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Whose Paradigm Is It Anyway? The US Antitrust Policy Shift in the Times of Economic Crises and the Chicago School of Law and Economics

Abstract

Why has the US Antitrust law and policy regime changed to allow more monopolization? Existing studies answer this by the influence of new policy paradigms, business influences and conservative politics over antitrust agencies and federal courts, but miss the role of the US Congress. Relying on original archival data and an in-case comparison of legislative proposals, this article argues that the laws legislated in the 1970s enabled the rise of a new policy paradigm conducive to monopolies. I show that under pressure from economic crises in the early 1970s, the antitrust policy field was split between two paradigms, one supported by the Congress and one by the antitrust agencies. This impasse was overcome by the legislative reforms that reconciled these paradigms, which then increased the overall policy control of the antitrust agencies and had the unintended consequence of weakening antitrust. I call this the "double-paradigm fallacy" pathway of policy change. This finding revises the well-known policy paradigm theory and gradual institutional change models.

Keywords: Antitrust Policy, Policy Paradigms, the US Congress, Monopolies, the 1970s

Introduction

On July 30th, 2020, the House Judiciary Antitrust Subcommittee invited the CEOs of four flagships of the US digital economy, Google, Facebook, Amazon and Apple, to testify in relation to their alleged monopolization of their markets. The Congressmen tried to corner the CEOs with their questions, armed with the documents collected by the public antitrust agencies. Besides a few potentially trial-worthy revelations, the main takeaway from these hearings was the undeniable role the US Congress in guiding the US Antitrust policy. The Congress used to hold investigations on previous corporate giants, like the GE, IBM and Du Pont regularly in the 1950s and 1960s, but such hearings have been rare in the last three decades. Those were the times the antitrust agencies, the Department of Justice (DOJ)'s Antitrust Division and the Federal Trade Commission (FTC) and the federal courts pursued a strict interpretation of antitrust laws, focusing on preventing the concentration of economic power in the hands of a few corporations.

Since the late 1970s, however, the US Antitrust policy has been in decline, with the courts and the antitrust agencies have shifted their attention on protecting the "consumer welfare", defined as the preservation of market efficiency and lower prices. This shift in focus allowed many of the monopolizing strategies of corporations, such as merging with or acquiring other competitors in the same market, signing restrictive contracts with the distributors, or selling below-cost to push the competitors off the market, to go on. Some research suggests as a result of this, monopolization has risen in the US to unprecedented levels, not just in a few high-tech industries, but in almost all sectors of the US economy (Furman and Orszag 2015; De Loecker and Eeckhout 2017; 2018; Eggertsson, Robbins, and Wold 2018; Jarsulic et al. 2016). Once the only country in the world with a strong antitrust system, the US has now fallen behind newer jurisdictions in controlling monopolization (Clark 2016; Fox 2006).

While monopolization in the US has created serious problems in consumer and worker protection, economic stability and inequality, and even in democratic representation narrowed by the influence of money in politics, sociologists have completely ignored the recent monopolization and antitrust issues. But scholars in other disciplines have advanced three main explanations for the changes in the US Antitrust policy. The most common explanation suggests that there was a "paradigm shift" (Kuhn 2012; Hall 1993) in antitrust under the growing influence of the Chicago School of Law and Economics (Davies 2010; Khan 2017; Vaheesan 2017; Wu 2018). Chicago scholars proposed that consumer welfare should be the only goal of antitrust policy and promoted reliance on economic expertise (see Bork 1978; Posner 1976), which changed the enforcement policies of the antitrust agencies and the courts (Ergen and Kohl 2019). This explanation fits the broader sociological theories of "policy paradigms" (Hall 1993) and the importance of ideational influences over policy changes (Weir and Skocpol 1985; Blyth and Mark 2002; Campbell 2002; Béland and Cox 2013). Other scholars have emphasized either corporate lobbying (Philippon 2019) or the conservative political ideology (Hovenkamp 2018, 600; Fox 1980, 1152) to explain the antitrust policy change.

However, these explanations all focus on the judicial or the executive (through the FTC and the DOJ) control over antitrust policy, ignoring the third branch of government, the Congress. As we saw in the recent tech hearings, the Congress can control the agenda of regulatory agencies through oversight hearings, investigations and policy pronouncements, including new legislation (Weingast 1984; Weingast and Moran 1983; McCubbins and Schwartz 1984). The Congress has typically supported a more interventionist antitrust historically, which would certainly be a problem for antitrust agencies and the courts if they decided to undermine it. In fact, the assumption in the literature that antitrust policy changed "without a single revision of antitrust

laws" (Ergen and Kohl 2019) is not correct. The Congress passed two important legislations in the 1970s, which interestingly expanded the scope and punitiveness of antitrust policy going counterary to the changes made by enforcement authorities. The Tunney Act of 1974 led to a 20-fold increase in fees and 3-fold increase in prison sentences for criminal antitrust cases. The Hart-Scott-Rodino (HSR) Amendment of 1976 created a notification requirement for companies before completing their mergers and acquisitions (M&As). Therefore, rather than simply asking how the Chicago School or business and ideological influences have shaped the US antitrust policy, we should ask how these influences could overcome the potential resistance from the Congress, and what did these seemingly contradictory legislative changes mean for the long term change in the US antitrust policy.

Using original archival data from Congressional debates and with an in-case comparison of the antitrust legislative proposals in the 1970s, this article shows that the Congress' policy position was not a reflection of its representation of electoral constituents, but its commitment to a more radical implementation of the old "structuralist" antitrust paradigm under the pressure of rising crises of conglomerate mergers and increasing inflation in the 1970s. This was in sharp contrast to the rising importance of the Chicago School paradigm inside the antitrust agencies, which is revealed by their dramatically different perceptions of policy related economic crises and solutions. Nevertheless, the Tunney Act and the HSR Amendment could successfully reconcile these paradigms, and were supported both by the Congress and the antitrust agencies, although for different reasons and expectations. Business presures and conservative presidents played only limited roles. However, these legislations also significantly increased the control of the antitrust agencies over antitrust policy *vis a vis* the Congress, allowing them to reduce antitrust enforcement later on, which was not the original intention of these legislations.

These findings suggest a "double-paradigm fallacy", a significantly different pathway of policy change than suggested by Peter Hall's classic paradigm shift theory (1993). His theory predicts that the competition between the old and new paratigms is resolved by the failures of the old paradigm in devising policy solutions, and the success of the new paradigm's recommendations (Blyth 2013). I instead argue that both the old paradigm and new paradigm can declare success over the same policy reform proposals, which they interprete from different perspectives. However, one major caveat of such paradigm reconciling reforms is they rearrange the balance of power between different policy actors, by giving the actors that propogate new paradigms new institutional capacity, which they can then use as leverage that to establish the dominance of their own paradigm. In other words, policies can change through realignment between the old and new paradigms for a brief transitional moment. This theory also corrects the existing social science theories on "gradual institutional change" (Hacker 2004; Streeck and Thelen 2005; Mahoney and Thelen 2009), by showing that gradual and swift forms of change are not mutually exclusive and in some cases can be complementary.

This article will first summarize the existing explanations for the US Antitrust policy shift and examine what they are missing by ignoring the role of the Congress and its legislative decisions. Second, I will outline three possible models of antitrust policy change that would incorporate Congress as an antitrust policy actor, based on different configurations of power and policy positions in the 1970s. Third, I will discuss my data and methods, elaborating the benefits of using an in-case comparison of successful and failed antitrust legislative proposals to test my hypotheses. Forth, I will examine the intellectual and economic crises of antitrust policy in the late 1960s and early 1970s and demonstrate the deep paradigmatic chasm in the antitrust policy field. The fifth section will investigate why four main legislative proposals to overcome these crises

succeeded or failed. Lastly, I will briefly discuss the aftermath of these legislations and conclude with summary of empirical and theoretical contributions.

Explanations of the US Antitrust Policy Change

Once politically salient, powerful and regularly used, the US antitrust laws have lost their relevance to managing the economy and controlling market power concentration since the late 1970s (Fligstein 1990; Davies 2010; Khan 2016; Wu 2018; Ergen and Kohl 2019). Because Sherman Act was written almost like a "constitution", having broad and abstract articles, its interpretation and meaning could change over time (Waller 1998). Some Supreme Court antitrust decisions in 1977 first signaled the adoption of more demanding enforcement criteria.[1] However, the shift in antitrust enforcement was most clear under Regan's Assistant Attorney General (AAG) in charge of Antitrust William Baxter (Mueller 1984; Pitofsky 2008; Khan and Vaheesan 2017). In the early 1980s, The DOJ and the FTC dropped major monopolization cases against AT&T and IBM, and allowed megamergers and highly leveraged buyouts in oil, airlines and banking sectors to go through (Eisner and Meier 1990). The new "Merger Guidelines" in 1982 reduced the restrictiveness of merger controls (Davies 2010). Agencies even began to actively advocate for lenient enforcement or nonenforcement in antitrust cases by filing *amicus curiae* briefs in private plaintiff initiated cases (Mueller 1984).[2]

As a result, dominant firms' strategies excluding smaller competitors and preventing new entries are not as frequently punished or prosecuted by the US antitrust system.[3] For example,

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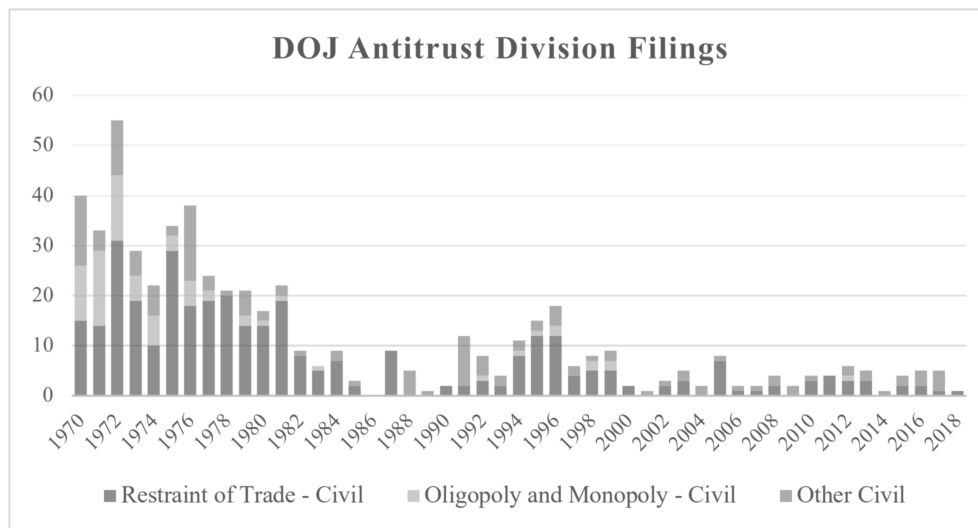
[1]For example, in the GTE Sylvania (1977) the Supreme Court cited Chicago Scholars for the first time and looked for "demonstrable economic effects" of the conduct as evidence (Kovacic 2003, 398).

[2]Although private plaintiffs can also file antitrust cases, their likelihood of winning is already decided by the enforcement policies set by these public authorities (Kovacic 2003).

[3]I use "dominant firm" or a "monopoly" interchangeably, by which I mean corporations that have substantial control over the price, output and investment in an industry.

predatory pricing, a strategy of using aggressive price cuts to eliminate economic rivals, is commonly ignored by the US antitrust authorities, although it has been rampant in industries like the airlines and pharmaceuticals (Elzinga and Mills 2009). Other potentially competition-restricting conduct including exclusive dealing agreements, refusal to supply (boycott), tying of products, price discrimination, and vertical restrictions, such as resale price maintenance agreements (RPM) are also rarely penalized. These were not temporary policy changes. Long-term antitrust enforcement data indicate that there was a "structural break" or "dramatic shift" in antitrust enforcement policy (Holliday 1998; Gallo et al. 2000; Ghosal 2011; Kades 2019). Graph 1 below shows the civil antitrust lawsuits filed by the DOJ's Antitrust Division- these cases are the main component of antitrust law enforcement dealing with monopolies and their abuses. Despite some temporary comebacks in the 1990s, the antitrust law and policy never had a proper return to limiting monopolization.



Graph 1: DOJ Antitrust Division's Civil Lawsuits dealing with monopolization, estimated based on the DOJ's "Workload Statistics"[4]

[4] Available at https://www.justice.gov/atr/division-operations [last accessed on August 1st, 2019].

There are three main theories explaining the shift in the US Antitrust policy. The most common is the change in antitrust goals under the influence of the Chicago School of Law and Economics scholarship (Davies 2010; Khan 2016; Khan and Vaheesan 2017; Wu 2018; Sawyer 2019). A number of prominent scholars in the University of Chicago Law School (mainly Robert Bork and Richard Posner) targeted what they saw as "extensive confusion" in antitrust enforcement (Teles 2008; Posner 1987). They argued that the use of numerous and often contradictory social and political goals in enforcement was intervening in the making of a robust antitrust policy. This idea was most powerfully expressed in Robert Bork's influential book *Antitrust Paradox* (1978), which depicted antitrust as a "policy in war with itself". Instead, the only and true goal for antitrust was "consumer welfare", i.e. the "maximization of wealth and consumer want satisfaction" (Bork 1967; 1978; Posner 1976).

The Chicago Scholars argued that the existing enforcement of antitrust was erroneous because it relied on faulty and outdated economic theories (Posner 1979). They insisted on using neoclassical economic theory to examine the anticompetitive effects of corporate practices and to guide antitrust decisions (Hovenkamp 2018). They suggested that many business conduct previously assumed to be anticompetitive were in essence efficiency-inducing and competitive (Bork and Bowman 1965). For example, exclusionary practices like exclusive dealing and tying, were in fact "either competitive tactics equally available to all firms or means of maximizing the returns from a market position already held" (Bork and Bowman 1965, 366). There was a strong assumption on the inherent efficiency-maximizing mechanisms of the market and that the monopoly problem can be naturally resolved by the market in these suggestions (Khan 2017, 974).[5]

[5] This is related to the "contestable market" assumption commonly used in industrial organizations (IO) economics (Niels, Jenkins, and Kavanagh 2011, 108).

The Chicago School ideas created a "revolution" in Antitrust academia. The "structure-conduct-performance" (SCP) model of market competition formulated by Harvard economists and turned into popular legal theories by Harvard law scholars like Carl Keysen and Donald Turner (also leading the DOJ Antitrust Division in the 60s) suggested that market concentration (i.e. low number of competitors in a product-market) creates anticompetitive business behaviors that harm competition (Kovacic 1989, 1413). This was recognized as the "structuralist paradigm" in antitrust and dominated the field until the 1970s. However, early 1970s, these scholars silently changed their position and adopted the Chicago School-like efficiency criteria and cost-benefits analyses in their writings, signaling the dawn of a new paradigm (Hovenkamp 2018).

The influence of the Chicago School approach was especially strong over the DOJ Antitrust Division and the FTC. Eisner (1991) shows that the presence and the power of economists inside the FTC and the DOJ increased since mid-1960s, which made these agencies more receptive to Chicago School ideas (also see (Davies 2010; Wood and Anderson 1993). At the same time, the profile of the antitrust attorney also changed. It became essential that they "think a bit like an economist and develop an economic intuition" (Niels, Jenkins, and Kavanagh 2011, 6). As Robert Bork himself stated, the changes inside the antirust agencies created by the Chicago School influence allowed AAG William Baxter to implement enforcement policy changes that already had widespread support (Bork 1985, 25).

This explanation resonates well with general social science theories that connect ideas and policies (Hall 1993; Weir and Skocpol 1985; Blyth and Mark 2002; Campbell 2002; Béland and Cox 2013). Hall's theory of "policy paradigm" (1993) is one of the most prominent models of policy change, suggesting that ideas transform policies by affecting the dominant frameworks and standards used by policymakers when analyzing and conceiving solutions to problems. Some

scholars have specifically identified the influence of Chicago School of Economics as an important force in policy changes around the world (Babb 2013; Dezelay and Garth 2002). An extension of this theory has emphasized the importance of economists in bridging intellectual and policy trends (Bockman and Eyal 2002; Fourcade 2006; Babb 2004). For example, the domination of the efficient markets hypothesis in finance and real business cycle theories in macroeconomic policy exerted important influences over policy making (Reay 2012).

The second and potentially complementary approach attributes the shift in the US antitrust policy to proactive lobbying and campaigning by business, especially big business groups. For example, Philippon's recent book argues that weaker antitrust policy towards monopolies was a result of corporate lobbying at the antitrust authorities, which have been increasing in the US since the 1980s (2019, 9 & 151). Using the European competition law system as the unobserved counterfactual, he estimates "a doubling of lobbying expenditures to the DOJ and FTC reduces the number of cases in a given industry by 9 percent. This is a sizable effect, considering that such lobbying nearly tripled from 1998 to 2008. If [these] estimates are correct, increases in lobbying can thus account for most of the decrease in enforcement in the US." (Philippon 2019, 173).

Another potentially complementary perspective points at the election of conservative Presidents. This account typically assumes that "pro-consumer" Democratic presidents pursue stronger enforcement policies while "pro-business" Republican presidents would be less stringent in enforcing antitrust (see a recent news article Tankersley 2020). However, most studies found no correlation between the political party affiliations of the US Presidents and antitrust enforcement patterns (Posner 1970; Gallo et al. 2000; Holliday 1998). Nevertheless, some suggest that antitrust became a partisan issue only since the 1970s. They point out that the changes in Supreme Court's approach coincided with the shift from the liberal leaning "Warren court" to conservative leaning

"Burger court" after four appointments by President Nixon (Hovenkamp 2018; Fox 1980). The judges appointed by the Republican presidents used Chicago School ideas more commonly than their more liberal leaning peers, which shows that ideational diffusion was mediated by political identities (Hovenkamp 2018, 600; Fox 1980, 1152).

Despite these differences, all of the existing explanations of the US antitrust policy change focus on the position of the courts and the antitrust agencies, and underline that the antitrust policy change happened "without making a single change to antitrust laws" (Ergen and Kohl 2019, 259; Kovacic 2003). This enforcement-based change narrative was recently theoretically formulated in the institutional studies in social sciences as a "gradual" form of change (Streeck and Thelen 2005). These "silent" changes can take the form of "drift" or "conversion", and result from the blocking of more swift forms of institutional changes by the "veto" actors like the Congress (Hacker 2004; Mahoney and Thelen 2009). However, the omission of the Congress and its legislative powers contradicts the literature that describes the Congress' significant power to oversee and overrule enforcement authorities (McCubbins and Schwartz 1984; Ferejohn and Shipan 1990). The Congress can make legislative amendments, block the Supreme Court nominees selected by the President, and influence the enforcement policies of antitrust agencies through oversight and appropriation hearings, congressional investigations and confirmation hearings of agency heads (Weingast and Moran 1983).

By the 1970s, two subcommittees in each chamber of Congress had emerged as strong proponents of antitrust policy: the "Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary in Senate" and "Antitrust Subcommittee (Subcommittee No.5) of the Committee on the Judiciary in the House of Representatives"[6]. They were composed of senior and high-

[6] Renamed "Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary" in 1973.

ranking members of both political parties. For example, the chair of the House Antitrust Subcommittee also chaired the House Committee of Judiciary. In the 50s, 60s and 70s, these subcommittees regularly held oversight and investigation hearings to advocate for more enforcement of antitrust on large corporations, and also sponsored the main antitrust law amendments. The Celler-Kefauver Act (also called "Anti-Merger Act") of 1950, which created a stronger M&A control system, was prepared and sponsored by the two chairmen of these subcommittees.

Through these subcommittees, the Congress was an effective "veto actor" (Mahoney and Thelen 2009) over antitrust agencies' attempts to reduce enforcement. For example, it rejected various different legislative proposals that would have instituted the Chicago School recommendations in the 1970s and 1980s, and President Regan's nomination of Robert Bork, the most prominent representative of the Chicago School of antitrust, to the Supreme Court in 1987. The Congress also picked fights with the DOJ and the FTC. In 1983, the DOJ and FTC's attempts to soften the enforcement of RPM cases through *amicus* briefs infuriated the Congress and led it to pass a joint resolution in the emergency spending bill in 1983 that stated "no funds appropriated for the Department of Justice or the FTC shall be used to overturn or alter the per se prohibition against resale price maintenance in effect under the federal antitrust laws." (cited in Seiberling 1984). The agencies had to stop filing these amicus briefs as a result.

The Congress did not just oppose weakening antitrust, but even took new steps towards strengthening it. The argument that antitrust enforcement policy changed without a single reform to antitrust laws is not entirely true. Congress did make two important changes to antitrust laws during the 1970s, which expanded the scope and restrictiveness of this policy. First, the Antitrust Procedures and Penalties Act (also called Tunney Act) of 1974 strengthened the rules and penalties

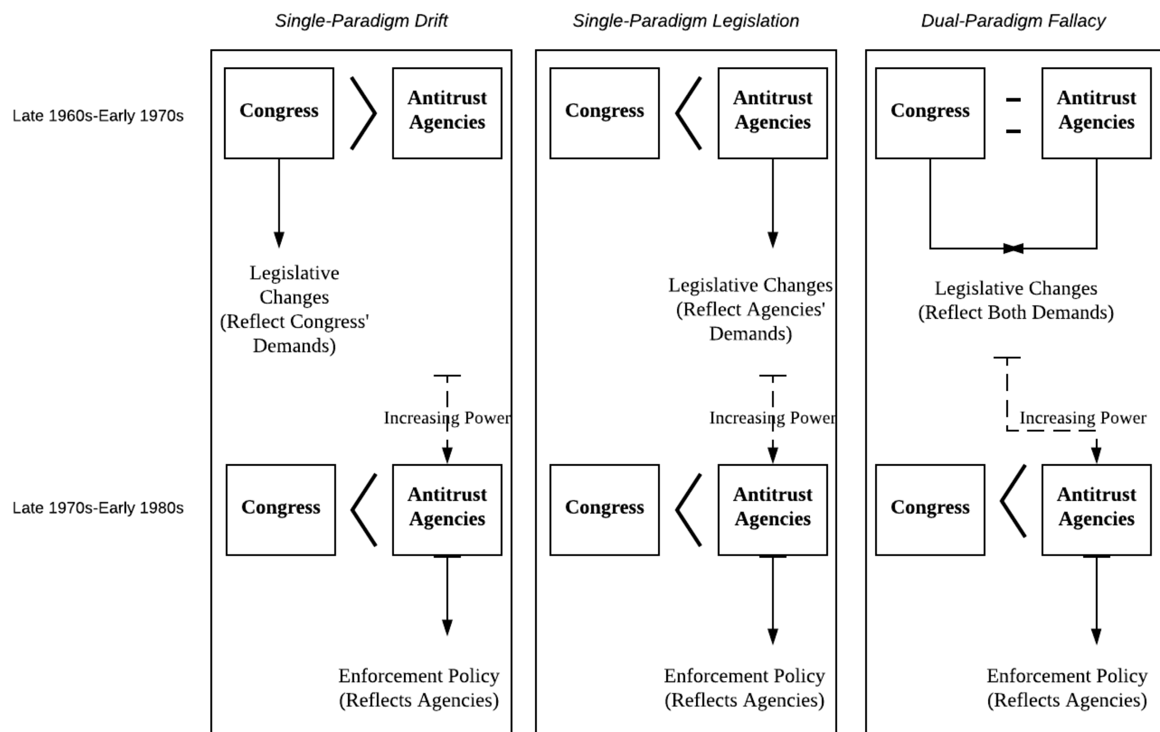
of criminal price fixing cases. Such cartelistic agreements typically involved competitors in the same market agreeing to fix prices, reduce output or allocate geographical markets to collectively increase prices. This legislation increased the maximum fine for such criminal cases from $50,000 to $100,000 for individuals and from $50,000 to $1 million for corporations -the first fine increase since 1950- and also increased the maximum prison sentence for individuals from one year to three, thus raising the status of a Sherman Act criminal offense from misdemeanor to felony. Second, the Hart-Scott-Rodino (HSR) Amendment of 1976 created the regulatory pre-merger notification and clearance system that is being used today. It requires mergers and acquisitions above a certain size threshold to report their mergers to antitrust agencies, the DOJ and the FTC, before they are consummated. Once the proper premerger notification papers are filed, the agencies have 30 days to decide whether to ask for more information or to allow the deal to go through.

These legal changes seem to be contradicting the description of a gradual decline in antitrust policy starting in the late 1970s. Then if we take Congress' actions into account, we are facing slightly different set of research questions: How did the influence of the Chicago School, business lobbying or conservative presidents circumvent the opposition from the Congress? Also, what explains strengthening legislations passed by the Congress when these other forces were working towards undermining antitrust policy in the same period? In the next section, I offer a theory on "dual-paradigm fallacy" that can answer these questions.

Incorporating the Congress and the Dual-Paradigm Fallacy

There are three possible explanations to the Congress' legislation of the Tunney Act and the HSR Amendment, each representing a different model of policy change when taking also the Congress into account (see Graph 2 below). The first possible explanation is that the Congress enacted the

Tunney and the HSR Acts according to its own paradigm or interests, overpowering the antitrust agencies in the legislative domain. But these changes had no impact on the resulting policy changes in the long run, which were solely influenced by the Chicago School paradigm organized inside the antitrust agencies. In this story, the enforcement actors overcome the Congress through “silent” strategies of change and the legislative changes and the Congress’ paradigm are not important. I will call narrative the “single-paradigm-drift” pathway of policy change.



Graph 2: Three alternative ways to connect the Congress to antitrust policy changes (“>” symbolizes “stronger than, “<” symbolizes “weaker than”, and “=” symbolizes “in equal power to”)

Second, the antitrust agencies requested these legislative changes according to their own paradigm, with the goal of increasing the institutional power of the antitrust agencies. Either because their paradigm was more accepted than the Congress’ or they had more control over the legislative agenda, they were able to get these legislations to pass. This narrative would keep the

antitrust enforcement authorities as the designers of the policy change but would add legislative reforms as another mechanism through which they changed the policy. I will call this narrative the "single-paradigm-legislative" pathway of policy change.

Third and lastly, a reconciliation between the Congress and antitrust agencies' paradigms took place. These legislations did not simply represent either the Congress' or antitrust agencies' paradigms but could fit into both. Nevertheless, unintentionally these legislative changes increased the power of the antitrust agencies *vis a vis* the Congress, thus in the long run allowing them to overcome the Congressional resistance. This suggests an entirely different pathway of policy change, in which the Congress' policy position contributed to the causal sequence. I will call this "dual-paradigm fallacy" pathway.

I argue that the last model represents the history of the US Antitrust Policy change better. This form of change occurs when two different and opposite policy paradigms, representing different set of interests and using different frameworks to perceive problems and their solutions, are equally powerful and represented by different policy actors inside a policy field. Such dual-paradigm fields can emerge during transitional periods when the existing paradigm is challenged by its own crises in managing society's problems and facing an already-organized alternative. Peter Hall himself talks about this transitional period in the British monetary policy field in his original account of paradigm shift (1993). He shows that for a time in the mid-1970s the old Keynesian paradigm upheld by the Treasury coexisted with the new Monetarist paradigm organized inside Bank of England. This duality was resolved, when the Treasury facing its own failure in managing economic crises created new policies that "adjusted traditional Keynesian practices", but "stretched its intellectual coherence… to the point of breaking" (Hall 1993, 285). These reactionary policies' failure escalated the fall of the old paradigm and led to the Prime

Minister's preference of the Bank over the Treasury in deciding monetary policy, which completed the paradigm shift. However, there was not an equivalent superior actor that could change the balance between the Congress and the antitrust agencies. Instead, the only way the antitrust agencies could increase their power was by convincing the Congress to make legislative changes. This forced a reconciliation between the two paradigms and concessions on both sides.

Paradigm reconciliations can occur because policies have various different component rules, often doing different things. In fact, a good way to define a policy is *a set of institutionalized rules that complement each other towards achieving a specific set of goals*. While Hall and others have assumed that different goals require different rules, it is the arrangement between these rules that make up the overall direction of the policy, not the rules themselves individually. Consequently, different paradigms can have opposite demands on one set of the rules, but they can also have reconcilable demands in other set of rules, although they seek to implement different policy goals overall. In antitrust, the old paradigm and the new paradigm were not able to agree on how to enforce the set of antitrust rules that govern monopolies' conduct that restrict competition; one side wanted non-enforcement, the other wanted strong enforcement. In another area, however, such as how much the price-fixing cartels should be punished or how the merger control should be conducted, they could agree on the future direction of policy. This does not mean they shared the same views or interests in supporting the same policy changes. The same reform can mean different things to each perspective, but both sides can still agree on the reform.

I call this a fallacy, because much like the reactive policy changes initiated by the Treasury in Hall's research, the US Congress' attempts to correct its own failures led to its own undermining, which was neither planned, nor expected by the Congress. As I will explain in the last chapter, the Tunney Act and the HSR Act increased the power of the antitrust agencies inside the policy field

and allowed them to shape antitrust enforcement more independently from the Congress and the courts. Baxter used Tunney Act's mandate to "foil" the slow decline in other areas of antitrust-while he was fighting over the control of other areas of antitrust, the increasing criminal prosecutions increased DOJ's political and institutional legitimacy. The premerger notification system was similarly essential in allowing the DOJ and FTC to take control over mergers and to replace the court-made law with their regulations. It is also important to note that, criminal antitrust cases and notified mergers' clearance constitute the main activity of antitrust authorities, which allow them to increase their resources despite the decline in antitrust in other areas.

I do not want to dismiss the potential influence of non-ideational factors, like big business lobbying and conservative politics. Both big businesses and conservative Presidents played important roles in the late 1960s and early 1970s when the Congress was preparing its legislative proposals. However, as I will show, although these influences often worked together with the Chicago School towards achieving similar policy goals, they were less influential on their own without the support from this paradigm. This is mainly because the Congress' was more hostile towards open demands of big businesses or conservative politicians. In fact, the reconciliation between these two paradigms could happen precisely when the Chicago School prescriptions diverged with the big business groups or the conservative presidents.

The dual-paradigm fallacy framework also adds more broadly to social science theories on institutional change. The "gradual institutional change" theory created by the historical-institutionalists argues that when actors seeking substantial policy changes face "veto actors", like the Congress regarding antitrust, they can use the ambiguities in rules to slowly transform the actual working and effects of the policy on the ground (Hacker 2004; Streeck and Thelen 2005, 9, 16; Mahoney and Thelen 2009, 11, 21). However, this assumes that the gradual and swift forms

of change are mutually exclusive, and gradual change only happens when swift changes are blocked. The dual-paradigm fallacy theory shows that these forms of change can also be complementary: swift changes can allow or contribute to gradual changes that undermine them. Furthermore, social scientists often interpret political actors as solely the representatives of some business interests or carrier of some political ideologies. However, political actors with long-term appointments in specialized policy branches can also develop policy expertise and hold onto paradigm frameworks that they use to perceive policy problems and solutions. In a sense, they can be intellectuals or technocrats in their own right. In the Antitrust field, as I will show, the Congressional Subcommittees of Antitrust held such policy expertise in the political field.

Data and Methods

To test these arguments, I collected original data on antitrust policy discussions from the late 1960s until 1980. In addition, I used "Legislative History of the Federal Antitrust Laws and Related Statutes" (Kintner 1978) to give these debates historical context. I also collected policy documents and public statements of the heads of the antitrust agencies, the declarations of the Presidents and policy relevant intellectual works by well-known antitrust intellectuals to understand their perspectives. Secondary resources from legal scholarship covering this period supplemented this original data.

With this data, I built an in-case comparison between four antitrust legislative proposals that were discussed by the Congress in this period to test the three models of policy change outlined above. In addition to the two successful legislations, the Tunney Act and the HSR Amendment, I selected two failed reform proposals, the "Deconcentation Act" and the "Robinson-Patman Repeal Act", both appearing persistently on the Congressional record over the course of the period under analysis, strongly indicating that they were feasible counterfactuals to the other policy reforms that

succeeded. Importantly, these failed proposals were either prepared by the Congressional or the antitrust agency experts.

There are distinct advantages to using legislative proposals that never turned into law to understand the proposals that did. First of all, looking at what could have had happened reveals the important components of uncertainty and unpredictability during the period of policy change that would have been missed in a more deterministic approach. The examination of the Deconcentation Act and the Robinson-Patman Repeal Act reveals that antitrust in the US could have been much more different. Second, incorporating failed and successful proposals together allows tracing which legislative proposals the different policy actors felt most strongly about and why they supported these changes. This is crucial to demonstrate the opposite points of view between the Congress and the antitrust authorities in this period. Lastly, the comparison between the successful and the failed antitrust change proposals can help reveal the power dynamics and interactions between the proponents of these proposals, with that it allows an examination of the necessary conditions for a successful legislative proposal.

The Crises and Divided Field of Antitrust

As someone at the FTC wrote in 1969 “Today, antitrust is under attack from both left and right... Although the critics start on common ground, they soon part company” (FTC 1970, 7). What she was describing was a policy field that was under strain economic crises undermining the legitimacy of antitrust policy, which were interpreted in radically different ways under two policy paradigms.

The first economic crisis was the boom in conglomerate mergers, which was the “most explosive issue” in antitrust policy field in the late 1960s (Austin 1969). Merger activity was doubling almost every year between 1965 and 1969, and consisted of more than 80% of

conglomerate mergers (Congress 1964). These mergers escaped antitrust enforcement, because they typically merged companies operating in unrelated markets (Fligstein 1990) and therefore, they did not increase market concentration. Therefore, the enforcement authorities hesitated in expanding the existing jurisprudence on mergers to conglomerations. For example, when ruling on the Procter & Gamble merger case in 1967, Supreme Court Justice Harlan stated, "It is clear enough that Congress desired that conglomerate and product-extension mergers be brought under Section 7 [Clayton Act] scrutiny, but well-versed economists have argued that such scrutiny can never lead to a valid finding of illegality".[7] Similarly, Assistant Attorney General Donald Turner argued that conglomerate mergers did not constitute an antitrust problem and refused to prosecute such cases until the end of his term in 1968 (Turner 1964; Reid 1969).

The second and related concern was the increase in inflation. Consumer good prices started to increase in the late-1960s, pressuring President Johnson's administration into action. In 1968, the Cabinet Committee on Price Stability studied the industries that were the persistent source of inflation and submitted four papers to the President. One paper titled "Industrial Structure and Competition Policy" contained an analysis of existing aggregate concentration trends and market concentration statistics and concluded that increasing market concentration was the leading cause of inflation and called for "more vigorous" antitrust enforcement (Cabinet 1969).

The failure of the structuralist school of antitrust in targeting the conglomerate merger and inflation crises was aggravated by the sharp division on perspectives inside the antitrust intellectual field. The Chicago School did not recognize conglomerate mergers or inflation as antitrust problems. Robert Bork had argued that conglomerate mergers were efficient mergers that should

[7] FTC v. Procter & Gamble Co., 386 U.S. 568, 587

never be intervened by antitrust (Bork and Bowman 1965).[8] The Chicago School economist, George Stigler had stated in no uncertain terms that "oligopoly and monopoly prices have no special relevance to inflation" (Stigler 1962). Other Chicago scholars argued that, "absent government controls, administered pricing is not a phenomenon observed in concentrated industries." (Fred Weston in Congress 1974). Instead, market concentration can be a sign of "economies of scale" and "productive efficiency", which can help lowering the price.

However, there was also a second group of intellectuals ignored by the previous research. I will call this second intellectual group, for lack of a better term, "radical structuralists". The views of this groups were epitomized in John K. Galbraith's "The New Industrial State" (2007). Galbraith, an influential Keynesian economist from Harvard University and previously an economic advisor to President Kennedy, argued that the market was already "dead" due to the increasing concentration of market power and antitrust was a "charade" for failing to prevent this. This strong criticism was taken as an admission of failure by the proponents of the old paradigm, which began demanding improvements to the antitrust laws to better achieve deconcentration in the market (see Davidow 1968; Reilly 1968; Rill 1966; W. F. Mueller 1970; Adams 1968). The radical structuralists criticized orthodox structuralists like Turner, calling him a "passive theorist" (Reid 1969) and argued that antitrust should be strongly used against conglomerate mergers and price increasing concentrated markets.

The differences between two different expert panels ordered by Presidents Johnson and Nixon to study antitrust policy is most revealing of the paradigmatic chams dividing the antitrust field in this period. The first report prepared by Phil C. Neal from Chicago University (Neal et al.

[8] This argument since then has been discredited, and most economists today agree that there were no significant efficiency gains from conglomerate mergers (see Kaplan and Weisbach 1992).

1968) was written from a radical structuralist perspective[9]. The most significant aspect of the report was the recommendation of a new "Concentrated Industries Act", which would aim deconcentrating industries where four largest firms hold 70% or more of the market through divestitures.[10] The Neal report also recommended a new "Merger Law" that can more clearly apply to conglomerate mergers that involved the acquisition of one of the four leading firms in a concentrated economy. The second report prepared by George Stigler (Stigler et al. 1968) fully embraced the Chicago School perspective. It opposed the Neal report's deconcentration act arguing "present economic knowledge" does not indicate any negative consequences of concentration *per se*. It also opposed antitrust control over conglomerate mergers. It stated, "We seriously doubt that the Antitrust Division should embark upon an active program challenging conglomerate enterprises on the basis of nebulous fears about size and economic power". Both reports were looking at the same economic problems but offering completely different interpretations and recommendations, representing two distinct paradigms. It was the view of the Neal report and the radical structuralists that the Congressional subcommittees allied with.

The Congressional antitrust subcommittees held extensive hearings on conglomerate mergers between 1965 and 1971, emphasizing them as "one of the most important and pressing economic, social and political problems of America's recent history" (Representative McCulloch in Congress 1970). While both the radical structuralists and the Chicago School scholars were invited to testify in these hearings, the subcommittees chose the radical structuralists as their voice. The main problem with these mergers, according to the Congressmen was the increase in

[9] It is a mystery why Bork agreed to sign this report. He would later explain in 1977 that he dissented to the report in preparation, but "the Task Force majority went ahead over [his] dead body, which they seemed to think was the scenic route" (Bork 1977, 874).
[10] This act would be in place for only 4 years, target industries with sales over $500 million or more and attempt to reduce the market share of companies below a share of 12%.

"aggregate concentration", defined as the increasing control of the overall economy by a few corporations, which differed from "market concentration", specific to product sectors. The Congressmen identified aggregate concentration, rather than product-sector specific market concentration is the main historical occupation of antitrust. The report on these hearings recommended "new remedies" to target "increasing concentration of economic power, in both the aggregate and in particular markets" (Congress 1971).

Interestingly, originally President Nixon's administration pursued a tough antitrust policy, and announced a number of investigations on conglomerates.[11] However, this position came to an abrupt end when the DOJ settled one if its biggest conglomerate merger cases against International Telephone and Telegraph Company (ITT) with a few concessions. Journalists quickly found out that the ITT promised a large donation to the Republican National Convention in 1972, and the possibility that Nixon made a *quid pro quo* alarmed the Congress. Independent of its effects on Nixon's impeachment trial, this scandal also deepened the crisis of antitrust and convinced the Congress that enforcement policy commitments of the agencies were unreliable and legislative changes were needed.

The antitrust subcommittees were also concerned by the inflation problem, especially in the early 1970s. The failure of Keynesian monetary and fiscal policies (derisively called "the old religion" in these debates) in dealing with the combination of inflation and unemployment had forced the Congress to open up the policy toolbox and try new solutions. In 1970, the Congress passed the Economic Stabilization Act, which gave President Nixon the authority to institute price and wage controls (freezes). This dramatic measure worked briefly until some of the price

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[11] Nixon's antitrust policy deserves separate research. Publicly, he advocated for strong antitrust policies, but the Nixon tapes revealed that privately he saw antitrust as an impediment and wanted his attorney general out of office (Naughton 1974)

restrictions were lifted in the second half of 1972, which led to severe price hikes in 1973 and 1974. In the same period, the antitrust subcommittees began to consider antitrust as an alternative to price controls. In 1971 the Senate Subcommittee held a four-day symposium with a suggestive title "Controls or Competition?" (Congress 1972). In 1973, the House Subcommittee held extensive hearings on food industry in order to "determine whether there may be some antitrust violations or anticompetitive practices sanctioned by law in part responsible for price increases" (Congress 1973a). This hearing was concluded with a suggestion "Vigorous enforcement of the antitrust laws is one way to obtain at least some relief from high food prices". When the Congress created a special Joint Economic Committee to provide specific legislative solutions to inflation in 1974, the first scheduled hearing was on the "concentrated industries" (Congress 1974a). These hearings were focused on figuring out if concentrated industries contributed more to the inflation problem by "administering" prices, which referred to the ability of companies with substantial market power to set the prices in their market. The radical structuralists again supplied supporting testimony (Scherer and Mueller in Congress 1974a). This theory suggested that inflation resulted "not of impersonal market forces but of conscious decisions by the firms involved".

Combined with the obvious example of the Organization of Petroleum Exporting Countries (OPEC) cartel fixing the world oil prices in 1973, the antitrust subcommittees' suggestion to perceive inflation as an antitrust problem suddenly gained traction in the Congress. As Representative Hart stated, a week didn't go by without a Congressman "gracing the Congressional Record with admiring words for antitrust as a weapon to fight inflation" (in Congress 1975) President Ford's administration was also on board. Ford stated in 1974 "heightened antitrust enforcement is a significant weapon in the current fight against double-digit

inflation" and included "vigorous antitrust enforcement" as a part of his inflation program (cited in Handler 1975). This pushed legislative agendas of antitrust forward.

On the side of antitrust agencies, however, other convictions were increasingly dominant, which has been extensively investigated in previous research (Eisner 1991; Davies 2010). Briefly, under the leadership of Thomas Kauper from 1972 to 1976, the DOJ Antitrust Division started to seek "a greater capacity for economic analysis… both in terms of the development of specific cases… and in the development of an overall program that made economic sense" (Kauper quoted in Eisner 1991). Similar changes were occurring inside the FTC as well. In 1974, an FTC commissioner was testifying in the Congress "Our staff is now required to advise the Commission of the estimated costs and consumer benefits expected from proposed enforcement activity" (Bradley Thompson in Congress 1974). The FTC chairman Engman also testified "I think that the [FTC] Commission recently had had a renaissance, one might say, with respect to a reevaluation of what the competition is attempting to do. I don't view our job of the antitrust enforcement as being designed to protect competitors, but to protect competition" (Lewis Engman in Congress 1974). Such statements strongly signaled the increasing adoption of the new Chicago School paradigm by the antitrust agencies by mid-1970s. This was important for the faith of the legislative proposals that were discussed in the Congress.

Antitrust Legislation Proposals

The four main legislative proposals brought to the Congress in the late 1960s and early 1970s all shared a connection to the conglomerate merger or inflation crises, which were the main motivations for the Congress to take up any proposal to legislate new antitrust laws (see Table 1 below). However, as I will show in this section, not all proposals were accepted. Only those proposals that reconciled these seemingly irreconcilable perspectives were legislated at the end of

the day. I will also show that big business lobbying and conservative ideologies upheld by presidents played only limited roles in in these decisions and do not seem to have an independent causal effect.

	FAILURE		**SUCCESS**	
Legislative Proposals	**Robinson Patman Act Repeal**	**Deconcentration Act**	**Tunney Act (1974)**	**HSR Amendment (1976)**
Years of Discussion	1969 & 1974-76	1972 &1973-1975	1969 & 1973-74	1975-76
Fits the Structural Paradigm	(-)	(+)	(+)	(+)
Fits the Chicago School Paradigm	(+)	(-)	(+)	(+)
Big Business Support	(+)	(-)	(+)	(-)
Conservative President Support	(-)	**(n/a)**	(+)	(-)

Table 1: Comparison of different antitrust legislation proposals in the late 1960s and early 1970s

Robinson-Patman Act Repeal

Robinson-Patman Act (RP Act) was legislated in 1938 to prohibit price discrimination, and by extension, predatory pricing by monopolists. It has always been criticized by economists, but the Chicago scholars increased the attack on this legislation, arguing price discrimination is always efficient and predatory pricing is nothing but more efficient competitors competing on prices. For example, Posner argued “A supplier might offer a discount or allowance to one distributor, but not to others, because the distributor did a better job of advertising. To object to such a "discrimination" would be tantamount to disapproving the payment of an extra bonus to a salesman who turns in an outstanding performance.” (Posner 1969, 56). Big business groups, especially in the retail sector also regularly lobbied the Congress to repeal this Act but could not succeed without the support of the antitrust agencies. Congressional records show that the economists and

commissioners inside the FTC were increasingly complaining about this legislation (Congress 1969) by 1969, but the agencies still upheld the law.

By 1974, however, antitrust agencies had turned against the RP Act. The FTC published a report in 1973 stating the prohibition of prevent price discrimination diminished competitive pricing (Congress 1974b). The DOJ Antitrust Division also called the Act "deleterious impact upon competition" (Congress 1976). Kauper announced, "I firmly believe that the time has come for substantial modification of the Robinson-Patman Act" (Kauper 1975, 154). The Division circulated two draft statutes "The Predatory Practices Act" and "The Price Discrimination Act" to amend or repeal the Act in 1975.[12] The antitrust agencies not only adopted the proposal of the Chicago School, but also its theory of price setting in the market. They argued that the inefficiencies created by the RP was causing inflation, not market concentration. For example, one FTC commissioner argued "If the FTC forces every chain grocery store and drug store in the land to pay the same price that is paid by the "mom and pop" grocer and the neighborhood pharmacist, the effect will inevitably be to eliminate a vast array of price discounts and thus raise the overall price in those important sectors of the economy" (Thompson in Congress 1974b).

The agencies' campaign to repeal the RP Act faced strong resistance in the Congress, where Congressmen often called the RP Act the "Magna Carta of small business". Congressmen perceived the objections to the RP Act as purely "theoretical" and had little basis in "the realities of business" (Congress 1969). They argued that the RP Act had the purpose of preventing manufacturers from giving discriminatory discounts to large chain stores, which deprives the small purchasers and retailers of the same discounts for not placing similarly large orders (Congress

[12] The former had the explicit purpose to overturn the case precedence set by the Utah Pie decision and limit how the courts should interpret "below-cost pricing" by looking at marginal cost. The latter had the more direct goal to limit the price discrimination prohibition to those cases where there is a "systematic scheme" that "clearly threatens" to eliminate competitors, and to allow for the defendants to use a number of arguments in their defense.

1969). If RP Act is repealed, these small businesses would disappear. Against the argument that the RP's price discrimination prohibition harms consumers by creating price rigidity, they argued that "the interests of the consumers are best served by the preservation of small business", because small businesses as the innovators, price cutters and providers of consumer-choice. (Congress 1969). The RP Act contributed to lowering inflation by forcing large businesses to give discounts indiscriminately.

Small business groups heavily lobbied the Congress and the President to prevent the repeal of the Act. They met with President Ford on August 17, 1975 (Congress 1975b)[13] and warned that, if the amendments are passed "there is no question that thousands would be driven from the marketplace with a disastrous impact on our economy, tax revenue and jobs" (Congress 1975b). As a consequence, Ford did not side with the antitrust agencies in this legislative proposal.

The RP repeal proposal reveals the growing influence of the Chicago School over antitrust agencies in the 1970s, and how this paradigm diverged so sharply from the structuralist paradigm still dominating the Congress. The failure of this proposal also suggests the limitations of big business lobbies, the Chicago School and conservative presidents in forcing legislative changes that fit their new paradigm, and the continuing power of small business lobbies. Therefore, it weakens single-paradigm legislation model, which argued the agencies could impose their reform proposals in this moment, and also weakens the hypotheses that big business lobbying and conservative ideology played a major role in antitrust policy change. The RP proposal failed because it was not presented from the perspective of the old paradigm assumed by the Congress.

[13] Including National Small Business Association, the National Federation of Independent Business, Council of Smaller Enterprises of Cleveland, Independent Business Association of Wisconsin, National Association of Small Business Investment Companies, Smaller Business Association of New England, and Smaller Manufacturers Council of Pittsburgh

Deconcentration Act

Today it is completely forgotten that the US Congress came closest to legislating the most structuralist interpretation of antitrust policy into law, not in the 1950s or 1960s when this paradigm was unchallenged, but in early 1970s when this paradigm was already dying. The main force behind this proposal was the new radical structuralists that also found expression in the Neal report and a senior, influential senator chairing the Senate Subcommittee on Antitrust and Monopoly, Senator Philip Hart.

Senator Hart first introduced the "Industrial Reorganization Act" (S. 3832) to the 92nd congress in 1972, then to the 93rd congress in 1973 (S.1167) and to the 94th congress in 1975 (S. 1959). Hart's proposal was even more radical than the Neal Report's-it would break up companies with a 4-firm market share of 50% (instead of 70%). The Act proposed the creation of new administrative and judicial agencies that would oversee this process (for more details see Jones 1973). [14] Surprisingly, this radical proposal was not marginalized in the Congress. The Senate antitrust subcommittee organized a 9-part hearing series from 1973 to 1975 to discuss and plan how the deconcentration would work in different sectors of the economy (Congress 1973b). The joint committee on inflation in 1974 and several congressional reports emphasized the proposal as a feasible solution to inflation caused by market concentration (Congress 1974a; 1976).

This positive political reception was thanks to Hart's ability to connect his proposal to the accepted paradigm. Hart argued that his Act was not as a radical departure from the existing laws, but their "upgrading". He stated the Act "merely restates the philosophy which has been the bedrock of the antitrust laws for 82 years" and "seeks to bring closer to reality what this country

[14] It proposed an 'Industrial Reorganization Commission', an administrative body to determine which corporations are in violation of the statute's prohibition against monopoly power. Then the cases would be brought to a new 15-member judicial body, the 'Industrial Reorganization Court'.

has pretended to have for years, a competitive economy" (Hart 1971). Hart also connected his proposal to the discussions that had been taking place around the issues of conglomerate mergers and inflation at the congressional antitrust subcommittees (Congress 1973b). He stated that his Act "bears the seeds of a reform program that could produce an economy in which inflation and high unemployment would no longer be a way of life" (Hart 1971). He argued that market deconcentration is in fact a "free-market" alternative to the growing dependence of the government on regulations and price control to deal with the problems of inflation, unemployment and stagnation (Hart 1971).

Big businesses groups like National Association of Manufacturers (NAM) opposed the proposed legislation and argued it had "potential for destroying the efficiency which has occurred as a result of good management and economies of scale" (Congress 1973b). They brought in Chicago School experts to testify in the Congress that "a comprehensive deconcentration policy could do great harm by decreasing efficient performance and removing part of the incentive toward improving performance in a behaviorally competitive industry" (Congress 1973b).

The antitrust agencies' resistance to the Congress was more measured given that they receive their institutional mandate from Congress' legislation and institutional capacity from Congress' budget allocation decisions. Nevertheless, when asked his opinion at a Bar Association meeting, Assistant Attorney General Kauper said: "My own feeling…is one of some skepticism... We are dealing with a very generalized economic theory, which says and predicts that concentrated industries behave in a certain way… I don't think that as of now the data in many industries is enough to tell us what these results are" (American Bar Association 1973). The FTC was similarly resistant to the structuralist theory behind the act that concentration is categorically harmful. The Director of Policy Planning at the FTC stated "For if concentration results from productive

efficiency, deconcentration will cause productive inefficiency. And production inefficiency will likely cause higher prices to consumers" (Wesley Liebeler in Congress 1973). However, the antitrust agencies did not produce an official stance against the deconcentration act, which they might have if the act reached the vote. Ultimately, Hart's Act died when he passed away in 1976, but his name lived on with the Hart-Scott-Rodino Act, which he also supported.

The proposal of the Deconcentration Act is revealing, not only of the strong structuralist tradition in the Congressional subcommittees and the Congress in general, but also the new radical turn this paradigm had taken during the crisis of Antitrust. It also weakens the single-paradigm drift model by showing that the Congress alone could not dominate the antirust policy field. I argue that this proposal failed because it was not reconciliatory with the rising new paradigm of the Chicago School and did not try to appease the antitrust agencies, by proposing to replace them with new administrative bodies to oversee the deconcentrating work. As Robert Bork put most elegantly "It is one of the ironies with which public policy abounds that so frequently ideas which have been around for decades begin to be translated into politics and then into law just at the time when they are coming to be recognized in the intellectual world as false" (Bork 1977, 873). The Deconcentration Act was facing a dawning new paradigm that would not let such legislation pass.

Tunney Act

When the Antitrust Penalties and Procedures, or Tunney Act was signed into law by President Ford, he praised it as "the first major reform of the Nation's antitrust laws in nearly 20 years" (Presidential Documents 1974). The Act had multiple parts, but as it was argued when the Act reached the debate at the House floor in 1974, its "most significant provision" was the increase in

criminal penalties (Congress 1974c). Since Sherman Act, the maximum fines for antitrust violations had only increased once in 1955.

The proposal originally came from Nixon's Council of Economic Advisers, which argued that due to inflation and increasing size of corporations the maximum antitrust fines had become useless. The proposal to increase the maximum fine from $50,000 to $500,000 reached the Congress in 1970 and immediately received strong support from Subcommittees. Senator Philip Hart commended the administration for offering this bill and supported for "it should increase the effectiveness of our antitrust laws as a deterrent to harmful economic concentration, and as such, should help decrease the burden on the Department of Justice and the courts created by antitrust prosecutions"(Congress 1970a).

The proposal generated little controversy and "no real opposition" (Kintner 1978). Even big business lobbyists seemed non-resistant. The Ford administration continued to advocate for this agenda. Before the Tunney Act reached vote, in October 1974, Ford delivered a message to the Congress calling for an increase in the fine to $1 million (Congress 1974c). Assistant Attorney General Kauper also announced that he intended to propose a legislation making antitrust violations punishable as felonies and increasing the maximum imprisonment to five years (which were not originally in the Tunney Act). The antitrust subcommittees immediately stood behind these proposals and pledged support (Congress 1974c). The law passed with these last-minute increases in penalties.

The seemingly conflictless legislation of the increase in antitrust criminal penalties reflect the alignment between the old structuralist paradigm and the new Chicago School paradigm over this legislation. In fact, the Stigler Report, which was ignored both by Nixon administration and the Congress had also advocated for an increase in criminal penalties of antitrust (Stigler et al.

1968). For the Chicago School, price-fixing constituted the biggest harm to the economy by causing efficiency losses, therefore it deserved the biggest punishment. Richard Posner also testified in the congress "There should be no maximum penalty, and the amount of the penalty should be determined in each case primarily, although not exclusively, by the economic harm caused by the illegal act" (Congress 1969).

However, departing from the Chicago School, the Congress interpreted this act based on the structuralist theory of "administered prices". As one historian of this law stated, the Act "in large part, … reflected a frequently expressed belief that anticompetitive activities by business were in part responsible for the national economic difficulties existing at the time of enactment" (Kintner 1984). The DOJ played an important role in creating this understanding in the Congressional debates by representing strong enforcement on price-fixing as a solution to inflation. For example, when asked to comment on how his agency can play a role in battling inflation, Kauper testified in the Congress: "It is the responsibility of the Antitrust Division to identify price rises which have not been compelled by increases in labor or material costs and to then investigate whether those unexplainable price rises are a product of collusion." (Congress 1974a), adding "Antitrust actions with the greatest short run promise [to battle inflation] include a redoubling of efforts to detect and prosecute price-fixing conspiracies" (Congress 1974a)

Tunney Act was successful in the absence of the resistance from either the proponents of the Chicago School or the structural paradigm. This finding supports dual-paradigm fallacy model, but it does not refute the role of big business support or conservative ideology of presidents. The examination of the HSR Act in the next section will provide a clearer example.

HSR Amendment

Creating a pre-merger notification system had been in discussions since the Clayton Act. Proposals were introduced to Congress in 1938, 1943, 1946, 1956, 1961 and most recently in 1967, but failed due to the strong business lobbying against it (Horton 2017, 199). Without this system, antitrust agencies were not alerted to planned mergers and had to rely on the publicly available information when investigating not yet consummated mergers. In other words, as Senator Hart explained, "if the Wall Street Journal missed one [merger], so well may the Federal Trade Commission and the Antitrust Division." (Congress 1975c). The FTC had created a pre-merger notification system in 1969 in response to the rise in conglomerate mergers, but compliance was low, because it was a regulatory provision. Also, only very sizable mergers were subject to this requirement and information was not shared across agencies, leaving the DOJ behind. Correcting DOJ's weakness in merger control, as Kauper stated was the "top legislative priority item" for the DOJ Antitrust Division in 1975 (Congress 1975c).

However, the DOJ's original proposal to the Congress did not involve a clearance system, but the expansion of the DOJ's Civil Investigative Demand (CID) powers. The Antitrust Division could use CIDs for non-criminal antitrust cases to collect information without having to first go through the courts thanks to the Antitrust Civil Process Act of 1962. But these powers were limited to documentary information (not testimonies from persons), could only involve the corporations that allegedly broke the law (not third parties), and most importantly, could not be based on actions not already committed, i.e. unconsummated mergers. Information had become especially important with the growing reliance on economic analyses in merger control. As Kauper stated: "Sound analysis of a pending merger requires assembly of reliable market data. We must formulate

relevant product markets, taking into consideration cross elasticity of demand among functionally related products" (Congress 1975c).

However, the DOJ's CIDs suggestion reignited the Congressional antitrust subcommittees' interest to institute a pre-merger notification system. Congressmen argued that, without complementing the new CID powers with a waiting period, the DOJ would not have enough time to collect the information it would need (Congress 1975c). They prepared a legislation requiring all merging parties (without a size threshold) to report to the agencies 30 days in advance. The proposal gave "giant corporations with assets or sales more than $100 million" an additional 30 days of investigation. This extra precaution for large M&As was reminiscent of the Congressional subcommittees' perception of "aggregate concentration" as the real antitrust threat. The most important part of the proposal was the automatic halt requirement for M&A transactions, if the agencies filed a complaint in court, which could stop the mergers indefinitely. An additional "escrow provision" also separated and fixed the value of the acquired stock and assets during this pause. With this proposal, the Congress sought to create a system that could divest harmful mergers easily. As Senator Hart explained, "Anyone who has looked at the problems in undoing a merger knows that, if the merger is not to be allowed, all the country and the companies would be much better off if it is never born" (Congress 1975c).

To the big business groups, the pre-merger notification system was as radical as Hart's Deconcentration Act. Business representatives from the Chamber of Commerce and the Business Roundtable strongly lobbied the Congress against it. For example, the Attorney representing the Chamber of Commerce stated: "I do not think that it is a good idea to put somebody in a position where they are in effect a regulator of acquisitions… You would have to then apply, in effect, to the Department of Justice for permission to merge, or to acquire substantial assets" (Rogers in

Congress 1975c). This was successful in getting President Ford and the Republicans in the Congress to fight against the Act. As a result, "perhaps only the tax reform bill has been the subject of such extensive committee and floor considerations as this legislation" (Senator Kennedy cited in Horton 2017, 199).

However, unlike the Ford administration, both antitrust agencies sided with the Congress, at least "in principle" (Congress 1975c), but requested a number of important revisions. The most objected section was the automatic halt requirement. Kauper argued that it goes "too far", adding "It does not seem to me appropriate to give such unreviewable and irrevocable discretion to any government agency, even my own, in this manner" (Congress 1975c). The FTC Chairman Engman similarly demanded "rather than mandating a court, upon application of the enforcement agency, to enter an order prohibiting consummation of a merger pending final judgment, the law should permit a court to require a showing by the government of probable illegality" (Congress 1975c). The cause of their objection was the fear of a possible "chilling effect" over mergers. They argued that when companies know their merger can be halted indefinitely without a trial, they would be less inclined to commit to M&As to begin with. This reflected the Chicago School concern with maintaining market efficiency. In objecting to the automatic halt, agencies often reminded Congress that "many mergers are pro-competitive, or promote efficiencies… Generally, unless there is a recognizable harm, businessmen should be permitted to make and implement business decisions without the sort of disincentives this provision would create" (Kauper in Congress 1975). The agencies also objected to the 'escrow provision' by saying that it is "surely severe disincentive to merger, and goes well beyond what may be necessary to insure competition" (Congress 1975c).

However, the Chicago School perspective could still align with the Congress' proposal. Chicago Scholars also strongly criticized the existing merger control system for relying on the

inefficient method of divestment. They did not seek to stop mergers potentially harmful from happening, but to negotiate appropriate "remedies" before the merger is consummated. This was the approach in the Stigler Report as well. The report argued that merger control should "not tell companies which mergers are forbidden, but which mergers are permitted" (Stigler et al. 1968). This regulatory approach to merger control required a pre-merger notification system where antirust agencies could negotiate with the merging parties before the merger is finalized.

The pressures from the agencies eventually led the replacement of the automatic stay requirement with a possibility to obtain preliminary injunction delaying consummation, if the agencies can bear the burden of proof of showing that the merger might be harmful. Furthermore, the Act passed with a notification requirement for only companies with assets or sales over $100 million when acquiring or merging with companies with assets or sales over $10 million 30-days in advance. The 'escrow' provision was eliminated. These amendments to the last bill basically reduced the HSR Act's ability to keep merging parties separate and order divestments.

The success of HSR Amendment, much like the Taylor Act, reflects the alignment between the dawning Chicago School and old structuralist paradigms of antitrust, supporting dual-paradigm fallacy model. While both sides agreed that divesting completed mergers defeats the purpose of merger control, they envisioned that a pre-merger notification system would resolve this problem in different ways. The Congress wanted (or hoped) the antitrust authorities would use this authority to block more mergers and stop them from increasing market concentration, while the Chicago School proponents had hoped, it would be used to tell the merging parties how they can improve the efficiency of their mergers. It also demonstrates the shortcomings of the explanations relying on big business lobbying and conservative ideologies. The corporate lobbyists' objections found no supporters among antitrust authorities, which conversely sought to increase their own

institutional power. President Ford was forced to concede to this legislation once it became clear he would face the "populist" Jimmy Carter in the elections, and he could not loose political points by vetoing an antirust legislation that sought to broaden antitrust enforcement (Horton 2017).

Antitrust Agencies' Increasing Powers to Reduce Enforcement

The previous explanations of the US antitrust policy also miss the fact that the Tunney and the HSR Amendment were fundamental for the antitrust agencies to preserve, even increase their institutional and political legitimacy while pursuing enforcement policies that undermined antitrust enforcement beginning in the mid-1970s.

When asked how he intends to enforce antitrust, William Baxter responded "I would not be here unless I intended to enforce the antitrust laws very, very vigorously" (Baxter et al. 1981). By vigorous, he specifically meant the criminal prosecution of price-fixing and related charges. Following this promise, by some estimates "from 1981 through 1988, the DOJ initiated more criminal prosecutions than the total of government criminal antitrust cases from 1890 to 1980" (Kovacic 2003, 420). Furthermore, the number of criminal antitrust cases that resulted in a jail sentence for some executives increased by 10-fold (Holliday 1998, 79–80), and the average real fine per firm through criminal cases increased by more than 144% (Gallo et al. 2000, 122–23). The table below summarizes some of these changes.[15]

	Criminal price-fixing cases filed by DOJ	**Number of firms fined**	**Average real fine per firm**
1961-1970	153	653	$ 51,893,100.00
1971-1980	292	890	$ 94,124,300.00
1981-1990	649	628	$ 229,723,700.00

[15] This trend of focusing on criminal antitrust cases would continue on in the 1990s. In 1990, Congress raised the maximum Sherman Act fine for individuals to $350,000 from $100,000 and for corporations to $10 million from $1 million.

Table 2: Criminal price-fixing enforcement by the DOJ (source Gallo et al. 2000)

Baxter used the increasing criminal prosecution of horizontal price-fixing to offset and legitimize the disappearance of other types of antitrust prosecutions by DOJ's Antitrust Division in the 1980s. In fact, the reduction in the prosecution of civil monopolization cases and the increase in criminal prosecution of cases by the DOJ had already started under Kauper. The latter he used to increase the budget and resources of the DOJ tremendously in the 1970s, offsetting the potential losses from the former.

The antitrust agencies need the Congressional support for their budget allocations, and the increasing criminal prosecution of price-fixing was (and still is) a perfect cover to keep growing the agencies. Therefore, when Kauper lobbied the congress for substantial increases to its budget in 1974, he argued "Our emphasis on price fixing means more criminal work, and thus more use of grand juries, also requiring additional resources" (Congress 1975a). Kauper asked for a \$1.5 million increase to his \$13 million budget, and a total of 83 new positions (a 14% increase). In 1975 various bills were submitted to the Congress, some of which would increase the \$17 million annual budget of the Division to \$50 million in the span of 2-3 years. For example, "the Antitrust Enforcement Authorization Act of 1975" (S.1136) aimed to increase the funding for both the Division and the FTC by 200%. The fact that this act collected 45 signatures in the Senate shows that even the conservative Congressmen normally opposed to increasing public spending supported the DOJ Antitrust Division's budget. Although this proposal did not pass, antitrust agencies could still secured a 94% increase (2.5% per year) to their combined budget between 1970 and 1997 (Kwoka 1999). This demonstrates how important it was that antitrust agencies preserved and even increased the enforcement of criminal antitrust cases in order to keep its institutional and political legitimacy intact while undermining enforcement in other areas.

Secondly, the premerger notification system of the HSR Amendment increased the control of the DOJ and FTC over mergers agencies (Rogers III 2012). Before the HSR Amendment, merger cases were regularly reaching and decided at the Supreme Court, but since this amendment there hasn't been a single merger cases decided by the Supreme Court. This is mainly because very few cases are decided by the courts to begin with. For example, between 1977 and 1997 only about 22% of the mergers challenged by the agencies were eventually litigated, compared to about 50% in the previous decades (Sims and Herman 1996). This means, most enforcement decisions over merger control are made by the FTC and the DOJ during the notification period, allowing them to control the accepted norms on mergers through their own administrative regulations or "merger guidelines". Most mergers are settled during the notification period by using structural and behavioral remedies (so-called "fix-it-first" approach) (Eisner 1991, 144). These are highly confidential negotiations conducted without judicial overview or public record, allowing the agencies' to pursue policy positions without scrutiny (Rogers III 2012, 27).

This more regulatory merger-control system allows for the agencies to control the enforcement of merger rules through their administrative regulations or "merger guidelines", which have replaced the text of the law and the courts' interpretation as the main source of law enforcement. It was thanks to this increased control that agencies could change the merger control policy dramatically through their "Merger Guidelines" in 1982 (Waller 1998). It is possible to say that, without the passing of the HSR Act in 1976, it would be very hard for William Baxter to decide and change how the government deals with the mergers, excluding the Courts and the Congress from the equation.

The Tunney Act and HSR Amendments were not unequivocal victories for the Chicago School paradigm proponents either. As discussed earlier, Chicago School intellectuals had strong

objections to some parts of the original bill to create the pre-merger notification system, and big businesses and the President were against the law in more certain terms. On the Tunney Act, Chicago scholars were also originally on the fence. For example, Stigler also argued that cartel agreements would break down easily on their own, even without strong legal sanctions (Ghosal and Sokol 2020, 476). Robert Bork only dedicated less than a paragraph on price-fixing in his "Antitrust Paradox", the bible for the Chicago School (Ghosal and Sokol 2020, 476). Richard Posner vocally argued against fail time for cartel organizers, and also suggested increased fines are not useful in deterring this behavior (Ghosal and Sokol 2020, 476). Therefore, both the HSR Amendment and the Tunney Act did not contribute to advancing the goals of the new Chicago School paradigm directly, but they contributed indirectly to the rise of this new paradigm by enabling and increasing the institutional power of the antitrust agencies, which became the active supporters of the Chicago School perspective beginning in the late 1970s.

Conclusion

The recent attention on the social and economic problems created by companies like Facebook, Google and Amazon almost monopolizing the digital economy has generated a new interest on the changes in the US antitrust policy. While sociologists have been missing in this inquiry, their conceptual tools and theories from the sociology of knowledge and expertise can still offer new perspectives on the ongoing debates in legal and economic scholarship.

This article argued that it was not solely the federal courts and antitrust agencies that gave a new direction to the US antitrust policy more accepting of monopolization as suggested by previous research, but the US Congress also played a distinct role with its own expertise and paradigmatic ideas. The Congressional policy actors responded to the economic problems and proposed policy reform solutions through their radicalized version of the old structuralist antitrust

policy paradigm, which was in stark contrast with the new Chicago School paradigm increasingly dominating the enforcement authorities. This dual-paradigm moment led to a deadlock in policy reform proposals and could only be resolved by the realignment of the new and old paradigms under the Tunney Act and the HSR Amendment. This paper showed that each paradigm saw proposals from its own perspective and the resulting legislative changes reflected both sides' point of view. This form of policy change, however, led to an important fallacy. While satisfying to the Congress at the beginning, the Tunney Act and HSR Amendments also increased the institutional powers and enforcement capacity of the antitrust agencies, allowing them to insert their own paradigmatic preferences on policy enforcement later on. The Congressional debates in the early 1970s suggest that this was an unexpected and unforeseen consequence of the legislations for the congressmen that supported them.

The policy change pathway of "dual-paradigm fallacy" has important theoretical implications for social science studies on policy changes in general. It suggests that when examining the influence of ideas and expert knowledge over policy changes, sociologists should not dismiss the roles of other institutionalized policy actors like the Congress, which can be policy experts and paradigm holders in their own right. It also suggests that Peter Hall's original model of policy paradigm shift was missing the paradigm realignment mechanism as another way for new policy paradigms to rise into power. The domination of an old paradigm with a new one is not always due to the failures of the old paradigm and the successes of the new paradigm, but sometimes the successes are enjoyed both by the new and the old paradigms in the same policy changes. Lastly, it reveals the complementarity between swift and dramatic forms of change like legislation and slow-moving gradual changes like policy drift. These two forms of policy change are imagined negatively correlated in the literature, while legislative changes can help in propelling

the slow-moving enforcement changes by shielding them from the influence of the potential veto actors. Future research should investigate further the possibility of multiple paradigms in a single policy field. The dual-paradigm fallacy in this paper suggests that multiple paradigms can coexist when different policy actors have equal or similar powers to control the policy. In the case of the US antitrust field, this was a transitional moment that was eventually resolved with realignment, but in other policy fields such dualities can break or restructure the power of policy actors in different ways.

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