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The Late Emerging Consensus Among American Economists on Antitrust Laws in the Second New Deal (1935-1941) [*]

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Abstract/Résumé

This paper presents the late convergence process from American economists that led them to support a strong antitrust enforcement in the Second New Deal despite their long-standing distrust toward this legislation. The paper presents the path from which institutionalist economists, on one side, and members of the First Chicago School, 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 a classical liberalism. The appointment of Thurman Arnold at the head of the Antitrust Division in 1938 gave the impetus to a vigorous antitrust enforcement. The 1945 Alcoa decision crafted by Judge Hand embodied the results of this convergence: in this perspective, the purpose of antitrust law enforcement does consist in preventing improper uses of economic power.

Keywords/Mots-clés: Antitrust, Efficiency, Economic Power, Institutional Economics, Chicago School, New Deal

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1. INTRODUCTION

For over the four last decades, antitrust laws enforcement in the United States 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, 1979 and 1987). In this perspective, judging an antitrust case must rely on an economic reasoning as method. Economic considerations – e.g. maximizing efficiency – both constitute the aim of the ruling and the method to follow to weight the arguments of the parties. In other words, the judge must use the tools provided by microeconomics to decide the case.

The legal consecration of the antitrust enforcement economization process by the US Supreme Court can be dated in the late 1970s with two successive rulings. The first one was *GTE Sylvania*[1]. It consecrated the effects-based approach to assess the compliance of market practices with Antitrust laws and departed from a *per-se* based approach. The second one was Sonote[2] in which the Supreme Court endorsed the Robert Bork's conception according to which the Sherman Act should be analyzed as a consumer welfare prescription (Bork, 1978).

However, this reversal of case law must be resituated over a longer period. It was confirmed in the early 1980s with the appointment of William Baxter as head of the Antitrust Division of the DoJ by President Reagan, but several indices show that the inflection of the US administration had been perceptible for many years, whether in the area of merger control (Williamson, 2003) or the muzzling of the Robinson-Patman Act[3] (Sokol, 2020). It is not surprising that agencies were the first - because of their position at the intersection of the academic and professional worlds - to initiate or even bring about paradigm shifts (Ergen and Kohl, 2019). However, this shift was favored in the United States by the fact that the effects-based approach was gradually adopted by the Harvard School in the same period (Kovacic, 2020).

The economization of American Antitrust is therefore not purely Chicagoan. It presents, to use Kovacic's (2007) words, a double-helix DNA, combining Chicago and Harvard. However, what

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[1] Continental TV vs GTE Sylvania, 433 US 36, 1977

[2] Reiter v. Sonotone Corp., 442 U.S. 330 (1979)

[3] SOKOL (2020, p.21) underlines that the DoJ unilaterally declared in 1977, it would no longer enforce the act due to its "deleterious impact on competition" and two years before in 1975 the FTC had stated that the Robinson-Patman Act was "protectionist". In other words, the shift in the administrative bodies predated the Supreme Court case law reversal.

characterizes the Chicago approach is an antitrust minimalism based on two characteristics: the assumption that certain market practices are efficiency-enhancing per se and the assumption that a false positive decision is more costly in terms of welfare than a false negative.

The crossroads between Economics and Antitrust in the late 1970s was not just its “chicago-isation, nor was it their first encounter. As Hovenkamp (1985) points out, it was primarily a shift in the economic theory on which the antitrust community relies. Indeed, while American economists had been interested in the issue of trusts as early as the 1880s (Hovenkamp, 1989), it was only belatedly that economic debates had an impact on decision-making practice. For instance, the first mention of economics in a Supreme Court decision dates to 1925 with the Maple Flooring case[4]. Even more significantly, until the mid-1930s, American economists were debating the pros and cons of antitrust. For some, concentration was seen as a necessary condition for economic efficiency and the prevention of ruinous competition. Concentration was a necessary evil and had to be regulated (Mayhew, 1998, 2008). Was the main purpose of antitrust laws to promote a fair or free competition? A second question also arose: should antitrust thwart the concentration of economic power in itself (the Bigness issue) or should the antitrust enforcement be only focused on practices impairing a competition on the merits?

We aim to show that an - unexpected - consensus initiated by the 1938 President Roosevelt's "anti-monopoly" April 29 speech and shaped by Thurman Arnold's efforts as Assistant Attorney General in charge of the Antitrust Division (Gressley, 1964; Hawley, 1966) was forged among American economists after the failure in 1935 of the first New Deal and the end of the NRA. This last experience had led to the cartelization of the economy under the auspices of the federal state (Taylor, 2002). The institutionalists' abandonment of the defense of a regulation of the economy centered on large companies (Rutherford, 2013) and the support given by the First Chicago School to the reinvigoration of public enforcement of the Sherman Act led to a scarce time of consensus on antitrust policy[5].

[4] The US Supreme Court judgment in Maple Flooring Manufacturers' Assn. v. United States, 268 U.S. 563 (1925) quotes Marshall (*Readings on Industrial Society*), Hobson (*The Evolution of Modern Capitalism*) and Fisher (*Elementary Principles in Economics*) in its argument overturning the lower court decision. While the Court of Appeal had ruled that the exchange of commercial and economic information between members of a trade association violates the Sherman Act, the Supreme Court contradicts it by pointing to their virtues in terms of market stabilization, fair prices, and practices that fall within the scope of "intelligent conduct of business operation". See infra, 3.2.

[5] Following Bougette et al (2015), we distinguish a first Chicago school that is classically liberal and favourable to a resolute implementation of antitrust rules (illustrated in particular by Frank Knight, Jacob Viner and Henry Simons) from a second Chicago school that is more reticent with regard to the enforcement of competition rules and embodied by Robert Bork, for example.

However, two observations should be made. Firstly, the defense of free competition cannot be understood only in terms of pure efficiency. Should the concentration of economic power be thwarted at the expense, if necessary, of efficiency? Henry Simons' views may be of interest to consider in the context of this debate. Secondly, this consensus was not long-lasting. The Alcoa judgment rendered by Judge Learned Hand in 1945, which was the final point of a procedure initiated in 1937, was both the culmination of an antitrust aimed at defending an effective competition structure and the beginning of the challenge to this acceptance that led the Second Chicago School to depart from the positions that Simons had taken (Director and Levi, 1956; Kitch, 1983; Van Horn, 2010).

Director and Levi, who were placed by Simons at the head of the Free Market Studies program and the Antitrust Project - successively led from 1947 to 1957, just before his death (Van Horn, 2014) had developed 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 U.S. case-law reversal, made twenty years later, in the 1977 decision *GTE Sylvania*. They stressed the importance of performing an economic assessment of the consequences of the practices on consumer welfare and challenged the legitimacy of judicial policies having any alternative or additional purpose in mind when enforcing antitrust law (Posner, 1977). In other words, Director and Levi laid down the very principle of the Second Chicago School's approach, which assigns only one purpose to antitrust (the maximization of consumer welfare) and rejects an egalitarian view of antitrust in which the judge would have to arbitrate between diversified objectives that may, for example, relate to the maintenance of a situation of effective rivalry in the market, fairness in transactions, pluralism, etc. (Kovacic, 2020; Sokol, 2020). Considering the late 1930s debates is fundamental to understand such trade-offs.

Our aim is both to analyze the change in the balance of power between Roosevelt's advisers, which led to the loss of influence of the planners to the benefit of advocates of the implementation of antitrust rules, and the evolution of the positions of American economists on the issue of competition policy with the transition of the institutionalists from a logic of regulated competition, or fair competition, to a logic of free competition (Ackerman, 1998)[6].

[6] “Nonetheless, the cases had a significant impact on the shape of Roosevelt’s New Deal programs. Historians often classify the New Deal into two halves. The first half, from 1933 to 1935, was marked by associationalism—legislative and executive efforts at centralized planning of the economy through industrial codes derived from guild-like associations closely supervised by governmental administrators. The second half of the New Deal,

The evolution of institutionalist economics from defending associationalist perspectives in the 1920s to rallying to Antitrust, as the Fetter petition in 1932 illustrated, is particularly significant: « Economists, who had been lukewarm about the Sherman Act, came to love the antitrust laws » (Martin, 2007). For the economists brought together by Fetter, the crisis did not imply abandonment of antitrust policy but, on the contrary, a thorough enforcement of it. One of the causes of the depression was not the inappropriateness of the Sherman Act, but the insufficiency of its enforcement. If the NIRA was the opposite of their proposals, the turn made in 1938 marked their victory.

In this article, we propose to trace this process of conversion from a Halmiltonian perspective relying on the intervention of a "big" federal government, countervailing the "big business" economic power, to a Jeffersonian perspective hostile to the concentration of both political and economic power (Arthur, 1986), which, after all, had already structured a good part of the history of American Antitrust from the promulgation of the Sherman Act in 1890 to the presidential election of 1912 (Crane, 2015) and which, in some respects, echoes with neo-Brandeis arguments (Wu 2018; Khan, 2020). The issue is often as much about the desirability of an equilibrium between Big Business and Big Government as it is about economic efficiency.

After having presenting in a second section, the very skeptical views of American institutional economists regarding the effects of Antitrust until the late 1930s', we highlight, in a third section, President F.D. Roosevelt's political turnaround, from the First New Deal, with the NIRA (National Industrial Recovery Act), to the strong reactivation of antitrust enforcement during the Second New Deal. We stress in a fourth section that this political turnaround, endorsed by institutionalist economists, was also supported classical liberal economists who accepted the legitimacy of government interventions to address the concentration of economic power issue to protect the market process against itself (Mirowski and Plehwe, 2009). As of the late thirties, American economists, whatever their theoretical background, started to concur with the Sherman Act[7]. However, we highlight in our fifth section how the Judge Hand's ruling in Alcoa (1945) was both the acme of this approach of Antitrust and the start of the divergence

prompted in substantial measure by Panama Refining and Schechter but also by the failure of the NIRA model to improve industrial conditions, involved more modest and targeted efforts at market regulation. As the constitutional historian Bruce Ackerman has pointed out, the central organizing concept of the first New Deal was "planning" while that of the second half was "liberty" (CRANE, 2007). It be can noticed that Gordon argues -against Ackeman's interpretation - that the first phase was less a "government-imposed" planning schema than a business interests-driven policy (GORDON, 1998).

[7] The rise of the Second Chicago School after 1945 does not mark the start of the economization of antitrust, rather a paradigm shift (HOVENKAMP, 2015)

of the Chicago School from this consensus. Our fifth section draws a parallel with current antirust debates.

2. Economists against competition law: from the American Fair Trade League to the NIRA – antitrust versus regulated competition

Although American economists began to question the efficiency of trusts as early as the 1880s, particularly in high fixed-cost industries, the promulgation of the Sherman Act was outside their influence (Hovenkamp, 1989). The problem was more political in nature: the concentration of economic power raised fears that the American social contract would be undermined.

Besides this enactment outside the influence of economics, the Sherman Act did not attract the support of American economists for two main reasons.

Firstly, in the Lochner era, the Common Law courts enforcing the Sherman Act were characterized by a strong conservatism[8] inspired by the classical legal thought. This conservatism undermined the economists' confidence in the effectiveness of the law, as the debates in the 1912 presidential election showed when Theodore Roosevelt, disappointed with his trustbuster experience, argued for the use of government agencies[9].

Secondly, American economists were polarized on the issue of the very desirability of this legislation. The dividing lines between economists trained in the German historical school[10]

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[8] According to Commons (1934, p.699): "Supreme courts, like individual human beings, are dominated by these habitual assumptions arising from the prevailing customs of the time and place". Hamilton and other institutionalists shared this view. The conceptions that animated the courts were no longer adapted to the reality of the concentration of economic power that had been the reality of the American economy since the end of the 19th century (Rutherford, 2005). In addition, it should be noted that Allyn Young made an assessment of the implementation of the Sherman Act that showed the inconsistency of judicial decisions (Young, 1915).

[9] The 1912 election opposed four candidates: Democrat Woodrow Wilson, Republican Howard Taft, Progressive Theodore Roosevelt, former Republican president, and Socialist Eugene Debs. Each of them took very distinctive positions on Antitrust and the concentration of economic power. In a Jeffersonian logic, Wilson defended the model of a competition-defense based on an activation of the Sherman Act and Roosevelt defended a more Hamiltonian approach based on a regulation of monopolies. Wilson's team included future Supreme Court Justice Louis Brandeis and Roosevelt's team included Learned Hand. Nowadays, Taft's position seems conventional to us, in that the size of firms did not appear to be a problem in itself and should not in itself give rise to antitrust action (Martin, 2007). These debates eventually resulted in the FTC Act of 1914 (J.B. Clark, 1915).

[10] In particular, this approach will have a strong influence on economists with an institutionalist tradition. The German Historical School favours case-by-case studies based on a careful analysis of data and institutional frameworks. Many leading American economists studied in Germany at the end of the 19th century, such as Fetter, Taussig, J.B. Clark, Ely, Patten, and Seligman (Hovenkamp, 1989, p.105). The discussion of methods was one of the points of controversy between institutionalist scholars and liberal economists in Chicago in the 1930s led by Frank Knight (1935). Before 1918, Chicago was a stronghold of institutionalism, with Veblen, Hoxie, Mitchell, Hamilton, Moulton, Clark, among others

and economists influenced by the English tradition[11] were overlaid with discussions on the concept of ruinous competition. The institutionalists saw concentration as necessary for a stable and efficient functioning of the economy. The aim was to regulate the exercise of such a power to ensure a reasonable outcome. They were no reason not to hinder it in the name of blackboard economy prescriptions[12].

American scholars had expressed contrasted views about the issue of industrial concentrations. We 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).

These uncertainties about the monopoly issue and about 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. Charles Francis Adams or Arthur Mink, for instance, considered competition could be "ruinous[13]", in specific conditions, in particular, for activities with high fixed costs and increasing returns. In such cases insufficient demand and excess supply could drive average costs below price (Mayhew, 2008, p. 63). 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.

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[14]. However, in the 1912 edition of *The Control of Trusts*, published with his son, John Maurice,

[11] A final manifestation of this controversy between the "new school" and the English neoclassical approach, which marked the creation of the American Economic Association in 1885, came from Ronald Coase, who judged the work of institutional economists in the field of competition as follows: « American institutionalists were not theoretical but anti-theoretical … Without a theory they had nothing to pass on except a mass of descriptive material waiting for a theory, or a fire” (COASE, 1984; p.230).

[12] For instance, Rutherford states for Walton Hamilton: “In his earlier work, Hamilton had been sharply critical of the antitrust laws. The Sherman and Clayton Acts and the Federal Trade Commission were attempts to enforce competition based on the textbook model of competitive markets”. (RUTHERFORD, 2011, p.1396)

[13] The argument of ruinous competition was one of the main objections of the institutionalists to Antitrust. Obstacles to the concentration or coordination of firms, and even more so to a possible dismantling, lead in this perspective to severe inefficiencies in fixed-cost industries. This ruinous-competition based defense had been rejected by the Supreme Court as a defence argument in the case of a price agreement in its 1897 Trans Missouri decision (United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897)). It was also the case in Addyston Pipe two years later (Addyston Pipe and Steel Co. v. United States, 175 U.S. 211 (1899)). Increasingly, institutionalists doubted about this argument, considering that high fixed costs were not sufficient to make competition impossible (TAUSSIG, 1915). They progressively limit these claims to industries characterized by natural monopolies (JONES, 1927).

[14] He announced by doing so, one of the main features of the Second Chicago School or, even more directly, the theory of contestable markets

his position had significantly evolved, advocating now for a stringent public supervision. But eventually, J. B. Clark rallied to pro antitrust views, to the point of having influenced the Clayton Act and the FTC Act of 1914, either indirectly - through his writings on trusts - or directly - as author of amendments to existing legislation and intervening in congressional debates (Fiorito, 2013)[15].

Many scholars saw, at that time, 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".

As noted by Rutherford (2011, p.1387), Hamilton (1919), 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).

Such a kind of "new competition" was defined as 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'. Institutional 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 (Himmelberg, 1965). This technocratic view of 'managed competition' was nothing else than the negation of Antitrust principles[16]. The WIB was the US first experience of government-promoted and coordinated business co-operations to achieve collective objectives, and led to putting aside antitrust law enforcement. Antitrust laws then appeared as anachronistic, if not counter-productive[17] (Himmelberg, 1994).

15 John Bates Clark' commitment in the drafting of the 1914 acts was made as a member of the National Civic Association.

[16] 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, in 1921, an antitrust suit against the printers (see BERK, 2009 describing the case of the UTA – *United Typothetae of America* succeeding in 1913 to the American Printers Cost Commission).

[17] The debates of the early 1920s in the United States on the adequacy of antitrust laws echoed the discussions of the 1980s on the handicap they could induce in international trade. For example, the prohibition of cartels appeared in the immediate post-war period as a risk of loss of competitiveness for American firms (LEVY, 1927). Let us

Two specific movements should be distinguished even if both were opposed to the enforcement of antitrust rules. The first is the movement of fair-trade leagues championed by Louis Brandeis (Berk, 2009). The aim was to give small firms, that lacked economic power, the ability to coordinate their actions to counterbalance the influence of large companies. The idea was rooted in a double American tradition: that of defending the middleman and that of seeking to limit both private and public economic powers. This tradition fits well with an institutionalist perspective in which the various stakeholders can work together to guarantee the reasonableness of transactions[18].

Brandeis' position was actually articulated around two hypotheses (Kovacic, 1992). First, the efficiencies achieved through economic concentration that benefits to consumers are uncertain, whereas the ability to foreclose competition is consubstantial. Secondly, a reasonable functioning of the market can be ensured through the implementation of a coordination of agents not possessing economic power to counterbalance that held by large firms. The trade-associations model is based on this collective countervailing market power.

Conversely, the WIB's experience has contributed to the birth of a second approach that is more consonant with the European corporatist model of the 1920s. Engineers' conscious management replaces blind adjustment by market prices. This vision, which would be endorsed by the NIRA and against which Brandeis would vote in Schechter Poultry (1935), was however also part of an American tradition. It related to the debate on ruinous competition. It can also make sense in a Hamiltonian logic in which Big Business dialogues with a Big Government. Thus, 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 views participated to a technocratic-inspired movement, privileging firms' coordination and public control in order to avoid cutthroat competition. Self-regulation or government regulatory supervision was preferred to antitrust interventions.

note that the 1918 Webb-Pomerene Act gave antitrust immunity to U.S. firms colluding on export markets, since they do coordinate their behaviour on the domestic market (Fournier, 1932).

[18] It is no coincidence that Brandeis advocated an economization of antitrust decisions as early as the 1920s. Brandeis (like other proponents of legal realism) « complained that judges frequently came to the bench unequipped with the necessary knowledge of economic and social science". He also "warned that "a lawyer who has not studied economics and sociology is very apt to become a public enemy" (Mason, 1946, p.26).

It worth noting that 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*.

Louis Brandeis' views were 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".

In this vein, a cartelization under a Government supervision (as the NIRA operated) was a better way to ensure a fair functioning of the markets. It corresponds more to the Hamilton (1919) 'intelligent handling' approach. Thus, as Giocoli (2009) states "the associationalist vision also led to an infatuation with planning". The NIRA echoes the 1931 Swope Plan[19]: "a program designed to coordinate production and consumption by forcing medium and big firms to join trade associations which would in turn be empowered to favour price stability and distribute information on business practices". The NIRA also reflected the logic of the institutionalist approach, which considered that the reconciliation of efficiency and equity required "intelligent handling" and "social control".

3. A NARRATIVE OF THE CONVERSION OF AMERICAN ECONOMISTS TO ANTITRUST AFTER THE NIRA DEMISE

This section is divided into three parts. A first one presents the NIRA and insists on the fact that it was much more aligned with a corporatist logic than an associationalist one. It was thus very different from the approach defended by the institutionalists and from a jeffersonian logic. The failure of the NIRA not only before the Supreme Court but also in the economic field led

[19] See Anthony (1932) presenting the whole mechanism annunciating the NRA. In order to stabilize the US economy, ach industry would have to join a trade association. Their respective boards would associate labor, employers, and government. These arrangements were presented as an alternative way to reach the objective of competition, maximizing the social welfare, but under a social control. See also Burns (1936).

to three years of hesitation, which corresponded to the diversity of points of view inside the President Roosevelt's brain-trust between planners and supporters of free competition. We analyse this issue in the second part. The third part illustrates the Thurmanian moment. Although it was the most resolute implementation of antitrust rules to date and had a decisive influence on post-war antitrust, it was nonetheless fragile. However, it found support among Chicago's liberal economists and jurists.

3.1. NIRA as a negation of Antitrust, 1932-35

The 1920s constituted the nadir of competition law enforcement (Kovacic, 1989). During the NIRA, antitrust prosecutions were nearly entirely suspended (Gressley, 1964). If such a mechanism was aligned with the WIB that made a model of undertakings coordination under government's supervision socially acceptable (Himmelberg, 1993). It is worth stressing that the NIRA logic was not expected at that time. The 1932 Democratic platform was aligned on antitrust law enforcement logic (Patch, 1947).

However, 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). The Hoover administration itself had little inclination for antitrust and a preference for inter-firm coordination (Crane, 2007). Future President Hoover, when he headed the Secretary of Commerce, during the 1920s, favored 'concentration and control' over 'competition and conflict'. However, Herbert Hoover during his mandate insisted on the necessary compliance of such agreements with Supreme Court case law on antitrust.

As stated by Crane (2007), the NIRA was an attempt to cartelize US economy under the supervision of the Administration[20]. Two risks should be taken into account: the coordination among big firms commonly led to a profitable situation for them and not mandatory for the whole economy and the approval mechanism set in place may lead to a public regulator capture by private interests since the information is asymmetrical and the codes are imposed to small market players[21].

[20] According to Sawyer (2019, p.13) the NIRA was a « cartel-led price-reflation ».

[21] "Antitrust had fallen into desuetude since the trustbusting days of Teddy Roosevelt. The Hoover administration preferred industry cooperation to competition and, initially, the Roosevelt administration showed little propensity to reverse course. Between 1933 and 1938, antitrust enforcement was sporadic and, ironically, often centred on enforcing the anticompetitive NIRA and Agricultural Adjustment Act codes" (CRANE, 2007).

The public oversight put in place by NIRA was intended to address the limitations of associationalist models, which amounted to purely private coordination (under antitrust supervision, however). 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. A public oversight seemed necessary.

However, the NIRA did not involve the State as a simple guarantor of the conformity of the coordination of firms with the general interest. It also made the agreements binding and could sanction firms that refused to follow the codes of conduct. The NIRA model did not rest upon voluntary deals among competing undertakings but brought into play industry wide agreements based on national plans[22]. The National Recovery Administration, by validating the codes of fair competition, made them compulsory for all players in the industry concerned. In the event of non-compliance with these codes, a company could be sanctioned by the FTC. In the end, the codes aggravated imbalances within the branches to the benefit of dominant firms and were tools for controlling and foreclosing firms from the competitive fringe.

Thus, 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".

The First New Deal and the law incarnating it, the NIRA (1933), reflect conceptions that gave prominence to "concentration and control" and "planning" (Barber, 1994) rather than competition, even a regulated one. It is therefore more a question of cartelization under the patronage of the State than of the model of reasonable competition advocated by the institutionalists. Antitrust, already dormant since the end of the First World War, had its darkest

[22]On the influence of the group of academics 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).

years. As Crane (2007) notes: "Between 1933 and 1938, antitrust enforcement was sporadic and, ironically, often centred on enforcing the anticompetitive NIRA and Agricultural Adjustment Act codes".

3.2. 1935-1938: from the end of NIRA to the revival of Antitrust

The NIRA rejection by the Supreme Court in 1935 constituted a breaking point for US economists' views on antitrust laws (Hovenkamp & Crane, 2013, pp. 168-170). The period following the cancellation of NIRA was marked by a break, which saw the imposition of an active antitrust policy.

3.2.1. Explaining the failure

The NIRA was invalidated by a Supreme Court decision on May 27, 1935 (Schechter Poultry Corp. vs. US, 295 US 495, 1935)[23]. The Statute was considered as an unconstitutional delegation of legislative power to the executive power. It worth underlining that Justice Brandeis had sustained this decision. This position should not be surprising considering the differences between the associationalist and NIRA visions, especially in terms of government intervention. The first ones aimed to enable companies to counterbalance differences in bargaining power in order to promote the reasonable functioning of capitalism. The NIRA was based on dialogue between big business and the state and amounted to a constraint on the middleman. It was closer to a European-style corporatism than to a Jeffersonian ideal[24]. The NIRA both conflicts with a conception of antitrust laws as protecting the consumer (whether to sanction practices limiting welfare (Bork, 1966) or those leading to undue transfers of welfare (Lande, 1982), and to a "constitutional" conception of antitrust rules as protection against the private regulation of markets[25].

Stigler (1982) suggested the end of the NIRA experience accelerated the decline of the attraction of the model of "coordinated competition under public supervision" and

[23] We should add the cancellation of the Agricultural Adjustment Act (AAA), the Farm Relief Bill. See United States v. Butler, 297 U.S. 1 (1936).
[24] This contradiction between the Hamiltonian and Jeffersonian approaches is particularly noticeable in the reactions of the various new-dealers to the cancellation of the NRA. For Hamilton (1938, p.18), this situation stemmed from the epidemic of "the higher lawlessness," and threatened to paralyze the activities of government. The argument of confusion between the NRA and European corporatism is used in the same article to criticize Brandeis' position: "the ghost of an imaginary fascism appeared for a time to deflect Brandeis from his orbit".
[25] It should be noted that this "constitutional" interpretation has been the subject of doctrinal debates in the United States (NACHBAR, 2013 and CRANE, 2013).

symmetrically increased the attention toward antitrust laws that emerged as an alternative to *laissez-faire* based policies. The failure was primarily an economic one.

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[26]. 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).

3.2.2. The Roosevelt administration's response

The Roosevelt administration was divided into several sensibilities. The Brain Trust effectively brought together all of the tendencies listed above. The NIRA was the emanation of those whom Crane (2007) refers to as the advocates of a "business commonwealth". According to Crane, they were advocates for a "business commonwealth". They defended "a rational, cartelized business order in which the industrialists would plan and direct the economy, profits would be insured, and the government would take care of recalcitrant chisellers." A. Berle, R. Tugwell, G. Means, and W. Douglas could associate themselves with this first current (Waller (2004)). The second current coincided with the associationalist visions. As Crane (2007) indicates, this group "favored "cooperative, collectivist democracy" in which all relevant interests—business, labor, consumers, etc.—were given a seat at the bargaining table". A third group took advantage of NIRA's failure to put forward its case. According to Crane (2007), this group represented those that "believed in old-fashioned, atomistic competition "in which basic decisions were made in an impersonal market and the pursuit of self-interest produced the greatest social

[26] As Sawyer (2019, p.13) clearly states : "Almost immediately, the NRA became a lightning rod of controversy for approving overlapping and contradictory codes and for raising consumer prices without ensuring higher wages"

good". Its members included Felix Frankfurter and Louis Brandeis, who was very critical of big business and economic concentration (see *The Curse of Bigness*, published in 1934).

The three years from the cancellation of the NIRA to Roosevelt's "Curbing Monopolies" speech were marked by Roosevelt's hesitations between the three factions. The "collectivist democracy faction" defended by Tugwell between 1933 and 1935 had not yet been really marginalized and a continuation of the NIRA was envisaged[27]. The associationalist arguments in favour of fair competition are reflected in the Robinson-Patman Act of 1936. However, the third tendency will gradually gain influence. After presenting how the Robinson-Patman has marked the last attempt to impose structure-based or fairness-based motives in the antitrust policy, we develop the shift toward a free-competition logic.

3.2.2.1. Fair or free competition: the Robinson-Patman Act and the hesitations of the first New-Deal regarding antitrust policy

The Robinson-Patman Act of 1936 undoubtedly falls within the logic of fair competition. It aims to protect a given market structure – based on small business - from consolidation in the sector. As Nicola Giocoli (2009) notes: "By negating the general idea of competition on the merits, such a goal openly contradicted the Supreme Court's principle of competition. Indeed, the Court itself seemed to conform to the new zeitgeist on antitrust".

From Maple Flooring in 1925 to Appalachian Coals in 1933, it had accepted the principle of a trade-off between competition and the ability of firms without market power to protect themselves against the effects of competition. The Court in Maple flooring questioned the compliance of trade association agreements and free competition principles. The purpose of such associations was to "openly and fairly gather and disseminate information" among its members at the risk to "engage in an unlawful restraint of commerce". In its reasoning the Court has combined competition-related arguments (in increasing transparency is favourable to market choices) and ruinous-competition-related ones (knowledge of the supplies of available merchandise tends to prevent over-production and to avoid the economic disturbances produced by business crises resulting from overproduction". According to the Court, the Sherman Act

[27] RUTHERFORD (2011, p.1393) points out that institutionalists like Hamilton, although disappointed by the NRA, did not abandon the project of intelligent handling: "While Hamilton was himself critical of the actual workings of the NRA codes and the encouragement they gave to monopoly pricing, he felt that the NRA could be reformed to work as a system for the control of business practice in the public interest". It should be noted that Hamilton (1957) considered that the capture of the public regulator by the industry was much more effective during World War II with the War Production Board (WPB) than it was during the NRA. For Hamilton, while consumers and employees were represented in the NRA, "it was the business interest alone which was enthroned"

did not aim at inhibiting an intelligent conduct of business operations. Such arrangements cannot be sanctioned “because the making available of such information tends to, stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise”.

At its origin, The Robinson-Patman Act was, in a meaningful way, named “Wholesale Grocer’s Protection Act” (Sokol, 2020). The protection granted to small business had an adverse effect on the prices paid by the consumers, involving a damage to their welfare (Hovenkamp, 2000). A fair competition purpose implies redistributive effects within the society that should be questioned. Even beyond this problem, the cyclical effect of these policies led to a reduction in the purchasing power of American consumers and was likely to further prolong the crisis

3.2.2.2. The conversion to free competition

While institutional economists had long considered that economic concentration was needed to achieve efficiency gains but that it was necessary to regulate them to ensure that they were reasonably distributed, their views evolved in the 1920s even before the implementation of the First New Deal. The Fetter petition of 1932 illustrates this inflection, which owes nothing to the NIRA experience.

Outside the economists' community, Brandeis argued very early on for an active antitrust policy, given his mistrust of the monopolies' superior efficiency argument. They can be, like small firms, inefficient and, when they become more efficient, they appropriate the gains rather than passing them on to consumers: "Whenever trusts have developed efficiency, their fruits have been absorbed almost wholly by the trusts themselves. From such efficiency the community has gained substantially nothing" (Brandeis, 1934 [2013], p. 186).

The shift of institutional economists towards free competition is part of this loss of influence of planist arguments. The shift of the institutionalist economists was never really complete, as the Hamilton case shows, or the one - in the legal field of Learned Hand - in which regulated competition was basically still their preference. However, a deepening mistrust of the economic effects of concentration had already developed in the 1920s, and among the signatories of the Fetter petition in 1932 were Commons and his former student Morehouse. The ability of firms to engage in price discrimination and to neutralize price competition was increasingly seen by institutional economists as one of the origins of the Depression (Fetter, 1931). They had been receptive, albeit not without criticism, to Chamberlin's theory of monopolistic competition:

while they admitted that competition includes elements of monopoly when firms offer differentiated products, institutional economists were more critical of the Chamberlin conception of firms' pricing behaviour. Copeland (1934), Means (1935) or Galbraith have more or less reproached Chamberlin for not taking into account the rigidity of the prices charged by firms despite the variation in market conditions and that the distribution of price change frequencies was bimodal, i.e. U-shaped (Fiorito 2010). Moreover, the fact that Chamberlin was working in a marshallian framework of partial equilibrium did not allow macroeconomic implications to be drawn in terms of its contribution to the depression. However Means (1935) suspected that price inflexibility, which he called "the inflexibility of prices", was not a factor in the depression. According to him, “administered prices”, “were largely responsible for the severity of the Great Depression” (Fiorito, 2010).

In the same vein, Giocoli (2009) considers that: “The statement turned the associationalist argument on its head and claimed that, far from promoting a more rapid economic recovery, cartels, trade associations and unabashed market power were among the culprit for the persistence of economic crisis”. As early as 1921, Jones weighed the potential efficiency gains associated with large firms against their ability to implement monopoly pricing or foreclosure practices.

The case of Learned Hand, although not an economist but a lawyer, is emblematic of this - reluctant - rallying to Antitrust. Winerman and Kovacic (2013) highlight a position taken during the preparation of the Alcoa decision of 1945, which shows the partial adherence of certain new dealers to the Antitrust: “There are two possible ways of dealing with [monopolies]: to regulate, or to forbid them. Since we have no way of regulating them, we forbid them. I don’t think much of that way, but I didn’t set it up; and now the ordinary run of our fellow-citizens – some, even of the ‘rugged individualists’ – regard the Sherman Act as the palladium of their liberties”.

Learned Hand had been active in the 1912 election campaign as Theodore Roosevelt was the candidate for the Progressive Party. Winerman and Kovacic (2013) show that he shared the former president's and Judge Holmes' belief that antitrust laws were economic nonsense. Hand was therefore in line with the analysis of the institutionalists before the turn of the 1930s: trusts were generating efficiency gains that should not be renounced, but regulation based on harsh social engineering was needed to prevent unfair practices on their part. Inevitably, the Common Law courts responsible for the application of the Sherman Act were not the best placed for such tasks. Like institutional economists, the model to which Learned Hand adhered was that of regulatory commissions.

According to Learned Hand, quoted by Winerman and Kovacic (2013), “The futility of any belief that the Sherman Act will restore small shopkeepers to their former business status, or that any considerable proportion of our people would be satisfied with such a Jefferson-Brandeis form of society, will I believe, be shown by future experience. Such abuses as are generally inherent in monopoly will not be effectually ameliorated by any such instrumentality as an anti-trust suit. In the end only something like an Industrial Interstate Commerce Commission having adequate control over industry may lessen abuses and at the same time preserve large corporate enterprises from ruinous cudgelling and bureaucratic interference”.

Following Winerman and Kovacic's (2013) thorough analysis of Learned Hand's personal archives, it is also fascinating to note that the cooperative model he defended led him to oppose the NIRA, which he saw as European corporatism.

These examples testify about the conflicted views of Roosevelt’s brain trust on the proper attitude toward the issue of private economic power concentration and may explain his changing policy during the 1930s’.

Indeed, several evolutions might explain this unexpected choice of the Roosevelt’s Administration in favor of antitrust enforcement despite the mixed views of his brain trust members.

The first evolution lies in the making of a consensus among economists 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.

The second unexpected evolution, considering its initial intention, was the rallying of the Roosevelt administration to a determined antitrust enforcement strategy. 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 evolution consisted 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. This change is also due to the change in the members of the Supreme Court.

The inflection came after Roosevelt's speech in April 1938. However, even before this speech and despite his indecision, in 1937 the Antitrust Division's activity experienced a revival - which resulted in the opening of the procedure against Alcoa that would eventually lead to the Learned Hand judgment in 1945. This procedure was initiated following the appointment at its head of Robert Jackson on January 18, 1937. Jackson took the head of a division that he judged moribund because of a policy that he considered antithetical to the very philosophy of antitrust. Therefore, before his appointment as Solicitor General in March 1938, he laid the groundwork for the inflection that his successor, Thurman Arnold, would achieve.

In a first approach, the (re)initiation of the Alcoa procedure by Jackson on 23 April 1937 could be seen as an attack on the dominant position in itself: for him a 100% market share based on the ability to foreclose potential competitors from entering the market « constitutes an illegal monopoly per se under Section 2 of the Sherman Act » (Winerman et Kovacic, 2013). Jackson was echoing here the wording of another pro-Antitrust new dealer, Justice Benjamin Cardozo. The latter, in United States v. Swift & Co., which he wrote in 1932, had stated: "Mere size, according to the holding of this court, is not an offense against the Sherman Act unless magnified to the point at which it amounts to a monopoly […], but size carries with it an opportunity for abuse that is not to be ignored when the opportunity is proved to have been utilized in the past[28]".

However, the approach did not focus exclusively on market share. The procedure highlighted a foreclosure problem (erection of barriers to entry) and thus damage to the competition process itself. Winerman and Kovacic (2013) rightly emphasise that the procedure was not aimed at promoting a given market structure but at achieving an objective of economic efficiency.

The arrival of Robert Jackson at the head of the Antitrust Division was not, however, marked by any real support from Roosevelt for an active antitrust policy. The changeover really took place with the return of the economy to recession at the end of 1937 (Miscamble, 1982, p.2).

[28] United States Supreme Court, United States v Swift & Co., 286 US 106 (1932).

The first quarter was also marked by the President's indecision in the face of the contradictory positions of his various advisers (Hawley, 1966, p.386).

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 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"[29].

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".

In the same speech, President Roosevelt has announced the creation of the Temporary National Economic Committee (TNEC). This committee was presented as a means to enhance the capacity of antitrust enforcers of solving competitive issues. The creation of TNEC at the instigation of progressive senators (O'Mahoney (Wyoming), La Folette (Wisconsin), among others) played a central role in the reinvigoration of antitrust and in the implementation of the antitrust policy of the following decades: Its final report was issued in March 31, 1941. It should be noted that the announcement of TNEC simultaneously with the signal of a political will to revive public enforcement of antitrust laws produced an ambiguous signal. Was it really a question of revitalizing the public enforcement of antitrust rules or of thinking about an eventual overhaul of these rules (Miscamble, 1982, p.4).

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". However, President

[29] 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).

Roosevelt was not completely convinced about the soundness of his late adherence to the merits of antitrust laws. President Roosevelt's views on undertakings' cooperation remained balanced. While he states "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".

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[30].

It was Robert Jackson's successor, Thurman Arnold, a Yale law professor, who really marked this pro-antitrust inflection (Waller, 2004). Jackson's promotion to Solicitor General was not a political achievement for Roosevelt's antitrust faction. It was due to the departure of the former incumbent, Stanley Reed, to the Supreme Court. The nomination of his successor was not consensual since he had just published a book in which he sharply criticized antitrust laws: *The Folklore of Capitalism* (Arnold, 1937). In his book, he had confessed an innate skepticism over antitrust laws, as he thought it only "preaches[31]" grounded on "manufactured economic panacea" (Gressley, 1964).

Arnold owed his appointment to the support of the antitrust faction of Roosevelt's brain trust. Roosevelt did not receive it before he was nominated for the position and later confessed that he had not read his recent book. Arnold was, however, one of the most consistent defenders of New Deal policy, having championed, among other things, F.D. Roosevelt's proposal to increase the number of Supreme Court justices to counter the conservatism of the Court [32].

[30]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).

[31] « The Antitrust Laws, being a preaching device, naturally performed only the functions of preaching » (MISCAMBLE, 1982, p.6).

[32] Roosevelt's proposal did not need to be acted upon. Not only did the judges change their attitudes ("By 1937 the cycle had run its course; judges recovered, as if by a miracle, their judicial poise; and, before a single change had been effected in its membership, the Court proceeded to smother its backward-looking decisions beneath more human entries" (Hamilton, 1938, p.19) but Roosevelt soon had to make new appointments, including Robert Jackson. The Court's turnaround has been particularly noticeable in cases such as West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

3.3. Th. Arnold at the head of the Antitrust Division

The appointment of Thurman Arnold, in March 1938, as head of the Antitrust Division of the Department of Justice (DoJ) gave antitrust laws enforcement a new impetus.

Indeed, the dramatic push on antitrust law was unexpectedly imparted by Thurman Arnold who was not so far known an antitrust laws buster. 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 based on established law[33]. Thurman Arnold's action, led the Antitrust Division to switch from a "vacillating and sporadic enforcement" to a voluntarist policy (Gressley, 1964). Considering his previous analyses, it was certainly a surprise for all stakeholders (Waller, 2004).

Th. Arnold's antitrust enforcement reflects the disappointment of the NIRA experience and the decline in institutionalist confidence in the ability of regulation to lead large firms to redistribute any efficiency gains resulting from the concentration of economic power. However, it had important specificities. Contrary to a Brandeisian perspective, he did not in itself challenge the concentration of economic power, which also distinguished him from Simons' positions, for which, as we shall see in our next section, antitrust had to deal directly with dominance in itself.

According to Thurman Arnold, "Most of the books in the past on the antitrust laws have been written with the idea that they are designed to eliminate *the evil of bigness*. What ought to be emphasized is not the evil size but the evils of industries which are not efficient or do not pass efficiency on to consumers" (Arnold, 1940).

However, if, unlike Simons, Thurman Arnold limits the scope of Antitrust to its economic dimension, his conception of efficiency does not match the post-war conception defended by the Second Chicago School.

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 institutionalists did, he gave preference to regulation devices (Miscamble, 1982). For all that, Arnold was all but a structuralist (in the sense that this term will take in the

[33] The link with institutionalist economist can be established through Walton Hamilton who has joined Yale Law School in 1928. Also involved in the New Deal, he worked alongside Thurman Arnold as special assistant to the Attorney General from 1938 to 1943 and at TNEC where he wrote two reports, "Antitrust in Action" in 1940 and "Patents and Free Enterprise" in 1941. Let us note, following RUTHERFORD (2011, p.1397), that he proposed to accelerate antitrust proceedings by having them handled by an administrative structure and not by the courts and by reversing the burden of proof to the detriment of the party benefiting from the best access to information..

1950's). He claimed antitrust laws are not "designed to eliminate the devil of bigness" (Arnold, 1940). In this respect, we should note that, unlike some institutional economists, his intellectual path will not go so far as to question the efficiency gains that may result from concentration.

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.: In his April 1938 speech "Curbing monopolies" F. D. Roosevelt insisted on this point: "It is not intended as the beginning of any ill-considered trust-busting activity which lacks proper consideration for economic results". 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).

Compared to the views presented in *the Folklore of Capitalism*, Arnold's 1937 positions evolved dramatically as soon as he took office. He insisted on the economic purpose of antitrust laws. He believed these ones have to focus on consumer interest protection: ensuring free competition is seen as essential for consumers. However, this position was not settled ex ante, it was only through his practice within the Antitrust Division that Thurman Arnold deviated from his initial approach, according to which: "the anti-trust laws should be revised so that the government could strike at market domination, regardless of how the power over prices had been acquired and regardless of motive or intent" (Hawley, 1966, p.411)

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 lawsuits. In 1939, 12 cases were initiated, 85 in 1940, 88 in 1941 and 97 in 1942[34].

[34]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 "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.

The most influential Supreme Court decision of the period in antitrust matters was Socony-Vacuum Oil Co. in 1940[35]. This resulted in price-fixing agreements being regarded as prohibited per se: "any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces". While this position is not surprising when one considers the intentions of the legislature in 1890 or current competitive practice, it also marks a clear departure from the Court's decision-making practice at the time and from the policy of the First New Deal[36]. Price stabilization does not justify hindering free competition. Thus the argument of ruinous competition was definitively rejected[37].

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 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 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 American 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.

[35] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940

[36] It was preceded in 1939 by the Interstate Circuit decision on a hub-and-spoke conspiracy, whose effects and justifications were comparable and for which the Court also ruled in favour of a per se prohibition. Interstate Circuit v. United States, 306 U.S. 208 (1939)

[37] This was hardly the case at the beginning of the decade, as evidenced by Jewkes' (1933) review of Fetter's (1931) *The Masquerade of Monopoly*. In this review, the defence of the Sherman Act was denounced as a lack of understanding of the concrete issues at stake in the industries.

It was only through his practice within the Antitrust Division that Thurman Arnold deviated from his initial approach according to which "the anti-trust laws should be revised so that the government could strike at market domination, regardless of how the power over prices had been acquired and regardless of motive or intent" (Hawley, 1966, p.411)

4. The First Chicago School's views on Thurman Arnold's enforcement policy

The singularity of the 1938 moment was that Th. Arnold's policy was not only accepted by institutionalist economists but also supported by the leading classical liberal economists of the University of Chicago. The latter, who were naturally opposed to the government-controlled economy which underlay the NIRA, took very favourable positions towards a particularly active antitrust policy. Their prescriptions differed, however, from those that would be defended after the war by the Second Chicago School. They lead to consider dominance as a problem in itself, to defend the use of rules per se and to adopt a broad definition of efficiency, which is not limited to consumer welfare. Finally, unlike the 2nd Chicago School, this first school has a purely Jeffersonian perspective that does not separate the economic and political spheres.

This section is therefore structured in two points: the first presents Henry Simons' support for Thurman Arnold's policy; the second underlines the specifics of Simons' position with regard to both Th. Arnold and what will be the 2nd Chicago School.

4.1. Henry Simons endorsed Thurman Arnold

The Chicagoan classical liberals (Knight, Viner and Simons) were evidently opposed to the NIRA. The positions of the institutionalists had been criticized at length by Knight (1932). This opposition between liberals and institutionalists had its roots both in the opposition that had structured the community of American economists at the end of the 19th century between supporters of the German historical school and supporters of English-style economics, and also in the opposition between Jeffersonian and Hamiltonian logics. The Chicago Liberals could not envisage an equilibrium between Big Business and Big Government.

During the NIRA, criticism of Roosevelt's policies was particularly sharp. 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".

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. 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".

If these liberals rejected any "organized competition" (Van Horn, 2010) or any notion of "social control" (Knight, 1932), they were nonetheless rather sceptical 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. Indeed, according to Simons, "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).

Secondly, Simons remained skeptical about the implementation of the rule of reason, advocating for *per se* rules (Rutherford, 2011)[38]. According to Simons, "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).

Thirdly, he rejected antitrust enforcement consisting in price supervision, considering it may lead to a regulation-style antitrust laws 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

[38] On the relative efficiency of per se rules, see for illustrating the current US Antitrust debate see CHOPRA and KHAN (2020)

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 might be a necessary evil, considering the economies of scale it allows[39].

If this latter point illustrates the differences between the institutionalists and the Chicago School. The positions taken by Simons must above all be understood as aiming to prevent a situation that is, after all, Hamiltonian, in which a private monopoly generates a demand for regulation that translates into government intervention, as was known during the NRA. The private monopoly must be prevented or eliminated by the action of competition rules or, if this is impossible, nationalized (Simons, 1934, p.17).

Regulated private monopoly is an even less desirable situation than a nationalized monopoly (Simons, 1934, p. 11). One of the reasons for this, which also foreshadows the analyses of the post-war Chicago School, is that from then on the regulated private monopoly will have every interest in investing in order to capture its regulator. It is for this reason that he advocates an "Avoidance of the regulation expedient, as a permanent solution for the railroads and utilities, and, above all, the utter repudiation of this expedient as a feasible, tenable compromise between socialization and free competition for other industries" (Simons, 1936, p.71). In other words, Simons considers "Unregulated, extra-legal monopolies are tolerable evils; but private monopolies with the blessing of regulation and the support of law are malignant cancers in the system" (Simons, 1936, p.74). He therefore shares the same opinion as the German ordoliberals of the 1930s. The market must be protected against itself if it leads to monopoly, otherwise the demands for public control will only undermine economic efficiency but also - and primarily in Simons' thinking - political freedom[40].

4.2. The characteristics of the First Chicago School regarding Antitrust

Despite the first Chicago School reaffirmed adherence to classical liberalism and its criticism against institutional economists' concept of social control (Knight, 1932); Chicago scholars converged with the institutionalist economists during the thirties toward advocating a more

[39]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".
[40] "I submit that the choice we make between freer competition and increasing regulation of prices and wages will largely determine whether we lead Europe out of the valley or follow it down and down » (SIMONS, 1936,p.76)

voluntarist antitrust laws enforcement. In the context of the rise of the 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. 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".

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. As such, classical liberal economists from the First School of Chicago, Simons and Knight alike, emphasized the links between the political and economic spheres (Marty and Kirat, 2018). However, their perspective was purely Jeffersonian: the dispersion of economic power was not only desirable to sustain the process of competition but also to avoid the concentration of political power[41]. Concentration of economic power runs the risk of capturing political power or of demands for compensation for this influence by a strong political power. It is indeed the Hamiltonian logic of the First New Deal that must be warded off.

[41] In a speech before the American Political Science Association in December 1937, Robert Jackson, then Assistant Attorney General, stated "the trend toward concentration is also a very real threat against the individual competitive system. This private socialism, this private regimentation of industry, finance, and commerce, if not stopped, is the forerunner of political socialism. […] With their power to contribute to campaign funds, they are as dangerous as a menace to political as they are to economic freedom".

A key issue is then to be emphasized. The activation of antitrust rules must aim at the dispersal of economic power, whatever the cost in terms of efficiency. In other words, following the example of the German ordo-liberals of the 1930s but also of Austrian economists, the objective is not to aim at the result of competition (efficiency) but to protect its process even for its own qualities[42]. The competition rules must therefore operate as rules of fair conduct that will prohibit certain practices or situations. In this respect, the rules are no longer those of a laissez-faire approach like the logic of the Classical Legal Thought. They are also diametrically different from the approach of the Second Chicago School, which will be based on a focus on efficiency, on the use of a rule of reason and on antitrust modesty[43].

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 sovereignty". The issue, according to Simons, allows envisaging a clear-cut solution such as dismantling monopolies or initiating 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' 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).

The positions taken by Simons were not isolated at that time. They are archetypal of the views of liberal economists of the late thirties. A strong antitrust enforcement was seen as a *sine qua non* condition to preserve competition. For instance, 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".

[42] All these scholars met in a colloquium organized in 1938 in Paris by a philosopher, Louis Rougier, to discuss Walter Lippmann's book, *An inquiry into the principles of the Good Society* (LIPPMANN, 1938). This colloquium (CLAVE, 2015) was the first step of a project that led after the Second World War to the creation of the Mont Pèlerin Society in 1947. Its first conferences shed light on the conflicting views between German ordoliberals and the Chicagoan scholars led by Aaron Director, whose positions progressively but also sharply depart from the Simons' ones.

[43] Simons also differs from the prescriptions of the 2nd Chicago School in that he considers that the effects of vertical integration are generally unfavourable (SIMONS, 1934, p.20).

In the late thirties, the Chicago School sustained anti-monopoly policies in order to thwart the economic power concentration (Simons, 1948) and to "ensure that no single corporation dominates an industry" (Van Horn, 2010). Kovacic (1992, p.299) emphasizes Simons' influence on the theoretical issue of the de-concentration of economic power: "Post-World War II hostility toward industrial concentration originated at the University of Chicago in the 1930s in the work of Henry Simon who argued that reducing the concentration level of the economy was essential to the nation's political and economic well-being". According to Simons, guaranteeing the sustainability of the competition process imposes to control its results in terms of structural dominance and if necessary to impose structural remedies to correct such a phenomenon.

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 (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*.

5. ALCOA: THE BEGINNING OF THE END OF A CONSENSUS

Our fifth section completes the analysis of this historical dynamics with a specific judgment of the U.S. Court of Appeals for the 2nd Circuit issued by Judge Learned Hand in 1945 in the Alcoa case. This ruling is emblematic in many ways of the evolution we have described in our article. However, it crystallizes the points of tension that will lead to the transition from the First to the Second Chicago School. First, it incarnates a continuity with respect to the end of the thirties and carries all their ambiguity. As we have previously mentioned, the procedure had been initiated by Jackson even before Thurman Arnold took over as head of the Antitrust Division. It is adjudicated by Learned Hand who was at the beginning of his career an adviser to Theodore Roosevelt and who remained all his professional life suspicious of the antitrust rules enforcement.

Secondly, it also heralds the structuralist period of American antitrust which will develop until the 1960s and which leads to the protection of a competitive structure for its own sake, even if it means implementing a criterion that is far removed from the spirit of Thurman Arnold, which is that of the monopolistic non-faulty. Arnold did not contest in any way Bigness itself. As such, he was closer to the institutionalists than to classical liberals like Simons. Conversely, Alcoa opened the way to a much more Jeffersonian logic in which the purpose of Antitrust is no longer simply the defence of competition on the merits but the preservation of a given market structure. It will moreover lead to the defence of structural remedies, including dismantling[44]., which is echoed in the current US antitrust debate (Khan, 2019).

More importantly, the reception of the Alcoa decision was the turning point between the First and Second Chicago Schools. In 1956, in the first article co-authored by the two co-directors of the two successive research programs launched at the Law School on Antitrust, Aaron Director and Edward Levi, the latter definitively departed from Henry Simons' positions to announce the lines of force of the Second Chicago School, which had been in gestation since 1947.

Alcoa is thus an essential point for the culmination of the dynamic initiated in 1938 (which will continue in the decision-making practice along the Warren period and until 1977) but also for the rupture it has created in the intellectual dynamic of the Chicago School and hence in our contemporary antitrust.

5.1. The road to structuralism? The Alcoa's acme

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 promoters (Clark, 1940). It also announces the rise of the structuralism developed by Mason (1939). As Kovacic (1992, p.299) notes, Henry Simons' emphasis on the dispersal of economic power marked a generation of American economists and jurists, establishing it as the primary goal of antitrust policy[45]. Such a trend is affected by the ambiguities of the new dealers of the 1930s, as evidenced by the intellectual dynamic of Judge Hand himself.

This judgment 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

[44] Such proposals echo with current US antitrust debates See KHAN (2019) for instance.

[45] « From 1945 until the early 1970s, many economists embraced Simons' enthusiasm for dispersing market power and preventing further concentration via merger. »

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*[46] 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.

It remains that Alcoa led to a somewhat extreme interpretation of the scope of the Sherman Act, moving from a logic of sanctioning the acquisition of a monopoly situation, its preservation or its extension on a basis other than that of merits to a structuralist logic in which the monopoly situation calls for competitive sanction in whatever way it is obtained and in whatever way it is exercised (Kovacic, 1989).

A second key point is worth noting. The Alcoa judgment can be interpreted in a variety of ways. It is distinct from the Thurman Arnold's conception of Antitrust, conception later partially endorsed by the Second Chicago School. The latter is based on the principle that the 1890 legislator did not (or not only) aim at efficiency but also at a multiplicity of objectives, which in the end outline a model of society characterized by the protection of actors without economic powers. In his decision, Judge Hand thus endorsed such an egalitarian conception of Antitrust. In the same time, despite his preferences for a regulation of economic power, his decision embodies the trade-off between firm size and efficiency. Renunciation to efficiency gains resulting from the concentration is legitimate: "great industrial consolidations are inherently undesirable, regardless of their economic results".

5.2. Alcoa's interpretation seals the rupture between the two Chicago schools

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: the 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. While this view is aligned

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

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[47].

The Director and Levi's criticisms of *Alcoa* provide 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[48]. *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.

It should also be pointed out that the diagnoses that have been made of the degree of concentration of the US economy diverged significantly before and after the war. The positions taken by Henry Simons are part of a context marked by the publication of Burns' book (1936). The originality of Burns' work was to combine approaches in terms of imperfect competition and monopolistic competition with an institutionalist analysis of the structure of the US economy in the wake of the NIRA.

Within the Burns' perspective (1936, p.523), antitrust laws are not to be rejected, but the remedies available to them are insufficient to respond to the concentration of economic power: an industrial re-organization is necessary to restore competition. Burns' (1936, p.525) prescriptions were quite straightforward: dominance is an obstacle to the very process of competition and must be remedied. The only alternative is a return to a "Hamiltonian" NIRA-type mechanism". The principal objective of this regulation of the size of the firms is to attain the fruits of competition without planning". In Burns' mind (1936, p.526), playing on behavior alone was vain. The guarantee of competition requires the correction of the Bigness problem:

[47] 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).
[48] According to Posner (1979, p.928), industrial organization scholarship in the United States up to the 1960s was dominated by an institutional and historical perspective. The Second Chicago School rejected it as being a-theoretical and descriptive.

"attempts to restore competitive behaviour by law offer no prospect of dealing with the developing elements of monopolistic control in industry".

Not only did Director and Levi had an alternative diagnosis to the pre-war situation assessment by Burns, with that one established by Nutter (1951) in the early years of the Second Chicago School, but they also considered that the concentration of economic power did not eliminate competitive incentives to the extent that potential competition still existed ... unless the firm in question is protected by regulatory barriers to entry, as Stigler (1968) would later demonstrate.

This skepticism announced the 'hallmark' of the Second Chicago School (Baker, 2013). In the understanding of the Second Chicago School scholars, the monopoly issue is not a relevant one. As Stigler (1988, p.166) "not until the late 1950s, under Aaron Director's influence, did Chicago repudiate de-concentration". It should be stressed that at the time Director and Levi's work is being published, the American antitrust consensus is far removed from what it will become once their ideas have taken hold in the second half of the 1970s. The primacy of structuralist ideas at the time made the 2nd Chicago School seem like a lunatic fringe, to use Posner's words (Posner, 1979, p.931).

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). 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).

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[49]. It leads to balance consumer interests with

[49] Such a view echoes a Jeffersonian approach. The US Supreme Court in its Brown Shoe ruling in the 1960s will confirm such a perspective in which tackling the concentration of economic power trumps efficiency concerns: "But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favour of decentralization".
Brown Shoe Co. v. United States, 370 U.S. 294, 344 (1962)

competitors', without any method allowing to weigh up their respective interests in terms of global welfare.

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 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).

It should be noted that while Aaron Director has gradually moved away from the positions held by Henry Simons, who had recruited him as Professor of Economics at the Law School of the University of Chicago (Bougette et al., 2015); a similar trajectory can also be traced for the co-director of the two programmes, Edward Levi. Levi, an alumnus of Yale Law School, was part of Thurman Arnold's close team at the ATR in the late 1930s, as was Walton Hamilton. Similarly, his views on concentration changed with the introduction of the Chicago program (Rutherford, 2011).

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").

However, it is important not to overstate the discontinuities between the two schools in Chicago. Milton Friedman in this exchange with Coase underlined an essential point. The position of Simons in the Second New Deal can also be explained by a particular economic and political context. His positions against the NIRA during the First New Deal were much more characterized by a "classic" liberal positioning closer to the positions that the Second Chicago School will take. 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".

6. Concluding comments: Drawing a parallel with contemporaneous debates

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. We aimed at demonstrating that both American institutional economists and First Chicago School scholars recognized that such legislation not only has economic purposes but also political ones. 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[50]. The dispersal of economic power resulting from the competition process is simultaneously an essential condition to prevent the capture of the political one, and eventually its concentration (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 Bork's' view, the Sherman Act promulgation was less motivated by economic injury against consumers than by the political hostility towards trusts' practices[51].

[50] For a discussion see Crane (2020).

[51] 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

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[52]: "*in Appalachian Coals, the government quoted for the proposition that price fixing ultimately benefits to consumers by ensuring fair returns for businesses"*. As Kovacic and Shapiro (2000, p.48) state "Like the Congress at the time, the Court appeared to have lost faith in free market competition and welcomed experiments with sector-wide private ordering. Appalachian Coals later came to be seen as a Depression-era aberration".

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.

The story that spans the ten years between the declaration of unconstitutionality of the NIRA and the Alcoa decision marks many ruptures in American antitrust policy, in the history of the thinking and practice of the antitrust community, both economists and legal scholars. However, it also reveals much continuity. Indeed, this balance must be put into perspective with the long history of the USA. The tensions between a conception in which efficient and reasonable operation is possible through regulation and a conception defending competition policies to work towards a reduction of the concentration level of economic power have been a

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".

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

characteristic feature of the American political debate since the early years of the Republic, as shown by the opposition between the Hamiltonian and Jeffersonian views.

Moreover, the debates of 1938 show that this dividing line is also characterized by very strong internal divisions. The Hamiltonian perspective can be broken down into two parts. The equilibrium between Big Business and Big Government can be achieved either by associating the different stakeholders or by a state-led approach. The tension between the positions of associationalists in the Brandeis' sense and the corporatist model of the First New Deal attests to this fact. The Jeffersonian perspective is also plural. A Thurman Arnold-style perspective does not consider dominance as a problem in itself, unlike the positions that Simons defended or those of the promoters of structuralism after Alcoa.

These contradictions are not new. Crane (2015) also noted them in the context of the debates on Antitrust in the American presidential election of 1912. Current debates around the New Brandeis movement or neo-structuralism also echo these tensions (Wu, 2018; Pasquale, 2018; Khan, 2019; Lamoreux, 2019). A continuum of competing arguments evoking both the debates of 1912 and those presented during the Second New Deal is emerging, ranging from the addition of alternative or additional criteria for consumer welfare, to proposals of a quasi-regulatory nature, to structural measures aimed at addressing the issue of the concentration of economic power itself. Similarly, the debates on the concentration of US industry and its consequences in terms of competition are long term if we consider the work of Burns (1936), Nutter (1951), the Neal Report (1968) or Philippon (2019).

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