THE CHICAGO SCHOOL AND THE FORMAL RULE OF LAW

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ABSTRACT

The Chicago School advanced a particular conceptualisation of the relationship between law and economics in antitrust that has been misunderstood for decades. A well-known consequence for US antitrust of their scholarship was for greater determinations of legality through the *ad hoc*, conduct-specific analysis of the rule of reason standard, inspiring advocacy for a similarly "more economic" approach to EU competition law. But although supporting the substantive economic outcomes of overturning rules of *per se* illegality, Bork, Posner, Easterbrook, and other Chicagoans routinely and consistently rejected this form of market intervention for determining legality. Rather than *ex post* effects-based analysis, the Chicagoan approach was to incorporate economics *ex ante* into the design of *generalised* norms (rules, presumptions, structured tests) to thereby foster legal certainty and administrability, virtues associated with the formal rule of law. The overlooked importance of the formal rule of law ideal can be discerned from Bork and Easterbrook's antitrust writing, Posner's economic analysis of law, and even traced back to the foundational scholarship of the Chicago School of economics. Reemphasising the importance of legal form in Chicagoan writing challenges their common contemporary portrayal, supporters of a particular version of "more economic" European enforcement, and the supposedly "neo"-Chicago approach.

JEL: B21; K00; K21; K40; K42

I. INTRODUCTION

Surely every competition lawyer is familiar with and has an opinion on the Chicago School of antitrust. Whether considered a "much needed corrective"[1] or a bunch of "neoconservative Darwinists",[2] their influence upon US antitrust law and scholarship is undeniable.[3] Even in historical accounts of EU competition law's theoretical evolution, the Chicago School is often afforded a central, almost messianic, role. Legal folklore suggests that after decades of being led astray by Ordoliberal economic illiteracy,[4] Chicagoan emphases upon the goal of efficiency and resilient market self-correction made European inroads during the 1990s, ushering-in a period of "modernisation" towards a "more economic" approach to EU competition law.[5]

Despite such prominence in the scholarship, with every facet of their divisive writings pored over and scrutinised, there continues to be a fundamental misunderstanding about the Chicagoan conceptualisation of the relationship between law and economics in antitrust. Such errors seemingly become ever more intractable as "The Chicago School" ossifies into an historical artefact of competition law's past.

Consider, for example, a recent portrayal of the Chicago scholars as so obsessed with ensuring that antitrust law maximised market efficiency that their approach can "hardly be seen as proper interdisciplinarity".[6] Instead, the author characterises Chicagoan antitrust as the economic "subordination of the law".[7] This is not only a judgement as to their preference for the *substance* of antitrust law being guided by faithful deduction from the assumptions of neo-classical price theory. It also goes to the idealised *form* of Chicagoan market intervention: their determination to ensure efficient business practices are not prohibited by overbroad application of *per se* rules supposedly rendered lawyerly qualms about legal certainty "overruled".[8] The Chicago-inspired revolution in US antitrust from the late 1970s undoubtedly involved both: on the basis of *substantive* economic arguments about the efficiency of business conduct, the US Supreme Court shifted the *form* for determining the legality of specific practices one-by-one from rule-based prohibitions *per se*, to a conduct-specific analysis of their particular

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[1] HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 2 (Harvard University Press 2008).

[2] Walter Adams & James W. Brock, *Antitrust and Efficiency: A Comment*, 62(5) N.Y.U L. REV 1116, 1117 (1987).

[3] *See* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 349 (Oxford University Press 1995).

[4] *Contra* Peter Behrens, *The Ordoliberal Concept of "Abuse" of a Dominant Position and its Impact on Article 102 TFEU*, in ABUSE REGULATION IN COMPETITION LAW, PROCEEDINGS OF THE 10TH ASCOLA CONFERENCE TOKYO 2015 (forthcoming).

[5] *See, e.g.*, Andreas Weitbrecht, *From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law*, 29(2) EUROPEAN COMPETITION LAW REVIEW 81, 82-85 (2008).

[6] OLES ANDRIYCHUK, THE NORMATIVE FOUNDATIONS OF EUROPEAN COMPETITION LAW: ASSESSING THE GOALS OF ANTITRUST THROUGH THE LENS OF LEGAL PHILOSOPHY 65 (Edward Elgar 2017). *See*, for further reflections on this brilliant work, Ryan R. Stones, 2(1) EUROPEAN COMPETITION AND REGULATORY LAW REVIEW 65 (2018).

[7] *Id.*

[8] *Id.* at 62.

competitive impact on the market (the "rule of reason" standard).[9] As a result, it has been routinely suggested that the Chicago School of antitrust advocated market intervention ideally conceptualised as "assessing a suspect agreement's anti- and pro-competitive effects in every individual case, instead of inferring its nature from its form."[10] On the opposite side of the Atlantic the legacy of this Chicagoan insurgency has been to inspire generations of scholars to advocate similarly effects-based analyses for determining the legality of business behaviour, thereby rendering EU competition law "more economic".

Yet commentators have failed to disentangle the *subsequent consequences* of Chicago School writing from their *actual conceptualisation* of the relationship between law and economics. What has fallen away as a result is how their writing can be interpreted as demonstrating an appreciation for the virtues of the formal rule of law ideal. Despite a reputation for dogmatic adherence to neo-classical microeconomic theory and efficiency-driven enforcement, the Chicagoan concern for the legitimate legal form of antitrust has habitually been overlooked;[11] the oft claimed advocacy of *ad hoc*, holistic, subject-specific, determinations of legality (e.g. the US rule of reason standard or "effects-based" analysis in the EU) is far from accurate. Rather than the economic "subordination" of law, the Chicago School's proposed approach attempted to reconcile an economically-informed normative substance with formal desiderata often associated with the rule of law ideal: general and equally-applicable norms that delineate the boundary between legality and illegality in a manner comprehensible to legal subjects.[12] By revisiting and engaging with the work of key protagonists, this article will challenge the common misunderstanding of the Chicagoan conceptualisation of the relationship between law and economics.

Section II provides a brief overview of the history, approach, and substantive implications of the Chicago School for US antitrust law. The subsequent two sections systematically analyse their writings to develop a clearer picture of the envisaged form that market intervention through law ought ideally to take. Section III considers the Chicago School's negative response to various calls for determining legality through effects-based, conduct-specific decision-making. Instead, it will be argued that they preferred a conceptualisation of market intervention where sophisticated economic wisdom was incorporated *ex ante* into the design of generalised norms - rules, presumptions, structured tests - that were administrable and comprehensible to businesses. Section IV considers how this may be attributable to a deeper faith in the formal rule of law. Indications of such in later Chicagoan writing can be substantiated either by tracing the ideal back to the more metaphysical writing of earlier Chicago School economists, or via Posner's economic analysis of the rule of law as the optimal form for incentive recalibration. This is followed by a conclusion briefly considering the implications for both a "more economic" approach to competition enforcement, and the supposedly "neo"-Chicago perspective on antitrust law.

II. THE HISTORY, APPROACH, AND IMPLICATIONS OF THE CHICAGO SCHOOL OF ANTITRUST

There are pitfalls aplenty in attempting to trace the contours of schools of thought.[13] Frequently they invite "slovenly stereotype[s]" that disregard heterogeneity.[14] Such reservations are justified in the instance at hand: accurately and faithfully portraying the Chicago School of antitrust is far from straightforward. It of course pivots upon the output of scholars directly affiliated with the University of Chicago Law School, particularly Robert H. Bork, Richard A. Posner, and Frank H. Easterbrook, especially from the 1950s to the 1980s. But it also has roots in the related Chicago School of Economics stretching back to the 1920s, implicating many figures less familiar to competition scholars. The geographic pull of Illinois for Chicagoan ideas was also rather weak: many lawyers and economists based at other US universities also contributed to its intellectual development.[15] Furthermore, the concrete policy recommendations offered by Chicago School writers for US antitrust were far from homogenous.[16]

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[9] *See infra* Section III.A.

[10] ANNE WITT, THE MORE ECONOMIC APPROACH TO EU ANTITRUST LAW 67 (Hart 2016). *See also* 65, 68 (it "convinced the US Supreme Court to move away from presumptions of illegality and to assess most business conduct as to its actual effects"); GUNNAR NIELS, HELEN JENKINS & JAMES KAVANAGH, J, ECONOMICS FOR COMPETITION LAWYERS 4 (2nd ed, Oxford University Press 2016). This was more implicit in older accounts: *see infra* note 105.

[11] *See*, for rare recognition of this: Robert H. Lande, *The Rise and (Coming) Fall of Efficiency as the Ruler of Antitrust*, 33(3) ANTITRUST BULL. 429, 436-438 (1988) Joshua D. Wright, *Overshot the Mark? A Simple Explanation of the Chicago School's Influence on Antitrust* (George Mason University Law and Economics Research Paper Series 09-23) at 7, 12.

[12] This conceptualisation of the rule of law is purely concerned with the *means* for determining the legality of conduct. It is to be distinguished from more substantive understandings which broadly propose hard limits to the *outcomes* which can be secured through law. *See* Paul P. Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, PUBLIC LAW 467 (1997).

[13] *See* Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76(4) U. CHI. L. REV. 1911, 1915 (2009).

[14] George Stigler, *Comment*, 70(1) J. POLITICAL ECON. 70 (1962). *See also*, on abandoning labels altogether: Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241 (2012)

[15] *See* Warren J. Samuels, *The Chicago School of Political Economy: A Constructive Critique* in THE CHICAGO SCHOOL OF POLITICAL ECONOMY 6 (Warren J. Samuels ed., Association for Evolutionary Economics 1976); Crane, *supra* note 13 at 1915.

[16] *See* Oliver E. Williamson, *Intellectual Foundations: The Need for a Broader View*, 33 J. LEGAL EDUC. 210, 211-213 (1983); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, COLUM. BUS. L. REV. 1, 10 (2007); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th*

Such caveats noted, this section A) provides a brief account of the historical development of the Chicago School, B) depicts the nature of their approach, and C) highlights the major substantive implications of their writing for competition law.

A) A Brief History of the Chicago School[17]

The Chicago School of *antitrust* was an offshoot from the body of interwar scholarship often referred to as the Chicago School of *economics*.[18] From the 1920s Chicago developed a reputation as the "extreme vanguard" of neo-classical price theory.[19] This was largely the result of scholarship by Frank H. Knight,[20] Jacob Viner,[21] and Henry Simons.[22] Knight and Simons were particularly prominent guardians of the price mechanism against the growing advocacy of central economic direction and eager interventionism. Knight's concretisation of a Chicagoan "style" of neo-classical microeconomic analysis deeply influenced his Nobel laureate students Milton Friedman and George Stigler.[23] The latter's work on industrial concentration, oligopoly theory, and barriers to market entry provided especially important economic foundations to the later legal writing of the Chicagoan antitrust scholars. Simons' importance for the subsequent Chicago School of antitrust – as well as "law & economics" generally - was more organisational. As the first economist at the Chicago Law School, he set an interdisciplinary precedent for years to come.[24] He was also instrumental in the appointment of another economist, Aaron Director, to the Law School in 1946 through a recommendation to Friedrich Hayek who had secured funding for a new institute.[25]

Aaron Director was arguably the most important protagonist in the development of the Chicago School of antitrust,[26] acting as the intellectual bridge between the old Chicago School of economics and a series of influential publications that would fundamentally alter opinions of US law. Legend goes that Director used his invitation to the antitrust law course as an opportunity to demonstrate to students that overbroad legal prohibitions made little economic sense.[27] Over many years he recruited a generation of young legal scholars to follow his clarion call that "the conclusions of economics do not justify the application of the antitrust laws in many situations in which the laws are now being applied."[28] Although publishing very little himself, Director provided the inspiration behind several seminal articles written by his students from the 1950s to the 1970s,[29] many in the *Journal of Law & Economics* that he founded in 1958. The disparate pieces on various economically-problematic facets of US antitrust policy were woven into comprehensive recommendations of a distinctive Chicago "School" with the publication of two monographs towards the end of the 1970s: Posner's *Antitrust Law* and Bork's *The*

Century, 78 ANTITRUST L.J. 147, 154, 171-172 (2012); Wright, *supra* note 14 at 244. *See*, for Posner's open disagreement with key Chicagoan arguments: Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41(3) U. CHI. L. REV. 506 (1974) [hereinafter Posner, *Exclusionary Practices*]; RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 171 (University of Chicago Press 1976) [hereinafter POSNER, ANTITRUST LAW 1976]; Kovacic, *supra* at 10-11; Crane, *supra* note 13 at 1917-1918; Kobayashi and Muris, *supra* at 154, 167. Posner particularly disputed the permissive approach to predation, highlighting the importance of strategic consequences. *See, e.g.*, Posner, *Exclusionary Practices*, *supra* at 516-517; POSNER, ANTITRUST LAW 1976, *supra* at 185-186; Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127(4) u. pa. l. rev. 925, 939-940 (1979) [hereinafter Posner, *Chicago School*].

[17] *See*, for historical accounts, Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983); Ronald H. Coase, *Law and Economics at Chicago*, 36(1) J.L. & ECON. 239 (1993); DUXBURY, *supra* note 3 at ch. 5.

[18] *See*, for accounts of the Chicago School of *economics*, H. L. Miller Jr., *On the "Chicago School of Economics"*, 70(1) J. POLITICAL ECON. 64 (1962); Samuels, *supra* note 15.

[19] Samuels, *supra* note 15 at 3-4.

[20] *See, e.g.*, Frank H. Knight, *Ethics and Economic Interpretation*, 36 Q.J. ECON. 454 (1922); Frank H. Knight, *The Ethics of Competition*, 37(4) Q.J. ECON. 579 (1923).

[21] *See, e.g.*, Jacob Viner, *Adam Smith and Laissez Faire*, 35(2) J. POLITICAL ECON. 198 (1927); Jacob Viner, *Cost Curves and Supply Curves*, 3(1) ZEITSCHRIFT FÜR NATIONALÖKONOMIE 23 (1931).

[22] *See, e.g.*, Henry Simons, *The Requisites of Free Competition*, 26 AM. ECON. REV. 68 (1936) [hereinafter Simons, *Free Competition*]; Henry Simons, *For a Free-Market Liberalism* 8(2) U. CHI. L. REV. 202 (1941) [hereinafter Simons, *Liberalism*]; Henry Simons, *The Beveridge Program: An Unsympathetic Interpretation*, 53(3) J. POLITICAL ECON. 212 (1945) [hereinafter Simons, *Beveridge Program*].

[23] *See* DUXBURY, *supra* note 3 at 333-334.

[24] *See* Wilbur G. Katz, *Economics and the Study of Law: The Contribution of Henry C Simons*, 14(1) U. CHI. L. REV. 1, 2-3 (1946); Coase, *supra* note 17 at 242-243; DUXBURY, *supra* note 3 at 335.

[25] *See*, on Director's involvement in the US publication of Hayek's *The Road to Serfdom* and later appointment at Chicago: Coase, *supra* note 17 at 246; DUXBURY, *supra* note 3 at 342.

[26] *See* Posner, *Chicago School*, *supra* note 16 at 925.

[27] *See* DUXBURY, *supra* note 3 at 344. *See also*, for a first-hand account, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF xii (2nd ed., The Free Press 1993) [hereinafter BORK, ANTITRUST PARADOX 1993].

[28] Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 282 (1956).

[29] *See* Sam Peltzman, *Aaron Director's Influence on Antitrust Policy*, 48(2) J.L. & ECON. 313 (2005); Kobayashi and Muris, *supra* note 16 at 151. Director's inspiration is often explicit in the acknowledgements. *See, e.g.*, Ward S. Bowman Jr., *Tying Arrangements and the Leverage Problem*, 67(1) YALE L.J. 19 (1957) (Director encouraged interest, provided the theory, and an application); John S. McGee, *Predatory Price Cutting: The* Standard Oil (N.J.) *Case*, 1 J.L. & ECON. 137, 138 (1958) (Director suggested an argument developed purely on logical grounds that McGee investigated with a specific case); Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960) (Director recommended the case study and provided assistance); Robert H. Bork & Ward S. Bowman Jnr., *The Crisis in Antitrust*, 65(3) COLUM. L. REV. 363, 366 (1965).

Antitrust Paradox.[30] The latter has come to be regarded as the orthodox account of the Chicago School of antitrust,[31] and is perhaps the most influential book in the history of competition law scholarship.[32]

Despite initially appearing to inhabit the fringes of antitrust scholarship,[33] these articles and monographs eventually had a tangible influence upon the law. Following the US Supreme Court's watershed *Sylvania* (1977) ruling removing non-price vertical restraints from the ambit of *per se* illegality,[34] decades-old precedents were sequentially re-evaluated by judges who had clearly absorbed the scholarly output of Chicagoan authors.[35] The 1981 appointment of William Baxter, a Chicago adherent, to head the Antitrust Division also saw reduced prosecutions by the Department of Justice for practices viewed benignly by the Chicago School.[36] In the same year Bork brazenly declared the School's irreversible intellectual victory.[37] This was a rather premature claim; with influence came resistance.[38] Their most prominent bulwark was professor and judge Frank Easterbrook, who fiercely defended the Chicago School approach throughout the more hostile academic environment of the 1980s. Notwithstanding such opposition, since the 1990s it has become clear that "there exists very little in the way of contemporary antitrust theory which has not been inspired to some degree by Chicago economic analysis."[39] Whether this inspiration is more as friend or foil is an open question.[40]

B) The Chicagoan Approach: Economic Method and Legal Motivation

Reading *The Antitrust Paradox,* one would think that before the Chicago School US antitrust law and scholarship was devoid of economic underpinnings.[41] This is, of course, far from correct.[42] Rather than a novel "discovery" of economics, the influential change brought about by the Chicagoan approach consisted of: 1. an economic method that put much greater emphasis upon the explanatory power of the theoretical assumptions of neo-classical price theory; and 2. an exclusive reliance upon total economic welfare (ie societal efficiency) as the motivation behind market intervention.

1. Economic Method: Trust Assumptions

Throughout the twentieth century competition microeconomics was animated by a dialectic tension between two methodological strands: on the one hand, the abstracted generalisations and concepts of neo-classical price theory; on the other, the more practical approach of industrial organisation economics ("IO"), seeking to quantify, contextualise, and ultimately complicate the understanding of how real-life markets operate.[43]

Post-war the pendulum had very much swung towards an inductive and descriptive form of antitrust IO. This "Harvard School" style relied heavily upon empirical data to "take account of the richness of the real world".[44] In contrast, since the 1920s economics at Chicago under Knight and Viner maintained faith in orthodox

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[30] POSNER, ANTITRUST LAW 1976, *supra* note 16; ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (Basic Books 1978) [hereinafter BORK, ANTITRUST PARADOX]. The main elements of Bork's monograph were settled in the late sixties, though delayed by personal matters and Bork's appointment as Solicitor-General).

[31] *See* Posner, *Chicago School, supra* note 16 at 926.

[32] *See, e.g.,* William E. Kovacic, *The Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, 36(4) WAYNE L. REV. 1413, 1416-1417 (1990); George L. Priest, *Bork's Strategy and the Influence of the Chicago School on Modern Antitrust Law,* 57(S3) J.L. & ECON. S1, S7 (2014). *See also,* for a more critical take on its influence, Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58(3) ANTITRUST L.J. 645 (1989).

[33] Posner, *Chicago School, supra* note 16 at 931.

[34] *Continental Television v. GTE Sylvania*, 433 U.S. 36 (1977).

[35] *See* Crane, *supra* note 13 at 1911-1912; Priest, *supra* note 32 at S1 (on the *Antitrust Paradox* as the most influential work upon the US Supreme Court in any field of law).

[36] Crane, *supra* note 13 at 1912.

[37] Robert H. Bork, *Emerging Substantive Standards – Developments and Need for Change*, 50(2) ANTITRUST L.J. 179, 181 (1981).

[38] See Section III.C.

[39] DUXBURY, *supra* note 3 at 349.

[40] *See generally* for a critical collection HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON US ANTITRUST (Robert Pitofsky ed,, OUP 2009).

[41] *See, e.g.,* BORK, ANTITRUST PARADOX, *supra* note 30 at 6-7 (the need to read antitrust 'in light of the disciplines of law and economics'); BORK, ANTITRUST PARADOX 1993, *supra* note 27 at xvi ("Chicagoans applied economic analysis more rigorously than was common"), xiii ("Few economists ever looked seriously at antitrust").

[42] *See* Herbert Hovenkamp, *Antitrust Policy after Chicago*, 84 MICH. L. REV. 213, 217-223 (1985) [hereinafter Hovenkamp, *After Chicago*]; Louis Kaplow, *Antitrust, Law & Economics, and the Courts,* 50(4) LAW & CONTEMP. PROBS. 181, 184 (1987); Herbert Hovenkamp, *The Reckoning of Post-Chicago Antitrust* in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 1-3 (Antonio Cucinotta, Roberto Pardolesi & Roger J. Van den Bergh ed., Edward Elgar 2002) [hereinafter Hovenkamp, *Post-Chicago Antitrust*]. *See also* Director & Levi, *supra* note 28 at 282 ("the antitrust laws have been greatly influenced by economic doctrine", albeit wrong).

[43] *See* for contemporary accounts of the IO method, Luc Peeperkorn & Vincent Verouden, *The Economics of Competition* in FAULL & NIKPAY: THE EU LAW OF COMPETITION 4 (Jonathan Faull and Ali Nikpay ed, 3rd ed., OUP 2014) (describing it as "applied microeconomics: it uses models and concepts of microeconomic theory in an effort to understand the development of real-world markets and company behaviour."); NIELS, JENKINS & KAVANAGH, *supra* note 10 at 4.

[44] Peeperkorn & Verouden, *supra* note 43 at 5. *See also,* for a Chicagoan take, Posner, *Chicago School, supra* note 16 at 928-929, 931 (a "microscopic examination of the idiosyncrasies of particular markets.").

neo-classical price theory,[45] i.e. deductions based upon simple assumptions of rationality, profit maximisation, downward-sloping demand, and so on.[46] This methodological commitment was continued by Aaron Director, deployed to deconstruct and discredit numerous *per se* rules of antitrust prohibition throughout the 1950s and 1960s.[47] Bork's *Antitrust Paradox* was explicit in its adoption of neo-classical price theory as he found it the only body of knowledge capable of separating anticompetitive business practices from those that are efficient;[48] in this way, the "simple ideas" of microeconomics were also the most "powerful".[49]

The Chicagoan adoption of neo-classical price theory as the primary method for understanding the nature and scope of competition policy is often legitimately highlighted as a core element of the School.[50] But they arguably did themselves few favours by proclaiming such blanket statements, inviting facile criticism of themselves as theoretical daydreamers, idly drawing curves and ignoring business behaviour at the coalface.[51] In reality, the Chicago School take on neo-classical price theory was intended to be empirically-substantiated and practically focused, addressing issues of organisation and market behaviour albeit from a *prima facie* abstract and deductive perspective.[52] Chicagoan scholars regularly engaged in empirical research, whether to test the veracity of or inductively build their theoretical arguments.[53]

The Chicago School method of invoking neo-classical price theory is perhaps best understood as a renewed faith in the explanatory power of these (empirically-grounded) economic assumptions: if businesses are rational profit maximisers, what reasons do they have to engage in conduct "X"?[54] If rivals and potential entrants are also rational profit maximisers, and inelastic consumers respond to price increases by purchasing elsewhere, how safe is an inefficient monopolist, and will attempts to exclude more efficient competitors be successful?[55] Taking assumptions seriously generated a method of antitrust analysis profoundly sceptical of claims that certain types of behaviour ought to necessarily be deemed illegal, lacking in pro-competitive explanation or the potential for remedial market self-correction.[56]

2. Legal Motivation: Allocative and Productive Efficiency

A second aspect of the Chicago School's approach was a belief that antitrust policy should be animated solely by the goal of maximising overall efficiency.[57] Although (deliberately?) obscured by the language adopted by Bork,[58] this meant the *total* societal welfare of neo-classical price theory, i.e. the combination of *allocative efficiency* (resources optimally directed to outputs most desired by consumers) and *productive efficiency* (eg low production costs, consumer benefits). Advocacy of efficiency as the sole motivation for market intervention has been a long-

[45] *See* Samuels, *supra* note 15 at 3-4, 11 ('a spirited defence of orthodox neoclassical economics').
[46] *See* Posner, *Chicago School, supra* note 16 at 931.
[47] *Id.* at 928 ("Director's conclusions resulted simply from viewing antitrust policy through the lens of price theory."); BORK, ANTITRUST PARADOX 1993, *supra* note 27 at xii.
[48] *See* BORK, ANTITRUST PARADOX, *supra* note 30 at 117 ("To abandon economic theory is to abandon the possibility of rational antitrust law"). *See also* Posner, *Chicago School, supra* note 16 at 932 ("the proper lens for viewing antitrust problems is price theory.").
[49] BORK, ANTITRUST PARADOX, *supra* note 30 at 90.
[50] *E.g.* Wright, *supra* note 11 at 10.
[51] *E.g.* Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust – Retrospective and Prospective: Where are we Coming From? Where are we Going?* 62(5) N.Y.U L. REV 936, 936-937 (1987) (a "sweeping set of theoretical assumptions" out of touch "with the changing business environment").
[52] *See* Milton Friedman, *The Methodology of Positive Economics* in ESSAYS IN POSITIVE ECONOMICS (University of Chicago Press 1953) (defending assumptions if they are reasonable predictions of reality); George Stigler, *The Politics of Political Economists*, 73(4) Q.J. ECON. 522, 529-530 (1959) (dismissing the "completely formal theorist" and advocating the "empirical study of economic life"); Samuels, *supra* note 15 at 4, 8 (quoting Friedman on Chicagoan use of theory to analyse ""concrete problems, rather than as an abstract mathematical structure of great beauty but little power"").
[53] *See* Samuels, *supra* note 15 at 8 (quoting Friedman: Chicago ""insists on the empirical testing of theoretical generalizations and [rejects] alike facts without theory and theory without facts.""); Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53(2) ANTITRUST L.J. 135, 151 (1984) ("At Chicago no economic model is worth much without testing."); Frank H. Easterbrook, *Workable Antitrust Policy*, 84(8) MICH. L. REV. 1696, 1701 (1986) [hereinafter Easterbrook, *Workable Antitrust*]; Wright, *supra* note 11 at 11; Kobayashi and Muris, *supra* note 16 at 152.
[54] *See* Posner, *Chicago School, supra* note 16 at 928, 931; Peltzman, *supra* note 29 at 329.
[55] *E.g.* Easterbrook, *Workable Antitrust, supra* note 53 at 1701 ("Competition is hardier than you think. The desire to make a buck leads people to undermine monopolistic practices").
[56] *See* Easterbrook, *Workable Antitrust, supra* note 53 at 1701; Peltzman, *supra* note 29 at 328-329.
[57] *See* BORK, ANTITRUST PARADOX 1993, *supra* note 27 at xi.
[58] *See*, on his questionable use of "consumer welfare", Lande, *supra* note 11 at 434-435; Eleanor M. Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714, 1715 (1986); Priest, *supra* note 32.

standing aspect of the Chicagoan approach to competition policy.[59] And despite continual resistance from certain scholars,[60] achieving widespread support for this proposition is perhaps the School's key legacy.[61]

The case for efficiency-animated antirust was most forcefully advanced by Bork. Synthesising various aspects of an argument that he had been making since the mid-1960s,[62] in *The Antitrust Paradox* he asserted that the "only legitimate goal of American antitrust law is the maximization of consumer welfare".[63] His main foils were various US court judgments deciding antitrust liability on the basis of the economic freedom of atomistic markets or supporting the welfare of small competitors:[64] Justice Peckham's "small dealers and worthy men" in *Trans-Missouri* (1897);[65] Judge Hand's protection of minor firms "for its own sake and in spite of possible cost" in *Alcoa* (1945);[66] or Justice Warren's "protection of viable, small, locally-owned businesses" in *Brown Shoe* (1962).[67] For Bork, these were political judgments, "an ugly demand for class privilege"[68] or "uncritical sentimentality about the "little guy"",[69] entirely overlooking the *total* efficiency implications. While judicial protection of small businesses may promote *allocative* efficiency, they failed to give due weight to *productive efficiency*.[70] Only by adopting total efficiency as the single "common denominator" by which to evaluate business practices, jettisoning incommensurable romantic political ideals of artisan craftsmen, was it possible for market intervention to be coherent.[71] Solely through affording equal weight exclusively to the combined trade-off between allocative and productive efficiency could the law avoid the paradoxical outcomes that gave Bork's book its title. This aspect of the Chicagoan approach has been so persuasive that even a noted critic warned advocates of multiple enforcement goals "to proceed very careful if antitrust is not to become a meaningless hodge-podge of conflicting, inconsistent, and politicized mini-policies."[72]

C) Legal Implications of the Chicago School Approach

The Chicago School's approach of combining a method that took seriously the assumption of rational business profit maximisation from neo-classical price theory with an exclusive concern for market intervention to foster overall efficiency had substantial implications for the law: generally it was over-inclusive in adopting rule-based, *per se* prohibitions.[73]

1. Market Structure

[59] *E.g.*, JOHN S. MCGEE, IN DEFENCE OF INDUSTRIAL CONCENTRATION 137 (Praeger Publishers 1971); Richard A. Posner, *A Program for the Antitrust Division*, 38(3) U. CHI. L. REV. 500, 505-506 (1971) [hereinafter Posner, *Antitrust Division*]; POSNER, ANTITRUST LAW 1976, *supra* note 16 at 4, 18-22; Easterbrook, *Workable Antitrust*, *supra* note 53 at 1703-1704.

[60] *E.g.* Robert Pitofsky, *The Political Content of Antitrust*, 127(4) U. PA. L. REV. 1051 (1979); Frederick M. Rowe, *The Decline of Antitrust and the Delusions of Models: The Faustian Pact of Law and Economics*, 72(5) GEO. L.J. 1511 (1984); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61(4) N.Y.U L. REV. 554 (1986); Fox & Sullivan, *supra* note 51; Adams & Brock, *supra* note 2 at 1116-1117; Eleanor M. Fox, *Post-Chicago, Post-Seattle and the Dilemma of Globalization* in POST-CHICAGO DEVELOPMENTS IN ANTITRUST LAW 77 (Antonio Cucinotta, Roberto Pardolesi & Roger J. Van den Bergh ed., Edward Elgar 2002) [hereinafter Fox, *Post-Chicago*].

[61] *See* Hovenkamp, *After Chicago*, *supra* note 42 at 234; Kovacic, *supra* note 32 at 1450. *See also,* for self-congratulation: BORK, ANTITRUST PARADOX 1993, *supra* note 27 at xiv; RICHARD A. POSNER, ANTITRUST LAW (2nd ed., University of Chicago Press 2001) ix.

[62] *See* Bork & Bowman, *supra* note 29 at 365; Robert H Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74(5) YALE L.J. 775, 831 (1965) [hereinafter Bork, *The Rule of Reason* [part I]].

[63] *See* BORK, ANTITRUST PARADOX, *supra* note 30 at 50-51, and *see also* 89, 405.

[64] *See id.* at 7. *See also*, against academics advancing the same, Robert H. Bork, *Contrasts in Antitrust Theory: I*, 65(3) COLUM. L. REV. 401, 413-415 (1965) [hereinafter Bork, *Contrasts*].

[65] *U.S. v. Trans-Missouri Freight Association,* 166 U.S. 290 (1897).

[66] *U.S. v Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945).

[67] *Brown Shoe Co. Inc. v. U.S.*, 370 U.S. 294 (1962). *See also* POSNER, ANTITRUST LAW 1976, *supra* note 16 at 104 (rested upon a "social objection" to mergers).

[68] Bork & Bowman, *supra* note 29 at 370. *See also*, for other allegations of "political" antitrust: Posner, *Antitrust Division*, *supra* note 59 at 505-506; POSNER, ANTITRUST LAW 1976, *supra* note 16 at 18-22; Easterbrook, *Workable Antitrust*, *supra* note 53 at 1703-1704. *Contra,* questioning efficiency-focused antitrust as apolitical, Fox, *supra* note 58; Fox, *supra* note 60; Fox & Sullivan, *supra* note 51 at 957.

[69] BORK, ANTITRUST PARADOX, *supra* note 30 at 54.

[70] *Id.* at 7-8, and *see also* 135 ("Considering only one vector in a two-vector situation"), 405 ("probably the major reason for the deformation of antitrust's doctrines.").

[71] *Id.* at 79, 405. *See also* Bork, *The Rule of Reason* [part I], *supra* note 62 at 832; Posner, *Antitrust Division*, *supra* note 59 at 506; Easterbrook, *Workable Antitrust*, *supra* note 53 at 1703.

[72] Hovenkamp, *After Chicago*, *supra* note 42 at 234.

[73] *See* Hovenkamp, *Post-Chicago Antitrust*, *supra* note 42 at 3.

On the structure of markets, Chicagoans argued that the frequent prohibition of horizontal mergers[74] and proposals for industrial deconcentration[75] overlooked the possible connection between size and efficiency.[76]

Suspicion of large firms throughout the 1950s and 1960s was based upon empirical studies in the tradition of the Harvard School's IO microeconomics, finding that oligopolistic markets persistently secured supra-competitive profits, perhaps through the parallel limitation of output.[77] This approach to the nefarious effect of market concentration reflects the "structure-conduct-performance" paradigm: because a concentrated market structure determined the conduct of actors, and their conduct determined the competitiveness of the market, a highly concentrated market structure therefore logically also determined market performance; the actual conduct of businesses therefore falls away from the concern of competition policy as a mere inevitability of concentration.[78]

Application of Chicago School thinking sought to make Harvard's fascination with deconcentration "intellectually bankrupt".[79] Methodological critique and rival empirical research by the wider Chicago School of economics - especially Yale Brozen, Harold Demsetz, and George Stigler - challenged the common distrust of market concentration.[80] Rather than presuming anticompetitive conduct, large profits and market share expansion to even very high levels could be the result of efficiency, whether substantial economies of scale to operate at lowest production costs, managerial talent, technological superiority, or simply giving consumers the best product.[81] To legally condemn this success was to suggest that "firms should compete but should not win".[82] Chicagoans argued that it was natural for firms incapable of rivalling these efficiencies to be excluded from the market.[83] And as barriers to potential entry by new firms had been overstated by Harvard economists,[84] if market share and profits were *not* based on efficiency, they would invite new entrants. In other words, the problem would be self-corrected by market forces.[85]

Translated into concrete competition policy, the Chicago School of antitrust suggested a hands-off approach to horizontal mergers lest productive efficiencies occasioned by size and success be threatened through over-eager fragmentation.[86] In essence, "whenever monopoly would increase efficiency it should be tolerated,

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[74] *E.g. Brown Shoe,* 370 U.S.. *See also* POSNER, ANTITRUST LAW 1976, *supra* note 16 at 100-105; BORK, ANTITRUST PARADOX, *supra* note 30 at ch. 9 (probably the "worst antitrust essay ever written").

[75] In 1968 a Task Force on Antitrust Policy recommended new legislation for divestiture where fewer than four firms together held market shares of over 70 per cent. *See* Yale Brozen, *The Antitrust Task Force Deconcentration Recommendation*, 13(2) J.L. & ECON., 279 (1970); MCGEE, *supra* note 59.

[76] The Chicago economists of the 1920s to 1940s had a more varied perspective on concentration, *see* Miller, *supra* note 18 at 65. Knight was in line with later scholars. *See, e.g.*, Frank H. Knight, *The Planful Act: The Possibilities and Limitations of Collective Rationality* in FREEDOM AND REFORM: ESSAYS IN ECONOMICS AND SOCIAL PHILOSOPHY 361-361 (Harper & Brothers 1947) [hereinafter Knight, *Planful Act*]; FRANK H. KNIGHT, INTELLIGENCE AND DEMOCRATIC ACTION 98 (Harvard University Press 1960) [hereinafter KNIGHT, INTELLIGENCE]. Simons was more willing to intervene. *See, e.g.*, Simons, *Free Competition, supra* note 22 at 70-71 ("a breaking down of enormous integrations"); Simons, *Liberalism, supra* note 22 at 205-206; John Davenport, *The Testament of Henry Simons*, 14(1) U. CHI. L. REV. 5, 6 (quoting Simons on "gigantic corporations" as the "great enemy of democracy"); Kitch, *supra* note 17 at 178; Coase, *supra* note 17 at 241.

[77] *See* Yale Brozen, *Significance of Profit Data for Antitrust Policy*, 14(1) ANTITRUST BULL. 119, 124-125 (1969); Brozen, *supra* note 75 at 279; DUXBURY, *supra* note 3 at 352-354; HOVENKAMP, *supra* note 1 at 35-37; Peeperkorn & Verouden, *supra* note 43 at 5.

[78] *See* HOVENKAMP, *supra* note 1 at 36-37; Peeperkorn & Verouden, *supra* note 43 at 7.

[79] Robert H. Bork, *Antitrust and the Theory of Concentrated Markets*, 46(3) ANTITRUST L.J. 873, 874 (1977). Director and Levi had defended the efficiency of monopoly in the absence of barriers to entry. *See* Director & Levi, *supra* note 28 at 285.

[80] *See* Peeperkorn & Verouden, *supra* note 43 at 6-7. For empirical refutation of Harvard: Brozen, *supra* note 75 at 279; Yale Brozen, *Concentration and Profits: Does Concentration Matter?*, 19(2) ANTITRUST BULL. 381 (1974).

[81] *See generally* Brozen, *supra* note 77 at 125-131; Brozen, *supra* note 80 at 390-391; Yale Brozen, *Competition, Efficiency, and Antitrust* in THE COMPETITIVE ECONOMY: SELECTED READINGS 6 (General Learning Press 1975); Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16(1) J.L. & ECON. 1, 1-5 (1973) [hereinafter Demsetz, *Industry Structure*]; Harold Demsetz, *Two Systems of Belief About Monopoly* in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid, Harold M. Mann & John F. Weston ed., Little, Brown and Company 1974) [hereinafter Demsetz, *Monopoly*]; Harold Demsetz, *Economics as a Guide to Antitrust Regulation*, 19(2) J.L. & ECON. 371, 372-375 (1976) [hereinafter Demsetz, *Economics as a Guide*]; MCGEE, *supra* note 59; POSNER, ANTITRUST LAW 1976, *supra* note 16 at 22; Sam Peltzman, *The Gains and Losses from Industrial Concentration*, 20(2) J.L. & ECON. 229 (1977); Bork, *supra* note 79 at 878.

[82] Brozen, *supra* note 81 at 7. *See also* Demsetz, *Industry Structure, supra* note 81 at 3 (on the importance of the incentive for short-term monopoly profit for driving competition); Demsetz, *Monopoly, supra* note 81 at 179; Demsetz, *Economics as a Guide, supra* note 81 at 383.

[83] *E.g.* Brozen, *supra* note 81 at 6; Bork & Bowman, *supra* note 29 at 375 ("Some businesses will shrink and some will disappear."); BORK, ANTITRUST PARADOX, *supra* note 30 at 49, 136-137.

[84] *See* Posner, *Chicago School, supra* note 16 at 946. This was largely based on the regulatory theory of: George Stigler, *The Theory of Economic Regulation*', 2(1) BELL J. ECON. & MANAG. SCI. 3 (1971). Chicagoans often found the most pervasive barriers to entry to be governmental at the behest of businesses, *e.g.* Demsetz, *Monopoly, supra* note 81 at 164-165, 181-182.

[85] *See* George Stigler, *The Economies of Scale*, 1 J.L. & ECON. 54, 55-56 (1958) (his "survivor technique" for finding the optimal size of firm as that which resisted actual and potential rivals); Brozen, *supra* note 81 at 8-9; Brozen, *supra* note 75 at 284; McGee, *supra* note 29 at 142 ("Entry is the nemesis of monopoly"); MCGEE, *supra* note 59 at 136; Demsetz, *Industry Structure, supra* note 81 at 1; Harold Demsetz, *How Many Cheers for Antitrust's 100 Years?*, 30(2) ECON. INQ. 207, 213-214 (1992) [hereinafter Demsetz, *100 Years*]; Posner, *Antitrust Division, supra* note 59 at 528-529; Posner, *Chicago School, supra* note 16 at 945-946; BORK, ANTITRUST PARADOX, *supra* note 30 at 179, 196.

[86] *See* Demsetz, *Industry Structure, supra* note 81 at 4-5; Demsetz, *Monopoly, supra* note 81 at 179; Demsetz, *Economics as a Guide, supra* note 81 at 375; POSNER, ANTITRUST LAW 1976, *supra* note 16 at 89-91; Peltzman, *supra* note 81 at 262-263; BORK, ANTITRUST PARADOX, *supra* note 30 at 56 ("a tax upon consumers for the benefit of some producers"), 179 ("If dissolution would destroy significant efficiencies, the cure may be worse than the disease").

indeed encouraged".[87] Vertical mergers were also considered overwhelmingly pro-competitive phenomena that ought to be subject to little oversight as fears of competitor foreclosure or more difficult entry were overstated.[88] This relaxed stance towards integration between different levels of the market was largely derived from Coase's theory that the boundaries of firms were determined by whether it was more efficient to contract under the price mechanism or internalise processes to avoid higher market transaction cost.[89]

2. Business Conduct

In terms of policing collusive or unilateral business conduct, the Chicago School dismissed antitrust's lazy legal stance of *prima facie* "inhospitality" towards any behaviour that might injure or exclude competitors.[90] Greater recourse to the assumption of rational profit maximisation, the robustness of market forces (consumers, rivals, potential entrants), and the prevalence of productive efficiencies again led the Chicago School to instead advocate a lesser scope for *per se* prohibition.

Perhaps their most influential claims related to vertical restraints in contracts between, for instance, a manufacturer and independent retailers relating to price, location, store display, and so on. The Chicago scholars argued that these terms should be generally outside legal condemnation.[91] Restrictions on sellers are *prima facie* counterintuitive for many manufacturers as self-imposed limitations hinder the sale of more products, which might suggest malevolent intent. But building upon Director's method of taking the assumption of rational profit maximisation seriously, vertical restraints were reconceptualised by Chicagoans as positive means to ensure additional sales services that customers valued by avoiding non-compliant dealers free-riding on the efforts of others.[92] Restraints on *intra-brand* competition between distributors were argued to enhance *inter-brand* competition through facilitating greater non-price product differentiation.[93] And as all forms of vertical restraints were substitutes, this Chicagoan claim was to apply across-the-board,[94] including to resale price maintenance.[95]

Similar scepticism was cast upon supposed attempts by large firms to exclude rivals and cement their market position. In their 1956 article, Director and Levi laid the foundations for the Chicagoan approach to exclusionary conduct by arguing that the hardiness of market forces made them unlikely to succeed.[96] Indeed, many condemned practices could actually be considered legitimate competitive practices for all firms, large or small, that excluded simply inefficient rivals whilst offering consumer benefits.[97] For instance, rather than an anticompetitive attempt to leverage power from one market to another, tying was a potentially efficient means to reduce the cost of providing complementary products, to ensure compatibility, and a consumer convenience.[98] Even without pro-competitive efficiency explanations, it was unlikely to succeed.[99] Predatory pricing was also deemed improbable owing to the instigator sustaining much heavier losses than the prey that were unlikely to be recouped in the future, thus conflicting with the assumption of profit maximisation that would render direct acquisition a more rational course of action.[100] To be sure, the Chicagoan views of supposedly exclusionary

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[87] POSNER, ANTITRUST LAW 1976, *supra* note 16 at 22.

[88] POSNER, ANTITRUST LAW 1976, *supra* note 16 at 196-201; BORK, ANTITRUST PARADOX, *supra* note 30 at 226-227.

[89] *See* Ronald H. Coase, *The Nature of the Firm,* 4(16) ECONOMICA 386 (1937).

[90] Frank H. Easterbrook, *The Limits of Antitrust*, 63(1) TEX. L. REV. 1, 4-7 (1984) [hereinafter, Easterbrook, *Limits*].

[91] *See* Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75(3) YALE L.J. 373 (1966) [hereinafter Bork, *The Rule of Reason* [part II]] BORK, ANTITRUST PARADOX, *supra* note 30 at 288-289; Easterbrook, *supra* note 53 at 135; Demsetz, *100 Years, supra* note 85 at 215-216.

[92] This argument was initially developed for resale price maintenance (*see, e.g.*, Ward S. Bowman jnr, *The Prerequisites and Effects of Resale Price Maintenance*, 22(4) U. CHI. L. REV. 825 (1955); Telser, *supra* note 29 at 91-92) but was expanded to account for all vertical restraints. *See, e.g.* Bork, *The Rule of Reason* [part II], *supra* note 91; BORK, ANTITRUST PARADOX, *supra* note 30 at 289-291; POSNER, ANTITRUST LAW 1976, *supra* note 16 at 148.

[93] *See* Bowman, *supra* note 92.

[94] *See* Bork, *The Rule of Reason* [part II], *supra* note 91 at 404-405.

[95] *See* Bowman, *supra* note 92; Telser, *supra* note 29; Bork, *The Rule of Reason* [part II], *supra* note 91 at 453; Robert H. Bork, *Vertical Restraints:* Schwinn *Overruled*, SUP. CT. REV. 171, 173 (1977) [hereinafter Bork, *Vertical Restraints*]; POSNER, ANTITRUST LAW 1976, *supra* note 16 at 283-285; Demsetz, *100 Years, supra* note 85 at 216.

[96] Director & Levi, *supra* note 28 at 290. *See also*, Bork & Bowman, *supra* note 29 at 367 (prohibitions were based on "hearsay and legends rather than on reality."); POSNER, ANTITRUST LAW 1976, *supra* note 16 at 171; BORK, ANTITRUST PARADOX, *supra* note 30 at 137 ("the theory of automatically exclusionary practices is entirely without merit."); Easterbrook, *Workable Antitrust, supra* note 53 at 1701.

[97] *See* Bork & Bowman, *supra* note 29 at 366; Lester G. Telser, *Abusive Trade Practices: An Economic Analysis*, 30(3) LAW & CONTEMP. PROBS. 488, 504 (1965); BORK, ANTITRUST PARADOX, *supra* note 30 at 134-135 ("the infliction of injury upon rivals' is also a 'means by which productive efficiency is created").

[98] *See* Bowman, *supra* note 29; Telser, *supra* note 97 at 490; POSNER, ANTITRUST LAW 1976, *supra* note 16 at 171-184; BORK, ANTITRUST PARADOX, *supra* note 30 at 380-381.

[99] *See* Peltzman, *supra* note 29 at 322-324.

[100] *See* McGee, *supra* note 29; Telser, *supra* note 97 at 495; BORK, ANTITRUST PARADOX, *supra* note 30 at 144-154; John S. McGee, *Predatory Pricing Revisited*, 23(2) J.L. & ECON. 289, 291-300 (1980); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48(2) U. CHI. L. REV. 263 (1981) [hereinafter Easterbrook, *Predatory Strategies*].

practices were not impossibility theorems; sometimes firms *would* act irrationality.[101] But exclusionary conduct was improbable and unlikely to succeed, leaving market intervention perhaps not worth the effort.[102]

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In summary, the Chicagoan message was that antitrust condemned concentrations and conduct unlikely to have anticompetitive consequences owing to robust market forces and rational profit maximisation, whilst also chilling potential efficiencies beneficial to consumers. As a result, the scope of antitrust liability through *per se* rules ought to be substantially narrowed, and predominantly directed towards cartels and horizontal mergers to monopoly.[103]

III. THE CHICAGOAN REJECTION OF *AD HOC*, SUBJECT-SPECIFIC DETERMINATIONS OF LEGALITY

The foci of Chicagoan scorn were the numerous market practices subject to blanket, *per se* prohibition by antitrust law. As seen in the previous section, deductions from microeconomic theory suggested to the Chicago School that they were efficient at best, at worst subject to market self-correction. It is therefore understandable why the US Courts would absorb this *substantive* critique of the overbroad reach of legal prohibition and thus adopt a *form* of market intervention that facilitated closer scrutiny of their actual impact on the market for determining legality: *ad hoc*, subject-specific analysis of whether, on balance, the practice in question would reduce overall market efficiency.

Despite the ease of the mistake, this judicial response to their writing was simply not an accurate representation of the Chicagoan understanding of the relationship between law and economics in antitrust. On the basis of underappreciated views as to the legitimate *form* that antitrust law ought to take, A) Posner, B) Bork, and C) Easterbrook all explicitly rejected this means for determining legality as unworkable for decision-makers and unpredictable for businesses. What they proposed instead was *ex ante* incorporation of economic learning into general norms which, despite imperfectly distinguishing between efficient and inefficient conduct in every instance, overall reconciled efficiency-driven antitrust with the desiderata of legal certainty and administrability.

A) Posner's Response to Sylvania

The US Supreme Court's *Sylvania* (1977)[104] decision is often thought to be one of the Chicago School's most important victories.[105] Nevertheless, to understand their approach to competition policy it is crucial to note that this was a partial triumph: as the response of Posner clearly demonstrates, the Chicagoans agreed that they had (almost) won the battle on the substantive economic approach to vertical restraints, but *not* on the resultant *form* of market intervention through law.

Sylvania represented the US Supreme Court fundamentally altering the legal treatment of vertical restraints that had been resolutely negative only a decade previously in *Schwinn* (1967).[106] Citing Bork and Posner, it accepted the Chicago argument that vertical restraints were generally beneficial, stimulating inter-brand product differentiation through guaranteeing extra sales services by preventing free-riding.[107] As a result, the rule-based *per se* prohibition of non-price vertical restraints - in this instance, location clauses - was inappropriate and was thus overruled. There was some disappointment that resale price maintenance continued to be prohibited *per se,*[108] and a degree of initial hesitancy that US antitrust would really shake the overly broad application of automatic

[101] *See* Peltzman, *supra* note 29 at 318.
[102] *See, e.g.* on predation, BORK, ANTITRUST PARADOX, *supra* note 30 at 154.
[103] *Id.* at 405 (also including "deliberate predation"). *See also* Posner, *Chicago School, supra* note 16 at 928, 933 (the "orthodox Chicago position"); Easterbrook, *Workable Antitrust, supra* note 53 at 1701; Hovenkamp, *Post-Chicago Antitrust, supra* note 42 at 3. On Posner's disagreement, see *supra* note 16.
[104] *Sylvania*, 433 U.S..
[105] *See e.g.*, M Waelbroeck, *Vertical Agreements: Is the Commission Right not to Follow the Current U.S. Policy?*, 25 SWISS REV. INT'L COMPETITION L. 45 (1985) ("to a large extent attributable to the advent of the Chicago School"); Richard Whish & Brenda Sufrin, *Article 85 and the Rule of Reason*, 7 YEARBOOK EUR. L. 1, 9 (1987); Kovacic, *supra* note 16 at 61 ("*Sylvania* can be attributed chiefly to the Chicago School."); WITT, *supra* note 10 at 67 ("marks the first major victory of the Chicago school.").
[106] *U.S. v. Arnold, Schwinn & Co*, 388 U.S. 365 (1967).
[107] *See supra* notes 91-95.
[108] *See, e.g.* Bork, *Vertical Restraints, supra* note 95 at 173; Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48(1) U. CHI. L. REV. 6, 8-14 (1981) [hereinafter Posner, *Next Step*]. The *per se* rule of illegality for resale price maintenance derives from *Dr Miles Medical Co. v John D. Park & Sons Co*, 220 U.S. 373 (1911) and was overturned in *Leegin Creative Leather Products In.c v PSKS Inc.*, 551 U.S. 877 (2007).

illegality.[109] Still, Bork and Posner were delighted with the economics underpinning the substance of the ruling and how it indicated a radical redirection towards efficiency-focused antitrust.[110]

Nevertheless, what has often been overlooked when considering *Sylvania* as a Chicagoan triumph is that Posner fundamentally disagreed with the proposed *form* of market intervention for determining legality. The Supreme Court removed non-price vertical restraints from the frying pan of *per se* condemnation and placed them into the fire of the "rule of reason" standard, as articulated by Judge Brandeis in *Chicago Board of Trade* (1918):[111]

> *'The 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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.'*

The Supreme Court in *Sylvania* gave little indication as to how this standard was to be applied,[112] save for stating that "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition."[113] In essence, legality depended upon an *ad hoc*, conduct-specific evaluation of the competitive effects of the particular restraint in question.

Posner's immediate response to this form of market intervention was overwhelmingly negative: it was "formless", a "poor guide to the decision of restricted distribution cases", and did not provide "usable criteria of illegality".[114] Rather than case-specific analysis of pro- and anticompetitive consequences, he proposed a more administrable and predictable test comprising three consecutive rules.[115] Yet returning to this issue in 1981 he found even this test difficult to apply and therefore, as anticompetitive consequences were thought highly unlikely, he recommended a rule of *per se* legality to "lighten the burden on the courts and to lift a cloud of debilitating doubt" for businesses unsure of their normative obligations.[116] The intervening years had also amplified his condemnation of determining legality via "broad-ranging assessment of all competitive, and perhaps all economic benefits and costs of the challenged practice."[117] This "particularized case-by-case approach" to lawfulness had fostered "considerable legal uncertainty", thereby deterring efficient and pro-competitive use of vertical restraints.[118] Posner thus deemed the substantive economics underpinning the *Sylvania* decision to be sound, but its *form* of market intervention to determine legality highly problematic.

It is important to note how Posner's two proposed alternatives incorporated presumptions from economic research on vertical restraints - the low likelihood of anticompetitive effects, the difficult and error-prone nature of sifting "good" from "bad" - into designing legal norms that were more comprehensible than the rule of reason. Indeed, in the first edition of *Antitrust Law* he suggested that his purpose was to see efficient business practices as outside *per se* prohibition but '*without having to compare directly the gains and losses from a challenged practice*.'[119] This can also be gleaned from his recommendations for merger control in the mid-1970s: strong presumptive legality for horizontal mergers below high combined market shares as they are "precise", "workable" and avoid "intractable subjects for litigation";[120] abandoning legal prohibition of acquisition of potential competitors owing to the "impossibility of developing workable rules";[121] and rejecting an efficiencies defence for mergers.[122] Similarly, Posner struggled with the appropriate legal test for predatory pricing owing to

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[109] *E.g.* Bork, *Vertical Restraints*, *supra* note 95 at 171.

[110] *See* Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45(1) U. CHI. L. REV. 1, 5 ('good economics'), 12-13 (1977) [hereinafter Posner, *The Rule of Reason*]; Bork, *Vertical Restraints*, *supra* note 95 at 172; BORK, ANTITRUST PARADOX, *supra* note 30 at 287 (exhibiting a "far higher degree of economic sophistication").

[111] *Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918).

[112] *See* Posner, *The Rule of Reason*, *supra* note 110 at 13-14.

[113] *Sylvania*, 433 U.S. at 49.

[114] Posner, *The Rule of Reason*, *supra* note 110 at 15-16.

[115] *Id.* at 19 ((1) small market share is legal; 2) large market share without presale services is illegal; 3) large market share with presale services is illegal if output subsequently fell).

[116] Posner, *Next Step*, *supra* note 108 at 21-23.

[117] *Id.* at 7 ("amorphous", not "a workable standard of decision"), 8 ("lacks content and so does not provide guidance", the balancing of competitive effects "is infeasible and unsound"), 14 ("unlimited, free-wheeling inquiry").

[118] *Id.* at 22, and *see also* 15 ("A standard so poorly articulated and particularized, applied by tribunals so poorly equipped to understand and apply it, places at considerable hazard any restriction").

[119] POSNER, ANTITRUST LAW 1976, *supra* note 16 at 22 (emphasis added). *See also*, in the second edition, Posner, *supra* note 61 at ix ("the design of antitrust rules should take into account the costs and benefits of individualized assessment of challenged practices relative to the costs and benefits of rule-of-thumb prohibitions").

[120] Richard A. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75(2) COLUM. L. REV. 282, 306-313 (1975).

[121] POSNER, ANTITRUST LAW 1976, *supra* note 16 at 122. *See also* Posner, *supra* note 120 at 323-324 ("there is no way of translating this theoretical insight into an objective standard of illegality.").

[122] *Id.*

administrability issues.[123] His negative response to the form of market intervention introduced by the Supreme Court in *Sylvania* should therefore not have come as a shock. Indeed, two years earlier he claimed that satisfactory legal rules must be "reasonably precise" to thereby limit the "discretion" of decision-makers,[124] and, pre-empting his critique of *Sylvania*, condemned the Supreme Court for:[125]

> *"insensitivity to the practical limitations of the judicial process, which require rules to guide decisions rather than invitations to roam at large through masses of factual materials thrown up by the defense bar."*

In this way Posner, the figurehead of the "law & economics" movement, refused to determine the application of antitrust law through conduct-specific analysis of economic effects. He was not alone amongst the Chicago scholars in condemning such a form of market intervention.

B) Bork versus Williamson and his Peculiar Conceptualisation of the Rule of Reason

Bork's especial contribution to the Chicago School was to stress that the sole motivation for antitrust law, thus delimiting the scope of liability, was the maximisation of total welfare, the overall combination of allocative and productive efficiency. The overbroad application of *per se* rules of illegality did not take into account the latter efficiency of condemned practices, and therefore ought to be scaled back to primarily naked restraints that had few possible efficiencies.[126] For non-naked ("ancillary") restraints, the rule of reason was the appropriate form of antitrust inquiry. But what has not been adequately recognised is that Bork's conceptualisation of the rule of reason was rather unusual: it certainly did *not* amount to appraising the legality of individual business practices through consideration of their specific pro- and anticompetitive effects as per *Chicago Board of Trade* or *Sylvania*.

Despite his notoriety as the doyen of efficiency-informed antitrust scholars, Bork's aversion to *ad hoc*, conduct-specific determinations of legality should have been obvious from his early dispute with Oliver Williamson.[127] Williamson's influential 1968 paper, *Economies as an Antitrust Defence*, gave graphical representation to the welfare trade-off in horizontal mergers, whereby the loss of allocative efficiency may be outweighed by the productive efficiency of realising economies of scale.[128] He thus proposed the adoption of a productive efficiencies defence for merging parties to show the particular positive effects of the concentration counterbalancing any resulting loss of rivalry,[129] alongside a list of other factors for consideration.[130]

In *The Antitrust Paradox*, Bork borrowed Williamson's trade-off graph to explain the consumer welfare approach and to demonstrate how many antitrust problems lead to a reduction in allocative but an increase in productive efficiency.[131] Nevertheless, he was adamant that purely effects-based legal analysis was *not* the appropriate form that "efficiencies are to be given weight by law".[132] To determine legality on the basis of the efficiency consequences of a specific practice would be to demand the impossible of both antitrust decision-makers and subjects; Bork argued that thoroughly unpredictable and unworkable market intervention would be the result as it was impossible to reliably quantify efficiencies, even by defendant firms themselves.[133] Williamson refused to favour administrability over accurate sifting between pro- and anti-competitive conduct in each instance, accused Bork of overstating the volatility of directly addressing the inevitable efficiency trade-off, and rather baldly claimed that over time the courts would somehow work it all out.[134]

For Bork, the alternative to consideration of conduct-specific efficiency consequences for determining legality was to incorporate economic analysis *ex ante* into generalised norms – rules, presumptions, cumulative filters – that were therefore also administrable and comprehensible: the aim of *The Antitrust Paradox* was to "show that rules can be devised which reflect and resolve the tension between productive and allocative inefficiency accurately enough for the law to confer a net benefit", to thus "balance the tradeoff considerations

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[123] *Id.* at 188-189.
[124] Posner, *supra* note 120 at 282.
[125] *Id*. at 325-326 (emphasis added).
[126] *See, e.g.*, Bork, *The Rule of Reason* [part II], *supra* note 91 at 474 ("misuse of the *per se* concept destroys efficiency").
[127] *See generally*, for a summary, Kenneth Heyer, *Consumer Welfare and the Legacy of Robert Bork*, 57(S3) J.L. & ECON. S19, S23-S24 (2014).
[128] Oliver E. Williamson, *Economies as an Antitrust Defence: The Welfare Tradeoffs*, 58(1) AM. ECON. REV. 18, 21-22 (1968).
[129] *Id.* at 33-34.
[130] *Id.* at 25-32 (timing, future expansion, incipient stalling of market-wide trends, social discontent, control of wealth, quality of life in a democracy, technological progress).
[131] *See* BORK, ANTITRUST PARADOX, *supra* note 30 at 107-110, 125.
[132] *Id.* at 125. *See also*, for the same argument with others, Bork, *Contrasts*, *supra* note 64 at 410-412.
[133] *Id.* at 125-126 (courts would have to estimate efficiency and deadweight loss in the actual and hypothetical scenarios when "Passably accurate measurement" of either "is not even a theoretical possibility"). *See also* Bork, *Contrasts*, *supra* note 64 at 410 ("the attempt to measure efficiencies directly would cause the trial process to denigrate into industry studies and economic extravaganzas that would clearly make the law largely unenforceable."); Bork, *The Rule of Reason* [part II], *supra* note 91 at 386-397.
[134] *See* Williamson, *supra* note 128 at 19, 24, 34; Oliver E. Williamson, *Allocative Efficiency and the Limits of Antitrust*, 59(2) AM. ECON. REV. 105 (1969).

through *general legal rules*."[135] Bork's writing offers numerous examples. Predatory pricing was unlikely to be rational or effective, and therefore introducing potentially erroneous and "unworkable" cost tests were not worth the hassle.[136] It was impossible to rigorously prove that never, under any circumstances, would resale price maintenance have an anticompetitive effect, but the most rational explanation for its use on balance was to provide additional sales services, thus justifying an overall lack of legal concern.[137]

The most prominent example of such logic was the *per se* rule of illegality for naked price-fixing agreements. This Bork, with Ward S. Bowman Jnr., considered a "model" law, reconciling the economic consensus on cartels with delivery through a "relatively clear, workable rule".[138] That price-fixing or output-limiting agreements *could* generate productive efficiencies or *might* be doomed to failure through instability or a lack of market power was entirely irrelevant;[139] economics suggested that allocative inefficiency would result in the overwhelming majority of instances so there was no point, on balance, wasting resources abandoning the simple *per se* rule of prohibition.[140] The inevitably inaccurate overreach of responding via rule-based market intervention was therefore justified "not only on economic grounds but also because of the rule's clarity and ease of enforcement."[141]

But if Bork strongly argued against conceptualising the appropriate form of antitrust intervention as *ad hoc*, subject-specific decision-making, what is to be made of his clear support for the (purely economic)[142] rule of reason standard, where legality is dependent upon "the effect [business] behaviour was likely to have, considering the market context"?[143]

It is crucial to note that Bork's advocacy of this means for determining legality was conditional upon his unorthodox understanding of what the rule of reason entailed. Rather than the formulation of Judge Brandeis from *Chicago Board of Trade* (1918) as applied in *Sylvania* (1977),[144] he preferred Chief Justice White's earlier statement of the rule of reason as prohibiting business practices "either because of their inherent nature or effect or because of the evident purpose of those acts."[145] Bork thus considered the rule of reason a three-stage analysis of i) *per se* rules prohibiting naked agreements, ii) intent, and iii) effect upon the market.[146] Nevertheless, the latter part in Bork's reading is not as it seems; by placing emphasis upon the word "inherent" to modify both "nature" *and* "effect" in White's formulation,[147] Bork argued that the effects-based analysis was not to involve "the futile direct study of actual effects"[148] but "applying *rules of thumb constructed with the aid of economic analysis*",[149] primarily market-share thresholds.[150] The avoidance of "lengthy industry studies of actual performance"[151] and of having courts "sift through endless data" at the effects-based stage rendered *Bork's* rule of reason administrable for courts and afforded "predictability that businessmen and their counsel desire."[152]

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[135] BORK, ANTITRUST PARADOX, *supra* note 30 at 129 (emphasis added). *See also* Bork, *Contrasts*, *supra* note 64 at 411 ("It is enough to know in what sorts of transactions efficiencies are likely to be present and in what sorts anticompetitive effects are likely to be present. The law can then develop objective criteria").

[136] BORK, ANTITRUST PARADOX, *supra* note 30 at 154-155.

[137] Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77(5) YALE L.J. 950, 963-964 (1968).

[138] Bork & Bowman, *supra* note 29 at 366.

[139] *Id*. *Contra* Director & Levi, *supra* note 28 at 294-295 (questioning the *per se* condemnation of cartels that do not cover a substantial share of the market).

[140] *See* Bork, *Contrasts*, *supra* note 64 at 410; Bork, *The Rule of Reason* [part II], *supra* note 91 at 384-385, 387; BORK, ANTITRUST PARADOX, *supra* note 30 at 286. This is why Bork considered the rejection of a 'reasonableness' standard by Justice Peckham in *Trans-Missouri*, 166 U.S. (*contra* Priest, *supra* note 32 at S7-S8 on historical inaccuracy) and Judge Taft in *Addyston Pipe & Steel Co. v. U.S.* 175 U.S. 211 (1899) for naked restraints to be very important; *see* BORK, ANTITRUST PARADOX, *supra* note 30 at 22-30. It also explains his displeasure with Judge Brandeis in *Chicago Board of Trade*, 246 U.S. implying that there ought to be no *per se* rules; *see* Bork, *The Rule of Reason* [part I], *supra* note 62 at 838; BORK, ANTITRUST PARADOX, *supra* note 30 at 44.

[141] BORK, ANTITRUST PARADOX, *supra* note 30 at 268. He also supportively quotes Justice Marshall in *U.S. v. Container Corp* 393 US 333 (1969) on the benefits of rule-based "arbitrariness" for countervailing administrative advantages that may outweigh considering individual instances; *see* BORK, ANTITRUST PARADOX, *supra* note 30 at 18.

[142] Much of his criticism of the rule of reason is directed at suggestions that non-economic, political factors could be considered. *See, e.g.*, Bork, *The Rule of Reason* [part I], *supra* note 62 at 838, 840, 843; BORK, ANTITRUST PARADOX, *supra* note 30 at 41-47.

[143] BORK, ANTITRUST PARADOX, *supra* note 30 at 18.

[144] *Chicago Board of Trade*, 246 U.S.; *Sylvania*, 433 U.S..

[145] *U.S. v. American Tobacco Co.*, 221 U.S. 106 (1911). *See* BORK, ANTITRUST PARADOX, *supra* note 30 at 18 ("its most perfect form").

[146] *See* Bork, *The Rule of Reason* [part I], *supra* note 62 at 803-804; Bork, *The Rule of Reason* [part II], *supra* note 91 at 388; BORK, ANTITRUST PARADOX, *supra* note 30 at 36-37.

[147] *See*, for the clearest evidence of this, Bork, *The Rule of Reason* [part I], *supra* note 62 at 804 ("If the word "inherent" in White's sentence modifies "effect", as seems likely, it may be that the test contemplated not an examination of actual effects but an inference of the effect from some other fact, probably from the market size or power of the party or parties.").

[148] BORK, ANTITRUST PARADOX, *supra* note 30 at 37. *See also* Bork, *The Rule of Reason* [part II], *supra* note 91 at 390 (courts should not "attempt to measure the efficiencies since measurement, for all practical purposes, is impossible.").

[149] Bork, *The Rule of Reason* [part II], *supra* note 91 at 389. *See also* BORK, ANTITRUST PARADOX, *supra* note 30 at 37 ("the inference of bad effects from some fact additional to the character of the restraint.").

[150] *See, e.g.*, Bork, *The Rule of Reason* [part I], *supra* note 62 at 804; Bork, *The Rule of Reason* [part II], *supra* note 91 389-390; BORK, ANTITRUST PARADOX, *supra* note 30 at 37, 267.

[151] BORK, ANTITRUST PARADOX, *supra* note 30 at 34.

[152] *Id.* at 276-277, and *see also* 34, 37.

To summarise, Bork refused to countenance *ad hoc* efficiencies analysis to determine the legality of business conduct. Instead, he advocated generalised norms - *per se* rules, presumptions - to structure a very peculiar conceptualisation of the rule of reason that restrained decision-making and therefore gave greater normative certainty to businesses. Undoubtedly the adoption of generalised norms meant that the absolute accuracy of prohibiting inefficient and permitting efficient practices was sacrificed. But to settle for the alternative and "demand perfection", Bork claimed, was "to demand the abolition of the law".[153] This conclusion reveals the latent conceptualisation of "law" as the medium for market intervention in the Chicago School's approach to antitrust. It can again be glimpsed when *critics* began to demand economic perfection in antitrust law throughout the 1980s.

C) Post-Chicago Complexity and Easterbrook's "Workable Antitrust" School

Whilst the 1970s represented the waxing of the Chicago School approach to antitrust, throughout the 1980s it waned in academic circles as its critics condemned how market intervention had been "minimalized and trivialized".[154] The coalition of counter-Chicagoan voices was broadly constituted: some were continuing adherents of older Harvard School scepticism of industrial concentration;[155] others rejected the exclusive focus upon efficiency as an impoverished foundation for antitrust.[156]

Yet the most interesting critics of the Chicago School were scholars that largely accepted their pure efficiency focus,[157] but challenged the veracity of their strong assumptions of rational profit maximisation and robust market self-correction. The main contribution of this "Post-Chicago" or "new" industrial organisation approach was to incorporate the strategic considerations of game theory into dynamic models, thus arguing that business practices often had more complex effects than the simple Chicagoan assumptions suggested.[158] Strategic barriers to entry may be rife;[159] for example, fostering a reputation for predatory pricing might deter market entry much more effectively than engaging in such irrational conduct itself.[160] The vertical restraints between producers and distributors deemed harmless by Chicagoans may actually be problematic owing to their ability to raise rivals' costs.[161] In essence, the Chicago School was accused of being far too sanguine in its reliance upon the simple assumptions of neo-classical price theory which could not account for every possible anticompetitive eventuality, instead resulting in under-inclusive legal prohibition.[162] Shifting the methodological pendulum in competition microeconomics back from abstract and deductive price theory towards complex and inductive IO, the Post-Chicagoans advocated context-specific studies into the consequences of particular practices on the market in question to determine legality; only such "[i]ntense fact-specificity anchors the law to reality".[163] As summarised by Sullivan, the scope of Chicago School antitrust was premised upon "generalizations", whilst "the post-Chicagoan must determine purpose and effect by empirical inquiry and analysis."[164] Context is key in evaluating whether conduct actually has, or will likely have, a negative or positive impact on specific markets.

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[153] *Id.* at 123.

[154] Eleanor M. Fox and Robert Pitofsky, *The Antitrust Alternative: Introduction*, 62(5) N.Y.U L. REV 931 (1987).

[155] *See, e.g.*, William G. Shepherd, *The Twilight of Antitrust*, 18(1) ANTITRUST L. & ECON. REV. 21 (1986) (the "old-time religion of bigness and virtuous monopoly should be as dead as the dodo"); Willard F., Mueller, *A New Attack on Antitrust: The Chicago Case*, 18(1) ANTITRUST L. & ECON. REV. 29, 43-44 (1986).

[156] *See supra* note 60.

[157] *E.g.*, Hovenkamp, *After Chicago*, *supra* note 42 at 213; Herbert Hovenkamp, *Chicago and its Alternatives*, 12(6) DUKE L.J. 1014, 1020 (1986); Kovacic, *supra* note 16 at 9.

[158] *See generally* Hovenkamp, *After Chicago*, *supra* note 42; Hovenkamp, *Post-Chicago Antitrust*, *supra* note 42 at 3-5; Oliver E. Williamson, *Delimiting Antitrust*, 76(2) GEO. L.J. 271 292-293 (1987); Baker, *supra* note 32; Carl Shapiro, *The Theory of Business Strategy*, 20(1) RAND J. ECON. 125 (1989); Kovacic, *supra* note 32 at 1464-1466; Wright, *supra* note 11 at 8; Peeperkorn & Verouden, *supra* note 43 at 8.

[159] *See* Steven C. Salop, *Strategic Entry Deterrence*, 69(2) AM. ECON. REV. 335 (1979); Oliver E. Williamson, *Review: The Antitrust Paradox*, 46(2) U. CHI. L. REV. 526, 530 (1979).

[160] *See* Williamson, *supra* note 159 at 528 (critiquing Bork on predation); Shapiro, *supra* note 158 at 129.

[161] *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price,* 96(2) YALE L.J. 209 (1986).

[162] *See* Hovenkamp, *After Chicago*, *supra* note 42 at 284 ("too simple to account for or to predict business firm behaviour in the real world."); Hovenkamp, *supra* note 157 at 1020 ("not complex enough to account for every situation in which the problem might occur"); Fox & Sullivan, *supra* note 51 at 945 ("reductionist paradigm"); Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World*, 63(2) ANTITRUST L.J. 669, 690 (1994) ("Too many practices that, if analyzed with greater particularity, would be found harmful to competition pass through the Chicago screen.").

[163] Fox & Sullivan, *supra* note 51 at 937 ("the law grows not by deduction from any sweeping set of theoretical assumptions but by an inductive process that stays in touch with the changing business environment and with the particular facts out of which specific disputes arise."). *See also* Sullivan, *supra* note 162 at 672 ("the post-Chicago approach invites detailed factual analysis.").

[164] Sullivan, *supra* note 162 at 678.

It would have been possible for Chicagoan scholars to fight economic fire with economic fire, arguing that their recommendations actually *did* incorporate strategic considerations,[165] or that the Post-Chicagoan approach was defective in substance.[166]

But instead Frank Easterbrook combatted the Post-Chicagoan charge on the grounds of administrability and normative predictability. Although similar concerns have been glimpsed in Chicagoan scholarship throughout this section, Easterbrook's distinctive contribution was to explicitly place institutional limitations and the comprehensibility of legal obligations for legal subjects at the centre of his analysis of the appropriate form of market intervention.[167]

His direct response to growing criticism that Chicago recommendations were too simple,[168] that they did not always prohibit the anticompetitive and permit the efficient in every instance, was that "pursuit of the perfect is the enemy of the good."[169] It was to fall foul of the "nirvana fallacy" to believe that every possible imperfection in the reach of the law was actually worth the cost of remedying it.[170] This idealism was being spurred by the Post-Chicagoan creation of ""existence theorems"", complex models showing that *generally* pro-competitive might lead to contrary outcomes in very *specific* circumstances.[171] To ensure that antitrust did more good than harm to overall efficiency, Easterbrook stressed that the formulation of legal norms had to incorporate economic research into the costs of likely errors (over- or under-inclusivity) and of their enforcement.[172]

Therefore, he argued that the virtue of *per se* rules was their simple *in*accuracy: generality was appropriate for prohibiting practices that would be anticompetitive in the overwhelming majority of instances as administrative savings from ease of application and normative clarity for businesses counterbalanced rare condemnation of pro-competitive efficiencies.[173] The same logic of *per se* legality applied conversely for practices where the potential for negative consequences was thought to be minuscule and the costs of searching for a few bad apples substantial.[174]

Despite its potential for perfect legal accuracy in sifting anticompetitive from efficient, Easterbrook was a staunch critic of the *ad hoc*, subject-specific legal analysis conducted under the rule of reason standard, stressing its sizeable error and administrative costs. It was naïve to assume that legality could be determined via the rule of reason standard without error,[175] and the vagueness of its formulation failed to help businesses planning their conduct, thus inviting further wasteful litigation.[176] The pursuit of absolute antitrust accuracy had mistakenly fostered over-ready recourse to the rule of reason in decisions such as *Sylvania*.[177] Even for practices where the consequences were more complex, Easterbrook stressed that it was not a black or white choice between the form of *per se* rules or particularistic determinations of legality: the task of economic research was to assist antitrust to "use the economists' way out" by devising cumulative presumptive filters to structure analysis.[178] This would be of considerable benefit not just for antitrust decision-makers but also for businesses to comprehend their obligations under antitrust.[179]

What renders Easterbrook's articulation of the various costs of antitrust enforcement distinctly Chicagoan is how he resolved the inevitable imperfections of generalised *per se* rules and presumptive filters. In

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[165] *See*, on the Chicago School pre-empting Post-Chicagoan revelations, Kobayashi and Muris, *supra* note 16 at 147-148, 161. *E.g.* for Posner on a strategic reputation for predatory pricing deterring entry, Posner, *Exclusionary Practices*, *supra* note 16 at 516-517; Posner, *Chicago School*, *supra* note 16 at 939-940. Director and Levi may have foreshadowed vertical restraints raising rivals' costs. *See* Director & Levi, *supra* note 28 at 290.

[166] This has been conducted by later defenders. *See, e.g.*, Crane, *supra* note 13 at 1924-1926; Wright, *supra* note 11 at 29-30; Kobayashi and Muris, *supra* note 16.

[167] *See* George L. Priest, *The Limits of Antitrust and the Chicago School Tradition*, 6(1) J. COMPETITION L. & ECON. 1, 8-9 (2010) (though underappreciating the similarity with other Chicagoans).

[168] *E.g.* Easterbrook, *Workable Antitrust*, *supra* note 53 at 1700.

[169] *Id.* at 1704.

[170] *See* Frank H. Easterbrook, *Breaking Up is Hard to Do*, 5(6) REGULATION 25, 26 (1981) [hereinafter Easterbrook, *Breaking Up*]; Easterbrook, *Workable Antitrust*, *supra* note 53 at 1711-1712 (on the "Nirvana Fallacy" – assuming that because a means for determining legality is more discriminating it should be adopted, ignoring the "costs of administration and error" of prohibiting efficient conduct, especially as inefficient practices missed by an imperfect rule may be eroded by competition anyway).

[171] Easterbrook, *Limits*, *supra* note 90 at 15, and *see also* 11; Easterbrook, *Workable Antitrust*, *supra* note 53 at 1706-1707.

[172] *See* Easterbrook, *Predatory Strategies*, *supra* note 100 at 335.

[173] *Id. See also* Easterbrook, *Limits*, *supra* note 90 at 9-10, 14-15, 39 (only really the case for naked agreements); Easterbrook, *Workable Antitrust*, *supra* note 53 at 1704 ("Rules that do well on average are the best courts can produce and apply.").

[174] *See* Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76(2) GEO. L.J. 305, 310 (1987) [hereinafter Easterbrook, *Decisionmaking*]. An approach developed through his early consideration of predatory pricing. *See* Easterbrook, *Predatory Strategies*, *supra* note 100 at 333-337.

[175] *See* Easterbrook, *Limits*, *supra* note 90 at 11-12 ("it is fantastic to suppose that judges and juries could make such an evaluation… A global inquiry invites no answer; it puts too many things in issue.").

[176] *Id.* at 12-13.

[177] *See* Easterbrook, *Limits*, *supra* note 90 at 13-14, 39. This problematic form for determining legality went beyond antitrust. *See* Frank H. Easterbrook, *What's So Special About Judges?,* 61(4) U. COLO. L. REV. 773,779-781 (1990) [hereinafter Easterbrook, *Judges*] (dismissing balancing tests as inconclusive "laundry lists").

[178] Easterbrook, *Limits*, *supra* note 90 at 14, 17, 39. *See*, for examples of filters: Easterbrook, *Limits*, *supra* note 90 at 17-18. Although the rule of reason is kept as a last resort, the aim is to substantially reduce its use: Easterbrook, *Limits*, *supra* note 90 at 18.

[179] *See* Easterbrook, *Limits*, *supra* note 90 at 14, 18.

the choice between substantive over-inclusion (false positives) and under-inclusion (false negatives), Easterbrook employed the Chicago School's foundational commitment to the robustness of market self-correction: imperfect rules and filters should err on the side of cautious acceptance of possibly detrimental practices as market forces themselves would probably act as a secondary disciplinary influence beyond legal condemnation. The alternative of erroneously condemning beneficial practices would have a greater chilling effect that extended beyond the instant conduct, causing wider societal inefficiency. Such legal false positive were thought much slower to self-correct, as demonstrated by the existence of ancient problematic precedents.[180]

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Easterbrook's countering of Post-Chicagoan calls for context-specificity and complexity in determining legality with administrability and normative comprehensibility was relatively successful.[181] But he also did not believe that his error-cost approach constituted much of a gloss upon the orthodox Chicagoan approach; so endemic was its concern for applicability and certainty in conceptualising the appropriate form of market intervention that Easterbrook thought it may as well have been rebranded the "Workable Antitrust Policy School".[182] The discussion of Posner and Bork's approach in this section provides substantial evidence for his proposal, as could other Chicagoan protagonists.[183] Their ideal vision of the relationship between law and economics in antitrust was for sophisticated insights from the latter to be *ex ante* incorporated into generalised norms (rules, presumptions, structured tests) to thereby formally foster legal certainty and administrability.[184]

But despite the clarity of their rejection of *ad hoc* determinations of legality – purely effects-based analysis, the rule of reason standard - their suggested conceptualisation of the most appropriate form of market intervention invites deeper enquiry. Beyond austere calculations of administrative cost-savings, why did the Chicagoans, the high priests of neo-classical price theory in competition law, believe there to be great virtue in determining legality through the form of generalised rules or presumptions?

IV. WHY? THE CHICAGO SCHOOL AND THE RULE OF LAW

The tell-tale sign of adherence to some conception of the rule of law is scholarship that refers to *intra vires* normative actions - statutory interpretation, precedential development, use of conferred powers - as still being "not really law". They amount to suggestions that legal validity is necessary but not sufficient; to recognition that there are "legitimate" and "illegitimate", "more legal" and "less legal" exercises of authority that are nonetheless constitutionally valid. Well-known examples include Friedrich Hayek's distinction between *nomos* and *thesis*,[185] Lon Fuller's contrasting of legal norms meeting the conditions of the rule of law with those closer to managerial direction,[186] or Albert Venn Dicey and Joseph Raz comparing respect for the formal ideal with the arbitrary exercise of legal authority.[187] There are countless definitions of the rule of law, each proposing a particular yardstick against which to judge the legitimacy of otherwise constitutionally valid exercises of legal authority.[188] What sets these theorists apart is their focus upon the appropriate *form* of law, irrespective of the substantive ends to which law is deployed.[189]

It will be demonstrated A) that ~~such~~ similar signals of aspirations towards realising the formal rule of law ideal are common to the later scholarship of the Chicago School of antitrust. Bork and Easterbrook particularly indicate that legality should be determined through the enforcement of generalised norms of lawfulness and

[180] *See* Easterbrook, *Breaking Up, supra* note 170 at 25 ("rival firms should outstrip courts in rectifying monopoly"); Easterbrook, *Limits, supra* note 90 at 2-3, 15-16, 24-25 (markets are better than judges at penalising inappropriate conduct); Easterbrook, *Workable Antitrust, supra* note 53 at 1701; Easterbrook, *Decisionmaking, supra* note 174 at 306-311. *Cf* Bork & Bowman, *supra* note 29 at 375 (poor judicial decisions are rarely corrected due to the political limitations upon Congress); BORK, ANTITRUST PARADOX, *supra* note 30 at 133.

[181] *See, e.g.*, Joseph F. Brodley, *Post-Chicago Economics and Workable Legal Policy*, 63(2) ANTITRUST L.J. 683, 694 (1994) ("Post-Chicago economics can be effectively incorporated into legal policy" but will require "workable legal rules."); Fox, *Post-Chicago, supra* note 60 at 77 ("for the sake of rule of law and administrability of law, economics must be simplified and generalized", but says nothing else on this). *See also,* for the damascene conversion of an earlier critic, Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique,* COLUM. BUS. L. REV. 257 (2001); HOVENKAMP, *supra* note 1 at 47-49. For more equivocal acceptance of Easterbrook's approach: Kaplow, *supra* note 42 at 195-196; Williamson, *supra* note 158; Lande, *supra* note 11 at 452.

[182] Easterbrook, *Workable Antitrust, supra* note 53 at 1700.

[183] *E.g.* McGee's return to predation and rejection of most tests proposed for being unworkable. *See* McGee, *supra* note 100; William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75(7) VA. L. REV. 1221, 1244-1245 (1989).

[184] As briefly discussed in the conclusion, this is indistinguishable from the contemporary "neo"-Chicago approach.

[185] *See generally* FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY (Routledge 2013).

[186] *See generally* LON L. FULLER, THE MORALITY OF LAW (rev. ed., Yale University Press 1969).

[187] *See generally* ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION ch. IV (8th ed., Liberty Fund 1982); Joseph Raz, *The Rule of Law and Its Virtue,* in THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (Clarendon Press 2011).

[188] *See* Craig, *supra* note 12; MARTIN LOUGHLIN, FOUNDATIONS OF PUBLIC LAW ch 11 (Oxford University Press 2010).

[189] *See* Raz, *supra* note 187 at 211, for a persuasive defence of the importance of isolating the virtues of legal form, rather than it being lost in a broader philosophy of the substantively "good" and "bad".

unlawfulness that afford legal certainty to businesses. To better understand the appeal of this legal conceptualisation of antitrust, two direct and more substantial engagements with the desirability of this form of market intervention will also be considered: B) the metaphysical discussion of the older Chicagoan economists, who connected the formal rule of law to political liberty; and C) Posner's economic analysis of the ideal as optimally recalibrating subject incentives to effectively deliver the goal animating market intervention, ie maximising efficiency

A) Bork and Easterbrook: On "Good" and "Bad" Law

The Antitrust Paradox is not just one of the most important books on the economics underpinning competition policy. It is arguably also a fundamental work on the conceptualisation of antitrust in accordance with the formal ideal of the rule of law.

Bork's intention was not simply to reorient US competition law according to the Chicagoan approach to *economics*, but also through considering "the virtues appropriate to law *as law"*.[190] Of course US antitrust was legal as a matter of constitutional validity; a number of statutes have been passed prohibiting various types of anticompetitive conduct and the US Supreme Court has the authority to interpret their meaning, thereby determining the normative obligations incumbent upon legal subjects. But as is clear from the earliest pages of *The Antitrust Paradox*, Bork believed that even valid law can take the form of "bad" law:[191]

> *"[Although] the very idea of the rule of law … is not, and cannot be, nearly so highly developed as that of economics, law does have requirements that are distinctively its own. When these are ignored, as they increasingly have been in antitrust adjudication, law that is bad as law, quite apart from its substantive content, necessarily results."*

Bork stressed that antitrust was "not respectable *as law"*.[192] Throughout his writing, he suggested that realising competition policy through the medium of law comes with its own requirements, an "intellectual discipline of its own".[193] The above reference to undesirability for reasons "quite apart from its substantive content" emphasises that his concern was not with a *substantive* conceptualisation of the rule of law (eg rights of due process, access to justice)[194] but the *form* of market intervention for determining the legality of conduct, regardless of its economic merit. This is confirmed by reference to "attributes of rationality, efficacy, tolerable certainty" as "characteristics of good law."[195] Sometimes the formal rule of law ideal was couched by Bork in terms of responsible adjudication, which required antitrust decision-making:[196]

> *"upon criteria which are judicially administrable, give fair warning to those required to obey the law, permit sufficient predictability so that desirable conduct is not needlessly inhibited, and permit rational explanation…"*

Furthermore, these requirements of "good" law could take precedence over even substantively sound economic theory.[197] And while more frequently expressed purely in terms of normative comprehensibility for businesses, at times Bork suggested that the form of generalised, "simple *rules* of substantive law" was critical to realising this benefit.[198]

The clearest demonstration of Bork's foundational faith in the virtues of the formal rule of law was actually his advocacy of efficiency as the sole goal animating antitrust. Chicagoan scholars unfailingly stressed the *economic* need to incorporate considerations both of allocative and productive efficiencies, excluding political preference for small businesses and atomised markets. But Bork also emphasised "only that goal permits courts

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[190] BORK, ANTITRUST PARADOX, *supra* note 30 at 7 (emphasis in original).
[191] *Id.* at 8 (emphasis added).
[192] *Id.* at 418 (emphasis added).
[193] Robert H. Bork, *The Role of the Courts in Applying Economics*, 54(1) ANTITRUST L.J. 21, 24 (1985) (Nobody listens to his claim that the case for consumer welfare rests on legal arguments too because they do not believe that "law has any intellectual discipline of its own.") [hereinafter Bork, *The Role of Courts*]. *See also* Bork, *The Rule of Reason* [part I], *supra* note 62 at 780 ("antitrust is law as well as economics, and law has its own claims, its own tradition and discipline."); BORK, ANTITRUST PARADOX, *supra* note 30 at 8 ("We are too little accustomed, however, to thinking of law as a science").
[194] Though this boundary is somewhat blurred when he shifts into arguments based upon the constitutional separation of powers. *See, e.g.*, Bork, *The Rule of Reason* [part II], *supra* note 91 at 876; Bork, *The Role of Courts*, *supra* note 193 at 24.
[195] Bork, *The Rule of Reason* [part II], *supra* note 91 at 876.
[196] Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57(2) AM. ECON. REV. 242, 244 (1967) [hereinafter Bork, *Antitrust and Monopoly*]. *See also*, on the formal rule of law in terms of judicial responsibility: BORK, ANTITRUST PARADOX, *supra* note 30 at 72.
[197] *See* Bork, *The Rule of Reason* [part I], *supra* note 62 at 781.
[198] BORK, ANTITRUST PARADOX, *supra* note 30 at 81 (emphasis added). *See also* Bork, *The Rule of Reason* [part I], *supra* note 62 at 780 (the rule of law requires one to "determine what rules can be properly laid down for the future" with its "additional limits" of "warning"); *supra* notes 135-141 on *per se* rules.

to behave responsibly and to achieve the virtues appropriate to law".[199] Indeed, this argument from the rule of law may have been his most important.[200] Bork's proposition was that permitting the judiciary *discretion* to draw upon any political goal they wished to decide antitrust liability in an *ad hoc*, subject-specific fashion fostered hopelessly unpredictable decision-making, denying fair warning as to one's normative obligations that hindered individual planning:[201]

> *"No businessman can know what the law is if the "law" depends upon the sympathies and prejudices of any one of the hundreds of federal judges before whom he may find himself arraigned at some certain date in the future."*

The use of quotation marks emphasises Bork's belief that without efficiency as the singular goal of antitrust, the resultant form of market intervention is a degenerate normative order that "hardly deserves the name of law".[202]

Easterbrook agreed with Bork's justification for consumer welfare based on legal certainty (and was also a fan of derisory quotation marks): for legal prohibition to be unforeseeably determined on the basis of any number of unknowable, incompatible goals in the particular discretionary decision at hand was "not a power to enforce "law" at all".[203] He too suggested that there are legitimate and illegitimate forms of market intervention, and was often much clearer than Bork in linking normative certainty with the decisional restraint of generalised, rule-based norms. This was particularly visible in his later writing. Developing his preference for cumulative presumptions in antitrust over the rule of reason, Easterbrook argued more generally that "laundry lists" of factors constituting legal balancing tests[204] or "plastic standards" defied regular application as they permitted decision-makers to 'go any which way.'[205] In such circumstances, where there are no norms of general scope, "no rules of law", but only judicial discretion to impose particular outcomes, uncertainty not only fosters needless litigation,[206] but also fails to guarantee equality before the law. Normative orders reliant upon *ad hoc* determinations of legality under vague standards, facilitating differential outcomes from case-to-case and decision-maker-to-decision-maker, permitted personal idiosyncrasies and views of the worthiness of the individual subject to unpredictably influence results.[207] In contrast, Easterbrook argued that a commitment to law as generalised norms of equal application - formulated to be prospectively applied in the future, and applied in the present to guarantee continuity with the past - ensure restrained and regularised enforcement so that such decisions "may be called law rather than will, rules rather than results."[208] It is for these reasons that Easterbrook considered "decision by rule […] an objective of law' and 'a benefit that cannot be doubted".[209]

It is therefore clear that Bork and Easterbrook subscribe to some formal understanding of the rule of law as a desirable ideal; that legitimate market intervention is conceptualised as generalised norms that in their rigidity and restraint delineate the boundaries between legal and illegal in a manner comprehensible to businesses (prospective, clear, public). The virtues justifying this aspirational form for determining legality seem to be the interconnected phenomena of administrative restraint and normative clarity. Still, this is rather vague. Bork and Easterbrook were not legal philosophers. Nevertheless, they were part of a movement that had amongst its ranks scholars – counter-intuitively, economists - who *did* engage with jurisprudential issues and regarded the formal rule of law to be a necessary component of political liberalism.

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[199] BORK, ANTITRUST PARADOX, *supra* note 30 at 89. *See also* Bork, *The Rule of Reason* [part II], *supra* note 91 at 876; Bork, *Antitrust and Monopoly*, *supra* note 196 at 244 ("Consumer welfare is the only legitimate goal of antitrust, not just because antitrust is economics, but because it is law.").

[200] *See* Bork, *Antitrust and Monopoly*, *supra* note 196 at 246. *See also*, for recognition of this underappreciated aspect, Lande, *supra* note 11 at 436-438; Kovacic, *supra* note 32 at 1462; Heyer, *supra* note 127 at S22.

[201] BORK, ANTITRUST PARADOX, *supra* note 30 at 81. *See also* Bork & Bowman, *supra* note 29 at 370 ("prediction of the courts' behaviour would become little more than a guessing game"); Bork, *The Rule of Reason* [part I], *supra* note 62 at 832 (consumer welfare meets "the virtues appropriate to good law by becoming capable of giving fair warning to those who must obey, susceptible for principled administration by the courts that apply it"); BORK, ANTITRUST PARADOX, *supra* note 30 at 405 ("Departures from that standard destroy the consistency and predictability of the law.").

[202] Bork & Bowman, *supra* note 29 at 370. *See also* BORK, ANTITRUST PARADOX 1993, *supra* note 27 at 427 (judicial discretion as to the goals of antitrust made "anything resembling a rule of law impossible.").

[203] Easterbrook, *Workable Antitrust*, *supra* note 53 at 1703. *See also* Easterbrook, *Limits*, *supra* note 90 at 716 ("multi-goal antitrust policy is unpredictable and unprincipled. If some efficiency is to be sacrificed to some other ends, then judges can reconcile any decision, in any case, with the policy.").

[204] Easterbrook, *Judges*, *supra* note 177 at 780.

[205] Frank H Easterbrook, *Abstraction and Authority*, 59(1) U. CHI. L. REV. 349 (1992) [hereinafter Easterbrook, *Abstraction*]. *cf* Posner, *supra* note 120 at 282.

[206] Easterbrook, *Judges*, *supra* note 177 at 780-781.

[207] *See id.* at 781 (with standards the judges focus on "the facts before them and not on how rules affect future conduct. When there are no "rules" the tug of fair treatment is especially strong. Judges who have personal idiosyncrasies or ideologies may indulge them freely."); Easterbrook, *Abstraction*, *supra* note 205 at 350 ("the more discretion, the less "law" remains in the system." Abstracted standards "liberate courts from rules, license *ex post* appreciations and "fair" divisions of the stakes; concrete rules establish restrain discretion later on.").

[208] Frank H. Easterbrook, *Stability and Reliability in Judicial Decisions*, 73 CORNELL L. REV. 422 (1988).

[209] Easterbrook, *Abstraction*, *supra* note 205 at 350.

B) The Chicago School of Economics and Liberal Political Theory

The historical account in Section I mentioned that the University of Chicago established a reputation in the inter-war period as a continuing devotee of liberal economic policy in an increasingly unreceptive climate favouring central direction. The scholars providing the microeconomic foundations to the subsequent Chicago School of antitrust were similarly animated by a belief in the efficiency of free markets.[210] But in contrast to later Chicagoans, they were also much more explicit in their being motivated by metaphysical considerations of individual freedom that further recommended a free market society. That "freedom itself is of transcendent importance as a condition of moral life" was especially visible in the writings of Frank Knight[211] and Henry Simons,[212] though even Stigler, the later figurehead of empirical Chicago economics, also made unusually philosophical claims concerning freedom and the dignity of man.[213]

Economic freedom on the open market and the enjoyment of political freedom were often considered by Chicago economists to be two sides of the same coin.[214] The common potential threat to both was the overbearing state, whether as central planner of economic production or despotic tyrant of the polity.[215] Yet just as neo-liberal economic policy both warns against and requires market intervention,[216] liberal political philosophy shares the tension that government is a necessary evil to guarantee individual freedom.[217] Whether its task is to prevent violence between citizens, enforce contracts, guarantee property rights, authoritatively adjudicate disputes, or prohibit cartels, there is a friction at the heart of liberalism, including the brand represented by the Chicago School: '[h]ow can we keep the government we create from becoming a Frankenstein that will destroy the very freedom we establish it to protect?'[218] Somewhat surprisingly for a group of economists, the two solutions were both legal.

The primary means to maintain individual political freedom vis-à-vis the state's monopoly of coercion was through *substantive constitutionalism*: restraining centralised power by only conferring a limited range of competences and powers to act with constitutional validity.[219] Naïve expectations that government could solve all ills and be trusted with greater constitutional competence ignored "its evils and dangers."[220]

However, many of the early Chicagoan economists also subscribed to *the formal rule of law* as an additional restraint; essentially a belt-and-braces limitation upon interference with individual freedom by state action that was nevertheless constitutionally valid. As precursors to the suggestions of Bork and Easterbrook above, prior Chicagoan scholarship is awash with conceptualisations of law as a generally-applicable framework of norms structuring individual conduct and restraining state power.[221] Indeed, a number of older Chicagoan scholars found the jurisprudential concept of the formal rule of law to be a concomitant ideal contained within

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[210] Notwithstanding the need for competition policy and disagreement as to what this entailed; *see supra* note 76.

[211] Knight, *Planful Act, supra* note 76 at 340. *See also*: Frank H. Knight, *The Role of Principles in Economics and* Politics, 41(1) AM. ECON. REV. 113 (1951) [hereinafter Knight, *Principles*].

[212] Simons, *Free Competition, supra* note 22 at 68 ("The preservation of freedom is, I submit, the most important end of policy"); Davenport, *supra* note 76 at 6 (Simons' views "rested on the dignity and worth of the individual and on the belief that the bulwark of individual liberty cannot be disassociated from the preservation of the free competitive market.").

[213] *See* George Stigler, *The Goals of Economic Policy*, 31(3) J. BUS. 169, 172 (1958).

[214] *See e.g.,* Frank H. Knight, *The Meaning of Democracy: Its Politico-Economic Structure and Ideals*, in FREEDOM AND REFORM: ESSAYS IN ECONOMICS AND SOCIAL PHILOSOPHY 201 (Harper & Brothers 1947) [hereinafter Knight, *Democracy*] (politics and economics "are so closely interrelated that they are ultimately little more than aspects of the same organisation"); KNIGHT, INTELLIGENCE, *supra* note 76 at 28; Simons, *Beveridge Program, supra* note 22 at 231 (the "implied political philosophy" of freedom within classical economics); MILTON FRIEDMAN, CAPITALISM AND FREEDOM (University of Chicago Press 1962) [hereinafter FRIEDMAN, CAPITALISM] ("intimate connection between economics and politics"); MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT (Secker & Warburg 1980) 1-3.

[215] *See, e.g.,* Knight, *Planful Act, supra* note 76 at 340 ("very "strong" government is more likely in the long run to be bad than good"); KNIGHT, INTELLIGENCE, *supra* note 76 at 14; FRIEDMAN & FRIEDMAN, *supra* note 214 at 4 (Adam Smith and Thomas Jefferson "had seen concentrated government power as a great danger to the ordinary man; they saw the protection of the citizen against the tyranny of government as a perpetual need.").

[216] Rather than the common contemporary pejorative, "neo-liberalism" is used here in the historical sense to denote free-market advocates who rejected *laissez-faire* and recognised the need for intervention to support the operation of market forces.

[217] *See, e.g.,* Knight, *Democracy, supra* note 214 at 204 (government has to "provide and enforce a framework of rules for securing freedom"); Knight, *Principles, supra* note 211 at 13 ("governments have to set some limits to individual freedom"); KNIGHT, INTELLIGENCE, *supra* note 76 at 14 ("Liberals hold that men are not to be trusted, beyond necessity, with arbitrary power."); Davenport, *supra* note 76 at 6 (quoting Simons that the state should: ""…maintain the kind of legal and institutional framework within which competition can function effectively…""); Aaron Director, *The Parity of the Economic Market Place,* 7 J.L. & ECON. 1 2 (1964) ("economic liberalism has always assumed a well-established system of law and order designed to harness self-interest to serve the welfare of all."); FRIEDMAN, CAPITALISM, *supra* note 214 ("The existence of a free market does not of course eliminate the need for government").

[218] FRIEDMAN, CAPITALISM, *supra* note at 214 at 2.

[219] *See, e.g.,* Knight, *Planful Act, supra* note 76 at 340, 369 ("a fairly narrow limitation of the functions of government"); FRIEDMAN & FRIEDMAN, *supra* note 214 at 4.

[220] Knight, *Planful Act, supra* note 76 at 340, and *see also* 369 ("Such grants of power tend to become irrevocable and the power itself tends to grow beyond assignable bounds."); Director, *supra* note 217 at 2, 9; FRIEDMAN & FRIEDMAN, *supra* note 214 at 4-5.

[221] *See, e.g.,* Knight, *Democracy, supra* note 214 at 204 (the role of government is to "provide an enforce a framework of rules."); Director, *supra* note 217 at 2-3; Director & Levi, *supra* note 28 at 282; FRIEDMAN, CAPITALISM, *supra* note 214 ("government is essential both as a forum for determining "rules of the game" and as an umpire to interpret and enforce the rules decided on.").

broader political and economic visions of the liberal state.[222] Requiring governmental intervention via generalised, equally-applicable norms was a formal restraint upon the discretion of the state to impose its own will in particular instances against individuals.[223] As a corollary of the increased certainty of eliminating an unknown quantity in the application of norms, such a formal conceptualisation of law was also respectful of individual rationality and freedom of action, thus facilitating planning as to how one wishes to live their life (or run their business). The "ethical character and import"[224] of the formal rule of law ideal in comparison to subject-specific, unpredictable imposition of the state's will can be seen in Knight's suggestion that:[225]

> *"there is a vast difference in principle between general laws, of the nature of traffic regulations or rules of the game, and concrete prescription of where, when, and how to travel or what game to play."*

Henry Simons most explicitly linked the formal rule of law ideal to antitrust in a review of Thurman Arnold's *The Bottlenecks of Business*.[226] In much the same manner as Posner, Bork, and Easterbrook above, Simons poured considerable cold water on determining the legality of business conduct on the basis of subject- and context-specific decisions pursuant to vague standards, whether the US courts' rule of reason or Arnold's recommendation that the antitrust statutes be replaced with a simple prohibition of "unreasonable behaviour".[227] For Simons this was "no law at all". Instead, it amounted to a "perpetual witchhunt", where decision-makers had the discretion to unexpectedly pick and choose which businesses to pursue, before finding "particular conduct lies outside or inside the moral pale as defined by emotive slogans".[228] Simons feared this would transform the Antitrust Division into a "super-public-utility commission" that would harass businesses into charging lower prices *ex post* rather than prospectively stating what would be considered illegal.[229] Therefore, in keeping with his advocacy of rules-based monetary policy,[230] Simons stressed that the aspirational form for antitrust ought to be "unambiguous rules of law".[231] In a later dismantling of the *Beveridge Report,* he emphasised that advocacy of the formal rule of law ideal over "discretionary authorities" was a bulwark against state tyranny that separated the economic liberals from the planners.[232] And the deontological nature of Simons reason for faith in law conceptualised as general, restrained norms - *freedom* - was indicated by his argument that, even if "omniscient and benevolent" state actors could better improve societal efficiency, it would not make any difference: "some of us dislike government by authorities, partly because we think they would not be wise and good and partly because we would still dislike them if they were."[233]

This is not to suggest guilt by association or scholarly osmosis: that because Knight, Simons et al explicitly advanced the political virtue of conceptualising market intervention in accordance with the formal rule of law ideal (ie general norms that are comprehensible to subjects) due to the imperative of freedom and enhanced state restraint, that Bork and Easterbrook agreed. Rather, at the very least, the ideas of the early Chicago School are recounted to demonstrate that when economic liberalism *does* addresses philosophical questions of the value of market-based society beyond efficiency, it may meet the formal rule of law ideal. It can be used to fill justificatory gaps in later, less conceptual work that signal an appreciation for a particular conceptualisation of the form that antitrust law should take. But if scepticism *vis-à-vis* the Chicago School of economics results from its metaphysical arguments, jarring somewhat with the later emphasis upon neo-classical assumptions and societal efficiency, an alternative justification can be found: Posner's economic analysis of the rule of law.

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[222] *See* Simons, *Beveridge Program, supra* note 22 at 231 (the classical economist sought "solutions which are within the rule of law"); Frank H. Knight, *Ethics and Economic Freedom,* in FREEDOM AND REFORM: ESSAYS IN ECONOMICS AND SOCIAL PHILOSOPHY 62-63 (Harper & Brothers 1947) ("The liberal state is essentially "The Law.""); Jacob Viner, *The Intellectual History of Laissez Faire,* 3(1) J.L. & ECON. 45, 48-49 (1960) (the rule of law as "an essential safeguard of economic and other freedoms"). *See also,* more recently: RICHARD A. POSNER, OVERCOMING LAW 20 (Harvard University Press 1995) ("Along with a market economy and a democratic political system, which in fact it undergirds, [the rule of law] is a presupposition of modern liberalism."). *Contra* Knight's scepticism that it was unlikely to be closely approximated, in KNIGHT, INTELLIGENCE, *supra* note 76 at 115, 124, 164.

[223] *See* FRIEDMAN & FRIEDMAN, *supra* note 214 at 299 (on law as equally-applicable "package deals" preventing discrimination); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 266 (7th ed., Aspen Publishers 2007) ("Generality increases the cost of persecution" of individuals).

[224] Knight, *supra* note 222 at 62.

[225] Knight, *Planful Act, supra* note 76 at 364.

[226] THURMAN W. ARNOLD, THE BOTTLENECKS OF BUSINESS (Reynal & Hitchcock 1940).

[227] Simons, *Liberalism, supra* note 22 at 208-210 ("I do not like the rule of reason (either Mr Arnold's or the Court's)"). *Contra* Simons, *Free Competition, supra* note 22 at 71 (in antitrust "one finds here a reason for proposing the generally objectionable expedient of an administrative authority with some discretionary power").

[228] *Id.*. Unusually, he thought the flexibility of the rule of reason allowed businesses to get away with anticompetitive behaviour owing to its 'timorous squeamishness'.

[229] *Id.* at 211.

[230] *See* Simons, *Free Competition, supra* note 22 at 69; Simons, *Beveridge Program, supra* note 22 at 214; Davenport, *supra* note 76 at 8.

[231] Simons, *Liberalism, supra* note 22 at 210 (though admitting that this was more of an ideal.

[232] Simons, *Beveridge Program, supra* note 22 at 214.

[233] *Id.* at 231.

C) Posner: The Rule of Law as Incentive Recalibration and Effective Intervention

Although it has been seen that Posner's antitrust writing rejected the form of particularistic market interventions and suggested a preference for generalised norms for determining legality that were comprehensible to businesses, linking this to a latent belief in the formal ideal of the rule of law in antitrust is slightly more complex. This is not simply owing to the lack of tell-tale signals, akin to Bork or Easterbrook, that there are "good" and "bad" ways of "doing law". It results instead from his explicit self-distancing from "rule-of-law conservatives".[234] Outside the confines of antitrust, Posner has developed a pragmatist theory of adjudication[235] which takes as its starting-point that the concept of "law" has almost no autonomous virtue or epistemic logic.[236] Furthermore, the entire notion of law as "rules of the game" is misplaced.[237] Instead, law is merely a prediction of what judges will decide,[238] largely based on an unscientific mixture of standard legal sources with pragmatic appeals to various values and policies.[239] Indeed, Posner suggests that incorporation of neo-classical price theory into US antitrust represents the nature of such anti-formalist pragmatic jurisprudence *par excellence*.[240]

The problem for Posner is that after thoroughly articulating pragmatism as profoundly sceptical of law being anything other than external policy or political sophistry, lacking method or desirable form, he finds himself painted into a corner with the legal realists and critical legal scholars to whom he also objects. With little sense of this, he proceeds to condemn them for downplaying the importance of distinctly legal constructs: the realists for eliding law with indeterminate judicial politics;[241] and the CLS authors for failing to recognise that the rule of law is a "genuine, indeed an invaluable, public good."[242] Especially in his later articulations of pragmatism, Posner is careful to stress that judges ought not completely disregard "the social interest in certainty of legal obligation"[243] or act as an "unprincipled, *ad hoc* decision maker".[244] Even where pragmatism strongly recommended normative change - including, for example, bringing antitrust closer to the learning of competition economics -[245] Posner accepts that it may still be necessary to maintain normative foreseeability[246] and, essentially, for the judge to act as a formalist.[247]

Unfortunately for the coherence of his theory of pragmatic adjudication, Posner has clearly done too much economic analysis of the formal rule of law ideal. No matter how much he attempts to resist, Posner remains an admirer of market intervention through generalised, comprehensible norms within the Chicago School of antitrust. Rather than based on lofty liberal philosophical concerns for freedom, individual planning, and the tyrannical state,[248] he reaches the same conclusion via a different route: the economic conceptualisation of effective law as accurate incentive-recalibration to realise consequentialist goods for society.

According to Posner, the basic function of law from an economic perspective is to "alter incentives" to pursue societal goods.[249] In the second edition of *Economic Analysis of Law* he argues that it is a mistake to define any command backed by coercive power as law. To optimally achieve its animating purpose - deterring cartels, permitting pro-competitive conduct - it ought to satisfy various "*formal* characteristics of law itself [deduced] from economic theory":[250] it cannot command the impossible; it must be of general and equal application, treating like cases alike; there must be a mechanism to ensure that normative obligations are predictably enforced in practice;[251] and it must be prospective, public, and intelligible or there will be "no effect on the conduct of the parties subject to it".[252] Posner's economic perspective therefore suggests that effective market intervention,

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[234] *See* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 434 (Harvard University Press 1990).
[235] For a summary, *see id.* at 26, 459-460.
[236] *Id.* at 37-39, 226 ("law has no nature, no essence"), 434-435 (rejecting "neo-traditionalist" claims that "law is an art - the art of social governance by rules.").
[237] *Id.* at 49-50 (unlike law, rules of the game would never be changed *in media res*).
[238] *Id.* at 26, 207 ("Predictions of what the courts will do is really all there is to law.").
[239] *See* RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY viii (Harvard University Press 2000) (e.g. "policy, common sense, personal and professional values, and intuition and opinions, including informed or crystallized public opinion."). *See also* POSNER, *supra* note 234 at 130 ("fact-soaked, policy-bound").
[240] *See* POSNER, *supra* note 239 at 228-229.
[241] *See* POSNER, *supra* note 234 at 39.
[242] *Id.* at 467. *See also* Posner, *supra* note 222 at 20 ("The rule of law, in the sense of a system of social control operated in accordance with norms of disinterestedness and predictability, is a public good of immense value.")
[243] POSNER, *supra* note 239 at 209, and *see also* 242 ("well-founded expectations necessary to the orderly management of society's business"), 263 (cannot "ignore the good of compliance with settled rules of law").
[244] *Id.* at 262.
[245] Posner, *supra* note 222 at 21.
[246] POSNER, *supra* note 239 at 242.
[247] *Id.* at 209.
[248] Though there are elements of this. *See supra* note 223 on generality and oppression.
[249] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 190 (2nd ed., Little, Brown and Company 1977) 190.
[250] *Id.* at 189-191.
[251] *Id.* (if price fixers are punished completely randomly, "there will be no incentive to avoid price fixing." Liability is the same, but actual price fixers get to keep their profits).
[252] *Id.*

actually altering business incentives to avoid anticompetitive and continue pro-competitive conduct, will take the form of the rule of law ideal.

Although purporting to neutral articulation of respective benefits and costs, this is also implied by two general pieces considering the distinction between conceptualising law in the form of rules (eg the *per se* rule against price fixing) or standards (eg the rule of reason).[253] Unlike the flexibility of a standard that provides the potential for a perfect categorisation of each instance before the decision-maker as "legal" or 'illegal' *ex post*, generalisations that *ex ante* remove individual factors from consideration are necessarily imperfect.[254] Such imperfections may be exacerbated over time with societal and technological progress that necessitates their reformulation, unlike a dynamic open standard.[255]

Nevertheless, Posner suggests that aspiring towards the formal rule of law ideal - generalised and comprehensible (clear, predictable, prospective) norms - improves the efficacy of intervention by better influencing the incentives of legal subjects to cease detrimental conduct, thereby optimally realising the societal good animating intervention.[256] Such normative clarity also minimises the ""chilling" of socially valuable behaviour by an uncertain law", preventing positive conduct from being consumed by the "penumbra of a vague standard."[257] And much like Easterbrook's focus upon the wider cost of antitrust norms, this manner of enforcement is argued to reduce the risk of erroneous application and administrative expenditure in numerous ways.[258]

Therefore, despite Posner's extended critique of formalism, his work can also be utilised to advance a separate justification for the advocacy of the formal rule of law ideal in Chicagoan writing: conceptualising market intervention as generalised, equally-applicable norms, that restrain and structure determinations of legality, thereby effectively realises the motivation behind such norms (eg efficiency) through better influencing the incentives of legal subjects. The particular language and author may give the impression that this is an approach to the rule of law peculiar to those of a "law & economics" persuasion. On the contrary, fellow Chicagoan Easterbrook, who did not engage in positive economic analysis of law, made comparable claims.[259] But more generally, this instrumentalist take on the formal rule of law has close connections with the classic debate in legal philosophy between H.L.A Hart, Raz, and Lon Fuller on normative effectiveness.[260]

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This section has directly challenged the perception of the Chicago School of antitrust as advocating the "subordination" of law or leaving concerns for normative comprehensibility "overruled" through an insincere and unbalanced commitment to "interdisciplinary" scholarship.[261] On the contrary, it has been demonstrated that generations of Chicagoans frequently considered the appropriate *form* for determining legality. These basic justificatory arguments signifying the desirability of adherence to the formal rule of law can be situated within centuries of writing on the political and economic virtues of the ideal. Although revolutionaries in the field of US antitrust law, the Chicago School's discernible appreciation for market intervention in accordance with the rule

[253] Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2(2) J. LEGAL STUD. 399 [hereinafter Posner, *Legal Procedure*] (discussing strict liability rules or the negligence standard in accident liability); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3(1) J. LEGAL STUD. 257 (1974). Though note that through repeated decision-making or judicial review, a standard can gradually crystallise into generalised norms. *See generally*, on the transformation of standards into rules and *vice versa*, Pierre Schlag, *Rules and Standards*, 33(2) UCLA L. REV. 379, 428-429 (1985). Similarly: Louis Kaplow, *Rules versus Standards: an Economic Analysis*, 42(3) DUKE L.J. 557, 611 (1992) (the predictability of standards will be enhanced by precedents transforming them into rules).

[254] *See* Posner, *Legal Procedure*, *supra* note 253 at 448-449 ("The essence of a rule is that it abstracts one or a few factors from the totality of relevant circumstances and attaches controlling weight to them… it will not lead to correct results in all cases, and thus error costs will be generated."); Ehrlich & Posner, *supra* note 253 at 268 ("a set of rules must in practice create both overinclusion and underinclusion").

[255] *See* Ehrlich & Posner, *supra* note 253 at 277-278. *See also* William M. Landes & Richard A. Posner, *Legal Precedent: A Theoretical and Empirical Analysis*, 19(2) J.L. & ECON. 249 (1976) (on the depreciation of precedents as sources of information over time).

[256] *See* Ehrlich & Posner, *supra* note 253 at 262, 275.

[257] Posner, *Legal Procedure*, *supra* note 253 at 449. *See also* Ehrlich & Posner, *supra* note 253 at 263.

[258] *See* Ehrlich & Posner, *supra* note 253 at 264-265 (cost-savings from ease of enforcement, fewer cases, lower litigation expenses); Posner, *Legal Procedure*, *supra* note 253 at 449-450.

[259] Frank H. Easterbrook, *The Supreme Court 1983 Foreword: The Court and the Economic System*, 98(1) HARV. L. REV. 4, 7 (1984) ("When the Court tries to influence the conduct of actors in the economic sphere, the clarity of rules becomes more important… Muddy rules arising from a desire to accommodate the needs of parties caught in a web of circumstance may have effects quite unanticipated by the judges."), 11; Easterbrook, *Workable Antitrust*, *supra* note 53 at 1709 (Without the assumption of rationality, "you have no reason to think that the threat of sanctions deters, or that the legal system can achieve anything useful."); Easterbrook, *Abstraction*, *supra* note 205 at 350 ("concrete rules establish incentives *ex ante* and restrain discretion later on.").

[260] *See generally* Fuller, *supra* note 186 at 150-151, 155-156; Raz, *supra* note 187 at 214, 224-226; H. L. A. Hart, *Book Review: The Morality of Law*, 78 HARV. L. REV.1281 (1965).

[261] *See supra* note fn 6-8.

of law ideal simultaneously casts them as quiet followers of well-known authorities on the rationality and restraint of liberal legalism.[262]

V. CONCLUSION

This piece has argued that for decades the legacy of the Chicago School has distorted their actual understanding of the relationship between law and economics in antitrust: while a *substantive* commitment to norms informed by rigorous deduction from the assumptions of neo-classical price theory is undeniable, their acute concern for the appropriate *legal form* of market intervention in antitrust has often been overlooked. Far from advocating the determination of legality via *ad hoc*, subject-specific analysis of the actual efficiency consequences of instant conduct, the Chicagoans preferred to incorporate economic wisdom into the *ex ante* design of generalised norms - rules, presumptions, structured tests - to thereby rigidify decision-making and thus afford normative comprehensibility to legal subjects. This conceptualisation of antitrust was, essentially, one that sought to optimally reconcile market intervention that was both economically accurate *and* realised virtues associated with the formal rule of law ideal.

Reemphasising this aspect of Chicago School writing has two implications for contemporary competition law scholarship.

First, attributing the rise of the rule of reason standard in US antitrust to their scholarship requires greater nuance. It is correct that their scholarship was the catalyst for the overturning of *per se* prohibitions in cases such as *Sylvania*, and figures such as Bork and Posner were pleased with their substantive consequences, i.e. efficient business conduct would not be condemned by *per se* rules of illegality. Nevertheless, the Chicago School did not support the *form* of market intervention characterised by the rule of reason for, essentially, its failure to approximate virtues associated with the formal rule of law: generality, administrability, and normative certainty. This should perhaps be kept in mind with regard to the endless debate as to how EU competition enforcement may become "more economic". Rather than an inspiration as recent European accounts would suggest,[263] the writing of the Chicago School *directly challenges* the automatic logic that efficiency-focused enforcement must *necessarily* adopt the form of purely effects-based analysis to determine legality.

Second, as has been briefly alluded to by other commentators,[264] the addition of the "neo-" prefix to denote a novel, contemporary descendent of the School is meaningless at best, and misleading at worst. The "neo"-Chicago approach to competition enforcement proposed by David Evans, Jorge Padilla, *et al.*, of using sophisticated economic priors – on the likelihood of efficiencies, administrative and error costs – to choose between norms of varying degrees of generality (*per se* rule, rule-and-exception, presumption, structured rule of reason, etc.) to foster administrability and legal certainty,[265] is simply a more rigorous version of what Chicagoans have been proposing since the 1960s. If anything, the "neo-" prefix *perpetuates* the mistaken belief that the likes of Bork and Posner in particular *didn't* address questions of the form of market intervention or the need for general, clear, workable legal norms.

The question of the desirable formal conceptualisation of antitrust *as law* was at the core of Chicagoan policy recommendations. That it has been – and continues to be – an overlooked aspect of what is undoubtedly the most debated body of antitrust literature ever is perhaps suggestive of the unwillingness of competition scholars to grapple with abstract legal concepts such as "normative form" or "the rule of law". But as US antitrust and EU competition policy *are* systems of law, these omissions might be thought deeply troubling.

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[262] Although far beyond the scope of this piece, the ideas touched upon by the Chicagoans can be linked to writings on the virtue of the formal rule of law by those mentioned *supra* notes 185-187 (Hayek, Fuller, Dicey, Raz), but also John Locke, Immanuel Kant, Public Choice Theory, Constitutional Economics, and many other sources.

[263] *See* ANDRIYCHUK, *supra* notes 6-8; WITT and NIELS, JENKINS & KAVANAGH, *supra* note 10.

[264] *See e.g.*, Kobayashi and Muris, *supra* note 16 at 147, 155; Wright, *supra* note 14 at 250-251.

[265] *See generally* Christian, Ahlborn, David S. Evans, & Jorge A. Padilla, *The Antitrust Economics of Tying: A Farewell to Per Se Illegality*, 49(2) ANTITRUST BULL. 287 (2004); David S. Evans and Jorge A. Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72(1) U. CHI. L. REV. 73 (2005); David S. Evans, *How Economists Can Help Courts Design Competition Rules: An EU and US Perspective*, 28(1) WORLD COMPETITION 93 (2005). *See also* the complementary works of Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of "Per Se Rules Vs Rule of Reason",* 2(2) J. COMPETITION L. & ECON. 215 (2006); Yannis Katsoulacos & David Ulph, *On Optimal Legal Standards for Competition Policy: A General Welfare-Based Analysis*, 57(3) J. INDUSTRIAL ECON. 410.