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The Late Emerging Consensus Among American Economists on Antitrust Laws in The Second New Deal

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Abstract

This paper presents the late convergence process from US economists that led them to support a strong antitrust enforcement in the late thirties despite their long standing distrust toward this legislation. The 1945 Alcoa decision crafted by Judge Hand embodied the results of this convergence. The purpose of antitrust law enforcement does not consist in promoting economic efficiency, as today's more economic approach advocates, but in searching for a reasonable compromise aiming at preventing improper uses of economic power. This paper presents the path from which institutionalist economists, on one side, and Chicagoan neoliberals, on the other one, have converged on supporting the President F.D. Roosevelt administration towards reinvigorating antitrust law enforcement as of 1938, putting aside their initial preferences for a regulated competition model or for *laissez-faire*.

Keywords: Antitrust, Efficiency, Economic Power, Institutional Economics, Chicago School

JEL Codes: B25, K21, L40, N42

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I. Introduction

For over four decades, US Antitrust laws enforcement has been characterized by a significant, if not hegemonic, influence on economic reasoning in judicial decision-making. Antitrust law is no longer deemed an autonomous discipline, considering the role of economic analysis (Posner, 1987). In this perspective, judging an antitrust case must be made from outside the legal sphere *in the strict sense of the term*, by using the tools provided by microeconomics. From the U.S., the so-called effects-based approach has spread like wildfire both in developed and in developing countries. It has become the touchstone of competition laws enforcement modernization.

For instance, such a 'more economic approach' – advocated by the European Commission for article 102 of the Treaty since the publication of the 2005 Economic Advisory Group on Competition Policy report devoted to the economic approach to article 82 (EAGCP, 2005) – seems to have eventually been endorsed by the Court of Justice in its *Intel* judgment[1].

The economization process of antitrust enforcement finds its roots in the *GTE Sylvania* US Supreme Court rulings[2].If the Supreme Court had overturned its long standing jurisprudence, it resulted from a long process that finally consecrated the influence of the Chicago-inspired economists and lawyers. While this influence had already been noticeable within the Department of Justice (DoJ) Antitrust Division since the 1960's (Williamson, 2003), the 'paradigmatic' turn was definitively taken in the early eighties with the appointment by the President Reagan Administration of William Baxter as head of the Antitrust Division of the Department of Justice (Dan Wood and Anderson, 1993).

While a scholar such as Richard Posner (1979) embodied the theoretical views that led to this case law reversal, its historical origin goes back to the early post-war years, with the foundation of the Second Chicago School of competition law and economics (Bougette et al., 2015), by Friedrich Hayek, with financial support from the Volker Fund. The *Free Market Studies* program and the *Antitrust Project* – successively led from 1947 to 1957 under the joint-direction of Aaron Director and Edward Levi – initiated this new approach of antitrust law enforcement

[1] Intel Corp / EU Commission, case C-413/14P, 6 September 2017
[2]Continental TV vs GTE Sylvania, 433 US 36, 1977

(Van Horn, 2010). The Director and Levi's paper, published in 1956 and entitled *Law and the Future - Trade Regulation*, constitutes its *manifesto*.

This seminal paper is even more relevant as it develops a long discussion of the *Alcoa* decision by Judge Learned Hand (1945), which seems to personify the exact opposite of the views defended by Chicago scholars (Winerman and Kovacic, 2013). Director and Levi's views announce the US case-law reversal, twenty years later, of *GTE Sylvania*. They stressed the economic assessment of these practices consequences on consumer welfare and challenged the legitimacy of judicial policies having any different purpose in mind when enforcing antitrust law (Posner, 1977).

However, the emergence of Chicago-based antitrust law and economics did not initiate the convergence between Antitrust and economic theory. Considering antitrust law enforcement under the light of economic theory was no novelty. While US antitrust laws were initially grounded on economic theory, American economists were not indifferent to them from 1890 to the end of the Second World War. Their long-standing distrust regarding this legislation has left room for support, from the late 1930's onwards. This acceptance of antitrust laws was shared by a broad range of US scholars, from the institutionalists to Henry Calvert Simons, the figurehead of the First Chicago School. The 'more economic approach' advocated by Director and Levi in their 1956 *manifesto* participates more to a paradigm shift in the subjacent economic theory of competition than an introduction to economic reasoning within competition case rulings.

As Hovenkamp (1985) wrote, "the impression created by these statements is that antitrust policymakers somehow discovered economics at the time of the Chicago School revolution in antitrust policy […]. Antitrust policy makers did not first develop an 'economic approach' in the late 1970s or early 1980s. They simply changed economic models".

However if economics had already met antitrust before the launching of the Chicagoan research program, this meeting was relatively new. In fact, US scholars in the field of economics just started to love antitrust laws, especially the Sherman Act, on the brink of the Second World War. The relationships between US economists and antitrust were all but love at first sight (Mayhew, 1998). Both institutionalist scholars and defenders of classical liberalism lengthily regarded antitrust law with suspicion. The reversal may also be dated with precision in 1938 through the President Roosevelt "anti-monopoly" April 29 speech and through the appointment, six month later, of Thurman Arnold as Assistant Attorney General in charge of the Antitrust Division (Gressley, 1964).

The impulse from the Federal government was consolidated by two converging processes. The first one was initiated in classrooms. Economists from both side of the theoretical spectrum started to provide staunch support to antitrust enforcement. The second one started in courtrooms. The Supreme Court reversed its conservative decisional practice allowing effective enforcement of antitrust laws and leading to a broad definition of them and to far reaching remedies that annunciate the post war *Warren era*.

Our objective in this article is to recount this early convergence process between antitrust law enforcement and competition law on one hand and economics analysis on the other.

We first consider the theoretical critics addressed to the *Alcoa* decision, taken as an emblematic example of this paradigm of antitrust enforcement. To that end, after presenting the main theoretical principles underlying this decision, we insist on its conformity with both institutional economists' views and those of the, at the time, Chicago School predominant scholars. Devoting a specific section to this decision allows us to present the *fermata* of the movement engaged in the thirties and the starting point of its theoretical challenges.

In the second part, we show that the rallying of the institutional school economists to the judicial implementation of the Sherman Act provision was all but evident. They formerly expressed their long-term mistrust of the capacity and voluntarism of courts to challenge trusts and monopolization practices. Antitrust institutionalist scholars were skeptical about antitrust law, both considering the very conservative positions of the US Supreme Court (impairing any government interventions on the basis of a literalist defense of property rights and contractual freedom) and the potential renunciation of the efficiency gains produced by economic concentration, if ever actually implemented. During the *post-Lochner era*[3], institutionalists advocated implementing antitrust policy outside the scope of courts, for example through administrative agencies. Analysing the promulgation of the FTC Act in 1914 enables us to bring to light institutionalists' arguments in favor of an alternative way to counteract dominant firms' power market.

In our third part, we highlight, President F.D. Roosevelt's political turnaround, from the First New Deal, with the NIRA (National Industrial Recovery Act), to the strong reactivation of

[3]US Supreme Court, Lochner vs. New York,198 U.S. 45 (1905)

antitrust enforcement during the Second New Deal. This political shortage went along with a shift in leading institutionalist scholars' theoretical positions. These removed their support for regulated competition, based on a private self-regulation coupled with public oversight (Phillips, 2011). They started to advocate determined antitrust laws enforcement to address economic power concentration-related issues. Such an evolution led institutionalist scholars to make their own the interpretation of the Sherman Act that was proposed decades later by Robert Lande (1982): a tool to sanction undue wealth transfers among economic agents. At the same time, the consequences of the 1929 crisis led some of the supporters of economic liberalism to accept the legitimacy of government intervention to address the concentration of economic power issue, in other words, to protect the market process against itself. The roots of neoliberalism can be found in the late thirties. *Laissez-faire* no longer appeared as a viable option. The determination to guarantee the viability of the market economy implies accepting government intervention based on antitrust law enforcement (Mirowski and Plehwe, 2009). As of the late thirties, US economists, whatever their theoretical background, started to love the Sherman Act.

This paper aims to characterize the key features of this short-lived consensus and to analyze the theoretical and historical dynamics that made it possible.

II – The Alcoa decision spirit: Is the dispersal of economic power a legitimate purpose for antitrust?

I-1 – Judge Learned Hand's ruling in Alcoa (1945): the consecration of a pre-war consensus as a grievance point for post-war controversies

A history of the early convergence between law and economics in the competition field may start with its high-point. Judge Learned Hand's decision in *Alcoa* personified the consistency between US antitrust laws enforcement and the views of a large array of scholars coming from different traditions, as the institutionalists', the antitrust First Chicago School, or the workable competition approach (Clark, 1940).

This decision illustrates the endorsement by antitrust law enforcers of far reaching objectives. Expressed in a contemporary and European way, a vertically integrated operator benefiting from a dominant position on the upstream market must not only charge a price that lets an 'as efficient competitor' keep up its operations downstream, but must also set its price to guarantee it can making sustainable profits. The 'dominant operator' has the 'special duty' to act in a way that allows maintaining its competitors on the market, whatever their efficiency. The competitive structure of the market has value in itself for the antitrust law enforcer. This accent put on market structure and not on the net economic effects of market practices found one last consecration in the US jurisprudence in 1962, with *Brown Shoe*[4] in which the Supreme Court upheld a district court judgement refusing a merger, on the ground that its effect might be to substantially lessen competition or to tend to create a monopoly, even if the market shares at stake were symbolical.

Nothing could be more remote from this approach than the one developed from 1947 by the antitrust Second Chicago School (Bougette *et al.*, 2015). Chicago scholars undertook to rehabilitate the dominant position, considering that the quest and exercise of market power might be welfare-enhancing (Van Horn, 2010). Another fundamental difference between the Second Chicago School's views and *Alcoa* has to be underlined: efficiency concern was not predominant in Judge Hand's reasoning. As Judge Hand wrote in Alcoa, the Sherman Act aims at preserving a situation of actual competition, whatever the cost considerations. While this view is aligned with the neoliberal approach as defined in the late thirties, it was definitively at odds with the Second Chicago School's views according to which allocative efficiency is the only purpose of antitrust policy.

The Director and Levi's criticisms of *Alcoa* provides the structure to their 1956 seminal paper. According to them, this decision, in particular, and antitrust enforcement, in general, does not sufficiently rely on well-grounded economic theories. *Alcoa* appears to them as outside the legitimate scope of antitrust, leading antitrust enforcement towards "laws of fair conduct, which may have nothing whatever to do with economics". They were critical of the application of antitrust laws "less than monopoly-size firms or to firms which had reached their sizes without combining".

By doing so, they moved aside from H.C. Simons' views, the posthumous founder of their school of thought (Van Horn, 2014), and broke antitrust enforcement away from the issue of the (mis)use of economic power. Moreover, they express their skepticism about the capacity of single firm practices to lead to irreversible market monopolization. This skepticism announced the 'hallmark' of the Second Chicago School (Baker, 2013).

[4]Brown Shoe Co., Inc. vs. United States, 370 U.S. 294 (1962)

Their exclusive focus on efficiency considerations also lays the foundation of the theoretical rehabilitation of dominant firms, even in a monopoly situation (van Horn, 2009). It raised the issue of implementing antitrust provisions to firms that gained their market position thanks to their efficiency[5]. According to them, a firm should not be sanctioned if it has acquired its market position from its own merits. The risk of over-enforcing antitrust rules was already pointed out: renouncing economic gains resulting from productive efficiency and consequently harming the final consumer.

In addition, according to Director and Levi, *Alcoa*-like decisions allow judges to discretionarily arbitrate between different, vague, and competing objectives. Protecting small firms or operators without market power "in spite of possible costs" leads to sacrificing final consumers' interests by impairing economic efficiency. It leads to balance consumer interests with competitors', without any method allowing to weigh up their respective interests in terms of global welfare.

Even if this decision seems at odds with the contemporary, more economic, approach based on the Second Chicago School's normative views, it does not mean that *Alcoa* was decided without any regard to economic considerations. *Alcoa* was not an isolated case in US case law, it was emblematic of the dominant economic paradigm at that time. The rise of the Second Chicago School heralded by Director and Levi does not imply economics emerged within the antitrust field; it just suggests the shadow cast by a paradigm shift (Hovenkamp, 1985). In our next sections, we present the construction of the former paradigm from 1890 to 1938

I-2 A coherent view with institutional economics prescriptions and with late thirties neo-liberalism opposed to the laissez faire approach

Alcoa might be read as a victory of institutional economists' point of view on government intervention and antitrust enforcement. Quite surprisingly, that very view of antitrust enforcement was accepted by the first Chicago School. Despite their reaffirmed adherence to classical liberalism and their criticism against institutional economists' concept of social control (Knight, 1932), Chicago scholars converged with the institutionalists during the thirties toward advocating a more voluntarist antitrust laws enforcement. In the context of the rise of the

[5]The acquisition, maintenance or extension of a monopoly is sanctioned by the Section 2 of the Sherman Act only if it is not the consequence of the undertaking's merits. The notion of merits was defined in the Grinnell US Supreme Court decision (United States vs. Grinnell Corp., 384 U.S. 563, 570-71 (1966)). Merits correspond to "the wilful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident".

neoliberal school of thought, they considered that public intervention may be necessary to counteract market dynamics. Contrary to *laissez-faire* upholders, they admitted that the market process may irreversibly lead to a later undisputable concentration of economic power (Simons, 1934). In that sense, the first Chicago School's outlooks were very close to late US institutional economists' by disapproving of the acquisition of substantial monopoly power "regardless of how reasonably that power may appear to be exercised" (Simons, 1934).

The School's figurehead, Henry Simons, up to then Manchester classical liberal economist, began to consider the large firms and the subsequent concentration of market power as a threat to the competition process and consequently a risk for political liberties (DeLong, 1990). It was on the basis of the classical liberal doctrine that the Chicagoans supported antitrust enforcement as a tool to thwart economic power concentration[6]. The issue of efficiency was deemed secondary at that time. The dispersal of economic power was from then on considered as the main purpose of antitrust.

The evolution of Simons' views about *laissez-faire* must be put into perspectives with the beginnings of the neoliberal school of thought (Brennetot, 2015). Its denomination stems from a colloquium organized in 1938 by a philosopher, Louis Rougier, to discuss Walter Lippmann's book, *An inquiry into the principles of the Good Society* (Lippmann, 1938). The 1929 crisis and the US experience of the NIRA, led some classical liberals to examine the risks for the future of the free market economy induced by the increasing concentration levels. Facing these risks impose active public policies that may consist in a determined antitrust law enforcement. This paradigm shift, accepted by most liberal scholars, both led to a reassessment of the virtues of antitrust law enforcement compared to *laissez-faire* and to distrust toward big firms and economic concentration. The threat they induce to the market process was from then on seen as more serious than the potential gains they may produce in terms of economic efficiency.

According to Simons (1948), "the great enemy of democracy is monopoly in all its forms". Even more precisely, "concentrations of power posed a threat to the price system, the *sine qua non* of freedom". Moreover, Simons considers that the power of the market to manipulate prices might lead to exploitative abuses and leads – in a *commonsian* wording – to "a usurpation of

[6]Quoting Smith and Bentham, Simons (1941) stated "their special insight was that political and economic power must be widely dispersed and decentralized in a supposedly free world; that economic control must, to that end, be largely divorced from the state and effected through a competitive process in which participants are relatively small and anonymous; and that the state must jealously guard its prerogative of controlling relative prices (and wages), not for the purpose of exercising them directly itself, but to prevent organized minorities from usurping them against the common interest".

sovereignty". The issue, according to Simons, allows envisaging a clear-cut solution such as dismantling monopolies[7] or launching antitrust suits against firms acquiring a monopoly position and thereby impairing the maintenance of an effective competition situation, "regardless of how reasonably that power may appear to be exercised". In this sense, Simons's normative views were coherent with Learned Hand's ones in recommending that antitrust laws should prevent the dominance of an industry by one sole firm (Simons, 1941).

In the late thirties, the Chicago School sustained anti-monopoly policies in order to thwart the concentration of economic power (Simons, 1948) and "ensure that no single corporation dominates an industry" (Van Horn, 2010). The similarity between Hand's view and the Chicago School's initial preferences was still noticeable in the late 1940's. Director and Levi themselves have on many occasions (for instance at the first meeting of the Mont Pèlerin Society in 1947) reaffirmed their support of Simons' view about monopoly[8] (Van Horn, 2010). However, their normative views were about to diverge. Their reversal might be dated back to the end of the Free Market Studies Program, in a book review authored by A. Director, and it came to broad daylight in their 1956 *manifesto*[9].

After presenting this tipping point, our purpose in the next sections is to highlight the path by which a theoretical consensus was reached in the USA on antitrust enforcement, a consensus obtained by the convergence of two very different theoretical economic traditions, yet both initially reluctant to accept the Sherman Act. We chose to focus particularly on the institutionalist school. We will demonstrate that the 1930's consensus was not only the outcome of a neoliberal *aggiornamento* but also the result of a delayed and not so obvious adherence by institutionalist scholars to the merits of antitrust law enforcement. Such adherence contrasts

[7]The option of structural remedies to ensure the integrity of the competition process was also considered by Hayek (1944): "« to split or decentralise power is necessarily to reduce the absolute amount of power and the competitive system is the only system designed to minimise by decentralisation the power exercised by man over man".

[8]For Director, "additional policy measures (to antitrust enforcement)… were needed… to address the inequality of income and the inequality of wealth that stemmed from exercised monopoly power" (Van Horn, 2009).

[9]The rupture with Simons' opinions on economic concentration and on the role devoted to antitrust enforcement (or to government regulations) created by the Second Chicago School appears noticeably in the verbatim record of a symposium organized in the Emory University in 1983, which gathered leading Chicago school Scholars, as Ronald Coase, George Friedman, Robert Bork, Aaron Director, George Stigler and Richard Posner (Kitch, 1983). During the symposium Ronald Coase confessed his lack of understanding of the 1934 Simon's *Positive Program for Laissez Faire*: "This strikes me as a highly interventionist pamphlet. If you think of what he wanted to do in antitrust, he wanted to use it in such way as to restructure American industry". If Milton Friedman insisted on the necessity to take into account the specific context of the thirties to evaluate his positions ("I thought at the time that it was strongly pro-free markets in its orientation"), it remains that Simon's recognition of the role of government interventions to guarantee the long-term viability of the competition process was then definitively rejected by Chicagoan scholars in harsh and awkward words (according to George Stigler "It's true that he was the man that said that the Federal Trade Commission should be the most important agency in government, a phrase that surely should be on no one's tombstone").

with their initial views on the market model that shapes antitrust policy and their distrust toward the judicial institutions in charge of their enforcement.

III - Competition law without economics: the mistrust between institutional economists and the Sherman Act

III-1 The untraceable economic theory-related foundations of the Sherman Act (1890)

Contrary to Bork's views (1966), presenting the enactment of the antitrust law as only motivated by the protection of consumer welfare[10], several researches in the historical field demonstrate that economics played no role in the promulgation of the Sherman Act (Lande, 1982; Bougette *et al.*, 2015; Khan, 2017). American legislative history reveals this initiative was originally taken by Republican Senator John Sherman (Ohio) to ward off Democrats' initiatives, in a political context characterized by debates against rising prices (Langlois, 2018). Something like a trade-off was at stake for the Republicans: taking an initiative against trusts might allow preserving what the *Grand Old Party* once considered as essential, e.g. the external tariff that was an essential pillar of US industry development, as a protection against British competitors (Kolasky, 2009). In other words, the legislative intent may be better explained by a feeling according to which "*something ought to be done about trusts"* (Dewey, 1964) than the translation into law of theoretical economic normative views[11].

Moreover, the legislative genesis of the act was all but obvious. Indeed, Senator Sherman early and irremediably lost control over his proposal to the benefit of the Judiciary Committee. One of the consequences of this jerky legislative process was entrusting its enforcement to judiciary order courts (Gardner, 1912; Bradley, 1990). Such a compromise was necessary to embed its purpose and enforcement within the global framework of the Common Law[12]. A second consequence of this difficult gestation was the vagueness of its wording and consequently its future sensitivity to judicial and political interpretations[13].

[10]According to him, even if many of the legislators do not directly intend to target economic objectives, "not only was the consumer welfare the predominant goal expressed in Congress but the evidence strongly indicates that, in case of conflict, other values were to give way before it".
[11]The issues related to discriminatory or excessive prices charged by dominant companies first led to the enactment in 1887of the Interstate Commerce Act in 1887. It created the Interstate Commerce Commission (ICC) vested with the power to regulate railways rates. The Sherman Act was predated at states level in the 1870's and in the 1880's by the so-called *Granger Laws*.
[12]As Crane (2013) notes: "The Antitrust statutes are widely recognized as open-ended delegations to the courts to create a common law of competition".
[13]For other scholars, because of the open-texture of the act and its sparsely wording (it appears that all attempt to find a clear-cut interpretation of the legislative intent within the legislative history and perhaps with the Supreme Court decisional practice might be doomed (Areeda and Hovenkamp, 2006, Crane, 2013).

Considering that economic purposes are just under the surface does not necessarily imply that they are the sole goal of the antitrust legislation. Again, Bork (1966) argued in favor of a pure economic view of the act: "*For a judge to give weight to other values, therefore can never assist in the correct disposition of a case and may lead to error. In short, since the legislative history of the Sherman Act shows consumer welfare to be decisive value, it should be treated by a court as the only value*". Such a view is consistent with the Second Chicago School's theoretical framework applied to antitrust policy. Economic efficiency (and more precisely the allocative one) must be the sole goal of competition. Such an interpretation is undoubtedly made easier by the vagueness the Sherman Act wording, but cannot be considered as the only acceptable narrative, considering both the legislative history of the act and its case law until the late seventies, as was demonstrated by the Alcoa decision.

Indeed, analyzing the economic history and the history of economic thought leads to different stories. Firstly, as Lande (1989) demonstrated, considering that the Sherman Act was primarily enacted in order to protect consumers against excessive prices seems an unlikely story (Mayhew, 1998). Price data analysis demonstrates that when the Sherman Act was promulgated, price levels were decreasing in the USA and especially for the more concentrated sectors in which trusts were at stake (North, 1966). A more common view within the historical literature leads to explaining the Sherman Act with the political hostility of large parts of the public opinion against the *robber barons* and trusts' market practices, which were deemed as particularly unfair (price discriminations for instance).

Not only was the role of economists in the promulgation of the Sherman Act inexistent, but they were at best indifferent and more frequently critical towards antitrust legislation.

Scholars' disinterest was highlighted by Mayhew (1998). While numerous academic papers were published in the 1880's about trusts and competition issues, in the 1890's, that issue nearly disappeared from economic journals in the USA.

While economists have actually paid more attention to these issues in the following decades, we cannot interpret this trend as evidence of support for the Sherman Act. The criticisms against the Sherman act might be divided into two categories. Some scholars, as will be seen in our next section, did consider that trusts (or a high level of industrial concentration) might be a necessary evil in terms of economic efficiency (Croly, 1909). In that sense, a certain kind of regulation is necessary, but not prohibition. A second set of arguments against antitrust law stemmed from its enforcement model, based on judicial courts.

Indeed, economists mistrusted the Sherman Act not only due to the very marginal position of economic theory in the legislative intent and the design of the law but also to its enforcement model. As has already been noted, such a model might be explained by the very difficult conditions in which the act was promulgated. Congress competency to regulate trade activities was not obvious. In order to overcome legislative hurdles, the promoters of the bill chose to integrate the future antitrust law within the common law institutional framework. However, in doing so, they weakened its potential effectiveness (Davis, 1900). Delegating the enforcement to federal courts exposed the act to judicial interpretation and submitted the competition "policy" to the, then strictly conservative, Supreme Court jurisprudence[14]. In this regard, Allyn Young noticed that the vagueness of the terms of the Sherman Act led to excessive heterogeneity in courts' rulings, from lower courts to the Supreme Court. Some courts decided that all contracts and agreements restraining trade were not illegal *per se*. Others decided that price agreements should not be made illegal if they were "reasonable". Young (1915) puts the emphasis on the lack of a coherent framework for deciding antitrust cases, which was caused by a high level of judicial interpretation of the Sherman Act. Moreover, Young (1915) stresses that the shift in jurisprudence made in the well-known Standard Oil and American Tobacco cases, while setting-up a more coherent doctrine than before, introduced a disputable assimilation of two concepts: restraints on trade and monopolization. According to him, the competition process naturally leads to monopoly situations, since it reflects the productive efficiency of leading firms: "The contention that 'to compete' and 'to attempt to monopolize' are synonymous is clearly unsound. These are definitely antagonist in principle" (Young, 1915, p. 215).

As a consequence, in the late 19th and early 20th centuries, both legal realists and institutionalist economists were particularly dubious, if not suspicious, of the judicial enforcement of the Sherman Act. They advocated for a more direct and active government role in supervising market transactions, and even regulating them, if necessary, (Fried, 1998). Using antitrust law to correct unbalances resulting from wielding economic powers (Jaffe, 1937), contrasted with the preference of the US Supreme Court for the laissez faire approach, and led them to reject the Sherman Act as a relevant tool to address market unbalance-related issues.

[14]We may quote the United States vs. E. C. Knight Co., 156 U. S. I., 1895 US Supreme Court decision, which ruled that Congress has no power to legislate concerning private manufactures since it does not directly affect interstate commerce.

III-2 Avoiding judicial enforcement: institutionalists' advocacy for an administrative enforcement model (1914)

Despite a number of striking decisions, such as the dismantling of the Standard Oil trust in 1911[15], scholars and antitrust policy makers were not confident in the US Supreme Court's involvement concerning the Sherman Act enforcement. *Standard Oil* is a much discussed decision. Some scholars, like Comanor and Sherer (1995), consider that the decision came too late and even proved counterproductive. Indeed, the trust's market power was already significantly eroded when the Supreme Court decided the case. In addition, the compensatory scheme for shareholders had been denunciated as being excessively favorable. Moreover, the decision, in itself, raised concerns, as it introduced the rule of reason concept, which might be misused by judicial courts in order to limit the range of antitrust law.

Indeed, the judicial model, adopted in 1890, presents two main shortcomings. The first is that the judiciary is not independent of political impulses. Law suits have to be initiated by the Antitrust Division of the Department of Justice (DoJ). As a consequence, antitrust law enforcement was very dependent to the political cycle. Even though private enforcement of the Sherman Act provisions constituted a mean to by-pass this kind of inertia, if not ill will, this alternative way of enforcement lacked efficiency. Actually, a political impulse was often necessary and a procedure introduced by a competitor was always regarded with suspicion. The second shortcoming was directly linked with the contemporary decisional practice of the US Supreme Court. Its interpretation of due process of law clause was narrow-minded. It led to thwart any progressive legislation from states and federal authorities (advocated by institutionalist scholars). This very restrictive and mechanically deductive approach of common law led to an under-enforcement of the Sherman Act provisions and to its enforcement to labor relations[16]. The values attached to property rights and to contractual freedom impair public initiatives aiming at limiting the exercise of market power.

This majoritarian conception, within the US Supreme Court, stemmed from the *Classical Legal Thought*, dominant in the US law academic field in the late 19th century. Its predominance was embodied by the Lochner decision in 1905, against which Judge Holmes expressed his famous

[15] US Supreme Court, Standard Oil Co. vs. United States, 221 U. S. I., 1911
[16] Berman (1930) and Lambert (1921) show how intense the application of the Sherman Act has been to the labor movements, since strikes, boycotts and any concerted efforts between workers and unions, were deemed illegal by the courts.

dissent[17]. Justice Holmes dissented on the basis that the 14th Amendment relative to literalist interpretation of due process of law ("nor shall any state deprive any person of life, liberty, or property, without due process of law") led to a laissez faire policy[18]. According to Holmes, the prohibition of any government's interference in the liberty to contract also reveals a political choice in favor of a given economic theory. As he stated: "[…] a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire".

Such a dominant view, deriving from Tiedeman (1886), made a synthesis between the mechanical conception of Common Law and a theoretical tradition according to which the role of the law is to limit the discretionary power of the legislative majority against its possible tendency to infringe individual rights. In this sense, the relationship with these views and Hayek's on democracy and sovereignty (1973) is obvious. The decisional practice was both constrained by the classical legal thought doctrine and by the indirect support to a given economic doctrine promoting the notion of limited government. Holmes's dissenting opinion in *Lochner*, according to which "general propositions do not decide concrete cases", has to be read under such a prism. For legal realists and institutionalists, courts' decisions must also be based on an assessment of their economic and social implications and on the "felt necessities of the time[19]".

Nothing was more different from the classical legal thought than the institutionalist scholars' views about market transactions[20]. The latter consider that the equilibrium of each transaction depends on the relative distribution of property rights. These rights both established vertical relationships between individuals and things, but also horizontal ones between the individuals involved in the transaction. As property rights are not equally distributed within society, some individuals might be in a position to exercise coercive powers, e.g. to abuse of their market

[17]Lochner vs New York, 198 US 45

[18]Legal conceptualism, more than formalism, is at stake in this case. As Justice Holmes writes in his dissenting opinion, "general principles do not decide concrete cases" (Nachbar, 2018).

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

[20] "Legal formalism is the idea that legal questions can be answered by inquiry into the relation between concepts and hence without need for more than a superficial examination of their relation to the world of fact" (Posner, 1990).

power[21]. Such an abuse is possible as soon as one of the partners has the capacity to withdraw from the transaction and to opt for another counterpart. If a party in the transaction is in a monopoly situation, its own counterparts cannot adopt the same strategy. As a consequence it has to accept its contractual conditions, even if they are unbalanced and unfair. In other words, even if the two bargainers are equal in the eyes of the law, their effective economic positions might create inequality. The unequal distribution of property rights leads to scarcity transactions. As potential contracting partners cannot equally turn toward an equivalent alternative, these scarcity rents induce contracting disequilibria. It might allow the partner who enjoys a monopoly position or controls an essential facility to exert its coercive powers (Commons, 1924). The latter may extract all the surplus produced by the transaction. This unbalance may produce an unreasonable result from the collective point of view. The social distribution of welfare might be distorted by such contractual disequilibria. While the Second Chicago School argued distribution had no consequence on global welfare, this was not the institutionalist scholars' opinion[22].

Antitrust laws in this acceptation should not ensure welfare maximization but prevent this kind of monopoly power abuse or, more broadly, guarantee a market that functions without the exercise of market power (Fried, 1998).

Such a view about the issue of economic power and the role attributed to government to counterbalance its asymmetric allocation within the whole society is particularly striking in John R. Commons' contributions. He does not reject the Sherman Act in itself, but grants it a very particular role, consisting in counteracting the effects of bargaining power unbalances. Ensuring equilibrium (or reaching reasonable sharing) is one of the main parts of the institutionalists' project but it does not imply using competition laws' tools in order to undermine monopoly positions; rather, it aims to favor the coordination between the economic agents deprived of such an individual negotiation power in order to counterbalance the monopolist's. The use of antitrust law is not geared against bigness in itself. Institutionalist

[21] We might also consider, besides, the issue of coercive power on one hand and the persuasive one on the other. These two sources of power have been identified by Commons (1893) in his analysis of the transactions as emphasizing the gap between "real life" and the marginalist model. The issue of the power of persuasion might perhaps be managed in keeping with the US antitrust legislation through the FTC Act. Two kinds of practices are covered by this one: the Unfair Methods of Competition (UMC) but also Unfair and Deceptive Acts and Practices (UDAP) injuring consumers.

[22] Recent advances in the field of economic theory reintroduce the relationship between distribution and potential growth (see for instance Piketty, 2014). Even more relevant for our purpose, some researches tend to reinvigorate Harberger's seminal work (1954) on the relationship between monopoly power and resources allocations efficiency. For instance De Loecker and Eeckhout (2017) describe the consequences on the macroeconomic situation of the current rise of market power concentration in the US economy.

scholars recognized the merits of economic concentration in terms of efficiency gains and, in Clark's analysis, of social income (J.B. & J.M Clark., 1912 [1914, p. 6]). According to their views, antitrust laws enforcement must be not directed against the concentration of economic power, leading for instance to a plea in favor of divestitures, whatever their efficiency consequences, as H. Simmons does. They prefer regulating this power. While they had advocated supervision and regulation though *ad hoc* commissions since the first decade of the century, during the thirties they evolved to support antitrust enforcement but mainly as a tool to enhance social control on economic power. The remedy, imposed in *Alcoa*, of guaranteeing a *living profit* to the downstream competitor of a vertically integrated group controlling an essential input upstream, must be read through this prim.

Concern for the concentration of economic power was a constant worry for institutionalists. Characteristically, the issue of monopoly power was noticed by Commons in his early works, notably his Distribution of Wealth (1893)[23]. Remarkably, his analysis of industrial concentration did not lead him to propose controlling firms sizes or making divestitures mandatory. He saw concentration, together with monopoly, as unavoidable[24]. According to him, intervention to protect society against possible abuses of economic power was collectively necessary. However, we again must stress that the main point of divergence between early institutionalist economists in the three first decades of the century and the final consensus reached between them and the neoliberals in the last thirties is that monopoly was not initially seen as undesirable from an economic point of view. Commons (1899) thought a monopoly might be preferable to competition in the sense that it prevents instability and inefficient uses of economic resources. In that sense, institutionalists' views were initially aligned with the Brandesian's ones. Cut-throat competition may lead to unproductive waste of resources, as stressed by J.B. and J.M. Clark in their common book (1912). Symmetrically, the result of the competitive process was also seen as an ever increasing unbalance in terms of welfare. A double issue was at stake, in terms of efficiency on one hand and in terms of distribution on the other, knowing both are interdependent, for institutionalists. As a consequence, it is up to the sovereign power of the State to counterbalance monopoly power in order to benefit from its economic advantages without being exposed to its possible abuses.

[23]One must notice that the early interest paid to the antitrust issue by Commons fades away in his Legal Foundations of Capitalism, in which the words "Sherman Act", and "antitrust" are not even included in the book index,

[24] "All industries except agriculture and retail merchandising have become monopolies and these are rapidly on the road to monopoly" (Commons, 1893).

Institutionalist scholars asserted antitrust was one tool among others to address this issue. However, this tool was initially seen as the least fitted one. In the utilities sector, government intervention has to be exercised through price regulation, for instance through a cost-reimbursement device, plus a guaranteed return on investment, allowing private investors to benefit from a reasonable margin. The regulation is not conceived as an expropriation or a requirement to set price at a (theoretical) marginal cost. The purpose is to find an equilibrium among conflicting interest through a reasonable price. However, this option was not the first one that was envisaged. For instance, in the case of common goods and services, Commons advocated for collective organization between market participants. It might take the form of trade associations, even cartels under some conditions, in accordance with Brandeis's proposals (Commons, 1934). Despite the lack of confidence toward them, antitrust laws may have a role to play in such a strategy. They may prevent combinations that increase the disparity in bargaining powers but the State has to favor the ones that equalize such powers. According to this view, a bilateral monopoly situation (e.g. constituting a collective countervailing bargaining power) is deemed as preferable to unilateral market power that only benefits a private firm.

However, such views conflicted with the Sherman Act in particular, but also with current US case law in general. Government intervention aiming at equilibrating bargaining powers, then advocated by the institutionalists, has a significant chance of being vetoed by courts. This risk was all the more serious during the *Lochner Era*. Institutionalist scholars initially preferred using antitrust laws provisions, and solve economic issues through legislative interventions, which Hamilton (1919) named 'intelligent handling'. Hamilton sharply criticized the Sherman Act, considering it was not correctly fitted to the current economic issues, because of the vagueness of its legal wording and due to its attempts "*to enforce competition based on the textbook model of competitive markets*" (Rutherford, 2011).

According to these views, the creation of the Federal Trade Commission in 1914 was interpreted as a political response to the limits imposed to the Sherman act, based on a political struggle against trusts (Winerman, 2004). In a context in which trusts were sharply criticized in public debates[25], the Sherman Act enforcement appeared as very deceptive (Young, 1915).

[25] We have to consider the influence of the muckraking literature, especially Ida Tarbell's *History of the Standard Oil Company*, published in 1904.

The disillusion was all the more significant as, during his first mandate, President Theodore Roosevelt created the Antitrust Division within the DoJ. 45 cases were brought to courts during its eight-year mandate, as against 3 in the four years of the former Mc Kinley's administration. During the following Taft mandate, the DoJ initiated suits regarding 58 cases in only three years. Nevertheless, such political voluntarism did not meet its target. The conservatism of courts reached its highest point at the same moment[26]. In his declaration of faith at the investiture of the progressive party in August 1912, he denounced the judicial model of enforcement of the Sherman Act and advocated for the creation of a dedicated federal agency: "[Antitrust] has occasionally done good, has usually accomplished nothing, has generally left the worst conditions wholly unchanged, and has been responsible for a considerable amount of downright and positive evil".

The objective was finally reached by President Wilson. The FTC Act (like the Clayton Act, also promulgated in 1914) was conceived as a tool at the disposal of the federal administration to oppose the US Supreme Court's tendency to narrow the scope of the Sherman act and especially its Section 2, relative to monopolization practices[27]. Section 5 of the FTC Act, relative to unfair competition methods, covers a larger scope of practices than Section 2, but also allows intervening since the inception of a practice that is likely to impair competition. In this way, it allows circumventing the rule of reason, recently introduced by the US Supreme Court and seen by antitrust practitioners and scholars as a powerful source of judicial discretion. In other words, the quasi-simultaneous promulgation of the Clayton and the FTC acts might be interpreted as "a clear legislative repudiation of the Supreme Court's amorphous rule of reason in Standard Oil" (Priest, 2012).

[26]However, he has obtained the dissolution of a cartel in the meat industry (the so-called *beef-trust*) in the Swift & Co. vs. United States Supreme Court Decision, 196 U.S. 375 (1905). This decision contrasted with the 1895 case of the *Sugar trust*. Manufacturing reintegrated the Scope of the Sherman Act.

[27]Wilson's approach was rather different than Theodore Roosevelt's. If Roosevelt had been a staunch user of antitrust law (his first mandate allowed him to gain a reputation of *trustbuster* – see for instance the dissolution of the Northern Security Co. in 1904, a holding controlling one of the major US railways – Northern Security Co. vs US, 193 US 197, 1904), he became sceptical about the capacity of the Sherman Act to address economic concentration-related issues. His *Square Deal* could have led to a form governmental trust supervision. Wilson's *New Freedom* relied, on the contrary, on re-invigorating antitrust law enforcement, notably under the influence of Louis Brandeis (Link, 1954). Theodore Roosevelt, and his progressive party, considered that private firms can serve broad public goals at the instigation of the government. The Sherman Act relies, on the opposite, on trusting the ability of free markets to organize economic life (Miller *et al.*, 1984). Theodore Roosevelt's preferences went to trusts regulation, seen as a natural evolution of the market process and a necessary condition to achieve efficiency gains. However, his defeat facing Taft (who was a determined antitrust enforcer) did not allow him to implement in practice a method to distinguish good agreements from bad ones and to regulate them (Sklar, 1988).

At that time, institutionalist scholars considered that antitrust laws participated more to the problem than to the solution. In the following section, we will present how such distrust culminated between 1917 and 1938. Before accepting rallying to an advocacy for stronger antitrust enforcement, they successively considered two options. The first one relied on an organization that associated firms to avoid inefficient competition. The Brandeisian movement was the perfect example of this tendency, a particularly influential one in the early twenties. The second option is symbolized by the NIRA, put in place by Franck Delano Roosevelt during the First New Deal. The main difference with the first option is to be found in the place granted to the federal government. The first model consists in a voluntary association aiming at limiting the negative effects of the competitive process, outside the State Umbrella. The second was structurally under State supervision, with the latter having a major role to enforce collective agreements. Both options were at odds with the Sherman Act. Both failed. However, from these two failures emerged the consensus in the late thirties about the usefulness of the Sherman Act to address economic power abuses.

IV – Economists against competition law: from the American Fair Trade League to the NIRA (1912-1932)

IV-1 The regulated competition model

Mistrust toward the judicial enforcement of the Sherman Act was not the only reason for which institutionalists were suspicious of the relevance of using antitrust laws to address economic issues. As noted by Rutherford (2011, p.1387), Hamilton, for example, considered that their underlying economic model, e.g. perfect competition, was unfitted to economic realities. On the contrary, many institutionalist academics advocated for “intelligent handling” or for a “new competition” concept, prefiguring the NIRA of the First New Deal, whose purpose was to establish both a coordination system between competitors and a control system of business practices in the public interest (Rutherford, 2011).

US scholars had expressed contrasted views about the issue of industrial concentrations. We again have to stress that, in the early 20th century, many economists did not reject monopoly in itself, as they were aware of its efficiency gains (Henry, 1995). For example, John B. Clark considered (at the very beginning of the century: 1901, 1904) that trusts are efficiency-enhancing and might be self-regulated by potential competition… announcing one of the main features of the Second Chicago School or, even more directly, the theory of contestable markets.

However, in the 1912 edition of *The Control of Trusts*, published with his son, John Maurice, his position had significantly evolved, advocating for stringent public supervision.

This uncertainty about the monopoly issue and the proper way to address its consequences was shared by most US scholars. Notably the institutionalists, as has been seen above, considered that concentration was necessary to achieve efficiency benefits. While they recognized that concentration raised many distributional concerns and favored market power abuses, they did prefer the solution of social handling, in order to reconcile the economic gains resulting from concentration with preventing the exercise of coercive powers that might result from it.

This view was all the more shared among scholars as many of them saw free competition as a cut-throat process inducing both waste of resource and economic instability. Three years before the promulgation of the Sherman Act, Hadley (1887), quoted by Mayhew (1998), considered that "regulated competition is better than irresponsible competition". Free competition may make way for fair competition (Waked, 2018). The oppositions between Progressists' and Democrats' views on economic concentration and the formers' lack of confidence on the adequacy of antitrust laws towards conciliating distributional- and efficiency-related concerns can be illustrated by the Walter Lippmann's criticism (1914) of "anti-trust people" who "would be breaking up the beginning of a collective organization thwarting the possibility of cooperation, and insisting upon submitting industry to the wasteful, planless scramble of little profiteers".

Such a kind of "new competition" was defined as inter-firms co-operations. For instance, they may consist in tough information exchanges regarding prices and output decisions. The purpose was to stabilize the market process and eliminate 'cut-throat competition'. Such a policy was advocated by future Justice Brandeis, through the American Fair Trade League. Institutionalist economists initially had rather favored a system of "private self-regulation by industrial associations coupled with public oversight" (Phillips, 2011). Such an organization followed the model of the War Industries Board (WIB), established in July 1917. This technocratic view of 'managed competition' was nothing else than the negation of Antitrust principles, especially in their future Chicagoan meaning[28]. The WIB was the US first experience of government-promoted and coordinated business co-operations to achieve collective objectives, and led to

[28] Such regulated-competition models have been experimented in some industrial sectors, such as the commercial printing industry, which developed a collective cost-plus approach in order to set prices. Paradoxically, the FTC later initiated an antitrust suit against the printers (Berk, 2009).

putting aside antitrust law enforcement. Antitrust laws then appeared as anachronistic, if not counter-productive.

In the same way, after the war, several WIB veterans and some business leaders advocated for formal antitrust law enforcement *aggiornamento* (Miller *et al.*, 1984), proposing self-regulation by industry. Such proposals were for instance supported by future President Herbert Hoover, then Secretary of Commerce (Hawley, 1974) and by the FTC whose 1928 Annual Report sustained the *associationalits'* movement and its *trade practice conferences*.

Two remarks must be added. The first one is that the same intellectual process was at stake between the two World Wars in Europe (Denord, 2009). Remarkably, the second one is that support to the Sherman Act by First Chicago School classical liberal economists could also be explained away by trying to avoid such a kind of "organized competition" (Van Horn, 2010). These liberal scholars' purpose was to ward off a second NIRA. According to Simons (1943), there is no difference between cartel agreements and such "commodity agreements". Stabilizing a particular price against a general decline inexorably leads to shift the burden of the depression upon less organized groups and thereby prolong its duration[29].

Before analyzing the simultaneous convergence between classical liberals and institutionalist economists towards antitrust laws, let us note that the NIRA made sense for institutionalist scholars. Louis Brandeis' views were also initially shared by Commons (1934). His analysis of economic history led him to distinguish three successive phases in the economic evolution. The first one corresponds to the pre-industrial revolution era. It was a period a scarcity. Economic activity had to be narrowly regulated by governments. With the industrial revolution, we entered a period of abundance in which Manchester liberalism (*laissez faire*) was pertinent since the competition intensity was sufficient to constrain the exercise of any market power. The last period, according to Commons, is a time of stabilization. The issue is now the self-destructive character of competition, leading to economic instability, price wars and waste of resources. The market economy might be preserved only if "combinations" are encouraged in order to produce "stability and fairness". The choice of coordination within the different industrial

[29]Simons (1941) considered that "the National Industrial Recovery inaugurated an orgy of price-fixing and invited businessmen to do, as patriots, what they had been doing before – on a vast scale, to be sure, but stealthily and with slightly bad conscience".

sectors during the NIRA era – encouraged and organized by the federal government – might be accounted for by this theoretical framework.

For institutionalists, supporting antitrust enforcement was a turnaround, considering their initial preference for a regulatory or a cooperative solution to counteract the potential abuses resulting from this concentration. Such views participated to a technocratic-inspired movement, privileging firms' coordination and public control in order to avoid cut-throat competition. Self-regulation or government regulatory supervision was preferred to antitrust interventions.

IV-2 From support to NIRA to adhesion to antitrust laws

US economists' conversion to the Sherman Act enforcement virtues might be dated between 1937 and 1938. Three events might explain such a sudden and perhaps unexpected convergence. The first is outside the scope of economic thought history. It lies in a jurisprudence reversal. The Supreme Court's decision *West Coast Hotel Co. vs. Parrish* marked the end of the *Lochner* era. Courts were no longer an obstacle for voluntary and effective enforcement of the Sherman Act. The second unexpected event, considering its initial intention, was the rallying of the Roosevelt administration to determined antitrust enforcement strategies. This political change was an indirect consequence of the end of the NIRA-based economic strategy with the Supreme Court's 1935 *Schechter* decision, as an 'organized competition' under government supervision was no longer possible. In addition, the First New Deal experience was seen as very deceptive, since President Roosevelt was convinced that *Big Business* had not played a cooperative game. According to President Roosevelt's views addressing inflation and underinvestment issues imposes to revive antitrust laws enforcement. The third and last phenomenon is conversion to it by US economists coming both from the institutionalist and the Chicagoan sides. They then shared the conviction that competition policy is a means to fight against the negatives consequences of economic power concentration. Some of them previously advocated organized competition, others until then defended *laissez-faire*, but both of them converged simultaneously on a shared conviction: a government led competition policy may address the issue of economic power concentration

In order to assess the breadth of the political reversal about Antitrust from the First to the Second New Deal, it is necessary to stress that, during the NIRA, antitrust prosecutions were nearly entirely suspended (Gressley, 1964). Indeed, the NIRA had consecrated the Brandeisian ideas of regulated competition[30]. As was also the case for many European countries, the experience of the War made such a model of undertakings coordination under government's supervision socially acceptable (Himmelberg, 1993). In the same movement, large firms gained large acceptation within the whole society. Time was no longer for an assault on big business but rather for the project of a stabilized economy that conciliates the efficiency produced by the quasi-industrial integration mimicked through coordination and consumers' protection (Watkins, 1928).

At the same time, the NIRA could also be analyzed as sign of mistrust toward the effective effects of the associationalist strategy, e.g. the private sector-led model of coordinated competition. For instance, as J.M. Clark (1931) put it: "[T]he industrialists persisted in their effort to exploit the opportunity they found in trade practice conference to temper the warfare of industrial competition and they were successful in devising euphemisms for trade-restraining agreements which escaped the attention of the Commission". In other words, the private-led coordination of the competition process no longer looks like a proper tool to reach the objective of a "public interest" model for regulated competition. As associationalism potentially led to "private interest"-regulated competition, public oversight seemed necessary. However, a second difference should be stressed: the NIRA model did not rest upon voluntary deals among competing undertakings but brought into play industry wide agreements based on national plans[31].

The competition-based model on which antitrust law relies was firmly rejected by the First New Deal. President Roosevelt's address to the US Chamber of Commerce (May 4, 1933) is emblematic of such a theoretical and political shift: "You and I acknowledge the existence of unfair methods of competition, of cutthroat prices, and of general chaos. You and I agree that these conditions must be rectified and that order must be restored. The attainment of that objective depends on your willingness to co-operate with one another to that end, and also your willingness to co-operate with your Government".

[30]In a significant way, Donald Richberg, who was appointed by Franklin Delano Roosevelt as general counsel for the National Industry Recovery Administration, worked in 1912 in Theodore Roosevelt's campaign team (Miller *et al.*, 1984). On the influence of the WIB experience on the NIRA conception, see also Bruce and Smith (1995). It is worth stressing that the NIRA logic was not expected at that time. The 1932 Democratic platform was still aligned on an antitrust law enforcement logic (Patch, 1947).

[31]On the influence of the group of academicians constituted by A. Berle, R. Tugwell, G. Means, and W. Douglas on the First New Deal policy regarding the issue of economic concentration, see for instance Waller (2004).

The NIRA rejection by the Supreme Court constituted a breaking point for US economists' views on antitrust laws[32]. The appointment of Thurman Arnold, in 1938, as head of the Antitrust Division of the Department of Justice (DoJ) gave antitrust laws enforcement a new start. The revival of the Sherman Act was consolidated by a 'progressive' shift in the US Supreme Court that closed the *Lochner* era. This shift all the more significantly impacted economists' views on antitrust laws as several structural movements led them to pay more attention to this domain (Mayhew, 1998). The promulgation of the Clayton Act in 1914, permitted to initiate several criminal prosecutions that led to more effective remedies, enhancing economists' confidence in the effectiveness of antitrust laws enforcement. Stigler (1982) suggested a second explaining factor: the end of the NIRA experience. It accelerated the decline of the attraction of the model of "coordinated competition under public supervision" and symmetrically increased the attention toward antitrust laws that emerged as an alternative to *laissez-faire* based policies.

The NIRA led to tripartite coalitions bundling labor interests' representatives, civil servants and business interests. The dominant partner was the third one, through trade associations. Not only was stabilization achieved at the expense of the absent partner – the consumer –, but the codes also allowed many sectors to engage price fixing activities to their own advantage.The failure of the NIRA in economic terms was one of the consequences of this capacity to set excessive and rigid prices in several sectors. According to Simons (1943), "During depressions, the stabilization of particular prices against a general decline serves to shift the burdens of depression heavily upon other groups and, thus, to increase the difficulties of effective monetary and fiscal counteraction. Sustaining such prices means larger curtailment of employment, and, thus, of spending. It means drawing off a larger share of spending to the particular enterprises, and thus, deepening the depression in other areas of the economy". The stagflation-style phenomenon that resulted from the NIRA led Franklin Roosevelt to sanction the firms that did not play a cooperative game and had captured the tools at their disposal to promote a "private interest"-based coordination model (Emmett and Van Horn, 2012).

Franklin Roosevelt's message to Congress (April 29, 1938), 'Curbing Monopolies', drew the conclusions from this deceptive experience: "One of the primary causes of our present difficulties lies in the disappearance of price competition in many industrial fields, particularly

[32]The NIRA moved far beyond the associationalist program. For instance Herbert Hoover during his mandate insisted on the necessary compliance of such agreements with Supreme Court case law on antitrust. The NIRA was invalidated by a Supreme Court decision on May 27, 1935 (Schechter Poultry Corp. vs. US, 295 US 495, 1935). The Statute was considered as an unconstitutional delegation of legislative power. It worth underlining that the then Justice Brandeis had sustained this decision.

in basic manufacture where concentrated economic power is most evident—and where rigid prices and fluctuating payrolls are general. […]When prices are privately managed at levels above those which would be determined by free competition, everybody pays". While President Roosevelt still admitted competition "can be carried to excess" or "should not [be] extend[ed] to fields where it has demonstrated bad social and economic consequences", he also stressed that "big business collectivism in industry" is both inefficient and dangerous, as it "compels an ultimate collectivism in government"[33].

President Roosevelt's political reversal in favor of antitrust law enforcement was not only a return to previous practices. Enforcement had to be implemented more efficiently to enable antitrust laws to meet their objectives: "To enforce them properly requires thorough investigation not only to uncover such violations as may exist but to avoid hit-and-miss prosecutions harmful to business and government alike". The creation of the Temporary National Economic Committee (TNEC) was in the same speech announced as a means to enhance the capacity of antitrust enforcers of solving competitive issues.

The end of the NIRA did not stop the influence of pro-planners such as Rexford Tugwell, Adolph Berle or Gardiner Means. President Roosevelt was not completely convinced about the soundness of his late adherence to the merits of antitrust laws[34]. In addition, the presidential attention was mainly focused on macroeconomic policy and increasingly by foreign affairs. Antitrust enforcement was not at the top of the political agenda[35]. Indeed, the dramatic push on antitrust law was unexpectedly imparted by Thurman Arnold, so far an antitrust laws buster. The moment Simmons, and following him many Chicago scholars, knew of its "religious conversion" to antitrust (Kitch, 1983), when Mason (1939) laid the foundations of the structuralist school and when institutionnalists rallied to antitrust virtues, the Antitrust Division of the DoJ switched, under Arnold's impulse, from a "vacillating and sporadic enforcement" to very voluntary policy (Gressley, 1964). The appropriation of judicial action resources offered by the Sherman Act by institutionalists might be also dated back to the late thirties. These latter

[33]Such views have been reaffirmed after the War. For instance according to President Truman's Attorney General, "Progressive abandonment of free and competitive enterprise leads to government domination of business" (Patch, 1947).

[34]President Roosevelt's views on undertakings' cooperation remained balanced. While he states that "remedial legislation should be considered" if agreements lead to "eliminate socially and economically harmful methods of competition", he advocates a more stringent supervision of trade associations to prevent "interference with legitimate competitive practices".

[35]At the same time, the amount of public money allocated to the DoJ for antitrust enforcement that were ranged from \$100,000 to 300,000 a year before 1935, have already reached \$400,000 for fiscal years 1936, 1937 and 1938. They reached a peak in 1942. The number of attorneys employed by the Antitrust Division increased from 50 in 1938 to 245 in 1942 (Patch, 1947).

no longer deemed antitrust legislation a purely theoretical view of economics whose implementation may impair efficiency gains. They started to consider that these legal action resources may help to counterbalance economic power dissymmetry and then prevent distorted market practices.

Nevertheless, the story of the Roosevelt administration push on antitrust laws enforcement looks more deceptive than expected. At the same time, even more paradoxically, Thurman Arnold's action was certainly a surprise for all stakeholders.

In the wake of his April 1938 speech, and following the opinions of progressive senators (O'Mahoney (Wyoming), La Folette (Wisconsin), among others), Roosevelt founded the TNEC, *Temporary National Economic Committee*[36] (Waller, 2004). While he incriminated the inadequacy and the defects of existing antitrust laws, he did not undertake to revise them. The revival of public enforcement of antitrust laws was achieved on the basis of established law with the appointment of a Yale Law School professor, previously a member of the TNEC, Thurman Arnold. His nomination was not consensual since he had just published a book in which he sharply criticized antitrust laws (Waller, 2004). In *The Folklore of Capitalism* (1937), he had confessed an innate skepticism over antitrust laws, as he thought it only "preaches" grounded on "manufactured economic panacea" (Gressley, 1964).

At that time, he deemed antitrust laws too often boiled down to a *per se* condemnation of economic power. He saw them as inconsequential imprecations, improper to produce effective solutions. As many institutionnalists did, he gave preference to regulation devices (Miscamble, 1982). For all that, Arnold was all but a structuralist. He claimed antitrust laws are not "designed to eliminate the devil of bigness" (Arnold, 1940). We must stress that Arnold's views were aligned with Roosevelt's position in 1938: reinvigorating antitrust enforcement did not aim at challenging private economic power[37]. Arnold's focus was no longer on the issue of fair competitions but, more contemporarily, on passing efficiency gains resulting from the industrial concentration onto final consumers. He initiated a reversal from advocacy of fair competition to defending free competition (Waked, 2018).

As soon as he took office, Arnold's views evolved dramatically. He insisted on the economic purpose of antitrust laws. He believed these were focusing on consumer interest protection.

[36]Its final report was issued in March 31, 1941. According to Waller (2004): "the decade that followed the TNEC produced a high point in both the reach of antitrust doctrine and the enforcement of antitrust legislation".
[37]"It is not intended as the beginning of any ill-considered trust-busting activity which lacks proper consideration for economic results". April 29, 1938, President Roosevelt message to Congress on *Curbing Monopolies.*

Ensuring free competition is seen as essential for consumers. His policy was all the more effective as he inaugurated new enforcement methods and especially used consent decrees in an innovative manner by simultaneously filing civil and criminal suits. During his mandate (1938-1943), he initiated 215 investigations (44% of all the proceedings engaged during the 53 years since the passage of the Sherman Act) and brought 93 lawsuits (Miscamble, 1982). The largest number of antitrust cases filed was observed in 1912, during the Taft's administration (29), over its first seven and one-half years, while the Roosevelt administration only instituted 44 law suits. In 1939 12 cases were initiated, 85 in 1940, 88 in 1941 and 97 in 1942[38].

What is particularly striking is that his activism resulted more from Roosevelt's lack of interest than the President's staunch support.

Inevitably, the preparation of the war finally led to premature easing off of the antitrust effort. At that time, many industries faced global investigations, such as the building and construction industries, the motion picture, tires, fertilizers, petroleum and transportation sectors. Arnold's activism even led him to bring a case against trade unions, forcing his extremely reluctant line officer (Attorney General Murphy) to support him in an indictment finally dismissed by the Supreme Court (Miscamble, 1982; Waller, 2004).

However, his impulse heralded the Warren Era of Antitrust enforcement after the Second World War and favored consensus among US economists on the worth of antitrust laws. At the same time, Arnold's policy had long term consequences on views on the purpose of antitrust laws, as Waked (2018) stressed. The first evolution is the switch from the objective of fair competition, archetypal of institutionalists' preferences, to a free one. It announced the future place devoted to the concept of competition on merits. It also paved the way for a consumer welfare-focused interpretation of the purpose of antitrust laws. In the same vein, Arnold's enforcement strategy not only led to disregard the issue of bigness in itself but also implicitly marginalized the economic power issue.

[38]58 in 1943, 22 in 1944, 24 in 1945 and 26 in 1946 (Patch, 1947). The enforcement of antitrust law by Arnold was paradoxically facilitated by the previous situation (Waller, 2004). Antitrust laws were rarely enforced during the 1920's, the NIRA had virtually repealed them for two years, and firms used to coordinate without fearing any lawsuits filed by government agencies for several years. As Waller (2004) states, there was many "low-hanging fruits to be plucked by the Antitrust Division". This view was also shared by Simons (1941) stating that "Arnold has skimmed off a rich cream of prosecution opportunities. It is also worth pointing out that in 1938 Arnold opened the Alcoa case that found its conclusion with Judge Hand's March 12, 1945 ruling, which we have started this paper with.

His position already implied a shift from Simon's views. In the late 1930's he advocated Antitrust enforcement that aimed at preventing the concentration of market power, even though structural remedies and, if necessary, through nationalizations. Accepting the idea of mandatory divestitures – whatever their cost in terms of efficiency and the origins of market dominance – was specific to the First Chicago School antitrust bias, and compliant with Walter Lippman's view (1937). Remedying economic power unbalances and guaranteeing market power dispersal constituted two legitimate purposes for the late 1930's neoliberals. While it is undoubtedly not the case of Second Chigaco School's scholars, it is worth noting that T. Arnold soon shifted away from these views in his advocacy of free competition against fair competition. Within this scope, the purpose of Antitrust does not consist in promoting efficiency but limiting economic power unbalances.

It is also worth insisting on Simons' rather skeptical views on Arnold's positions concerning antitrust laws enforcement (Simons, 1941). Simons was disillusioned about the capacity of existing antitrust laws and of their judicial enforcement standards to properly address the issue of economic concentration. Firstly, their activation seems to come too late[39]. Secondly, Simons remained doubtful about the implementation of the rule of reason, advocating for *per se* rules[40]. Thirdly, he rejected antitrust enforcement consisting in price supervision, considering it may lead to a regulation-style implementation, turning the Antitrust Division into a "super-public-utility commission with power not to fix prices (rates) but to harass those who charge unreasonably until they abandon the practice" (Simons, 1941). He argued that Arnold "ought to concern himself about maintaining effective competition, not about hammering monopoly prices down to competitive levels with grand juries".

This last point is all the more important as it allows us to highlight a structural divide in antitrust matters on the issue of economic power concentration and especially on the issue of bigness. Both institutionalists and Arnold asserted economic concentration was not an issue in itself and

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[39]"We have never had an anti-monopoly policy in fact; few lawyers or courts have ever condoned such policy; and the unsubstantial concessions which have been made to advocates of freer markets, in legislation, court decisions, and in sporadic bursts of innocuous prosecutions, have mainly enabled us to postpone effective action until monopoly conditions have become so consolidated, until interested minorities have become so numerous and powerful, and until the public has become so enamoured of other, incompatible causes, that effective action seems now nearly impossible" (Simons, 1941).

[40]"Our anti-trust law should be reinterpreted administratively as simple proscription of unreasonable behaviour […] Main reliance should be placed on definitive, legislative implementation, on unambiguous rules of laws, […]" (Simons, 1941).

might be a necessary evil, considering the economies of scale it allows[41]. For the Second Chicago School scholars, the monopoly issue is not a relevant one. Foreshadowing Bork's views, Director argued, as of the 1950's, that competition prevails over monopoly without state intervention (Van Horn, 2011). A potential competition provides sufficient incentives to discipline a monopoly: "large corporations approximated the impersonal ideal of the market, giving rise not to business monopolies but to competition – provided that the government did not undermine the economic process through its interventions" (Van Horn and Emmett, 2015).

On the contrary, thirties' neoliberals, such as Simons, claimed that economic power concentration both impaired the market process and endangered political freedoms, since economic power concentration may facilitate political power concentration. The same views about bigness are nowadays shared by the *new Brandeis movement* (Khan, 2017) and challenged by "technical antitrust" defenders (Langlois, 2018; Hovenkamp, 2018).

V. Conclusion

An early crucial dimension in this historical dynamic consists in finding the proper criteria to use in antitrust enforcement. The Second Chicago School considers that antitrust laws only aim at promoting economic efficiency, whatever the distributional consequences (Marty, 2014).We aimed at demonstrating that both US institutionalist economists and First Chicago School scholars recognized that such legislation not only has economic purposes but also political ones[42]. These concerns were both essential for explaining the promulgation of the Sherman Act in itself but also for understanding its enforcement. One of the main objectives shared in the late thirties by US economists was to avoid economic power concentration leading to concentration of political power. The dispersal of economic power resulting from the competition process is simultaneously an essential condition to prevent the concentration (e.g. the capture) of the political one (Zingales, 2017).

It is worth stressing that this thinking was significant both at the time of the Sherman Act promulgation and during the thirties. Contrary to Borks' view, the Sherman Act promulgation

[41]According to Simons (1941), "Arnold likewise pays deep respect to the economies of mass production and deplores popular notions of the Sherman Act as an attack upon bigness".

[42]For instance, according to Simons (1934): "My conclusion, drawn from the evidence in the Congressional Record, is that Congress intended the courts to implement […] only the value we would today call consumer welfare. To put it another ways, the policy the courts were intended to apply is the maximization of wealth or consumer want satisfaction".

was less motivated by economic injury against consumers than by the political hostility towards trusts' practices. For example, Andrews (1889) asserted just one before its enactment: "Our sources show that the witchery of the Standard Oil interest has penetrated even the political world. For some years it influenced, not to say, dominated, in at least one great State, the legislature, executive, and courts. Its wiles in that field, described in great detail in the records of the Congressional committee, render very clear the political menace resident in these stupendous aggregations of wealth. Only the Nation's arm can cope with them".

The tension between fair and free competition constitutes the second crucial dimension to stress. We have seen that Arnold's enforcement policy led to a shift from the first, which echoes institutionalists' concerns, to the second, which is compliant with neoliberal approaches. The notion de *fair competition* first emerged in the *Schechter Poultry Corp. vs. US* case in a *Brief for the US* (App. 288 US 372). The latter defined this notion through the Appalachian case law[43]: "*in Appalachian Coals, the government quoted for the proposition that price fixing ultimately benefits to consumers by ensuring fair returns for businesses"*. The shift toward free competition does not immediately imply a Second Chicago School type of antitrust law enforcement. During the *Warren era*, structuralist views lead to "*enforcement agencies and the courts tend to equate free competition and atomistic rivalry"* (Meese, 2013). It was still necessary to make approaches evolve to make it admissible that competitive pressures still exist in an underlying way, even for a monopoly.

In the same way, the Arnold era of antitrust enforcement is all the more important as it broke away from several traditions or theoretical recommendations. First, it separated public antitrust enforcement through lawsuits before courts from any regulation implemented by a government agency. Second, it did not address the issue of bigness or the issue of economic power concentration in itself, but only anticompetitive practices. In that sense, it led to an inflexion from institutionalists or First Chicago School scholars and paved the way for the Second one.

As has previously been underlined, Aaron Director's case is particularly representative of this shift (Van Horn and Emmett, 2015). He had defended Simons-style views in his 1947 address to the first Mont Pèlerin Society conference, considering that the State has a role to play to foster individual freedom and guarantee the dispersal of market power through antitrust laws enforcement. However, by the 1953 conference (published in 1964 in the *Journal of Law and*

[43]US Supreme Court, Appalachian Coals v. US, 288 US 344 (1933). The DoJ obtained the dismantling of a 137 firm trust in the field of bituminous coal distribution to act as a single selling agent vested with the authority to set the prices.

Economics), "Director no longer saw business monopoly and large corporations as a substantial threat to effective competition and hence political freedom. […] He began to argue that concentrations of market power were relatively benign; the real threat to a free society came from those seeking to use state power to break up or to countervail market power (Van Horn and Emmett, 2015).

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