Chicago's Shifting Attitude Toward Concentrations of Business Power (1934–1962)

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I. INTRODUCTION

The postwar Chicago School[1] is commonly associated with a pro-corporate standpoint because of its position toward antitrust law and business monopoly. For example, starting in the 1950s, Aaron Director—who is often considered the father of Chicago law and economics—and his students, such as John McGee, defended the practices of the Standard Oil Company, arguing that the Supreme Court's holding against the company in 1911 was erroneous.[2] Since that time, Chicago has been associated with the position that competition has a self-correcting power, ensuring that monopoly power is short-lived.

Members of the Chicago School did not always take a pro-corporate position. In the 1930s, for example, the respected University of Chicago professor and self-identified classical liberal, Henry Simons, described monopoly in all its forms, including "gigantic corporations" and "other agencies for price control," as "the great enemy of democra-

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1. The term "Chicago School" refers to a school of thought generated by a group of economists centered largely at the University of Chicago after WWII. Milton Friedman is probably the most widely recognized public face of this school. As its central protagonist, Friedman contributed to the rise of the Chicago School through his contributions to monetarism and Chicago price theory.

2. *See* John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137, 168 (1958); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995).

cy."[3] For Simons, concentrations of power undermined the necessary condition for democracy to flourish, namely, a competitive market.[4] Besides Simons, Jacob Viner, the infamous Chicago price-theory guru and self-proclaimed classical liberal, also opposed concentrations of business power. Viner's views on business monopoly in the late 1930s can be gleaned from his correspondence with Laird Bell, a distinguished attorney and public benefactor of Chicago.[5] In writing Bell, Viner acknowledged that big business had some benefits, but emphasized, "[T]he mere *size* of business units tends almost inevitably to result in attempts to escape the impact of competition which have important—and in my opinion highly desirable—consequences for the operation of the economic system."[6] Viner considered this to be "*the* most important economic issue of our day" because "'bigness' . . . *is* the essential element in the faulty working . . . of our economic system."[7]

This Essay traces the development of the Chicago School's changing position toward concentrations of business power. In Parts II and III, the Essay details the Chicago School's early position of broad hostility toward concentrations of business power and its belief that such concentrations of power needed to be eradicated by vigorous antitrust enforcement and radical corporate reform. Then, in Part IV, the Essay charts the Chicago School's shift during the Free Market Study toward a broad acceptance of concentrations of power and a position that large corporations and industrial monopoly were relatively benign. This Essay argues that the Chicago School's shift toward concentrations of power was a product of the postwar Chicago School's effort to reconstitute liberalism as a bulwark against collectivist challenges and increasing government regulation of business.

II. THE DECONCENTRATION OF POWER YEARS

From the mid-1930s through the mid-1940s, among the economists (and economists in training) associated with the University of Chicago, there was a cohort of young economists—which included Henry Simons, Aaron Director, Milton Friedman, and George Stigler—who opposed concentrations of economic power on the basis of classical liberal doctrine. Simons was the public face of this group. According to the preemi-

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3. HENRY C. SIMONS, ECONOMIC POLICY FOR A FREE SOCIETY 43 (1948).

4. *Id.* For evidence of Simons's classical liberal bent, see J. Bradford DeLong, *In Defense of Henry Simons's Standing as a Classical Liberal*, 9 CATO J. 601 (1990).

5. Jacob Viner Papers, Letter from Jacob Viner to Laird Bell, Box 3, Folder 33 (Nov. 16, 1937) (on file with Mudd Library, Princeton University) [hereinafter VPML].

6. *Id.*

7. *Id.*

nent historian Ellis Hawley, Simons's "widely read" 1934 pamphlet, *A Positive Program for Laissez Faire*, was at the vanguard of a barrage of arguments against increased concentration in industry.[8] Indeed, by November of 1949, Simons's pamphlet had sold nearly 24,000 copies.[9]

Simons himself attributed his strong skepticism toward concentrations of power to the classical liberal heritage of Chicago economics. Simons wrote: "A distinctive feature of 'Chicago economics,' as represented by Knight and Viner, is its traditional-liberal political philosophy—its emphasis on the virtues of dispersion of economic power (free markets) and of political decentralization."[10] Indeed, Viner considered himself an "Old-English Liberal" and believed that opposition to monopoly power was a cornerstone of that faith.[11] This echoed Viner's understanding of Adam Smith. According to Viner, Smith believed that private monopoly corrupted the natural order on which all economic phenomena depended.[12]

Simons located his own work squarely within the classical liberal tradition. The opening line of his *Positive Program* asserted: "This is frankly a propagandist tract—a defense of the thesis that traditional liberalism offers . . . the best basis . . . for a program of economic reconstruction."[13] Indeed, Simons staunchly opposed the New Deal in his *Positive Program* precisely because it ignored the insights of Adam Smith, a point he made forcefully in 1933 when he addressed the Social Workers Discussion Group at the University of Chicago. Simons opened his talk with invective directed toward the Roosevelt Administration:

> We have called up all the expletives in condemning the policies of Mr. Hoover; and we need them all and more to express our feelings with regard to the present administration. . . . We now feel obliged to condemn [Roosevelt] for the opposite kind of error—for the willingness to tinker foolhardily with every exposed part of the economic machine. . . . [T]he so-called brain-trust . . . needs nothing so badly as an understanding of Adam Smith.[14]

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8. ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY 292 (Fordham Univ. Press 1995) (1966).

9. University of Chicago Press Papers, "Stock Short Report," Box 422, Folder 1 (Nov. 1, 1949) (on file with Regenstein Library, University of Chicago) [hereinafter UCPP].

10. Henry Simons Papers, Box 8, File 9 (undated) (on file with Regenstein Library, University of Chicago) [hereinafter SPRL]. Although this file is undated, its contents suggest that Simons wrote it in 1945.

11. VPML, *supra* note 5, Box 9, Folder 4 (July 3, 1945).

12. Jacob Viner, *Adam Smith and Laissez Faire*, 35 J. POL. ECON. 198, 198–99 (1927).

13. SIMONS, *supra* note 3, at 40.

14. SPRL, *supra* note 10, Box 13, Folder 2 (notes from talk given June 7, 1933 at the Harmony Cafeteria Social Workers Discussion Group on the New Deal).

Simons is significant because, as we will see below, he influenced the bright young minds of some of the later leaders of the postwar Chicago School with his pamphlet, which many of his colleagues considered the pinnacle of his scholarly work.[15] Consequently, to appreciate the Chicago classical liberals and the postwar Chicago School's shift in attitude regarding concentrations of business power, it is useful to closely look at Simons's *Positive Program*, particularly portions concerning the concentrations of business power.

In the spirit of classical liberalism, Simons observed:

> *The great enemy of democracy is monopoly, in all its forms*: gigantic corporations, trade associations and other agencies for price control, trade-unions—or, in general, organization and concentration of power within functional classes.[16]

For Simons, concentrations of power in the market had perilous ramifications. Concentrations of power posed a threat to the price system, the sine qua non of freedom. Using his monopoly power, a monopolist could cause commodities to be traded at prices that failed to reflect underlying social scarcities. Since a monopoly could exert a tremendous power in order to exploit society and sabotage the economy, the state must, as Simons put it, "destroy" that monopoly.[17] If the state acted otherwise, the consequence, according to Simons, would be "a usurpation of sovereignty" by the monopolists and perhaps even, "a domination of the state by them."[18]

Simons believed that the proliferation of monopoly had led to the Depression and the dissolution of economic efficiency.[19] The societal consequences of the growth in monopoly, according to Simons, were deplorable: "The gains from monopoly organization in general are likely, of course, to accrue predominantly to the strong and to be derived at the expense of the weak."[20] As a result, monopoly power, especially in the hands of large corporations, tended to create gross inequality, both in terms of power and income. Simons maintained:

> An important factor in existing inequality . . . is the gigantic corporation. We may recognize, in the almost unlimited grants of powers

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15. For evidence that Simons's *Positive Program* was the pinnacle of his work, see SPRL, *supra* note 10, and see Aaron Director, *Prefatory Note*, *in* SIMONS, *supra* note 3, at v–vii.

16. SIMONS, *supra* note 3, at 43.

17. *Id.*

18. *Id.*

19. Simons defined "economic efficiency" as "an allocation such that units of every kind of productive service make equally important (valuable) contributions to the social product in all the different uses among which they are transferable." *Id.* at 47.

20. *Id.* at 49.

> to corporate bodies, one of the greatest sins of government against the free-enterprise system. There is . . . no reasonable excuse . . . for hundred-million-dollar corporations, no matter what form their property may take. Even if the much-advertised economies of gigantic financial combinations were real, sound policy would wisely sacrifice these economies to preservation of more economic freedom and equality.[21]

Further, Simons derided anyone who supported the status quo, with its great concentrations of power and gross income inequality: "Surely there is something unlovely, to modern as against medieval minds, about marked inequality of either kind."[22]

Simons called for an "outright dismantling of . . . gigantic corporations" and "persistent prosecution" of producers who organized to restrict output or maintain price.[23] He championed "unqualified repudiation of the so-called 'rule of reason,'" which he claimed granted absurd powers to corporations.[24] He warned of the dangers of private mergers that resulted in monopoly power, "regardless of how reasonably that power may appear to be exercised," and recommended that vertical integration be permitted only when it did not harm the maintenance of effective competition.[25] Simons demanded vigorous antitrust enforcement, maintaining that an antitrust violation ought to be considered "a major crime" and "prosecuted unremittingly" by the Federal Trade Commission, whose power, according to Simons, needed to be increased.[26] In sum, according to Simons, "*there must be a complete 'new deal' with respect to the private corporation*. . . . [The] corporation is simply running away with our economic (and political) system."[27]

Even though Simons acknowledged that the corporate firm served a useful social function by pooling resources in order to take advantage of otherwise unattainable economies of scale, corporate power had to be checked by clearly established rules of the game. Simons's recommendations for corporate reform included: (1) the federal government, not states, should charter corporations, and existing state-granted charters

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21. *Id.* at 52.
22. *Id.* at 51.
23. *Id.* at 58.
24. *Id.*
25. *Id.*
26. In the mid-1940s, Simons also demonstrated his opposition to concentrations of business power when he approved of the role antitrust law played in preventing business monopoly. Indeed, Simons praised the antitrust crusade of Thurman Arnold, head of the United States Antitrust Division in the Department of Justice from 1937 to 1943. Simons had great admiration for Arnold: "One cannot deny that Arnold has done a magnificent job. The record is impressive, even when one makes every allowance for the favorable circumstances which he faced." *Id.* at 100.
27. *Id.* at 58.

should be annulled; (2) a corporation that manufactures or sells goods and services should not have an ownership interest in another corporation; and (3) all corporations should have the amount of property they own limited, which should ensure that no single corporation dominates an industry.[28]

Besides an "outright dismantling" of large corporations, Simons also called for a complete overhaul of the patent system. Simons condemned the patent system because it enabled firms to restrict competition, both actual and potential, and thereby augment their monopoly power. After publishing his *Positive Program*, Simons observed: "It is shameful to have permitted . . . the gross abuse of patent privilege for extortion, exclusion, and output restriction."[29] Simons believed that just as free trade required equal and free access to markets, industrial research required equal and reasonable access, if not wholly free access, to technical knowledge, whether patented or unpatented. Simons especially criticized large corporations because their size enabled them to abuse the status quo patent system to the detriment of smaller firms.

Some of Simons's policy recommendations in his *Positive Program* run counter to classical liberalism, such as his call to gradually nationalize all industries for which competition could not serve as an effective regulatory agency. These recommendations should be understood not as a departure from classical liberalism, but rather as an attempt to address the exceptional economic circumstances of the Great Depression in the spirit of classical liberalism. It is worth noting that Simons himself privately confessed to using a "low, debating trick" when he called for the nationalization of certain industries in his *Positive Program*.[30] Indeed, Simons recommended nationalization because he feared the alternative: extensive private monopoly regulated by government.[31]

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28. It is worth noting that Simons continued to oppose concentrations of business power and to adhere to the policy recommendations about corporations that he made in his *Positive Program* well after writing it. For example, in his 1941 article entitled *For a Free-Market Liberalism*, Simons still endorsed the policy recommendations for corporate reform that he advanced in his *Positive Program*. Henry C. Simons, *For a Free-Market Liberalism*, 8 U. CHI. L. REV. 202 (1941). And in 1943, Simons still maintained a strongly negative view of corporations:

> The efficiency of gigantic corporations is usually a vestigial reputation earned during early, rapid growth—a memory of youth rather than an attribute of maturity. Grown large, they become essentially political bodies, run by lawyers, bankers, and specialized politicians, and persisting mainly to preserve the power of control groups and to reward unnaturally an admittedly rare talent for holding together enterprise aggregations which ought to collapse from excessive size.

SIMONS, *supra* note 3, at 246.

29. SIMONS, *supra* note 3, at 130.

30. SPRL, *supra* note 10, Box 3, File 40 (Dec. 18, 1934).

31. *Id.*

In the conclusion of his pamphlet, Simons emphasized that his anti-monopoly, anti-gigantic-corporation proposals would not only serve to help to maintain liberty, but also prevent another depression from happening in the future. In closing his *Positive Program*, Simons called for the "custodians of the great liberal tradition" to join him in order to stop the movement toward collectivism in the United States.[32] Two young scholars swiftly responded to Simons's call: Allen Wallis and George Stigler. Graduate students at the University of Chicago at that time, Wallis and Stigler wrote an editorial in the *New York Times* entitled *Problems of Competition*. Criticizing a previously published editorial, written by a layperson, they demonstrated their anti-monopoly bias, stating: "It is . . . not correct to say that imperfect competition might by chance 'work out well for the common good'" because convincing evidence demonstrated that "monopolization reduces the national income."[33]

In a different editorial, Stigler and Wallis adduced Simons's *Positive Program* as an exemplar of great scholarship: "[E]conomics enables us to formulate . . . concrete and practical proposals for social policies, such, for example, as that contained in Professor Henry Simons's brilliant and suggestive 'A Positive Program for Laissez Faire.'"[34] Indeed, in his memoirs, Stigler later acknowledged that Simons's *Positive Program* deeply influenced him;[35] until the 1950s, he believed in the need for robust anti-monopoly policies to safeguard competition.

Besides Stigler and Wallis, Milton Friedman was among the admirers of Simons's *Positive Program* closely affiliated with the University of Chicago. Since opposition to concentrations of business power was a central theme of Simons's pamphlet, this suggests that Friedman too adhered to Simons's classical liberal view on this matter. Friedman later stated, "I thought at the time that [Simons's pamphlet] was strongly pro free market in orientation";[36] for Friedman, calling a work "strongly pro free market" amounted to high praise.

Aaron Director also praised Simons's pamphlet highly, which, according to Director, provided the bedrock for Simons's scholarship.[37] Like Simons, Director also attacked concentrations of power in the market. In 1933, when commenting on business power, Director said:

32. SIMONS, *supra* note 3, at 77.

33. Allen Wallis & George Stigler, Letter to the Editor, *Problems of Competition*, N.Y. TIMES, Dec. 7, 1934, at 22.

34. Allen Wallis & George Stigler, Letter to the Editor, *Professor Simons' Book*, N.Y. TIMES, Dec. 24, 1934, at 12.

35. *See generally* GEORGE STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST (1988).

36. Edmund W. Kitch, ed., *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J. L. & ECON. 163, 178 (1983).

37. Director, *supra* note 15.

"Adam Smith said all that needs to be said on this point: 'People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.'"[38] Director's critical attitude toward concentrations of power is not surprising given that Director was Simons's "best friend" and was "considerably influenced [by Simons's] views."[39]

Notably, at this juncture, the later leaders of the postwar Chicago School—Friedman, Director, Stigler, and Wallis—all extolled Simons's *Positive Program* and held Simons in high esteem.

III. ECHOING SIMONS ON THE MONT

As WWII drew to a close, the liberal faith was nearly extinct. Many adherents of liberalism, both in Europe and the United States, thought they needed to create a more robust liberalism to prevent its extinction and thereby countervail the threat of totalitarianism. To accomplish this feat, they organized to investigate and debate aspects of the classical liberal doctrine, including how to deal with business organization, such as business monopoly and corporations. The two organized efforts that involved the Chicago classical liberals were the Mont Pelerin Society and the Free Market Study. First, this Part turns to the Mont Pelerin Society. Then, Part IV addresses the Free Market Study.

The Mont Pelerin Society (MPS), a transnational institutional project, sought to reinvent a liberalism that had some prospect of challenging collectivist doctrines (Keynesianism, institutional reformism, and socialism) ascendant in the immediate postwar period. Led by F. A. Hayek, the Society enabled its members—liberals from America (many who represented the Chicago School) and Europe—to debate and offer each other mutual support. At the first meeting in 1947, its members debated multifarious topics, including "The Future of Germany," "The Problems and Chances of European Federation," "Liberalism and Christianity," and "Modern Historiography and Political Education." The opening session, which was on "'Free' Enterprise or Competitive Order," was, in Hayek's opinion, the one in which the vast majority of the members would be interested.[40]

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38. AARON DIRECTOR, THE ECONOMICS OF TECHNOCRACY 24 (1933).

39. Ronald Coase, *Aaron Director*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 602 (Paul Newman ed., 1998).

40. Aaron Director Papers, Box 1, Folder: Correspondence 1946–1952 (Feb. 14, 1947) (on file with Regenstein Library, University of Chicago) [hereinafter DPRL]. Notably, after the first Mont Pelerin meeting, several charter members drew up a "Draft Statement of Aims" of the Mont Pelerin Society. In the statement, point five demonstrates the pivotal importance of the competitive order to its framers:

For MPS members, the main reason the topic of free enterprise or competitive order loomed large was due to the position of their opponents on the Left, the collectivists. Since the start of the twentieth century, the Left had argued that business monopoly had been expanding throughout the western world and predicted that competition would not be able to stop this inexorable growth. Thus, the economy would soon be inevitably controlled by industrial monopolies.[41] Consequently, the Left claimed that state control of the economy was the only viable solution. This argument threatened the liberal doctrine, especially its tenet that effective competition existed or had the potential to exist.

Director, along with Hayek and Walter Eucken, delivered an address on "'Free' Enterprise or Competitive Order." In many ways, Director's address echoed Simons. Speaking with the sense of urgency that Simons conveyed in his *Positive Program*, Director maintained that harmful state intervention had become regrettably prevalent, that the western world was rapidly shifting from individualism to authority, and that some countries had completed the shift and consequently no longer supported the virtues of individual freedom.[42] Director highlighted the collectivist allegation that because of the tremendous increase in efficiency of large-scale business enterprise and because of the inevitability of monopoly, it would be imprudent to prevent enterprises from becoming monopolies.[43] Director maintained that this allegation contributed to the trend toward central planning and the suppression of individual freedom.[44]

Director emphasized that the substantial amount of state intervention responsible for the destruction of the economy resulted from the fact that liberal doctrine was not robust enough.[45] He observed that, even though the founders of liberalism endeavored to minimize the role of the state, the task of his day was to redefine the role of the state.[46] To begin to address this question, Director focused on the fundamental question of

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> The preservation of an effective competitive order depends upon a proper legal and institutional framework. The existing framework must be considerably modified to make the operation of competition more efficient and beneficial. The precise character of the legal and institutional framework within which competition will work most effectively and which will supplement the working of competition is an urgent problem on which continued exchange of views is required.

R.M. HARTWELL, A HISTORY OF THE MONT PELERIN SOCIETY 49 (1995).

41. *See, e.g.*, LORIE TARSHIS, THE ELEMENTS OF ECONOMICS (1946).

42. Mont Pelerin Society, Records of the 1947 meeting (on file with Liberaal Archief, Ghent, Belgium) [hereinafter MPS1947LA].

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

how the legal framework ought to be altered in order to make competition work effectively—that is, how to design a "competitive order."[47] Director viewed this task as necessary in order to counter the trend toward collectivism.[48] Like Simons, Director asserted that designing an effective competitive order was vital to address the immense problem of concentrations of power.[49]

Director maintained that one central role of the state in the immediate post-WWII period had to be prevention of business monopoly power, thereby promoting freedom by dispersing concentrated market power.[50] While Director acknowledged that international trade substantially checked the growth of industrial monopoly, he admonished that international trade was an insufficient check.[51] Director cited England as an example.[52] He blamed England's overconfidence in the ability of international trade to eliminate monopoly as a significant cause of the relatively large number of monopolies in England.[53] Although he expressed qualified praise for the enforcement of American antitrust law, Director suggested that more vigorous antitrust enforcement was necessary to address the substantial amount of monopoly power.[54]

On the basis of his study of antitrust cases, Director condemned patents without qualification as a means of solidifying and extending monopoly power.[55] From 1939 to 1947, the Supreme Court had condemned the use of patents to monopolize industry or stifle competition in nearly a dozen antitrust cases.[56] To address the patent problem, according to Director, the patent system needed to be overhauled. For example, he recommended that the period during which a patent protected its holder be significantly reduced.[57]

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47. *Id.*

48. *Id.*

49. To create a working competitive order, Director, like Simons, advocated state action on three fronts: (1) preventing private monopoly; (2) controlling combinations among workers and businesses; and (3) providing monetary stability. Because of the scope of issues examined in this Essay, only (1) and (2) will be addressed below.

50. MPS1947LA, *supra* note 42.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *See* Int'l Salt Co. v. United States, 332 U.S. 392, 395–96 (1947); United States v. Nat'l Lead Co., 332 U.S. 319, 327–28 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386, 406–07 (1945); Mercoid Corp. v. Minneapolis-Honeywell Regulator Co., 320 U.S. 680, 684 (1944); Mercoid Corp. v. Mid-Cont'l Inv. Co., 320 U.S. 661, 666 (1944); United States v. Masonite Corp., 316 U.S. 265, 277 (1942); United States v. Univis Lens Co., 316 U.S. 241, 250 (1942); B. B. Chem. Co. v. Ellis, 314 U.S. 495, 497–98 (1942); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 491–92 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 452–53 (1940).

57. MPS1947LA, *supra* note 42, at 79.

Director also blamed the status quo corporate law as a primary cause of the concentration of power in the economy. In the spirit of Simons, Director took a strong line and called for the removal of the "unlimited power of corporations."[58] To accomplish this feat, Director suggested that radical corporate reform was necessary. Echoing Simons's ideas in his *Positive Program*, Director recommended limiting the size of corporations, eliminating interlocking directorates, forbidding harmful mergers, circumscribing the scope of corporate activities, and more.

At the time of his address to the MPS, Director shared Simons's disdain for concentrated power because it ultimately undermined freedom. In short, Director was convinced that industrial monopoly needed to be prevented, and he harbored strong reservations against large corporations. His attitude, however, as well as that of other key figures of Chicago School, would begin to shift by the early 1950s.

IV. THE FREE MARKET STUDY: CHICAGO'S SHIFTING POSITION ON CONCENTRATIONS OF BUSINESS POWER

A. Classical Liberalism's Continued Dominance in the Early Years

In America, the central base for the reconstitution of liberalism was the University of Chicago Law School. Hayek had acquired funding from a right-wing foundation, the Volker Fund, to set up a research project called the Free Market Study (FMS) (1946–1952).[59] The MPS and the FMS were joined at the hip at birth—both sought to investigate a number of legal and policy areas in order to move toward effective competition.[60]

In the fall of 1946, the FMS commenced because of the persistent efforts of Hayek and the work of Director and Simons.[61] Its members were Frank Knight, Milton Friedman, Edward Levi, Garfield Cox, Theodore Schultz, and Wilbur Katz, and its leader was Director. In an outline he drew up for the FMS, Director, echoing Simons, called for limitations on corporate size and for federal incorporation to be required, for the successes and failures of antitrust law to be investigated, and for patent policy to be reconsidered. Consequently, the FMS studied numerous issues concerning the concentrations of power.

58. *Id.*

59. For a detailed account on how the FMS came to fruition, see Robert Van Horn & Philip Mirowski, *The Rise of the Chicago School of Economics and the Birth of Neoliberalism*, *in* THE ROAD FROM MONT PELERIN 139 (P. Mirowski & D. Plehwe eds., 2009).

60. *Id.*

61. For the details of the formation of the FMS, see *id.*

During the early years of the FMS (1946–1949), its members were uncertain how exactly to reinvigorate the liberal doctrine in order to undermine collectivism. Like Director during his 1947 Mont Pelerin address, FMS members, as we will see below, echoed Chicago classical liberalism, expressing concerns about concentrations of power, including industrial monopoly. The FMS convened regularly and enabled its members to discuss and debate how to reformulate liberalism. Because of the perceived strength of collectivism, the FMS undertook its task with a sense of urgency. Indeed, Hayek, in 1949, said: "The intellectual revival of liberalism is already under way. . . . Will it be in time?"[62]

Like in his 1947 MPS address, Director explicitly conveyed at the early meetings that the liberal doctrine needed to be reconstituted. At the second meeting of the FMS, Director distributed a research proposal entitled "A Program of Factual Research into Questions Basic to the Formulation of a Liberal Economic Policy." Through empirical investigation, Director sought to find a more robust liberal policy and thereby counterattack collectivism.

Although the FMS could have pursued numerous research avenues, after the first couple of meetings, it quickly narrowed its focus to issues concerning monopoly and corporations—i.e., concentrations of business power. This suggests that the FMS, like the opening session of the MPS, sought to respond to the collectivists' view of business monopoly.

In mid-November of 1946, the FMS addressed the issue of industrial concentration. Director essentially offered two alternative, competing explanations for the existence of concentrations of business power: (1) the status quo level of concentration was politically objectionable because it perpetuated inequality and promoted inefficiency; or (2) the existing level of concentration was, in the main, competitive and resulted in the most efficacious use of resources.[63] The former echoed Simons and Director's 1947 MPS lecture; the latter gave voice to the view typically associated with the postwar Chicago School—i.e., concentrations of business power are relatively benign. Because Director gave his MPS address less than six months after he proffered these two explanations, it is reasonable to infer that he espoused the first of the two explanations at this time. That is, he saw business monopoly as the problem as opposed to the solution.

62. F. A. Hayek, *The Intellectuals and Socialism*, 16 U. CHI. L. REV. 417, 433 (1949).

63. Theodore Schultz Papers, Box 39 (addenda), Folder: Free Market Study (Nov. 15, 1946) (on file with Regenstein Library, University of Chicago) [hereinafter TSPR].

Before the 1947 MPS meeting, the FMS also considered the topic of barriers to entry.[64] Even though the Chicago School became known for claiming that barriers to entry erected by businesses themselves were essentially a myth,[65] Director and the other members took the notion of barriers to entry seriously enough at this juncture to discuss and debate it. Director pointed out that many barriers to entry had been created by government to supposedly further consumer interest.[66] Instead of blaming the government for being captured by corporations, however, he suggested corporations were the source of the problem.[67] In doing so, Director reasoned in accord with Chicago classical liberalism because, like he did in 1933, he viewed corporations with suspicion and suggested concentrations of business power were harmful to the economy.[68]

Besides Director, other members of the FMS, such as Levi and Friedman, also voiced concerns about concentrations of business power during early years of the FMS.[69] Levi revealed his opposition to concentrations of power through his activities outside of the FMS. In 1947, at a Chicago Round Table radio discussion, Levi spoke with Wendell Berge and James Martin, who Levi called "valiant fighters against monopoly," who were "willing to go against size as such and to see to it that the American way of life—the competitive way—is preserved."[70] Berge was the former Assistant Attorney General of the Antitrust Division, and Martin was chief of the Decartelization Branch of the United States Office of Military Government for Germany. Together they discussed the issue of monopoly and antitrust law enforcement in the United States and in Germany.[71] They lamented the continuing presence of concentrations of business power. Levi probably best captured their concerns about the

64. Conventionally, these barriers included: the availability of raw resources; unfair competition—like boycotts or predatory activities; the control of methods or means of distribution—like exclusive dealerships or advertising trademarks; and the control over credit resources.

65. Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213, 226–27 (1985).

66. TSPR, *supra* note 63, Box 39 (addenda), Folder: Free Market Study (Feb. 26, 1947).

67. *Id.*

68. This stands in stark contrast with the later Chicago position, which states that corporations capture the regulatory process, and hence government cannot be trusted to devise economic policy.

69. Since little is known about Levi relative to Friedman, it is worth saying a few words about him here. Levi received his law degree from the University of Chicago in 1935. He received his J.S.D. degree from Yale in 1938. From 1940 to 1945, Levi served as Special Assistant to the Attorney General, and Levi worked under Thurmond Arnold in the Antitrust Division of the Department of Justice. Coming to the University of Chicago Law School in 1946, Levi worked as a professor. From 1950 to 1962, Levi served as Dean of the University of Chicago Law School, becoming President of the University of Chicago in 1968.

70. Edward Hirsch Levi, Wendell Berge & James Martin, *Are We Against Monopoly*, 1 U. CHI. ROUND TABLE PAMPHLETS 1, 19 (1947).

71. *Id.* at 2.

United States when he stated, "there is enormous concentration in the American economy today and an enormous amount of monopoly."[72] In a 1947 article, Levi expressed similar concerns about concentration in the United States economy, attributing its cause partly to ineffectual antitrust law enforcement.[73]

Like Levi, Friedman also expressed concerns. At a meeting in early January of 1947, Friedman, in the spirit of Chicago classical liberalism, proposed that the FMS should investigate the issue of the separation of corporate ownership and corporate control.[74] He emphasized the social disadvantages that stemmed from the separation of ownership from control, including the fact that this separation facilitated the securing of monopoly power.[75] In response to this problem, Friedman prescribed increasing the ownership interest of the corporate directors: "By identifying ownership with control, the proposal would eliminate many of the present abuses of the corporate form. It would immediately eliminate holding companies . . . [and] it would make mergers more difficult."[76] Friedman hoped the result would break up large corporations and lessen industrial monopoly.

B. The Rise of Neoliberalism in the Later Years

During the latter part of the FMS (1950–1952), attitudes toward concentrations of business power shifted, and a new form of liberalism began to emerge. In accord with Director's mandate that the FMS investigate the facts taken for granted by liberals, the FMS funded empirical investigations, including one by Warren Nutter.[77] Writing his dissertation in association with the FMS and under the supervision of Director, O.H. Brownlee, and Milton Friedman, Nutter undertook an empirical study of the extent of business monopoly in the United States and found that there had been no significant increase in business monopoly since 1900.[78] Since the Left had maintained that monopoly had been increasing by leaps and bounds, Nutter's investigation dealt a sharp blow by suggesting that the Left had exaggerated the growth of monopoly and thus was mistaken about its inevitability.

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72. *Id.* at 3.

73. Edward H. Levi, *The Antitrust Laws and Monopoly*, 14 U. CHI. L. REV. 153, 160, 182 (1947).

74. TSPR, *supra* note 63, Box 39 (addenda), Folder: Free Market Study (undated).

75. *Id.*

76. Robert Van Horn, *Reinventing Monopoly and the Role of Corporations*, *in* THE ROAD FROM MONT PELERIN, *supra* note 59, at 204, 215 (quoting Milton Friedman).

77. *See* WARREN G. NUTTER, THE EXTENT OF ENTERPRISE MONOPOLY IN THE UNITED STATES, 1899–1939 (1951).

78. *Id.*

This reorientation toward concentrations of business power first showed up in Director's review of Charles Lindblom's *Unions and Capitalism*.[79] Director maintained that the market system, due to the "corroding influence of competition," tended to "destroy" monopoly in all its forms.[80] This sharply contrasted with Simons, who feared monopoly in all its forms would eventually undermine democracy unless corporate reform and vigorous antitrust law enforcement were undertaken. Moreover, Director's position starkly departed from his own position in his 1947 MPS address. In 1950, therefore, Director departed from the Chicago classical liberal position and showed a new faith in the power of competition by suggesting concentrations of business power were relatively benign.

In 1951, in consonance with his changed attitude toward business monopoly, Director expressed his revised views of corporations. According to Director, the corporate form was ideal because it did not contribute toward business monopoly and because it approximated the impersonal ideal of the market.[81] Director maintained that competitive forces could sufficiently control corporations, even large ones.[82] Furthermore, Director, in contrast to Friedman's 1947 concern, asserted that although the separation of corporate ownership and corporate control did seem to be problematic, the capital market tended to ameliorate this divergence.[83] Therefore, Director sharply departed from Simons's mandate (and his own in 1947) that radical corporate reform needed to be undertaken to check the power of large corporations. In sum, for Director, concentrated markets tended to be efficient, regardless of the size of the corporations.

Less than five years after the FMS began, Director's 1946 speculation about the power of competition—i.e., "monopoly tends to disappear and competition to revive even where once dormant"—became, for the Chicago School, an assertion of fact; competition undermines all forms of monopoly. This marked a crucial watershed in the emergence of a new liberalism (or neoliberalism) at Chicago.

As the FMS ended, its sister project, the Antitrust Project, began in 1952, and the reconsiderations of liberalism proceeded. Director headed the project; Edward Levi assisted. The members included John McGee, William Letwin, Robert Bork, and Ward Bowman. The Antitrust Project focused on issues of monopoly, select areas of antitrust law, and the his-

79. *See* Aaron Director, *Unions and Capitalism*, 18 U. CHI. L. REV. 164 (1950) (book review).

80. *Id.* at 165–66.

81. Aaron Director, *Conference on Corporation Law and Finance*, 8 U. CHI. L. SCH. CONF. SERIES 3, 74–77 (1951).

82. *Id.*

83. *Id.*

tory of the Sherman Act.[84] It investigated these topics in light of the conclusions of the FMS. Moreover, in the spirit of the FMS's attempt to influence policy, it investigated these topics with a critical eye toward U.S. antitrust law precedent, and many of the conclusions of the Antitrust Project contravened the conclusions of the courts. In 1954, for instance, Bork, in contrast to Director's classical liberal concern in 1947 about the excessive size of corporations and their concentrated economic power, maintained that "[vertical mergers added] nothing to monopoly power."[85] This Chicago neoliberal position suggested, therefore, that vertical mergers should always be legal. Consequently, Bork suggested that one aspect of antitrust law precedent, which required an investigation of motives of a vertical merger in order to make a determination of its legality, was not only extraneous, but also erroneous.[86]

Bork's article fell under the Antitrust Project's umbrella article and manifesto, *Law and the Future: Trade Regulation*, by Director and Levi, which they published in 1956.[87] In this article, Director and Levi demonstrated skepticism about the extension of monopoly power through the use of exclusionary practices, such as tying arrangements, and a concomitant disdain for adjudication or legislation that regarded these practices as per se deleterious or as per se illegal.[88] Director and Levi suggested that exclusionary practices, including ones that involved patents, were no worse than harmless price discrimination and served as either competitive tactics equally available to all businesses or means of maximizing returns on an established market position. Notably, Bork and Bowman concurred with this description.[89] They asserted, "Director's analysis indicates that absent special factors that have not been shown to exist, so-called exclusionary practices are not means of injuring the competitive process." Thus, Director and Levi maintained that when the courts deemed it necessary to consider the legality of an exclusionary practice, they should use a rule of reason analysis, not a per se approach. This sharply contrasted with Simons who claimed a rule of reason analysis granted absurd powers to corporations.

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84. For a list of the articles and books that the Antitrust Project published and that it caused to be published, see G.L. Priest, *The Rise of Law and Economics: A Memoir of the Early Years*, *in* THE ORIGINS OF LAW AND ECONOMICS 353–54 (F. Parisi & C.K. Rowley eds. 2005).

85. Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157, 195 (1954).

86. *Id.*

87. *See* HERBERT L. PACKARD, THE STATE OF RESEARCH IN ANTITRUST LAW 55 (1963); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 NW. U. L. REV. 281, 281–96 (1956).

88. PACKARD, *supra* note 87, at 56.

89. Robert H. Bork & Ward S. Bowman, Jr., *The Crisis in Antitrust*, 65 COLUM. L. REV. 363, 366 (1965).

Thus, the later years of the FMS, as well as the early years of the Antitrust Project, demonstrated a significant departure from the Chicago School's early suspicion of concentrations of business power.

V. CONCLUSION

In 1959, about fifteen years after Simons's untimely death in 1946, Viner delivered the second annual "Henry Simons Lecture."[90] In the course of his lecture, Viner again demonstrated his hostility toward big business and concentrations of power, and he rooted this hostility in the tradition of Adam Smith:

> The classical exponents of laissez faire always qualified their enthusiasm for the free market by the condition that it should be a competitive market. Adam Smith . . . intensely disliked monopoly in all its forms. He regarded merchants as perpetual seekers of monopoly power. Also, because he thought that in all but routine activities they would inevitably be inefficient, he disliked all large-scale privately owned companies.[91]

In light of this classical liberal view of monopoly, Viner lamented the state of the contemporary market structure: "[M]onopoly is so prevalent in the markets of the western world today."[92] Indeed, Viner claimed that anyone who championed the virtues of the competitive market as if it existed or would exist in the future egregiously overlooked the ubiquity of monopoly. Viner called for a challenge to monopoly practices: "Given the prevalence or danger of substantial intrusion of monopoly into the market, the logic of the laissez faire defense of the market against state-intervention collapses and there is called for instead, by its very logic, state-suppression or state-regulation of monopoly practices."[93]

Even though Viner advocated the suppression and regulation of monopoly, and thereby indicated that the government needed to adopt a positive role in the economy, he still considered himself a proponent of a classical liberalism or, in his words, an "Old-English Liberal[ism]."[94] Indeed, Viner indicated that classical liberals sometimes had to advocate a positive state role "in the case of emergency or abnormal conditions."[95] Viner's classical liberal opposition to monopoly power motivated his call to positive state action. Likewise, Viner suggested that Simons's *Positive*

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90. The Chicago Law School established a lecture series in honor of Henry Simons, and George Stigler gave the premier lecture. *See* VPML, *supra* note 5, Box 8, Folder 21 (Oct. 22, 1958).

91. Jacob Viner, *The Intellectual History of Laissez Faire*, 3 J.L. & ECON. 45, 65 (1960).

92. *Id.* at 66.

93. *Id.* at 67.

94. *Id.*

95. *Id.* at 46.

Program in 1934 was in the spirit of classical liberalism and was an attempt to use positive state action to address an economic emergency, the Great Depression, which Simons had claimed stemmed to a large extent from large corporations and monopoly power.[96]

Contrasting Viner's conception of concentrations of business power with the post-1950 perception of Director and Friedman is instructive. In the 1950s and early 1960s, Director and Friedman trumpeted the benefits of the competitive market. Indeed, in *Capitalism and Freedom*, Friedman echoed the conclusion of the FMS that the extent of the industrial monopoly was not a serious problem, and he claimed that because of this and because he presumed that large corporations approximated the impersonal ideal of the market there was, in his words, "[a] wide . . . range of . . . industries for which it is appropriate to treat the economy as if it were competitive."[97] In his 1959 address, Viner, however, viewed proclamations of the benefits of free competitive markets and statements that concentrations of business power were not pervasive as pernicious. Commenting on the enormity of the concentration of power in the economy, Viner said: "[D]iscussion of the merits of the free competitive market as if that were what we were living with or were at all likely to have the good fortune to live with in the future seem to me academic in the only pejorative sense of that adjective."[98] The contrast between Viner's perception of business monopoly and Friedman's perception of it is stark because Viner remained rooted in the classical liberal tradition of Chicago School economics and never adopted the Chicago neoliberal position that large corporations and industrial monopoly were relatively benign.

In 1983, about twenty years after Viner delivered his Chicago Law School speech, Director, Friedman, Stigler, and other members of the Chicago School gathered to reflect on the rise of the postwar Chicago School.[99] During their colloquy, they conversed about Simons's *Positive Program*. Even though Director, Friedman, Stigler, and Wallis all had extolled Simons's pamphlet prior to the rise of Chicago neoliberalism, they offered Simons's work only faint applause—if any applause at all. If they had discussed Viner's Chicago Law School address, they, in all likelihood, would have frowned upon their former teacher's strong opposition to concentrations of power and his endorsement of Simons's *Positive Program*. Much had changed since the time that they were all Chicago classical liberals.

96. *See id.* at 67.
97. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 120 (1962).
98. Viner, *supra* note 91, at 66.
99. *See* Kitch, *supra* note 36.