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A NEO-CHICAGO PERSPECTIVE ON ANTITRUST INSTITUTIONS

DANIEL A. CRANE*

It has long been fashionable to categorize antitrust by its “schools.” From the Sherman Act’s passage to World War II, there were (at least) neo-classical marginalism, populism, progressivism, associationalism, business commonwealthism, and Brandeisianism.¹ From World War II to the present, we have seen (at least, and without counting the European Ordo-Liberals) Paleo-Harvard structuralism, the Chicago School, Neo-Harvard institutionalism, and Post-Chicagoans.²

So why not Neo-Chicago? I am already on record as suggesting the possible emergence of such a school,³ so it is too late for me to dismiss the entire “schools” conversation as window-dressing. This Symposium is dedicated to defining and analyzing a “Neo-Chicago” School, so define and analyze we shall.

My contribution is to offer several observations about the substantive underpinnings of the Neo-Chicago School and then discuss at greater length how it can contribute to the debate about antitrust institutional structures. There are two reasons for this angle.

First, institutional considerations and biases dominate antitrust policy and explain substantive antitrust rules in ways that the legal academy has too long

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neglected. If the Neo-Chicago School does not seriously grapple with institutional issues, then it will fail to capture important contributions to the structure and orientation of modern antitrust law.

Second, Neo-Chicago's two principal competitors at the moment are Post-Chicago and Neo-Harvard. I will argue that Post-Chicago is still too diffuse and undetermined to qualify as a full-fledged "school," but as it forms more concretely it will provide a serious challenge to Chicago School (and, derivatively, Neo-Chicago) ideas. Neo-Harvard—a highly influential modern school—is defined primarily by its institutionalism and is less of a threat to core Chicago School ideas. Neo-Chicago needs to embrace Neo-Harvard's institutionalism—mutatis mutandis—if its proponents want to perpetuate the uneasy Chicago-Harvard alliance that has prevailed in the Supreme Court for the last two decades.

This essay seeks to contextualize and define the Neo-Chicago School through an institutionalist lens. The Paleo-Chicago School failed to offer a thorough institutional assessment. I argue that to be relevant the Neo-Chicago School needs a positive institutional theory, as contrasted to the "pox on all of your houses" dismissiveness of Paleo-Chicago. I consider the institutional question in historical perspective by stylizing three dominant institutional models as personified by the three principal contenders in the 1912 Presidential election. With these three models as context, I offer some prescriptions for a Neo-Chicago institutionalist approach, which would center on a preference for executive-branch enforcement, administrative rather than adversarial decisionmaking processes, and a continued strong judicial role in norm creation.

I. WHAT IS THE NEO-CHICAGO SCHOOL?

Intellectual "schools" tend to be "Protestant" rather than "Catholic," meaning that there is no central creedal authority to delimit orthodoxy and heresy. It is difficult enough to draw the lines around the Chicago School, whose titans, such as Richard Posner, Frank Easterbrook, Aaron Director, and Robert Bork, are associated with the University of Chicago. By contrast, Neo-Chicagoan antitrust analysis is not geographically centered at the University of Chicago, nor necessarily associated with household names in the legal academy. Further, since the school—if there be such a school—is still in its relative infancy, there is no fixed canon of work ready for compilation and attribution to the school.
Hence, defining the Neo-Chicago School requires more than identifying a cluster of ideologically similar intellectuals working on similar issues, using similar methods, and drawing upon a common intellectual infrastructure, such as a university, think tank, or academic network. It requires placing Neo-Chicago within a sweep of antitrust intellectual history.

The roots of the story go back to at least the 18th century, but I pick up the story in the post-War era. During the 1950s and '60s, a structuralist “Harvard School” associated with Joe Bain, Carl Kaysen, and Donald Turner dominated U.S. antitrust thought. Harvard—or what I will later call Paleo-Harvard—rested interventionist policy prescriptions on a deterministic structure-conduct-performance paradigm in which the structure of a market predetermined its competitive performance.

During the 1970s and '80s, the Chicago School—or perhaps we should now call it the Paleo-Chicago School—scored a knockout punch against the Paleo-Harvard School by significantly discrediting its empirical assertions about the relationship between structure and performance and explaining that many practices once understood as anticompetitive were competitively benign.

While Paleo-Chicago was making its inroads, the Harvard contingent underwent an “unacknowledged conversion experience,” in which it abandoned its earlier interventionism without fully embracing the Chicago perspective. The emerging Neo-Harvard School, represented by the canonical Antitrust Law treatise and its principal custodians, Turner, Phillip Areeda, and now Herbert Hovenkamp, articulated a centrist or even conservative approach to antitrust law. Hovenkamp, the reigning dean of the Neo-Harvard School, writes that “[t]oday the Harvard School is modestly more interventionist than the Chicago School, but the main differences lie in details.”

But the details are not unimportant. Paleo-Chicago and Neo-Harvard can be compared and contrasted on two important vectors of antitrust policy. First, Paleo-Chicago expresses a much stronger belief in the good functioning and self-correcting properties of the market than does Neo-Harvard. Second, while both Paleo-Chicago and Neo-Harvard mistrust antitrust’s institutional apparatus—particularly private plaintiffs, juries, and treble damages—there are im-

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7 See INTELLECTUAL HISTORY OF COMPETITION POLICY: SELECTED READINGS (Daniel A. Crane & Herbert Hovenkamp eds., forthcoming 2012) (tracing the roots of intellectual engagement over competition policy and ideology in 18th-century thought).
10 Id. at 38.
important differences in their institutional prior beliefs. Neo-Harvard, best represented perhaps by Justice Stephen Breyer, prefers regulatory solutions to antitrust solutions and public enforcement to private enforcement. In cases like Trinko, linkLine, NYNEX, and Credit Suisse, this led the Breyer wing of the Supreme Court to concur in the Chicago School’s judgment that private antitrust liability should be disallowed. The Chicago School, by contrast, disfavors both regulatory interventions and antitrust interventions, and has no particular affinity for government suits over private suits. Hence, the story of antitrust on the Supreme Court over the last two decades—of defendants’ 15–0 rout of plaintiffs between 1993 and 2010—is best understood as the uneasy and sometimes begrudging alliance of Paleo-Chicago and Neo-Harvard.

As usual, the challenge to the dominant intellectual school began quietly while the incumbent was still ascendant. Already during the 1980s there was talk of a Post-Chicago School that would correct some of Chicago’s overreaching. That Post-Chicago lacks the geographical identifier of its predecessor “schools” reflects the fact that Post-Chicago may still be less of a discrete school than a collection of attacks on Chicago School tenets. Robert Pitofsky’s 2008 collection, How the Chicago School Overshot the Mark, is an attempt to corral leading Post-Chicago voices, but it fails to articulate a common theoretic or normative approach to antitrust law as a proposed successor to Chicago. It is not primarily a call for more empiricism, a different theoretical approach (such as behavioralism or game theory), or a different normative understanding of antitrust. Rather, it consists of a succession of targeted criticisms of particular Chicago School arguments.

At the present time, at least, Post-Chicago has hardly coalesced into a real school. The important work that has been done—for example, the Bolton, Brodley, and Riordan paper on predatory pricing and Einer Elhauge’s paper

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11 Crane, Institutional Suspicions, supra note 6, at 1919–20.
16 Crane, Institutional Suspicions, supra note 6, at 113.
19 Crane, Chicago, Post-Chicago, supra note 3, at 1928.
on tying, price discrimination, and bundled discounting\footnote{Einer Elhauge, \textit{Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory}, 123 \textit{Harv. L. Rev.} 397 (2009).}—are significant pieces standing alone but lack a sufficiently common approach and texture to permit the mapping of a new school. Also, it is possible that the “schools” categorization exercise has reached the limits of its utility when it comes to such fine questions as the difference between Post-Chicago and Neo-Harvard, which may turn out, with the benefit of historical hindsight, to overlap to the point of indistinction.

This brings us to the emergent—or possibly emergent—Neo-Chicago School. As the foregoing historical narrative suggests, it is probably premature to say anything terribly concrete about the new school. If Post-Chicago has not yet sufficiently coalesced, that observation is even more true as to Neo-Chicago, which is in part a reaction to both Neo-Harvard and Post-Chicago. Further, it is unclear to what extent Neo-Chicago differs that greatly from the Neo-Harvard of a Herbert Hovenkamp, for example. I have previously referred to Neo-Harvard as “Chicago-lite,”\footnote{Daniel A. Crane, \textit{Antitrust Modesty}, 105 \textit{Mich. L. Rev.} 1193, 1195 (2007) (book review).} and it would not be unreasonable to refer to Neo-Chicago also as Chicago-lite, although of a somewhat different flavor.

Notwithstanding these equivocations, let me suggest four possible characteristics of the emerging—or possibly emerging—Neo-Chicago School. First, the Neo-Chicago School is the current custodian of antitrust’s “hospitability” tradition. Oliver Williamson once referred to an antitrust “inhospitality tradition,” roughly coincident with the Warren Court, which “attributed anticompetitive purpose and effect to novel or nontraditional modes of economic organization.”\footnote{Oliver E. Williamson, \textit{Symposium on Antitrust Law and Economics: Introduction}, 127 \textit{U. Pa. L. Rev.} 918, 920 (1979); see also Oliver E. Williamson, \textit{Assessing Vertical Market Restrictions: Antitrust Ramifications of the Transaction Cost Approach}, 127 \textit{U. Pa. L. Rev.} 953, 959 (1979) [hereinafter \textit{Vertical Market Restrictions}]. Williamson attributed this tradition to Donald Turner, then-Assistant Attorney General at the Antitrust Division of the U.S. Department of Justice, who was quoted as stating: “I approach territorial and customer restrictions not hospitably in the common law tradition, but inhumanely in the tradition of antitrust law.” Williamson, \textit{Vertical Market Restrictions}, supra, at 959 (quoting N.Y. \textit{State Bar Ass’n, Antitrust Law Symposium} 29 (1968) (remarks of Stanley Robinson)).} This is a useful mnemonic device, since it captures the balance of hostile perspectives on such activities as mergers and dominant firm conduct. “Hospitability” equally well captures the balance of sympathetic perspectives, characteristic of all manifestations of the Chicago School, to unfettered business freedom, including the freedom to merge vertically and horizontally and engage in aggressive conduct toward rivals.

Second, while Neo-Chicago is closely aligned in substance with the Chicago School, it is likely to be narrower, more cautious, and less categorical in
its hospitality than was its ancestor. Whereas Paleo-Chicago would claim that predatory pricing never or almost never happens, Neo-Chicago would likely acknowledge that predatory pricing might occasionally happen, but claim that the vast majority of predatory pricing cases (particularly by competitors) are overstated. Whereas Paleo-Chicago would claim that tying could never result in monopoly leverage because of the one monopoly profit theory, Neo-Chicago would acknowledge that the one monopoly profit theory is not an absolute bar to the profitability of leveraging, but also claim that leveraging is still not plausible much of the time that it is alleged.

Third, to the extent that Neo-Chicago has—or will come to have—a common methodological approach, it is an insistence on evidence-based justifications for antitrust interventions. Empirical work is a key to the Neo-Chicago School’s future success. But even beyond formal empirical work, Neo-Chicago focuses on testing the veracity of propositions in real market contexts. An example is David Evans and Michael Salinger’s work examining the various examples of tying and bundling in competitive markets and showing that these marketing strategies are the products of market-specific scale economies. In a few years’ time, empirical work on the effects of Leegin will doubtless have to become a top priority for all competing “schools.”

The final characteristic of the Neo-Chicago School, and the one that I will examine in the rest of this essay, is (or should be) a focus on institutionalism. In this, Neo-Chicago shares a great deal with the Neo-Harvard School which, as noted, is dominated by institutionalist concerns. The two schools share a common belief that given the institutional structures of U.S. antitrust law, courts and agencies should employ antitrust judiciously. Yet, to revert to Hovenkamp’s observation, there are differences in the details, and they largely follow the lines of the Neo-Harvard/Paleo-Chicago divide. Neo-Chicagoans have stronger prior beliefs in the robustness of markets and thus are quicker to abandon antitrust interventions because of institutional frailties. Further, Neo-Chicagoans distrust regulation as an alternative to antitrust much more than do the Neo-Harvardians, which shows up in different institutionalist prescriptions.

24 Frank H. Easterbrook, Predatory Strategies and Counterstrategies, 48 U. Chi. L. Rev. 263, 264 (1981) (observing that theories about predatory pricing are so variegated “for the same reason that 600 years ago there were a thousand positions on what dragons looked like”).


26 Crane, Chicago, Post-Chicago, supra note 3, at 1931–32.


And how does Neo-Chicago differ from Paleo-Chicago on institutions? As we shall see, Paleo-Chicago was characterized by a disdain for antitrust institutions almost across the board. By contrast, to remain distinctive, and thus viable, in a world of rising Post-Chicago sentiment, Neo-Chicago needs to offer both negative and positive institutionalist judgments. It cannot dismiss antitrust's institutional apparatus as hopelessly broken, thus justifying non-intervention as a default; otherwise it will have little, if anything, to separate it from Paleo-Chicago. It must offer a positive prescription for how the state can best intervene to correct competitive market failures.

II. PALEO-CHICAGO ON INSTITUTIONS

A focus on institutions was not a major part of the early Chicago School critique. It played very little role in either of the Chicago School's two defining monographs—Bork's and Posner's books published in the mid-1970s. Bork's *Antitrust Paradox* has virtually nothing to say about the institutional structure of antitrust enforcement, focusing instead on the normative goals of antitrust law and efficiency explanations for various commercial practices. The 1976 version of Posner's *Antitrust Law* has a single chapter devoted to "The Problem of Enforcement," which Posner expanded modestly in the revised 2001 edition. Relatively little of the chapter in the first edition deals with institutional structure issues. Most of it concerns remedies and procedural issues. The second edition contains an expanded section on institutional structure issues, but most of the new thoughts relate to problems of antitrust federalism and the perception that state attorneys general frustrate federal enforcement—probably a reflection of Posner's frustration with the failed *Microsoft* mediation. Posner makes no attempt to offer an overall prescription for an institutionalist approach to antitrust. Nor does one find anywhere in the Paleo-Chicago canon an effort to provide a comprehensive account of institutional arrangements.

But although Paleo-Chicago has not offered a thoroughgoing institutionalist assessment, small glimpses of its background views on antitrust institutions

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29 By institutionalism, I mean, broadly speaking, the study of trans-substantive determinants—the inputs into antitrust decisionmaking other than legal doctrines or economic policy frameworks. See *Crane, Institutional Structure*, supra note 4, at xii.

30 *Bork, supra* note 25.


33 Posner was appointed as a mediator to try to settle the *Microsoft* case brought by the federal government and nineteen states. The mediation, which occurred after Judge Thomas Penfield Jackson issued his findings of fact but before he issued his conclusions of law, failed to generate a settlement. In press accounts, Posner blamed the state attorneys general for obstructing a mediated resolution. See Ken Auletta, *Final Offer: What Kept Microsoft from Settling Its Case?*, *New Yorker*, Jan. 15, 2001, at 40.
emerge at various junctures. The resulting collage is an unsympathetic perspective on almost any of antitrust's major institutional components.

A. THE AGENCIES

Paleo-Chicago finds few kind words to say about the federal antitrust agencies, although, if pressed, seems to give a nod to the Antitrust Division over the FTC. Posner, himself a product of the FTC, has long dismissed the FTC as having no comparative advantage over Article III courts. His 1969 article offered a scathing rebuke of the FTC as incompetent, self-aggrandizing, and lacking any comparative advantage over generalist judges.\(^34\) Despite considerable modernization and improvement at the FTC in subsequent decades, in the second edition of Antitrust Law, Posner continues to dismiss the FTC as unlikely to have any comparative advantage over courts: "[T]he FTC is the prototype of a specialized trade-regulation court, yet I have never heard anyone argue that it has displayed superior expertise to the courts when it comes to deciding antitrust cases."\(^35\) Posner finds dual enforcement "peculiar" but "pretty harmless" overall since the agencies have found ways to divide responsibilities and some competition between government agencies may produce some "modest benefits."\(^36\)

Frank Easterbrook comes down even more harshly on the FTC. Surveying the allocation of decisional authority to the agencies through the lens of public choice theory, Easterbrook argues that given the FTC's hybrid structure and primary accountability to a Congressional committee chairman, it is more beholden to producer interests than to consumer interests.\(^37\) By contrast, Easterbrook argues, the Justice Department—a purely executive agency—has traditionally advanced the interests of consumers over those of producers.\(^38\) Hence, Easterbrook argues that "[m]odern public choice theory leads us to discard claims based on 'expertise' and 'vigor' so that we may see the real effect of 'independence.'"\(^39\)

Robert Bork and Ward Bowman offer equal-opportunity criticism of both the FTC and the DOJ's Antitrust Division, observing that the agencies "pro-


\(^{36}\) Id.


\(^{38}\) Easterbrook, supra note 37, at 1341–42.

\(^{39}\) Id. at 1341.
tectionist" polices had exposed them to ridicule: "Scolding the enforcement agencies . . . is highly diverting sport at bar association meetings—a sort of sedentary version of bullbaiting suitable for middle-aged lawyers . . . ." Bork and Bowman allow that Congress might be equally at fault for passing dumb laws like the Robinson-Patman Act, but this caveat seemed more designed to spread blame than to rehabilitate the agencies.

1. Judges and Juries

Given its aversion to the technocratic FTC model, Chicago might have been expected to embrace the generalist Article III actors—judges in particular—as the proper repositories of antitrust decisionmaking. In fact, Paleo-Chicago has relatively sour things to say about the ability of judges and juries to decide antitrust cases.

Reflecting his error/cost paradigm, Easterbook has taken the Chicago School’s lead in questioning the competence of judges and juries. Indeed, Easterbrook takes the general incompetence of judges and juries to decide complex antitrust issues as a reason to limit antitrust altogether:

So we do not trust judges to make business decisions in corporate law. Yet antitrust law now calls for the same sorts of economic judgments. We ought to be skeptical of judges’ and juries’ ability to give good answers. And this implies being skeptical of antitrust itself, beyond some simple rules such as do not collude.

Posner, like Easterbrook, has questioned the ability of antitrust juries to sort out complex economic cases. Posner, however, has also dismissed proposals for specialized courts, including in antitrust. Just as Chicago dismissed claims about the superiority of "expert" agencies, it also dismissed claims about the superiority of "expert" courts.

2. Private Enforcement

For the Chicago School, most of the fine questions about private enforcement—for example, whether indirect purchasers should have a right to recover for overcharges—are simply rearranging the deck chairs on the Titanic. The right question is whether there should be private antitrust enforcement at

41 Id.
45 Id. at 280; RICHARD A. POSNER, THE FEDERAL COURTS, ch. 8 (1996).
all, and the answer seems to come out somewhere between no and probably not.

Thus, for example, Easterbrook describes some forms of antitrust litigation, including private cases, as "an exercise in rent-seeking [that] is directed against practices that raise output and lower prices." Posner expresses considerable skepticism about private antitrust enforcers, noting that "[s]tudents of the antitrust laws have been appalled by the wild and woolly antitrust suits that the private bar has brought—and won." He ultimately comes out as agnostic on whether eliminating the private right of action would be a good idea. In the second edition of his antitrust book, however, Posner proposes that the enforcement agencies be given a right of first refusal to bring damages actions, which would preempt the right of private litigants and state attorneys general.

3. State Enforcers

As noted at the outset of this section, the Chicago School has been particularly critical of state attorneys general. Posner blames the state attorneys general for obstructing a mediated resolution of Microsoft and subsequently argued that states should be "stripped of their authority to bring antitrust suits, federal or state, except under circumstances in which a private firm would be able to sue." Alternatively, he has proposed giving federal authorities a right of first refusal to bring antitrust cases and strip states and private parties from suing over the same matter. Without mentioning Microsoft specifically, he has developed a theory that state attorneys general follow a "strategy consisting of bringing high-profile lawsuits that attract publicity to the attorney general and promote the interests of politically influential state residents . . . at the expense of nonresidents."

In a more recent empirical study drawing on Posner's data, Michael Greve finds evidence of parochialism in state attorney general antitrust enforcement, but not because of overenforcement against out-of-state interests.

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48 *Id.* at 276.
49 *Id.* at 282.
50 See Auletta, supra note 33, at 40.
52 *Id.* at 941.
finds that states almost never challenge their sister states’ anticompetitive con­duct and have “consistently advocated a partial surrender of state regulatory autonomy.”

Picking up on similar themes, Easterbrook has noted that state attorneys general from the states in which Microsoft’s competitors were head­quartered were some of the prime movers in the Microsoft litigation, and re­ferred to this diffusion of enforcement power as resulting in “competition to impose costs on citizens of other states.”

In sum, there are few positive evaluations of any key institutional aspect of U.S. antitrust enforcement in the Paleo-Chicago canon. The overall view seems to be that the antitrust system is ill-equipped to enforce antitrust law—a view that leads to certain obvious conclusions about how much antitrust enforcement is socially optimal.

III. NEO-CHICAGO’S CHOICES

The preceding collage of Paleo-Chicago perspectives on antitrust institu­tions points to a stark choice between antitrust minimalism and antitrust abdi­cation. If, per the Paleo-Chicago School, the FTC has been alternately a sleepy backwater of incompetence or a protector of inefficient producers at the expense of consumers, if the Antitrust Division has been a laughingstock of middle-aged lawyers at bar association meetings, if Article III judges have been unable to keep up with antitrust’s specialized and technical economic character, if juries are powder kegs of populism waiting to explode, if private litigants are ill-motivated rent seekers wielding a treble damages cudgel, and if state attorneys general are political actors waiting to exploit non-constitu­ents in other states, then perhaps we should simply repeal the antitrust laws.

But, for better or for worse, Neo-Chicago does not have the luxury of tak­ing that position. The current, and probably durable, alignment of political wills in the courts, Congress, and the antitrust agencies suggests that antitrust will persist, and with some force. To remain relevant, any school must speak not only to what antitrust should not do but also to what it should do. And, just as important as what it should do is how it should do it.

A. MOVING BEYOND “A POX ON ALL INSTITUTIONS”

Neo-Chicago does not have the luxury of attacking every possible institu­tional player in the antitrust system as incompetent and calling for a con­sequent moratorium on antitrust enforcement. Antitrust abolition is not in the cards. Despite Chicago’s substantial inroads in curtailing antitrust liability norms between the mid-1970s and the present, antitrust remains a potent legal

55 Id. at 101.
56 Easterbrook, When Does Competition Improve Regulation?, supra note 46, at 1306.
and regulatory instrument. Even the generally Chicago School Supreme Court has limited antitrust liability rather than abolish it in key areas such as tying, predatory pricing, refusals to deal, and vertical intra-brand restraints. The lower courts, the final word on most antitrust cases, have begun to show signs of restlessness with the prevailing Chicago sentiment. Further, the mood of the legal academy, the antitrust enforcement agencies, and state attorneys general, has swung in a more pro-enforcement direction. With a thousand new treble damages actions filed annually in the federal courts alone, a majority of states having repealed *Illinois Brick* in whole or in part under state antitrust laws, cartel fines and imprisonment reaching record levels, and new antitrust regimes taking off around the world, antitrust enforcement seems to be here to stay for the foreseeable future. Although the long-run effects of the “Great Recession” on regulatory politics remain to be seen, it seems likely that laissez-faire, anti-regulatory ideologies will face increasing pressure in coming years.

At the same time that antitrust appears to be rebounding, institutional structure and dynamics are in vogue. For example, the FTC has recently begun to reassert its unique institutional position, calling for a reinvigorated reading of Section 5 of the FTC Act in order to unleash the FTC from the baggage of private litigation. The Antitrust Modernization Commission devoted sub-

61. See, e.g., *Spirit Airlines, Inc. v. Nw. Airlines, Inc.*, 431 F.3d 917 (6th Cir. 2005) (permitting predatory pricing claim to be submitted to jury); *United States v. AMR Corp.*, 335 F.3d 1109, 1115 (10th Cir. 2003) (observing that, in light of Post-Chicago scholarship, the court would not approach predatory pricing claims “with the incredulity that once prevailed”); *LePage's Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003) (en banc)* (asserting the importance of monopolization law and rejecting predatory pricing analogies for bundled discounting claims).
64. *Crane, Institutional Structure*, *supra* note 4, at 156.
stantial energy to institutional assessments, and made important recommenda-
tions, particularly on the federalism front.68

Perhaps most significantly, the Neo-Harvard School is making its most im-
portant moves on the institutional front. Take, for example, the statements in
Justice Breyer’s *linkLine* concurrence that price squeeze claims find a natural
home in government (but not private) enforcement actions,69 his *NYNEX* opin-
ion worrying about transforming routine business torts into treble damages
actions,70 his *Leegin* dissent that transitioning from the per se rule to the rule
of reason puts too much pressure on judges and juries,71 his *California Dental*
dissent that the FTC should be accorded deference in identifying what is and
is not misleading advertising,72 his *Credit Suisse* opinion finding antitrust law
preempted because of the SEC’s superior regulatory competence,73 or the por-
tions of *Trinko* presumably inserted to attract Justice Breyer’s vote about the
regulatory presence of the FCC cutting against creating a duty to deal.74 Anti-
trust institutionalism has played a significant role in antitrust’s development
over the last two decades. It is likely to play an even larger role in the future,
as institutional theories are more widely discussed and generalized.

Neo-Chicago cannot afford to miss the institutionalist conversation, nor to
enter it only to find fault with all of the institutions. To remain relevant and
successful in an increasingly difficult post-Great Recession environment,
Neo-Chicago needs to articulate an affirmative perspective on institutions:
Which institutional arrangements work best? Which institutional adjustments


monopolization case where the Government as plaintiff seeks to show that a defendant’s monop-
oly power rests, not upon ‘skill, foresight, and industry,’ but upon exclusionary conduct . . . .”
(citations omitted)).

of Sherman Act “would transform cases involving business behavior that is improper for various
reasons, say, cases involving nepotism or personal pique, into treble-damages antitrust cases”).

J., dissenting) (“But antitrust law cannot, and should not, precisely replicate economists’ (some-
times conflicting) views. That is because law, unlike economics, is an administrative system the
effects of which depend upon the content of rules and precedents only as they are applied by
judges and juries in courts and by lawyers advising their clients.”).

72 Cal. Dental Ass’n v. FTC, 526 U.S. 756, 787 (1999) (Breyer, J., dissenting) (“The Commis-
sion, which is expert in the area of false and misleading advertising, was uncertain whether [the
association defendant] had even made the claim.”).

73 Credit Suisse Secs. (USA) LLC v. Billings, 551 U.S. 264 (2007) (holding that initial public
offering “laddering” practices were not antitrust violations because of SEC’s regulatory jurisdic-
tion over such practices).

74 Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411–15
(2004) (examining presence of FCC regulatory authority as further reason not to impose a duty to
deal under Section 2 of Sherman Act).
are best suited to maintaining a lightly but competently interventionist state hand? Which institutional arrangements provide the best complements to favored substantive rules—to the hospitality tradition? If it does not sincerely and persuasively answer these sorts of questions, Neo-Chicago will fail to establish itself as a viable and effective school.

B. Paradigms from the 1912 Election

Given the broad parameters of American law and politics, institutional choices for antitrust enforcement turn on several overlapping vectors, including: (a) courts or agencies as principal norm creators; (b) public enforcement within the executive branch or an independent agency; (c) adjudication, regulation, or administration; and (d) expert or generalist decisionmaking. There is no better way to understand these conflicting and competing policy vectors than by examining the positions on competition and antitrust enforcement advanced during the momentous three-way presidential race of 1912 between Teddy Roosevelt, Woodrow Wilson, and William Howard Taft. Each candidate advanced a comprehensive perspective on the key themes bearing on the institutional structure of U.S. competition policy. Their three perspectives remain the best exemplars of the institutional positions that have competed over the course of the 20th and early 21st centuries and hence provide a menu of discrete options for the Neo-Chicago School.

Despite wearing the moniker “trustbuster,” Roosevelt was far less interested than Taft and Wilson in restoring a competitive equilibrium to the market. Roosevelt saw the large industrial trust as a necessary step in industrial progress. In private correspondence, he opposed the Standard Oil break-up, noting: “I do not myself see what good can come from dissolving the Standard Oil Company into forty separate companies, all of which will still remain really under the same control. What we should have is a much stricter governmental supervision of these great companies . . . .” For Roosevelt, the imperative was not to break up large trusts or restore competition, but to bring the large trusts under the control of the government (an objective that forced him constantly to dodge accusations of socialism). Roosevelt viewed the courts as largely incapable of performing the necessary task of bringing the trusts under the thumb of the market and administering markets in an orderly fashion. He supported the creation of a strong administrative agency to control, regulate, and manage the trusts. Roosevelt’s institutionalist views thus

77 Sklar, supra note 75, at 341.
78 Id. at 343–45.
translate into weak courts and a strong bureaucratic and administrative apparatus to control and regulate large aggregations of capital.

Wilson, regarded as a progressive, was considerably less progressive than Roosevelt on matters of institutional structure, in the sense that Wilson favored a weaker role for agencies and a stronger role for courts. As Marvin Sklar has written, "Wilson's position . . . may be regarded as a synthesis of Roosevelt's and Taft's: the establishment of a federal administrative commission charged with policing the market against unfair business methods, but limited in its powers by statute and judicial review. . . ." 79 Wilson and his antitrust brain trust, Louis Brandeis, favored agency technocratic expertise over generalist decisionmaking in the executive branch, and to some extent administrative adjudication over judicial adjudication, but they did not go nearly as far as Roosevelt in abandoning the federal courts and consolidating regulatory power in a federal agency. Wilson explained that he did not "want a smug lot of experts to sit down behind closed doors in Washington and play providence to me." 80 Wilson's institutionalist views thus translate into a balance of power between technocratic agencies and courts.

At the far end of the spectrum, Taft concurred in the need for a vigorous antitrust policy, but expressed a far more conservative perspective on the manner of governmental interventions. Taft became increasingly suspicious of the "administrative methods of regulation," including license registration proposals for large corporations, displacing state incorporation law with federal incorporation schemes for large trusts, and the establishment of a trade commission. 81 Taft, a former and future federal judge (and, as a candidate in 1912, one who wanted nothing better than a seat on the Supreme Court), viewed the courts as the proper locus of antitrust decisionmaking, trusting them to safeguard property rights, announce incremental and adaptive solutions to the trust problem, and manage the conflicting interests of various stakeholders in the world of government, politics, and business. 82 Thus, for example, during his presidency Taft downgraded the role of the Bureau of Corporations and reinvigorated the role of the Justice Department. 83 Taft thus equates to an affinity for strong courts, a strong but judicially bounded law-enforcing executive, and little use for technocratic administrative agencies.

Of these three positions, Taft's pro-judicialism and his belief that courts should affirmatively consider the protection of property interests as an inde-

79 Id. at 420.
81 SKLAR, supra note 75, at 367.
82 Id. at 365–66.
83 Id. at 369–70.
dependent policy objective when deciding antitrust cases should find the easiest sympathy of Neo-Chicagoans. After all, since the 1970s, the federal courts have been the most Chicago-friendly of institutions, rolling back the excesses of the Warren and early Burger Courts and expressing empathy for efficiency arguments. Further, Taft's affinity for executive branch over administrative agency enforcement and his coolness toward technocratic expertise are consonant with Paleo-Chicago's hostility to the FTC and (mild) preference for the Antitrust Division.

But Neo-Chicagoans face considerable difficulties in embracing Taft as their unqualified institutionalist champion. Most importantly, the competing perspectives in 1912 were focused on the government as antitrust enforcer—not on the role of private treble damages litigation. Today, there are ten private cases for every government case. In the last two decades, only one public antitrust case (California Dental) has reached the Supreme Court. Private litigation—and all of its baggage—has largely driven the creation of substantive antitrust norms over the last three decades.

The predominance of private litigation suggests that Neo-Chicago should be chary of embracing an undifferentiated "courts and rule of law" approach to antitrust enforcement. In a world dominated by private litigation, "courts and rule of law" can easily come to mean competitor plaintiffs, customer class actions, treble damages, unilateral attorney-fee shifting, and juries as ultimate decisionmakers. This reality is markedly different from the "admirable adaptability of decrees in equity" envisioned by Taft.

Neo-Chicago's embrace of "courts and law" needs to be qualified as a preference for executive enforcement in the courts and hence public, rather than private, law. But this refinement opens difficult implementation issues in the current legal, regulatory, and political context. Short of scrapping antitrust's institutional framework and starting from scratch, Neo-Chicago needs to articulate a comprehensive institutional framework incorporating, but rebalancing, the existing actors. In the final section, I suggest a Neo-Chicago institutional framework, focused on executive enforcement, technocratic administration, and a strong continued role for the federal courts.

C. Neo-Chicago's Institutional Attachments: Executive Authority, Technocratic Administration, and Courts

Neo-Chicago's institutionalism will likely be Taftian, preferring judicial checks on agency overreaching, continued development of antitrust common law in the courts as opposed to ex ante regulation, and reluctance to delegate

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84 Crane, Institutional Structure, supra note 4, at 163.
excessive powers to the "headless 'fourth branch' of the Government." Yet this broad Taftian paradigm will need to take into account the institutional realities of contemporary antitrust enforcement, including the predominance of private litigation and its spillover effects on all of antitrust enforcement, the increasingly complex economic character of antitrust decisionmaking, and the success of hybrid institutional features developed over time, such as the quasi-administrative merger control process instituted by the Hart-Scott-Rodino Act. Consistent with both the principles and the realities, I propose three broad principles for Neo-Chicagoan institutionalism: (1) executive authority; (2) technocratic administration; and (3) judicial supremacy.

1. Executive Authority

In this context, "executive authority" entails at least three separate ideas. The first is that public enforcement should predominate over private enforcement. The second is that the executive branch of government, the Justice Department's Antitrust Division, should not be marginalized as compared to the FTC, which is an independent agency not located within the executive branch and not directly accountable to the President. The third is that the executive branch of government should have some discretionary space within which to form antitrust policy and resolve competition issues.

I will defer consideration of the third idea until the following discussions on administrative solutions and courts and focus now on the first two ideas concerning the position of the Antitrust Division compared to private enforcers and the FTC. Presently, private enforcement is by far the greater threat to Neo-Chicago ideals than the constitutionally suspect FTC. For the last several decades, the FTC has been relatively tame in its antitrust actions, whereas private enforcers have driven most of the controversial theories of liability, such as bundled discounting, refusals to deal, prize squeezes, predatory overbidding, predatory pricing, vertical intrabrand restraints, and all of the Robinson-Patman Act cases. With a few exceptions, the cease and desist remedies sought and obtained by the FTC have been mild compared to the gargantuan treble damages awards and privately negotiated settlements obtained by the private bar, negotiating in the shadow of the jury.

The comparison between the FTC and private enforcement is relevant because one of the currently discussed policy levers for rebalancing the relative strength of public and private enforcement involves according the FTC an

87 Humphrey's Ex'r v. United States, 295 U.S. 602 (1935) (holding that the President may only remove FTC Commissioners for cause).
enhanced position under Section 5’s “unfair methods of competition” prong. Given the choice between a strong FTC and contained private bar and a neutered FTC and empowered private bar, Neo-Chicago’s preference should be clear. Given the present balance of influence, at least, it would be far preferable for antitrust capital to flow to the FTC than to private enforcers.

But recapitalizing the FTC by building up an independent Section 5 has negative consequences for another Neo-Chicago value since it involves according the FTC a statutory advantage not enjoyed by the Antitrust Division, and hence building up the independent administrative agency at the comparative expense of the executive agency. The same is true of according the FTC a 53(b) advantage in merger preliminary injunction proceedings. While there may be sound arguments for giving the government (generically) an advantage over private litigants in merger proceedings, it should be of concern to the Neo-Chicago School that the FTC has greater advantages in court than does the Antitrust Division.

The upshot is that one aspect of Neo-Chicago’s affirmative institutional vision should be to articulate ways in which public enforcement can be revived at the expense of private litigation, without having the side effect of promoting the FTC over the Antitrust Division. This essay is about broad themes rather than implementation details, so I will not attempt to sketch out the argument further here, except to say that statutory solutions may or may not be required. Some fairly strong recalibrations—such as giving the Justice Department a preemptive right over private litigation or state enforcement—would require Congressional action. On the other hand, there are enough hints of willingness in the Harvard School to treat the Antitrust Division differently than private litigants—think Justice Breyer’s elliptical statement in linkLine—that Neo-Chicago may find some well-placed allies to advance portions of this project in the courts without legislative action.

2. Technocratic Administration

Both Taft and his Paleo-Chicago successors expressed discomfort with an administrative institutional structure for antitrust law. It is unsurprising that conservative, market-oriented antitrust schools would look suspiciously on technocratic ideals, given that the technocratic ideology that prevailed from

[88 See Daniel Crane, Thoughts on Section 5 of the FTC Act and the Case Against Intel, CPI Antitrust Chron., Winter 2010 Vol. 2, No. 2 [hereinafter Intel].


[90 One area where the Antitrust Division operates largely free from competition from the FTC or private litigants is criminal anti-cartel enforcement, a subject I do not consider here.

[91 See supra text accompanying note 70.]
the Progressive Era to the New Deal was strongly anti-market and pro-central planning. However, there is nothing inherently interventionist about a "technocratic" or "administrative" approach to antitrust enforcement, if by that we mean only a preference for decisionmaking by experts rather than generalists and for problem-solving approaches to competition problems rather than adversarial litigation. Indeed, in many other regulatory contexts, modern technocrats tend to be conservative, insofar as they call for "objective" or "scientific" approaches to risk management because of a perception that populist decisionmakers tend to overestimate risks and hence prohibit efficient behavior.

Further, a preference for expert administration over adversarial adjudication does not have to entail an affinity for the FTC or, more generally, an independent commission model. The Antitrust Division has as much "expertise" and technocratic capacity as the FTC, and may serve as well in a technocratic-administrative capacity.

The best example of a successful technocratic-administrative model in U.S. law is merger review under the Hart-Scott-Rodino Act. Whereas merger cases used to be litigated in courtrooms post-merger before randomly drawn Article III judges, most modern merger practice unfolds as premerger information disclosure to the agencies and negotiation over divestiture packages or conduct remedies in borderline cases. This sort of administration is unambiguously superior to the prior adjudicatory model, but it also should not be confused with a top-down bureaucratic regulatory model. Decisionmaking is largely informal, expert, ad hoc, individually tailored, and negotiated.

As I have explored more fully elsewhere, there are also available models of private technocratic administration to solve market power problems, such as the use of RAND commitments for standard-setting organizations and patent pools. Technocratic administration is characterized by expert problem-solving of competition issues, but the technocrats need not be government actors or central planners. The technocratic mode is fully consistent with market-oriented values.

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92 Daniel A. Crane, Technocracy and Antitrust, 86 Tex. L. Rev. 1159, 1163 (2008) [hereinafter Technocracy].
93 Id.
94 See generally Crane, Institutional Structure, supra note 4, ch. 2.
95 Id. at 93–94.
96 Id.
Neo-Chicago should find technocratic administration appealing in many contexts. It avoids many of the institutional features that Neo-Chicagoans find most alarming, such as command-and-control regulation, populist and incompetent juries, and ill-motivated private plaintiffs wielding the treble damages cudgel.

3. Judicial Supremacy

The third prong of Neo-Chicagoan institutionalism—judicial supremacy—need not be understood to stand in contradiction to the two earlier prongs—executive authority and technocratic administration. Rather, the belief in judicial supremacy articulates two important preferences as to the continued development of antitrust norms: first, that courts continue to serve as a backstop to executive and administrative processes; and second, that Congress allow courts to continue to develop substantive norms in a common law fashion rather than attempt to specify substantive norms legislatively.

a. Courts and Agencies

In contrast to Roosevelt’s view that courts had little useful role to play in controlling market power, both Taft and Wilson viewed the courts as essential players in demarcating the boundaries of antitrust law and limiting administrative and executive discretion. For Neo-Chicagoans, the question is not whether the courts should play a role in shaping competition norms, but how much of a role courts should play, given the goal of resolving as many antitrust problems as possible employing a non-adjudicative, administrative modality. Obviously, if the parties are able to reach resolution of the competition issue by negotiating within the administrative process—as is true in most merger cases—there is no need for a judicial function, except to the extent that the parties’ agreement needs to be embodied in a consent decree, where the role of the court, beyond the Tunney Act review phase, is usually nominal. The hard questions arise when the administrative negotiation breaks down, the agency reaches a decision contrary to the defendant’s interests, and the courts are called upon to decide whether (1) in an FTC administrative case, the agency’s decision was lawful, or (2) in an FTC litigated case or DOJ case, the agency has established antitrust liability.

In such cases, the courts must fulfill their ultimate function “to say what the law is.”98 But to what extent, if any, should the courts defer to the agencies’ articulation of antitrust norms? This is technically a question of *Chevron* def-

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98 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
ference, although the courts have not articulated it that way in the antitrust space. Under existing law, the federal courts of appeal are to review FTC decisions on matters of law de novo, although they also pay lip service to "afford[ing] the FTC some deference as to its informed judgment that a particular commercial practice violates the FTC Act." The DOJ's Antitrust Division can enforce the antitrust laws only as a litigant, and is not formally accorded any prophylactic role in shaping the content of antitrust law.

It would not be inconsistent with judicial supremacy for the courts to accord the agencies some degree of respect when the agencies propose new norms of antitrust liability, so long as the new norms are supported by a sufficient record of deliberation, fit within the broad boundaries of the antitrust statutes' mandate, allow for judicial review under the norms' own terms, and do not pose an unacceptable risk of private litigation contagion. I will discuss briefly each of these criteria.

First, when the agencies propose new liability norms, the courts should defer only if there is sufficient evidence that the new norms grew out of a deliberative process in the agencies and were not merely made up on the fly to patch over factual weaknesses in the agencies' cases. Evidence of policy workshops, guidelines proposed for public comment, the collection of scholarly papers or empirical data, and similar indicia of systematic contemplation of the problem should support agency proposals for new liability or remedial norms.

Second, the norms proposed by the agencies should be accorded respect only if they fit within the broad ambit of the antitrust statutes. That is to say, courts should always require that the agencies' theory concerns impediments to the functioning of competitive markets and problems of market power. The agencies should not be permitted to aggrandize their powers beyond the competition mandate by claiming prophylactic space to solve problems adjacent to—but not of—competition.

Third, the agencies' proposed liability determinants must be ones that the courts can administer. In other words, the courts should not let the agencies get away with claiming prophylactic space to decide issues without criteria for judicial review. I have previously observed that this was an arguable problem with the FTC's theory of Section 5 in the Intel case—the FTC articulated many reasons why it should be free from the strictures of the Sherman Act but failed to articulate criteria by which the courts could review its Section 5

100 Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1063 (11th Cir. 2005).
decisions. 101 Without justiciable criteria, the agencies’ plea for “space” is a plea to be free from the courts and “the rule of law.”

Finally, the courts should be most willing to accord the agencies deference on new liability theories when those theories can be administered solely within the realm of government enforcement and not spill over to private litigation. For the FTC suing under Section 5, this is straightforward, since there is no private right of action to enforce the FTC Act. 102 As previously noted, it is much more challenging for the Antitrust Division.

According some degree of deference to the agencies under these circumstances would not entail abdicating the judiciary’s ultimate authority to determine legal norms. Rather, it would strengthen the engagement between the courts and the agencies by providing a roadmap for a judicially supervised agency role in creating and revising antitrust norms.

b. Courts and Congress

The second major aspect of judicial supremacy is a preference that Congress respect the success that the courts have enjoyed in developing an antitrust common law and not try to specify substantive norms legislatively. To be sure, there are needs for Congressional interventions on procedural and institutional issues—Hart-Scott-Rodino’s success and the possibility of a statute giving the Antitrust Division preemptive powers are two such examples. But there is little reason to believe that Congress could do better than the federal courts in articulating substantive antitrust norms, for example mandating a discount-attribution test for bundled discounts (which I favor) or overruling Leegin (which I do not).

This is not because antitrust law is not amenable to rules, but only to standards, or because the courts are particularly good at articulating antitrust norms. Many antitrust principles can and should be reduced to rule-like determinants, 103 and the courts have sometimes shown remarkable ineptitude at articulating antitrust principles. Rather, a Neo-Chicagoan preference for courts over Congress would stem from a view that, in antitrust, incrementalism is generally preferable to drastic change and that the damage wrought by bad norms is generally less and more quickly undone when the perpetrator is a judge than a Member of Congress. The Robinson-Patman Act has remained on the books since 1936 even though it is highly doubtful that it could be

101 See Crane, Intel, supra note 88.
102 See, e.g., Dreisbach v. Murphy, 658 F.2d 720, 730 (9th Cir. 1981).
reenacted today. In the antitrust field, legislative inertia is stickier than *stare decisis*.

IV. CONCLUSION

If Neo-Chicago is a school, it is an elementary school waiting for developments in the Post-Chicago middle school next door. As Post-Chicago develops its arguments for more interventionist substantive liability norms, there will be greater need for Neo-Chicago scholarship in response. On the other hand, the institutional side of antitrust law is already fully ripe for Neo-Chicago intervention.