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Placing economists' analyses of antidumping in an antitrust context

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Abstract
Within the legal profession, there has been a long debate about whether antitrust and antidumping are fundamentally related or dissimilar. However, when U.S. economists have written about antidumping over the last several decades, they have frequently understated or even ignored any arguments that ground antidumping in antitrust law and theory. This paper discusses how antidumping law is presented by many modern U.S. economists, and compares those presentations to how the law and legal scholars have viewed the relationship between antidumping and antitrust law. It shows that understanding the relationship between the justifications for antitrust and antidumping laws requires an understanding of the profound historical changes in antitrust law and the perceptions of antitrust law.

This paper finds that most of the modern economic literature on antidumping either (1) does not discuss antitrust when discussing the reasons for antidumping, (2) presents only an incomplete view of antitrust when discussing the reasons for antidumping, or (3) grounds its view of antidumping in a "Chicago" view of antitrust. These factors, while undeveloped in the economics literature on antidumping, are important for understanding the assumptions underlying the modern economic arguments against antidumping law.

I. Introduction: Antidumping and antitrust, according to modern U.S. economists

The modern U.S. economics literature on antidumping is highly critical of antidumping. Antidumping is described as "broadly negative," "a serious impediment to international trade," and a law that economists "decry."[2] The criticism seems rooted in assertions that antidumping law is purely "protectionist," with few economically valid justifications.

However, as this paper will show, this critique is based on some crucial assumptions about antitrust law, and the purpose of antitrust law. In their critique of antidumping, modern U.S. economists either (1) do not discuss antitrust when discussing the reasons for antidumping,

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[2] See table 2 below.

(2) present only an incomplete view of antitrust when discussing the reasons for antidumping, or (3) ground their view of antidumping in a "Chicago" view of antitrust.

The language of the first U.S. antidumping law (1916) proceeds from the language of the first U.S. antitrust act (Sherman).[3] However, modern U.S. economists, when writing about antidumping law, tend to downplay this connection, or mention it in passing only as if antidumping law, once put in its basic modern form in the Antidumping Act of 1921, has moved completely away from its original antitrust moorings.

This paper looks more closely at the relationship between the economic justifications for antidumping and antitrust laws. It finds that understanding this linkage requires a much closer understanding of the evolution of antitrust law than most modern U.S. economists demonstrate when writing papers about antidumping. Analyzing any linkage also necessitates taking into account the different legal requirements in enforcing an antitrust law domestically versus doing so internationally, where U.S. law holds no sway.

Both antidumping and antitrust law and enforcement have changed since their inceptions. In broad brush, antitrust law has undergone a much more radical revision than antidumping law. When looking at the relationship between the two, one needs to ask: what is meant by "antitrust law"? Do we mean the original understanding of antitrust law, as it was enforced from the New Deal until the 1970s, or do we mean the "Chicago" understanding of antitrust law that has held sway since the 1970s and 1980s? The answer to that question has a profound impact on any economic analysis of whether antidumping law and antitrust law are fundamentally related or at odds.

This paper is not a legal analysis. It is rather a presentation and critique of the economics literature on antidumping, and one that tries to add to that literature by grounding it in an understanding of how economic criticisms of antidumping law need to be analyzed in the context of different understandings of antitrust law.

II. A thumbnail history of U.S. antitrust and antidumping

To understand what the economics literature on antidumping often misses, one must conduct a quick review of developments in the history of antitrust and antidumping. This section and the following sections are not, nor are intended to be, comprehensive legal histories of either antidumping or antitrust law. They are intended to cover broadly the general points of relevance to the economic literature on antidumping. However, some antitrust issues, such as mergers, are not relevant to antidumping and so are not covered at all in this treatment.

There are three main U.S. antitrust laws potentially relevant to antidumping: The Sherman Act (1896), the Clayton Act (1914), and the Robinson-Patman Act (1936). The first U.S. antitrust law, the Sherman Act, criminalized agreements that "intended to operate in restraint of lawful trade."[4] However, the Sherman Act was severely limited in its ability to apply to imports because the Supreme Court restricted its use when applied to contracts concluded in foreign

[3] Mastel (1998).
[4] Gifford (1991), quoting the statute.

countries. In 1916, the first U.S. antidumping law was passed, criminalizing importing products below market value with the intent to injure a U.S. industry or restrain competition. The Congressional rhetoric and some of the legal language for this law drew in part on that used for the Sherman Act. [5]

In the 1912 presidential elections, all three parties ran on platforms alleging that the Sherman Antitrust Act had been too lenient on large corporations. After the elections, and viewing the Sherman Act as too restrictive to bring effective prosecutions, Congress enacted the Clayton Act. The Clayton Act, among its other provisions, limits price discrimination when that price discrimination tends to build a monopoly.[6] Significantly, the Clayton Act does not contain the Sherman Act requirement to prove intent as part of a finding of anticompetitive behavior.[7]

In 1921, Congress passed the 1921 Antidumping Act, the foundation of current antidumping law.[8] The 1921 Antidumping Act was passed in part because its proponents saw the 1916 law as ineffective.[9] Just as the Clayton Act does not require intent for establishing that anticompetitive behavior took place, the 1921 Antidumping Act does not contain a requirement of intent to establish that dumping took place. Later U.S. antidumping law (such as Title VII of the Tariff Act of 1930) preserves the basic structure of the 1921 law. Since 1921, U.S. antidumping law has basically defined dumping as international price discrimination that injures a domestic industry.

On the antitrust side, Congress was not finished with expanding antitrust law. Again concerned that the existing antitrust law was not doing enough to help small businesses, in 1936, it passed the Robinson-Patman Act, which forbad price discrimination from the same seller to two different purchasers. The Robinson-Patman Act was aimed mainly at preventing large retailers from putting small retailers out of business by demanding lower prices from suppliers.[10] Nonetheless, the prohibition on price discrimination, extending such prohibitions already present in the Clayton Act, reads somewhat similarly to prohibitions in antidumping law.[11]

At this point, however, the histories of antitrust law and antidumping law diverge. In the 1950s and 1960s, the enforcement of antidumping law did not result in many affirmative decisions. The Treasury Department determined dumping margins, and often rejected petitions, or took a long time to make a decision, as there was no statutory time limit. In the 1970s and 1980s, however, a series of changes to the antidumping law took the margin

[5] See Finger (1993) and Sykes (1996), as well as Mastel (1998).
[6] http://www.antitrustlaws.org/Clayton-Act.html
[7] "Although this legislative history suggests that Congress wanted to outlaw predatory pricing and provides some indication of Congress' understanding of predatory pricing, section two of the Clayton Act does not contain an explicit intent requirement. The Act forbids price discrimination whenever discrimination "may" result in a lessening of competition or a tendency towards monopoly. The identification of predatory pricing by the House committee as the focus of the legislation suggests that the Act's drafters largely equated the reduced competition referred to in the Act with predatory pricing. The Act reflects Congress' decision to define the forbidden conduct objectively rather than through a subjective intent requirement." Gifford (1991). Gifford also argues that U.S. Courts did not recognize this lack of intent requirement until 1936, but nonetheless, the law already existed with language not mandating intent in 1914.
[8] Finger (1993).
[9] Mastel (1998) and Finger (1993). This point is discussed more below.
[10] http://www.pepperlaw.com/publications_article.aspx?ArticleKey=318
[11] See tables 1 and 2 for some examples of scholars who have noted the similarities.

decision out of the hands of Treasury and placed it in the Commerce Department. Statutory time limits, the right to appeal, and other reforms were also implemented.[12] Also coincident with the first U.S. trade deficits in decades, the number of antidumping (as well as countervailing) cases rose in the early 1980s, although it fell by the mid-1980s and has levelled off since.[13] However, not all the changes made it easier for U.S. industries to file and win cases. Some changes have made it more difficult to win or keep antidumping margins, e.g., the institution of sunset reviews and restrictions on how Commerce can use available information.[14]

On the antitrust side, antitrust law was not vigorously enforced in the Roaring Twenties, as the Progressive Era (which had led to antitrust law in the first place) came to an end. However, in the decades following the New Deal, antitrust enforcement was reinvigorated, reaching the likely apex of its reach in 1962 with the *Brown Shoe* decision and/or in 1967 with the *Utah Pie* decision. These decisions were seen as placing strict limits on price discrimination.

However, The *Brown Shoe* decision, coming only a few years after critics of antitrust law had begun their own attack on the law, was effectively reversed in 1972, as the Courts began to take heed of critics of antitrust law.[15] By 1977, in a major decision (*Brooke*) involving Japanese imports, the Supreme Court was defining the standard for antitrust quite differently than it had before, as described in the following section.[16]

In summary, while antitrust and antidumping law flowed from similar economic justifications, their enforcement and legal development followed very different routes. Antitrust enforcement was strongest after the New Deal and until the 1970s. Antidumping enforcement was weakest during this period, and increased in the late 1970s and early 1980s.

The paper now turns to understanding the reasons why antitrust law changed so substantially in the 1970s.

III. The Chicago Way

Beginning in the 1960s, conservative intellectuals, many associated with the University of Chicago, began an attack on the economic justifications for antitrust law.[17] One of these intellectuals was Alan Greenspan (with no connection to the University of Chicago), who in 1962 published the essay “Antitrust.” This essay argued that antitrust law punished successful firms for their success, thus harming innovation. “No one will ever know what new products, processes, machines, and cost-saving mergers failed to come into existence, killed by the Sherman Act before they were born. No one can ever compute the price that all of us have paid for that Act which, by inducing less effective use of capital, has kept our standard of

[12] See Mastel (1998) and Prusa (1996).
[13] U.S. International Trade Commission (2010).
[14] Mastel (1998).
[15] Markovich (2013). See also Page (2008) and Gifford (1991).
[16] See Cann (1996) and Stewart (1996).
[17] The scholars described herein as proponents of the “Chicago” school have different connections to the actual University of Chicago. This paper uses the moniker “Chicago” to mean these critics of antitrust, whether they were professors or students of the University of Chicago.

living lower than would otherwise have been possible."[18] (Modern analysts differ over whether antitrust law helps or hurts innovation.[19])

A more complete deconstruction of antitrust law was finished by Robert Bork and Richard Posner, both associated with the University of Chicago. Bork, in turn, credited the influence of Chicago's Economics Department, especially Aaron Director, as influences on his work.[20] Bork described many of the terms used in antitrust law, such as "unfair" competition, as undefined. He then examined the Congressional debate over the Sherman Act, and interpreted the intended purpose of the pricing sections of the law as preventing potential harm to consumers, which he stated could only come from predatory pricing.[21] Later Courts would define predatory pricing as eliminating competitors, continuing to exclude them, and recouping losses from the elimination and exclusion by raising prices later. (Failing to do these three things means that you did not hurt consumers.)[22] Bork then concluded that to use antitrust law, one must show harm from predatory pricing, if one is to show any harm to consumers.[23] To this conclusion, later Courts and commentators then added findings from economists that predatory pricing was rare, and even more rarely an effective strategy for the predator.[24]

Bork's conclusions remained controversial in the 1960s, but by 1980, had won over the Courts and many policymakers.[25] As Judge Douglas Ginsburg described the evolution of Bork's critique, "[w]hen Bork's article was first published in 1966, his thesis was novel. By 1977, it had become the conventional wisdom of the federal courts."[26] With several major judicial decisions in the 1970s supporting Bork's interpretation, and then the election of Ronald Reagan (sympathetic to Bork's view on the issue), the Justice Department began enforcing antitrust very differently than it had in the 1940s, 50s, and 60s. Enforcement of the Robinson-Patman Act effectively ended. Standards for antitrust law changed to a focus on "consumer welfare."[27]

The relevant economic points underlying what has emerged from the Chicago critique of antitrust law are summarized below.

1. Antitrust law is designed to aid consumers; this is the only good economic justification for antitrust law- and the original intent of those who wrote the law.

[18] Greenspan, "Antitrust" (1962).
[19] See Orbach (2010) for a discussion of the debate over whether Bork's interpretation of antitrust, or his critics', would be better at encouraging innovation. Additionally, Lynn (2010) presents a detailed argument that an original understanding of antitrust law led to more innovation.
[20] Priest (2008), Page (2008), and Markovich (2013).
[21] See, for example, Lande (1988) and Priest (2008).
[22] Cann (1996), Morgan (1996), and Stewart (1996). See also *Matsushita v. Zenith* 475 U.S. 574 (1986).
[23] Lande (1988).
[24] Bolton (2000).
[25] Nonetheless, Bork's interpretation of the original intent of the writers of the Sherman Act remains debatable. Writing in 2010, Orbach, who is broadly sympathetic with the "Borkean" changes to antitrust law, states that "all other [non-Bork] studies of the legislative history of the Sherman Act conclude that Bork was too one-sided and misleading in his presentation of the facts." Orbach (2010).
[26] Kirkwood and Lande article, p. 194. (2008). Page describes the shift in the Supreme Court's view as somewhat slower, and beginning in 1977. See Page (2008).
[27] See, for example, Lynn and Longman (2010), Foer and Lande (1999), Lande (1988), and Markovich (2013).

2. The only type of anticompetitive pricing behavior that hurts consumers is predatory pricing. Predatory pricing means eliminating competitors, continuing to exclude them, and recouping losses from the elimination and exclusion by raising prices later. (Failing to do these three things means that you did not hurt consumers.)

3. Predatory pricing is very rare in real life.

All three of these characteristics are important to the debate over antidumping as well. All three are implicitly or explicitly accepted by economist critics of antidumping law and generally form the underpinning (although usually not stated) of their critique of antidumping law.

IV. The case against the Chicago Way

The Chicago view of antitrust has become, for the most part, the way antitrust law is interpreted and enforced since the 1970s. However, it still has its critics, many of whom are grounded in what this paper will refer to as having an "original" understanding of antitrust.

Specific critiques

One critique of the Chicago view, developed by legal scholars Lande and Kirkwood, Orbach, and others,[28] points out that Bork misused the phrase "consumer welfare" in his critique of antitrust law. For Bork, "consumer welfare" meant what economists refer to as "total welfare," i.e., the welfare of both consumers and producers. Bork pointed out how some of the rhetoric around the Sherman Act focused on the harm to consumers, but Kirkwood and Lande respond that such concern for consumers does not mean that the law should focus on total welfare but rather true "consumer welfare," i.e., the welfare of consumers, exclusive of (rather than inclusive of) the attempted monopolists. In economic terms, for example, consumer welfare could be hurt when consumers lose their rents to monopolists, but under a total welfare standard, this damage would not be counted if the end result were still the same total welfare. Kirkwood and Lande describe Bork as inaccurately using Congressional debate language focused on consumers to justify an antitrust standard of allocative efficiency (i.e., total welfare) rather than a standard of true consumer welfare.[29] Thus, Lande and Kirkwood conclude that the history of antitrust does not suggest that Congress' intention was to allow anticompetitive behavior if it were allocatively efficient.[30]

Lande and Kirkwood also point out that some of the original rhetoric around the Sherman Act focused on helping small producers that were negatively affected by trusts (i.e. monopolists)

[28] See Kirkwood and Lande (2008), Orbach (2010), and Foer (2005).
[29] Similarly, Barry Lynn points out that the actual language of antitrust law rarely (once in Clayton and not at all in Sherman) references the word "consumers," but rather, preventing "unfair" competition. Lynn states that Bork disguised an argument based on efficiency (a word with negative connotations) to consumers (a word with more positive connotations). Unfair competition is not defined as only predatory pricing (allocative efficiency). Lynn posits that regardless of the effect on consumers, certain types of competition are unfair to other suppliers, and such an interpretation is consistent with the way antitrust law is actually written. Lynn (2010).
[30] Orbach (2010) and Foer (2005) make related points. Kirkwood and Lande note that if a thief robbed a University of Chicago economist, the law would not ask whether such a robbery was allocatively efficient before penalizing the thief, nor should it. Kirkwood and Lande (2008).

acting as purchasers,[31] and they also point out how even failed predatory pricing can have negative effects for consumer welfare and for smaller producers. Others have also argued that anticompetitive behavior can do economic damage to consumers without necessarily putting other competitors out of business. For example, predatory pricing may discourage competition without putting competitors out of business, or may discourage innovation and further investment.[32] [33] Still other critiques of the Chicago view of antitrust focus on showing that predatory pricing is really not that rare.[34]

Many of the above critiques have perspectives that range from still admiring the basic Chicago shift in antitrust law enforcement (Orbach) to agreeing that the primary focus of antitrust law should be lower prices to consumers (Kirkwood and Lande), while acknowledging there is an element of penalizing behavior that targets smaller producers. These critiques offer some potential important analytical comparisons with antidumping law. For example, these papers point out that Congress did not agree to allow anticompetitive behavior that was allocatively efficient, they point out that predatory pricing can have harmful economic effects even if it is not successful (potentially altering what is meant by predatory pricing), and they acknowledge that some of the justifications for antitrust law focused on the welfare of smaller producers relative to the attempted monopolists. As shall be seen, accepting these critiques of the Chicago view of antitrust undermines much of economists' critiques of antidumping law.

Broad critiques

There are also broader critiques of the Chicago view of antitrust, and these broader critiques are also rooted in interpretation of the original antitrust laws and how they were enforced until the 1970s. These broader critiques are based on the idea that the original intent of antitrust law was to prevent concentrated economic power. A supplier that can use pricing power in one market to undercut rivals in other markets can take over those other markets. As it takes over more markets, the supplier can become more influential politically as well as economically.

This point of view was relatively mainstream in the past. In 1944, for example, Henry Wallace warned in the pages of the New York Times that "[w]e all know the part that the cartels played in bringing Hitler to power, and the rule the giant German trusts have played in Nazi conquests."[35] More recently, Albert Foer of the American Antitrust Institute has argued that, based on the original writing of antitrust law, the goals of such law should include "decentralization of economic power, freedom, fair distribution of wealth, maintenance of a level playing field, and other 'public interest' goals." Foer also quotes another legal scholar as

[31] For example, one Congressman noted that four large Chicago livestock buyers suppressed prices paid to ranchers while also raising prices to consumers. Kirkwood and Lande (2008).
[32] Foer (2005), Lynn (2010), Bolton et al (2000), Markovich (2013).
[33] Similarly, game theory, much of which developed after Bork's original critique, has shown how seemingly pro-consumer behavior can actually be anti-consumer collusion. Markovich (2013). Nonetheless, such new economic theories may have "qualified" some of the Chicago style decisions, but are still not resulting in more rulings of antitrust violations. Page (2008).
[34] Bolton et al (2000).
[35] Wallace (1944).

arguing that antitrust law is about ensuring a "level playing field,"[36] a phrase often invoked in U.S. trade politics.[37]

Some of the critics of Chicago antitrust have also warned of the development of larger government without strong antitrust laws. For example, in 1965, Blake and Jones, in a strong critique of Bork's views on antitrust, described antitrust law as "the chief bulwark against economic and political forces which historically lead first to a monopolized and then to a socialized economy." Their argument was that a less-concentrated economy is less likely to evolve into one that requires an abundance of government supervision. They are also highly critical of Bork's emphasis on efficiency as a criterion for antitrust law, because they believe that economic and political diffusion is more important than efficiency. In justifying their interpretation of the reason for antitrust, they quote Senator Sherman's description of the 1896 law as "a comprehensive charter of economic liberty."[38]

Additionally, Barry Lynn points out that the actual language of antitrust law rarely, if ever, references consumers, but rather, preventing unfair competition. Unfair competition was not defined in the legislation as only predatory pricing or allocative inefficiency. Lynn also points out that regardless of the effect on consumers, certain types of competition are unfair to other suppliers, and that such an interpretation is consistent with the way antitrust law is actually written.[39]

Lynn has also argued that the 1975 Consumer Good Protection Act "legalized price discrimination" and "undid" U.S. antitrust law, which he described as substantially restraining price discrimination prior to this point. To Lynn, this change, along with the changing interpretation of antitrust law in the Courts in the 1970s, contributed to the strengthening of large U.S. retailers' competitive position relative to U.S. manufacturers, the increased concentration of large U.S. retailers, and ultimately, the concentration of U.S. manufacturing conglomerates (precipitated by the increased concentration in the retail industry) as well.[40]

These broader critiques of the Chicago view of antitrust are likely also consistent with- or at least not contradictory of- justifications for antidumping because they are not grounded in purely predatory pricing, narrowly defined.

This paper now turns to examining how economists have covered antidumping issues, and whether and to what extent they have incorporated the history of antitrust law in their analysis.

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[36] Foer (2005). Pitofsky also makes a call for the inclusion of these types of "non-economic" goals in antitrust law, although he does not agree with antitrust law helping small producers, while he acknowledges there are extensive quotes from Congressional antitrust debate using exactly such a justification. He simply asserts that the Courts have already reached a compromise not to take such concerns into account anymore. Pitofsky (1979).

[37] Similarly, Mitchell argues that when large national suppliers put regional suppliers out of business, less money stays in the local community. Where before local suppliers may spend their money in the community, and generally have held an interest in maintaining a community, larger national suppliers may simply extract profits from the community. To some extent, antitrust law might prevent large national suppliers from using pricing power from other markets to put local suppliers out of business. Mitchell (2006).

[38] They also describe U.S. antitrust as making the United States relatively unique among nations of the time, and add that it has allowed the United States to avoid adopting the types of "paternalistic" and even "despotic" regulations employed by the British and Swedes, respectively. Blake and Jones (1965).

[39] Lynn (2010).

[40] Lynn (2010).

V. Modern U.S. economists on antidumping

Economists justifying antidumping

The economic literature on antidumping begins with Nobel Prize winning economist Jacob Viner's "Dumping: A Problem in International Trade" from 1923. Viner defines dumping as price discrimination between domestic and foreign markets, outlines situations in which it may occur, and then analyzes each situation to assess whether it would, on a national welfare basis, cause economic damage to the importing nation. Viner's treatment is balanced and thorough. He notes examples of U.S. dumping in foreign markets and criticizes some (World War I era) U.S. allegations of German dumping. He does not condemn dumping under all circumstances.[41]

Nonetheless, Viner does find that dumping is harmful to the importing nation when it involves predatory pricing or when it discourages further investment in the importing nation. However, it is likely that Viner's definition of predatory pricing is not narrow. In defining predatory dumping, he includes not only eliminating competitors but also changing the behavior of competitors and/or weakening them. As for investment, Viner also discusses how sporadic, unpredictable dumping may affect domestic producers' decisions about capital. Thus, Viner's concerns about dumping are not limited to predatory pricing as later Chicago analysts would define it.

In 1977, Wares wrote an analysis of Viner's work on dumping and concluded that, because price discrimination could occur without negative effects on the total welfare of the importing nation, antidumping actions were not justified on as wide a class of cases as some think. However, Wares still concluded that dumping does harm the importing nation in cases when there is attempted foreign monopolization and when there is injury to U.S. producers, albeit with more restrictive conditions than in U.S. law of the time.[42] Like Viner, Wares attempted a thorough catalog of why dumping may occur and whether it is harmful. He was critical of many of those who believe dumping is a problem. Nonetheless, his work is rarely or never mentioned as a source in any modern economists' works on antidumping, perhaps because he does acknowledge some situations in which dumping may be harmful.

In addition to Viner, another economist writing on the potential reasons for dumping was Ethier in a 1982 paper. Ethier proposes an alternative reason for dumping, i.e., that with demand uncertainty and sluggish factor price adjustments, countries' producers may have motivations to dump in order to keep production lines running when demand disappoints, with a potentially negative effect for the importing nation. He does not conclude that antidumping is either usually or rarely an effective solution in response, but his work demonstrates a possibility in which it might be a welfare-enhancing solution for the importing country.[43]

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[41] Viner (1923).
[42] Wares (1977).
[43] Ethier (1982). The fact that Ethier's theory, like Viner's, comes years after the 1921 law went into effect should not lead one to conclude, as Sykes does regarding Viner's work, that it could not possibly have been a motive for the 1921 law. While economists may have taken a few more years to spell out with logical precision what dumping is and is not, lawmakers may have had the same general idea earlier, even if they had not spelled out all the assumptions and logical boundaries at that time.

However, as will be shown, most modern U.S. economists "decry" antidumping in their articles on the subject.[44]

Irwin as an example of modern U.S. economists

One of the best examples of the general attitude of modern U.S. economists on antidumping can be found in Douglas Irwin's "The Rise of US Antidumping Activity in Historical Perspective." Irwin mentions both the 1896 Sherman Act and the 1914 Clayton Act in the opening of his discussion of "the evolution of U.S. antidumping law." He connects the 1916 antidumping law to the principles of these laws. However, he then describes the 1921 antidumping law as introducing antidumping law "as we currently know it" and describes it as differing "markedly" from the 1916 antidumping law in that:

> "The 1916 law focuses on the intent of the exporter, whereas the 1921 law hinges on a finding of price discrimination and injury. … In the 1916 law, dumping is related to some vague notion of predatory pricing, but in the 1921 law dumping occurs simply if foreign firms charge lower prices in the United States than in their home market, regardless of whether predation is an issue."[45]

This paragraph shows two points that this paper will develop further. First, many critics of antidumping are possibly also critics of antitrust, but do not criticize antitrust as overtly. Irwin here describes the 1916 law as having "some vague notion of predatory pricing" when it has a similar notion of predatory pricing to that which antitrust law did at that time.[46] The phrase "some vague notion," then, could possibly be applied by Irwin to antitrust law as well, and may mean that Irwin shares some or all of the Chicago views of antitrust.

Irwin draws a distinction between the 1916 antidumping law requiring a finding of predatory intent, whereas the 1921 law requires only finding charging lower prices regardless of predation. However, this distinction is not only between the antidumping law of 1921 and the antidumping law of 1916, but also between the 1896 Sherman Act (the basis for the 1916 antidumping law) and the 1914 Clayton Act (in effect when the 1921 antidumping law was passed). Indeed, one might argue that it would not make sense to have only Clayton on the books when one does not have an antidumping law as well to enforce parallel international efforts.

Finally, Irwin does not mention another major reason why the 1916 law was reformulated in 1921. It had proved virtually impossible to prove predatory intent by a foreign firm under no obligation to U.S. law.[47]

Additionally, when HIllberry (2011) finds that a demand shock in conjunction with increased imports increases the likelihood of the filing of an antidumping case, he uses that finding to question the motives of the filing industries. Interestingly, however, Hillberry's finding might be completely consistent with Ethier's 1982 paper, which finds that demand shocks in the exporting nation may contribute to dumping.

[44] Bown (2004).

[45] Irwin (1997).

[46] See Mastel (1998) and Finger (1993).

[47] Mastel (1998). Finger (1993) addresses this issue, and dismisses arguments similar to those of Mastel, but not on the basis of specific Congressional arguments. In some sense, the difference

Empirical papers on antidumping motives

Beyond theoretical issues, the recent economics literature on antidumping sometimes asserts that empirically, the motive for most antidumping cases is not really predatory pricing.[48] When these statements are substantiated, they often cite to one paper, Hyun Ja Shin's 1998 "Possible Instances of Predatory Pricing in Recent U.S. Antidumping Cases." In this paper, Shin concludes that predatory pricing in antidumping cases is generally rare because U.S. and foreign industries are not always concentrated. Unfortunately, his test for concentration involves looking at data on antidumping cases by four-digit SIC code. (The SIC code, for example, has one code for "steel," whereas many U.S. antidumping cases on steel involve much finer distinctions.) This level of aggregation is far wider than the typical product definition in a U.S. antidumping case, and could lead to an underestimate of how concentrated U.S. and foreign industries are.

More broadly, the modern U.S. economics literature on antidumping also consists of a large number of empirical papers that attempt to identify why antidumping cases are filed. Willig asserts that one 1998 selection of these papers (including the aforementioned Shin paper) shows that antidumping is not designed to protect competition from predation in 90 percent of the cases analyzed.[49] As with Shin's paper, these papers often end up using broad measures, such as wide product categories (much wider than the categories usually used in antidumping cases), to attempt analysis. Hilberry (2011) attempts an analysis at a relatively specific level of product classification, and ends up with more nuanced results than many of the other papers (with broader definitions) do.[50]

Arguably, some of these papers could be examining whether antidumping reflects antitrust motives (such as predatory pricing) or not. However, in the broad class of these papers, the connection with antitrust motives is rarely spelled out. While the papers often contain the economist's censure of antidumping law and/or its results, the papers do not always elucidate whether the economist regards antidumping as an extension of antitrust law.

Other economists have criticized the specifics of how antidumping law is enforced, e.g., the use of "facts available" in determining margins.[51] In these papers, it is not always clear if such critiques are the author's only criticism of antidumping law, or whether the author has other criticisms as well.[52] In the rare paper (such as Shin's) that addresses specific antitrust-type motives (such as predatory pricing), it is also even more rarely spelled out whether the author has a Chicago or original understanding of antitrust.

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between Finger and Mastel may be rhetorical. Both agree that the 1921 law was designed to rectify perceived problems with the 1916 law. Mastel believes these problems were real, and Finger believes the stated problems were a cover for "protectionism."

[48] For example, see Zanardi (2005).

[49] Wilig (1998)

[50] See a summary of some such papers in Hilberry (2011). As another example, a 2001 paper by Prusa and Skeath, "The Economic and Strategic Motives for Antidumping Laws," concludes that, because nations with antidumping law usually use antidumping law against other nations with antidumping law, antidumping law is employed for "strategic" rather than only "economic" reasons. Prusa and Skeath (2001).

[51] For example, see Moore (2001).

[52] It is also worth noting that the economics literature frequently discusses lobbying as an explanation for antidumping law, as domestic industries lobby for protection. This type of description interestingly ignores that there are also importing and purchasing firms that lobby against antidumping.

In sum, economists' empirical work on the motives for antidumping filings often focuses on broad measures, and does not always explicitly state the authors' beliefs about the underlying reasons for antidumping, nor how those beliefs connect to the authors' underlying beliefs about antitrust.

The modern U.S. economics literature on antidumping and antitrust

Table 1 summarizes some of the economics literature on antidumping in which either antitrust is mentioned, or in which reasons for antidumping law are elaborated. It is not (nor is meant to be) an exhaustive list of all the literature, but rather a selection of some of the titles that an economist, searching for the latest or most definitive research on the economics of antidumping law, might come across. As can be seen from the table, antitrust law is rarely developed as a motive for antidumping law. If antitrust law is mentioned, the description of antitrust law provided is often brief and may not cover potentially relevant aspects like the absence of an intent requirement in Clayton or the handling of price discrimination in Robinson-Patman. When antitrust law is mentioned, the papers often show a sympathy for a Chicago understanding of antitrust law, without necessarily mentioning other potential understandings.

This paper is not claiming that these papers should always have such a connection clearly drawn. In some cases, it is not the point of the paper, and perhaps in other cases, the authors have thought through the issue but not written it down. Whatever the reason, one can read large swathes of the economic literature on antidumping and not find a detailed discussion of the relationship between antidumping and antitrust law, even when the reasons for antidumping law are discussed. Thus, it is not clear whether the economist in question accepts the basic idea of an antidumping law but questions its enforcement, or whether s/he would prefer to "decry" it altogether, and if so, what the economist thinks about antitrust law.

Table 1 Selected economics papers on antidumping

Name of authors and paper	Summary of relevant portions	Discussion of antitrust
Blonigen and Prusa, "The Cost of Antidumping: The Devil is in the Details" (2003)	This paper describes a "disconnect" between antidumping and competition policy. Describes antidumping law as targeting a vaguely-defined "unfair" practices. States that the most relevant anticompetitive behavior to antidumping is predatory pricing.	Its description of competition policy is based on the Chicago-school understanding, as it claims that antitrust laws do not deem price discrimination as antitrust (without further explanation). It states that "[f]ortunately," Robinson-Patman is no longer enforced. Does not note that antitrust law also uses the word "unfair."
Blonigen and Prusa "Antidumping" (2001)	Reviews the economic literature on antidumping. Asserts that antidumping is "the most serious impediment to international trade."	Draws broad conclusions that antidumping is not about antitrust goal of predatory pricing in one mention.
Bown, "Trade Remedies and WTO Dispute Settlement," (2004)	In a section labelled the "Economic Motivation for Trade Remedy Laws," there is a dismissal of trade remedy as import substitution that generates welfare inefficiencies. He notes that trade remedy laws have been justified by some economists as an insurance or safety valve for nations entering trade liberalization agreements.	There is no mention of antitrust concerns as a potential economic motivation for trade remedy laws, only that economists "decry" antidumping laws.
Gallaway, Blonigen, and Flynn "Welfare costs of US antidumping (AD) and countervailing duty laws," (1999)	Models effects of U.S. antidumping laws and finds a net negative effect to the U.S. economy.	Does not mention antitrust. Does not model any benefit to antidumping action other than benefit to producers and government, i.e., the assumption is that the law has no other justification than helping producers and generating tariff revenue.
Mankiw and Swagel, "Antidumping: The Third Rail of Trade Policy," (2005)	Antidumping has a "broadly negative" impact. It was developed to address foreign predatory pricing, but "fair value" goes far astray from only addressing predatory pricing.	Mentions the Sherman Act but no other antitrust laws. States that "By the standards of antitrust, low prices are a problem not when they simply harm other competitors, but when they threaten to wipe out competition and thereby ultimately harm consumers. In practice, this situation is rare."
McGee, "Antidumping Laws as Protectionist Trade Barriers: The Case for Repeal" (1996)	Argues that antidumping laws are purely protectionist and should be repealed.	Discusses the history of AD laws without mentioning antitrust laws. Later, calls predatory pricing the rationale behind AD law. Claims that antitrust law can make the economy less efficient.

Name of authors and paper	Summary of relevant portions	Discussion of antitrust
McGee, "Some Ethical Aspects of Antidumping Laws" (2000)	States that the only reasons for antidumping laws are to stop predatory pricing (which he states "does not exist") or to level the playing field, which contradicts trade theory.	States that there is evidence that antitrust law was designed to "protect producers," and adds that "antitrust laws are being used as weapons to protect less successful competitors from more successful competitors."
Prusa "The Trade Effects of U.S. Antidumping Actions" (1996) and "The Road Most Taken" (1995)	AD law is portrayed entirely as "protection" with industry lobbying to get more.	Does not mention antitrust law in brief backgrounds on antidumping.
Ruhl, "Antidumping in the Aggregate," 2013.	Like Galloway et al above, models the effects of antidumping without any possible positive effects, and adds another potential negative (in this model) effect: importers artificially raising prices.	Concedes that this paper does not model possible predatory pricing, but mentions no other motives for antidumping. Refers only to other modern U.S. economist papers (most cited here) when referencing the reasons for antidumping.
Shin, "Possible Instances of Predatory Pricing in Recent U.S. Antidumping Cases" (1998)	Predatory pricing is generally rare because U.S. and foreign industries- at the wide four-digit SIC level- are not often concentrated. There are no good economic motivations for antidumping other than predatory pricing.	Calls for an antitrust test in antidumping cases, although it should be noted he likely means a "predatory pricing," i.e., Chicago-school test. He acknowledges the Robinson-Patman Act, and states that it has been criticized for similar reasons as he is criticizing antidumping.
Vandenbussche and Zanardi, "What explains the proliferation of antidumping laws?" (2008)	"The only type of 'unfair' dumping, according to economists, is the case of 'predatory dumping.'"	Does not mention antitrust concerns as trade expands as a reason why nations may adopt antidumping laws.
Willig, "The Economic Effects of Antidumping Policy" (1998)	Divides dumping into nonmonopolizing and monopolizing categories, the latter of which includes both strategic dumping and predatory pricing, and could have negative effects on the importing market.	Notes that antitrust policy is focused on predation, and that predation requires similar criteria to those described above in this paper under antitrust. Concludes that the empirical record shows that antidumping is usually not undertaken to protect competition.
Zanardi, "Antidumping, a Problem in International Trade," (2005)	As predatory dumping is rare, antidumping imposes a larger consumer cost on society than benefits producers. Predatory dumping is the only "sound economic" motive for AD.	Other than brief discussion of predatory pricing, there is only a brief mention of antitrust in a footnote.

Source: Author's summary of listed papers. See bibliography for complete listing.

To summarize the modern U.S. economist's theoretical case against antidumping as an analog to antitrust, the following points are usually present, although they are not often stated, or if stated, often stated very quickly and with little elaboration.

1. The 1916 antidumping law may have been influenced by the 1896 antitrust act, but there is little to no acknowledgment of later antitrust developments (such as the

removal of the requirement of intent in Clayton and the emphasis on price discrimination in Clayton and Robinson-Patman) that are similar to antidumping law.

2. Predatory pricing is almost the only, or the only, reason for antitrust law, and as such, should be the only motivation for antidumping law.
3. Predatory pricing is rare.

As previous sections showed, none of these three points is beyond debate.

The Stiglitz framework

Economist Joseph Stiglitz has also offered a critique of antidumping in his 1997 paper "Dumping on Free Trade."[53] While the paper uses most of the typical modern U.S. economist's unstated assumptions about antidumping and antitrust, it also offers an interesting framework with which one can consider antidumping in a more balanced fashion.

Stiglitz begins by noting that, from a static perspective, dumping would seem to make the importing nation better off. However, he notes two exceptions to that possibility: dumping due to predatory pricing; and "new trade theory" effects from dumping. While Stiglitz does not elaborate in great detail on what he means by potential new trade theory effects, he may include investment effects from having market power in one country, and/or from externalities. If so, these "new trade theory" effects may overlap with the type of investment effects that Viner referred to in 1923.

Stiglitz continues on, though, to an analysis more typical of modern U.S. economists. He asserts that "since the 1921 Antidumping Act, it has not been necessary to demonstrate predatory intent or effect, so any international price discrimination… has been proscribed." In doing so, he does not note that since the Clayton Act of 1914, intent has not always been necessary in antitrust either.

Stiglitz then states that "since the 1974 trade act, the focus has shifted from preventing price discrimination to preventing sales below fully allocated average cost." He goes on to claim there are reasonable economic reasons such sales may occur, citing two papers.[54] He does not make any analysis of whether such reasons may be more or less likely than anticompetitive reasons for dumping, nor does he take into account the difficulties for U.S. government in determining whether foreign companies are engaged in international price discrimination for reasonable or for anticompetitive reasons.[55] As will be shown below, supporters of antidumping law have defended the reliance on average cost.

Stiglitz then offers a useful method of considering the pros and cons of antidumping. Borrowing from statistics, he describes antidumping policy as potentially leading to either type I errors (not using antidumping law when it should be used) or type II errors (using

[53] Stiglitz (1997).
[54] As shall be seen below, some U.S. legal writers, like Stewart, do not agree that long-term sales below fully allocated average cost can reflect anything other than anticompetitive factors. Stiglitz does not address whether such sales below fully allocated average cost are long-term or not.
[55] Stiglitz goes on to critique particular methods used in calculating antidumping margins, some of which may have changed since he wrote the paper. This treatment is not meant as a complete summary of his entire paper.

antidumping law when it should not be used). This framework can be seen as recasting the antidumping debate into an empirical question in which antidumping supporters view type II errors as less frequent than type I errors, and antidumping critics hold the opposite view. (Stiglitz clearly falls into the antidumping critics category, but interestingly does not call for abolishing antidumping, but rather restraining it to try to reduce type II errors).

This framework is similar to the debates over antitrust, in which the Chicago critics have adopted a restricted set of reasons for when antitrust law should be used (i.e., only in cases of predatory pricing) and operate under a presumption that predatory pricing is a relatively rare phenomenon. On the other hand, original antitrust supporters hold a view that antitrust is about more than just predatory pricing, narrowly defined, and such anticompetitive behavior is not necessarily rare.

Economist Robert Willig reached a similar, relatively balanced conclusion in 1998.[56] He describes various categories of dumping, and concludes that, at least in theory, some of these categories can be negative for total welfare in the importing nation and sometimes globally. However, his paper, which introduces a series of papers that attack antidumping (see table 1), concludes that the empirical record is that antidumping is used to distort rather than encourage competition. There are serious potential difficulties with the techniques used in these (and other) papers, but Willig's major contribution is again reiterating the Viner finding that there are circumstances in which dumping can be harmful, including not only predatory pricing but also "strategic dumping."

As can be seen in table 1, however, the relative balance of Stiglitz and Willig stands in contrast to most of the modern U.S. economists who write about antidumping. Most such works are more likely to be filled with the warnings about increasing use of antidumping, descriptions of antidumping as nearly pure "protectionism," and little mention of the wider context of antitrust law and history.

VI. Non-economists on antidumping and antitrust

In contrast to modern U.S. economists, non-economists (mostly legal scholars) have offered a wider range of analyses both on whether antidumping law is a desirable policy, and whether antitrust and antidumping are fundamentally related or not. A selection of these analyses is summarized in table 2. Not all of these papers were written specifically to address the relationship between antitrust and antidumping, but by touching on the issue (or not touching on it when it could be relevant) show the authors' underlying assumptions or analyses of the relationship.

While again this table is not a complete presentation of every paper written on the reasons for antidumping, it does show that in the selection presented, authors coming to a similar conclusion as U.S. economists (i.e., that antidumping and antitrust are not closely related) do so with similar underlying assumptions, i.e., little discussion of Clayton or Robinson-Patman, dismissal of Robinson-Patman when it is brought up, and dismissal of predatory pricing as rare.

[56] Willig (1998).

Table 2 Selected non-economic writings on antidumping and antitrust

Name of authors and paper	Summary of relevant portions	Discussion of antitrust
Papers with a similar perspective to modern U.S. economists		
Applebaum, "The Interface of Trade/Competition Law and Policy: An Antitrust Perspective," (1987)	Antidumping law does not have the same standards as antitrust law, including those of intent and ability to monopolize successfully. Antidumping cases could even allow antitrust violations when filers act in concert.	Concludes that there are fundamental differences between antitrust and antidumping law.
Cann "Internationalizing Our Views Toward Recoupment and Market Power: The Antidumping/ Antitrust Dichotomy through WTO-Consistent Global Welfare Theory," (1996)	"Antidumping laws are protectionist measures applied regardless of market structure, consumer welfare, or the relative efficiencies of foreign and domestic industries. They effectively outlaw international price discrimination, while ignoring its domestic equivalent, by treating predatory and nonpredatory price levels similarly."	Antidumping and antitrust law are in "dichotomy" because antidumping law is broader, with some examples being based on recent Court decisions restricting antitrust findings (such as *Brooke*). However, he also critiques the Chicago view of antitrust, arguing that its narrow definition of predatory pricing has led to firms filing antidumping cases because it is so difficult to win antitrust cases on foreign predatory pricing. The author proposes a "antitrust-based predatory pricing remedy to be considered during future WTO negotiations."
Finger, "Unfair Trade and the Rules on Dumping," in *The World Trading System* (1989)	While acknowledging early antidumping law as an extension of antitrust, asserts that later antidumping laws and changes to laws were entirely protectionist.	Does not discuss the Clayton Act or the Robinson-Patman Act, even as he focuses on the lack of intent in antidumping.
Hoekman and Mavroidis, "Dumping, Antidumping and Antitrust," (1996)	Antidumping law should include consideration of consumer welfare, and assessments of whether the foreign market is contestable. Proposes various ways of making antidumping law more like modern antitrust law.	While antidumping proponents portray antitrust as the motivation for antitrust, the relationship is "no longer the case." Most economists "agree that predatory dumping is the exception, not the rule. Proponents of antidumping are concerned, implicitly if not explicitly, with the continued existence of national firms that produce a good." These statements are not developed.
Jackson, *The World Trading System* (1989)	While connecting the 1916 antidumping law to antitrust, does not connect the 1921 law to antitrust. Offers reasons why firms may price discriminate between nations while not dumping.	Does briefly acknowledge some similarities between antidumping and Robinson-Patman, but dismisses Robinson-Patman as criticized by economists and no longer enforced.
Victor, A Paul. "Antidumping and Antitrust: Can the Inconsistencies Be Resolved?" (1982)	The 1916 Antidumping Law was modified because it was "virtually unenforceable." However, successor laws have not distinguished between the goals of stopping anticompetitive behavior as opposed to	Antidumping's material injury standard is different than Robinson-Patman's competitive effects standard. Antidumping law has been enforced without the traditional antitrust objective of increased price competition.

	protecting domestic industries.	
Name of authors and paper	**Summary of relevant portions**	**Discussion of antitrust**
Wu, "Antidumping in Asia's Emerging Giants," (2011)	Discusses antidumping in Asia, with lots of references to protectionism "rearing its ugly head," antidumping being "backdoor protectionism," etc.	There are two mentions of antitrust, and no detailed discussion of antitrust. The author thanks many economists for their contributions.
Papers with other analyses		
Anthony, "The American Response to Dumping from Capitalist and Socialist Economies," (1969)	Dumping "may impair normal conditions of competition" and has potentially ill effects in both the long and short run.	Does not discuss much the relationship to antitrust law, other than to footnote that others have commented on the issue.
Eckes (historian and government official), "The Interface of Antitrust and Trade Laws- Conflict or Harmony?" (1987)	Trade remedy laws emerged from similar concerns as antitrust. Dumping and subsidies lead to distorted international resource allocations.	Trade remedy laws are compatible with antitrust laws and the goals of antitrust laws (increasing competition), although they may conflict in the short run.
Epstein, "The Illusory Conflict Between Antidumping and Antitrust," (1973)	Concludes that the only way protracted dumping can take place is with market restraints in the exporting market.	States that "antidumping regulations act as an extension of antitrust legislation," allowing regulation of foreign anticompetitive behavior when the effectiveness of U.S. antitrust law is limited (i.e., in foreign countries).
Garten (government official), " New Challenges in the World Economy: The Antidumping Law and U.S. Trade Policy," (1994)	Dumping results from closed foreign markets, anticompetitive markets, and/or nonmarket conditions in exporting country. Dumping " sends false signals to the market…. causes resources to be misallocated … has a dramatic effect on investors' decisions." The belief that lower prices will result from allowing dumping is "shortsighted" and such lower prices do "not reflect genuine free competition."	Antitrust law was an important distinction between U.S. law and that of most countries. The emergence of a culture of antitrust, combined with foreign dumping, led to the extension of antitrust principles into antidumping.
Gifford, "Rethinking the Relationship between Antidumping and Antitrust Laws," (1991)	Traces the history of antitrust law, for example, the removal of intent with the Clayton Act, the use of the Robinson-Patman Act to make price discrimination illegal, and the Chicago reaction to antitrust law.	"Despite superficial inconsistencies, however, it appears possible to reconcile trade and antitrust laws to a substantial extent." He describes the *Utah Pie* antitrust case (which provoked strong reaction from the Chicago-style critics) as similar to an antidumping case (while not approving of *Utah Pie*).
Mastel, *Antidumping Laws and the U.S. Economy* (1998)	Provides an economic rationale for antidumping law as providing a counterweight to dumping based on sanctuary markets, subsidized industries, and/or nonmarket economies; questions Finger's interpretation of antidumping history.	Attributes the development of the 1921 antidumping law to practical problems with enforcement of the 1916 law that had been modeled more directly on antitrust. Describes antitrust and antidumping as different in that antidumping includes more than predatory pricing, "narrowly defined."
Stewart, "Why Anti-Dumping Laws Need Not Be Cloned After Competition Laws Nor Replaced By Such Laws," (1996)	Justifies antidumping as a response to foreign firms that are selling below all of its costs, as doing so implies that such firms "be in a nonsustainable position, receiving subsidies, or cross-subsidizing its losses with	Notes that there are no internationally-agreed competition laws, and so antidumping law allows better resource allocation than antidumping law. Also criticizes more recent developments in antitrust law, such as the focus on only average variable costs (and not all costs),

	supra-competitive prices elsewhere" and will send false signals to the market.	and more recent unwillingness to find antitrust when there is cross-subsidization. Criticizes the *Brooke* decision.
Name of authors and paper	**Summary of relevant portions**	**Discussion of antitrust**
United States Permanent Mission to the World Trade Organization (WTO), "Observations on the Distinctions between Competition Laws and Antidumping Rules," 1998.	Argues that antidumping deals with "different" concerns than competition policy. Antidumping law is grounded in the need to address remaining "market distortions" that would otherwise do damage in the world trading system.	While stating that antidumping and antitrust are different, the paper also notes that "[t]here is an important linkage" between antidumping and antitrust laws, in that one cause of dumping can be " the absence of, or the lack of adequate enforcement of, meaningful competition laws."
Wood, "'Unfair' Trade Injury: A Competition-Based Approach," (1988)	Proceeds from the assumption that there can be legitimate cases of injury from "unfair" imports, when such imports are lower-priced than domestic product due to artificial advantages.	To avoid protecting domestic monopolies, antidumping law could be brought into alignment with antitrust law by having an injury test that determines whether the U.S. industry is also benefitting from a restricted domestic market.

Source: Author's summary of listed papers. See bibliography for complete listing.

However, as can also be seen in table 2, writers that connect antidumping and antitrust often do so by appealing to a broader understanding of antitrust than just predatory pricing (e.g., Garten, Stewart, Mastel) and/or as an extension of predatory pricing policy with an eye to enforcement of such laws on foreign firms (Epstein, Mastel).

Several legal authors that criticize antidumping for its differences from antitrust (including Cann and Wood in table 2) propose replacing current antidumping law with more of an international antitrust standard. Their critiques of antidumping, although grounded in a Chicago view of antitrust, also are not as rhetorically severe as those of some of the economists in table 1. They do not necessarily propose that antitrust is a law rarely needed, so that invocation of it is likely just a justification for protectionism. (Indeed, Cann argues that the difficulty in winning legitimate antitrust cases has encouraged some firms to file antidumping cases instead.[57]) Similarly, the 1998 U.S. communication to the WTO (see table 2 above), while arguing against folding antidumping law into competition law, notes that one cause of dumping can be the lack of competition law, or enforcement thereof, in other countries.

These proposals for an international antitrust standard to replace antidumping show some important parallels between antitrust and antidumping law. Nonetheless, implementing such proposals raises many questions, such as the issue of defining what is meant by antitrust violations and whether that includes everything that is meant by dumping. Such proposals also need to address the issue of whether other countries have an interest in reconciling their antitrust laws with U.S. antitrust law. Will other countries' governments regularly cooperate with antitrust actions filed by U.S. firms?

VII. Sykes and Morgan – elucidating the debate

Two legal papers which offer particular insight into the issue of the relationship between antitrust and antidumping are Alan Sykes' "Antidumping and Antitrust: What Problems Does

[57] Cann (1996).

Each Address?,"[58] which argues that antitrust and antidumping address fundamentally different issues, and Clarisse Morgan's "Competition Policy and Anti-Dumping Is it Time for a Reality Check,[59] which argues that antitrust and antidumping address fundamentally the same issues, but from a domestic versus foreign perspective. Understanding these two papers can illuminate the antitrust context for economics papers on antidumping.

Sykes

On the surface, Sykes' paper is typical of many of the legal and economic critics of antidumping in its view of antitrust. The paper is highly critical of antitrust, especially the "misguided" Clayton Act and the "protection" motives of the Robinson-Patman Act.

However, Sykes also shows he understands the fundamental similarities in the justifications for antidumping and antitrust as well. Sykes' paper contains many fascinating quotes from the original authors of both antitrust and antidumping law. He quotes Senator Sherman (of the Sherman Act) noting that trusts may both raise or lower prices. He also quotes Congressional sources that justified the Robinson-Patman Act as helping consumers in the long run by ending unfair business practices. He quotes Judge Learned Hand in the Alcoa antitrust case as saying that Congress "did not condone 'good' trusts and condemn 'bad' ones; it forbad all. Moreover, in so doing, it was not necessarily actuated by economic motives alone." Sykes also quotes Supreme Court Justice Earl Warren as stating that the Court "cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses" in describing antitrust law. These references certainly sound similar to, or at least consistent with, the justifications for antidumping law.

However, in his paper, Sykes advances two separate notions, the latter of which is at odds with those references. First, Sykes states that with Bork's critique of antitrust law, "[a]s enlightened economic thinking about antitrust policy developed, the judges could thus embrace and operationalize economic thinking in the law." This statement is another way of saying that the Bork critique allowed antitrust law to be changed, by the Courts and through enforcement, to reflect the findings of modern U.S. economists, especially those more critical of older antitrust understandings. Stripped of its rhetoric justifying the changes to antitrust law, Sykes' statement is correct in noting that antitrust law enforcement has changed, dramatically, from its early years, based in part on Bork's (controversial)[60] reading of the intent of the writers of the Sherman Act.

Most importantly, though, Sykes goes on to argue that the language used to justify antidumping law is too vague, and too different from the language of antitrust law to allow such a change. He states that the multiple references to predation in the language of those proposing antidumping law were "largely pretense," but his justification for this characterization hinges on an interpretation of antitrust as being about predatory pricing only and on his own characterization of how the original bill passed.

Sykes writes that "[o]riginally marketed as antipredation measures, [antidumping laws] are now written in a way" that compels authorities to impose duties whenever there is injury from

[58] Sykes (1998).
[59] Morgan (1996).
[60] Sykes acknowledges that Bork's reading of Sherman's intent was "controversial."

lower cost imports, a broader class of cases than predation. However, Sykes omits noting that the original concept of antitrust did not rule out a broader class of cases than predation, as narrowly defined by later economists. Sykes also does not note any difficulty that enforcement authorities might have with enforcing antipredation laws overseas, and whether that might necessitate a different, albeit second-best, standard, as perhaps illustrated by the shift from the 1916 antidumping law to the 1921 antidumping law.

Second, while Sykes does acknowledge that Viner did not justify antidumping only on the grounds of antipredation, he argues that because Viner's book was not written until 1923, two years after the 1921 law, then the writers of the law could not have had such other, nonpredation motives in mind. This logical step is flawed. While modern economists and competition lawyers may have a very specific idea of "predation" (involving lowering prices to force the exit of competitors, taking their market share, and then raising prices while excluding new entrants), it is not clear that the law's Congressional writers would have had such a restricted definition, and very likely might have included negative investment effects (of the kind referenced by Viner, or of the effects of failed predation or incomplete predation) as an example of "predation."[61]

At a broad level, Sykes' paper is typical of many of the legal and economic analyses that do not see much relationship between antitrust and antidumping. He implicitly assumes the Chicago understanding of antitrust is the correct one, and bases his analysis off of that assumption. However, Sykes goes beyond most of his intellectual comrades in delving deeper into the relationship between antitrust and antidumping. He acknowledges the clear linkages between the two types of law and tries to see why they have diverged.

Morgan

Clarisse Morgan has also offered an important, if overlooked in the economics literature, paper showing some of the essential conceptual similarities between antitrust and antidumping.

She opens her paper by stating that the price discrimination standard in antidumping and antitrust is different, but again, her argument is based on an implicit Chicago definition of antitrust. For example, she states that in antidumping cases, the first issue is whether import prices are below normal value, but in antitrust, the issue is whether price discrimination "has the possibility of driving a competitor or competitors in the lower-priced market out of business, and then keeping that market closed to competition, or 'noncontestable.'" She cites the 1986 antitrust case *Matsushita* as an example of a Court finding no predatory intent by Japanese exporters even though the Court did find that the Japanese industry had a cartel-like structure and did sell into the U.S. market at a lower price than in the Japanese market. The Court did so because it argued that the U.S. industry had survived for many years despite the presence of the Japanese imports.[62]

[61] Additionally, Sykes first describes the motivations for antidumping law as being too vague, and then describes them as specific enough to exclude the non-predatory motives listed by Viner. These descriptions by Sykes may not be logically consistent.
[62] See also *Matsushita v. Zenith* 475 U.S. 574 (1986).

Morgan does not note, though, that the "noncontestable" criteria in antitrust is relatively new, and related to the idea that antitrust violations must involve predatory pricing, "narrowly defined" (Morgan).[63] It is not clear that earlier understandings of antitrust hinged on such a narrow definition. The *Matsushita* case was a 5-4 decision, and possibly earlier Courts, with an older understanding of antitrust, might not have reached the same decision. In other words, while Morgan is using a Chicago view of antitrust to reach her findings, her findings would likely be bolstered by using the original view of antitrust.

Morgan goes on to argue that it there is a "broad middle ground" between completely open, contestable foreign markets and completely predatory ones. This broad middle ground might include, for example, markets in which the government offers difficult-to-detect assistance to an industry or does not enforce competition laws. She points out that critics of antidumping ignore this broad class of possibilities when asserting that all non-predatory price discrimination is not harmful. [64]

Morgan's above points are an important counterweight to critics of antidumping, hitting on the nub of their basic assumption that in general, international price discrimination is probably not predatory, and so antidumping is very different than antitrust. Once again, the key issue of exactly what is meant by antitrust is key to understanding whether antidumping and antitrust are similar or not.

From price discrimination, Morgan goes on to consider the case of selling below cost. She argues that in general, in both domestic and foreign contexts, allowing selling below average variable cost for anything other than some short-run sales is likely not economically optimal.[65] She also points out that "It is a substantial theoretical leap, which seems to go largely unquestioned, to move from the statement that pricing at variable cost is not necessarily inconsistent with economic efficiency, to the conclusion that pricing at variable cost proves that a firm is operating in a nonpredatory, economically efficient manner." (The latter would be a standard more likely to meet Chicago antitrust standards, but, as shown earlier in this paper, would perhaps not pass muster with older understandings.)

Morgan argues instead to use an antitrust standard of predation as "as pricing that yields profits below the opportunity cost of money, i.e. below the profitability of competing investments." This definition, she then points out, would yield an analysis very similar to the analysis in current antidumping law.[66]

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[63] Interestingly, another defender of antidumping, Greg Mastel, also finds that antidumping covers a wider class of problems than antitrust, but again is implicitly using the Chicago definition of antitrust. Mastel (1998).

[64] Morgan also points out that in a general equilibrium framework, when one country's industry dumps from protected home markets at lower than the world price, it distorts investment decisions and causes net welfare losses.

[65] As Mastel and Stewart also point out, in the long run, average costs are the same as average variable costs.

[66] She points out that the injury standard would still be different, in that antitrust law imposes a "recoupment test" testing for the impact on consumer welfare, while antidumping law imposes an injury test that looks at the impact on producer welfare. She argues that in cases in which dumping is causing a negative resource allocation, it is not always true that a consumer welfare test based on recoupment will be more societally optimal than a producer injury test. In addition to Morgan's arguments, the modern antitrust understanding of the recoupment test—that the predator must be able to recoup all its losses from low pricing—may not be consistent with an original understanding of antitrust law. Thus,

Morgan concludes that "once the dumping and predation frameworks are reduced to their essential forms, they can be seen in some cases to resemble each other rather closely."[67] It is worth noting once more that in her analysis, any remaining differences are likely based on a Chicago school understanding of antitrust law that requires effective predatory pricing in order to find an antitrust violation. As developed earlier in this paper, an older understanding of antitrust law would thus likely be even more similar to current antidumping law.

Also interesting to note in Morgan's work is that she acknowledges some of the potential pitfalls of antidumping (e.g., creating anticompetitive opportunities for U.S. producers and penalizing price discrimination that is not anticompetitive), but states these outcomes are likely rare. Her analysis is, then, somewhat consistent with that of Stiglitz (in his Type I and Type II error framework), who comes to the opposite conclusion about which type of error is more likely. Their arguments suggest that one of the main differences over antidumping is a question of how likely anticompetitive behavior is, and again, this question dovetails with the issues underlying antitrust. Chicago antitrust believers tend to believe that predatory behavior is rare and minimally harmful; original antitrust believers had (and their modern analogs have) a wider view of the potentially negative effects of anticompetitive business behavior.

VIII. Ways in which antidumping flows from antitrust

With this history of antitrust in mind, one can now turn to ways that the economics literature on antidumping can be better understood by more consideration of the parallels with antitrust law. The following section discusses four ways in which antidumping law is consistent with the original understanding of antitrust law, and even flows from it.

First, antidumping takes place in a world in which the normal methods of proving antitrust violations, e.g., subpoenaing the records of accused antitrust violators, are not easy or possible. Foreign firms are under no obligation to obey U.S. antitrust laws, nor subject to penalties by U.S. authorities. Thus, it makes sense that antidumping law may have different methods than antitrust. For example, proving intent or predation might become something more like proving injury due to price discrimination or below-cost pricing.

Predatory pricing might be more likely to exist in an international context because of protected home markets, a phenomenon less likely to exist within a nation, especially one with tough antitrust laws (like the United States after the New Deal). Another country may have no antitrust law or weaker antitrust law, resulting in some of its firms having market power within that country, and allowing them to dump into the U.S. market. Similarly, other markets may be closed to international competition, for reasons that are not easily discernible, such as close (but not public) relationships between firms or between firms and the government of that nation. Again, in such circumstances, the firms of that country may dump into the U.S. market.[68]

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under an original understanding of antitrust law, the arguments for an antidumping law might not even require this argument.

[67] Her analysis here can also be seen as a refutation of the arguments presented by Applebaum and Victor in table 2.

[68] Similar arguments were made by the U.S. mission to the World Trade Organization in 1998, when the United States argued that antidumping law covered a wider class of policy issues than competition

Within the U.S. market, such dumping would be covered by antitrust law, and indeed, likely be an antitrust violation, with all the firms concerned being subject to U.S. antitrust law. However, when international trade is considered, the U.S. market will now be open to products produced in areas outside the scope of U.S. antitrust law. Attempting to close that loophole is arguably consistent with antitrust law.

Second, as has been shown, some U.S. antitrust law, notably the Clayton and Robinson-Patman Acts, do not require predatory intent and do, under some interpretations, penalize price discrimination. The debate over how to interpret these laws was a large and expansive one in the history of antitrust, and is still ongoing. One's view of antidumping law may depend heavily on one's view of this debate in antitrust. It also likely depends on one's views of the related issues of what is meant by predatory pricing, and how often predatory pricing occurs. The economics literature on antidumping often reflects an unstated acceptance of the Chicago view on these antitrust issues.

Third, whether predatory pricing is the only justification for antitrust (the Chicago view) or not, there may be additional justifications for a different type of competition policy in an international trade context. Allowing dumping to take place can affect domestic firms' investment decisions, as noted as far back as Viner and more recently. That is, otherwise economically efficient U.S. producers might not make investments in U.S. production if the market in which they produce is subject to dumping. The economics literature on antidumping rarely mentions this possibility as a justification for antidumping law.

Fourth, the economics literature almost never mentions countervailing duty law, which is designed to counter explicit foreign subsidies. Countervailing duty law follows a very similar legal path to antidumping law in the United States, with investigations needing to show injury in the same way but by reason of subsidy (rather than dumping) in the foreign market.

John Maynard Keynes argued for countries to have the flexibility to subsidize their industries when necessary as part of the international economic system, but then for their trading partners to respond with countervailing duties.[69] Keynes clearly saw such a system (subsidies with countervailing duties) as consistent with an international rules-based trading system. A similar argument could be constructed for antidumping law, in which countries would be allowed flexibility for their own competition policies, and other nations could react with antidumping law.

IX. "Protectionism"

The modern economics literature on antidumping frequently describes antidumping as "protectionist." One difficulty with the logical argument against antidumping being related to antitrust is the imprecise use of the word "protectionism." Interestingly, many of these economic authors sometimes refer to some types of antitrust, such as Robinson-Patman, as "protectionism." Clearly, if protectionism is defined traditionally as placing barriers to international trade, antitrust law cannot be protectionist when it involves relations between domestic firms.

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policy does. See United States Permanent Mission to the World Trade Organization, "Observations on the Distinctions between Competition Laws and Antidumping Rules," 1998.

[69] Horsefield (1969).

What those who use "protectionist" to describe antitrust law likely mean is summarized in the Supreme Court's 1993 (i.e., post-Chicago antitrust) opinion that U.S. competition law should "protect competition and not competitors." Thus, "protectionism" is probably defined as meaning "protecting competitors." Nonetheless, this definition is still very vague. Exactly how does one protect competition without protecting competitors? Any sanction on one competitor could be portrayed as "protecting" another competitor. There is a danger in some of this literature that "protectionism" can simply be defined as something that the specific author does not like. At best, one could say that "protectionism" has been unofficially redefined to mean any competition policy that goes beyond protecting against predatory pricing, as defined by Bork et al. However, such an explicit definition is not always elucidated.

Antidumping critics may argue that antidumping actually creates problems for consumers, by protecting inefficient or oligopolistic domestic firms. Whether this argument is correct or not, it has a near-exact parallel to the critics of antitrust from the mid-20th century, when scholars like Robert Bork argued that antitrust was "protectionism" for smaller, less-efficient producers. This argument again shows the fundamental parallel between the motivations for antitrust and antidumping, and the motivations for criticism of them.

X. Conclusion

Legal scholar William Page has described the underlying tension between the Chicago vision of antitrust and the original view as a tension between "evolutionary" and "intentional" visions of the market. In the evolutionary vision, the market is a self-regulating mechanism that allows free exchange among individuals, none of whom has lasting influence on the market. On the other hand, the "intentional" vision sees the market as tending toward monopoly, and resulting in coercion on individuals and smaller businesses.[70]

Page's framework is useful to show the broad similarities between views of antitrust and antidumping. Modern U.S. economists are perhaps more likely than legal scholars, historians, and even economists of previous years to view relatively laissez-faire economies as tending toward the most efficient equilibrium. Thus, their literature on antidumping will reflect a point of view similar to that of the Chicago critics of antitrust, i.e. that antidumping (and antitrust) address a problem that is rare, and the cure may be more damaging than the problem. It is important to understand this fundamental, and often unstated, belief of modern U.S. economists when reading their analysis of antidumping.

Though antitrust law and antidumping law are not exactly the same, they proceed from many of the same concerns, i.e., that of whether government ought to restrain sellers with market power from hurting other sellers through low pricing based on that market power, and whether such actions also hurt consumers. This paper has shown that if antitrust law is interpreted as Robert Bork and the other "Chicago"-style critics argued (successfully to date), then antidumping law may be interpreted as broader than antitrust law as it is not motivated entirely by predatory pricing and its effect on consumer welfare. Nonetheless, an argument for antidumping law as currently used might still be tenable as a method of dealing with the inability of the U.S. government to obtain information abroad as it would in an antitrust case.

[70] Page (2008).

However, if antitrust law is interpreted as it was in the 1940s through the 1960s, then antidumping law is more likely to be at least a rough analog of antitrust law applied to foreign trade.

Perhaps the best way to understand the debate over antidumping law is to view the world in the way Stiglitz and Morgan do, i.e., in a framework in which imperfect information is going to lead to errors either way. Either antidumping cases will be filed when they should not, or cases will not be filed when they should. Stiglitz and Morgan both raise this broad framework, and yet reach different conclusions about the efficacy of antidumping law. No matter what, understanding the analytical frameworks of economists who discuss antidumping requires also understanding what they believe about the nature and goals of antitrust.

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