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# Antitrust Schools of Thought: Rethinking “Ordoliberalism” versus “the Chicago School”

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## Antitrust Schools of Thought: Rethinking “Ordoliberalism” versus “the Chicago School”

*Draft of final version forthcoming in The Cambridge Handbook on the Theoretical Foundations of Antitrust and Competition Law*

Ryan Stones\*

### Abstract

Competition lawyers often refer to schools of thought. While these constructs have value, they are not without risks. This chapter problematises the use of schools in antitrust by exploring how contrasting groups from different historical periods may artificially exaggerate disagreements between them. It does so by revisiting the purported clash between “Ordoliberalism” and “the Chicago School” on antitrust policy towards big businesses. Ordoliberal antitrust is commonly depicted as recommending the breakup of large firms, contrary to the hands-off enforcement suggested by the Chicago School. Although ample evidence supports these widespread characterisations, the alleged divergence between them is a consequence of fixing both groups at different points in time. By only comparing Ordoliberalism from the 1930s and 1940s with Chicagoan literature from the 1950s onwards, we are not comparing historical like with like. When analysed in tandem, considerable agreement and a simultaneous period of evolution are visible. Both advocated antitrust hostility towards big business in the 1930s and 1940s, before softening from the 1950s. This is demonstrated by bringing into focus the missing historical counterparts: “Old” Chicago, contemporaneous with the usual depiction of Ordoliberalism; and the “New” Ordoliberalism of the Social Market Economists, which developed alongside the well-known Chicago School. Furthermore, the narrative of a sharp contrast overlooks how key protagonists associated with each school – particularly Franz Böhm and Aaron Director – changed their views on large firms over time. When comparing like with like, it is the similarities of Ordoliberal and Chicagoan antitrust, not the differences, that really shine through.

**Keywords:** Competition Law; Antitrust; Ordoliberalism; Chicago School

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## Introduction

As researchers, commentators, and educators, the competition law community is prone to referencing various schools of antitrust. Whether charting its historical development, analysing contemporary enforcement, or introducing students to the subject, allusions to scholarly collectives on competition policy are rife; “Harvard”, “Chicago”, “Ordoliberal”, “Neo-Brandeis”, and several others are engrained from our first exposure to this field.<sup>1</sup>

Schools of thought serve several purposes that go to the foundations of how we make sense of competition law. Generalising the views of a group into a simplified collection of shared tenets facilitates discussions by acting as commonly understood abbreviations (eg “The Court adopted a Chicago School perspective by...”, or “X is echoing the Harvard School in recommending...”). Schools are also an important pedagogic tool, introducing students to a basket of different positions on competition policy that they can readily deploy, as well as offering a potted history of how thinking in the field has developed over time. Less admirable – but perhaps a strong reason for their persistence – is that being embroiled in battles between schools of competition law is, simply, rather fun. Like picking a sports team to support, we can celebrate our school’s rise and rue its demise at the hands of clearly mistaken pretenders to the throne of policy influence.

Of course, designating a “school” is not without conceptual problems. George Stigler highlighted the risk of ‘slovenly stereotype[s]’,<sup>2</sup> and antitrust scholars have often recognised that our affection for schools might be erasing the nuances of our field’s intellectual lineage.<sup>3</sup> In particular, the literature recognises that generalising perspectives into schools may paper over certain contrasts between individuals, suggesting a more homogenous, harmonious thought collective than was really the case.<sup>4</sup>

Beyond the issue of internal heterogeneity, this chapter seeks to further problematise the use of schools in antitrust by exploring how contrasting groups from *different periods* may artificially exacerbate perceived disagreements between them. Indeed, a failure to recognise the temporal distance between the various schools to which we often refer in competition scholarship may be masking their surprising similarities when we compare historical like with like.

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<sup>1</sup> As evidenced by introductory textbooks, eg Alison Jones, Brenda Sufrin and Niamh Dunne, *Jones & Sufrin’s EU Competition Law: Text, Cases, and Materials* (8th edn, OUP 2023) 18–27; Daniel Francis and Christopher Sprigman, *Antitrust: Principles, Cases, and Materials* (ABA 2023) 22–26.

<sup>2</sup> George Stigler, ‘Comment’ (1962) 70 JPE 70.

<sup>3</sup> eg William Kovacic, ‘The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix’ (2007) 2007 Colum Bus L Rev 1, 10–11; Bruce Kobayashi and Timothy Muris, ‘Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century’ (2012) 78 Antitrust LJ 147, 154, 167.

<sup>4</sup> eg Daniel A Crane, ‘Chicago, Post-Chicago, and Neo-Chicago’ (2009) 76 U Chi L Rev 1911, 1917–1918 (on differences in the Chicago School).

The importance of this temporal dimension to schools of antitrust is analysed by rethinking the commonly recounted battle between “Ordoliberalism” and “the Chicago School” on effective competition policy, especially regarding the vexed question of how to respond to big businesses. In the red corner is “Ordoliberalism”, which developed from inter-disciplinary research by the economist Walter Eucken and lawyer Franz Böhm at the University of Freiburg in the 1930s and 1940s. Owing to its emphasis on economic freedom, Ordoliberalism is commonly characterised as advocating the deconcentration of industry; of breaking up big businesses to emulate perfect competition, even if this risked societal inefficiency and higher prices for consumers. In the blue corner is “the Chicago School”, a generation of antitrust scholars and practitioners from the 1950s onwards who are usually depicted as more comfortable with big business and a lesser role for competition enforcement. Influenced by the tutelage of Aaron Director, the likes of Robert Bork and Richard Posner emphasised efficiency and the pressure exerted by potential market entrants, concluding that significant size either reflected a business being the best at giving consumers what they wanted or was a necessity to achieve productive efficiencies of scale. In short, we often equate “Ordoliberalism” with an antitrust policy that is hostile to large firms, while “the Chicago School” is said to be much more cognisant of the benefits of big business, leading to a hands-off approach to enforcement.

The purported clash between these two schools over the last century is not just some historical curiosity. Especially in EU competition law, this tension is sometimes used to explain how we have reached where we are today. It is common for the modernisation efforts around the turn of the millennium to be understood as a break from the initially Ordoliberal disposition of EU law, in favour of a Chicagoan take on enforcement.<sup>5</sup> Furthermore, this battle between rival schools may still inform where we go in the future. For instance, a prominent critic of the titans of the digital economy has called for a rediscovery of the Ordoliberal zeal for industrial deconcentration, which he considers to have been foolishly abandoned by the European Commission in its embrace of Chicagoan nonchalance towards large firms.<sup>6</sup> Some therefore see the clash between these two scholarly collectives as significant for our understanding of where EU competition law has come from and where it may be going.

Despite such prominence, it will be argued that the seemingly sharp contrast between “Ordoliberalism” and “the Chicago School” on how antitrust should respond to big businesses is artificial. It is a construct of tying each school to different periods in time. As Section 1 recounts, there were indeed stark differences on whether industrial concentration was “bad”

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<sup>5</sup> eg Andreas Weitbrecht, ‘From Freiburg to Chicago and Beyond – the First 50 Years of European Competition Law’ (2008) 29 ECLR 81; Josef Hien, ‘The Rise and Fall of Ordoliberalism’ (Forthcoming) Socio-Economic Review. See n 32 for more sources generally discussing Ordoliberalism in EU competition law.

<sup>6</sup> Tim Wu, *The Curse of Bigness: How Corporate Giants Came to Rule the World* (Atlantic Books 2020) 4, 72–79, 110–111, 118–119.

or “good” if we contrast Ordoliberal writing in the 1930s and 1940s with Chicagoan thinking from the 1950s onwards, as is usually portrayed in the literature. But this juxtaposition glosses over how, when analysed *in parallel over the entire period*, there was significant agreement. As Section 2 demonstrates, during the 1930s and most of the 1940s – the period to which “Ordoliberalism” is usually fixed – both Ordoliberal *and* Chicagoan scholarship was seemingly in favour of breaking up big firms; if anything, Eucken was more nuanced than his Chicagoan counterparts. At the other end of the timeline, the Ordoliberal descendants of the 1950s onwards – the Social Market Economists – were more relaxed about the efficiency of large business as an engine for growth than had previously been the case, much like their Chicagoan contemporaries.

This distortion could simply be remedied by talking of four schools – the “Old” and “New” Ordoliberal and Chicago schools – and being more careful in denoting to which of the variants we are referring in competition scholarship. That would at least acknowledge how the standard clash in the literature is not comparing historical like with like, and would raise awareness of the considerably greater coherence when we do. But as Section 3 will argue, such a solution reveals another problem for our obsession with schools: when looking at group evolution, it is difficult to separate “Old” from “New” as almost all of the protagonists writing from the 1930s into the 1960s changed their views on big business. “Old” Ordoliberals Franz Böhm and pre-war Chicagoan Frank Knight who had earlier championed deconcentration became more sympathetic to the benefits of larger firms; while the intellectual father of “New” Chicagoans, Aaron Director, had not always been so tolerant of industrial scale. Rather than a sharp revolution, both Chicagoan and Ordoliberal views went through a gradual evolution, roughly in tandem.

While clearly constituting a helpful toolbox of analytical abbreviations and offering a more entertaining historical story for new students of competition law, this rethinking of the standard clash between “Ordoliberalism” and “the Chicago School” will suggest that greater nuance is needed when interpreting the past development of our field and attempting to shape its future direction. More fundamentally, it offers yet another reason for caution in how we so often resort to thinking in terms of schools of antitrust.

## 1. The Common Clash between “Ordoliberalism” and “the Chicago School”

### 1.1 “Ordoliberalism”: An Overview

Ordoliberalism developed at the University of Freiburg in the 1930s when Walter Eucken (1891-1950), Professor of Economics, met two lawyers, Franz Böhm (1895-1977) and Hans Grossmann-Doerth (1894-1944). Upon discovering that they shared similar analyses of the

economic crises of the 1920s and the rise of National Socialism, they commenced interdisciplinary work on law and economics, published a mission statement in 1936,<sup>7</sup> and established the journal *ORDO* in 1948 as a platform for scholarship on economic and legal order. In addition to this initial “Freiburg School” strand of Ordoliberalism, close friends Wilhelm Röpke (1899-1966) and Alexander Rüstow (1885-1963) constituted a branch sometimes referred to as the ‘Sociological Neoliberals’,<sup>8</sup> adopting a broader, more metaphysical analysis of society. Both were affiliated with Eucken in the 1920s and, despite fleeing Germany in 1933, continued to exchange correspondence and supportive cross-references in their work.<sup>9</sup>

Ordoliberalism was generally held together by a common methodology, vision, and set of tools for coherent delivery.

First, the Ordoliberal methodology was to think in pure orders. Eucken was critical of the ‘Great Antinomy’<sup>10</sup> in economic methodology: the empirical studies of the Historical School lacked systematic awareness,<sup>11</sup> while abstracted models left the Theoretical School oblivious to the reality of an economic system.<sup>12</sup> Instead, he argued that every economy could be understood as a mixture of the centrally-directed or exchange-based orders,<sup>13</sup> combinable into over one hundred varieties.<sup>14</sup> The chosen economic order was interdependent with law, governance, and broader society, all of which affected its actual operation.<sup>15</sup>

Second, the Ordoliberals believed in the market-based economic order but acknowledged that it needed protection. While decentralised coordination through prices optimised allocative efficiency,<sup>16</sup> nineteenth-century laissez faire attitudes overlooked how such efficiency and freedom required conscious interventions to be fully realised.<sup>17</sup> The first defect to be remedied was how markets could create hardship, with all strands of Ordoliberalism acknowledging the need for corrective social policy. As Röpke pithily stated, ‘people do not live by cheaper vacuum cleaners alone’.<sup>18</sup> Nevertheless, the appropriate means

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<sup>7</sup> Franz Böhm, Walter Eucken, and Hans Grossmann-Doerth, ‘The Ordo Manifesto of 1936’ in Alan Peacock and Hans Willgerodt (eds), *Germany’s Social Market Economy: Origins and Evolution* (St Martin’s Press 1989).

<sup>8</sup> Razeen Sally, ‘Ordoliberalism and the Social Market: Classical Political Economy from Germany’ (1996) 1 *New Political Economy* 233, 234.

<sup>9</sup> Norman Barry, ‘Political and Economic Thought of German Neo-Liberals’ in Alan Peacock and Hans Willgerodt (eds), *German Neo-Liberals and the Social Market Economy* (Palgrave Macmillan Springer 1989) 107.

<sup>10</sup> Walter Eucken, *The Foundations of Economics: History and Theory in the Analysis of Economic Reality* (William Hodge & Co 1950) 42.

<sup>11</sup> *ibid* 61–63.

<sup>12</sup> *ibid* 42.

<sup>13</sup> *ibid* 118.

<sup>14</sup> *ibid* 120–128, 156.

<sup>15</sup> Böhm, Eucken, and Grossmann-Doerth (n 7) 18; Walter Eucken, ‘Competition as the Basic Principle of the Economic Constitution [1942]’ in Thomas Biebricher and Frieder Vogelmann (eds), *The Birth of Austerity: German Ordoliberalism and Contemporary Neoliberalism* (Rowman & Littlefield International 2017) 93; Walter Eucken, ‘The Competitive Order and Its Implementation [1949]’ (2006) 2 *CPI* 219, 231–232.

<sup>16</sup> eg Walter Eucken, ‘What Kind of Economic and Social System? [1948]’ in Peacock and Willgerodt (eds), *Germany’s Social Market Economy* (n 7) 27–28; Franz Böhm, ‘Decartelisation and De-Concentration: A Problem for Specialists or a Fateful Question? [1947]’ in Biebricher and Vogelmann (eds), *The Birth of Austerity* (n 15) 126.

<sup>17</sup> Eucken, ‘Competitive Order’ (n 15) 223–224; Eucken, *Foundations* (n 10) 314.

<sup>18</sup> Wilhelm Röpke, *A Humane Economy: The Social Framework of the Free Market* (Henry Regnery 1960) 107.

to address this was the most contentious issue among Ordoliberals.<sup>19</sup> The second defect of laissez faire was the absence of competition policy; ‘deliverance from the predominant power of the State’, claimed Eucken, should not leave society at the ‘mercy of private centres of power’.<sup>20</sup> Faith in spontaneous, inherent harmony overlooked the need for an ‘armed night-watchman’ to ensure the ‘life blood’ of the competitive order<sup>21</sup> and thus defend “capitalism” against the “capitalists”.<sup>22</sup>

Third, Ordoliberals recognised that their nuanced agenda of *some* state action in a market economy – but not *too* much – risked incoherent realisation.<sup>23</sup> Their first solution was an “economic constitution”. Rather than a free-market equivalent to a political constitution, this was the overarching decision in favour of an exchange-based economy against which every norm, institution, and market intervention was to be checked for conformity.<sup>24</sup> The second device for ensuring coherence was to insulate state power from the ‘persistently dangerous influences exerted by interested parties’.<sup>25</sup> This necessitated limited and discrete competence conferral to the state, rather than broad discretion.<sup>26</sup> Where the state had to act, such as competition policy, the Ordoliberal solution was for politically-independent enforcement by an administrative monopoly office.<sup>27</sup> Without such insulation from private pressure, competition enforcement was potentially the Achilles heel of successfully delivering the exchange-based order.<sup>28</sup>

Regarding the substance of Ordoliberal competition law, Eucken generally recommended the prohibition of “preventive” or “impediment” behaviour by businesses; conduct that excluded competitors and facilitated the accumulation of market power via means other than on the merits of performance.<sup>29</sup> But beyond this abstract distinction, early scholarship revealed little as to which types of conduct fell on either side of the divide. Cartels were clearly to be banned outright.<sup>30</sup> Eucken was also critical of exclusive dealing, resale price

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<sup>19</sup> See Section 2.2.

<sup>20</sup> Walter Eucken, ‘The Social Question [1948]’ in Wolfgang Stützel and others (eds), *Standard Texts on the Social Market Economy: Two Centuries of Discussion* (Gustav Fischer 1982) 270.

<sup>21</sup> Franz Böhm, ‘Rule of Law in a Market Economy [1966]’ in Peacock and Willgerodt (eds), *Germany’s Social Market Economy* (n 7) 51.

<sup>22</sup> Wilhelm Röpke, *Economics of the Free Society* (Henry Regnery 1963) 237.

<sup>23</sup> Eucken, ‘What Kind’ (n 16) 39; Eucken, ‘Social Question’ (n 20) 275.

<sup>24</sup> Böhm, Eucken, and Grossmann-Doerth (n 7) 24; Eucken, *Foundations* (n 10) 83; Alexander Rüstow, ‘Liberal Intervention [1932]’ in Stützel and others (eds), *Standard Texts on the Social Market Economy* (n 20) 184–185.

<sup>25</sup> Röpke, *Humane Economy* (n 18) 143.

<sup>26</sup> Franz Böhm, ‘Monopoly and Competition in Western Germany’ in Edward Chamberlin (ed), *Monopoly and Competition and their Regulation* (Macmillan 1954) 159; Rüstow (n 24) 185–186; Wilhelm Röpke, *Civitas Humana, A Humane Order of Society* (W Hodge 1948) 93.

<sup>27</sup> Eucken, ‘Competitive Order’ (n 15) 241; Wilhelm Röpke, *The Social Crisis of Our Time* (University of Chicago Press 1950) 234.

<sup>28</sup> Böhm, ‘Decartelisation’ (n 16) 134–135.

<sup>29</sup> Eucken, ‘Competitive Order’ (n 15) 235, 242; Walter Eucken, ‘A Policy for Establishing a System of Free Enterprise [1952]’ in Stützel and others (eds), *Standard Texts on the Social Market Economy* (n 20) 119.

<sup>30</sup> Böhm, Eucken, and Grossmann-Doerth (n 7) 18; Eucken, *Foundations* (n 10) 83; Böhm, ‘Monopoly’ (n 26) 144, 161.

maintenance, predatory pricing, loyalty rebates, price discrimination, and excessive pricing.<sup>31</sup> But generally, early Ordoliberal writing did not explore the conduct of firms in much depth. Instead, it was more fixated on market structures.

## 1.2 “Ordoliberalism” on Large Firms

Whether as its magnetism or mistake, depictions of Ordoliberalism usually emphasise its alleged commitment to the goal of economic freedom – rivalry for rivalry’s sake – rather than maximising efficiency.<sup>32</sup> Translated into competition policy, Ordoliberalism’s animating force is said to invite a more sceptical approach to large market shares, mergers, and whether it is legitimate for big firms to exclude even inefficient rivals, in sharp contrast with the more relaxed attitude of “the Chicago School” on these issues.

Undoubtedly, there is ample evidence to support this common characterisation of Ordoliberalism. Even in their purely economic research, Ordoliberals were not simply concerned with efficiency but also metaphysical considerations of freedom. This is unsurprising given the context of writing during fascism, whether inside Nazi Germany or in exile, and then during the Cold War with Germany divided. The most important economic question for Eucken was ‘[h]ow can modern industrialized economy and society be organized in a humane and efficient manner?’<sup>33</sup> To this end, the virtue of free markets for Ordoliberals was not just their ‘economic effect’ but also the ‘profound meaning for freedom.’<sup>34</sup> They valued the depoliticisation of individual economic success; of outcomes dependent on responding to the direction of the price mechanism and flattering consumers rather than bureaucrats.<sup>35</sup>

When translated into antitrust policy, both supporters and detractors can identify manifold examples through the 1930s and 1940s in which key Ordoliberals supported industrial deconcentration. Eucken routinely advocated complete competition, a market structure where industrial ‘power disappears completely’,<sup>36</sup> and interventions not simply to tame abuses by large firms, but targeted ‘against their very existence’.<sup>37</sup> He often proposed the dissolution of big businesses,<sup>38</sup> which were not to be trusted owing to the ‘omnipresent,

<sup>31</sup> Eucken, ‘Competitive Order’ (n 15) 233, 235, 243; Eucken, ‘A Policy’ (n 29) 119.

<sup>32</sup> eg David Gerber, ‘Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the “New” Europe’ (1994) 42 *AJCL* 25, 36–37, 50–53; James Venit, ‘Article 82: The Last Frontier - Fighting Fire with Fire?’ (2004) 28 *Fordham Int’l LJ* 1157; Christian Ahlborn and Carsten Grave, ‘Walter Eucken and Ordoliberalism: An Introduction from a Consumer Welfare Perspective’ (2006) 2 *CPI* 197, 214; Liza Lovdahl Gormsen, ‘Article 82 EC: Where Are We Coming From and Where Are We Going To?’ (2006) 2 *Comp L Rev* 5; Pinar Akman, ‘Searching for the Long-Lost Soul of Article 82EC’ (2009) 29 *OJLS* 267; Anne Witt, *The More Economic Approach to EU Antitrust Law* (Hart 2016) 79–86, 99; Wu (n 6) 72, 75.

<sup>33</sup> Walter Eucken, *This Unsuccessful Age or The Pains of Economic Progress* (William Hodge and Co 1951) 27.

<sup>34</sup> Böhm, ‘Monopoly’ (n 26) 159. Similarly: Eucken, *Foundations* (n 10) 128.

<sup>35</sup> Böhm, ‘Decartelisation’ (n 16) 125–126; Röpke, *Social Crisis* (n 27) 106.

<sup>36</sup> Eucken, *Foundations* (n 10) 269–270.

<sup>37</sup> Eucken, *Unsuccessful Age* (n 33) 35.

<sup>38</sup> Eucken, ‘Competition as the Basic Principle’ (n 15) 90; Eucken, ‘Competitive Order’ (n 15) 241; Eucken, ‘A Policy’ (n 29) 130.

strong and irrepressible urge to eliminate competition and to acquire a monopolistic position.<sup>39</sup> When faced with natural monopoly, Eucken followed the recommendation of his student Leonard Miksch that they be legally forced to act “as-if” subjected to the constraints of complete competition,<sup>40</sup> replicating competitive prices and the pressure to be productively efficient.<sup>41</sup> Franz Böhm’s writing on competition policy also exhibited a considerable degree of discomfort with big business. For him it was not the misuse but the ‘very emergence’ of large firms that threatened freedom, thus recommending a policy of ‘pitiless de-concentration of the private economy.’<sup>42</sup> Böhm was also a prominent member of the expert group that produced the 1949 “Josten” draft statute for West Germany which included the elimination of economic power, “as-if” regulation of natural monopolies, and significant divestitures elsewhere.<sup>43</sup> Wilhelm Röpke similarly disparaged ‘monopolism, concentration and capitalist gigantism’ which could not be considered a ‘genuine free market and system of competition’.<sup>44</sup> Supporting deconcentration by a ‘very painful process, to more reasonable proportions’,<sup>45</sup> Röpke wanted guaranteed market access for small- and medium-sized businesses.<sup>46</sup> Even if this resulted in the ‘sacrifice’ of societal efficiency, it was a price worth paying.<sup>47</sup>

Some have argued that the Ordoliberals’ robust response to industrial concentration was not really about economics, but reflected their fear of powerful businesses stifling competition through political channels.<sup>48</sup> Others claim that it was a projection of their appreciation for the small-scale, family-run industries surrounding Freiburg at their time of writing.<sup>49</sup>

But whatever the reason for it, there is ample evidence for “Ordoliberalism” being highly sceptical of large firms and advocating complete competition through industrial deconcentration to realise economic freedom. These policy recommendations are at odds with how we commonly conceptualise “the Chicago School” and its approach to competition law.

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<sup>39</sup> Eucken, ‘Competitive Order’ (n 15) 222.

<sup>40</sup> Eucken, ‘Competition as the Basic Principle’ (n 15) 90–91; Eucken, ‘Competitive Order’ (n 15) 241–243. cf Nils Goldschmidt and Arnold Berndt, ‘Leonhard Miksch (1901-1950): A Forgotten Member of the Freiburg School’ (2005) 64 *AJES* 973.

<sup>41</sup> Eucken, ‘Competitive Order’ (n 15) 243.

<sup>42</sup> Böhm, ‘Decartelisation’ (n 16) 130–131.

<sup>43</sup> Ernst-Joachim Mestmäcker, ‘Competition Policy and Antitrust: Some Comparative Observations’ (1980) 136 *JITE* 387, 390–391.

<sup>44</sup> Wilhelm Röpke, ‘The Guiding Principles of the Liberal Programme [1944]’ in Stützel and others (eds), *Standard Texts on the Social Market Economy* (n 20) 188–190.

<sup>45</sup> Wilhelm Röpke, *Crises and Cycles* (W Hodge 1936) 7.

<sup>46</sup> Röpke, *Civitas Humana* (n 26) 169; Röpke, ‘Guiding Principles’ (n 44) 190.

<sup>47</sup> Röpke, *Social Crisis* (n 27) 221; Röpke, *Civitas Humana* (n 26) 174.

<sup>48</sup> Viktor Vanberg, ‘Ordnungspolitik, The Freiburg School and the Reason of Rules’ (2014) 9 *i-lex* 205, 211.

<sup>49</sup> Volker Berghahn, ‘Ordoliberalism, Ludwig Erhard, and West Germany’s “Economic Basic Law”’ (2015) 2 *Eur Rev Int Stud* 37, 41.

### 1.3 “The Chicago School”: An Overview

Much like the formation of Ordoliberalism at Freiburg, the genesis of “the Chicago School” also looms large in antitrust lore. It similarly sprung from interdisciplinary work in law and economics during the 1930s, with the economist Henry Simons (1899-1946) moving to the law school to teach a module on economic analysis.<sup>50</sup> Simons owed his position at Chicago to being the protégé of Frank Knight (1885-1972), an economist who gained prominence for work in the 1920s on technical aspects of neo-classical microeconomic reasoning, especially the assumptions underpinning perfect competition and decision-making under uncertainty.<sup>51</sup> Along with Jacob Viner, Simons and Knight established inter-war Chicago as a hotbed of liberal economic thought. However, Simons’ death in 1946 is often thought to mark the beginning of “the Chicago School” of antitrust. Difficult discussions had been ongoing to get Aaron Director (1901-2004) to Chicago to lead a project at the Law School – the Free Market Study – using funding secured by Friedrich Hayek.<sup>52</sup> Following Simons’ passing, Director was finally offered a position to lead the five-year project, conditional on him teaching Simons’ module on economic analysis.<sup>53</sup>

Importantly for the evolution of US competition policy, Director also led a weekly session on the antitrust course at Chicago, where he would analyse legal doctrine from a neo-classical economic angle that profoundly influenced its students.<sup>54</sup> Upon completion of the initial Free Market Study, Director and Edward Levi secured further funding to conduct a second five-year initiative: the Antitrust Project.<sup>55</sup> Although publishing little himself, Director shaped pieces throughout the 1950s and 1960s by former students and researchers working on the two projects that challenged the received wisdom of US antitrust. This included works by Robert Bork on vertical integration,<sup>56</sup> Ward Bowman on resale price maintenance and tying,<sup>57</sup> and John McGee on predatory pricing and price discrimination.<sup>58</sup> These articles laid

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<sup>50</sup> Wilber Katz, ‘Economics and the Study of Law: The Contribution of Henry C. Simons’ (1946) 14 U Chi L Rev 1, 2.

<sup>51</sup> eg Frank Knight, *Risk, Uncertainty and Profit* (Houghton Mifflin 1921); Frank Knight, ‘A Suggestion for Simplifying the Statement of the General Theory of Price’ (1928) 36 JPE 353.

<sup>52</sup> Robert Van Horn and Philip Mirowski, ‘The Rise of the Chicago School of Economics and the Birth of Neoliberalism’ in Philip Mirowski and Dieter Plehwe (eds), *The Road from Mont Pèlerin: The Making of the Neoliberal Thought Collective* (Harvard University Press 2009) 144–149.

<sup>53</sup> William Kolasky, ‘Aaron Director and the Origins of the Chicago School of Antitrust Part II - Aaron Director: The Socrates of Hyde Park’ (2020) 35 Antitrust 101.

<sup>54</sup> Edmund Kitch, ‘The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970’ (1983) 26 JL&E 163, 183–184.

<sup>55</sup> William Kolasky, ‘Aaron Director and the Origins of the Chicago School of Antitrust: Part III - The Antitrust Project: Laying the Foundations for Chicago School Antitrust’ (2020) 35 Antitrust 103.

<sup>56</sup> Robert Bork, ‘Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception’ (1954) 22 U Chi L Rev 157.

<sup>57</sup> Ward Bowman, ‘The Prerequisites and Effects of Resale Price Maintenance’ (1954) 22 U Chi L Rev 825; Ward Bowman, ‘Tying Arrangements and the Leverage Problem’ (1957) 67 YLJ 19.

<sup>58</sup> John McGee, ‘Predatory Price Cutting: The Standard Oil (N.J.) Case’ (1958) 1 JL&E 137; John McGee, ‘Price Discrimination and Competitive Effects: The Standard Oil of Indiana Case’ (1955) 23 U Chi L Rev 398.

the foundations for more comprehensive Chicagoan treatises in the 1970s: Bork's *The Antitrust Paradox* and Richard Posner's *Antitrust Law*.<sup>59</sup>

While far from identical in their analyses,<sup>60</sup> the Chicago School generally recommended scaling back antitrust law to primarily focus upon preventing cartels and mergers to monopoly.<sup>61</sup> This relaxed approach to enforcement was built upon the neo-classical assumption of rational profit maximisation: businesses would not engage in seemingly concerning practices unless for a good reason (eg giving more to consumers to get ahead of rivals) and, even if they did, market entry would undermine inefficient behaviour.<sup>62</sup> Some Chicago School arguments were adopted by US courts, leading to the *per se* illegality of vertical restraints being overturned<sup>63</sup> and requiring evidence of potential recoupment of predatory losses for unlawful monopolisation to be established.<sup>64</sup>

#### 1.4 “The Chicago School” on Large Firms

When pitting “the Chicago School” against “Ordoliberalism” in competition law, their seemingly contrasting reactions to big business are often emphasised. Unlike the complete competition, economic freedom, and deconcentration associated with the Ordoliberals, comfort with industrial scale is probably the defining characteristic of Chicagoan antitrust, for better<sup>65</sup> or worse.<sup>66</sup>

Contrary to the apparent importance of economic freedom for Ordoliberalism, the founding commitment of Bork's *Antitrust Paradox* was to consumer welfare – by which he meant the optimisation of allocative *and* productive efficiencies – as the singular goal of antitrust.<sup>67</sup> From this perspective, large market shares may be necessary to realise economies of scale or result from superior products, ignorance of which would leave antitrust pushing up costs (and prices) and punishing successful firms who best met consumer needs.<sup>68</sup> Expansion to ‘large market size’ was not problematic according to Bork,<sup>69</sup> nor horizontal mergers short of monopoly.<sup>70</sup> Overall, atomisation into smaller business units was a misguided policy that

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<sup>59</sup> Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* (2nd edn, Free Press 1993); Richard Posner, *Antitrust Law: An Economic Perspective* (University of Chicago Press 1976).

<sup>60</sup> Posner is slightly more interventionist: Richard Posner, ‘The Chicago School of Antitrust Analysis’ (1978) 127 U Pa L Rev 925, 939–940. See Crane (n 4) 1917–1918.

<sup>61</sup> Posner, ‘Chicago’ (n 60) 928, 933.

<sup>62</sup> Robert Bork and Ward Bowman, ‘The Goals of Antitrust: A Dialogue on Policy’ (1965) 65 Colum L Rev 363, 366–367; Bork, *Antitrust Paradox* (n 59) 406; Frank Easterbrook, ‘Workable Antitrust Policy’ (1985) 84 Mich L Rev 1696.

<sup>63</sup> *Continental TV v GTE Sylvania* (1977) 433 US 36; *Leegin Creative Leather Products v PSKS* (2007) 551 US 877.

<sup>64</sup> *Brooke Group v Brown & Williamson Tobacco Corp* (1993) 509 US 209.

<sup>65</sup> Easterbrook (n 62) 1698.

<sup>66</sup> eg William Shepherd, ‘The Twilight of Antitrust’ (1986) 18 Antitrust L & Econ Rev 21, 22–23 (‘religion of bigness and virtuous monopoly’).

<sup>67</sup> Bork, *Antitrust Paradox* (n 59) 7–8, 91, 104, 405.

<sup>68</sup> *ibid* 7–8, 52, 56.

<sup>69</sup> *ibid* 4, 164–165, 406.

<sup>70</sup> *ibid* 4, 199, 210–216.

protected inefficient competitors, not consumers.<sup>71</sup> In typical combative style, Bork claimed in *The Antitrust Paradox* that calls for deconcentration were little more than ‘uncritical sentimentality for the “little guy”’.<sup>72</sup> This magnum opus represented the culmination of two decades of similar analyses by Bork on whether big should be considered bad in antitrust,<sup>73</sup> stretching all the way back to his participation in Director’s Antitrust Project.

Bork was certainly not alone at Chicago with such views. Richard Posner opposed incorporating into antitrust ‘hostility to big business’ or the desire ‘to protect existing enterprises from being destroyed by competition’.<sup>74</sup> Were it not for efficiencies or being the best competitor, he believed large firms would be undercut by new entrants.<sup>75</sup> Although focused more on questions of administrability and error costs, Frank Easterbrook, student and staff at Chicago from the 1970s, similarly maintained comfort with industrial scale reflecting efficiencies/success and ultimately being controlled by market self-correction.<sup>76</sup> Easterbrook’s especial contribution was to question whether judges could be trusted to effectively decide upon appropriate structural remedies to deliver competition.<sup>77</sup> This tapped into an earlier reflection by Posner that the Chicagoans had more faith in market entry than heavy-handed antitrust intervention to address any problem arising from big business.<sup>78</sup>

The positive perspective of Bork, Posner, and Easterbrook on the efficiency of large firms and a scaled back role for antitrust was complemented by several economists also associated with Chicago from the 1950s to 1980s. Nobel laureate Milton Friedman (1912-2006) had worked on Director’s Free Market Study in the 1940s and early 1950s. A decade later, he was the face of Chicagoan faith in market forces and the rolling-back of governmental intervention, popularised in *Capitalism and Freedom*. While Friedman thought ‘concentration of power’ the greatest threat to freedom,<sup>79</sup> this seemingly only arose from the power of the state and trade unions.<sup>80</sup> In contrast, he felt market power was vastly exaggerated as most industries were competitive and, where they were not, government was to blame for supporting monopolies.<sup>81</sup> John McGee, another contributor to Director’s projects, would publish a monograph in 1971 titled *In Defence of Industrial Concentration*, arguing as the

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<sup>71</sup> *ibid* 7, 52, 59–60, 179, 196–197.

<sup>72</sup> *ibid* 54.

<sup>73</sup> eg Robert Bork, ‘The Rule of Reason and the Per Se Concept: Price Fixing and Market Division’ (1964) 74 YLJ 775; Bork and Bowman (n 62); Robert Bork, ‘Contrasts in Antitrust Theory: I Goals of Antitrust: A Dialogue on Policy’ (1965) 65 Colum L Rev 401.

<sup>74</sup> Richard Posner, ‘A Program for the Antitrust Division’ (1970) 38 U Chi L Rev 500, 505.

<sup>75</sup> *ibid* 528–529; Richard Posner, *Economic Analysis of Law* (1st edn, Little, Brown & Co 1973) 129–130; Posner, *Antitrust Law* (1976) (n 59) 22, 89–91. Posner was more cautious on merger control to prevent collusion: Posner, ‘Chicago’ (n 60) 944.

<sup>76</sup> Easterbrook (n 62) 1700–1701.

<sup>77</sup> Frank Easterbrook, ‘Breaking up Is Hard to Do’ (1981) 5 Regulation 25, 26; Easterbrook (n 62) 1700–1701.

<sup>78</sup> Posner, ‘Chicago’ (n 60) 948.

<sup>79</sup> Milton Friedman, *Capitalism and Freedom* [1962] (University of Chicago Press 2020) 21, 48.

<sup>80</sup> *ibid* 3–5, 20–21, 150.

<sup>81</sup> *ibid* 146–155.

name suggests.<sup>82</sup> In addition, George Stigler developed his survivor theory in the 1950s, whereby the most efficient size of firms could not be determined for each market but depended upon the resources held.<sup>83</sup> As a result, his research suggested that there was ‘a fairly wide range of optimum sizes’, ranging from large to small.<sup>84</sup> Furthermore, the dangers of monopoly were inflated and many industries were susceptible to competitive entry owing to few barriers.<sup>85</sup> Finally, Harold Demsetz, Professor of Economics at Chicago from 1963-1971, stressed that concentration provided no indication as to whether prices and outputs were competitive,<sup>86</sup> and, in the absence of barriers to entry, showed efficiency or superiority.<sup>87</sup> Therefore punishing successful firms through deconcentration would significantly damage the incentive to compete and innovate to win consumers.<sup>88</sup>

In this way, there is ample evidence for something well known to competition scholars: that by the 1960s and 1970s, the Chicago School of antitrust, as represented by Bork and Posner, influenced by the tutelage of Aaron Director, and supported by complementary views in economics (Friedman, Stigler), clearly advocated a hands-off approach to big business.

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This section will have been familiar to many in the competition community. It has recounted the standard picture of the clash between rival antitrust schools: “Ordoliberalism”, epitomised by Eucken and Böhm, calling for deconcentration to complete competition to protect economic freedom; and “the Chicago School”, spearheaded by Robert Bork and Richard Posner, recognising the efficiency and success of big business to roll back antitrust enforcement. Which of these is the “right” or “wrong” school is a matter of personal taste.

But while commonplace in competition scholarship and clearly not without evidence, this account only tells half the story. We therefore turn from the familiar to the unfamiliar.

## 2. Comparing Historical Like with Like: “Old Chicago” and “New” Ordoliberals

The problem with the apparent clash between “Ordoliberalism” and “the Chicago School” in antitrust is that it does not compare historical like with like. It freezes both groups at different points in time: “Ordoliberalism” is informed by writing purely in the 1930s and 1940s to be pitted against “the Chicago School” as exclusively based on scholarship from the mid-1950s

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<sup>82</sup> John McGee, *In Defence of Industrial Concentration* (Praeger Publishers 1971).

<sup>83</sup> George Stigler, ‘The Economies of Scale’ (1958) 1 JL&E 54, 57.

<sup>84</sup> *ibid* 71.

<sup>85</sup> George Stigler, ‘Prometheus Incorporated: Conformity or Coercion?’ in Robert Spiller (ed), *Social Control in a Free Society* (University of Pennsylvania Press 1960) 84–89.

<sup>86</sup> Harold Demsetz, ‘Why Regulate Utilities’ (1968) 11 JL&E 55, 59–60.

<sup>87</sup> Harold Demsetz, ‘Industry Structure, Market Rivalry, and Public Policy’ (1973) 16 JL&E 1; Harold Demsetz, ‘Economics as a Guide to Antitrust Regulation’ (1976) 19 JL&E 371, 374–375.

<sup>88</sup> Demsetz, ‘Industry Structure’ (n 87) 3–5; Demsetz, ‘Economics’ (n 87) 383.

onwards. Such suggests that Ordoliberals *always* advocated industrial deconcentration to ensure economic freedom while the Chicagoans *consistently* recognised the efficiency of scale. But this was simply not the case. Thinkers at Chicago who were writing in the same period as Ordoliberal scholarship upon which we commonly focus were just as – if not more – concerned about industrial titans and eager to deconcentrate into smaller business units; whereas from the 1950s, when the Chicago School was establishing its relaxed approach to antitrust, the intellectual successors to Eucken were themselves concerned that competition law pursuing atomistic market structures would lead to inefficiency.

Competition scholarship often offers up two rival schools – “Ordoliberalism” and “the Chicago School” – but drawn from different historical periods. Considering the entire span from the 1930s to the 1970s, it is contrasting an earlier “Old” Ordoliberalism and a later “New” Chicago School. However, if we bring into view the overlooked collectives – the “Old” Chicago School and the “New” Ordoliberals – the contemporaneous similarities between them are much more apparent. Essentially, the thrilling tale we often tell of a major clash between rival schools of antitrust may be an artificial consequence of not comparing historical like with like.

### 2.1 The “Old” Chicago School: More “Ordoliberal” than Eucken?

In the 1930s and 1940s when Walter Eucken and Franz Böhm were advocating competition policy animated by economic freedom and realising complete competition, their contemporaries at Chicago were Henry Simons and Frank Knight, both of whom recommended a similar approach to antitrust.<sup>89</sup> If anything, Simons advanced a more radical, less nuanced, approach to deconcentration than the Ordoliberals.

As noted in Section 1.1, Simons is a significant figure in the history of Chicagoan antitrust, being the first economist at the law school and joint mastermind with Hayek of Aaron Director’s return to run the Free Market Study. Despite this, it is no exaggeration to suggest that Simons was more akin to the common depiction of “Ordoliberalism” than Eucken himself.<sup>90</sup> Indeed, he claimed that if a single word were to describe his policy agenda, it would be deconcentration.<sup>91</sup>

Simons’ introduced his 1934 *A Positive Program for Laissez Faire* as ‘frankly a propagandist tract’.<sup>92</sup> Despite the titular reference to laissez faire, the “positive” part renders Simons’ approach, like the Ordoliberals, one of the state acting as a strong guarantor of the conditions for the continuing operation of the free market order.<sup>93</sup> He claimed that it was this

<sup>89</sup> Jacob Viner wrote little on this topic.

<sup>90</sup> cf Robert Van Horn, ‘Reinventing Monopoly and the Role of Corporations: The Roots of Chicago Law and Economics’ in Mirowski and Plehwe (eds), *The Road from Mont Pèlerin* (n 52) 213.

<sup>91</sup> Henry Simons, ‘Free Enterprise’ (1951) 2 Labor LJ 741.

<sup>92</sup> Henry Simons, *A Positive Program for Laissez Faire: Some Proposals for a Liberal Economic Policy* (University of Chicago Press 1934) 1.

<sup>93</sup> *ibid* 3–4.

failure to protect competition that had brought capitalism into popular disrepute.<sup>94</sup> Among various recommendations on monetary policy and tax, deconcentration of industry was at the heart of his programme. Simons believed that ‘the great enemy of democracy is monopoly’,<sup>95</sup> as well as being responsible for societal inequality and economic instability.<sup>96</sup> He therefore recommended the ‘[e]limination of private monopoly in all its forms’<sup>97</sup> and the ‘outright dismantling of our gigantic corporations.’<sup>98</sup> Horizontal mergers should be banned and vertical integration closely scrutinised.<sup>99</sup> Echoing Röpke, Simons recognised that breaking up firms risked losing economies of scale, yet ‘sound policy would wisely sacrifice these economies to preservation of more economic freedom and equality.’<sup>100</sup> This required the Federal Trade Commission setting the maximum size of companies for each industry.<sup>101</sup> As productive efficiencies were vastly overrated, he did not envisage the need for most firms to supply more than 5% of market demand.<sup>102</sup> Beyond deconcentration, Simons also advocated a ban on horizontal shareholding<sup>103</sup> and thought the “rule of reason” standard for commonly determining illegality too soft on businesses.<sup>104</sup> Finally, were antitrust to fail to control industrial giants, in his last article Simons recommended a radically progressive corporation tax regime that would facilitate deconcentration.<sup>105</sup> It is therefore unsurprising that a German student of the 1950s could see few differences between his allocated reading of Eucken and Simon’s lecture notes of the 1930s.<sup>106</sup>

Simons was not alone at Chicago in the 1930s and 1940s as a critic of big business. Before a conversion in the 1950s,<sup>107</sup> his mentor Knight was seemingly in favour of using antitrust to reduce industrial concentration too. This is perceptible in both his narrower reflections on economic efficiency, but also his broader writing on the ethics of competition.

For over 20 years, Knight exhibited considerable scepticism that the alleged efficiency of big business should make it tolerable. Throughout his celebrated work in the 1920s, he routinely argued that economies of scale were being vastly overrated and diseconomies beyond a moderate size were being downplayed.<sup>108</sup> He scolded economists who followed

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<sup>94</sup> *ibid* 6.

<sup>95</sup> *ibid* 4.

<sup>96</sup> *ibid* 12.

<sup>97</sup> *ibid* 17.

<sup>98</sup> *ibid* 19. Similarly: Henry Simons, ‘The Requisites of Free Competition’ (1936) 26 AER 68, 71; Henry Simons, ‘Postwar Economic Policy: Some Traditional Liberal Proposals’ (1943) 33 AER 431, 433–434.

<sup>99</sup> Simons, *Positive Program* (n 92) 20.

<sup>100</sup> *ibid* 13. Similarly: Simons, ‘Free Competition’ (n 98) 71; Simons, ‘Postwar Economic Policy’ (n 98) 436.

<sup>101</sup> Simons, *Positive Program* (n 92) 20.

<sup>102</sup> *ibid* 20–21, 38; Henry Simons, ‘For a Free-Market Liberalism’ (1940) 8 U Chi L Rev 202, 206; Simons, ‘Postwar Economic Policy’ (n 98) 435–436.

<sup>103</sup> Simons, *Positive Program* (n 92) 13, 19–20.

<sup>104</sup> *ibid* 4, 19; Simons, ‘Free-Market’ (n 102) 208, 210.

<sup>105</sup> Henry Simons, ‘Federal Tax Reform’ (1946) 14 U Chi L Rev 20, 63.

<sup>106</sup> Peter Bernholz, ‘Henry Simons and Chicago Liberalism’ (1984) 140 JITE 387.

<sup>107</sup> See Section 3.1.

<sup>108</sup> eg Frank Knight, ‘Cost of Production and Price over Long and Short Periods’ (1921) 29 JPE 304, 329; Knight, ‘Suggestion’ (n 51) 365–366.

'popular romantic notions' of gains under monopoly,<sup>109</sup> while claiming the 'idea that large-scale production is more efficient than small-scale, beyond fairly narrow limits, is [a] fallacy'.<sup>110</sup> Although in the 1920s he had argued that perfect competition was a 'logical device', realisation of which nobody took seriously,<sup>111</sup> in 1934 he suggested that the ideal 'more or less *ought* to be approximated'.<sup>112</sup> Intriguingly, there were also allusions to what looks like Ordoliberal "as if" regulation even beyond natural monopolies: when markets 'fail for one reason or another to work ideally and without friction', the appropriate response was to 'facilitate the achievement of the results of theoretically perfect competition'.<sup>113</sup> Thus in this period, Knight did not believe efficiencies legitimated industrial concentration.

Nor in his conceptual work did Knight think tolerance of large firms ethically justifiable, for reasons that seem akin to contemporaneous Ordoliberals on economic freedom. Beyond efficiency, the main benefit Knight could find for a free competitive order was the opportunity to potentially win the market-based game and pursue one's ends.<sup>114</sup> The problem was that the ensuing winners and losers produced inequality,<sup>115</sup> creating unbalanced battles between "captains of industry"<sup>116</sup> where allusions to freedom seemed meaningless.<sup>117</sup> This, he feared, facilitated unjustified coercion of smaller rivals and potentially bred private political power,<sup>118</sup> both typical Freiburg concerns. Nor did he subscribe to the laissez-faire belief in the weakness and fleetingness of monopoly, which he labelled 'mere dogma and, to most economists, improbable'.<sup>119</sup> These reflections left Knight, while a liberal, sceptical of the ethical basis for competition beyond "progress", vaguely construed.<sup>120</sup>

When the pre-1950s Ordoliberals are compared with the contemporaneous Chicago School, rather than a later variant, it is clear that both groups recommended antitrust enforcement animated by economic freedom and targeted against big businesses.

If anything, Eucken was *more* nuanced in his views than these older Chicagoans. It is not entirely clear whether he thought "complete competition" was a state to be emulated or a stylised model, comparable to the role of perfect competition in modern microeconomic

<sup>109</sup> Frank Knight, 'Economists on Economic Ethics' (1937) 48 Int J Ethics 98, 102.

<sup>110</sup> Frank Knight, 'Socialism: The Nature of the Problem' (1940) 50 Ethics 253, 268.

<sup>111</sup> Frank Knight, 'The Ethics of Competition' (1923) 37 QJE 579, 587.

<sup>112</sup> Frank Knight, 'The Nature of Economic Science in Some Recent Discussion' (1934) 24 AER 225, 235.

<sup>113</sup> Knight, 'Socialism' (n 110) 275.

<sup>114</sup> Knight, 'Competition' (n 111) 586–587, 602–603; Frank Knight, 'Economic Psychology and the Value Problem' (1925) 39 QJE 372, 406–409.

<sup>115</sup> Knight, 'Competition' (n 111) 609.

<sup>116</sup> *ibid* 604–606.

<sup>117</sup> Frank Knight, 'Ethics and Economic Reform [Part I]' (1939) 6 *Economica* 1, 24–27; Frank Knight, 'Free Society: Its Basic Nature and Problem' (1948) 57 *Philos Rev* 39, 52–53.

<sup>118</sup> Knight, 'Economic Reform' (n 117) 22.

<sup>119</sup> Frank Knight, 'Lippmann's The Good Society' (1938) 46 *JPE* 864, 869.

<sup>120</sup> Knight, 'Competition' (n 111) 614, 633; Frank Knight, 'The Role of the Individual in the Economic World of the Future' (1941) 49 *JPE* 817, 830.

theory.<sup>121</sup> In *Foundations of Economics*, Eucken stressed that market concentration and profits should not be conflated with economic power, revealing nothing as to whether there existed sufficient competitive constraint.<sup>122</sup> His categorisation of ‘unavoidable’ monopolies necessitating “as-if” supervision but *not* subject to deconcentration was rather ambiguous,<sup>123</sup> including natural monopolies (pipelines, railways) but also ‘a factory producing precision scales or medicinal equipment’ that may only *partially* dominate the market ‘on the basis of genuine cost advantages’, i.e. productive efficiency.<sup>124</sup> This coheres with his suggestion that a dominant firm with smaller rivals ought to be supervised – not explicitly dissolved – by the competition authority,<sup>125</sup> and indication that it was possible to come under its scrutiny through ‘becom[ing] a monopolist by using competitive means’.<sup>126</sup> The same can be seen with oligopolies, where Eucken recommended close oversight by the competition authority, particularly to punish predatory pricing or loyalty rebates, but does not go so far as to advocate greater deconcentration as ‘decisive monopoly supervision’ will be enough to ensure effective competition.<sup>127</sup> This indicates an approach of scrutinising the conduct of dominant firms, rather than eradicating dominance itself.

If “Ordoliberalism” as a school of competition policy means deconcentration of industry to replicate perfect competition, Henry Simons, the most prominent economist-lawyer at Chicago in the 1930s and 1940s, was arguably more “Ordoliberal” than Eucken himself. While “Ordoliberalism” and “the Chicago School”, as commonly portrayed in competition scholarship, certainly have ample evidence for clashing on how antitrust should handle large firms *at different times*, putting them in the same historical period – the 1930s and 1940s – illustrates much closer agreement. The same can be said of the other way around.

## 2.2 The “New” Ordoliberals: Social Market Economists

It is to be welcomed that several accounts have also recognised the cohesion between Chicagoan and Ordoliberal antitrust in the 1930s and 1940s, as just explored.<sup>128</sup> This is a step in the right direction against the simplistic clashing of “Ordoliberalism” with “the Chicago School” in competition scholarship. But what unfortunately persists in these accounts is the suggestion that the later Chicago School broke away from its earlier interventionist roots *and*

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<sup>121</sup> Mel Marquis, ‘Introduction, Summary, Remarks’ in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart 2008) xlix; Peter Behrens, ‘The Ordoliberal Concept of “Abuse” of a Dominant Position and Its Impact on Article 102 TFEU’ (2015) <<https://papers.ssrn.com/abstract=2658045>> accessed 05 November 2024.

<sup>122</sup> Eucken, *Foundations* (n 10) 269–270.

<sup>123</sup> Eucken, ‘Competitive Order’ (n 15) 241–244.

<sup>124</sup> *ibid* 238.

<sup>125</sup> *ibid* 241.

<sup>126</sup> *ibid* 245.

<sup>127</sup> Ahlborn and Grave (n 32) 205–206.

<sup>128</sup> eg Van Horn (n 90) 213; Daniel Stedman Jones, *Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics* (Princeton University Press 2012) 7.

Ordoliberalism, which *continued* to oppose big business. This misses how Ordoliberal thought itself evolved through the 1950s and 1960s, when attention usually shifts towards Aaron Director and his band of sceptical students in Chicago. Ordoliberalism also warmed to the benefits of large firms and a less aggressive antitrust policy after the 1940s.

During the post-war reconstruction of West Germany, Ordoliberal thought largely evolved into the concept of the social market economy (“SME”), a phrase coined – at least in print – by Alfred Müller-Armack (1901-1978).<sup>129</sup> As Professor of Economics at the Universities of Münster and Cologne, as well as member of the West German Ministry of Economics from 1952-1963, Müller-Armack was responsible for the theoretical evolution of Ordoliberalism into the SME. It was Ludwig Erhard (1897-1977) who implemented the concept as Economics Director of the British/American Bizone from 1948, Minister for Economics of the Federal Republic from 1949, and then second West German Chancellor from 1963-1966.<sup>130</sup> Erhard was a stalwart defender of free markets against their detractors,<sup>131</sup> pursuing economic growth by whatever means necessary, and is credited with the post-war German economic “miracle”.<sup>132</sup>

Before getting into their thoughts on big business, some argue that the SME should be kept separate from earlier Ordoliberal thought.<sup>133</sup> The usual first objection relates to the SME going much further on social policy.<sup>134</sup> Müller-Armack placed considerable emphasis upon the ‘social’ part of the concept.<sup>135</sup> Earlier Ordoliberal writing had always envisaged efforts to soften the harsh inequalities occasioned by *laissez faire*, yet Müller-Armack advocated a ‘multiform and complete system of social protection’,<sup>136</sup> realising ‘social justice’ through ‘good social services.’<sup>137</sup> This made SME adherents more amenable to subsidies, welfare payments, vocational training, and the pursuit of full-employment.<sup>138</sup> Scholars have indicated that these

<sup>129</sup> Nils Goldschmidt and Michael Wohlgemuth, ‘Social Market Economy: Origins, Meanings and Interpretations’ (2008) 19 *Const Pol Econ* 261, 262–263.

<sup>130</sup> See Christian Glossner and David Gregosz, ‘The Formation and Implementation of the Social Market Economy by Alfred Müller-Armack and Ludwig Erhard: Incipency and Actuality’ [2011] Konrad Adenauer Stiftung <[https://www.kas.de/c/document\\_library/get\\_file?uuid=43f08a1b-2eeb-728c-6d6d-8740bda786fd&groupId=252038](https://www.kas.de/c/document_library/get_file?uuid=43f08a1b-2eeb-728c-6d6d-8740bda786fd&groupId=252038)> accessed 05 November 2024.

<sup>131</sup> As retold in Ludwig Erhard, *Prosperity Through Competition* (Frederick A Praeger 1958).

<sup>132</sup> Harald Hagemann, ‘Ordoliberalism, the Social-Market Economy, and Keynesianism in Germany, 1945–1974’ in Roger Backhouse and others (eds), *Liberalism and the Welfare State: Economists and Arguments for the Welfare State* (OUP 2017) 57.

<sup>133</sup> eg Wolfgang Kasper and Manfred Streit, *Lessons from the Freiburg School: The Institutional Foundations of Freedom and Prosperity* (Centre for Independent Studies 1993) 4.

<sup>134</sup> Christian Joerges and Florian Rödl, ‘“Social Market Economy” as Europe’s Social Model?’ (2004) 12–14 <<https://papers.ssrn.com/abstract=635362>> accessed 05 November 2024; Viktor Vanberg, ‘The Freiburg School: Walter Eucken and Ordoliberalism’ [2004] Freiburg Discussion Papers on Constitutional Economics 2; Glossner and Gregosz (n 130) 12.

<sup>135</sup> Alfred Müller-Armack, ‘The Principles of the Social Market Economy [1965]’ in Peter Koslowski (ed), *The Social Market Economy: Theory and Ethics of the Economic Order* (Springer-Verlag 1998) 258.

<sup>136</sup> Müller-Armack quoted in Hans Otto Lenel, ‘Evolution of the Social Market Economy’ in Peacock and Willgerodt (eds), *German Neo-Liberals* (n 9) 27.

<sup>137</sup> Alfred Müller-Armack, ‘The Social Aspect of the Economic System [1947]’ in Stützel and others (eds), *Standard Texts on the Social Market Economy* (n 20) 10.

<sup>138</sup> Hans Zacher, ‘Social Market Economy, Social Policy, and the Law’ (1982) 138 *JITE* 367, 376; Sally (n 8) 249.

policies would not have been considered market-conforming by earlier Ordoliberals,<sup>139</sup> while also highlighting Müller-Armack's relative coldness on the benefits of the market order.<sup>140</sup> The common second objection to seeing the SME as a continuation of earlier Ordoliberal thinking is how its practical implementation was often subject to pragmatic compromise.<sup>141</sup> The term can itself be considered a deliberate 'integration formula', politically palatable to both left and right.<sup>142</sup> Beyond concessions on social policy and to occupying forces,<sup>143</sup> the 1957 Act against Restraints of Competition is often considered a failure to deliver a strict Ordoliberal regime for cartels, big businesses, and mergers owing to compromise.<sup>144</sup> The latter years of the SME moved further away from original Freiburg thought when Erhard's party was forced into coalition with the Social Democrats following his resignation in 1966, heralding a shift towards Keynesianism.<sup>145</sup>

Yet despite these objections, there are good reasons to see the SME concept, as advanced and implemented from the late 1940s to the mid-1960s in West Germany, to be an evolution from the Ordoliberalism of the 1930s and 1940s. Both Müller-Armack<sup>146</sup> and Erhard<sup>147</sup> thought that their endeavours were the development or delivery of earlier Ordoliberalism. Continuity between the two is also a common interpretation in secondary literature.<sup>148</sup> And in any event, the most significant difference is found to be in social policy which is not under consideration here.

As with the shift seen in Chicago towards the end of the 1940s, the SME advocates in Germany were more willing to accept the benefits of industrial scale, with a less radical approach taken to competition policy. Several commentators have highlighted how the notion of "as-if" regulation of monopolies was rapidly dropped in the 1950s.<sup>149</sup> But it went further than that.

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<sup>139</sup>Kasper and Streit (n 133) 19; Vanberg (n 134) 2; Hien (n 5).

<sup>140</sup> Goldschmidt and Wohlgemuth (n 129) 272–273.

<sup>141</sup> Wolfgang Stolper and Karl Roskamp, 'Planning a Free Economy: Germany 1945-1960' (1979) 135 *JITE* 374, 377; Berghahn (n 49) 47.

<sup>142</sup> Nils Goldschmidt, 'Alfred Müller-Armack and Ludwig Erhard: Social Market Liberalism' [2004] Freiburg Discussion Papers on Constitutional Economics 5.

<sup>143</sup> Hien (n 5).

<sup>144</sup> Hans Otto Lenel, 'Does Germany Still Have a Social Market Economy [1971]' in Peacock and Willgerodt (eds), *Germany's Social Market Economy* (n 7) 265–267; Lenel (n 136); Hagemann (n 132) 66.

<sup>145</sup> Hagemann (n 132) 59; Tim Krieger and Daniel Nientiedt, 'The Renaissance of Ordoliberalism in the 1970s and 1980s' [2022] Wilfried-GuthStiftungsprofessur für Ordnungs- und Wettbewerbspolitik Diskussionsbeiträge 6 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4278451](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4278451)> accessed 05 November 2024.

<sup>146</sup> Müller-Armack, 'Social Aspect' (n 137) 11; Alfred Müller-Armack, 'The Social Market Economy as an Economic and Social Order' (1978) 36 *Review of Social Economy* 325, 325.

<sup>147</sup> Goldschmidt (n 142) 12, 15; Goldschmidt and Wohlgemuth (n 129) 267; Hagemann (n 132) 59; Krieger and Nientiedt (n 145) 6.

<sup>148</sup> Stolper and Roskamp (n 141) 377; Zacher (n 138) 372; Joerges and Rödl (n 134) 12; Goldschmidt (n 142) 17; Glossner and Gregosz (n 130) 12–13; Behrens (n 121); Hien (n 5).

<sup>149</sup> Marquis (n 121) xxxvi; Ernst-Joachim Mestmäcker, 'The Development of German and European Competition Law with Special Reference to the EU Commission's Article 82 Guidance of 2008' in Lorenzo Federico Pace (ed), *European Competition Law: The Impact of the Commission's Guidance on Article 102* (Edward Elgar 2011) 42–43; Krieger and Nientiedt (n 145) 9.

Erhard was entirely dedicated to maintaining competition.<sup>150</sup> Like earlier Ordoliberalists he defended “economic freedom” in the abstract,<sup>151</sup> was an ardent critic of cartels,<sup>152</sup> and spent almost a decade attempting to introduce German competition law.<sup>153</sup> But his foremost priority in the post-war reconstruction of West Germany was to do whatever necessary to increase economic growth. When removing almost all market restrictions in 1948, he did not intend to support ‘uneconomic enterprises’ and ‘carry lame ducks’ but to reward ‘individual risk’.<sup>154</sup> The priority was to increase wealth through greater productivity and then later decide upon equitable distribution.<sup>155</sup> He believed ‘every advantage arising from greater efficiency [...] will benefit all the people, and lead to the greater satisfaction of the consumer.’<sup>156</sup> As a result, Erhard was more relaxed than Ordoliberal predecessors on industrial concentration in an effort to increase economic productivity, so long as monopolies were avoided.<sup>157</sup> Despite misgivings about European integration, Erhard saw benefits if it were to break down market boundaries and foster the growth of efficient, pan-European firms to rival those of the USA.<sup>158</sup> It is notable that in his earliest endeavours, Erhard was assisted – on the recommendation of Eucken –<sup>159</sup> by Leonard Miksch, who had already acknowledged that deconcentration could harm efficiency<sup>160</sup> and had abandoned his “as-if” standard for monopoly regulation,<sup>161</sup> which continues to blight Ordoliberalism in some competition circles.

Like the later Chicagoans, recognising the benefits of large firms informed a less intensive approach to antitrust. While Erhard accepted that substantial economic power could increase prices and facilitate consumer exploitation, his recommendations for antitrust policy were vague (‘preserving, to the greatest possible extent, competition’), but clearly directed at ‘the abuse of monopoly power’, rather than countering its existence through deconcentration.<sup>162</sup> Like Chicagoans in this period, Erhard increasingly directed his criticism towards the state’s role in sanctioning monopolies.<sup>163</sup> He also had faith in market self-correction. Economic power was primarily a problem for small markets without the possibility of entry,<sup>164</sup> leading him to push for trade liberalisation, despite protestations from German

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<sup>150</sup> Erhard (n 131) 2–3.

<sup>151</sup> *ibid* 103.

<sup>152</sup> *ibid* 123–125.

<sup>153</sup> *ibid* 117–123.

<sup>154</sup> Erhard quoted in Goldschmidt (n 142) 7.

<sup>155</sup> Erhard (n 131) 3–5, 163.

<sup>156</sup> *ibid* 125.

<sup>157</sup> Volker Berghahn, ‘Ideas into Politics: The Case of Ludwig Erhard’ in RJ Bullen, H Pogue Von Strandmann and AB Polonsky (eds), *Ideas Into Politics: Aspects of European History, 1880 to 1950* (Barnes & Noble 1984) 180–182; Berghahn (n 49) 47.

<sup>158</sup> Erhard (n 131) 224–225.

<sup>159</sup> Hien (n 5).

<sup>160</sup> Leonhard Miksch, ‘Competition and Economic Constitution [1937]’ in Stützel and others (eds), *Standard Texts on the Social Market Economy* (n 20) 150.

<sup>161</sup> Goldschmidt and Berndt (n 40) 978.

<sup>162</sup> Erhard (n 131) 127.

<sup>163</sup> *ibid* 108, 124.

<sup>164</sup> *ibid* 124.

industry about exposure to international competition.<sup>165</sup> For all of this, Erhard was labelled the ‘Minister for Heavy Industry’ by his critics, though he maintained that his push for efficiency was ultimately intended to benefit ordinary consumers.<sup>166</sup>

Several elements of Erhard’s approach to big business were also reflected in Müller-Armack’s writing. While warning in 1947 of the need ‘to prevent any one-sided accumulation of economic power’,<sup>167</sup> by the 1960s he was defending economies of scale as ‘largely [...] responsible for the nation’s higher standard of living’ which rendered ‘measures to remove the so-called concentration of power in industry’ unwise.<sup>168</sup> If ‘market influence goes hand in hand with reduced prices and an above-average rate of expansion, we must recognize that it is indispensable’.<sup>169</sup> Like Erhard, Müller-Armack believed that European integration would be the impetus for bigger businesses.<sup>170</sup> Specifically on competition enforcement, in the late 1950s he explained that the SME approach aimed to ‘exercise control’ over monopolies and oligopolies,<sup>171</sup> rather than deconcentrate. This view is reflected in archival evidence from the drafting of the 1957 German competition law, where Müller-Armack argued based on ‘newer economic theory’ that monopolies and oligopolies were often sites of intense competition, therefore requiring a more ‘nuanced view’.<sup>172</sup> Such evolution also explains why the German delegation to the drafting of the Treaty of Rome – including Müller-Armack – pushed for abuse control over the French preference for a prohibition of dominance.<sup>173</sup>

Similarly bridging the gap between domestic implementation of the SME and European integration, a key influence during the formative years of EU competition law was Ernst-Joachim Mestmäcker, a post-war student of Böhm, first president of the West German Monopoly Commission, and special adviser to the European Commission on competition.<sup>174</sup> In 1970s debates on merger control, Mestmäcker advocated an effects-based approach, rather than structural presumptions of harm.<sup>175</sup> While acknowledging heightened risks to competition than internal expansion and the need for future oversight of abuses, he argued that the primary reason for concentrations was to approximate optimum size to reduce costs (with competitive harms a ‘secondary or side effect’).<sup>176</sup> Mestmäcker also claimed that mergers

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<sup>165</sup> *ibid* 208–213.

<sup>166</sup> *ibid* 100–102.

<sup>167</sup> Müller-Armack, ‘Social Aspect’ (n 137) 18.

<sup>168</sup> Alfred Müller-Armack, ‘The Second Phase of the Social Market Economy: An Additional Concept of a Humane Economy [1960]’ in Stützel and others (eds), *Standard Texts on the Social Market Economy* (n 20) 53.

<sup>169</sup> *ibid*.

<sup>170</sup> *ibid*.

<sup>171</sup> Alfred Müller-Armack, ‘The Meaning of the Social Market Economy [1956]’ in Peacock and Willgerodt (eds), *Germany’s Social Market Economy* (n 7) 84.

<sup>172</sup> Müller-Armack quoted in Matthew Cole and Sören Hartmann, ‘Ordoliberalism: What We Know and What We Think We Know’ (2023) 86 MLR 1309, 1316.

<sup>173</sup> Heike Schweitzer, ‘The History, Interpretation and Underlying Principles of Section 2 Sherman Act and Article 82 EC’ in Marquis and Ehlermann (eds), *European Competition Law Annual 2007* (n 121) 16; Behrens (n 121).

<sup>174</sup> Behrens (n 121).

<sup>175</sup> Ernst-Joachim Mestmäcker, ‘Concentration and Competition in the EEC’ (1972) 6 JWTL 615, 616–617.

<sup>176</sup> *ibid* 623–624, 643–645.

should be defensible on the basis of countervailing efficiencies,<sup>177</sup> and denounced a proposed *per se* ban as ‘mere protection for the middle classes’.<sup>178</sup> Like the Chicagoans, he was critical of how Government was often the source of restrictions of competition.<sup>179</sup> Consequently, Mestmäcker is often painted as a prominent protagonist of a second wave of Ordoliberalism, generally more relaxed on concentration.<sup>180</sup> It is therefore unsurprising that as Ordoliberalism has come under renewed scrutiny in recent decades, Mestmäcker has been critical of its caricature as a school wishing to replicate perfect competition, apply “as-if” regulation, and radically deconcentrate industry.<sup>181</sup>

1957 is often considered an *annus horribilis* for “Ordoliberal” competition law: with the West German competition law and (now) Article 102 TFEU, they had failed to tackle big business at root, instead forced into accepting mere oversight of its abuses.<sup>182</sup> That may well be the case for the antitrust approach of older Ordoliberalism in the 1930s and 1940s, but *not* what it had evolved into through the 1950s. Erhard, Müller-Armack, and latterly Mestmäcker were more attuned to the efficiencies of industrial scale and therefore supported a milder form of antitrust oversight. Rather than defeats, these legal regimes were reflections of how Ordoliberalism – just like the older Chicago School - had moved on by the late 1950s.

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When comparing historical like with like, the clash between Ordoliberal and Chicagoan antitrust largely disappears: the Chicago scholars of the 1930s and 1940s were generally against big business, like the contemporaneous Ordoliberal writing on which competition scholarship usually focuses; and the SME Ordoliberals of the 1950s and 1960s wished to maintain the benefits of industrial scale, like the views commonly associated with the Chicago School epitomised by Director and Bork. The friction between them is largely artificial, ignoring parallel shifts in thinking on antitrust by freezing these schools at different points in time. At the very least then, the clash between “Ordoliberalism” and “the Chicago School” should be reframed as one between “Old” Ordoliberal and “New” Chicagoan antitrust. This would highlight that views from different periods are being juxtaposed, with the friction largely fading when considered in tandem.

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<sup>177</sup> Ernst-Joachim Mestmäcker, ‘Concentration and Competition in the EEC: Part II’ (1973) 7 *JWTL* 36, 61–62.

<sup>178</sup> Ernst-Joachim Mestmäcker, ‘The Role of Competition in a Liberal Society [1979]’ in Koslowski (ed), *The Social Market Economy* (n 135) 345.

<sup>179</sup> Mestmäcker, ‘Competition Policy’ (n 43) 405–406.

<sup>180</sup> Anselm Küsters, ‘Ordering ORDO: Capturing the Freiburg School’s Post-War Development through a Text Mining Analysis of Its Yearbook (1948–2014)’ (2023) 64 *Jahrbuch für Wirtschaftsgeschichte* 55, 85–86.

<sup>181</sup> Mestmäcker, ‘German and European Competition Law’ (n 149).

<sup>182</sup> Akman (n 32) 284–285, 294–295; Angela Wigger, ‘Debunking the Myth of the Ordoliberal Influence on Post-War European Integration’ in Josef Hien and Christian Joerges (eds), *Ordoliberalism, Law and the Rule of Economics* (Hart 2017) 175.

Nevertheless, concluding that there are four schools here – “Old” and “New” Ordoliberalism, “Old” and “New” Chicago – is also a distortion of what actually happened. Views on the antitrust response to large firms did not change overnight, nor were they necessarily led by life-long visionaries. For those writing from the 1930s to the 1960s, this was an evolution, not a revolution.

### 3. Revolution or Evolution?

The introduction referenced George Stigler’s distaste for “schools” expressed in 1962.<sup>183</sup> This was in response to Miller’s designation of a “Chicago School of economics”, whose pro-market advocacy, application of neo-classical theory, and deep distrust of government was said to distinguish it from other economists.<sup>184</sup> What is interesting about Miller’s account is how it identifies, rather early on, a split between the ‘present generation’ (Friedman) and the ‘earlier generation’ (Knight, Simons) on whether big business was a problem which needed tackling.<sup>185</sup> This is relatively common in accounts of Chicagoan economics and antitrust,<sup>186</sup> perhaps reflecting a later desire to establish distance from Simons’ radicalism. Whatever the reason, this approach supports the previous discussion of an “Old” (Simons, Knight) and “New” (Director, Bork) Chicago, where greater similarity can be seen with the contemporaneous “Old” (Eucken, Böhm) and “New” (Erhard, Müller-Armack) Ordoliberals.

The problem is that such “four schools” analysis is a simplification of the reality: many thinkers cannot be neatly categorised into either the “Old” or “New” camp because of *evolution in their thought*. Of course, not everybody had the opportunity to rethink. Simons and Eucken had passed before their respective “New” iterations developed, while Bork and Posner were writing when Chicago had already deviated from its “Old” ways. But many of the contributors to Chicagoan and Ordoliberal thought – not least Aaron Director and Franz Böhm – lacked consistent views throughout. The late 1940s and 1950s marked a major shift in neoliberal approaches to big business on both sides of the Atlantic: those usually considered of an “Old” school converted to the “New”; and several often associated with a “New” school previously agreed with the “Old”. In short, the change from an aggressive antitrust agenda against concentration towards nonchalance, from the “Old” to the “New” Chicago and Ordoliberalism, was not a clean revolution, as the four schools approach would suggest, but a gradual evolution.

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<sup>183</sup> Stigler, ‘Comment’ (n 2)

<sup>184</sup> H Laurence Miller, ‘On the “Chicago School of Economics”’ (1962) 70 JPE 64.

<sup>185</sup> *ibid* 65–67.

<sup>186</sup> Neil Duxbury, *Patterns of American Jurisprudence* (OUP 1995) 366–367; Stedman Jones (n 128) 90–93.

### 3.1 The “Old” became “New”: Knight, Böhm, Röpke

Frank Knight, Franz Böhm, and Wilhelm Röpke are generally seen as fitting into the “Old” approach to Chicagoan and Ordoliberal competition policy. Sections 1 and 2 offered ample evidence from their writings to support such categorisation. However, what is less commonly recognised is that these scholars all shifted into greater alignment with the next generation of “New” Chicagoans and Ordoliberals who succeeded them.

As recounted in Section 2.1, Knight’s writing in the 1920s and 1930s cohered with Henry Simons, both of whom considered the implications of industrial scale for efficiency and freedom problematic. Yet in *The Antitrust Paradox*, Bork made two supportive references to Knight when articulating the productive efficiencies that justify large market shares.<sup>187</sup> This connection between “Old” and “New” Chicago arose because Knight’s thinking on big business changed.

From 1939 to the 1950s, Knight’s writing increasingly exhibited hallmarks commonly associated with later Chicagoan thought. He came to view the opportunity to defeat rivals and gain market power as the driving force of competition as ‘it is the big prizes which make a lottery “go”’.<sup>188</sup> In Borkian fashion, he criticised Bertrand Russell for a ‘dogmatic’ distaste for ‘economic power’ based on nothing more than ‘uncritical sympathy for the underdog’, akin to compassion for a child losing a race.<sup>189</sup> In contrast, substantial economic power was seen as ‘inevitable [...] natural and useful in a free and progressive society’<sup>190</sup> and even ‘positively good’.<sup>191</sup> Although still wishing to maintain his distance from the libertarianism of Ludwig von Mises and Lionel Robbins, Knight confessed ambivalence on whether monopoly required ‘coercive repression’ as it would be rare and admitted intrigue for laissez-faire as it had not really been tried.<sup>192</sup>

However by 1950, Knight’s analysis of market concentration and the necessary response – if any – was firmly aligned with “New” Chicago thinking.<sup>193</sup> Reversing earlier claims, he argued that replicating perfect competition in practice would be ‘monstrous and impossible’ to achieve.<sup>194</sup> Temporary monopoly was good for rewarding innovation and risk-taking, with the exceptions of lobbying government for legal privilege, union power, and agricultural collectives.<sup>195</sup> Importantly, Knight argued that a ‘tolerable degree of productive efficiency under

<sup>187</sup> Bork, *Antitrust Paradox* (n 59) 91, 104.

<sup>188</sup> Frank Knight, ‘Bertrand Russell on Power’ (1939) 49 *Ethics* 253, 276. Similarly: Frank Knight, ‘The Sickness of Liberal Society’ (1946) 56 *Ethics* 79, 85.

<sup>189</sup> Knight, ‘Russell’ (n 188) 270.

<sup>190</sup> Frank Knight, ‘The Planful Act: The Possibilities and Limitations of Collective Rationality [1944]’, *Freedom and Reform: Essays in Economics and Social Philosophy* (Harper & Brothers 1947) 361–362.

<sup>191</sup> Knight, ‘Free Society’ (n 117) 52.

<sup>192</sup> Knight, ‘Economic Reform’ (n 117) 18–19.

<sup>193</sup> cf Frank Knight, *Intelligence and Democratic Action* (Harvard University Press 1960) 93–99.

<sup>194</sup> Frank Knight, ‘Economic and Social Policy in Democratic Society’ (1950) 58 *JPE* 513, 520.

<sup>195</sup> *ibid* 520–521.

modern technical conditions requires organization of many branches of production into very large units.<sup>196</sup> While a possible tension with individual economic freedom was acknowledged – reminiscent of his work on the dubious ethics of competition – this was a necessary compromise. Therefore, despite being a founding father of the “Old” Chicago School of economics, the mentor of Henry Simons, and critic of big business in the 1920s and 1930s, by 1950 Frank Knight had shifted into the “New” Chicago school.

The same evolution can be seen with the original Ordoliberalists who, unlike Eucken, had the opportunity to continue writing into the 1960s. While the prior reflections of Franz Böhm and Wilhelm Röpke in Section 1 provided ample evidence for the radical agenda of deconcentration affiliated with early Ordoliberalism, their later movement into line with the more accommodating views towards big business espoused by the Social Market Economists is less noted.

As his student Mestmäcker has stressed, it is erroneous to suggest that Franz Böhm always favoured economic freedom over efficiency in competition policy to dissolve industry.<sup>197</sup> Even in his 1947 radical agenda for deconcentration, Böhm demonstrated nuance in claiming that businesses could only influence the market price at ‘a very high percentage’ of market share.<sup>198</sup> Furthermore, complete competition was a mere theoretical concept as ‘[t]he practical needs of daily economic life are generally satisfied where competitive conditions are only partially present’.<sup>199</sup> But from the mid-1950s, such small exceptions in previous writing became the general tenets of Böhm’s approach. He continued to recognise that economic power created issues for freedom, but refuted the need to emulate perfect competition as he acknowledged efficiencies occasioned by greater output.<sup>200</sup> The optimum size of firms ought to be determined through the free market mechanism rather than administrative gut-feeling,<sup>201</sup> while the efficiency of vertical integration also required recognition.<sup>202</sup> Although continuing to believe in the need to ban cartels outright, he was reluctant to vaguely prohibit the means by which businesses strive to become a monopolist, as he did not think it easy to distinguish between problematic conduct and fierce competition undertaken by all.<sup>203</sup> Furthermore, Böhm’s faith grew in the robustness of market self-correction in the absence of barriers to entry.<sup>204</sup> This shift in approach also explains his positions during – and the ultimate outcomes from – the committee drafting the 1957 German Act against Restraints of Competition. As

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<sup>196</sup> *ibid* 522.

<sup>197</sup> Mestmäcker, ‘German and European Competition Law’ (n 149) 43–44.

<sup>198</sup> Böhm, ‘Decartelisation’ (n 16) 122.

<sup>199</sup> *ibid* 126.

<sup>200</sup> Franz Böhm, ‘Democracy and Economic Power’, *Cartel and Monopoly in Modern Law: Volume I* (CF Müller 1961) 43. Similarly: Böhm, ‘Monopoly’ (n 26) 157.

<sup>201</sup> Böhm, ‘Monopoly’ (n 26) 158.

<sup>202</sup> Böhm, ‘Democracy’ (n 200) 41.

<sup>203</sup> *ibid* 31.

<sup>204</sup> *ibid* 43.

Cole and Hartmann have found, Böhm pushed for oversight of potential abuses by dominant firms rather than deconcentration, finding size to be economically “neutral” owing to the potential for productive efficiencies.<sup>205</sup> By 1961, Böhm’s approach to antitrust had evolved over three decades towards a less radical agenda: ‘any competition whose effects will be felt by the holders of economic power, will suffice’ and even for partial monopolists or oligopolists where competitive pressure is not as intense, ‘it nevertheless has the effect of weakening existing dominant positions and preventing their reinforcement.’<sup>206</sup> Böhm’s analysis of competition as probably as strong as it really can be, even in concentrated markets, would generally be associated more with the contemporaneous “New” Chicago School.

Finally, a similar evolution is visible in the writings of Wilhelm Röpke when comparing his thoughts from the 1930s to early 1950s on the need for deconcentration, with his position in the 9<sup>th</sup> edition of *Economics of the Free Society* from the early 1960s.<sup>207</sup> At this point, Röpke directly rejected replicating the structural model of perfect competition as the ‘incentives provided by the temporary advantages of market dominance’ were needed to galvanise ‘the continuous striving of the producers for the favour of the consumers.’<sup>208</sup> Competition was only restricted where ‘the “lead” becomes a permanent position of privilege and power’, and intervention was therefore not appropriate where dominance ‘is temporary and the leader is closely followed by competitors who are free to overtake him in turn.’<sup>209</sup> Were it not for governmental favour, Röpke thought it unlikely that any monopolies would materialise in the first place.<sup>210</sup>

Despite their usual freezing at a much earlier point, that these “Old” Ordoliberalists changed their antitrust approach to industrial concentration should really come as no surprise. From the beginning, Ordoliberalism as an interdisciplinary endeavour conceptualised legitimate market intervention as entirely dependent upon economic wisdom. The foundational *Ordo Manifesto* of 1936 called for lawyers to avail themselves of the ‘findings of economic research’.<sup>211</sup> By the 1960s, traditionally “Old” Ordoliberalists Böhm and Röpke had decided that the economic tide had turned against deconcentration, as did the “New” Social Market Economists and the later Chicago School. Perhaps Eucken would have done the same, especially given that, like Frank Knight, his analysis became increasingly ambivalent in the 1940s. But these older scholars were not alone in their evolution on antitrust policy: some “New” Chicagoans had not always been so sympathetic to large firms.

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<sup>205</sup> Cole and Hartmann (n 172) 1315–1317.

<sup>206</sup> Böhm, ‘Democracy’ (n 200) 43.

<sup>207</sup> Röpke, *Economics of the Free Society* (n 22).

<sup>208</sup> *ibid* 162.

<sup>209</sup> *ibid*.

<sup>210</sup> *ibid* 159.

<sup>211</sup> Böhm, Eucken, and Grossmann-Doerth (n 7) 24–25.

### 3.2 The “New” were once “Old”: Director and Disciples

Reflections on the Chicago School of antitrust in its 1960s and 1970s heyday often give the impression of it marking a revolutionary break with the “Old” Chicago of Henry Simons, justifying their existence as distinct schools of thought.<sup>212</sup> The figure central to the common perception of “New” Chicago as something radically different is Aaron Director. As retold in Section 1.3 and 1.4, the folklore is that Director’s distinct perspective inspired a new generation to think differently about big business. He was the one that disrupted antitrust classes with his neo-classical reasoning and spearheaded two projects in the 1940s and 1950s – the Free Market Study and Antitrust Project – that influenced Chicagoan titans such as Bork and Friedman. As illustrated by countless thankful footnotes,<sup>213</sup> this is the interpretation favoured by later Chicagoans themselves: that Director was responsible for a “new” Chicago School of antitrust,<sup>214</sup> inspired by his ‘heterodox’ thinking which saw ‘antitrust policy through the lens of price theory,’<sup>215</sup> and whose ‘basic views of the world [...] never really changed.’<sup>216</sup> But his views *had* changed.

Undoubtedly, Director played a critical role in homogenising the “New” Chicago into a collective that was confident in the benefits of industrial concentration and, as a result, a light touch approach to antitrust. This can be seen in two significant ways.

First, Director provided the “New” Chicagoans with a mission statement, comparable to the “Ordo Manifesto” of the 1930s. Director remains a somewhat mythical figure owing to the scarcity of his publications, primarily leaving us with glowing secondary testimonies by notorious followers. Yet towards the end of the Antitrust Project, in 1956 Director and Edward Levi co-authored ‘Law and the Future: Trade Regulation’. Although more than two decades before what is commonly considered the sacred text of the Chicago school – Bork’s *Antitrust Paradox* – this article contained the foundational tenets that would define its competition policy. Director and Levi argued that US antitrust law was inconsistent with economic analysis,<sup>217</sup> instead obsessed with the size of businesses rather than whether their actual conduct was questionable.<sup>218</sup> Unlike the “Old” Chicago of Simons, industrial concentration may result from efficiencies, making deconcentration an agenda for a ‘less efficient system of production’.<sup>219</sup> This meant that the focus should be on conduct, rather than structure, but even then, the practices of dominant firms are unlikely to succeed in excluding rivals and may

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<sup>212</sup> Kitch (n 54) 178; Ronald Coase, ‘Law and Economics at Chicago’ (1993) 36 JL&E 239, 241.

<sup>213</sup> Bowman, ‘Tying Arrangements and the Leverage Problem’ (n 57) 19; Bork and Bowman (n 62) 366–367; Posner, *Economic Analysis [1973]* (n 75) xi; Bork, *Antitrust Paradox* (n 59) xv.

<sup>214</sup> Posner, ‘Chicago’ (n 60) 925.

<sup>215</sup> *ibid* 928.

<sup>216</sup> Kitch (n 54) 231.

<sup>217</sup> Aaron Director and Edward Levi, ‘Law and the Future: Trade Regulation’ (1956) 51 Nw U L Rev 281, 281–282, 296.

<sup>218</sup> *ibid* 282–283.

<sup>219</sup> *ibid* 285–287.

actually increase production.<sup>220</sup> Bork's later work is of course more comprehensive in its analysis, but arguably it is a systematic extrapolation from Director's foundational views.

Second, Director clearly shaped the views of his students and collaborators. Beyond influencing fresh minds, what is more interesting is how exposure to Director's thinking led some to abandon their *pre-existing* "Old" Chicago views that antitrust should be applied very firmly to large businesses. Two Chicagoans are notable. First, Edward Levi, who taught the antitrust course from 1945. Levi's conversion towards the co-authored piece in 1956 is well known. In 1946 he had argued that the goals of the Sherman Act with regard to dominant firms were confused, with structural solutions sidelined by clearly egregious conduct and business protestations about freedom and punishing their success.<sup>221</sup> Levi rued 'the trend toward greater concentration'<sup>222</sup> and, while not expecting 'atomization',<sup>223</sup> recommended action in industries of only three to five competitors<sup>224</sup> and greater recourse to divestiture in monopolisation cases.<sup>225</sup> A second, less recognised, convert to Director's way of thinking was Ward Bowman, later shaper of Chicagoan analyses on resale price maintenance and tying, as well as co-author with Bork in the 1960s of pieces laying the groundwork for his *Antitrust Paradox*. Prior to joining the Antitrust Project, young Bowman was heavily influenced by Henry Simons.<sup>226</sup> In a 1952 article on the steel industry,<sup>227</sup> he disputed the claims in *Alcoa* that 60-64% market share was a dubious monopoly, 33% certainly was not, and that even 90% share might not be monopolistic if thrust upon a business by economies of scale.<sup>228</sup> Bowman doubted that economies of scale really justified such large firms, dismissed judicial timidity in antitrust enforcement for fear of harming productive efficiencies, and ultimately called for a presumption of illegality for firms supplying more than 10-15% of demand.<sup>229</sup> What would become central tenets of "New" Chicago School thinking were previously rejected by Bowman's appreciation for the "Old": concentration did not justify incentives to innovate or to compete,<sup>230</sup> while horizontal mergers were driven by anticompetitive motives rather than efficiencies and would not be corrected through market entry.<sup>231</sup>

The conversions of Levi and Bowman from "Old" to "New" Chicago might suggest that this was more of evolution, rather than a revolutionary break between two separate schools. The main problem with such an interpretation is Director, who appears to have been a radical

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<sup>220</sup> *ibid* 290–294.

<sup>221</sup> Edward Levi, 'The Antitrust Laws and Monopoly' (1946) 14 U Chi L Rev 153, 153–158.

<sup>222</sup> *ibid* 181.

<sup>223</sup> *ibid* 182.

<sup>224</sup> *ibid* 164.

<sup>225</sup> *ibid* 182.

<sup>226</sup> Kitch (n 54) 182.

<sup>227</sup> Ward Bowman, 'Toward Less Monopoly' (1952) 101 U Pa L Rev 577.

<sup>228</sup> *United States v Aluminum Co of America* (1945) 148 F2d 416, 424, 429.

<sup>229</sup> Bowman, 'Toward Less Monopoly' (n 227) 586–589.

<sup>230</sup> *ibid* 622–629.

<sup>231</sup> *ibid* 638–640.

catalyst for change. He was a driving force of the “New” Chicago school of antitrust, deviating significantly from the “Old” distaste for concentration, and fetching many others on the journey with him.

Nevertheless, it would be a mistake to suggest that Director *himself* marks the revolutionary clean break between “Old” and “New” Chicago. This is because Director’s views also evolved in the late 1940s. He was certainly an early convert to relaxing antitrust against big business. In a book review published autumn 1950, he claimed that ‘[e]nterprise monopoly is evidently held in check by entry of new firms’ and must struggle against the ‘corroding influence of competition’.<sup>232</sup> While accepting that firms wished to avoid competitive pressure, Director was convinced by the ‘effective tendency of the market system to destroy all types of monopoly’.<sup>233</sup> This faith in the power of competition to discipline even dominant firms was further elaborated during a 1951 conference at Chicago.<sup>234</sup> But as revealed by Van Horn and Kolasky, Director did not always hold such stereotypically “New” Chicagoan views. At a speech given during the first meeting of the Mont Pèlerin Society in 1947, Director advocated economic freedom through “promoting the dispersion of power necessary for the competitive order”.<sup>235</sup> While international competition placed some pressure on US firms, he argued that it was insufficient; more vigorous action was necessary to control “excessive size”,<sup>236</sup> including prohibitions on interlocking shareholdings and “perhaps too through a direct limitation of the size of corporate enterprise”.<sup>237</sup> The first respondent to Director’s policy agenda was supportive, albeit stressing the need for enforcement by an independent agency. That supporter of Director’s analysis was Walter Eucken.<sup>238</sup>

That in the late 1940s Director was sympathetic to industrial deconcentration should not really come as a surprise. Just as he would later influence his students and collaborators, so too was Director influenced by Knight and Simons as a postgraduate student, research assistant, and, for Simons, friend at Chicago from the late 1920s.<sup>239</sup> Indeed, in the 1948 preface to a collection of Simons’ essays, Director praised Simons’ identification of “the proliferation of monopoly power” as requiring “the wisest measures of the state” to remedy.<sup>240</sup> This endorsement almost led the private funders of the Free Market Study at Chicago to remove Director as its leader.<sup>241</sup>

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<sup>232</sup> Aaron Director, ‘Review of Unions and Capitalism’ (1950) 18 U Chi L Rev 164, 165.

<sup>233</sup> *ibid* 166.

<sup>234</sup> Van Horn (n 90) 218–219.

<sup>235</sup> Director quoted *ibid* 211.

<sup>236</sup> Director quoted in Kolasky, ‘Director Part II’ (n 53).

<sup>237</sup> Director quoted in Van Horn (n 90) 211–212.

<sup>238</sup> *ibid* 212–213.

<sup>239</sup> William Kolasky, ‘Aaron Director and the Origins of the Chicago School of Antitrust Part I - Aaron Director: A Portrait of the Economist as a Young Man’ (2019) 34 Antitrust 85.

<sup>240</sup> Director quoted in Kolasky, ‘Director Part II’ (n 53).

<sup>241</sup> Van Horn and Mirowski (n 52) 157–158; Van Horn (n 90) 208–209.

By 1950 Aaron Director had indeed ‘become an acolyte of unprecedented faith in the forces of competition’,<sup>242</sup> gradually leading Levi and a band of young thinkers working on the Antitrust Project to reach the same conclusions. This might be interpreted as a decisive shift, justifying the distinction between the “Old” and the “New” Chicago schools. But as has been argued, there was no clean break. Director himself had once been a keen member of the “Old” ways of antitrust.

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Bringing into focus overlooked schools of competition policy – the “Old” Chicagoans, the “New” Ordoliberal – highlights how the common clash between “Ordoliberalism” and “the Chicago School” is exacerbated by time differences, while comparing historical like-with-like reduces the disparity. But that does not necessarily undermine the use of antitrust “schools”; if anything, it emboldens them, suggesting that thinkers in the same tradition can be neatly placed onto either side of a clean, revolutionary dividing line between “Old” and “New”. But as this section has argued, even this is an artificial, arbitrary endeavour because the shifting approach to antitrust did not necessarily involve different people. Many thinkers pivotal to the portrayal of “Old” and “New” articulations cannot be decisively placed on either side of a divide: those more associated with earlier ways of thinking on big business eventually came into line with later views, and even the most influential advocates of a relaxed approach to antitrust had not always been so inclined.

## A Conclusion and Three Questions

Competition scholarship often positions various thought collectives in tension with each other. This chapter has discussed one of the most prominent clashes between allegedly rival schools in European scholarship: “Ordoliberalism” versus “the Chicago School” on the antitrust response to big businesses. While issues with homogenising individuals into groups are well known, this chapter has rethought their alleged contrasts by emphasising the importance of *when* thinkers are writing for understanding their similarities.

First, it has been argued that comparing Ordoliberal and Chicagoan thinking on competition policy from different periods in time artificially exacerbates the differences between them. While it is undoubtedly true that Ordoliberal approaches to industrial concentration in the 1930s and 1940s were very different to Chicago scholarship from the 1950s onwards, when comparing historical like with like, their consistency largely shines through. Simons and Knight were as sceptical of big businesses – if not more so – as Eucken

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<sup>242</sup> Van Horn (n 90) 218.

and Böhm in the same period, while the Social Market Economists in the 1950s and 1960s were rather relaxed about industrial size, much like the writing of Bork and Posner.

Second, even if the previous claim is heeded, this chapter has problematised splitting both Ordoliberal and Chicagoan thought into “Old” and “New” schools. While this better reflects their changing perspectives in tandem, several key thinkers cannot so easily be placed onto either side of a binary divide. Many with early concerns about big businesses – Frank Knight, Franz Böhm, Wilhelm Röpke – mellowed in their writings of the 1950s and 1960s, bringing them into line with later Chicagoan and Ordoliberal perspectives on how competition law should respond. At the same time, major figures in the rethinking of antitrust and industrial concentration – not least Aaron Director – had once exhibited a radicalism in keeping with pre-1950s Ordoliberal and Chicago School thought. Rather than a clear, clean revolution, the shift from “Old” to “New” thinking was more of a gradual evolution. The changing views of some of these key figures is underappreciated in much competition literature on the historical development of our field.

In rethinking the usual story of a clash between “Ordoliberalism” and “the Chicago School” on antitrust and big business, this chapter recommends closer recognition of the temporal differences between and contemporaneous evolution of what might simplistically be denoted as contrasting schools of thought. Without such, the foundations of competition law – how we discuss it, teach it, and understand its history – are built upon exaggerated conflicts.

This conclusion does however leave open three significant questions.

First, if it is not structural considerations of size and complete competition that distinguish Chicago from Ordoliberal when a long-term view is taken, then what really is the difference between them? Perhaps Ordoliberalism could be distinguished through its foundational commitment to economic freedom or its methodology of thinking in interconnected orders. But if the later SME abandoned the antitrust programme of fostering rivalry for rivalry’s sake through, what did “economic freedom” then come to mean to the “New” Ordoliberals? Furthermore, even order-based thinking doesn’t seem as unusual when the jurisprudential aspects of Chicagoan antitrust are highlighted,<sup>243</sup> or it is situated within the broader context of the Law and Economics and public choice movements with which it is closely connected.

Second, why is it that competition scholarship has specifically clashed “Old” Ordoliberalism with the “New” Chicago School of antitrust, and not the other way around? When put on the same historical timeline, this appears arbitrary. Especially given that “New” Ordoliberal ideas underpinned the drafting of the Treaty of Rome on abuse regulation, why did European scholarship not develop the alternative narrative: a clash between the SME

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<sup>243</sup> eg Ryan Stones, ‘The Chicago School and the Formal Rule of Law’ (2018) 14 JCL&E 527.

focus upon efficiencies from scale and international market correction, as opposed to Simon's agenda of deconcentration from Chicago in the 1940s or even the better-known early Harvard School? Why does there need to be a clash at all if Ordo and Chicago – and maybe even Harvard –<sup>244</sup> all evolved in tandem? Is it just to tell a thrilling tale?

Third and finally, why did so many antitrust thinkers move towards a relaxed approach to big business in the late 1940s and 1950s?<sup>245</sup> Having excluded the individual influence of Aaron Director as is often implied, the reason for this correlation is not obvious. Perhaps this general pivot came about due to the Cold War battle against collectivist ideology or post-war dabbling in socialist initiatives,<sup>246</sup> which were easier for liberals to fight with a starker view of what the state should and should not be doing in the economy. Maybe general opinions were swayed by a series of empirical investigations at that time that concentration was explicable in terms of economies of scale rather than greedy mergers.<sup>247</sup> The Mont Pèlerin Society was also formed in 1947, bringing together thinkers from Chicago and Freiburg as a forum for refining liberal thought. Did one group influence the other here? Were they swayed by the Mont Pèlerin Society itself, which was financed by pro-business funds<sup>248</sup> and which from the 1950s became increasingly populated by industry leaders who attempted to shift the emphasis away from industrial concentration towards governmental interference?<sup>249</sup> As noted, the funders of research at Chicago at the time were also unhappy with Director initially endorsing Simons' agenda of industrial deconcentration.<sup>250</sup> Whether these influences shifted opinion, we may never know.

Ninety years on from interdisciplinary antitrust thinking at both Freiburg and Chicago, there is still much to be rediscovered and appreciated about the intellectual history of our field.

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<sup>244</sup> See Kovacic (n 3) 32–36.

<sup>245</sup> One could also broaden this to include the Harvard School, which also gradually came into alignment with Chicagoan thinking: *ibid.*

<sup>246</sup> Van Horn and Mirowski (n 52) 158; Van Horn (n 90) 204; Stedman Jones (n 128) 23, 100, 120.

<sup>247</sup> Van Horn (n 90) 224; Kolasky, 'Director Part II' (n 53).

<sup>248</sup> Stedman Jones (n 128) 169–170.

<sup>249</sup> François Denord, 'French Neoliberalism and Its Divisions: From the Colloque Walter Lippmann to the Fifth Republic' in Mirowski and Plehwe (eds), *The Road from Mont Pèlerin* (n 52) 55–56.

<sup>250</sup> See n 241.