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The Chicago School’s Limited Influence on International Antitrust

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The Chicago School’s Limited Influence on International Antitrust

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Abstract. Beginning in the 1950’s, a group of scholars primarily associated with the University of Chicago began to challenge many of the fundamental tenants of antitrust law. This movement—which became known as the Chicago School of Antitrust Analysis—profoundly altered the course of American antitrust scholarship, regulation, and enforcement. What is not known, however, is the degree to which Chicago School ideas influenced the antitrust regimes of other countries. By leveraging new datasets on antitrust laws and enforcement around the world, we empirically explore whether ideas embraced by the Chicago School diffused internationally. Our analysis illustrates that many ideas explicitly rejected by the Chicago School—like using antitrust law to promote goals beyond efficiency or regulate unilateral conduct—are common features of antitrust regimes in other countries. We also provide suggestive evidence that the influence of the antitrust revolution launched by the Chicago School has been more limited outside of the United States.
I. INTRODUCTION

The rise of law and economics introduced profound changes in a wide range of legal fields. In few fields, however, did the movement have a more profound effect than in antitrust. The law and economics movement led antitrust law and scholarship in the US to become increasingly informed by economic theories. Formalistic per se rules that used to characterize US antitrust doctrine gave way to a case-by-case assessment of the economic effects of firm conduct. As a result, antitrust enforcement increasingly began to rely on economic experts, theoretical models, and econometrics studies that are now all but mandatory in antitrust litigation.1

This shift in the US antitrust policy marked the triumph of ideas championed by scholars associated with the University of Chicago.2 The so-called “Chicago School of Antitrust Analysis”3 (hereinafter “Chicago School” or “CS”) used rigorous micro-econometric analysis to change enforcers’ focus from economic power to economic incentives. This view, combined with a more conservative judiciary, led to a gradual reversal of many previously established antitrust doctrines4—from the prosecution of vertical mergers5 to the per se treatment of several forms of unilateral conduct.6 Although antitrust scholars may disagree on the appropriateness of the Chicago School ideas, few would question the profound influence those ideas have had on US antitrust policy.

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2 See, e.g., Andrew I. Gavil, William E. Kovacic, & Jonathan B. Baker, Antitrust Law in Perspective: Cases, Concepts, and Problems in Competition Policy 67 (2008) (noting how the Chicago School “altered the terms of the antitrust debate” to include price theory and concepts such as market power, entry and efficiency).


5 An example is the Supreme Court’s decision in Brown Shoe Co. v. United States, 370 U.S. 294 (1962). In that case, the Court enjoined a merger where the combined vertical market share of both companies did not reach 10% of the national market, and, as evidence of potential anticompetitive harm, the Court noted that in 118 cities the combined horizontal market share of companies exceed 5% but was not above 20%.

An open question remains, however, whether the CS has influenced the antitrust policies of other countries. Anecdotal examples indicate a complex picture. For instance, several countries recognize an efficiency defense—i.e., justifications used to approve an otherwise anti-competitive merger because of the various efficiencies the merger is expected to generate—in assessing the competitive effects of mergers. This practice is very much in line with the CS’ ideas. But at the same time, enforcement against unilateral conduct of dominant firms remains vigorous in many jurisdictions (at least when compared to the US), including the EU. This practice is in tension with the CS view that unilateral conduct rarely calls for an antitrust intervention. Moreover, Chicago Scholars also strongly condemned the use of antitrust laws for redistributive ends or the promotion of industrial policy. For them, it would be disconcerting to learn that several countries list the promotion of employment or of national industries as a goal of antitrust laws or evaluate mergers based on whether they advance “public interest.”

In this paper, we seek to go beyond these anecdotes and provide some concrete data on the CS’ international influence. To do so, we leverage two recently created datasets on antitrust regimes around the world. The first—the Comparative Competition Law Dataset—provides detailed coding on the provisions of the antitrust statutes of 131 jurisdictions from their first adoption through 2010. The second—the Comparative Competition Enforcement Dataset—provides data on the enforcement resources and activities of 112 antitrust agencies between 1990 and 2010. Together, these datasets provide a detailed picture of the world’s antitrust regimes across countries and over time.

As these data illustrate, since the CS’ antitrust revolution, the number of countries with antitrust regimes has soared. Figure 1 shows that in 1979, at the end of period where the CS’ most prominent intellectual contributions were made, just 41 countries had an antitrust regime in place. But by 2010, 127 countries had adopted an antitrust regime. Our data thus allows us to examine whether these 86 antitrust regimes that were adopted after the CS’s prominence in the US

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9 See infra Part II.B. for an explanation of why we designate this window as the height of the Chicago School.
incorporate the insights of the CS into their regime, and also whether the countries that already had an antitrust regime amended their laws to reflect CS theories.

**Figure 1: Countries with Antitrust Statutes, 1900 to 2010**

We specifically use these datasets to examine the influence of the CS in three areas. First, we examine the goals and exemptions that countries have codified in their antitrust statutes. This analysis reveals that many countries have explicitly endorsed ideas in their antitrust laws that are antithetical to CS theories. For instance, by 2010, 49 percent of countries with antitrust regimes had explicitly codified goals in their antitrust laws unrelated to efficiency—including the protection of small companies or promotion of exports. Second, we examine the provisions of countries’ antitrust regimes that regulate unilateral conduct. These data reveal that a majority of countries with antitrust regimes prohibited several kinds of conduct that CS scholars had argued were unlikely to reduce efficiency. For instance, in 2010, 63 percent of countries with antitrust regimes prohibited unfair pricing. Moreover, in 2010, there were more investigations opened around the world into abuses of dominance than in cartels. Third, we examine merger review policies around the world. Again, this analysis illustrates that many countries with merger review regimes have laws that incorporate ideas that were rejected by the CS. For example, by 2010, 42
percent of countries with antitrust regimes had merger defenses unrelated to efficiency—including the promotion of general “public interest”.

That said, from the outset, it is important to acknowledge that there are several reasons for why the global influence of the CS is difficult to quantify. First, the CS’ ideas are perhaps best understood as a commitment to a certain method of antitrust enforcement rather than an agreement on specific policy outcomes. This analytical method—including the general endorsement of an effects-based analysis of competitive conduct—may not always have been codified in antitrust laws the way a clear rule or policy prescription would be, making it difficult to detect. Second, the ideas associated with the Chicago School are not always easy to theoretically or empirically separate from other schools of thought that endorse economic analysis of antitrust laws. As a result, our evidence may be best understood as capturing the diffusion of economic analysis of antitrust laws generally as opposed to the diffusion of the Chicago School ideas specifically. Finally, the primary data we use study the influence of the CS is based on countries’ antitrust statutes, which do not always reflect how laws are enforced in practice. These limitations may lead us to either under- or overestimate the extent of CS’ global influence.

Given these limitations, we are unlikely to settle the debate on what has been the CS’ contribution to international antitrust. But we hope that our results paint a more nuanced view than currently exists of the CS’ thrust. Specifically, we hope to shed light on whether the CS remained largely a US phenomenon, with a limited ability to shape antitrust thinking abroad, or whether its ideas diffused more broadly. We also hope that our results help enlighten the ongoing debate on the potential need to re-assess antitrust enforcement, and the CS, in countries other than the US.

This paper proceeds as follows. Part II summarizes the CS’ main ideas. Part III discusses existing evidence on the international influence of the CS and the difficulties that arise when trying to empirically measure this influence. Part IV describes our data and empirical findings. Part V briefly concludes.

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10 Part III.C. more extensively discusses the limitations of our approach.

II. THE CHICAGO SCHOOL OF ANTITRUST

A. Background

The so-called Chicago School is the result of decades of academic scholarship on antitrust law and policy by professors associated with the economics and law departments of the University of Chicago. While it is hard to pinpoint an exact beginning and end, the CS is said to have started forming around the 1950s, reflecting the teaching and influence of the University of Chicago law professor Aaron Director and the ideas developed by his students and colleagues, including George Stigler, Harold Demsetz, Ward Bowman, Richard Bork, John McGee, Lester Telster, Richard Posner, and Frank Easterbrook. More than articulating a cohesive theory on antitrust policy, Director instigated his peers to use microeconomics and price theory to challenge what were, at the time, key antitrust doctrines related to tie-ins, predatory pricing, and vertical conduct like resale price maintenance and exclusive dealing. The CS advocated that scholars and courts should focus on the incentives of economic agents and not on the structure of the market to determine the competitive effects of mergers and firm conduct. This view directly challenged the more structuralist view associated with the so-called Harvard School that was concerned with market concentration. By doing so, the CS promoted a more benign view of corporate conduct, one that warranted less antitrust intervention based on a belief that markets would largely self-correct while governmental intervention could entrench monopolies.

The CS’ influence peaked in the 1970s and 1980s. The enactment of new federal Merger Guidelines that largely reflected the teachings of CS scholars demonstrated their profound impact on the work done by the administrative agencies tasked with enforcing antitrust laws. At the same time, a more conservative US judiciary also started to incorporate CS ideas into US case law by

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14 See Frank H. Easterbrook, Workable Antitrust Policy, 84 Mich. L. Rev. 1696, 1698 (1985); MELAMED ET AL., supra note XX, at 51 (reviewing antitrust at the time); GAVIL ET AL., supra note XX, at 70 (discussing the shift from a structuralist view to an incentives view).

reverting or qualifying important antitrust doctrines, such as those around intrabrand vertical restraints or tying.\textsuperscript{16}

The CS’ influence in the US, however, started to wane around the 1990s and 2000s, at least in academia.\textsuperscript{17} Around that time, other scholars began to combine CS’s own methodological foundations with a more in-depth use of game theory to challenge, or at least qualify, some of its basic tenets like rationales for market exclusion and the Single Monopoly Profit Theorem.\textsuperscript{18} This criticism of the CS ideas gave birth to what some have called the Post-Chicago School, which combines industrial organization, game-theory, and empirical tools to measure the extent to which firms compete with one another.\textsuperscript{19}

**B. Chicago School Approach to Antitrust**

The Chicago School approach to antitrust is difficult to summarize because there is variation in the ideas embraced by various scholars associated with the School.\textsuperscript{20} To simplify, we focus on briefly explaining the basic arguments of Judges Robert Bork and Richard Posner in three of their seminal works: Bork’s *Antitrust Paradox*, Posner’s *Antitrust Law: an Economic Perspective*, and Posner’s *The Chicago School of Antitrust Analysis*.\textsuperscript{21} We choose to focus on the works of Bork and Posner not only because of their prominent role as judges who applied the CS teachings to

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\textsuperscript{17} The CS still had important wins in the judiciary, such as the cases around Resale Price Maintenance. See *State Oil Co. v. Khan*, 522 U.S. 3 (1997); *Leegin Creative Leather Products v. PSKS*, Inc., 551 U.S. 877 (2007).


\textsuperscript{19} See Herbert Hovenkamp, *Antitrust Policy After Chicago*, MICH. L. REV. 213 (1985) (discussing how the Chicago School models did not consider appropriately real world problems and ignored many forms of strategic behavior). See also GAVIL ET AL., supra note XX, at 76. For a review on the problems of these “School” divisions, see Kovacic, supra note XX.


concrete antitrust cases, but also because of their tendency to articulate largely similar and comprehensive views on how the CS should impact most fields of antitrust policy.\textsuperscript{22}

According to the CS, the main goal of antitrust is the promotion of consumer welfare, which Bork understood as general or total welfare. The CS ignores “small business welfare,”\textsuperscript{23} and the protection of competition for competition’s sake.\textsuperscript{24} For instance, it decried the Robinson-Patman Act as an example of “small-business antitrust” that represented un-sound redistributive antitrust policy.\textsuperscript{25} More broadly, antitrust policy should not concern itself with redistributing surplus between consumers and firms or among different firms. This type of redistribution is better left for private bargaining, markets, and Congress.\textsuperscript{26} Nor should antitrust policy be deployed for the pursuit of industrial policy.

For CS scholars, price theory is the proper lens to study the competitive behavior of firms.\textsuperscript{27} Courts should not infer market power from market shares (save at very high concentration levels), and should demonstrate market power and consumer harm in order to justify an antitrust intervention. Bork in particular was against “inception” theories—that is, Courts being able to identify anticompetitive conduct before it took place.\textsuperscript{28} The Chicago view was that false positives are costlier than false negatives because the market has strong incentives to self-correct, while speculative government intervention may lead to consumer harm and a waste of taxpayer money.\textsuperscript{29}

This enforcement philosophy led the CS to advocate a minimalist antitrust policy that focuses on egregious competitive restraints that have no efficiency justification.\textsuperscript{30} The goal was to fight deadweight loss; in particular, output restrictions that raise consumer prices in an artificial

\textsuperscript{22} It is important to acknowledge that Bork and Posner did disagree on important topics, like how to characterize predatory pricing or the dangers of parallel conduct.

\textsuperscript{23} BORK, supra note XX, at 17, 51.

\textsuperscript{24} Id. at 54, 58.

\textsuperscript{25} Id. at 64, 386.

\textsuperscript{26} Id. at 55-56. Bork specifically rejects granting judges the power to define trade-offs in terms of gainers or losers of economic surplus. Id. at 80 (“striking the balance is essentially a legislative task”).

\textsuperscript{27} Posner, supra note XX, at 932. BORK, supra note XX, at 117.

\textsuperscript{28} Id. at 17, 48; BORK, supra note XX, at 180.

\textsuperscript{29} Posner, supra note XX, at 932. BORK, supra note XX, at 133.

\textsuperscript{30} Id. at 30, 265.
manner.\textsuperscript{31} Antitrust enforcement should therefore focus on dismantling cartels and preventing large horizontal mergers (\textit{i.e.}, merger between competitors) that lead to inefficient monopolies or that facilitate collusion.\textsuperscript{32} The CS also warned against using the intent to exclude competitors as a proxy for a competition violation, as all businesses have the intent to exclude their rivals,\textsuperscript{33} and argued that consumers would typically benefit from the exclusion of inefficient rivals.\textsuperscript{34}

The CS’s antitrust minimalism was supported by the School’s resounding faith in efficient business conduct and self-correcting markets. The CS promoted the view that most corporate conduct was efficient, further justifying the narrow scope for government intervention. This view subsequently translated into an expanded use of efficiency defense for all forms of mergers and unilateral conduct.\textsuperscript{35} Similarly, CS emphasized the ability of new entrants to discipline most types of anti-competitive behavior. The CS attacked an expansive view of barriers to entry in markets, arguing that such barriers are less common than conventionally envisioned.\textsuperscript{36}

The presumption that mergers generally lead to efficiencies lent support for a narrow merger regime limited to reviewing large, horizontal mergers.\textsuperscript{37} The CS was not concerned about simple increases in market shares (save at very high concentration levels).\textsuperscript{38} The CS also criticized American courts for neglecting this efficiency justification, in particular the Supreme Court’s \textit{Brown Shoe} and \textit{Von Grocery} decisions.\textsuperscript{39} The CS scholars defended vertical mergers as generally efficient,

\textsuperscript{31} \textit{Id.} at 21-22, 35, 122-123.
\textsuperscript{32} Posner, \textit{supra} note XX, at 928, 933.
\textsuperscript{33} BORK, \textit{supra} note XX, at 39.
\textsuperscript{34} BORK, \textit{supra} note XX, at 56.
\textsuperscript{35} BORK, \textit{supra} note XX, at 19, 25-26, 88, 111. Here some clarification is needed. Antitrust initially included efficiency defenses, but the Brandeis Supreme Court movement largely set them aside. In addition, Bork was initially against an efficiency defense in mergers as proposed by Williamson in Oliver E. Williamson, \textit{Economies as an Antitrust Defense: The Welfare Tradeoffs}, 58 \textit{AM. ECON. REV.} 18 (1968), arguing that Courts would not be able to properly measure it. For him, efficiency should be largely presumed as a result of mergers. Nonetheless, we believe that CS scholars were largely responsible for bringing discussions on the efficiency of mergers back to antitrust policy, similarly to what they have done to discussions around efficiency in many other areas.
\textsuperscript{36} \textit{Id.} at 311, 313, 314, 328, 323. In particular, the CS argued that economies of scale, product differentiation, expenditures on advertising and promotion, rebates, and dealership deals and capital requirements in general do not constitute entry barriers
\textsuperscript{37} \textit{Id.} at 40-41.
\textsuperscript{38} BORK, \textit{supra} note XX, at 180-181. That is because many oligopolies were seen as actually competitive.
\textsuperscript{39} \textit{Id.} at 22, 28, 199-204 (attacking \textit{Brown Shoe Co. v. United States}, 370 U.S. 294 (1962) and \textit{United States v. Von’s Grocery Co.}, 384 U.S. 270 (1966)).
asserting that they rarely lead to foreclosure concerns.\textsuperscript{40} Similarly, conglomerate mergers were seen as typically efficient, warranting little antitrust intervention.\textsuperscript{41}

CS scholars further believed that firms cannot generally obtain or enhance monopoly power through unilateral action. This is because, in most cases, firms would just preserve or gain market-share at the expense of profits.\textsuperscript{42} In addition, antitrust law should not be concerned with attacking companies in monopolized or oligopolized industries when their size has been achieved by internal growth as larger firms are normally more efficient than smaller ones.\textsuperscript{43} As previously noted, they also viewed oligopolies as largely competitive.\textsuperscript{44} Bork goes as far as to say that exclusionary conduct by dominant firms is a class of illegal behavior that does not exist.\textsuperscript{45} For example, predatory pricing is generally pro-competitive as subsequent attempts to recoup losses from below-cost pricing will inevitably face new entry that erodes monopoly profits. Even if strategic behavior in specific circumstances could lead to predatory pricing, the high administrative costs of separating legitimate discounts from predatory pricing should prevent authorities from focusing enforcement on such conducts.\textsuperscript{46} Given the CS’s benevolent view of unilateral conduct, they resisted the idea of breaking up monopolies.\textsuperscript{47}

The CS also viewed many other competition restrictions as efficiency-enhancing. For example, intra-brand restraints were seen as generally pro-competitive given their tendency to spur inter-brand competition.\textsuperscript{48} Similarly, price discrimination allowed the monopolist to serve

\textsuperscript{40} BORK, supra note XX, at 227. Cases where products are not consumed in fixed-proportions may be exceptions, but even in those cases vertical mergers may increase efficiency by enabling price-discrimination.

\textsuperscript{41} Id. at 246. Conglomerate mergers are defined as any merger that is not horizontal (fear of coordination) nor vertical (fear of foreclosure).

\textsuperscript{42} Posner, supra note XX, at 928.

\textsuperscript{43} BORK, supra note XX, at 164.

\textsuperscript{44} Id. at 103.

\textsuperscript{45} Id. at 171.

\textsuperscript{46} Posner, supra note XX, at 939.

\textsuperscript{47} Posner, supra note XX, at 944. BORK, supra note XX, at 178. The reason for opposing break-ups as a remedy was two-fold: either competition is feasible, case in which new entrants are more efficient than governments in transforming uncompetitive oligopolies into competitive markets; or markets are simply not competitive (e.g. natural monopolies), cases in which breaking up firms would lead to a loss of scale and inefficiencies.

\textsuperscript{48} Id. at 157. Interventions in these cases should be restricted to the few cases where the market shares of the company involved were very high (e.g. 80-90 percent) and there was proof of intent to harm competition.
additional consumers and mitigate deadweight loss.\textsuperscript{49} CS also emphasized the efficiencies associated with maximum and minimum resale price maintenance,\textsuperscript{50} exclusive dealing and long-term contracts,\textsuperscript{51} territorial restraints,\textsuperscript{52} conditional discounts;\textsuperscript{53} and tying.\textsuperscript{54}

### III. The Global Influence of the Chicago School

As the above discussion illustrates, the Chicago School advocated a much smaller role for antitrust enforcement than what had been occurring in the United States.\textsuperscript{55} But beyond the acknowledgement of the gradual adoption of antitrust law and economics in the EU and few other jurisdictions, there has been limited scholarship on the whether the CS’ more minimalist approach—or what Bork called “workable” antitrust policy\textsuperscript{56}—disseminated outside of America. In this Part, we first discuss what is known about how CS ideas—and law and economics more generally—have been incorporated into antitrust policies around the world. We then explain why the specific ideas associated with the CS seem to have gained limited traction. Finally, we address the difficulty of empirically testing the extent of the CS’ influence.

#### A. What We Know about the Influence of the Chicago School

While a significant body of scholarship discusses the influence of the CS on US antitrust law, we are unaware of any notable literature examining the influence of the CS across the world. The existing scholarship recognizes the international influence of the law and economics movement in general, but it pays little attention to the role of the CS in particular. While this literature suggests that law and economics has gained some traction outside the US, the influence of the CS seems more tentative. Some commentators even suggest that outside the US, “the Chicago model has in general been studied more for its pitfalls than for its accuracy and

\textsuperscript{49} Posner, \textit{supra} note XX, at 926; BORK, \textit{supra} note XX, at 240.
\textsuperscript{50} Posner, \textit{supra} note XX, at 926; BORK, \textit{supra} note XX, at 33, 281.
\textsuperscript{51} Posner, \textit{supra} note XX, at 927; BORK, \textit{supra} note XX, at 309.
\textsuperscript{52} Posner, \textit{supra} note XX, at 927; BORK, \textit{supra} note XX, at 298.
\textsuperscript{53} BORK, \textit{supra} note XX, at 326.
\textsuperscript{54} Posner, \textit{supra} note XX, at 926; BORK, \textit{supra} note XX, at 375.
\textsuperscript{55} Kovacic, \textit{supra} note XX, at 17.
\textsuperscript{56} Easterbrook, \textit{supra} note XX, at 1700-1701.
appropriateness.” But the CS ideas may have diffused selectively as part of some foreign jurisdictions’ willingness to embrace principles associated with law and economics.

In particular, over the last two decades, the law and economics movement has become more influential in some parts of the world, even though foreign jurisdictions have embraced it more selectively and deployed its ideas with more caveats compared to the US. As a result, a growing number of antitrust jurisdictions “are creating, analyzing, and enforcing law with an eye toward its economic consequences, usually defined in terms of allocative efficiency.” For instance, the SSNIP test—an economic test used to identify the smallest relevant market within which a monopolist could profitably impose a significant increase in price—is now the most commonly used method for market definition.

The evolution of EU antitrust law illustrates the growing influence of law and economics outside the US. As of late 1990s and early 2000s, the EU has increasingly embraced economic analysis of antitrust law, including some aspects of the Chicago School. The goal of EU antitrust law has increasingly centered on consumer welfare: the broader goals that characterized the earlier decades of EU’s antitrust policy are no longer the main drivers of EU enforcement, even if some, such as market integration, remain important. Various Commission enforcement guidelines similarly emphasize the effects-based analysis and the central role of the efficiency defense. On mergers, the European Commission’s approach is similar to the US. On unilateral conduct, the Commission has abandoned its prior, overly formalistic analysis in favor of a more effects-based analysis of anti-competitive behavior—even if the Commission continues to be criticized for


falling short of the economic analysis endorsed in its own Article 102 guidelines, or sometimes deems (almost) per-se illegal conduct that is (almost) per-se legal in the US.\textsuperscript{62}

As evidence of this general shift towards greater acceptance of economic analysis of EU antitrust law, the former Director General of Competition for the European Commission, Philip Lowe, argued in a 2003 speech for the need for a “comprehensive reassessment of practice under Article [102] in the light of economic thinking [because a] credible policy on abusive conduct must be compatible with mainstream economics.”\textsuperscript{63} Suggesting that the EC had “learned from US doctrine,” Lowe emphasized the need to focus on “economic analysis” and apply economic theory to existing case law.\textsuperscript{64} The shift in tone took place in merger review after the European Commission experienced a string of humiliating defeats before the European Court of Justice, which overturned three of the Commission’s merger prohibitions at the appeal stage in a close sequence, strongly criticizing the Commission’s inadequate economic assessment. This criticism prompted the Commission to re-assess its antitrust policy, and contributed to the Commission’s greater willingness to embrace economic analysis as a cornerstone of the EU’s antitrust enforcement. A 2009 study by the United Nations Conference on Trade and Development (“UNCTAD”) also documents the shift in the EU antitrust policy, citing the recent reforms in the EU antitrust law “from a form-based towards a more effects-based approach is an example of greater reliance on economic analysis.”\textsuperscript{65} In particular, the UNCTAD emphasizes the EU’s adoption of the SSNIP test for defining relevant markets in 1997, the revision of its rules on vertical and horizontal restraints in 1999 and 2000, and its revised merger regulations in 2004 and 2007.

Despite these developments, many key elements of EU competition law that are contrary to CS principles have remained intact. For example, the EU continues to challenge vertical and conglomerate mergers instead of embracing the CS’ teachings that emphasize these types of


\textsuperscript{64} Id. at 3, 7.

mergers’ pro-competitive effects. In a similarly stark departure from the CS ideas, vertical agreements that contain territorial restrictions or restrict the resale price of goods or services often lead to per object antitrust liability in the EU. Additionally, the EU treats exclusionary conduct by dominant firms with suspicion and actively pursues these firms’ tying, discounting, exclusive dealing, as well as predatory, discriminatory, or unfair pricing practices. By continuing to subject such a broad range of conduct to antitrust scrutiny, the EU shows it has not relinquished its rather “maximalist” approach to antitrust, which is antithetical to the CS’ antitrust minimalism.

Some scholars have suggested that the way law professors and students are trained explains why law and economics takes hold in certain places. For example, Spencer Weber Waller argues that law and economics became more influential in the EU as increasing “direct study and personal, professional, and academic contacts between the US and EU competition communities… inevitably expose[d] EU decision-makers to Chicago School jurisprudence.”66 Similarly, in Japan, law and economics became more prominent as young Japanese faculty were increasingly completing at least part of their training in the US.67 One empirical study attributed the popularity of law and economics in some countries, but not others, to different structural incentives in each academic community: in countries such as Israel, the Netherlands, and the United States, writing law and economics papers is viewed as more valuable when considering academic appointments and promotions, leading to greater influence of law and economics there in comparison to countries like Germany.68

Frequent interactions among antitrust enforcers have also contributed to the dissemination of economic theories. The US and the EU antitrust agencies have concluded several bilateral cooperation agreements with their foreign counterparts. These formalized channels of interaction, together with cooperation of technical assistance and training, have enabled greater diffusion of basic economic theories underlying antitrust enforcement in the US and the EU. The OECD and the International Competition Network have also provided important settings for voluntary cooperation and diffusion of best practices, including economic analysis of antitrust law. However,
these networks have not fully embraced the CS’ vision of antitrust law. Instead, they have endorsed a more expansive notion of antitrust enforcement while emphasizing the benefits of economic principles as a foundation of sound antitrust policy.

B. Why the Chicago School’s International Influence May Be Limited

Given the growing popularity of law and economics in some jurisdictions, it is worth asking why the Chicago School has had a more limited international influence. One explanation is that the CS never even intended to have a global reach. Its creators and promoters were primarily focused on transforming American antitrust doctrine and lacked any self-conscious objective to spread its teachings abroad. Yet the absence of a “missionary agenda” likely also reflects the thin international antitrust landscape at the height of the Chicago School thinking. Only 41 jurisdictions had adopted an antitrust law by 1979. Few likely predicted in the early 1970s that the world in 2019 would have over 130 jurisdictions with a domestic antitrust law or saw the extent to which even the conduct of US corporations would be constrained by EU and other foreign antitrust regulators. Thus, there was no perceived need to internationalize the Chicago School ideas at the time.

More recently, there has been a growing understanding in the US of the globalization of antitrust law, which has led to a more concerted effort to export US-style antitrust laws and economics abroad. However, by the time the significant internationalization of antitrust law had become clear, the more coherent ideas of the CS had given way to more diffuse set of economic ideologies, shaped by multiple different schools of thoughts. Thus, when the DoJ and the FTC began to engage with their foreign counterparts in earnest in late 1990s, their “export product” was a more diluted version of the CS. In other words, the economic principles they endorsed no longer followed the pure tenants of CS ideas, and they instead embraced variations of Harvard School and Post-Chicago School economics that had since become mainstream in US antitrust thinking.

Relatedly, what may also have compromised the direct influence of the CS ideas is the lack of a scholarly consensus over which facets of US antitrust law were actually influenced by it, as opposed to a hybrid Chicago-Harvard or post-Chicago ideas. If this was not clear in the US, it was likely even less clear for any foreign jurisdictions looking to import ideas from abroad. Any foreign jurisdiction seeking to emulate US antitrust policies hence was less likely to make the distinction
among these variants of economic thinking, adopting some elements of each of these schools of thought as opposed to any pure variant of CS. Further, even those elements were more likely adopted to fit the local needs and circumstances, further blending the theories that came to guide the various domestic antitrust laws.

What likely also compromised the global diffusion of the CS ideas is that by the time most foreign jurisdictions adopted an antitrust law, they had an alternative antitrust model to follow, and often preferred to turn to the EU instead. While the US has attempted to promote the “development of sound antitrust laws” abroad, historically, the EU system has had more direct influence on countries seeking to implement competition policies for the first time. There are several reasons for this, including that the EU actively promotes its model through preferential trade agreements and has an administrative template that is easy to emulate due to its relative statutory precision. Former FTC Chairman William E. Kovacic suggests that unlike the EU, the US does not have the consolidated bargaining power to induce potential trade partners into adopting its antitrust models; it instead must persuade those jurisdictions that its experience and theories are superior. The US’s attempts to emphasize the superior theoretical merits of its antitrust law and economics version, however, has rarely been successful. Indeed, we show elsewhere how the EU’s antitrust model eclipsed that of the US in 1990s as the template for new antitrust jurisdictions.

However, the EU’s gradual adoption of economic analysis, in turn, may have contributed to the diffusion of law and economics movement around the world. Thus, the US’s ideas of antitrust law and economics have most successfully diffused only once the EU started to embrace

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71 *Id.* See also William E. Kovacic, *The United States and Its Future Influence on Global Competition Policy*, 22 Geo. Mason L. Rev. 1157, 1157 (2015) (suggesting that “the compatibility of the EU’s antitrust institution with civil law states that were new adopters of competition law contributed to its increased influence”); Dina I. Waked, *Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges*, 12 J.L. Econ. & Pol’y 193, 202 (2016) (noting that “the EU has been extremely active in the process of spreading its competition law to developing countries…. to the extent where some argue today that the EC competition law is the dominant model of competition law in the world.” (internal quotations omitted)).


73 *Id.* Bradford et al., *Global Dominance*, *infra* note XX.
and promote them as part of its own legal regime. Yet the EU never embraced a strong version of the CS and has been hesitant to spread many of its principles. This partially explains why the variant of law and economics that has gained traction abroad is the variant embraced by the EU. As we show in the next Part, many jurisdictions around the world continue to follow the EU’s lead in prohibiting a broad range of anticompetitive conduct by a monopolist and restricting many types of vertical agreements that the CS considered \textit{per se} pro-competitive. However, by recognizing efficiency defenses and enforcing their laws against the benchmark of “consumer welfare” or “efficiency,” these jurisdictions also acknowledge the broader contours of law and economics as key to their antitrust policies.

Even though the CS’ international influence may be limited in practice, an argument could be made that the CS’ philosophy would have served many jurisdictions well. The CS’ minimalist doctrine would arguably have been simpler for many jurisdictions to follow compared to the more nuanced analytical models associated with post-Chicago School. This may be true in particular for countries with few resources and hence the ability to engage only in selective antitrust interventions. The inadequate economics training of many agencies and judges in these countries make it difficult for these jurisdictions to pursue conduct where pro- and anti-competitive effects are difficult to separate. For example, unilateral conduct, vertical agreements, and vertical mergers are difficult to investigate as they often present complex trade-offs between pro- and anti-competitive effects. The narrow focus on hard core cartels or horizontal mergers could therefore have presented a legitimate agenda that would have been more feasible to carry out.

Despite the advantage of the Chicago School’s narrow enforcement agenda, these jurisdictions did not have the domestic support for the strong pro-market ideology that was associated with the CS. The markets in these countries were less robust and more prone to failure, inviting an antitrust agenda that was broader and more interventionist. Also, there often was public support for the pursuit of unilateral conduct by monopolies in many of these jurisdictions, in particular in economies where the state still controls many large enterprises or where the privatization has merely shifted the ownership of large conglomerates from public to private hands. There was thus no fertile political economy ground for the CS ideas in their pure forms to take hold.
C. Why The Chicago School Influence is Difficult to Test

Testing the international influence of Chicago School empirically is difficult, which likely explains the few attempts to do so to date. As mentioned in the introduction, our own mapping attempt faces three important limitations: (1) the CS’ general commitment to methods rather than specific policy outcomes; (2) the intertwining between the CS’ propositions and the broader growth of the law and economics movement; and (3) our database reflects mostly antitrust statutes around the world, which may fail to capture subtleness in policy changes. We do our best in this paper to overcome these limitations, but we readily acknowledge that we are better able to address some points than others.

First, as we explained in Part II.B., the CS was more of a commitment to deploy certain methods, like price theory, to understand firm behavior than it was a specific substantive philosophy. This means that even CS scholars disagreed on policy outcomes.74 This creates two challenges: first, it allows us to, in theory, pick the most favorable results to our analysis and then justify them on some variation of the CS; and, second, the CS methods normally lead to most forms of firm behavior being evaluated under the rule-of-reason—a process not always reflected in formal rules that form the bulk of our database.

Second, some of the ideas associated with the CS are somewhat intertwined with a more general use of economic analysis of laws. This is a limitation that we cannot effectively address. Therefore, the results below, to the extent they indicate a spread of the CS, can be interpreted more broadly to capture the diffusion of economic analysis of antitrust laws generally as opposed to specific diffusion of the CS ideas specifically—although the CS was a main driver of both processes.

Third, the data we deploy to study the CS influence consists of comprehensive coding of the world’s antitrust statutes and selected aggregate information on enforcement actions taken by antitrust authorities around the world. To the extent that these laws and cases do not reflect the

74 For example, Bork and Posner disagreed on how to treat predation claims, with Bork advocating an almost per-se legality to predation and Posner affirming that it can be damaging in specific circumstances. For the disagreements in general, see Fred S. McChesney, Be True to Your School: Chicago’s Contradictory Views of Antitrust and Regulation, 10 Cato J. 775 (1991).
actual enforcement practice of a given country, our results may underestimate or overestimate the extent of CS’ global influence.⁷⁵

IV. EMPIRICAL EVIDENCE

These limitations notwithstanding, there is a general lack of studies and evidence on the international influence of the Chicago School. The value of this study is in starting to fill this gap. Therefore, we now turn to empirically exploring the international influence of the CS. We first briefly introduce our data on antitrust laws and enforcement around the world. We then examine whether countries’ antitrust regimes are consistent with CS ideas in three ways: (1) the goals and exemptions they explicitly incorporate into the law, (2) their regulation of unilateral conduct, and (3) their provisions on the review of mergers.

A. Data

In order to test the international influence of the CS, we use data that two of us—Anu and Adam—recently collected as part of the Comparative Competition Law Project.⁷⁶ We specifically draw from two distinct datasets. Although these datasets both have limitations, we believe they provide the most comprehensive picture currently available of antitrust regimes around the world. To provide a sense of their scope, Figure 2 shows the countries that are included in at least one of the datasets.

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⁷⁵ An example is the Robinson-Patman Act in the US, which is still on the books but rarely enforced by Courts. Our database would indicate that this law is against the teachings of the Chicago School, while actual enforcement data would say otherwise.

⁷⁶ See generally Bradford et al., Competition Law Gone Global, supra note XX.
First, our data on antitrust laws is from the Comparative Competition Law Dataset. This dataset was constructed over a period of six years by employing a team of over 70 Columbia Law School students with relevant legal training and language skills. To construct the dataset, we first identified all the antitrust statutes, relevant sector-specific regulations, and other laws that contained provisions related to regulating market competition that any jurisdiction with an antitrust regime had passed at any time prior to 2010. For each law, we had two coders complete a 171-part survey that documented relevant elements of the jurisdictions’ antitrust regime, including whether it provides for criminal sanctions or whether it recognizes a public interest defense in merger reviews. We then had a third, more experienced, coder review discrepancies and create a final consensus coding for every antitrust provision. In total, we coded 700 laws for 131 jurisdictions, including 126 countries and 5 regional organizations.

This data admittedly focuses on the antitrust laws codified in statutes, but it is worth noting that, unlike the US, in most countries courts do not play a major role in the development of antitrust law. To confirm this, we conducted an expert survey of antitrust experts from around the world that asked about the role that courts play in the development of antitrust law. In total,

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77 For a more detailed explanation of this dataset, see Bradford et al., Competition Law Gone Global, supra note XX, at 5-14.

78 There are four jurisdictions that we are aware of having an antitrust regime prior to 2010 for that we were unable to code: ASEAN, Djibouti, Faroe Islands, and Iran.

79 For more information on the survey, see Anu Bradford and Adam Chilton, Trade Openness and Antitrust Law, 62 J. L. ECON. 29 (2019).
186 experts from 86 countries completed our survey. Of those countries, the experts responded that courts play a large or extensive role in the development of antitrust law in just twelve countries. As a result, for most countries, our coding of countries antitrust laws on the book should accurately capture their content antitrust regimes.

Second, our data on antitrust enforcement is from the Comparative Competition Enforcement Dataset. This dataset was constructed over a period of five years by employing a team of over 40 Columbia and University of Chicago Law School students that also had relevant legal training and language skills. To construct this dataset, we identified jurisdictions with an antitrust agency in place any time between 1990 and 2010. We collected publicly available information on variables such as the agencies’ resources (e.g. staff and budget), investigations opened, and investigations closed with remedies. After reviewing all publicly available information for each agency, we then created specifically tailored questionnaires that we sent directly to each agency to ask for more information on their enforcement activities. Through this process, 103 agencies provided us with at least some data and in total, we were able to collect at least some data from 112 agencies from 100 jurisdictions.

B. Goals and Exemptions

We begin by exploring the goals that countries explicitly state in their antitrust statutes. As previously noted, the CS emphasizes that the appropriate goals of antitrust policy are related to efficiency. But instead of following CS teachings and stipulating that the goals of their antitrust regime are simply efficiency, consumer welfare, or total welfare (“Efficiency-Related Goals”), some countries explicitly articulate goals aimed at broader industrial or social policy (“Non-Efficiency-Related Goals”).

Figure 3 shows the proportion of countries with an antitrust law in place in a given year that articulated only Efficiency-Related goals, only Non-Efficiency-Related Goals, both types of goals, or no explicit goals. As Figure 3 shows, through 1990, roughly 70 percent of regimes did not explicitly stipulate any goals. After 1990, there was an increase in the number of countries that

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80 The twelve countries that received an average score of 4 or higher are: Argentina, Australia, Austria, Germany, Hong Kong, Ireland, Israel, New Zealand, Nicaragua, Spain, United Kingdom, and United States.

81 For a more detailed explanation of this dataset, see Bradford et al., Competition Law Gone Global, supra note XX, at 14-27.
explicitly stipulated Efficiency-Related Goals: by 2010, 14 percent of countries had goals codified in their antitrust statutes that were exclusively Efficiency-Related. However, even more countries adopted goals that were not purely related to efficiency: by 2010, 16 percent of countries had goals codified in their antitrust statutes that were exclusively Non-Efficiency-Related and 33 percent of countries had goals codified in their antitrust statutes that were both Efficiency and Non-Efficiency Related. In other words, of the countries that stipulated goals in their antitrust statutes, just 22 percent focused exclusively on efficiency. Or put another way, contrary to the teachings of the CS, 49 percent of countries with antitrust regimes had explicitly codified non-efficiency goals in their antitrust laws by 2010.

![Figure 3: Prevalence of Efficiency Related Goals in Antitrust Statutes](image)

In addition to rejecting the use of antitrust policy to advance goals unrelated to efficiency, the CS unambiguously rejected the use of antitrust policy for protectionist ends or to advance industrial policy. Of course, countries are unlikely to explicitly stipulate that industrial policy is a
goal of their antitrust law. Instead, if a country is using antitrust policy in pursuit of industrial policy, it may choose to exempt categories of enterprises from the scope of their antitrust regime.

Figure 4: Prevalence of Enterprise Exemptions in Antitrust Statutes

To test this, Figure 4 reports the proportion of countries with an antitrust law in place in a given year that provide complete exemptions to certain categories of enterprises. Panel A specifically breaks out countries that include an explicit exemption for state owned enterprises or state operated enterprises. As Panel A makes clear, these exemptions are rare, but they do exist. For instance, by 2010, 7 percent of countries included them. Panel B breaks out countries that have other kinds of enterprise exemptions. These include, for example, designated monopolies or export cartels. Again, although the majority of countries do not include any of these complete exemptions in their antitrust regimes, they have remained common. In 1980, they were included

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82 Our data codes whether countries’ antitrust laws included either complete or partial enterprise exemptions. Figure 4, however, only graphs countries with complete enterprise exemptions. This is because, depending on the type and their rational, partial exemptions may be consistent with the economic theories advanced by the Chicago School.
in 41 percent of countries’ antitrust laws, and by 2010, they were included in 37 percent of countries’ antitrust laws. In other words, although the proportion of countries has slightly decreased since the CS emerged, over a third of countries with antitrust regimes have exempted entire categories of enterprises from the scope of those laws.

Figure 5: Prevalence of Industry Exemptions

Finally, another way to examine if a country’s antitrust policy aims to advance certain industries, and thus is using antitrust in pursuit of industrial policy, is to examine if it exempts entire industries from the scope of its antitrust laws. To examine this, Figure 5 reports the proportion of countries with an antitrust law in place in a given year that exempt at least one industry entirely from the scope of their laws. Again, this trend has also notably increased over time, and the increase has been pronounced in the period after the height of the CS in the 1970s. In 1950, 26 percent of countries had an industry exemption; in 1990, 49 percent of countries had
an industry exemption; and by 2010, 50 percent of countries exempted at least one industry from their antitrust regime.

C. Unilateral Conduct

**Figure 6: Prevalence of Prohibitions on Unilateral Conduct**

One of the defining features of the CS was its skepticism of the need to police unilateral conduct by monopolies. By emphasizing the importance of scale economies, the CS often viewed large firms as efficient, and argued that such firms’ unilateral actions likely improved consumer welfare. As a result, many CS scholars argued that there were various unilateral activities that traditional antitrust law had condemned as anticompetitive that should not be regulated by antitrust regulators. As Figure 6 shows, however, many countries continued to include provisions in their antitrust laws that regulated a range of unilateral conducts. Notably, in 2010, 63 percent of countries with antitrust regimes included provisions prohibiting unfair pricing while 72 percent prohibited discriminatory pricing. Figure 6 thus suggests that many countries that passed laws
after the CS’ peak of influence in the United States continued to draft laws that prohibited conduct that CS scholars argued were unlikely to reduce efficiency. In addition, the data also shows that only 37 percent of countries allowed efficiency defenses in unilateral conduct investigations—a CS scholar would argue that these should be allowed in all cases. On the other hand, 24 percent of countries allowed a public interest defense, something outside of the CS framework.

Figure 7: Comparing the Enforcement Against Cartels and Unilateral Conduct

CS philosophy would suggest that cartel enforcement should be the focus of antitrust policy whereas few resources should be dedicated to challenge unilateral conducts. To examine whether countries have followed this philosophy, Figure 7 compares enforcement activities for both cartel and unilateral conduct cases from countries around the world from 1990 to 2010. Contrary to the CS ideas, Figure 7 suggests that, around the world between 1990 and 2010, the agencies that reported their activities carried out considerably more unilateral conduct investigations than cartel investigations. For instance, in 2010, there were 1,495 cartel
investigations and 4,128 abuse of dominance investigations around the world. The same story emerges for investigations that were actually closed with remedies. In 2010, there were 388 cartel investigations that were closed with fine or other remedies, which is a small number compared to the 1,617 abuse of dominance investigations that were closed with remedies.

That said, the enforcement data used to create Figure 7 does have limitations. Notably, the total number of investigations and remedies are likely undercounted because not all agencies reported their data. Moreover, these data count all investigations as equal, and thus it do not tell us anything about the amount of resources that were dedicated to each investigation. For instance, it is possible that the unilateral conduct investigations were small while the cartel investigations were more substantial. Finally, an extremely large percent of the abuse of dominance investigations were initiated by a single country: Russia. In 2010, for example, Russia initiated 66 percent (2,736 total) of the world’s abuse of dominance investigations (2,736 total). In 2010, Russia also was responsible for an astounding 90 percent (1,453 total) of the world’s abuse of dominance investigations closed with remedies. In comparison, Russia was responsible for 41 percent (607 total) of the world’s cartel investigations in 2010, and was responsible for 52 percent (393 total) of the world’s cartel cases closed with remedies in 2009 (Russia did not provide data on cartel investigations closed with remedies for 2010). There are several reasons for Russia’ distinct enforcement pattern, including that Russian agency also uses antitrust law to curb inflation and to control prices.83 Although Russia was the world leader of abuse of dominance cases, even excluding Russia, the rest of the world still opened more abuse of dominance investigations than cartel investigations in 2010. This provides at least some evidence that countries have ignored the CS teachings that unilateral conduct should rarely be the focus of antitrust enforcement.

D. Merger Review

As previously explained, another area where the Chicago School was critical of existing antitrust doctrine was in merger review. The CS argued that mergers are generally efficient and that an intervention would be justified in only rare instances. Mandatory merger notification could be considered antithetical to this view because it subjects a larger number of mergers—even efficient ones—to the scrutiny of antitrust regulators and, as such, taxes economic activity. To

explore how many countries have endorsed the CS’ thinking on this point, Figure 8 graphs the proportion of countries with an antitrust policy in place in a given year that require mandatory merger notification. As more counties have adopted merger review over time, they also have adopted mandatory merger notification. As Figure 8 shows, just 4 percent of countries with an antitrust regime had mandatory merger notification in 1950; but, by 2010, 64 percent of countries with antitrust regimes had this requirement in their law—something that may be considered against core CS teachings.

**Figure 8: Prevalence of Merger Pre-Notification Requirements**

Further, not only do many countries require the notification of mergers, our data suggests that notification is not a mere formality. Instead, regulators often restrict mergers in various ways. Figure 9 uses data from the Comparative Competition Enforcement Dataset to show the number of mergers restricted around the world from 1990 to 2010. By “restricted” mergers we denote mergers that were blocked, conditionally cleared, or withdrawn.
The data behind Figure 9 has some important limitations,\(^{84}\) but it still is informative. As Figure 9 shows, 253 mergers were restricted in 2000, and 286 mergers were restricted in 2005. In 2007, this number exploded to 875 restricted mergers. By 2010, this dropped down to 309 restricted mergers. In other words, antitrust agencies around the world appear to be actively reviewing and restricting merger activity. This claim should be taken with a grain of salt, as without more information on the specific cases—total number of mergers, whether the restricted cases are mostly vertical or horizontal, etc—it is impossible to say whether the mergers targeted by regulators are the ones that CS teachings would suggest are problematic.

Another way to indirectly assess the influence of the CS in merger control is to look at the types of defenses that can be claimed by companies when confronted with a potential restriction. The CS school defended that antitrust should focus solely on allocative efficiency, so the existence of an efficiency defense in a jurisdiction is very much in line with CS’ teachings. The opposite is

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\(^{84}\) There two important limitations to this data. First, the data is incomplete because not all jurisdictions provided us with data, and the jurisdictions that did provide us with data did not always do so for every year. Second, our data do not distinguish whether the mergers being blocked were vertical or horizontal, or whether the mergers were blocked for efficiency or non-efficiency related reasons.
true if countries allow for other non-efficiency related public policy considerations to inform merger review.

**Figure 10: Prevalence of Efficiency and Public Interest Merger Defenses**

Figure 10 graphs the prevalence of merger defenses in antitrust regimes around the world from 1950 to 2010. More specifically, for countries with an antitrust statute, it shows the share of countries that had an efficiency defense, a public interest defense, both defenses, or neither defense. Notably, the share of countries with explicit defenses in their statutes has increased over time. By 2010, only 36 percent of countries had neither efficiency or public interest defenses. Instead, 22 percent of countries had efficiency defenses, 8 percent had public interest defenses, and 34 percent of countries had both efficiency and public interest defenses. Taken together, Figure 10 notably reveals that 42 percent of countries with antitrust regimes had adopted merger defenses unrelated to efficiency reasons by 2010—in opposition to CS’ teachings.

**V. CONCLUSION**

Posner and Bork published their treatises more than 40 years ago, marking one of the highpoints of decades of intellectual work by scholars associated with the University of Chicago.
Since then, antitrust policy underwent a revolution: US Antitrust enforcement changed significantly, reflecting many of the teachings of the CS. In the decades that followed, antitrust regimes around the world also multiplied. However, despite the CS’s vast influence in the US, the evidence we have presented in this paper suggests that the CS’s international penetration was less pervasive than many would imagine.

More recently, as public attention in the US has begun to focus on increased market concentration, lessening of competition, and rise in economic inequality, the US congress and enforcement agencies are facing mounting calls to strengthen the antitrust laws and their enforcement. Many influential scholars are arguing that the US needs to rethinking its approach to antitrust policy, with some specifically blaming the CS school for providing the intellectual foundation for the lax antitrust policy that has characterized US antitrust enforcement over the recent decades. While our research does not directly address whether the CS was too lenient on large corporations, or whether and how US antitrust policy should be reformed, our data provides a more nuanced view of the CS’s global reach. It also suggests that, if the US wants to re-evaluate many of the core CS teachings and re-invigorate its antitrust enforcement, it has many examples around the world to turn to.

