operation of sector-specific regulation was an important theme running through the Supreme Court and lower court access cases. Many formative cases involved demands for access to assets, such as electric power transmission lines, that were subject to extensive regulation by federal commissions or state public utility bodies.<sup>215</sup> In many of these cases, the defendants argued that public utility regulatory controls obviated the need for, or formally displaced, the application of antitrust rules.<sup>216</sup> Antitrust courts were urged to defer to the judgment of collateral regulatory institutions responsible for monitoring the dominant firm’s behavior.

Throughout the early 1980s, court decisions involving the application of antitrust rules to regulated industries often expressed acute doubt about the effectiveness of public utility regulatory controls as a check upon abusive conduct by dominant incumbent firms.<sup>217</sup> Courts generally brushed aside arguments that collateral regulation established antitrust immunity and often did so by finding gaps in the operation of the regulatory regime.<sup>218</sup> Judges also tended to reject suggestions that the availability of public utility

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<sup>213</sup> *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

<sup>214</sup> See, e.g., *MCI Commc’ns Corp. v. Am. Tel & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *Byars v. Bluff City News Co.*, 609 F.2d 843, 856 (6th Cir. 1979).

<sup>215</sup> See e.g., *Otter Tail*, 410 U.S. at 366.

<sup>216</sup> See William E. Kovacic, *Accounting for Regulation in Determining the Application of Antitrust Rules to Firms Subject to Public Utility Oversight*, 40 ANTITRUST BULL. 483 (1995) (examining interplay in antitrust litigation between antitrust law and public utility regulation).

<sup>217</sup> *Id.* at 496 (discussing judicial views of effectiveness of public utility regulation).

<sup>218</sup> *Id.*

oversight provided an adequate mechanism for control. Skepticism about the quality of sectoral regulation appeared, among other places, in Judge Harold Greene's opinions involving the Department of Justice monopolization suit against American Telephone and Telegraph<sup>219</sup> and the administration of the divestiture decree and line of business restrictions that resolved the case.<sup>220</sup> Judge Greene expressed concern that nominally powerful regulatory controls supplied a feeble constraint as applied and welcomed the application of antitrust rules to offset weaknesses in the regulatory regime.<sup>221</sup>

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<sup>219</sup> *United States v. Amer. Tel. & Tel. Corp.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

<sup>220</sup> *See, e.g., United States v. W. Elec. Co.*, 767 F. Supp. 308 (D.D.C. 1991) (lifting certain restrictions imposed on regional operating companies pursuant to consent decree that settled the Justice Department's monopolization suit); *United States v. W. Elec. Co.*, 673 F. Supp. 625 (D.D.C. 1987) (lifting restrictions on regional operating companies with respect to unrelated businesses and denying request to lift various other restrictions), *aff'd in part and rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990).

<sup>221</sup> *See, e.g., W. Elec.*, 767 F. Supp. at 317-18 ("[I]n the days prior to its break-up, the Bell System was under a comparable obligation by virtue of the then existing FCC regulation, but . . . these regulations were entirely incapable of halting anticompetitive activity."); *W. Elec.*, 673 F. Supp. at 541 ("In determining what remedy would most effectively protect in the future against similar anticompetitive abuses, both the parties and the Court carefully considered and rejected the alternative of improved FCC regulation. . . . [F]ederal and state regulation had simply not been capable of preventing the antitrust problems that the decree was to resolve. . . . It also appeared that when the FCC did act, its effects were largely unsuccessful."); *AT&T*, 552 F. Supp. at 168 ("[I]t seems clear that the problems of supervision by a relatively poorly-financed, poorly staffed government agency over a gigantic corporation with almost unlimited resources in funds and gifted personnel are no more likely to be overcome in the future than they were in the past."); *Id.* at 170 ("There has long been a debate over the relative merits of regulation and competition. The evidence adduced during the *AT&T* trial indicates that the Bell System has been neither effectively regulated nor fully subjected to true competition. The FCC officials themselves acknowledge that their regulation has been woefully inadequate to cope with a company of *AT&T*'s scope, wealth, and power . . .").



The Supreme Court's 2004 *Trinko* decision took a significantly different view on these issues.<sup>222</sup> The *Trinko* majority adopted a narrow interpretation of when unilateral refusals to deal are inappropriate<sup>223</sup> and expressed skepticism about the existence of an essential facilities doctrine.<sup>224</sup> In reaching this result, the Court dwelled extensively on the institutional capabilities of antitrust courts and regulatory institutions.<sup>225</sup> In rejecting the plaintiff's claim for treble damages, the Court also highlighted administrability problems that an antitrust court must confront when determining the terms on which a dominant firm must provide access to cure a wrongful unilateral refusal to deal.<sup>226</sup>

At first glance, *Trinko* might seem to be the product of Chicago School thinking. The majority opinion contains a number of outward signs of the Chicago School's influence. The opinion's author, Justice Antonin Scalia, is a leading scholar of the Chicago School. Justice Scalia's writing for the Court resonates with themes familiar to readers of Chicago School literature—cautions about the costs of wrongly condemning benign or procompetitive conduct,<sup>227</sup> warnings about the dangers of rules that would mandate cooperation between competitors,<sup>228</sup> and reminders of the institutional limitations of antitrust tribunals.<sup>229</sup> Lest readers fail to detect a basic skepticism toward antitrust intervention to control the conduct of dominant firms, the opinion includes a

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<sup>222</sup> *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398 (2004).

<sup>223</sup> *Trinko*, 540 U.S. at 407-11.

<sup>224</sup> *Id.* at 410-11.

<sup>225</sup> *Id.* at 411-15.

<sup>226</sup> *Id.* at 414-15.

<sup>227</sup> *Trinko*, 540 U.S. at 414 (“The cost of false positives counsels against an undue expansion of § 2 liability.”).

<sup>228</sup> *Id.* at 408 (“[C]ompelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion.”).

<sup>229</sup> *Id.* (“Enforced sharing . . . requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”).

memorable passage about the benefits to society of monopoly pricing.<sup>230</sup>

*Trinko*'s ideas are hardly, or predominantly, Chicago's alone. On several levels, *Trinko* powerfully illustrates the Chicago/Harvard double helix at work. Perspectives of the modern Harvard School pervade the decision.<sup>231</sup> The Court's pattern of reliance on secondary authority is one indication. The only commentary cited by the *Trinko* majority is material authored or co-authored by Phillip Areeda.<sup>232</sup> In three places, the *Trinko* majority quotes passages authored or co-authored by Areeda to support its analysis.<sup>233</sup> The Court's high estimation of this Harvard School scholar jumps from the page. In one passage, the Court prefaces a quotation from an Areeda article by observing, "We think Professor Areeda got it exactly right . . ." <sup>234</sup>

*Trinko*'s extensive reliance on the ideas of the modern Harvard School is not a consequence of chance. Justice Breyer's participation in the *Trinko* majority assured this

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<sup>230</sup> *Id.* at 407 ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth.").

<sup>231</sup> I share Professor Waller's interpretation of *Trinko* as demonstrating the impact of the modern Harvard School scholars. See Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 901, 915-16. Professor Waller emphasizes the citations to the work of Professors Areeda, Turner, and Hovenkamp and highlights the significance of Justice Breyer's participation in the *Trinko* majority. From his comparison of *Trinko* to the D.C. Circuit's 2001 en banc decision in *United States v. Microsoft Corp.*, 253 F.3d 24 (D.C. Cir. 2001), Professor Waller concludes that "Judge Posner may indeed be correct that there are few, if any, remaining differences between the Chicago School and the so-called Harvard School of antitrust." Waller, 2006 UTAH L. REV. at 915.

<sup>232</sup> See *Trinko*, 540 U.S. at 410-11 (citation in text to Areeda law review article and Areeda-Hovenkamp treatise on essential facilities doctrine); *Id.* at 411 (citation in text to Areeda-Hovenkamp treatise on application of antitrust law to regulated industries); *Id.* at 415 (text citation to Areeda article on essential facilities).

<sup>233</sup> *Id.* at 411, 415.

<sup>234</sup> *Id.* at 415.

result. The majority opinion bears the name of Justice Scalia, but the text unmistakably is the product of a Scalia-Breyer (Chicago/Harvard) collaboration. The path that brought the two justices to *Trinko* began in the academy where Breyer and Scalia both taught administrative law and antitrust. Through a lifetime of study and extensive earlier experience as jurists, Breyer and Scalia had developed an extensive familiarity with *Trinko*'s issues—including the relative efficacy of conventional public utility regulation and antitrust oversight.<sup>235</sup> To study the *Trinko* majority opinion is to see that Justice Scalia relied heavily on Justice Breyer's ideas to state the decision's rationale.

Justice Breyer, acting on his own, may have written less flamboyantly and may have softened or omitted *Trinko*'s statement about the benefits of monopoly pricing as an inducement for entry.<sup>236</sup> Yet he joined the opinion, and it is easy to see why. As a court of appeals judge in 1990, Justice Breyer authored a similar opinion in *Town of Concord v. Boston Edison Co.*,<sup>237</sup> and had laid out the intellectual foundation for the Supreme Court's majority opinion in *Trinko*.<sup>238</sup> In *Town of Concord*, which *Trinko* cites prominently,<sup>239</sup> the court of appeals rejected monopolization claims brought by a municipally owned electric utility against an integrated electric utility (Boston Edison). The plaintiff accused Boston Edison of orchestrating a price squeeze. Boston Edison allegedly obtained wholesale rate increases from the Federal Energy Regulatory Commission

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<sup>235</sup> The issues of regulatory design and regulatory agency performance had been a particularly major focus of Justice Breyer's scholarship. See, e.g., STEPHEN BREYER, *REGULATION AND ITS REFORM* (Harv. Univ. Press 1982).

<sup>236</sup> *Trinko*, 540 U.S. at 407.

<sup>237</sup> *Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990). The *Town of Concord* decision is analyzed in Philip Weiser, *The Relationship between Antitrust and Regulation in a Deregulatory Era*, 50 ANTITRUST BULL. 549 (2005).

<sup>238</sup> See Spencer Weber Waller, *Microsoft and Trinko: A Tale of Two Courts*, 2006 UTAH L. REV. 901, 916 (“*Trinko* is virtually the living embodiment of Justice Breyer's own opinion on the 1st Circuit in *Town of Concord v. Boston Edison Co.*”).

<sup>239</sup> *Trinko*, 540 U.S. at 412.

(FERC) without aggressively seeking approval for retail rate increases from the Massachusetts state public utility commission. Faced with higher wholesale rates and unable to raise its retail prices, the municipally owned utility saw its revenues squeezed.<sup>240</sup>

The Breyer opinion in *Town of Concord* refused to find liability, emphasizing the operation of public utility regulation at the federal and state levels.<sup>241</sup> FERC could address abusive behavior with respect to wholesale rates, and the Massachusetts public utility commission could address misconduct involving retail rates. Then-Judge Breyer added that there was no obvious basis for concluding that federal judges sitting in antitrust cases could do a better job than the sectoral regulators in addressing the competitive problem in question.<sup>242</sup> The First Circuit decision revealed a notably more sanguine view of the effectiveness of public utility regulation and a more doubtful view of the value to be added by supplementing this regime with antitrust oversight.

Further evidence of the Chicago/Harvard double helix in *Trinko* is the Supreme Court's depiction of the essential facilities concept. In noting its historical refusal to endorse an essential facilities doctrine, the *Trinko* Court repeated arguments that Professor Areeda had popularized in writings published in the 1980s.<sup>243</sup> Areeda called the essential facilities doctrine "an epithet in need of limiting principles,"<sup>244</sup> and his critique of the doctrine helped inspire further commentary that attacked the concept. Areeda emphasized the potential adverse incentive effects that could result from mandated access and, consistent with his longstanding concern with administrability, identified difficulties that an antitrust court would need to address when specifying and policing terms of access, unless these

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<sup>240</sup> *Town of Concord*, 915 F.2d at 19-21.

<sup>241</sup> *Id.* at 19.

<sup>242</sup> *Id.* at 27-28.

<sup>243</sup> *Trinko*, 540 U.S. at 411.

<sup>244</sup> Phillip Areeda, *Essential Facilities: An Epithet in Search of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

functions could be assigned to a regulatory body better suited to perform these tasks.<sup>245</sup>

When the *Trinko* majority came to address the possible application of an essential facilities doctrine, the ideas of the modern Harvard School marked the way. The opening of the majority's discussion of the essential facilities doctrine included a "see generally" reference to Professor Areeda's *Epithet* article and a citation to Justice Breyer's dissent in *AT&T Corp. v. Iowa Utilities Board*<sup>246</sup> for the proposition that "We have never recognized such a doctrine."<sup>247</sup> The majority then quoted the Areeda-Hovenkamp treatise for the view that the essential facilities doctrine is unavailable when public sectoral regulators have power to mandate access and regulate its terms.<sup>248</sup> To punctuate its concerns about administrability, the majority then quoted the Areeda *Epithet* paper on the burdens that an antitrust court must bear when it mandates access to a facility.<sup>249</sup>

## V. THE CHICAGO/HARVARD DOUBLE HELIX AND FUTURE U.S. ANTITRUST POLICY

The Chicago/Harvard double helix improves upon the Chicago/Post-Chicago dialectic as a means for understanding the intellectual history of modern U.S. antitrust policy toward dominant firms for appreciating why the adjustments in U.S. doctrine and policy from 1960 to the present have

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<sup>245</sup> *Id.* at 852-53.

<sup>246</sup> *Iowa Utilities Board*, 525 U.S. 366, 412 (1999) (Breyer, J., concurring in part and dissenting in part).

<sup>247</sup> *Trinko*, 540 U.S. at 411. The cited passage from the Breyer dissent in *Iowa Utilities Board* had called the essential facilities concept "an antitrust doctrine that this court has never adopted." *Iowa Utilities Board*, 525 U.S. at 428. Justice Breyer's dissent also cited Areeda's *Epithet* article for the view that "a convincing explanation" for mandatory sharing must be provided "where a new entrant could compete effectively without the facility, or where practical alternatives to that facility are available." *Id.* Echoing concerns stated in Areeda's *Epithet* article, Justice Breyer warned about "significant administrative and social costs" and adverse incentive effects that might result from compulsory sharing. *Id.* at 428-29.

<sup>248</sup> *Trinko*, 540 U.S. at 411.

<sup>249</sup> *Id.* at 415.

been so extensive and enduring. There is a tendency in some commentary to attribute the intervention skepticism of modern U.S. competition law to a takeover by Chicago School extremists.<sup>250</sup> This interpretation easily can lead one to conclude that, owing to their extremist roots, the presumptions of U.S. doctrine and policy that disfavor intervention are intellectually unsound, relatively short-lived aberrations.

The Chicago/Harvard double helix undermines this interpretation. The scope of the reorientation of U.S. competition law and policy toward dominant firms since 1960 could not have been so extensive if the intellectual consensus supporting the adjustments had been narrow. The shift in modern U.S. antitrust policy toward dominant firms derived its strength from two complementary streams of thought—the Chicago/Harvard double helix—and would have been considerably more modest if only one school (Chicago or Harvard) had provided the intellectual foundation. Nor could the reorientation have endured to the present, or enjoyed strong prospects for continued vitality, without the support of the two schools.

The operation and content of the Chicago/Harvard double helix sheds insights on matters with substantial practical significance for the U.S. antitrust system. By achieving a clearer view of the framework of formative ideas, we can see better how the foundations for U.S. competition law can be extended or limited, stretched or collapsed. Discussions about the future of the U.S. antitrust system cannot proceed sensibly without an accurate understanding of the origin of and bases for the modern presumptions in U.S. antitrust law and policy that disfavor intervention to address dominant firm misconduct.

Two closely related presumptions embedded in the Chicago/Harvard double helix stand out. First, the double helix assumes that overinclusive applications of antitrust law to control dominant firm conduct pose greater hazards to economic performance than underinclusive applications. This presumption assumes that the likelihood that entry and adaptability by competitors, customers, and suppliers more

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<sup>250</sup> See *supra* notes 31 and 83 and accompanying text.

often than not will blunt dominant firm efforts to exercise market power.

The foregoing presumption is subject to and worthy of continuing reassessment. Both the Chicago and Harvard schools abide by the view that antitrust doctrine should reflect the rigorous application of microeconomic theory and should respond to insights from empirical work about the implementation of antitrust rules and about the impact of specific business practices. A body of law that is faithful to well-established theory and empirical testing of existing assumptions presumably will change with adjustments in the state of economic learning. This suggests that ex post assessments of past decisions to prosecute or not to prosecute and empirical work in industrial organization will be crucial to supporting an expansion of existing U.S. policy and, perhaps, to sustaining existing constraints on dominant firm conduct.<sup>251</sup> Modern research that has underscored the likely harms of various forms of exclusionary behavior also provide a basis for altering the assumption of the Chicago/Harvard double helix that improper exclusion invariably is difficult to identify accurately and therefore must be approached with special caution.<sup>252</sup>

The second critical presumption of the Chicago/Harvard double helix is grounded in concerns about institutional design and capacity. To understand the Chicago/Harvard concern with the implementation of antitrust policy is to see how perceptions about the quality of institutional design and capacity have affected substantive outcomes in U.S. antitrust law and policy. The permissiveness of the Chicago/Harvard approach to dominant firms, including the emphasis on administrable rules that tend to exculpate, hinges crucially upon doubts about the capabilities of enforcement agencies and courts and antipathy toward what

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<sup>251</sup> The case for investments in ex post evaluations of enforcement decisions is presented in William E. Kovacic, *Using Ex Post Evaluations to Improve the Performance of Competition Policy Authorities*, 31 J. CORP. L. 503 (2006).

<sup>252</sup> See Susan A. Creighton et al., *Cheap Exclusion*, 72 ANTITRUST L.J. 975 (2005) (outlining a program for redressing exclusionary conduct that involves relatively modest investments by incumbent dominant firms).

is posited to be an unduly expansive system of private rights of action. Through the lens of the Chicago/Harvard double helix, Post-Chicago scholars often falter because they make unduly hopeful assumptions about the capacity of the key implementing institutions of the antitrust system to apply the insights of Post-Chicago analysis skillfully.<sup>253</sup> By this view, non-interventionist presumptions are endorsed not because they inevitably make sound assumptions about the harms of specific forms of business behavior, but instead because they make more accurate assumptions about the limitations of courts and enforcement agencies.<sup>254</sup>

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<sup>253</sup> See Hovenkamp, *Review and Critique*, *supra* note 14, at 269 (“The biggest danger presented by post-Chicago antitrust economics is not that the variety and likelihood of anticompetitive practices will be exaggerated, although that has happened as well. Rather, the danger is that antitrust tribunals will be confronted with antitrust solutions that they are not capable of administering. Indeed, the major shortcoming of post-Chicago antitrust analysis is its failure to take seriously problems of judicial or agency administration.”); Hovenkamp, *Review and Critique*, *supra* note 14, at 275 (“[I]n too many instances antitrust tribunals are simply not up to handling post-Chicago theory. Judges do not know enough economics; the economics itself is insufficiently capable of sorting out anticompetitive from competitive or harmless explanations; the American jury system turns complex fact findings into chaos.”).

<sup>254</sup> This doubtful view about the capacity of antitrust institutions is apparent in Professor Hovenkamp’s writings of recent years. For example, in his 2001 article on Post-Chicago antitrust analysis, he observed:

[U]nder post-Chicago antitrust analysis, the market has become a far messier place. The post-Chicago economic literature has produced impressive arguments that certain market structures and certain types of collaborative activity are much more likely to have anticompetitive consequences than Chicago School antitrust writers imagined . . . .

It now seems quite clear that Chicago School economic orthodoxy is no longer the best, or certainly not the only, analytic tool for evaluating markets. But the sad fact is that judges have not come close to developing antitrust rules that takes this messier, more complex economics into account. An even sadder fact is that in many instances judges may not be capable of doing so. As a result, the rather benign Chicago School rule may be the best one for policy purposes even though it does not do the best job of expressing what we know about economic theory.



Two antidotes to these institutional concerns come to mind. The first is to study more critically the assumption that private rights of action in the United States are dangerously out of control. As noted above,<sup>255</sup> I am attracted to the hypothesis that the U.S. courts since the early 1970s have retrenched substantive liability standards for abuse of dominance in order to counteract what judges believe to be excesses in the design of the mechanism for private enforcement. To assert, as I have, that judges perceive the U.S. system of private rights to be excessive does not mean that their perceptions are invariably correct or enjoy convincing empirical support. Professor Robert Lande correctly notes that assumptions about the asserted dangers of overdeterrence from private enforcement in the United States ought not be accepted as a matter of faith and ought to be tested vigorously in light of modern experience and empirical study.<sup>256</sup>

The concern about private rights also highlights the importance of the role of public enforcement to address episodes of dominant firm misconduct. Yet the effectiveness of public enforcement may depend upon overcoming the concern of the Chicago/Harvard double helix about perceived deficiencies in the capacity of enforcement agencies and courts. This suggests the urgency of measures to enhance the capacity of the U.S. antitrust system's implementing institutions. Among other steps, this requires increases in the investments in institutional capacity that make the courts and enforcement agencies better able to address the more demanding analytical tasks. For the public enforcement agencies, such a program would include outlays for research and development, of which empirical work would be one component.<sup>257</sup> The willingness of the FTC since

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Hovenkamp, *Review and Critique*, *supra* note 14, at 270-71.

<sup>255</sup> See *supra* note 210 and accompanying text.

<sup>256</sup> See Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651 (2006).

<sup>257</sup> The concept of competition policy research and development is introduced and described in Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359 (2003).

mid-2001 to commit itself to the most ambitious program of abuse of dominance enforcement the Commission has undertaken in any comparable six-year period since 1971-1976 has depended vitally on investments in building relevant knowledge from the mid-1990s forward.<sup>258</sup> For courts, the matter of capacity-building includes consideration of training for judges and greater reliance on neutral experts to advise courts in individual litigated matters.

It is important to emphasize that the perspectives that combine to form the Chicago/Harvard double helix do not make capacity building a fruitless exercise. To see the composition of the Chicago/Harvard double helix and to appreciate its influence does not require one to conclude that the two schools are identical in all respects. They assuredly are not, just as not all members within one or the other of the schools are entirely congruent. One set of differences involve interrelated matters of substantive doctrine and institutional capacity. For example, Areeda and Turner endorsed recognition of a no-fault monopolization cause of action to redress persistent, substantial monopoly power that was not attributable to continuing superior performance.<sup>259</sup> The two Harvard scholars offered the concept as one way of correcting errors that might result from adopting too permissive a standard for behavior such as predatory pricing. In at least one sense, the no-fault proposal appears to contradict the concerns that the Harvard scholars' voiced in other contexts about administrability and institutional capacity. To endorse the no-fault concept, Areeda and Turner must have assumed that the courts and federal anti-trust agencies possessed, or could attain, enough capability to make the difficult judgments (e.g., about the causes and

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<sup>258</sup> The dimensions of the FTC's program involving improper dominant firm behavior from 2001 to the present, and the investments in institutional capacity on which the program rests, are examined in William E. Kovacic, *The Importance of History to the Design of Competition Policy Strategy: The Federal Trade Commission and Intellectual Property*, 30 SEATTLE L. REV. 319 (2007).

<sup>259</sup> III AREEDA & TURNER, ANTITRUST LAW, *supra* note 99, at ¶¶ 614-23; Donald F. Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207 (1969).

persistence of observed monopoly power) that the implementation of a no-fault monopolization cause of action would require them to make. If these demanding analytical endeavors are amenable to successful resolution by courts and enforcement agencies, what other antitrust-related tasks would not be?

A second area of disagreement involves institutional arrangements and the motivations that guide public enforcement agencies. The Chicago and Harvard School shared concerns about the limitations of courts and enforcement agencies, but Harvard School scholars did not take the further step of questioning the motives of the public enforcement agencies. In 1978 in the ANTITRUST PARADOX, Robert Bork expressed a dismal view of the aims that guide the Justice Department and the FTC. These agencies, Bork said, desired and greatly succeeded in aggrandizing their power because the affected private sector interests were too timid or well-organized to resist DOJ and FTC efforts to expand their authority.<sup>260</sup> In this respect, Bork's work echoes the view of public choice scholars who argue that, beyond problems associated with making an accurate diagnosis of observed commercial phenomena and implementing effective approaches for curing apparent market failures, enforcement officials respond to incentives that lead them to deviate from the pursuit of society's best interests.<sup>261</sup> The modern Harvard School of Areeda, Turner, and Breyer does not embrace this gloomy view of the incentives of public officials and instead rests the case for cautious intervention on grounds of institutional capacity.

A third significant difference concerns assumptions about how rules evolve. The positions of both Bork and Areeda and Turner on predatory pricing illustrate the point. Bork's ANTITRUST PARADOX appeared in 1978, three years after Areeda and Turner published their predatory pricing law review article. Bork depicted the rule as an improvement over the status quo but criticized it as an ineffective half-

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<sup>260</sup> BORK, ANTITRUST PARADOX, *supra* note 28.

<sup>261</sup> For a representative statement of this perspective, see WILLIAM F. SHUGHART III, ANTITRUST POLICY AND INTEREST GROUP POLITICS 82-120 (1990).

measure for retooling predatory pricing law.<sup>262</sup> The only sound way to discourage wasteful challenges to aggressive pricing was to endorse a no rule approach.

The differences between the Bork and Areeda-Turner proposals reflect a difference not only in substantive economic views (Bork believed harmful episodes of predatory pricing to be nonexistent, while Areeda and Turner deemed them to be rare) but also in tactics. To use a golf analogy, the Chicago School in effect says that in many cases the only proper way to strike the ball to the green is to aim directly for the cup. By this view, the only worthy shot is designed to land in the hole on the fly. By contrast, the Harvard School is more cautious in overall philosophy and tactics. The modern Harvard School asserts that good policy results are best achieved by hitting the green and allowing the ball to roll toward the cup. With this approach, the ball sometimes will roll close to the cup, and may even go in.

The trajectory of predatory pricing cases since 1975 suggests that the Areeda-Turner approach may produce results that converge upon the preferred outcomes of the Chicago School. In their predatory pricing proposal, Areeda and Turner did not try to hit the ball directly into the cup, which would have been the golfing equivalent of a no rule strategy. Despite occasional plaintiff successes in reported opinions, the evolution of predatory pricing doctrine since publication of the 1975 Areeda and Turner article has made it especially difficult for plaintiffs to establish liability for predatory pricing—a rough, but not complete, equivalent to a no rule result.<sup>263</sup>

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<sup>262</sup> *Id.* at 154-55.

<sup>263</sup> Professor Daniel Crane points out that the Areeda-Turner rule reduced the antitrust exposure of dominant firms but did end the filing and litigation of predatory pricing claims. Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 7-8 & n.18 (2005). A practical demonstration of the difference between the views of Areeda and Bork took place in *Brooke Group*, where Bork argued the case before the Supreme Court for the successful defendant and Areeda argued the case for the losing plaintiff. *Brooke Group*, 540 U.S. at 211. Judicial acceptance of Bork's "no-rule" approach would have forestalled the prosecution of traditional predatory pricing claims under federal antitrust law. This does not mean that challenges to dominant firm pricing conduct

The differences between the Chicago and Harvard schools outlined above do not disturb the core of the double helix, but they demonstrate how the American antitrust system might change over time. Standing alone, changes in economic theory and new empirical work can best be seen as necessary but not necessarily sufficient to alter the consensus embodied in the double helix. A core element of the Chicago/Harvard double helix is the requirement that proposed additions to the antitrust enforcement agenda and expansions in doctrine be tested by their compatibility with the capacity of antitrust institutions, especially courts and enforcement agencies, to implement them. The more ambitious the proposed agenda or doctrine, the greater must be the perceived capacity of courts and enforcement agencies. From this perspective, one cannot consider expanding the scope of enforcement activity or broadening the reach of doctrine without asking whether the implementing institutions are up to the task.<sup>264</sup> It is noteworthy that commentators associated with the modern Harvard School appear to have greater faith than Chicago School commentators in the prospect that enhancements in capability can be achieved.<sup>265</sup>

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would have ceased. Reacting to the strictures established by judicial acceptance since the mid-1970s of permissive standards toward predatory pricing, plaintiffs have begun to challenge dominant firm pricing conduct in the guise of loyalty discounts, bundling, and other forms of behavior that are not readily classified as predatory pricing. See Hovenkamp, *The Law of Exclusionary Conduct*, *supra* note 139, at 27 (discussing the “migration in the case law from older, head-on challenges to single-product prices as predatory” to new forms of allegations that “have focused on strategies that are perhaps best characterized as purchases of exclusionary rights”).

<sup>264</sup> See Hovenkamp, *Review and Critique*, *supra* note 14, at 273 (“[T]he basic rule should be nonintervention unless the tribunal has a high degree of confidence that it has identified anticompetitive conduct and can apply an effective remedy.”).

<sup>265</sup> See *id.* at 274-75 (“[T]he reluctance to advocate a general use of post-Chicago economics in antitrust litigation should be regarded as a contingent and temporal rather than as an absolute and permanent truth. In some areas, refined economic analysis has enabled us to identify anticompetitive outcomes with at least as much predictive power as older

The Chicago/Harvard double helix also draws attention to the interrelated features of the U.S. antitrust system. Proposed adjustments to any single element of the U.S. competition system—for example, liability standards or remedies—must account for how a suggested change will interact with other elements of the competition policy system. Areeda and Turner emphasized institutional interdependencies and demonstrated how imbalances in one area of competition policy tend to be offset over time by changes in others.

## VI. CONCLUSION

To say that the dominant influence upon modern U.S. antitrust doctrine and policy is the Chicago School misapprehends how the American competition policy system has evolved in the past half-century. The intervention skepticism often seen in the U.S. system does not rest on a single strand of ideas originating in the Chicago School of Robert Bork, Richard Posner, and Frank Easterbrook. Instead, the U.S. system's intellectual DNA is chiefly a double helix that intermingles Chicago School perspectives with the Harvard School contributions of Phillip Areeda, Donald Turner, and Stephen Breyer. Harvard has had as much to do as Chicago with creating many of the widely-observed presumptions and precautions that disfavor intervention by U.S. courts and enforcement agencies.<sup>266</sup>

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methodologies gave us. In that case, fashioning of new antitrust rules is not merely appropriate, it is essential.”).

<sup>266</sup> In his comparison of the second edition of Judge Posner's *ANTITRUST LAW* with the Areeda & Turner treatise, Professor Hovenkamp observes that judicial doctrine since the mid-1970s “has tracked the Harvard treatise more closely than it has tracked the Chicago School literature.” He adds that since the early 1980s “the Harvard School has moved rightward, closer to the Chicago position, while at least some Chicago School members have moderated their positions to the left.” Hovenkamp, *Book Review*, *supra* note 34, at 927. See also Frank H. Easterbrook, *Comparative Advantage and Antitrust Law*, 75 *CAL. L. REV.* 983, 989 (1987) (discussing paper by Phillip Areeda on antitrust standards for monopolization and mergers; observing that “Professor Areeda says much with which I agree, and very little that is open to question”).

The Chicago/Harvard double helix is important to U.S. competition law for two reasons. First, the Chicago/Harvard double helix explains why U.S. competition doctrine and enforcement policy toward dominant firms moved from a comparatively expansive approach to intervention from the 1940s through the mid-1970s to the more cautious approach that has characterized the decisions of courts and, with some variation, enforcement agencies in the past 30 years. The modern ascent of intervention skepticism within the U.S. antitrust system could not have been so dramatic in various areas of antitrust policy without formative Harvard School contributions, in writing and in the teaching of countless individuals in classes and conferences, from Areeda, Breyer, and Turner. In backing the U.S. system away from expansive intervention in the affairs of dominant firms, the Harvard School of Areeda, Breyer, and Turner played as large a role as the Chicago School of Bork, Easterbrook, and Posner.

The Chicago/Harvard double helix also provides a clearer view of how U.S. competition law and policy might evolve in the future. By accounting for the contributions of the Harvard School and identifying its relationship to Chicago School ideas, the double helix focuses attention on the importance of institutional capability as a determinant of doctrine and enforcement policy. Although both schools of thought address institutional themes, the Harvard School has played a uniquely influential part in highlighting the connection between liability standards and remedies, in engendering suspicion about the use of private treble damage suits to police dominant firm conduct, in rethinking the relative competence of antitrust authorities and sectoral regulators, and in demanding that antitrust rules be designed to be administrable. In each area, Harvard School scholars played crucial roles in spurring retrenchments of the U.S. system's treatment of dominant firms.

By reason of the Chicago/Harvard double helix, theories that support a broader scope for antitrust intervention will be tested according to their compatibility with the capacity of courts and enforcement agencies to implement the theories skillfully. A key implication of this process is the need for

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continuing improvements in the capacity of the implementing institutions. Investments in capacity will be indispensable to the performance of an enforcement role that exceeds the constraints that the double helix imposes.