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THE EVOLVING GEOGRAPHY OF THE AMERICAN ANTITRUST MIND

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ABSTRACT

The American antitrust regime has long been accused of countenancing the unprecedented monopolization of high-tech industries, including Facebook, Amazon, Apple, Netflix and Google. Such regulatory omission was thrown into sharp relief against the original antitrust history in which industrial behemoths, such as Standard Oil, were broken up. Yet, with a series of federal recruits of neo-Brandeisians, the Biden administration attempted to revamp the American antitrust regime. Why was the American antitrust regime passionately pro-industry in past administrations, to the extent that the very rationale of antitrust was in doubt? Also, what caused the sudden paradigm shift in the new administration? In an effort to answer these vexed questions, this Article employs a new concept of "regulatory mind," which can be broadly defined as a basic set of assumptions, beliefs, and values that constitute a particular regulatory ideology. This Article advances a dynamic investigation of the American antitrust mind, which can elucidate the nature and identity of the American antitrust regime. First, this Article maintains that Chicago School's market fundamentalism heavily influenced the American antitrust mind. Second, this Article seeks to corroborate such observation by tracing the dynamic shift of antitrust jurisprudence surrounding vertical price restraint (VPR). The main

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contribution of this Article is to reveal granular details that punctuate the analytical veil of clichéd images of American antitrust law and offer fresh insights informed by a sociological methodology of process-tracing.

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INTRODUCTION: THE GILDED AGE *REDUX*

THE Gilded Age is back in the United States. "Big Tech" companies, such as Apple, Google, Facebook, Amazon and Microsoft, have become modern-day Vanderbilts or Rockefellers.[1] On the one hand, the rise of Big Tech may symbolize an American corporate culture characterized by Schumpeterian destructive innovation.[2] On the other hand, however, the same phenomenon summons an old specter of monopoly. Indeed, bigger companies have recently pursued titular "killer acquisitions," buying smaller yet innovative companies to prevent any threatening competition in the future.[3] Amid the vortex of the pandemic crisis, small businesses have plunged into an apocalyptic pitfall where approximately four hundred thousand small companies have already closed.[4] This scandalous corporate power grab has invited a populist backlash[5] accusing the U.S. economic system of being "rigged" in favor of the rich.[6]

While the advent of a new Gilded Age offers another critical juncture in the history of American antitrust regime, it also confirms a distinct theme of the regime, namely an alternating cycle of *trust* and *antitrust*. If the creation of the Sherman Act in late nineteenth century was a lurid reaction to the old Gilded Age, Reaganism ushered in an era of market concentration. Now, the new campaigners for strong antitrust regulation, labeled as neo-Brandeisians, are threatening Reagan's anti-antitrust legacies.[7] In 2020, the Federal Trade Commission and forty eight state attorneys general sued Facebook for its alleged violation of the Sherman Act by buying up its potential competitors, such as Instagram and WhatsApp.[8] In 2019, Senator Amy Klobuchar proposed

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1 Kevin Carty, *Tech Giants Are the Robber Barons of Our Time*, N.Y. POST (Feb. 3, 2018, 11:50 AM), https://nypost.com/2018/02/03/big-techs-monopolistic-rule-is-hiding-in-plain-sight/.

2 Adam Thierer, *Tech Titans And Creative Destruction*, FORBES (Oct. 19, 2011, 6:00 PM), https://www.forbes.com/forbes/2011/1107/opinions-capital-flows-tech-titans-destruction-adam-thierer.html?sh=59822f082f8a.

3 Austan Goolsbee, *Big Companies Are Starting to Swallow the World*, N.Y. TIMES (Sep. 30, 2020) https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html.

4 *Id.*

5 Martin Wolf, Editorial, *Friedman Was Wrong on the Corporation*, FIN. TIMES (Dec. 9, 2020), https://www.ft.com/content/e969a756-922e-497b-8550-94bfb1302cdd.

6 Rana Foroohar, *Corporate America's Deal with the Devil*, FIN. TIMES (Nov. 23, 2020), https://www.ft.com/content/e49fdbcf-5992-4d17-8ccd-c5223707e14d.

7 *See infra* Section I.B.

8 Rana Foroohar, *Regulators Move Fast and Break Things*, FIN. TIMES: SWAMP NOTES (Dec. 14, 2020), https://www.ft.com/content/53a70afd-4c2d-47b8-82f8-d8dafa0c313d.

a new antitrust bill titled the "Consolidation Prevention and Competition Promotion Act."[9] Importantly, however, such political responses may not necessarily be aligned with the *legal* responses in the courts. Ever since the late seventies, the U.S. antitrust court has not demonstrated much enthusiasm in restraining corporate giants; until recently, the Supreme Court has been rather doubtful of big antitrust suits, such as those against American Express and AT&T Time Warner.[10]

These rich developments in American antitrust, despite their climatic nature, warrant a systematic analysis to unearth the reality buried under confusing details. In response, this Article offers a theory of "regulatory mind" to serve as a conceptual tool for both discerning the historical trajectory of American antitrust policy and divining its future path. Regulatory mind can be broadly defined as a set of thought patterns or assumptions, explicit or implicit, on which antitrust agencies and antitrust courts may construct the cognitive range of available solutions to antitrust problems.[11] Thus, it is regulatory mind, this Article contends, that constitutes American antitrust law and policy.

The theory of regulatory mind highlights the role of "Chicago School" doctrine in the history of American antitrust. The Chicago School orthodoxy of market fundamentalism ("market always knows best" or "market always self-corrects") has long characterized the gestalt of the U.S. antitrust regime. Formed in the sixties, but consolidated in the eighties due largely to Reaganism, the Chicago School doctrine has empowered legal scholars under the banner of "law and economics," and popularized their schemata of both diagnosing and prescribing antitrust issues.[12] This peculiar academic pattern of thinking garnered certain intellectual prestige in the form of symbolic capital,[13] which has contributed to a systematic and coherent set of jurisprudence on antitrust issues. This Article, by employing a coherent set of heuristic narratives, explains the causal relationship between the existence of such symbolic capital and

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9 Samuel Miller, *Revisiting Klobuchar's Crucial Antitrust Reform Proposals*, LAW360 (Jan. 26, 2021, 3:11 PM), https://www-law360-com.kentlaw-iit.idm.oclc.org/articles/1347392/revisiting-klobuchar-s-crucial-antitrust-reform-proposals.

10 *America and Europe Clamp Down on Big Tech*, THE ECONOMIST (Dec. 19, 2020), https://www.economist.com/leaders/2020/12/19/america-and-europe-clamp-down-on-big-tech; *see, e.g.*, Diane Bartz & Nandita Bose, *FTC Says Facebook 'Bought and Buried' Rivals in Renewed Antitrust Fight*, REUTERS (Aug. 19, 2021, 3:35 PM), https://www.reuters.com/legal/litigation/us-ftc-expected-file-amended-complaint-against-facebook-2021-08-19/.

11 *Cf.* John L. Campbell, *Institutional Analysis and the Role of Ideas in Political Economy*, 27 THEORY & SOC'Y 377 (1998).

12 *See infra* Section I.A.

13 PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 183 (Richard Nice, trans., 1977).

deregulatory judicial interpretation. Given the important role that case law occupies in formulating American antitrust law, it is critical to identify a causal pathway from the Chicago School oracle[14] to actual court decisions. While several scholars indubitably recognize the Chicago School's impact on American antitrust policy[15], very few have actually demonstrated such causal link in a methodical manner.

Admittedly, causally linking ideas to policy change requires a different methodology from the typical positivist causal explanation in natural sciences because the antitrust reality is *socially* constructed. A major ontological premise of this project is that ideational factors, such as beliefs and values, construct possible problem-solving options for policymakers. Under these circumstances, providing convincing empirical evidence that reinforces the given causal mechanism appears to be challenging.[16] For this reason, this Article subscribes to the "process-tracing" methodology which connects historical dots to make a causal account, rather than seeking strict causality characteristic of the natural sciences.[17] Markedly, process-tracing countenances the revelation of a "constitutive" notion of causality.[18] In social sciences, unlike natural sciences, "[c]auses are not ontological substances to be isolated 'out there' but heuristic focal points used by the researcher to make sense of social life."[19] This Article advances a "causal-process observation," which involves "an insight or piece of data that provides information about context, process, or mechanism, and that contributes distinctively to causal inference."[20]

In this regard, this Article identifies discursive, if not strictly causal, connections between the Chicago School doctrine and American antitrust policy.[21] The uniquely discursive focus of this project warrants a sophisticated "narrative explanatory protocol" that demonstrates "why things are historically

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14 *From Hospitality to Hipsterism: A Healthy Dose of Competition*, THE ECONOMIST (Aug. 8, 2020), https://gbr.businessreview.global/articles/view/5f35faca5203001da60a7137/en_GB/zh_CN.

15 *See id.*

16 Campbell, *supra* note 11, at 377.

17 Vincent Pouliot, *"Sobjectivism:" Toward a Constructivist Methodology*, 51 INT'L STUD. Q. 359, 373 (2007).

18 *Id.* at 372.

19 *Id.* at 367.

20 Henry E. Brady et al., *Introduction* to RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS 2 n.3 (Henry E. Brady & David Collier eds., 2d ed. 2010).

21 *See generally* Jeffrey Haydu, *Making Use of the Past: Time Periods as Cases to Compare and as Sequences of Problem Solving*, 104 AM. J. SOCIO. 339 (1998) (using U.S. industrial regimes to illustrate how the past may inform the present while minimizing the risk of methodological deficits).

so and not *otherwise*."[22] Anchored by this discursive analysis, this Article traces the holistic process in which the Chicago School ideology was indoctrinated and disseminated, in and outside of the U.S. antitrust court. Markedly, economists are social scientists who observe social actors and formulate a theory based on their behaviors in a scientific (positivist) manner. Unlike natural science, however, economists' own beliefs often penetrate those social actors' minds and eventually change their behaviors in a self-fulfilling manner. While a physicist's theory cannot influence the movement of an electron, an economist's theory can alter behaviors of the very subjects of their study, including businesspeople, policymakers and even judges. This is the classical example of "double hermeneutic" in that an analyst's own interpretation can shape an interpretation by an object that the former analyzes.[23] After all, George Stigler, one of the gurus of the Chicago School, appeared to be clairvoyant when he asserted a half-century ago that "[o]ur expanding theoretical and empirical studies will *inevitably and irresistibly* enter into the subject of the public policy, and we shall develop a body of knowledge essential to intelligent policy formulation."[24]

The Chicago School ideology, this Article postulates, has penetrated American regulatory mind in two different tracks: executive and judicial. First, political adoption of the doctrine by the Reagan administration opened the executive pathway toward a lenient antitrust policy. The U.S. antitrust court's characteristic susceptibility and deference to agential activism can be said to have led the court in the same policy direction. Likewise, the President's power to change the court's composition can be said to have exerted the same effect. Second, judges may have accepted, directly and voluntarily, the Chicago School doctrine through various outlets, such as lectures and workshops. This Article seeks to trace the evolution of judicial mind in a case study regarding vertical price restraint (VPR).[25] Beside VPRs, no other areas of antitrust regulation have demonstrated the Chicago School's dogmatic influences on the judiciary more eloquently. In illustrating judicial behavioral change driven by the

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22 John Gerard Ruggie, *What Makes the World Hang Together?: Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855, 861 (1998).

23 *See* Sungjoon Cho, *A Social Critique of Behavioral Approaches to International Law*, 115 AJIL UNBOUND 248, 250 (2021).

24 BINYAMIN APPELBAUM, THE ECONOMISTS' HOUR: FALSE PROPHETS, FREE MARKETS, AND THE FRACTURE OF SOCIETY 377 n.23 (2019) (emphasis added).

25 For the purpose of this Article, the notion of "regulatory mind" does not, and could not, capture all important details in the evolution of American antitrust law for the past several decades, including the jurisprudence on extraterritoriality. Admittedly, some minor changes at granular levels might be seen to diverge from the Chicago School doctrine. I owe this insight to Hisashi Harata.

indoctrination of Chicago School tenets, this Article scrutinizes, in a chronological manner, antitrust decisions by the Supreme Court and two Federal Courts of Appeal (the Seventh and the Ninth Circuit) regarding VPRs. As discussed below, those decisions left indelible judicial marks, which were undeniably in favor of "efficiency" or "consumer welfare," rather than concerns for economic *justice*.

This Article holds major implications for the contemporary backlash against Big Tech. Tracing American antitrust mind can produce a dual dimension of a retrospective account ("enchainment") and a prognostic perspective ("self-fulfilling prophesy").[26] It not only substantiates the Chicago School doctrine's causal influence on American antirust policy but may also offer a bounded prediction as to whether the future court will modify its judicial interpretation on antitrust cases. The sheer magnitude of current anti-monopoly sentiments, both among politicians and ordinary citizens, may be powerful enough to create some fissures on the surface of a rock-solid symbolic dam of Chicago School dogma.

Against this backdrop, this Article unfolds in the following sequence. Part I provides a general background for the subsequent discussion as it carefully documents a standard version of American antitrust history. This part reveals the alternating theme of trust and antitrust in the evolution of American antitrust regime. It also highlights the *American* characteristics in law and politics that have shaped unique contours of antitrust regulation in the United States. Part II then postulates a theory of regulatory mind comprised of a dynamic nexus of project, paradigm, frame and public sentiments. This part theorizes that antitrust mind instructs antitrust agencies and antitrust courts to construct the cognitive range of available solutions to antitrust problems. Based on the theoretical platform devised in the previous part, Part III tracks a causal trajectory of American antitrust regime from the Chicago School doctrine to deregulatory antitrust policy. This part identifies supportive sets of discourse, such as policy statements and court decisions, from which one can infer a causal mechanism between an academic doctrine and an actual policy change. Part IV finally reveals several salient factors that have influenced the evolution of American antitrust mind. If the life cycle theory of antitrust mind elucidates a panoramic view of American antitrust law, those influencing factors tend to offer useful snapshots that characterize its critical properties. This Article concludes with a comparativist caution. American antitrust mind, as it remains *American*, may be resistant to words of wisdom from a foreign jurisdiction. Yet,

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[26] *See generally* Andrew Abbott, *From Causes to Events: Notes on Narrative Positivism*, 20 SOCIO. METHODS & RSCH. 428 (1992).

to reform American antitrust, regulatory dialogue between different jurisdictions is necessary. Ironically, American antitrust regulators must "[d]eny [s]elf for [s]elf's sake."[27]

I. Setting the Stage: Antitrust as an American History

A. The Perennial Circle of Trust and Antitrust

The U.S. antitrust policy is a product of history rather than logic. The original foundation of *anti*-trust is based on the suspicion or antagonism of economic concentration, which is a "political consensus reflected in the law," "not a hypothesis to be confirmed or disproved." [28] The American revolutionaries believed that "decetralized [sic], balanced economic power" would be the best bulwark against the British monarchy and the abuse of government power.[29] Yet, the unprecedented economic glamour from the Gilded Age ushered in a new economic order that legitimized *big* corporations and de-legitimized government interventions in the market force.[30] The postbellum industrial revolution in the United States drove the country into the same capitalist abuse as suffered by the earlier capitalist champion, the United Kingdom. The Sherman Act itself was a brainchild of its own time. Senator Sherman declared: "[A]mong [problems] all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations."[31]

To Senator Sherman, even mergers (combinations) that "reduce prices . . . by better methods of production" remain unjustifiable in that "[the] saving of cost goes to the pockets of the producers."[32] Likewise, the Clayton Act aimed to "properly control . . . the great industrial corporation that really has power—the power to arbitrarily control prices and thus exact unjust profits from the people."[33] Ever since the creation of the Sherman Antitrust Act in 1890, the U.S. antitrust regime continued to solidify through the Progressive Era, the Clayton Act reform, and the New Deal period. The Sherman Act brought about

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27 BENJAMIN FRANKLIN, POOR RICHARD'S ALMANAC 30 (1914).

28 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, 942 (1987).

29 David Millon, *The Sherman Act and the Balance of Power*, 61 S. CAL. L. REV. 1219, 1219-20 (1988).

30 *Id.* at 1220.

31 Eleanor Fox, *Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1147 (1981) (quoting 21 CONG. REC. 2460 (1890)).

32 *Id.*

33 Fox, *supra* note 31, at 1149 (quoting 51 CONG. REC. 9265 (1914) (remarks of Rep. Morgan)).

the break-up of Standard Oil, a symbol of the Gilded Age, in 1911.[34] The antitrust law was hailed as a "charter of freedom" in that it would guarantee free commerce in the market without any unfair manipulation by big enterprises.[35] The antitrust regime was in full gear even in the postwar era, unlike other major western economies that recruited big enterprises to rehabilitate war-torn economies.

This earlier zeitgeist also led the Supreme Court to heed socioeconomic concerns for equity and fairness "in spite of possible cost."[36] For example, if one bank merges with another in a local community, small businesses have "one less source of financing," putting those businesses "at the mercy of the few."[37] Until the early seventies, the Supreme Court applied the traditional tenets of decentralization under the Sherman Act.[38] The Court consistently highlighted competition as "process" and the "freedom of traders," but not efficiency.[39] Chief Justice Warren held that:

> [W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. 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.[40]

Then, in the fifties, big U.S. businesses began to launch their complaints against the rigidity of American antitrust laws. They complained that "[t]he government is attempting to substitute itself for the market in determining whether small or big business should do a particular job" and emphasized that "[b]ig business is necessary for military mobilization, efficiency, and technological progress."[41] This collective resistance to antitrust laws from big businesses intensified in the sixties and seventies when many U.S. companies

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34 *See* Daniel A. Crane, *Were Standard Oil's Rebates and Drawbacks Cost Justified?*, 85 S. CAL. L. REV. 559 (2012).

35 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-360 (1933).

36 United States v. Von's Grocery Co., 384 U.S. 270, 274-75 n.7 (1966) (quoting United States v. Aluminum Co. of Am., 148 F.2d 416, 429 (2d Cir. 1945)).

37 Fox & Sullivan, *supra* note 28, at 943 (citing United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 364-67 (1962)).

38 Fox, *supra* note 31, at 1151; *see* Ford Motor Co. v. United States, 405 U.S. 562 (1972); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); *Philadelphia Nat'l Bank,* 374 U.S. at 362-63.

39 Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951).

40 Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962).

41 JOEL B. DIRLAM & ALFRED E. KAHN, FAIR COMPETITION: THE LAW AND ECONOMICS OF ANTITRUST POLICY, THE NEW ANTITRUST CRITICISM 28 (1954).

were sized up through vertical integration. Particularly, they argued that the antitrust rigor impeded their growth and put them into a disadvantageous position against European and Japanese rivals. The U.S. government initially resisted big companies' pleas to loosen antitrust regulation. Yet, it was the oil shock in the late seventies that eventually reversed political support for strong antitrust regulation. Amid economic quagmires, politicians were easily captured by big enterprises.[42]

It was at this critical juncture that the Chicago School economists came along and offered a timely intellectual justification for deregulation. Those economists dismissed the classical legal and philosophical foundation of the U.S. antitrust regime characterized by popular forebodings on big, powerful companies' abuse of market power. Instead, the Chicago School economists, armed with numbers and equations, preached market orthodoxy, i.e., a self-correcting market. "They believe[d] that . . . entry generally eliminates monopoly power and because collusion is very difficult to sustain in the face of incentives to defect."[43] They were skeptical of the judgements of judges and juries on issues of complex industrial structures and therefore prioritized under-deterrence (false negatives) over over-deterrence (false positives).[44] Big corporations vigorously proselytized the Chicago School thinking to weaken antitrust authorities. At the same time, the Nixon and Ford administrations engineered dramatic change in the composition of the Supreme Court justices. During this period, justices who held the traditional antitrust view (Chief Justice Warren and Justices Black, Harlan, Fortas, and Douglas) had been replaced by pro-industry justices (Justices Blackmun, Burger, Rehnquist, Powell, and Stevens).[45]

The election of Ronald Reagan firmly cemented this new intellectual trend of a small government and deregulation. "Reaganism" was a perfect storm that punctuated a prior cognitive foundation of fairness-minded antitrust regulators and replaced it with the new antitrust doctrine of "efficiency."[46] The judicial trend was also in alignment with this political drive toward an efficient market thesis. While the Warren Court in the sixties maintained the original suspect of power embedded in the Sherman Act, the Burger Court in the seventies began to take on a consequentialist turn in interpreting the Sherman Act. Indeed, this was a paradigm shift from process (competition itself) to outcome (market

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[42] Fox & Sullivan, *supra* note 28, at 944-45.

[43] Steven C. Salop, *What Consensus? Why Ideology and Elections Still Matter to Antitrust*, 79 ANTITRUST L. J. 601, 603-04 (2014).

[44] *Id.*

[45] Fox, *supra* note 31, at 1143 n.8.

[46] *Id.* at 1154.

efficiency).[47] In a landmark case, *Continental T.V., Inc. v. GTE Sylvania Inc.*,[48] the Supreme Court overruled *Schwinn*,[49] which established the per se test in illegalizing vertical price restraints and instead embarked on a "rule of reason" test.[50] In formulating this paradigm shift, the *Sylvania* court relied on the Chicago School ideology. The *Sylvania* court held that, "[e]conomists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the *efficient* distribution of their products"[51] and that:

> Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain *efficiencies* in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. *Economists have identified* a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.[52]

Since *Sylvania*, the Court has replaced a legal analysis with an economic analysis. The Court weighed both anticompetitive and procompetitive aspects in determining the legality of vertical restraints, although its stance has not always been coherent.[53]

B. A New Gilded Age and the Rise of Neo-Brandeisians

Beginning in the late 1970s, the rise of the Chicago School of Law and Economics metamorphosed the U.S. antitrust enforcement.[54] The Chicago School indoctrinated both antitrust agencies and the court with mantras like "market efficiency" and "consumer welfare." Based on the assumption of self-correcting markets, antitrust regulators have long disregarded the potential

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47 *Id.* at 1152; *see, e.g.*, United States v. Gen. Dynamics Corp., 415 U.S. 486 (1974); Cont'l T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 411 U.S. 1 (1979).

48 433 U.S. 36 (1977).

49 United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977).

50 433 U.S. at 59.

51 433 U.S. at 56 (emphasis added); *see* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division II*, 75 YALE L. J. 373, 403 (1965).

52 *Sylvania*, 433 U.S. at 54-55 (emphasis added).

53 Fox & Sullivan, *supra* note 28 at 955-56.

54 Maurice E. Stucke & Ariel Ezrachi, *The Rise, Fall, and Rebirth of the U.S. Antitrust Movement*, HARV. BUS. REV. (Dec. 15, 2017), https://hbr.org/2017/12/the-rise-fall-and-rebirth-of-the-u-s-antitrust-movement.

economic, political, and social harms associated with too much concentration in an industry.[55] They believed that the market itself would correct any episodic instances of market power better than governmental intervention.[56]

Interestingly, however, more than three decades ago, Herbert Hovenkamp predicted that the Chicago School model would eventually collapse, as a new political vision demanded legal changes in antitrust regulation by spotlighting the model's flaws.[57] Hovenkamp critically observed that:

> [T]he notion that public policymaking should be guided exclusively by a notion of efficiency based on the neoclassical market efficiency model is naive. That notion both overstates the ability of the policymaker to apply such a model to real world affairs and understates the complexity of the process by which the policymaker must select among competing policy values.[58]

Hovenkamp's earlier prediction appears to have been clairvoyant. The Chicago School's seemingly invincible predominance in antitrust doctrines has recently begun to wane. Unprecedented levels of economic inequality and insecurity have not only persisted since the 2008 financial crisis but have also dented the decades-old blind faith in market efficiency and deregulation. Now, the public "appears ready to challenge the technocrats' monopoly on the political content of antitrust law and push for a competition policy that tames concentrated private power."[59] Furthermore, the COVID-19 pandemic has highlighted concerns for economic concentration. The pandemic has enriched only a handful of big corporations, including Big Tech and pharmaceutical firms, while wiping out countless other small businesses.[60]

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55 Jacob M. Schlesinger, *The Return of the Trustbusters*, WALL ST. J. (Aug. 27, 2021, 10:55 AM), https://www.wsj.com/articles/the-return-of-the-trustbusters-11630076102.

56 *Id.*

57 Herbert Hovenkamp, *Antitrust Policy After Chicago,* 84 MICH. L. REV. 213, 230-31 (1985).

58 *Id.* at 284.

59 Sandeep Vaheesan, *The Twilight of the Technocrats' Monopoly on Antitrust?*, 127 YALE L. J. F. 980, 995 (2018); *see generally* Leah Nylen et al., *Lobbying Intensifies Over Undecideds on Antitrust Bill*, BLOOMBERG (June 6, 2022, 10:00 PM), https://www.bloomberg.com/news/articles/2022-06-07/lobbying-intensifies-over-senate-undecideds-on-antitrust-bill ("Undecided lawmakers are facing a barrage of lobbying from Alphabet Inc.'s Google, Amazon Inc., tech trade groups and progressive advocates ahead of a planned vote later this month on antitrust legislation to rein in the largest tech platforms").

60 Steve Dubb, *Rules of the Road for the Internet Age? An Anti-Monopoly Movement Rises,* NONPROFIT Q. (Feb. 10, 2021), https://nonprofitquarterly.org/rules-of-the-road-for-the-internet-age-an-anti-monopoly-movement-rises/; Peter Allen Clark, *Big Tech Announces Striking Pandemic Gains as Small Businesses Strain to Find Their Footing*, TIME (Aug. 2, 2021, 5:09 PM),

This widespread public sense of urgency has nurtured a new school of thought, dubbed the "New Brandeis Movement," which has sought to revert to the "trust-busting Progressive Era."[61] Inspired by Supreme Court Justice Louis Brandeis, the New Brandeis Movement aims to revive Justice Brandeis's antitrust framework, which initially targeted industrial trusts in railroads, steel, and oil.[62] The New Brandeis Movement endeavors to neutralize the Chicago School ideology by "shift[ing] the focus of antitrust law from consumer welfare alone to include the competitive structure of markets."[63] Markedly, the new antitrust zeitgeist goes "beyond questions of consumer prices and narrow ideas of economic efficiency, and instead view[s] all this through the prism of *power*: economic power, which rapidly morphs into political and even cultural power, and now threatens the foundations of the democratic state."[64] Here, one could witness the return of the old zeitgeist: public anger against "evil powers" of monopolies.[65] Historically, monopoly has "always meant some sort of unjustified power, especially one that raised obstacles to equality of opportunity." Today's Big Tech companies have "decisively upset the balance of economic power on which a true democratic republic depends."[66]

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https://time.com/6085674/big-tech-apple-microsoft-facebook-amazon-google-earnings/; Therese Poletti, Opinion, *$1.4 Trillion? Big Tech's Pandemic Year Produces Mind-Boggling Financial Results*, MARKETWATCH (Feb. 7, 2022), https://www.marketwatch.com/story/1-4-trillion-big-techs-pandemic-year-produces-mind-boggling-financial-results-11644096594.

[61] Shannon Bond, *New FTC Chair Lina Khan Wants To Redefine Monopoly Power For The Age Of Big Tech*, NPR (July 1, 2021, 11:45 AM), https://www.npr.org/2021/07/01/1011907383/new-ftc-chair-lina-khan-wants-to-redefine-monopoly-power-for-the-age-of-big-tech; *see* Ron Knox, *How Washington Got Back into Trustbusting*, WASH. POST (June 25, 2021, 6:00 AM), https://www.washingtonpost.com/outlook/2021/06/25/ftc-antitrust-monopoly-silicon-valley/.

[62] *Id.*

[63] Jonathan Hatch & Jake Walter-Warner, *"New Brandeis" Antitrust Concepts Hit the Campaign* Trail, JD SUPRA (Mar. 21, 2019), https://www.jdsupra.com/legalnews/new-brandeis-antitrust-concepts-hit-the-93238/.

[64] Michelle Meagher & Nicholas Shaxson, Opinion, *The US is Taking on Its Corporate Monopolists – Now the Rest of the World Must Follow*, OPEN DEMOCRACY: OUR ECON. (Sept. 17, 2021) (emphasis added), https://www.opendemocracy.net/en/oureconomy/the-us-is-taking-on-its-corporate-monopolists-now-the-rest-of-the-world-must-follow/.

[65] Millon, *supra* note 29, 1224-28.

[66] *Id.* at 1228 (quoting W. LETWIN, LAW AND ECONOMIC POLICY IN AMERICA 59 (1965)); *see, e.g.*, Jasper Jolly, *'It's Just the Beginning:' Covid Push to Digital Boosts Big Tech Profits*, THE GUARDIAN (May 1, 2021, 1:00 PM), https://www.theguardian.com/business/2021/may/01/its-just-the-beginning-covid-push-to-digital-boosts-big-tech-profits (discussing Big Tech record profits during Covid-19 pandemic).

The neo-Brandeisians have recently stormed the Biden administration, ushering in a new Progressive Era to respond to the "second Gilded Age."[67] The Biden administration has appointed several neo-Brandeisians, including Lina Khan,[68] new head of FTC, Jonathan Kanter, head of the Justice Department's antitrust division, and Tim Wu,[69] special assistant to the President for technology and competition policy.[70] Predictably, the movement has recently led to various investigations initiated against tech giants such as Amazon, Google and Facebook.[71] In a highly symbolic fashion, President Biden issued a far-reaching Executive Order on July 9, 2021, which "repudiated 40 years of antitrust policy that favored bigness and overlooked the harm monopoly power can inflict on workers, small businesses, and the competitive process."[72] The Executive Order recognizes "the key role state government could and should play in reducing monopolists' stranglehold."[73]

States have also begun to tackle Big Tech's monopolistic practices with newly minted enthusiasm. For example, in the spring of 2021, several states introduced legislation aiming to break up Google and Apple's duopoly in

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67 *See* David Dayen, *It's Not a Big Tech Crackdown, It's an Anti-Monopoly Revolution*, AM. PROSPECT (Dec. 18, 2020), https://prospect.org/power/its-not-a-big-tech-crackdown-its-an-anti-monopoly-revolution/; *see, e.g.*, Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L. J. 893, 902 (2022) (noting that most Americans "support measures to prevent Big Tech companies from acquiring or maintaining their monopoly status"). *But cf.* Aurelien Portuese, *Biden Antitrust: The Paradox of the New Antitrust Populism*, 29 GEO. MASON L. REV. 1087, 1126 (2022) (observing that the Neo-Brandeisian revolution "has not gone unnoticed and uncontroversial").

68 *See* Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018).

69 *See generally* TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

70 Schlesinger, *supra* note 55.

71 Jonathan Hatch & Jake Walter-Warner, *New Investigations of Large Tech Firms Reflect Continuing Influence of New Brandeisian Ideas*, PATTERSON BELKNAP WEBB & TYLER LLP (Oct. 3, 2019), https://www.pbwt.com/antitrust-update-blog/new-investigations-of-large-tech-firms-reflect-continuing-influence-of-new-brandeisian-ideas/; *see also* Nihal Krishan, *Anti-Big Tech Antitrust Push Expected Under Biden*, WASH. EXAM'R (Feb. 24, 2021, 6:33 AM), https://www.washingtonexaminer.com/news/anti-big-tech-antitrust-push-expected-under-biden (quoting former FTC chairman Bill Kovacic who stated that "[w]e're traveling on an unmistakable path towards more activism and more aggressive antitrust enforcement at the FTC" under the Biden administration).

72 Ron Knox, *Biden's Executive Order Takes Aim at Monopoly Power on Behalf of Small Businesses, Farmers, and Workers*, INST. FOR LOC. SELF-RELIANCE (July 26, 2021), https://ilsr.org/bidens-executive-order-takes-aim-at-monopoly-power-on-behalf-of-small-businesses-farmers-and-workers/.

73 Justin Stofferahn, Opinion, *Anti-Monopoly Movement: States can Lead*, MINNPOST (July 23, 2021), https://www.minnpost.com/community-voices/2021/07/anti-monopoly-movement-states-can-lead/.

smartphone apps.[74] In June 2021, the New York Senate passed a trailblazing revamp of its antitrust laws ("The Twenty-First Century Anti-Trust Act") to discipline big corporations' monopolistic practices under which their temporary price reductions tend to force their rivals to sell the latter's businesses to the former.[75]

Unsurprisingly, businesses have fiercely resisted the New Brandeis Movement. The new chief executive of the U.S. Chamber of Commerce, Suzanne Clark, has expressed a thinly veiled threat of litigation against the recent anti-monopoly policy.[76] Clark stated that "[i]f bureaucrats and elected officials don't stop getting in the way, we will stop them, because what's at stake is no less than the future of our free market economy . . . ."[77]

C. Antitrust as American Exceptionalism

As discussed above, antitrust regulation in the United States is a product of *American* history. To that extent, evolving regulatory mind in American antitrust is characteristic of the unique traits of the U.S. legal and political systems. So long as the past of antitrust law and regulation remains American, so does its future.

First, an enormous power is vested in the President to shape the composition of the federal bench. Not surprisingly, the Reagan administration's reshuffling of the federal bench with pro-market judges led to deregulatory decisions in antitrust cases.[78] This libertarian court packing by the Reagan administration paralleled its equally aggressive deregulatory policy stance within antitrust agencies. Sanford Litvack, former Assistant Attorney General, Antitrust Division, professed in 1982 that:

> While I and my predecessors considered the Division to be mainly a law enforcement agency—the 'policeman' of the

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74 *Id.*

75 J. Mark Gidley et al., *New York's Sweeping New Antitrust Bill— Requiring NY State Premerger Notification ($9.2M Filing Threshold) and Prohibiting "Abuse of Dominance"—Inches Closer to Becoming Law*, WHITE & CASE (June 11, 2021), https://www.whitecase.com/publications/alert/new-yorks-sweeping-new-antitrust-bill-requiring-ny-state-premerger-notification.

76 Andrew Edgecliffe-Johnson & Kiran Stacey, *Top US Business Lobbyist Lambasts Joe Biden's Antitrust 'Over-Reach'*, FIN. TIMES (Jan. 11, 2022), https://www.ft.com/content/6fd7d5c3-00b2-43fc-9308-7d96614c53bb.

77 *Id.*; *see also* Ryan Tracy, *Business Groups Challenge Lina Khan's Agenda at Federal Trade Commission*, WALL ST. J. (Nov. 19, 2021, 5:30 AM), https://www.wsj.com/articles/ftc-khan-us-chamber-11637288699.

78 *See supra* notes 44-51 and accompanying text.

> economy—the current leadership apparently views the Division as a neutral arbiter of theoretical micro-economics. The Division seems mainly concerned not with enforcing the law, but with re-evaluating, analyzing, and changing it. Never before has the Department of Justice sought, as its prime objective, to narrow the scope of antitrust prohibitions.[79]

Second, Congress used to defer to the active mandates of antitrust agencies, such as the FTC, in terms of both rulemaking and enforcement. In turn, this agential activism, fully harnessed by its rich resources and experts, squeezes into the space of "judicially-invented policies"[80] via the *Chevron* doctrine.[81] More recently, however, many have called for Congress to restore its original mandate in antitrust regulation, especially in the face of "a technocracy that has not answered to the public in decades."[82] Likewise, the House, with bipartisan support, has recently introduced a sweeping set of bills that could be considered "the most ambitious update to monopoly laws in decades" to "restrain[] the power of Big Tech and stav[e] off corporate consolidation."[83] These bills would "embolden enforcers, who have become constrained by court decisions that have narrowed interpretations of century-old antitrust laws."[84]

Third, in a regime, such as in the United States, where courts play an essential role in shaping antitrust law, courts are sensitive to external pressures.[85] The U.S. courts "have for the most part responded to shifting political imperatives and economic theories."[86] For example, in the late seventies and early eighties, "a belief that our economic position in the world economy will be improved if only we water down the antitrust laws" pressured the U.S. Supreme Court to countenance more conservative economic ideology sympathetic toward big corporations.[87] Moreover, unlike most jurisdictions, the Sherman Antitrust Act provides a private remedy, meaning that private

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79 Sanford M. Litvack, *Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division*, 60 TEX. L. REV. 649, 650 (1982).

80 GANESH SITARAMAN, GREAT DEMOCRACY INITIATIVE, TAKING ANTITRUST AWAY FROM THE COURTS 7 (2018).

81 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

82 Vaheesan, *supra* note 59, at 990.

83 Cecilia Kang, *Lawmakers, Taking Aim at Big Tech, Push Sweeping Overhaul of Antitrust*, N.Y. TIMES (June 11, 2021), https://www.nytimes.com/2021/06/11/technology/big-tech-antitrust-bills.html.

84 *Id.*

85 *See* DAVID J. GERBER, COMPETITION LAW AND ANTITRUST: A GLOBAL GUIDE 39-40 (2020).

86 Laura Phillips Sawyer, *US Antitrust Law and Policy in Historical Perspective* 24 (Harv. Bus. Sch., Working Paper No. 19-110, 2019).

87 Stephen D. Susman, *Business Judgment vs. Antitrust Justice*, 76 GEO. L. J. 337, 337 (1987).

litigation may set an anti-monopoly agenda, with or without the federal agenda.[88] Considering the U.S. courts' susceptibility to external pressure, an influx of private litigation motivated by the new antitrust reform agenda might influence the jurisprudential development in the area.

At the same time, however, unlike civil law jurisdictions, in the U.S. courts, attorneys are "given authority to acquire relevant factual material and shape a factual *story* that is then presented to the court."[89] Since "[e]ach side presents its own story," the court proceeding is profoundly "fact-oriented" and therefore "tends to generate *complex and expensive* litigation."[90] This may explain an enduring pattern of industry-friendly jurisprudence. Whether the New Brandeis Movement indeed holds the potential to "change the mindset of those in the judiciary"[91] remains to be seen amid the interplay between the two aforementioned attributes of the U.S. courts.

Fourth, in common law jurisdictions, such as the U.S. court system, a court's decision is subject to "precedent" with varying degrees of binding force.[92] Often, a uniquely influential ruling, dubbed a "landmark" decision, may be repetitively referenced in subsequent similar cases. This precedential effect tends to consolidate a certain jurisprudential propensity, such as pro-big corporations, once professed at a critical juncture. For example, *GTE/Sylvania* overturned the previous per se rule depriving a manufacturer of its power to restrict retail locations of its products, and instead introduced a "reasonableness" standard which empowered manufacturers to exercise a tighter grip on franchise agreements with their distributors.[93] Ever since, *GTE/Sylvania* has continuously been cited in antitrust cases as it legitimized subsequent court decisions and further consolidated the pro-market jurisprudence.[94] This precedent effect saved the appeals court from conducting its own analysis on the merits of the per se approach by simply referencing the Supreme Court's decision on the rule of reason.[95]

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88 *See* Dayen, *supra* note 67.

89 Gerber, *supra* note 85, at 96 (emphasis added).

90 *Id.* (emphasis added).

91 David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION (Apr. 4, 2017), https://www.thenation.com/article/archive/this-budding-movement-wants-to-smash-monopolies/.

92 Gerber, *supra* note 85, at 43.

93 *See* Daniel J. Gifford, *The Jurisprudence of Antitrust*, 48 SMU L. REV. 1677, 1688 (1995).

94 *See id.* at 1681-82; *see also* Edward Fallone, *The Clinton Court Is Open for Business: The Business Law Jurisprudence of Justice Stephen Breyer*, 50 MO. L. REV. 857, 886-87 (1994).

95 "The Court's premise, that the New York statute mandated *per se* violations of § 1, has been overtaken by a change in antitrust law. In 2007, the Supreme Court, culminating a line of

II. REGULATORY MIND: THEORIZING THE EVOLUTION OF AMERICAN ANTITRUST REGULATION

As discussed above, the history of American antitrust regulation is characterized by its distinctively dynamic, often recurring, nature. Two dueling cognitive themes – trust and antitrust – have circled back and forth throughout the history. To effectively capture this rather dramatic transformation in regulatory philosophy, this Article theorizes "regulatory mind," which can be broadly defined as a set of thought patterns or assumptions, explicit or implicit, on which antitrust agencies and antitrust courts may construct the cognitive range of available solutions to antitrust problems.[96] Regulatory mind is a useful analytical tool by which one may unearth a hidden causal pathway from the Chicago School to antitrust policy.[97] This Article postulates based on the discourse analysis conducted above, and on public statements, policy briefs, and court decisions from politicians, policymakers, and federal judges. Once constructed, regulatory mind can be inherited by the next generation of regulators in the form of collective memory until countered by a new set of memories. Thus, regulatory mind secures path dependency until punctuated by a new critical thinking movement or event.

This Article employs John Campbell's taxonomy of policy ideas to uncover the life cycle of the U.S. antitrust regulatory mind. In a creative mix of historical institutionalism and organizational science, John Campbell offers a useful taxonomy of policy ideas.[98] Campbell first identifies the realm (foreground and background) in which policy ideas emerge.[99] He then identifies the level (cognitive and normative) at which policy ideas become crystalized.[100] According to these two parameters, Campbell formulates four types of policy ideas: programs ("elite policy prescriptions that help policy makers to chart a clear and specific course of policy action"); frames ("symbols and concepts that help policy makers to legitimize policy solutions to the public"); paradigms ("elite assumptions that constrain the cognitive range of useful solutions

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decisions, held that rule of reason-and not *per se*-analysis applies to all vertical restraints . . . . Henceforth, the Supreme Court stated, 'vertical price restraints are to be judged by the rule of reason.'" Conn. Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 32 (2d Cir. 2019) (quoting Leegin Creative Leather Products, Inc. v. PSKS, Inc., 551 U.S. 877, 882 (2007)).

96 *Cf.* Campbell, *supra* note 11, at 384-85.

97 *See generally* Reiner Keller, *The Sociology of Knowledge Approach to Discourse (SKAD)*, 34 HUM. STUD. 43 (2011); PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY (1967).

98 Campbell, *supra* note 11, at 384.

99 *Id.*

100 *Id.*

available to policy makers"); and public sentiments ("public assumptions that constrain the normative range of legitimate solutions available to policy makers").[101]

Hypothesizing causal links that constitute the life cycle of antitrust policy ideas, from the birth of the Chicago School in the sixties to the rise of Reaganism in the eighties, can also benefit from reflexive sociology. At its inception, a radical "program" of market fundamentalism was shared only among a small group of scholars, such as Aaron Director, George Stigler, and Richard Posner, labeled the "Chicago School." [102] This program of market fundamentalism remained in the foreground of their collective mind in the sense that it was still prone to an internal contestation from peers. Indeed, the Chicago School doctrines, such as price theory, was not widely circulated among antitrust law scholars in the seventies. In the late seventies, Richard Posner observed:

> Yet it is still fair to ask why the application of price theory to antitrust should have been a novelty. The answer, I believe, is that in the 1950's and early 1960's, industrial organization, the field of economics that studies monopoly questions, tended to be untheoretical, descriptive, "institutional," and even metaphorical. Casual observation of business behavior, colorful characterizations (such as the term "barrier to entry"), eclectic forays into sociology and psychology, descriptive statistics, and verification by plausibility took the place of the careful definitions and parsimonious logical structure of economic theory.[103]

A program requires a period of incubation to fully evolve into a "paradigm." Once an early idea (program) was fully incubated and ripened among antitrust experts, it was largely taken for granted in the background of their collective mind. Such an incubation process transpires in an epistemic community, such as the Chicago School. Yet even this paradigm of market fundamentalism remained at the cognitive level in the sense that it was a subject of scholarly debates. But once those experts upgraded their paradigm by organizing political symbols to valorize them, the paradigm turned into a "frame," which was

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101 *Id.* at 384-85.
102 *See supra* Section 1.A.
103 Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928-29 (1979).

readily transportable to a normative field, such as the court.[104] An ideational transition from a cognitive level of knowledge (a program as episteme) to a normative level of knowledge (a frame as phronesis) may require certain energy or power to harness such a qualitative change.[105] Interestingly, the main institutional incubator of Hayekism at University of Chicago was not the Department of Economics—it was the Law School! As an institutional origin for the "law and economics" movement, the Chicago Law School played a pivotal role in converting what used to be an esoteric scholars' manifesto to an exoteric normative frame readily used in antitrust litigation.

As a result, the logic of fairness, which was the original leitmotif of the Sherman Act, was replaced by the logic of efficiency in antitrust discourse, not only in scholarly debate but also in court rulings. Economics as a discipline, and economists as an occupation, have been privileged even in the litigation setting.[106] As discussed in Part III, by the eighties, it became customary that parties to VPR litigation present quantitative data, such as data related to the correct depiction of the relevant market and the impact that the disputed restrictions might exert on that market in its entirety.[107] The Court's decisions were often based upon the overall accuracy of the data presented.[108] For example, the respondent in *Northwestern Wholesale Stationers* alleged that the petitioner possessed a fifty percent market share.[109] However, this allegation was not substantiated by actual data.[110] In fact, the petitioner responded that

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[104] *See* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 44 (3d ed. 2017) (discussing the behavior-shaping power of symbols and other cultural entities, such as narratives and storytelling).

[105] Campbell, *supra* note 11, at 379-81.

[106] *See infra* Part III.E.

[107] *See id.*

[108] *See id.*

[109] "The record below is silent as to the market share of the parties . . . [i]t would appear, however, that these 35 other members of Northwest, not including Pacific, probably accounted for somewhat more than half of the retail market. If proven, this would be very much the same kind of market share which led this Court to brand two prior concerted refusals to deal to be unlawful-in *Fashion Originators* . . . ." Brief of Respondent at 28, Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284 (1985) (No. 83-1368), 1984 WL 565674, at *28-29; Reply Brief of Petitioner at 42, *Nw. Wholesale Stationers*, 472 U.S. 284 (1985) (No. 83-1368), 1985 WL 669100, at *2.

[110] "Pacific finally confesses that 'the record below is silent as to the market share of the parties', but then asserts that . . . the market was populated by approximately thirty-five independent retailers . . . [i]t then speculates that these thirty-five members 'probably' accounted for 'somewhat' more than half of the retail market. There is absolutely nothing in the record to support this." Reply Brief of Petitioner at 2, *Nw. Wholesale Stationers*, 472 U.S. 284 (1985) (No.83-1368), 1985 WL 669100, at *2; *Nw. Wholesale Stationers*, 472 U.S. at 287.

the "Court will search in vain for any analysis of market power in the record."[111] Petitioner further argued in their original brief that "there was no showing in the district court of market power to coerce or exclude."[112] After arguments from both parties were heard, the court ruled against respondents, finding no antitrust violation.[113]

Importantly, this transition from a mere academic idea (paradigm) to a normative, judicial policy (frame) connotes a quasi-causative mechanism that is characteristic of "double hermeneutic." [114] As observers or analysts, the Chicago School scholars investigated and explained allegedly rational behaviors of social actors, including judges and policymakers.[115] Yet, as social scientists, Chicago School scholars differ from natural scientists. When a physicist extracts a regular pattern from data of atom movement, only his or her own interpretation matters (*single* hermeneutic). In other words, atoms are neither cognizant of the fact that they are being watched nor influenced by the assumption that the physicist predicates on their observation. However, social scientists, such as Chicago School scholars, experience their own interpretation of what their object of investigation (social actor) itself thinks or interprets (*double* hermeneutics). Therefore, those objects (social actors) can modify their behaviors upon receiving that social scientist's theory or belief. In this case, the social scientist becomes a "proselytizer" of a particular set of assumptions or beliefs. This is what happened in the ideational transition from an academic paradigm of market fundamentalism, shared by the Chicago School scholars, to a new judicial frame of rule of reasoned jurisprudence in the U.S. courts. The nature of double hermeneutic, endemic to social sciences such as law and economics, empowered Hayekians to impose their ideas on the objects of their own studies, (i.e., judges) to modify their jurisprudential thinking. It is in this sense that an idea (market fundamentalism) at the cognitive level produced a change in the judicial behavior (rule of reason) at the normative level.

Finally, the Reagan administration further politicized the Chicago School paradigm of market fundamentalism and deregulation. Reaganism penetrated

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111 Reply Brief of Petitioner at 2, *Nw. Wholesale Stationers*, 472 U.S. 284 (1985) (No. 83-1368), 1985 WL 669100, at *2.

112 *Id.*; Brief of Petitioner at 28, *Nw. Wholesale Stationers*, 472 U.S. 284 (1985) (No. 83-1368, 1984 WL 565670, at *25.

113 *Nw. Wholesale Stationers*, 472 U.S. at 298.

114 *See* THE CAMBRIDGE COMPANION TO COMPARATIVE LAW 36-37 (Mauro Bussani & Ugo Mattei eds., 2012).

115 *See generally* Richard A. Posner, *Judicial Behavior and Performance: An Economic Approach*, 32 FLA. ST. U. L. REV. 1259 (2005); Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1 (1993); Howard Latin, *Legal and Economic Considerations in the Decisions of Judge Breyer*, 50 L. & CONTEMP. PROBS. 57 (1987).

the "public sentiments" and molded a new zeitgeist in the eighties, as symbolized by the celebrated aphorism that "government is not the solution to our problem; government is the problem."[116] Ever since, general sentiments in favor of a small government have remained largely unchallenged in the United States.[117]

Table 1: The Life Cycle of Regulatory Mind[118]

	Foreground	Background
Cognitive	**Programs** (Elite Policy Ideas)	**Paradigms** (Established Epistemic Assumptions)
Normative	**Frames** (Symbols for Legitimation)	**Public Sentiments** (Established Public Assumptions)

III. FROM CHICAGO SCHOOL TO ANTITRUST POLICY: TRACING THE CAUSAL PROCESS

The theory of regulatory mind postulates a causal relationship between an idea, such as the Chicago School doctrine, and a policy, such as loosened antitrust regulation. Then, the theory calls for a careful methodology, such as "process-tracing," which situates the new antitrust regulatory culture as a social phenomenon and elucidate its causal process in a systematic manner.[119] Regulatory mind can be said to represent a "narrative exploratory protocol" that demonstrates "why things are historically *so* and not *otherwise*."[120] Various statements and conversations collectively construct meaning and organize knowledge in a particular socio-political setting. Out of such statements and conversations, one could distill an ideational shift in the form of changing regulatory mind. As discussed below, process-tracing not only illustrates how

116 Ronald Reagan, President of the U.S., Inaugural Address at the U.S. Capitol Building, (Jan. 20, 1981).

117 *See* PEW RSCH. CTR., BEYOND DISTRUST: HOW AMERICANS VIEW THEIR GOVERNMENT 36-37 (2015), https://www.pewresearch.org/politics/2015/11/23/beyond-distrust-how-americans-view-their-government/; *see also* Catherine Rampall, Opinion, *A New Problem for Democrats: Americans Suddenly Want Smaller Government After All*, WASH. POST (Oct. 14, 2021, 6:18 PM), https://www.washingtonpost.com/opinions/2021/10/14/new-problem-democrats-americans-suddenly-want-smaller-government-after-all/.

118 Campbell, *supra* note 11, at 385.

119 David Collier, *Understanding Process Tracing*, 44 POL. SCI. & POL. 823, 824 (2011).

120 JOHN GERARD RUGGIE, CONSTRUCTING THE WORLD POLITY: ESSAYS ON INTERNATIONAL INSTITUTIONALIZATION 32 (1998).

the Chicago School doctrine shaped the new antitrust movement in the eighties, but also how it privileged big businesses, as well as how the New Brandeisian Movement has now emerged as an ideological resistance to the Chicago School.[121]

A. Process-Tracing and the Meaning of Causality

A theory of regulatory mind establishes a plausible causal hypothesis, which is a starting point of process-tracing. Then, researchers match this hypothetical "causal graph," namely the theory of regulatory mind, to an "event-history map," such as the jurisprudential shift in antitrust law.[122] In doing so, researchers identify the "productive continuity" in which individual causal nodes, such as policy, frame and paradigm, carry the causal flow.[123] If empirical data, such as court decisions or policy statements, may either substantiate or falsify the hypothesis, a valid causal inference is possible.[124] If the causal inference is ever made, we can say not only that the Chicago School doctrine caused the interpretive change in the U.S. antitrust court ("causal adequacy"), but also that it happened because of the very causal mechanism hypothesized by the causal graph ("explanatory adequacy").[125]

In securing causal adequacy, evidentiary representativeness is critical. More often than not, available empirical observables may lack the probative power necessary to drive the putative causal inference, risking over-interpretation. Scholars often liken causal adequacy to a "smoking-gun test,"[126] which may mean that there are no important aspects of the outcome that are unaccounted for by the explanation.[127] Importantly, however, in social sciences, causality must not be equated with that of natural sciences. Social sciences do not

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121 *Cf.* Neta C. Crawford, *Understanding Discourse: A Method of Ethical Argument Analysis*, 2 QUALITATIVE & MULTI-METHODS 22, 22-23 (2004).

122 David Waldner, *What Makes Process Tracing Good?: Causal Mechanisms, Causal Inference, and the Completeness Standard in Comparative Politics*, *in* PROCESS TRACING: FROM METAPHOR TO ANALYTIC TOOL 126, 150 (Andrew Bennett & Jeffrey T. Checkel eds., 2014). A "causal graph" may be described as "X → M1 → M2 → Y." *Id.* at 131. Here, X stands for an independent variable; M1 and M2 intervening variables; Y an outcome variable, respectively. *Id.*

123 *Id.* at 128-29.

124 *Id.*

125 *Id.* at 151.

126 Collier, *supra* note 119, at 827.

127 Derek Beach, *Process-Tracing Methods in the Social Sciences*, OXFORD RSCH. ENCYCLOPEDIA OF POL. (Nov. 22, 2022), https://oxfordre.com/politics/display/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-176?rskey=M4ekuc&result=1.

concern mechanical causality, but meaning-making,[128] which is a true guide to human action.[129] Thus, process-tracing focuses on backward sequential reasoning within a particular historical context, rather than strict statistical correlations of data.[130] Process-tracing aims to unearth the current meaning structure that broadly constitute, rather than directly regulate, human action.[131] By the nature of social, or human, sciences, the "gains in explanatory depth" in process-tracing by far exceed any losses in methodological rigor endemic to natural sciences, such as parsimony.[132]

Basically, human sciences are not prone to statistical treatment of ideas for the purpose of causality.[133] Identifying a series of discourse to crystalize intersubjective meanings is prone to "hard choices of the extent and limits of analysis."[134] These limitations tend to render a causal mechanism countenanced by process-tracing hardly able to predict future events. Moreover, human affairs are often "multiple and indeterminate," which causes ideas to be one of many probable causes of policy change.[135] For example, certain material factors, such as economic interests of big corporations, contributed to a deregulatory policy shift in U.S. antitrust policy in the eighties and the nineties. As discussed below, big corporations indeed played a critical role in both incubating and diffusing the Chicago School doctrine.

B. The Primordial Causal Node: An Ardent Journey into Indoctrination

It is imperative to note that economists in general were opposed to the very idea of antitrust, (i.e., regulating monopoly) at the inception of the Sherman Act. Indeed, the official position on monopoly by the American Economic Association in 1890 was surprisingly similar to that of the Chicago

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[128] Pouliot, *supra* note 17, at 367; *see also* PETER WINCH, THE IDEA OF SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY 95-96 (Routledge Classics ed., 2008); *see generally* GARY KING ET AL., DESIGNING SOCIAL INQUIRY: SCIENCE INFERENCE IN QUALITATIVE RESEARCH (1994).

[129] Winch, *supra* note 129, at 51-53; Hüseyin Özel, *Closing Open Systems: Two Examples for the 'Double Hermeneutics' in Economics*, 30 METU STUD. DEV. 223, 230 (2003).

[130] ALEXANDER L. GEORGE & ANDREW BENNET, CASE STUDIES AND THEORY DEVELOPMENT IN THE SOCIAL SCIENCES 13 (2005); Pouliot, *supra* note 17, at 367.

[131] Albert S. Yee, *The Causal Effects of Ideas on Policies*, 50 INT'L ORG. 69, 97 (1996).

[132] John Kurt Jacobsen, *Much Ado About Ideas: The Cognitive Factor in Economic Policy*, 47 WORLD POL. 283, 286 (1995).

[133] ROXANNE LYNN DOTY, IMPERIAL ENCOUNTERS: THE POLITICS OF REPRESENTATION IN NORTH-SOUTH RELATIONS 6 (1996).

[134] Crawford, *supra* note 121, at 24.

[135] Yee, *supra* note 131, at 70. Even in natural science, causal mechanisms remain indeterminate due to possible "random noise" as seen in fluctuations in electronic circuits. Mario Bunge, *How Does It Work?: The Search for Explanatory Mechanisms*, 34 PHIL. SOC. SCI. 182, 195 (2004).

School, which emerged decades later. The American Economic Association objected to the creation of the Sherman Act on the grounds that, without government intervention, the market itself would liquidate monopoly, and that intervention would only impede this liquidation process and generate unnecessary costs.[136] Likewise, it is not that pre-Chicago School antitrust policymakers never embraced economic theory; rather, it is Chicago School that relied exclusively on economic analysis in antitrust regulation.[137]

Several eminent scholars in the early twentieth century sowed the seed for an "anti-antitrust" culture-turned-ideology that characterizes the Chicago School. For example, George Stigler, under the banner of "survival principle," believed that markets knew best and profit-pursuing practices were generally optimal as their survival relied on their adaption to market conditions.[138] According to Stigler, the very existence of big corporations provided their justification, which obviated any need for the government to intervene.[139] Stigler's logic dictates that the market destroyed cartels, not the other way around: "Competition . . . is a tough weed, not a delicate flower."[140] Stigler was befriended by and worked closely with like-minded economist, Milton Friedman, from the University of Chicago, who explicitly abjured the merits of antitrust laws.[141]

In 1946, Aaron Director, Friedman's brother-in-law, pioneered the transplantation of anti-antitrust ideology in American law schools when he, an economist, joined the law faculty of University of Chicago.[142] During the second World War, Director campaigned for the publication of an English edition of Friedrich Hayek's book *The Road to Serfdom* at University of Chicago.[143] Hayek reciprocated Director's favor by persuading the Volker Fund, a libertarian nonprofit organization based in Kansas City, to fund Director's position at University of Chicago Law School.[144] In the late sixties, Stigler and Director found their acolyte in Richard Posner, a new professor at Stanford Law School, who allegedly attempted to replace "justice" with

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136 Harlan Blake, *Conglomerate Mergers and the Antitrust Laws,* 73 COLUM. L. REV. 555, 577 (1973).

137 Hovenkamp, *supra* note 57, 222-23.

138 Appelbaum, *supra* note 24, at 136-37.

139 *Id.*

140 *Id.* at 141 (quoting George J. Stigler, *Monopoly*, *in* THE FORTUNE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 1st ed. 1993)).

141 Milton Friedman, *The Business Community's Suicidal Impulse,* CATO POL'Y REP., MAR.-APR. 1999, at 6, https://www.cato.org/sites/cato.org/files/serials/files/policy-report/1999/3/cpr399.pdf .

142 Appelbaum, *supra* note 24, at 141.

143 *Id.* at 142.

144 *Id.*

"efficiency" in U.S. antitrust jurisprudence.[145] Posner joined University of Chicago Law School in 1969 and was appointed a judge in the Seventh Circuit in 1981.

In the early seventies, Henry Manne, one of Director's disciples, made an enormous contribution in disseminating anti-antitrust ideology by establishing an economics "boot camp" for law professors at University of Rochester.[146] Funded by big corporations, such as IBM and General Electric, this special economics seminar course paid $1000 to professors from elite law schools to simply attend the seminar classes.[147] Several years later, Manne added a similar two-week course for "federal judges" at University of Miami.[148] The "Manne program" focuses on the applications of economics in traditional domains like labor and antitrust.[149] Manne's economics seminar program proved to be extremely successful. By the early nineties, a whopping forty percent of all federal judges had attended the seminar.[150] Predictably, their rulings in antitrust cases demonstrated a significant pro-market shift after attending the seminar.[151] One federal judge confessed that "more and more . . . life is best explained not by religion, not by law, but by *economics*."[152]

Robert Bork, a University of Chicago graduate, later became a law professor at Yale where his students labeled his class "protrust."[153] In 1978, returning from a stint as a solicitor general under the Nixon administration, Bork wrote an influential, yet controversial book, *The Antitrust Paradox*. Here, Bork formulated an oracle of legal doctrine, which later became instrumental in manifesting the anti-antitrust ideology in the judicial realm. Bork's economistic reading of the Sherman Act led him to believe that its original purpose was to maximize "consumer welfare," instead of preventing the concentration of market and political power.[154] Bork's message was simple and clear, which attracted many judges, even liberal ones, who had suffered from

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145 *Id.* at 145-46; *see also* William H. Page, *The Chicago School and The Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221 (1989).

146 Appelbaum, *supra* note 24, at 148.

147 *Id.*

148 *Id.* at 149; *see* Fred Barbash, *Big Corporations Bankroll Seminars For U.S. Judges*, WASH. POST (Jan. 20, 1980), https://www.washingtonpost.com/archive/politics/1980/01/20/big-corporations-bankroll-seminars-for-us-judges/8385bf9f-1eb7-451a-8f3d-bdabb4648452/.

149 Elliot Ash et al., *Ideas Have Consequences: The Impact of Law and Economics on American Justice* 2, 8 (NAT'L BUREAU OF ECON. RSCH., Working Paper No. 29788, 2022).

150 Appelbaum, *supra* note 24, at 149.

151 Ash et al.*, supra* note 149, at 51.

152 Barbash, *supra* note 148 (quoting Judge Andrew Hauk) (emphasis added).

153 Appelbaum, *supra* note 24, at 149.

154 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 66 (1978).

the increasing complexity of antitrust cases.[155] Stephen Breyer said in the early eighties that an economic doctrine, such as the consumer welfare doctrine, "offers objectivity – terra firma – upon which we can base decisions."[156] The consequence – a jurisprudential shift – was rather instantaneous and dramatic! The Federal Trade Commission began to lose more antitrust cases in the court. Its winning ratio dropped from eighty-eight percent during the first half of the seventies to a mere forty-three percent during the second half of the seventies.[157]

The indoctrination into the Chicago School ideology had become so pervasive and deep-rooted that some experienced a total revelation when they were recruited to government posts and eventually confronted by the naked reality on the ground, much like a proverbial caveman out of the cave. For example, Robert Litan, under the Clinton administration, professed:

> I was shocked that there was as much cartel activity as what was going on. I thought it was almost impossible. I thought that people don't do this anymore. Most economists – and I brought this prejudice with me – we didn't think it existed. And it was massive. It was all over the place.[158]

C. The Secondary Causal Node: Reaganism and the Executive Push for the Chicago School Doctrine

Unlike the osmotic manner of indoctrination by earlier apostles of the Chicago School, the Reagan administration's intervention was direct and unfiltered. Reagan's new appointments to key positions in the DOJ and FTC brought immediate antitrust policy changes that veered toward market fundamentalism. Ronald Reagan, as a two-term president, had vigorously and consistently pursued a deregulatory agenda informed by economic thinking, which was translated into under-enforcement in the antitrust area. In 1981, William French Smith, Reagan's new Attorney General, declared, in a symbolic manner, that "bigness in business does not necessarily mean badness, and that

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155 Appelbaum, *supra* note 24, at 150.

156 *Id.* (quoting Stephen G. Breyer, J. on U.S. First Cir. Ct. of Appeals, Panelist on Judicial Precedent and the New Economics, *in* ANTITRUST POLICY IN TRANSITIONS: THE CONVERGENCE OF LAW AND ECONOMICS 5, 9 (Eleanor M. Fox & James T. Halverson eds., 1983)).

157 *Id.* at 150-51. Admittedly, the Carter administration's combative pursuit of antitrust also contributed to the decline of the FTC's winning ratio in the court. *See* MARK ALLEN EISNER, ANTITRUST AND THE TRIUMPH OF ECONOMICS 179 (1991).

158 Appelbaum, *supra* note 24, at 155 (interview with Robert Litan (Mar. 8, 2018)).

success should not automatically be suspect[.]"[159] The Justice Department issued new antitrust guidelines that incorporated Smith's pro-big corporations policies in 1982 and reinforced them even further in the 1984 revision.[160] Likewise, the antitrust division of the Department of Justice, under William Baxter's fervent deregulatory push,[161] directly executed this agenda through its 1982 revised merger guidelines, proposed legislation to Congress, and amicus briefs to the court. As a paradigm shift, the 1982 merger guidelines[162] viewed that big mergers were "presumptively good and efficient."[163] During the period between 1981 and 1985, out of 319 deals under antitrust investigation, only three percent were actually subject to antitrust enforcement;[164] during the same period, the Department of Justice brought only two civil and one criminal monopoly cases, in stark contrast with the eleven civil and three criminal monopoly cases brought from 1976 to 1980.[165]

Harold Brown eloquently describes the implementation of the Chicago School thinking under the Reagan antitrust authorities as being "coached with the precision of a professional football offense."[166] Brown observes:

> The ATD [Antitrust Division of the DOJ] and FTC public relations campaign has been pervasive and intense. Pending criminal and civil prosecutions have been dropped. Existing consent and equitable decrees have been modified. There has been a virtually clean sweep of personnel in the ATD and the FTC. While economists formerly aided the prosecutors, the latter are now forbidden to take any action before it has been expressly approved by the economists. For the long run, it is planned to achieve these revolutionary goals through the already 200 to 300 appointments of ultra-conservative judges at the district and circuit court levels, the most prominent involving those of William Posner to the Seventh Circuit and Robert Bork to the D.C. Circuit. It is, of course, idle to predict

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159 *Id.* at 151 (quoting William French Smith).

160 *Id.* at 151, 381 n.65.

161 Richard A. Posner, *Introduction to Baxter Symposium*, 51 STAN. L. REV. 1007, 1009 (1999).

162 U.S. Dep't. of Justice 1982 Merger Guidelines, 47 Fed. Reg. 28, 493 (June 30, 1982), *reprinted in* 2 Trade Reg. Rep. (CCH) ¶ 4500 (1982).

163 Fox & Sullivan, *supra* note 28, at 953.

164 Ronald W. Davis, *Antitrust Analysis of Mergers, Acquisitions, and Joint Ventures in the 1980s: A Pragmatic Guide to Evaluation of Legal Risks*, 11 DEL. J. CORP. L. 25, 36-37 (1986).

165 Fox & Sullivan, *supra* note 28, at 947 (citing; Department of Justice, Antitrust Division Workload Statistics FY 1976-1985, at 3-4 (unpublished) (on file with N.Y.U. L. Rev.)).

166 Harold Brown, *The Administration's Attack on the Antitrust Laws*, 27 BOS. BAR J. 14, 15 (1983).

> what will occur in the next two years, particularly as to Supreme Court replacements.[167]

Antitrust authorities boldly declared that "virtually all vertical restraints are pro-competitive."[168] Along this line, the Federal Trade Commission's Chief Economist, Robert J. Tollison, testified that "aggressive competition" by companies with major market shares to "maintain or enhance" their positions must not be deterred without collusion.[169] Likewise, antitrust authorities in the Reagan era believed that collusion would be "rarely found to exist under sophisticated market definitions based on supply-substitutability, cross-elasticity of demand, or other debatable standards such as the 'rate of technological change, the complexity of the product, or the detectability of price changes if certain market conditions were to change.'"[170] When the DOJ and the FTC announced this policy, it was treated as "gospel" in the antitrust community and resulted in instantaneous effects.[171]

The Reagan administration sanctified economists' opinions to the extent that prosecutors were prevented from taking any action before receiving an explicit approval from the economists.[172] The Chicago School's indoctrination of the executive branch left an indelible mark on the nation's antitrust policies. A renowned journalist poignantly describes this long-enduring anti-antitrust legacy:

> The merger wave of the Clinton years was surpassed by the merger wave of the Bush years, which was surpassed by the merger wave of the Obama years. The country was left with four major airlines, three big car rental companies, two big beer makers–the list of industries emulating the meatpacking business kept growing.[173]

D. The Causal Productivity: From the Model of the Reality to the Reality of the Model

As discussed above, an extremely deliberate and well-organized campaign by the Chicago School had successfully incubated the Chicago School's cardinal

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167 *Id.*

168 *Id.*

169 *Id.*; *see also* interview with Robert D. Tollison, Chief Economist, Fed. Trade Comm'n, 43 Antitrust & Trade Reg. Rep. (BNA) No. 1083 at 609, 612 (Sept. 30, 1982).

170 Brown, *supra* note 166, at 15.

171 *Id.*

172 *Id.*

173 Appelbaum, *supra* note 24, at 156.

ideology. In astute partnership with big corporations, this campaign targeted both academics and policymakers, lasting an extensive period spanning from the sixties to the eighties. The advent of the Reagan administration accelerated this process through its strong executive interventions in implementing the Chicago School's mantras. By the nineties, market fundamentalism, once simply a model, had evolved into its own reality.[174] The Chicago School's "law and economics" ideology trumped the former consensus that economics might play only a "supporting" role and boldly declared that "antitrust law should *be* economics."[175]

The Chicago School's economistic ideology led its proponents to prioritize an "outcome" over "process-competition."[176] What constitutes the Chicago School's antitrust reality lies in "aggregate outcomes" in terms of consumer welfare, rather than the "expectations and behavior of the people who participate in the markets."[177] Therefore, the cognitive radar of the Chicago School could not capture the traditional mission of antitrust law of "provid[ing] an environment that nurtures a system of checks, balances, and incentives, causing firms to compete to provide new, better, and lower cost means of satisfying consumers."[178] Its paradigmatic obsession with immediate measure and control turned antitrust law into a purely regulatory machine, rather than a constitutive process. The Chicago School can be said to misunderstand the goal of antitrust law, which is not to promote successful businesses and weed out bad ones, but to facilitate the flow of competition itself.[179]

Likewise, the Chicago School was largely dismissive of social concerns rooted deeply in the Sherman Act, such as the prevention of economic inequality among businesses, mainly because those concerns were unquantifiable.[180] The Chicago School constructed its own reality based on a mathematical model, which was characteristically "clear and crisp," as it gutted unmeasurable, but real, aspects of the antitrust reality.[181] This highly effective methodological and rhetorical appeal captured judicial minds.[182] Judges

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174 *See* Bourdieu, *supra* note 13, at 29 (regarding the distinction between the model of the reality and the reality of the model).
175 Fox & Sullivan, *supra* note 28, at 956-57 (emphasis in original).
176 *Id.* at 959.
177 *Id.*
178 Fox, *supra* note 31, at 1141.
179 *Id.* at 1180.
180 Brown, *supra* note 166, at 17.
181 *Id.*
182 *See infra* Part III.E.

appeared to be convinced of "a simple economic model to answer all antitrust questions by deductive reasoning."[183]

E. The Causal Destination: Making Chicago School Courts

While the executive branch's implementation of the Chicago School ideology was immediate, the jurisprudential shift in the same direction emerged in a more nuanced fashion. First and foremost, the seeds of change had been sown in the Court even before Reagan took office. The economics training program for federal judges designed by Henry Manne succeeded in equipping the judges with "economics language," which eventually led to "conservative verdicts in economics-relevant cases."[184] Thus, Manne judges were more inclined to rule against government regulatory agencies.[185] Moreover, through promotion in the legal profession outside of the Manne program and the exposure of law clerks to such ideas, the Manne program likely even influenced the judicial thinking of peers who had never attended the program[186] Manne-influenced judges were not shy from citing in their decisions academic literature on "radically conservative economic theories" by Chicago School scholars, such as George Stigler, Robert Bork, and Richard Posner.[187] This shift in judicial thinking to an efficiency-based model was tantamount to a "Great Transformation of American Law."[188]

One federal judge's testimony echoes such transformation. District Court Judge Carter stated:

> I regard myself as a social progressive and all the economists in attendance, from my perspective, had Neanderthal views on race and social policy. The basic lesson I learned . . . is that social good comes at a price, a social and economic cost. I had never thought that through before being exposed to Henry's teachings . . . [It] has led me to measure the cost of the social good being furthered against the gain to be achieved.[189]

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183 Fox & Sullivan, *supra* note 28, at 945; *Interview with William F. Baxter*, 50 ANTITRUST L. J. 151, 152-153 (1981).

184 Ash et al., *supra* note 149, at 3.

185 *Id.* at 27.

186 *Id.* at 23.

187 Brown, *supra* note 166, at 15.

188 Elliot Ash et al., *Ideas Have Consequences: The Impact of Law and Economics on American Justice* 8 (Mar. 20, 2019) (preliminary working paper) (on file with the Nat'l Bureau of Econ. Rsch.).

189 Ash et al., *supra* note 149, at 64 (alteration in original).

The U.S. court's use of economic science in its legal interpretation is evidence of the judiciary's effective indoctrination into the Chicago School's "law and economics" ideology. Those judges who subscribe to economic thinking tend to "pay very little attention to legal rules, statutes, constitutional provisions" and instead focus on an economically "sensible" resolution of the dispute.[190] They also tend to circumvent "a recent Supreme Court precedent or some other legal obstacle stood in the way of ruling in favor of that sensible resolution." [191] This indoctrination was so effective that judges often substituted economics for the role of law in antitrust rulings. "It allows economics to provide the *competition law norms themselves* – that is, it allows economics to determine whether conduct violates the law."[192] At the same time, economic analyses presented by economists are evaluated, as evidence, according to ordinary judicial procedures.[193] For example, in broadening the scope of legality of vertical pricing agreements, the Fourth Circuit relied explicitly on an emergent consensus in economic theory that such agreements, while sometimes anticompetitive, could still lead to procompetitive effects.[194]

Interestingly, however, the antitrust jurisprudential change into efficiency itself was rather incremental than radical. In the eighties, while the post-*Sylvania* precedent gravitated toward the efficiency (consumer welfare) criteria, the court refrained from explicitly overruling the pre-Sylvania precedent focusing on the traditional fairness criteria.[195] For example, in *Arizona v. Maricopa County Medical Society*,[196] the Supreme Court confirmed that in antitrust cases, efficiency concerns must be balanced with other considerations such as "competition, economic decentralization, the survival of smaller businesses, and the innovation of entrepreneurs."[197]

Instead, the court "reinterpret[ed] the existing body of precedent in terms of the Chicago models" as it "identif[ied] practical indicia of monopolistic or

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[190] *See, e.g.*, Richard Posner, *An Exit Interview With Richard Posner, Judicial Provocateur*, N.Y. TIMES (Sep. 11, 2017), https://www.nytimes.com/2017/09/11/us/politics/judge-richard-posner-retirement.html.

[191] *Id.*

[192] Gerber, *supra* note 85, at 44 (emphasis added).

[193] *Id.*

[194] Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282, 287 (4th Cir. 2009).

[195] Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 2 (1977) (opining that the *Sylvania* decision effectively overruled *United States v. Arnold, Schwinn & Co.*, as the former salvaged, with efficiency justification, those business practices that would have been treated as per se monopolistic by the traditional standard).

[196] 457 U.S. 332 (1982).

[197] Litvack, *supra* note 79, at 656-57.

competitive effects."[198] In doing so, the court had begun to devise "a new version of the business judgment rule," for the purpose of antitrust law, under which "the manufacturer's ability to do what it wants receives more weight than consumer welfare or the need for prices to be set in a fully competitive market."[199] As a result, the court bestowed upon manufacturers an enormous level of "deference" in their business judgment in both vertical[200] and horizontal price-fixing cases.[201] In the same vein, the court imposed on plaintiffs a tough burden of proof requirement: "[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[202] All in all, this new hermeneutical style effectively replaced the "per se invalid" rule with the "rule of reason" in price-fixing.[203]

No other areas of antitrust regulation have demonstrated the Chicago School's dogmatic influences on the judiciary more prominently than vertical price restraints (VPRs). In illustrating judicial behavioral change driven by the indoctrination of Chicago School tenets, this Article scrutinizes, in a chronological manner, antitrust decisions by the Supreme Court and two Federal Courts of Appeal (the Seventh and Ninth Circuit) regarding VPRs. This Article mainly traces the shift from the per se rule to the rule of reason in VPR cases, a shift in the judicial frame from "fairness" (represented by the predominant use of the per se rule) to "efficiency" (represented by the predominant use of the rule of reason), accompanied by the court's reliance on quantitative data such as market share, price changes and market impacts.

198 Page, *supra* note 145, at 1227.

199 Susman, *supra* note 87, 338-39.

200 *See, e.g.*, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752 (1984) (vertical price-fixing).

201 *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986) (horizontal price-fixing).

202 *Matsushita*, 475 U.S. at 587.

203 *See* Susman, *supra* note 87, at 340.

1. Supreme Court

Table 2: VPR Rulings by the Supreme Court: 1950 – Present

	1950 – 1976	1977* – Present
Total VPR Cases	12	22
Per Se	11	6
Rule of Reason	0	14
Unclear	1	2
No Antitrust Violation	1	10

* The year when the *GTE-Sylvania* decision that introduced the rule of reason was released.

During the pre-*GTE Sylvania* period, the per se approach demonstrated an extremely robust correlation with an antitrust violation finding; all eleven cases using the per se method found an antitrust violation. The Supreme Court's decisions from this time found that even those business practices that would promote business efficiency would not be exempted from the per se analysis.[204] The Supreme Court viewed "an aggregation of trade restraints" as "unlawful under § 1 of the Sherman Act without the necessity for an inquiry in each particular case as to their business or economic justification, their impact in the marketplace, or their reasonableness."[205]

The *GTE-Sylvania* ruling, rather abruptly, reversed the aforementioned stable line of per se jurisprudence in VPR cases. It justified its departure from the per se approach, represented by the *Schwinn* precedent, by relying heavily on Chicago School literature. It ruled:

> Since its announcement, Schwinn has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion has been critical of the decision, and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach. In our view,

204 United States v. Arnold, Schwinn & Co., 388 U.S. 365, 375 (1967) ("The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct. It is only if the conduct is not unlawful in its impact in the marketplace or if the self-interest coincides with the statutory concern with the preservation and promotion of competition that protection is achieved.") (citation omitted).

205 United States v. Sealy, Inc., 388 U.S. 350, 357-58 (1967).

> the experience of the past 10 years should be brought to bear on this subject of considerable commercial importance.[206]
>
> . . . .
>
> Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These 'redeeming virtues' are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.[207]
>
> . . . .
>
> Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products.[208]

The court in *National Society of Professional Engineers v. United States* (1978), which post-dated the *GTE-Sylvania* ruling, justified its use of the rule of reason by emphasizing the open-ended nature of the legal text under the Sherman Act and the consequent need for a common law interpretive doctrine such as the rule of reason. The court reasoned:

> Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose.[209]

Interestingly, the subsequent court in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* refused to adopt the per se approach on the ground that it was not familiar with the underlying business practices in question. The court opined:

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206 *GTE-Sylvania*, 433 U.S. at 47-49; Daniel A. Crane, *Antitrust Principles Affecting Franchise Law*, *in* FRANCHISING CASES, MATERIALS, & PROBLEMS 185, 228 (Aleander M. Meiklejohn ed. 2013) ("Even the leading critic of vertical restrictions concedes that Schwinn's distinction between sale and nonsale transactions is essentially unrelated to any relevant economic impact").

207 433 U.S. at 54-55.

208 *Id.* at 56.

209 435 U.S 679, 688 (1978).

> It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act. . . . And though there has been rather intensive antitrust scrutiny of ASCAP and BMI and their blanket licenses, that experience hardly counsels that this Court should outlaw the blanket license as a *per se* restraint of trade.[210]

These three pioneering decisions that introduced the rule of reason in the late seventies led to the Supreme Court's continuation of the same methodology in lieu of the per se approach in the eighties and onwards. For example, the Court in *State Oil Co. v. Khan*[211] overruled *Albrecht v. Herald Co.*,[212] which was the controlling precedent on the per se approach to VPRs. Markedly, the Court in *Khan*, referring to various scholars and prior case law, opined that the *Albrecht* rationale was no longer valid in regulating VPRs.[213] Throughout the twenty first century, the Court's reference to economic articles to support the pro-competition theory of VPRs had become a salient pattern.[214] According to a new theory subscribed to by the Court, a per se application to all VPRs would actually enable monopolist dealers to exercise their market power in an unrestricted manner.[215] Likewise, the Court in *Leegin* cited scholarly sources to support the theory that VPRs imposed by retailers may suggest a Sherman Act violation, while those that "manufacturers" impose are less likely to suggest a violation.[216]

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210 441 U.S. 1, 2 (1979) (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 607-08 (1972)).

211 522 U.S. 3 (1997).

212 390 U.S. 145 (1968).

213 *Khan*, 522 U.S. at 15, 22; Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1553 (1989); Frank H. Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 887-90 (1981).

214 Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 890 (2007) (citing THOMAS R. OVERSTREET, JR., FED. TRADE COMM'N, RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE (1983)); THOMAS R. OVERSTREET, JR., RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 170 (1983); Pauline M. Ippolito, *Resale Price Maintenance: Empirical Evidence from Litigation*, 34 J. L.& ECON. 263, 292-93 (1991).

215 *Khan*, 552 U.S. at 4 ("[T]his Court finds it difficult to maintain that vertically imposed maximum prices could harm consumers or competition to the extent necessary to justify their *per se* invalidation . . . other courts and antitrust scholars have noted that the *per se* rule could in fact exacerbate problems related to the unrestrained exercise of market power by monopolist-dealers.").

216 *Leegin*, 551 U.S. at 897-98; PHILIP E. AREEDA ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES 566 (8th ed. 2021) ("If there is evidence retailers were the impetus for a

During the post-*GTE Sylvania* period, the rule of reason approach exhibited a fairly strong correlation with a finding of no antitrust violation; out of a total of fourteen cases using the rule of reason method, ten found no antitrust violation (sixty four percent). One hermeneutical advantage of the rule of reason lies in its ostensibly convincing style. While the per se approach seldom provided analytical scrutiny at a concrete level, the rule of reason methodology was rife with detailed descriptions backed by both theoretical and empirical sources. For example, the rule of reason dictates that any anticompetitive effects of VPRs "are far from intuitively obvious" and therefore "demand[] a more thorough enquiry into the consequences of those restraints."[217] Thus, one might reasonably speculate that judges gravitated toward this apparently persuasive style of ruling.

Tellingly, one might discover indelible marks of Chicago School ideology in the probative use of quantitative data by each side of the litigation, and its contribution to the outcome of the case in the Supreme Court. The most prominent pieces of data included an accurate description of the relevant market as well as how the disputed restrictions impact that market in its entirety. Most of the rule of reason cases reviewed in this Article ultimately found no antitrust violation on the ground that the plaintiffs failed to either identify the relevant market[218] or failed to demonstrate some type of competitive harm within that market.[219]

While concrete evidence of price increases, along with market power, appears to be one of the most critical factors in VPR cases, the use of such data in the court tended to generate controversies. For example, in *Rice v. Norman*, while the plaintiffs argued that VPRs hurt their businesses and therefore would cause prices in the overall market to increase,[220] the respondents claimed that

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vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer). *See* Brief for William S. Comanor & Frederic M. Scherer as Amici Curiae Supporting Neither Party at 7–8, Leegin Creative Leather Prods. v. PSKS, Inc., 551 U.S. 877 (2007) (No. 06480), 2007 WL 173679, at *7-8.

217 Cal. Dental Ass'n v. F.T.C., 526 U.S. 756, 759 (1999).

218 *See, e.g.*, N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 298 (1985).

219 Brief for Respondents at 36, Ohio v. Am. Express Co., 138 S. Ct. 2274, 2278 (2018) (No. 16-1454) (suggesting that American Express' market share of 26.4 percent was too low to constitute market share as "Amex's competitors are in virtually every wallet and at every register").

220 Brief for Consumers Union of United States, Inc. as Amici Curiae Supporting Respondents at *7-8, Rice v. Norman Williams Co., 458 U.S. 654 (1982) (Nos. 80-1012, 80-1020, 80-1052), 1982 WL 608590, at *7-8 ("The designation statute would prohibit Respondents from importing distilled spirits, thus eliminating the only meaningful form of competition

the restriction at issue would not cause any direct price increase in the liquor retailer market.[221] Likewise, in *American Express*, the respondents demonstrated that there was no noticeable difference in fee pricing between merchants subject to alleged restrictive practices by contracting with American Express and those who did not.[222] The court often dismissed the plaintiffs by treating their business losses due to VPRs as individual, and therefore anecdotal and fortuitous, rather than structural from the standpoint of the correct market. For example, the court in *NYNEX* ruled:

> [C]omplaint does not adequately allege harm to competition, as opposed to harm to Discon itself . . .. Discon has claimed that it was injured by the alleged NYNEX-AT & T agreement to exclude it from being a supplier to NYNEX . . . this alleged harm to an individual competitor does not constitute harm to competition, *i.e.,* a marketwide limitation on the ability of existing and potential suppliers of removal services to offer lower prices or better service to meet consumer demand in competition with AT&T and other providers of removal services.[223]

Naturally, the plaintiffs, not the defendants, were left to shoulder the daunting burden of proving the existence of an "injury to competition itself."[224] On the other hand, defendants easily substantiated the lack of such structural

at the wholesale level. Eliminating wholesale competition will certainly cause retail prices to rise, but will have no effect on the amount of alcohol consumed").

221 Brief for Petitioner at 26-27, Rice v. Norman Williams Co., 458 U.S. 654 (1982) (Nos. 80-1012), 1982 WL 608585, at *26-27 ("[A]fter the time the California importer designation statute, section (sic)26372(sic), was scheduled to go into effect, the prices wholesalers would have to pay brand owners in each state for similar merchandise would be the same . . . the price to wholesalers necessarily would be the same (no higher than the lowest price at which the distiller sells in any other state), and the statute, on its face, would not affect price in any way.").

222 Brief for Respondents Am. Express Co. & Am. Express Travel Related Servs. Co. at 28, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454), 2018 WL 481636, at *28 ("Plaintiffs' expert witness acknowledged that, in the three years after Visa and MasterCard agreed not to enforce their nondiscrimination provisions, there was no evidence that merchant fees decreased for merchants that did not accept Amex cards . . . . Furthermore, the same expert stated that he could not confidently predict whether, in the absence of nondiscrimination provisions, merchant fees would increase or decrease.").

223 Brief for Petitioners at 37, Nynex Corp. v. Discon, Inc., 525 U.S. 128 (1998) (No. 96-1570), 1998 WL 283056, at *37.

224 Brief for Petitioner at 14, N.W. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (No. 83-1368), 1984 WL 565670, at *14.

antitrust injuries by pointing to a selected set of market data, such as industry-wide transaction volume.[225]

2. Courts of Appeals

Ever since the *GTE Sylvania* decision, the Courts of Appeals have acknowledged that the rule of reason is the Supreme Court's established standard for judging VPRs, while at the same time leaving narrow occasions for the per se rule where there is "manifestly anti-competitive" conduct.[226] This controlling effect of the Supreme Court's precedent regarding the rule of reason has forced some appellate courts that were sympathetic to the per se rule to remand their cases to district court in light of the Supreme Court's firm position on the rule of law.[227] The rule of reason has effectively prevented the appellate courts from invoking the per se rule even when vertical price restraints may raise a possibility of anticompetitive effects.[228]

This radical jurisprudential shift from the per se approach to the rule of reason betrayed a trace of deregulatory ideology disseminated by the Chicago School. Once the court dismantled VPRs, the original antitrust suspect, under the traditional per se approach, VPRs could be seen as nothing but normal private contracts whose terms must be preserved in a free market. The court subscribed to the Chicago School doctrines, one of which professed that confusing competition with exclusion leads to "false positives" in finding antitrust violations.[229] In this vein, the Seventh Circuit in *Quality Auto Body v. Allstate Ins. Co.* ruled:

> The vertical agreements, to the extent they exist here, are between buyers (the insurance companies) with apparently extensive market power and sellers (the body shops) with what, in comparison, seems slight market power. Since we find no reason on the face of things to regard dealings between such buyers and sellers as violations of the antitrust laws, we think the district court properly subjected these so-

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225 Brief for Respondents Am. Express Co. & Am. Express Travel Related Servs. Co. at 42, Ohio v. Am. Express Co., 138 S. Ct. 2274 (2018) (No. 16-1454), 2018 WL 481636, at *42.

226 Ctr. Video Indus. Co. v. United Media, Inc., 995 F.2d 735, 737 (7th Cir. 1993).

227 *See, e.g.*, Discon, Inc. v. NYNEX Corp., 184 F.3d 111, 114 (2d Cir. 1999).

228 *See, e.g.*, Conn. Fine Wine & Spirits, LLC v. Seagull, 932 F.3d 22, 32-33 (2d Cir. 2019).

229 Viamedia, Inc. v. Comcast Corp., 951 F.3d 429, 502 (7th Cir. 2020) (Brennan, J., concurring in part) (citing Frank H. Easterbrook, *The Chicago School & Exclusionary Conduct*, 31 HARV. J. L. & PUB. POL'Y 439, 445 (2008)).

> called vertical agreements to analysis under the rule of reason.[230]

The use of quantitative data in weighing the evidence and applying the rule of reason was salient across the circuits. In approving or disapproving a particular VPR in question, the court of appeals in major circuits considered various types of quantitative data, including competitors' imposition of a markup amount in new contracts after driving out a deal from the market,[231] the post-VPR increase of new entrants,[232] and the post-VPR increase in market share.[233]This quantitative approach, which seems to be a natural consequence of the shift to the rule of reason, incentivized plaintiffs to include market data in their briefs. The court often dismissed their claims on the ground that "allegations that an agreement has the effect of reducing consumers' choices or increasing prices to consumers does not sufficiently allege an injury to competition."[234]

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230 660 F.2d 1195, 1203 (7th Cir. 1981).

231 Discon, Inc. v. NYNEX Corp., 93 F.3d 1055 (2d Cir. 1996), vacated, 525 U.S. 128 (1998).

232 Brief for Defendant-Appellee United States Soccer Federation, Inc. at 42, N. Am. Soccer League, LLC v. United States Soccer Fed., 888 F.3d 32 (2018), 2017 WL 6336722, at *42 ("That conclusion is unassailable given the juxtaposition between the rampant team failures that soccer experienced here before the Standards were adopted and the unprecedented growth that soccer in the U.S. has seen since").

233 Quality Auto Body, Inc. v. Allstate Ins. Co*.,* 660 F.2d 1195, 1203 (7th Cir. 1981) ("The vertical agreements, to the extent they exist here, are between buyers (the insurance companies) with apparently extensive market power and sellers (the body shops) with what, in comparison, seems slight market power."); A.H. Cox & Co. v. Star Mach. Co., 653 F.2d 1302, 1308 (9th Cir. 1981) ("Cox made no credible showing that it was likely or even possible that, after Star gave up a product accounting for 50 percent of the market in exchange for one accounting for only 25 percent, Star's market share was significantly increased. For these reasons, we agree with the lower court that Cox failed to demonstrate any anticompetitive intent or effect arising from Star's actions."); JBL Enters., Inc. v. Jhirmack Enters., Inc., 698 F.2d 1011, 1017 (9th Cir. 1983) ("The trial court found that Jhirmack's market share was 2.3%–4.2% of beauty products sold to PST outlets (or 1%–2% of shampoos and conditioners sold by all retail outlets). These shares are too small for any restraint on intrabrand competition to have a substantially adverse effect on interbrand competition . . . JBL's contentions that Jhirmack possessed sufficient market power to significantly affect interbrand competition despite its insignificant market share are unsupported and were properly rejected at trial.").

234 Brantley v. NBC Universal, Inc., 675 F.3d 1192, 1201-02 (9th Cir. 2012); Cascade Cabinet Co. v. W. Cabinet & Millwork Inc., 710 F.2d 1366, 1373 ("Cascade's attempt to establish a rule of reason violation fails for the same reason as its attempt to establish a per se violation: there is no evidence of injury to competition. Although Cascade complains of its business losses, economic injury to a competitor does not equal injury to competition. . . . We have stressed that '[i]t is injury to the market, not to individual firms, that is significant.' . . . We hold that Cascade has failed to produce sufficient evidence to prevent summary judgment

To evince the jurisprudential shift from the per se rule to the rule of reason, this Article identified all VPR opinions from the Second, Seventh, and Ninth Circuits ranging from 1980 through the present day. A careful survey of a total of nineteen decisions in the sample warrants a general proposition that the jurisprudential shift to the rule of reason would contribute substantially to findings of no Sherman Act violation. Tellingly, while sixty percent of VPR rulings under the per se approach were found to violate the Sherman Act, only one case out of nineteen (five percent) was held to be an antitrust violation under the rule of reason.[235]

Indeed, the court's own formula in determining antitrust violations in VPRs is characteristic of a mathematical equation. The Second Circuit in *North American Soccer League, LLC v. U.S. Soccer Federation, Inc.* held that:

> First, a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior can have an adverse effect on competition in the relevant market. Second, if the plaintiff satisfies this initial burden, the burden shifts to the defendant, who must demonstrate the procompetitive effects of the challenged restraint. Third, if the defendant provides that proof, the burden shifts back to the plaintiff to show that these 'legitimate competitive benefits . . . could have been achieved through less restrictive means.' Ultimately, '[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.[236]

Ironically, however, a closer look at the way the court utilized the market data at a granular level tends to question the typical expectation from a quantitative approach. In a conventional sense, using numbers in weighing the evidence would raise consistency and predictability of court decisions in similarly situated cases (VPR), if not creating a strict formula. Yet the court's

against it on its section 1 claim") (alternation in original); Lucas v. Citizens Cmty. Co., 244 F. App'x. 774, 777 (9th Cir. 2007) ("If we were to construe the maximum prices established under the Energy Wise program as a vertical restraint, Lucas fails to establish under the rule-of-reason analysis that the restraint is unlawful . . . Lucas has not adduced evidence demonstrating that KE intended to harm or restrain competition, that an actual injury to competition occurred, or that the restraint is unreasonable.").

235 *See supra* table 1, at 25.

236 883 F.3d 32, 42 (2d Cir. 2018) (citing United States v. Am. Express Co., 838 F.3d 179, 194 (2d Cir. 2016)) (citations omitted).

actual *interpretation* of data varied to the point of defying coherence among VPR decisions that relied on the market data.

For example, in the presence of a valid agency contract between the defendant manufacturers and their distributor, the court refused to engage in an analysis of market power and its impact on competition, ultimately finding no antitrust violation.[237] Indeed, the *Quality* court, although acknowledging that the defendant insurance companies (State Farm and Allstate) did possess significant market power,[238] still dismissed the antitrust claim. The court viewed that such market power, in tandem with the competitive pricing, would in fact benefit consumers without proof of the abuse of their dominant market power. Likewise, in *In re Musical Instruments,* the court dismissed an antitrust claim, even though the plaintiff did demonstrate the increase of guitar prices ($63 within only two years) after a VPR deal, holding that the plaintiff relied on an overbroad market in pointing to the price surge.[239]

Moreover, when the court ostensibly adopted the per se approach, its actual scrutiny appeared to follow the rule of reason methodology. For example, in *Hampton Audio Electronics, Inc. v. Contel Cellular, Inc.*,[240] the Fourth Circuit initially declared that "price fixing, whether vertical or horizontal, is illegal *per se*" and indeed found sufficient evidence of price fixing.[241] Nonetheless, the court refused to find an antitrust violation on the ground that the plaintiff did not present "sufficient evidence of an injury or sufficient proof of damages, both of which are necessary elements in a Sherman Act claim."[242]

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237 Valuepest.com of Charlotte, Inc. v. Bayer Corp., 561 F.3d 282, 287-88 (4th Cir. 2009).

238 Quality Auto Body, Inc. v. Allstate Ins. Co., 660 F.2d 1195, 1204 (7th Cir. 1981). In *Quality Auto Body*, the Court considered data that State Farm was the largest insurance provider, collecting nearly $2 billion in premiums and sustaining $1.2 billion in losses from insurance claims. Allstate was the second largest insurance provider, collecting $1.3 billion in premiums and paying around $800 million; *see also* Brillhart v. Mutual Med. Ins. Co., 768 F.2d 196, 199 (7th Cir. 1985) ("Since the agreement in the present case runs between an insurance company (the buyer) and individual doctors (the sellers), the arrangement is really vertical, rather than horizontal. Thus, we will proceed to examine whether this vertical agreement constitutes an unreasonable restraint of trade under the rule of reason.").

239 *In re* Musical Instruments and Equip. Antitrust Litig., 798 F.3d 1186, 1197 (9th Cir. 2015) ("First, plaintiffs do not allege that the average retail price of guitars and amplifiers manufactured *by defendants* rose during the class period. They allege an increase in the average retail price of *all* guitars and guitar amplifiers sold, including products outside the relevant product market, like low-cost imports. . . . Plaintiffs do not allege any facts connecting the purported price increase to an illegal agreement among competitors. And without such a connection, there is simply no basis from which we can infer an agreement.").

240 Hampton Audio Elecs., Inc. v. Contel Cellular, Inc., No. 91-2186, 1992 WL 131169, at *4 (4th Cir. 1992).

241 *Id.* at *4.

242 *Id.*

All in all, the court clearly relied on demonstrative data in weighing the evidence after its shift to the rule of reason. The Supreme Court ruled against the application of a per se rule "without some minimum scrutiny of the purpose, competitive effect and economic reality of the conduct."[243] The court's demand of the overall accuracy of the presented data tended to strain the plaintiffs who had suffered from VPRs. For example, even if a plaintiff could demonstrate market power, his or her claim will eventually fail if alleged price increases are not specifically shown, or do not correspond with the appropriately defined market. Also, even a plaintiff negatively affected by a VPR may not hold a meritorious antitrust claim without direct evidence of the abstract harm to competition itself. The court's pro-VPR use of quantitative data established a de facto "assumption" in favor of a VPR in applying the rule of reason. Naturally, proving the existence of an antitrust injury was a tall order for the plaintiffs. This bias explains a very robust correlation between the court's employment of the rule of reason and the consequent dismissal of claims for antitrust violations.

IV. FACTORS SHAPING REGULATORY MIND

As discussed previously, changing antitrust regulatory mind has not been through a sudden epiphany, but through a gradual process.[244] Exploring the trajectory of American antitrust evolution inevitably reveals several salient factors that have influenced this process. If the life cycle theory of antitrust mind elucidates a panoramic view of American antitrust law, those influencing factors tend to offer useful snapshots that characterize its critical properties. Eventually, those snapshots, fit together in a coherent structure, corroborate the life cycle theory.

A. Cognitive Factors: Habitus

Reflexive sociology enables Campbell's categorization to espouse a useful hypothesis in the evolution of the deregulatory U.S. antitrust philosophy and its indelible impact on judicial decisions. The Chicago School was comprised of personal relations of like-minded people who shared the same skills, habits,

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243 Brief of Petitioner at 15, N.W. Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (No. 83-1368), 1984 WL 565670, at *15.

244 *See generally* HOWARD GARDNER, CHANGING MINDS: THE ART AND SCIENCE OF CHANGING OUR OWN AND OTHER PEOPLE'S MINDS (2004).

and dispositions, which can be dubbed the "habitus," *a la* Pierre Bourdieu.[245] The habitus of the Chicago School includes their common philosophy (Hayekism), common skill sets (quantitative methodologies), and common avenues of publication (peer-reviewed journals). An ideational transition from a cognitive level of knowledge (a program as *episteme*) to a normative level of knowledge (a frame as *phronesis*) may require certain energy or power to harness such a qualitative change. Here, one could reasonably speculate that a tight circle, if not cult, of the Chicago School based on personal relations and its own mantras (*doxa*), was remarkably effective in both incubating market fundamentalism (Hayekism) and indoctrinating judges.

"Symbolic capitals," in the form of scholarly recognition and reputation in the field of antitrust studies, serve as a critical catalyst to convert what would have remained simply a peculiar academic theory (program) to a well-established and widely accepted set of assumptions (paradigm). Adherents to the Chicago School often boasted a "simple economic model to answer all antitrust questions by deductive reasoning," as they trivialized the "dominant antitrust thinking, which [they] pictured as wrongheaded, fuzzy, unworkable, protectionist, and perverse."[246] At the same time, however, some scholars criticized the Chicago School of thought as "theoretical speculation by economists and lawyers from a handful of expensive private universities" which unduly replaced judicious legal reasons that should have justified such radical changes in antirust decisions.[247]

B. Material Factors: Interest and Power

John Campbell insightfully observes that "some types of ideas are endogenous to the policy process in the sense that they are influenced by policy struggles in which interests, resources, and power loom large."[248] His observation dovetails with the systematic incubation of the Chicago School doctrines by big corporations. As discussed above, indoctrination of the Chicago School doctrines was not purely ideational. It was the corporate world that funded material incentives for such indoctrination, including flying, dining and eventually wining numerous federal judges for an extensive period.[249]

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[245] BOURDIEU, *supra* note 13, at 17.

[246] Fox & Sullivan, *supra* note 28, at 945; *see also* Harvey M. Applebaum et al., *Panel Discussion: Interview with William F. Baxter Assistant Attorney General, Antitrust Division*, 50 ANTITRUST L. J. 151 (1981).

[247] Susman, *supra* note 87, at 345.

[248] Campbell, *supra* note 11, at 378-79.

[249] *See supra* Part III.B.

Big corporations' support for the Chicago School was more institutional than anecdotal, as seen in the Hayek Project, the Volker Fund, and regular donations to the University of Chicago Law School faculty. Also, it is through this tremendous financial support from the corporate world that the Chicago School managed to propagate their ideas through an "interactive" process of discourse, including journal articles, lectures, seminars and conferences.[250] From a critical perspective, this "colonialization" of the lifeworld may appear to be pathological.[251] The capitalist pure market logic, symbolized by the Chicago School doctrine and championed by big corporations, tends to control the public life (lifeworld) by distorting communicative actions among ourselves.[252]

Economic interests of big corporations are inextricably linked to power politics. As discussed above, Reaganism is classic example of such nexus. Along this line, this Article probes the correlation between Justices' political affiliation and their doctrinal preferences. Here, Justices' political affiliation does not necessarily represent their own personal political predisposition, i.e., Republican versus Democrat. Rather, it merely indicates the political party of the President who appointed those Justices. In this survey, each count represents an occasion in which each Justice voted, as a part of the majority, for every VPR case within the specified timeframe. In this survey, a general trend emerges in which older VPR cases before 1980 exhibit a much fairer balance between Republican and Democrat-appointed Justices. In newer VPR cases after 1980, the scale leaned further conservative. During this period, Republican-appointed Justices predictably constituted the majority of those Justices who invoked the rule of reason methodology, and consequently dismissed antitrust claims.

Table 3: Total Counts (Majority Votes)

	Republican-Appointed	Democrat-Appointed
1950 – 1979	43	48
1980 – Present	92	23

250 *See* Vivien A. Schmidt, *Reconciling Ideas and Institutions through Discursive Institutionalism*, *in* IDEAS AND POLITICS. IN SOCIAL SCIENCE RESEARCH 76, 82-83 (Daniel Béland & Robert H. Cox eds., 2010).

251 *See* Timo Jütten, *The Colonialization Thesis: Habermas on Reification*, 19 INT'L J. PHIL. STUD. 701 (2011).

252 *See* THE CAMBRIDGE HABERMAS LEXICON 36 (Amy Allen & Eduardo Mendieta eds., 2019).

Table 4: Per Se Approach (Majority Votes)

	Republican-Appointed	Democrat-Appointed
1950 – 1979	26	40
1980 – Present	17	6

Table 5: Rule of Reason Methodology (Majority Votes)

	Republican-Appointed	Democrat-Appointed
1950 – 1979	14	4
1980 – Present	52	14

Table 6: Antitrust Violation (Majority Votes)

	Republican-Appointed	Democrat-Appointed
1950 – 1979	29	42
1980 – Present	25	9

Table 7: No Antitrust Violation (Majority Votes)

	Republican-Appointed	Democrat-Appointed
1950 – 1979	12	6
1980 – Present	49	11

C. Blocking Factors: A Shadow Paradigm

The abrupt shift in operational ideology from fairness to efficiency was not without tensions. Since the seventies, there have been several reform attempts to discipline powerful monopolies within specific industries whose antitrust concerns were strikingly similar to current ones. For example, Senator Phillip Hart (D-MI) proposed a bill titled the "Industrial Reorganization Act of 1973."[253] Senator Hart's supporting statements echoed today's concerns surrounding Big Tech enterprise, particularly "the current feeling that opportunities no longer exist for the individual and that the economic life of the nation will always be dominated by a few."[254] The Act sought to implement a rebuttable presumption that corporations possess monopoly power if: "(1) a corporation earned an average, after-tax rate of return in excess of 15 percent, (2) there has been no substantial price competition among two or more

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253 Industrial Reorganization Act, S. 1167, 93rd Cong. (1973).

254 Philip A. Hart, *Restructuring the Oligopoly Sector: The Case for a New 'Industrial Reorganization Act'*, 5 ANTITRUST L. & ECON. REV. 35, 37 (1972).

corporations, or (3) any four or fewer corporations account for 50 percent of sales in a line of commerce."[255]

Interestingly, the arguments against the Act also bear prominent similarities to those arguments against the current antitrust reform. In his testimony in the Senate Judiciary Committee, opposing the Act, Henry Manne emphasized that "General Motors' fraction of free world vehicle production is approximately twenty-two percent; a figure that even the most ardent GM-baiters would not claim is sufficient to dominate an industry."[256] Another criticism against the Act centered on a familiar theme—the fear of "Big Brother:" "No one can seriously believe that a Federal agency that has once tasted the addictive power of dissolving or restructuring the largest industries in America would quietly abdicate its political power when that job was done."[257]

The backlash against the efficiency revolution occasionally pitted the FTC against the DOJ on the debate of under-enforcement versus over-enforcement as well as whether to justify monopoly profits in the name of innovation.[258] Traditionally, the FTC's mission is tuned to the classical agenda of protecting ordinary citizens from the economic abuse of Big Trust. Under the banner of offering the "little man" an opportunity to succeed, Woodrow Wilson spearheaded the reinforcement of the antitrust regime by engineering the passing of the Clayton Act and the creation of the FTC.[259] Under Section 45 of the FTC Act, the FTC has the power to supervise and discipline "unfair methods of competition" and "unfair or deceptive acts or practices in or affecting commerce."[260] Backed by a court decision in 1972, the FTC fostered the fairness agenda by implementing twenty-four new rules until 1980.[261]

In contrast, the DOJ, as part of a political branch, had quickly been saddled with the new zeitgeist in the eighties. As a "prosecutor" in antitrust violations,

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255 HENRY G. MANNE, TESTIMONY ON THE PROPOSED INDUSTRIAL REORGANIZATION ACT OF 1973 4 (2018).

256 *Id.* at 19.

257 *Id.* at 21.

258 Kelly Everett, *Trust Issues: Will President Barack Obama Reconcile the Tenuous Relationship Between Antitrust Enforcement Agencies?*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 727, 748-49 (2009); *see* MICHAEL E. BRATMAN, SHARED AGENCY: A PLANNING THEORY OF ACTING TOGETHER (2014). Admittedly, other institutions, such as the court, may also contribute to the formation of a particular regulatory culture. Nonetheless, this article focuses on two antitrust agencies, i.e., the DOJ and the FTC.

259 Fox, *supra* note 31, at 1148.

260 15 U.S.C. § 45(a)(2); Raymond Z. Ling, *Unscrambling the Organic Eggs: The Growing Divergence Between the DOJ and the FTC in Merger Review After Whole Foods*, 75 BROOK. L. REV. 935, 943 (2010).

261 Everett, *supra* note 258, at 751.

the DOJ could exercise discretion whether to prosecute a particular case.[262] In particular, the Reagan administration proposed to assist industries suffering from foreign competition by allowing anticompetitive mergers.[263] While boosting international competitiveness is not a traditional goal of antitrust, the Reagan administration sought to achieve its political mission by "clarify[ing] the permissiveness of the law with respect to foreign transactions, and . . . eas[ing] the entry of domestic firms into foreign markets."[264] President Reagan appointed William Baxter as Assistant Attorney General for Antitrust who spearheaded the deregulatory spirit of the Reagan administration.[265] While the DOJ originally objected to the merger between the nation's third largest steel producer (LTV Corporation) and the fourth largest producer (Republic Steel),[266] the support from the Department of Commerce in the name of international competitiveness eventually prevailed.[267]

Yet, the DOJ's implementation of Reaganism, and the consequent under-enforcement of antitrust law, encountered a pushback from the FTC. Former FTC Chairman Robert Pitofsky lamented that "extreme interpretations and misinterpretations of conservative economic theory . . . have come to dominate antitrust."[268] Another former FTC Chairman, Michael Pertshuck, openly challenged the then deregulatory movement. Pertshuck noted:

> Throughout the breadth of the Federal government, the Reagan administration brewed a poisonous admixture of crude freemarket ideology and corporate sycophancy.

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262 *Id.* at 749; Edward F. Howrey, *Changes in the Government's Attitude Toward Competitive Marketing Practices*, 45 TRADE-MARK REP. 243, 246 (1955), https://www.ftc.gov/system/files/documents/public_statements/687261/19550121_howrey_remarks_._new_york_patent_law_association.pdf).

263 Reagan Administration's Package to Congress for Revision of the Federal Antitrust Laws, 50 Antitrust & Trade Reg. Rep. (BNA) No. 1253, 308 (Feb. 20, 1986); Fox, *supra* note 31, at 1143 (observing that the fierce competition from the Japanese and German firms contributed to the paradigm shift of the U.S. antitrust regime in favor of big corporations).

264 Fox, *supra* note 31, at 1171 n.122; *see also* U.S. DEP'T. OF JUSTICE ANTITRUST DIVISION, ANTITRUST GUIDE FOR INTERNATIONAL OPERATIONS 5-6 (1977).

265 Michael Pertschuk, Commissioner, Fed. Trade Comm'n., A Keynote Speech to Consumer Federation of America's Consumer Assembly (Jan. 20, 1983), https://www.ftc.gov/system/files/documents/public_statements/689031/19820120_pertschuk_the_consumer_movement_in_the_80s-_a_sleeping_giant_stirs.pdf.

266 *See* Department of Justice Merger Policy—LTV-Republic, 5 TRADE REG. REP. (CCH) ¶50,462 (Mar. 19, 1984); *see also* Merger Policy—Antitrust Division Chief, 5 TRADE REG. REP. (CCH) ¶50,463 (Mar. 19, 1984).

267 United States v. LTV Corp., 746 F.2d 51, 52 (D.C. Cir. 1984).

268 William E. Kovacic, *Politics and Partisanship in U.S. Federal Antitrust Enforcement*, 79 ANTITRUST L. J. 687, 694 (2014).

> Consumers were bugs on the Reagan windshield of regulatory removal.
>
> . . .
>
> And for those who now grasp as an industrial panacea the "loosening" of the antitrust laws so that the united American cartels can go forth to do international combat . . . .[269]

The FTC was not the only actor who resisted the execution of the Chicago School ideology. As the DOJ's antitrust enforcement became lax and more M&As passed muster, competitors of those companies increasingly filed private antitrust lawsuits.[270] Obviously, such lawsuits were motivated by "fear of injury to its basic business from a combination of two of its competitors."[271] As part of the American characteristics of competition law, these private remedies empowered affected businesses to function as private antitrust regulators.

In a 2008 study assessing the benefits of private antitrust enforcement, Robert Lande and Joshua Davis examined forty high-profile antitrust cases.[272] Lande and Davis concluded that America's "distinctive system of private enforcement" has resulted in substantial benefits for the U.S. economy.[273] For example, one of the main functions of U.S. antitrust law is to "compensate victims of illegal behavior."[274] In this respect, U.S. antitrust laws provide the only means of redress for victims of illegal, anticompetitive business conduct.[275] The study showed that in the forty cases that were analyzed, the defendants were required to pay back around $18-20 billion to consumers and other aggrieved parties.[276] The study also found that private antitrust enforcement serves as a deterrent and is "often substituted for federal and state action entirely when government did not act at all or did not achieve meaningful results."[277]

Even the jurisprudential shift toward the Chicago School was not necessarily a smooth, linear process without resistance.[278] Some judges protested by highlighting the lingering value of per se rules to judges, business,

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269 Pertschuk, *supra* note 265, at 1, 14.
270 Davis, *supra* note 164, at 41.
271 *Id.*
272 Robert H. Lande & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases*, 42 U.S.F. L. REV. 879, 879 (2008).
273 *Id.* at 904.
274 *Id.* at 881-82.
275 *Id.* at 904.
276 *Id.* at 904-05.
277 *Id.* at 905.
278 *See* Krehl v. Baskin-Robbins Ice Cream Co., 664 F.2d 1348 (9th Cir. 1982).

and the practicing legal community.[279] These judges resisted the idea of "the supposed 'science of economics' having displaced antitrust policy."[280]

Ultimately, those blocking factors had not been powerful enough to counter the tides of the Chicago School ideology. The earlier arguments have proven to be unsuccessful, which could be a nuanced indication that the Chicago School's ideological influences have been predominant in conjunction with big corporations' relentless lobbying efforts. However, they did leave cognitive DNA for anti-Chicago School ideas, in the form of a shadow paradigm or frame in antitrust minds of silent objectors. ,It was these lingering antitrust ideas that triggered the subsequent New Brandeisian Movement. After all, regulatory mind does evolve, and the Chicago School is not the end of antitrust history.

The same arguments and concerns raised in the seventies are again resurfacing today in terms of Big Tech, as opposed to the oil, automobile, and railroad industries in the past. In a symbolic gesture, on July 29, 2020, Congress summoned the CEOs of Amazon, Apple, Facebook, and Google to testify in response to alleged anticompetitive conduct. The common theme of allegations against those big technology firms was that they abused their prominent market power to impede innovation and preserve their gatekeeper status.[281] As the Congressional Report by the House Judiciary Sub-Committee stated, "companies that once were scrappy, underdog startups that challenged the status quo have become the kinds of monopolies we last saw in the era of oil barons and railroad tycoons."[282] For example, Amazon was accused of disadvantaging third party sellers who rely on its online platform. Apple was criticized for the app store's anticompetitive policies and high-price commissions it charges to third-party app developers. Facebook was censured for the titular "Copy, Acquire, Kill" strategy which it supposedly uses to acquire

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279 Arizona v. Maricopa Cnty. Med. Soc'y, 457 U.S. 332, 354 (1982).

280 Lande & Davis, *supra* note 272, at 905.

281 Bill Baer, *The Tech Antitrust Hearings Are Over: What's Next for Enforcement?*, BROOKINGS: TECHTANK (Aug. 11, 2020), https://www.brookings.edu/blog/techtank/2020/08/11/the-tech-antitrust-hearings-are-over-whats-next-for-enforcement/).

282 Shirin Ghaffary & Jason Del Rey, *The Big Tech Antitrust Report Has One Big Conclusion: Amazon, Apple, Facebook, and Google are Anti-Competitive*, VOX (Oct. 6, 2020, 8:35 PM), https://www.vox.com/recode/2020/10/6/21505027/congress-big-tech-antitrust-report-facebook-google-amazon-apple-mark-zuckerberg-jeff-bezos-tim-cook); Leah Nylen, *Tech Antitrust Bill Threatens to Break Apple, Google's Grip on the Internet*, BLOOMBERG (July 26, 2022), https://www.bloomberg.com/graphics/2022-tech-antitrust-bill/ (describing the "stranglehold" that Big Tech platforms have over their markets).

its competitors. Last, criticisms of Google involved its misuse of its market power in cultivating online advertising data.[283]

Against this background, Senator Amy Klobuchar has recently proposed a new antitrust bill titled the "Consolidation Prevention and Competition Promotion Act of 2021"[284] to arrest the judicial trend which has taken a lenient approach in the antitrust review. The bill addresses recent antitrust court opinions which the bill problematizes as having "limited the vitality of the Clayton Act." [285] The bill argues that the court's soft approach disregarded formerly accepted presumptions that certain acquisitions are anticompetitive and prioritized an acquisition's impact on price in the short term, therefore excluding other potential anticompetitive effects. The bill further argues that the court's leniency has underestimated the long-term risks from vertical and horizontal mergers in lowering quality, reducing choice, impeding innovation, and excluding competitors. Finally, the bill is also critical of the substantial burden imposed on plaintiffs in requiring proof of harmful effects of a proposed merger to "near certainty."[286] The bill would shift the burden of proof in a way that the defendant companies would be required to prove that their proposed mergers are not anticompetitive.[287] The proposal also intends to increase funding and expertise for FTC and DOJ staff members and to implement stricter standards for proposed mergers.[288]

Interestingly, a recent court ruling was silhouetted against the New Brandeisian Movement. In *United States v. Apple* (2015), the Second Circuit appeared to have silently revived the long-fossilized per se rule. In this case, Amazon claimed that Apple committed a per se violation of unlawful price-fixing conspiracy by creating a special e-book distribution system within its App Store (iBookstore) in partnership with major book publishers, such as Random House. The Second Circuit sided with Amazon. In this case, the Court of

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283 *Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google: Hearing Before Subcomm. on Antitrust, Com. and Admin. L.*, 116th Cong. 78 (2020).

284 Competition Prevention and Competition Promotion Act of 2021, S. 3267, 117th Cong. (2021).

285 *Id.* at § 2(a)(15)(A) (referencing most likely the Supreme Court's decision to forego the per se violation approach in the case of vertical price fixing).

286 *Id.* at § 2(a)(15)(A)-(D).

287 *Id.* at § 2(b)(4).

288 Allen St. John, *How Stronger Antitrust Rules for Big Tech Could Help Consumers*, CONSUMER REPS. (Mar. 12, 2021), https://www.consumerreports.org/competition-mergers-antitrust/stronger-antitrust-rules-for-big-tech-help-consumers/); *see also* Eric A. Posner & Cass R. Sunstein, *Antitrust and Inequality*, 8 (Working Paper, 2022), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4023365 (describing the effects of antitrust regulatory efforts in the context of gender, noting that antitrust law that prevents mergers and other anti-competitive behavior will benefit women more than men).

Appeals, in sharp contrast to previous court decisions in similar antitrust cases, preserved the doctrinal prominence of the per se rule. On one hand, the Apple court acknowledged that the rule of reason would apply to vertical price fixes because they "are widely used in our free market economy" and "do not inevitably have a pernicious effect on competition."[289] On the other hand, however, the same court opined that the per se rule can still apply to a vertical scheme where a vertical player helps organize a horizontal scheme.[290] Thus, the court eventually ruled: "This evidence, viewed in conjunction with the district court's findings as to and [sic] analysis of the conspiracy's history and purpose, is sufficient to support the conclusion that the agreement to raise ebook prices was a *per se* unlawful price-fixing conspiracy."[291]

CONCLUSION: A COMPARATIVIST NOTE

This Article seeks to offer a quasi-causal narrative on American antitrust policy indoctrinated by the Chicago School. After tracing historical developments of American antitrust policy, this Article theorizes "regulatory mind" to analyze the impact of ideational factors, such as the Chicago School ideology, to antitrust policy, especially as shaped by court decisions. A crafty incubation of the Chicago School ideology, as well as a successful indoctrination of judges, proved to be critical in transforming a former academic program into an actual policy. Also, business and political interests were uniquely aligned with these ideational trends during the heyday of the Chicago School. At the same time, however, regulatory mind tends to be fickle. As the New Brandeisian Movement eloquently demonstrates, the Chicago School's ideological grab has recently become loose, heralding a new version of antitrust mind.

American regulatory mind is a product of American regulatory tradition, and to that extent, it might be prone to a distorted image from an outsider's standpoint. Both distance and power tend to facilitate that distortion: "distance in the sense of cognitive distance and power as the frame in which that distance has been embedded."[292] For example, foreign scholars whose regulatory traditions differ from that of the United States are inclined to project images from the former into the latter. Moreover, this cognitive distance is likely to

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289 United States v. Apple, Inc., 791 F.3d 290, 323 (2d Cir. 2015).

290 *Id.* at 323-24.

291 *Id.* at 329.

292 David J. Gerber, *Prisms of Distance and Power: Viewing the U.S. Regulatory Tradition*, 93 BUS. HIS. REV. 781, 781 (2019).

amplify itself in the face of the U.S. superpower status. Heeding this critical comparative law insight, this Article offers a more balanced perspective by integrating an insider's narratives on American regulatory tradition with a more detached yet systematic tracing of key developments within that tradition. For example, when the European Commission torpedoed the GE-Honeywell merger application in 2001, the American antitrust community dismissed the decision as a matter of politics, not that of law.[293] Unfortunately, American antitrust scholars and regulators were oblivious to the fact that in Europe it is bureaucrats that mainly operationalize competition law and policy. They erroneously projected their own images of heavily court-reliant antitrust law into the European context, including the distorted perception that the European competition policy is purely a product of politics.

When American antitrust regulators are self-content to be their own fixers, they do not feel obliged to make themselves and their regimes understood to outsiders. Naturally, they seldom pay attention to external criticisms, such as those on the failure in disciplining Big Tech.[294] Given this solipsistic culture, any reform agenda must begin with a conscious effort among the U.S. antitrust regulators to go beyond the ostensible, and confront the invisible forces as represented by antitrust mind, behind their taken-for-granted sources and practices. Perhaps, the New Brandeis Movement may converge with either the European or the East Asian antitrust mind.[295] Likewise, from the standpoint of European or East Asian competition law agencies, understanding American regulatory mind may provide a perfect opportunity to compare the U.S. antitrust regime with their own. In this sense, regulatory mind may be touted as a "language" of comparative competition law.[296]

Without this *franca lingua*, each legal system will remain but a "black box" to both insiders and outsiders, if not for the same reasons.[297] To open the black box, we need to shorten the cognitive distance by de-biasing ourselves. Then, we will be able to create within us the cognitive space broad enough to appreciate different contexts of a foreign system. At the same time, however,

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293 *Id.* at 794.

294 Reed Albergotti & Jay Greene, *When Regulators Fail to Rein in Big Tech, Some Turn to Antitrust Litigation*, WASH. POST (Aug. 21, 2020, 7:00 AM), https://www.washingtonpost.com/technology/2020/08/21/big-tech-lawsuits-antitrust/; Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L. J. 893, 895-96 (2022) (calling attention to bipartisan concerns about failure to reign in Big Tech's "concentrated power").

295 Meagher & Shaxson, *supra* note 64.

296 *See generally* David J. Gerber, *System Dynamics: Toward a Language of Comparative Law?*, 46 AM. J. COMP. L. 719, 720 (1998).

297 Gerber, *supra* note 292, at 797.

we can also recognize that our own laws and regulations might not be that different from those of a foreign nation, considering the common functions (or meta-functions) shared between a foreign regulatory regime and our own.