

# ANTITRUST MODESTY

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THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION. By *Herbert Hovenkamp*. Cambridge, MA and London: Harvard University Press. 2005. Pp. vi, 368. \$39.95.

## INTRODUCTION

Herbert Hovenkamp<sup>1</sup> is one of the preeminent antitrust scholars of his generation and the current custodian of the highly influential Areeda-Turner *Antitrust Law* treatise.<sup>2</sup> The treatise (now commonly referred to as the “Areeda-Hovenkamp” treatise) is in its second edition, spans fourteen volumes, and enjoys unparalleled prestige. It has been cited in over forty Supreme Court decisions and in hundreds of lower court decisions. Justice Breyer once remarked that advocates would prefer to have “two paragraphs of Areeda’s treatise on their side than three Courts of Appeals or four Supreme Court Justices.”<sup>3</sup>

As custodian of the treatise, Hovenkamp speaks with oracle-like authority on antitrust matters. Recently, a company that settled an antitrust lawsuit for a disappointingly low sum explained to its shareholders that a new *draft* article by Hovenkamp posted for public comment on the Social Science Research Network (“SSRN”) had diminished the value of its claims by undermining one of its key legal theories.<sup>4</sup> Such is Hovenkamp’s authority in antitrust circles.

Given Hovenkamp’s influence and intellect, the publication of *The Antitrust Enterprise* is a major event, particularly since he sets out, according to the book’s jacket, to provide “the first authoritative and compact exposition of antitrust law since Robert Bork’s classic *The Antitrust Paradox* was published more than thirty years ago.” Nevertheless, one could quibble with the jacket’s claim. Richard Posner substantially updated his own authoritative and compact exposition of antitrust law in 2001.<sup>5</sup> In a 2003 book review, Hovenkamp called Posner’s second edition a “marvelous and important

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1. Ben V. and Dorothy Willie Professor of Law and History, University of Iowa College of Law.

2. Hovenkamp is the current lead reviser of what began as PHILIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* (1st ed. 1978).

3. Justice Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889 (1996).

4. *See* Info. Res., Inc. Litigation Contingent Payment Rights Trust Annual Report (Form 10-K), at 6 (Mar. 31, 2006).

5. RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001) (1976).

book.”<sup>6</sup> So, before beginning a review of Hovenkamp’s new work, it seems necessary to address the question of why we need another such treatment four years later.

The answer is that Hovenkamp’s goal is very different from that of Posner and Bork. Posner and Bork wrote what Hovenkamp calls “polemical works” against the prevailing antitrust regime (p. 37). In the 1970s the prevailing regime was highly interventionist, suspicious of all manner of horizontal and vertical restraints and mergers, and intent on protecting small business from larger rivals, regardless of the cost to consumers. Bork and Posner’s “polemical” works attacked the entire edifice of antitrust reasoning that had prevailed since the second half of the New Deal. By 2001, Posner had seen much of his revolutionary vision come to fruition, but his second edition retained its attacks on the Warren Court’s antitrust policies just in case anyone was tempted to turn back the clock.

Hovenkamp has no such revolutionary ambition. As custodian of the Areeda-Turner treatise and hence the doctrinal center, he takes care to avoid associating too closely with any particular antitrust “school.” While he describes his own position as primarily “new Harvard” (p. 37), one is hard-pressed to locate the core tenets of this “new Harvard” school. It certainly does not resemble the Structure-Conduct-Performance Harvard school of the 1950s and ’60s, which viewed antitrust problems in formalized structuralist terms. As Hovenkamp acknowledges, the Harvard school (and the Areeda treatise) took a sharp turn westward, toward Chicago, after Donald Turner’s conversion experience in the late 1970s.<sup>7</sup> Although “new Harvard” borrows from the institutional design concerns of the traditional Harvard school—administrability is one of Hovenkamp’s key concerns—this “new Harvard” school could just as easily be called “Chicago lite.” It accepts the essential theoretic insights of the Chicago School but acts cautiously in applying them to real cases because of skepticism over the predictive power of theoretic models in litigation. Hovenkamp readily admits that the main differences between the new Harvard and Chicago schools “lie in details” (p. 38).

By the same token, this “new Harvard” school embraces some of the insights of the post-Chicago school—which tends to justify greater antitrust intervention following game-theoretic predictions of market failures—but then is hesitant to apply those theoretic insights without strong proof of their predictive power in real cases. As Hovenkamp notes, “new Harvard” is “the position most followed by the federal courts today” (p. 37). In other words, then, the antitrust enterprise that Hovenkamp ad-

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6. Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 944 (2003) (reviewing POSNER, *supra* note 5).

7. P. 37. The Chicago school of antitrust law generally began in the 1950s with Aaron Director and other economists and law professors associated with the University of Chicago. The Chicago school sought to debunk the interventionist assumptions of various legal doctrines, such as structuralist assumptions about industry performance in merger cases and the purported threats to competition from tying and predatory pricing. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925–28 (1979).

vocates is the antitrust jurisprudence of the judicial mainstream, a generally incremental and cautious enterprise.

To be sure, Hovenkamp is not merely an apologist for the status quo. He musters criticisms of several mainstream antitrust positions—for example, the Supreme Court’s *Kodak*,<sup>8</sup> *Illinois Brick*,<sup>9</sup> *Maricopa*,<sup>10</sup> *Brooke Group*,<sup>11</sup> *California Dental*,<sup>12</sup> and *Dr. Miles*<sup>13</sup> decisions, and the Department of Justice’s (“DOJ”) post-appeal position on remedies in *Microsoft*<sup>14</sup>—and offers numerous suggestions for improving antitrust law and practice. But the general tenor of the book is conservative, in both senses of the word. Hovenkamp defends the essential character of the antitrust enterprise as it exists today and advocates a restrained approach to antitrust intervention in commercial markets.

Overall, Hovenkamp defends the antitrust status quo in accessible and wonderfully jargon-free prose. The book succeeds in offering profound insights for antitrust specialists while remaining accessible to lay readers. Where necessary, Hovenkamp rounds off the rough edges of an antitrust enterprise that is otherwise about where it ought to be. His proposals for reform, summarized at the conclusion of the book, are mostly ideas that mainstream voices have proposed, and some may see the light of day when the Antitrust Modernization Commission concludes its work in 2007.<sup>15</sup>

*The Antitrust Enterprise* is organized into three parts. Part I—“Limits and Possibilities”—presents an overview of consumer welfare economics, the limitations of antitrust as a regulatory regime, and the procedural apparatus of antitrust enforcement. Part II—“Traditional Antitrust Rules”—examines the state of contemporary antitrust law in its three primary areas of coverage: collaborative restraints of trade,<sup>16</sup> unilateral exclusionary conduct,<sup>17</sup> and mergers.<sup>18</sup> Part III—“Regulation, Innovation, and Connectivity”—addresses various “hot” issues in antitrust enforcement, such as

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8. Pp. 98–102 (discussing *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992)).

9. Pp. 74–76 (discussing *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

10. Pp. 142–43 (discussing *Arizona v. Maricopa Med. Soc.*, 457 U.S. 332 (1982)).

11. Pp. 169–70 (discussing *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993)).

12. Pp. 147–48 (discussing *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999)).

13. P. 186 (discussing *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911)).

14. Pp. 298–304 (discussing *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), *cert. denied*, 534 U.S. 952 (2001)).

15. The Antitrust Modernization Commission was created by Congress in 2002 and charged with studying the antitrust laws and producing a report to Congress and the President. Antitrust Modernization Commission, About the Commission, [http://www.amc.gov/about\\_commission.htm](http://www.amc.gov/about_commission.htm) (last visited Oct. 29, 2006).

16. Sherman Act, 15 U.S.C. § 1 (2000).

17. *Id.* § 2.

18. Clayton Act § 7, 15 U.S.C. § 18 (2000).

the obligation to do business with competitors, intellectual property and antitrust convergence, and the role of competition policy in network industries.

Hovenkamp's work is an important and welcome book by an undisputed master of the trade. But perhaps the lingering value of the book is that it thoroughly captures the spirit of this particular moment in U.S. antitrust law both for the present generation and for historians to come. To exaggerate only slightly, Hovenkamp *is* the modern antitrust enterprise. And, like Hovenkamp himself, the antitrust enterprise has become, in a word, modest—existentially, procedurally, and substantively. In the following sections, this Review examines this modesty from existential, procedural, and substantive perspectives. The Review then offers some insights as to where the antitrust enterprise may go next whenever it sheds its current modesty and reclaims a more aggressive posture.

### I. EXISTENTIAL MODESTY

For someone whose life's work is antitrust law,<sup>19</sup> Hovenkamp has low expectations about what antitrust should seek to accomplish. He repeatedly admonishes that antitrust is “an economic, not a moral, enterprise,” dismissing the specter that antitrust's heavy artillery should be turned on ordinary business torts (pp. 10, 54). Further, Hovenkamp does not believe that antitrust is well suited to perform a wealth-redistribution function, such as allocating the gains of trade between producers, consumers, labor, and other interests (p. 45). Hovenkamp understands allocative efficiency as antitrust's sole normative aspiration.

So far, no surprises. Very few mainstream scholars view antitrust's goals as moral or assign it a redistributionist goal.<sup>20</sup> But Hovenkamp goes further than simply limiting antitrust's normative goal. In at least three additional ways, he seeks to reign in antitrust's ambitions.

First, he assigns antitrust a back seat to other branches of regulatory policy. In his view, antitrust is merely a “residual” regulator, “promot[ing] competition to the extent that market choices have not been preempted by some alternative regulatory enterprise” (p. 13). Thus, antitrust principles never should be invoked to challenge legislative overextension of intellectual property rights or regulatory folly (p. 255). Antitrusters may wring their hands in frustration at congressional largesse with copyright holders, as with the Sonny Bono Copyright Term Extension Act,<sup>21</sup> but theirs is not to rectify (p. 250). Antitrust corrects market failures, not governmental failures.

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19. In *The Antitrust Enterprise*, Hovenkamp describes the *Antitrust Law* treatise as his “life's work.” P. vii.

20. This was not always the case. It is not difficult to locate early antitrust decisions expressly locating a moral content to antitrust. *See, e.g.*, *United States v. Patterson*, 201 F. 697, 716 (S.D. Ohio 1912) (concluding that there is a moral basis to the Sherman Act because “dealings between man and man must be on terms of justice”).

21. Pub. L. No. 105-298, 112 Stat. 2827 (1998) (codified as amended at 17 U.S.C. §§ 108, 203, 301–304 (2000)). The act has been nicknamed the Mickey Mouse Protection Act.

Second, Hovenkamp advocates restraint when applying antitrust law to correct even admitted market failures. Hovenkamp describes antitrust law as a “second order” regulatory regime that is “largely reactive” to severe market distortions (pp. 14–15). In what could be the topic sentence for Bork’s *The Antitrust Paradox*, Hovenkamp admonishes, “At all times we must remember that if we believe that markets generally work well when left alone, then intervention is justified only in the relatively few cases where the judiciary can fix the problem more reliably, more cheaply, or more quickly than the market can fix itself” (p. 124). Antitrust interventions should be few and far between.

Finally, Hovenkamp takes a narrow view of the kind of harm with which antitrust law should be concerned. This comes out particularly in Hovenkamp’s sharp criticism of the Supreme Court’s *Kodak*<sup>22</sup> decision, where the Supreme Court allowed independent service organizations’ claims that Kodak had monopolized aftermarkets for photocopier service by refusing to sell replacement parts for Kodak copiers (pp. 98–102). The standard Chicago school criticism of *Kodak*, which Hovenkamp embraces, is that Kodak could not have had a monopoly in the service market since it faced vigorous competition in the primary market for copiers.<sup>23</sup> In *Kodak*, however, the Court expressed concern that Kodak could find it profitable to act anticompetitively as to its installed base of customers who became “locked in” to Kodak parts and service.

One response to the majority view in *Kodak*—probably a correct one—is that these sort of anticompetitive effects due to market imperfections are theoretically plausible but extremely unlikely and, therefore, do not justify a rule of antitrust intervention in aftermarkets where the primary market is competitive.<sup>24</sup> Hovenkamp, however, goes further and postulates that antitrust should not interfere *even if* aftermarket distortions occur due to customer lock-in. Hovenkamp worries that allowing power in an aftermarket to become “market power” within the meaning of antitrust law would dangerously expand the antitrust domain by making “antitrust the vehicle for fixing contracts that we might think unfair or, worse yet, for protecting people from their own carelessly made bargains” (p. 101).

What is particularly interesting about this last observation is that an act could cause harm to consumers through suppressing competition and yet, per Hovenkamp, lack sufficient antitrust ingredients because it does not affect a market broader than the defendant’s own brand. For Hovenkamp, harm to consumers because of suppression of competition is a necessary but not sufficient condition for the intervention of antitrust law. A seller’s own brand can never be a market unto itself, even if the seller prevents competitors from offering customers replacement parts or service for the brand and, thereby, is able to exact monopoly rents from customers.

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22. Eastman Kodak Co. v. Image Technical Servs., 504 U.S. 451 (1992).

23. See, e.g., POSNER, *supra* note 5, at 236–37.

24. Carl Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of Kodak*, 63 ANTI-TRUST L.J. 483 (1995).

There is nothing inevitable about this view of antitrust injury and nothing conceptual to prevent antitrust from being applied to aftermarket of a single seller's brand.<sup>25</sup> The reasons for taking this view are largely prudential, not conceptual. Hovenkamp argues that antitrust must be cabined because it is too blunt an instrument, too laden with baggage (such as the treble damages remedy), and too easily misconstrued by judges and juries to be unleashed on competitive business behavior at large. Antitrust must aspire to only a modest supporting role in the broader enterprise of economic regulation.

In one important sense, however, Hovenkamp does not display existential modesty about the antitrust enterprise. He recognizes that the legislative history of the major antitrust statutes conflicts with the consumerist, efficiency-oriented ideology that prevails today (p. 40–41). The Sherman and Clayton Acts to some extent, and the Robinson-Patman and Cellar-Kefauver Acts to a large extent, were motivated by protecting small business from larger, more efficient rivals.<sup>26</sup> Hovenkamp is too intellectually honest to try to reconstruct a consumerist account of antitrust law by pasting together disparate snippets of legislative history, as Robert Bork has been accused of doing.<sup>27</sup> Instead, he bluntly advocates ignoring the Brandeisian views advanced in the legislative history as outmoded, irrational, and not compelled by the statutory language (p. 43).

Antitrust since the Chicago revolution has been in overt rebellion against past congressional will. But it is hard to find anyone today eager to enforce that long-expired will. The economic interpretation of the antitrust laws is so much more consistent with contemporary values that, by silent conspiracy, the antitrust agencies, litigants, courts, and most scholars have let the old ideas be forgotten. It feels much like a wacky old uncle has died leaving his entire fortune to the cat, and the probate judge and next of kin quietly agree that he must have meant the family instead. Who will complain? So one cheer for disregarding irrational and inconvenient congressional intent! Particularly when it gets in the way of antitrust minimalism.

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25. As Benjamin Klein and John Wiley have observed, market power within the meaning of antitrust law need not be market power in the way that economists use that term. Benjamin Klein & John Shepherd Wiley, Jr., *Competitive Price Discrimination As An Antitrust Justification for Intellectual Property Refusals to Deal*, 70 ANTITRUST L.J. 599, 624–29 (2003). Economists view market power as the power to charge a price over marginal cost. Such power is inherent whenever there is brand differentiation, as there was in *Kodak*, but allowing this to become market power of the kind with which antitrust concerns itself would vastly expand the antitrust domain given the ubiquity of brand differentiation. *See id.*

26. For a generally accurate recounting of the Cellar-Kefauver Amendment's troubling legislative history, see *Brown Shoe Co. v. United States*, 370 U.S. 294, 311–23 (1962). Although many scholars believe that the Robinson-Patman Act's legislative history evidences a similarly protectionist bent, others find efficiency concerns in the legislative history. *E.g.*, Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save It, Let Go of It*, 48 EMORY L.J. 1057, 1074–80 (1999).

27. For a leading criticism of Bork's view of the Sherman Act's legislative history, see Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 82–106 (1982).

## II. PROCEDURAL MODESTY

A good bit of *The Antitrust Enterprise* focuses on procedure, although Hovenkamp does not break “substance” and “procedure” into separate sections of the book. A staunch functionalist, Hovenkamp understands that procedure and substance are often not discrete and separately operating repositories of legal norms, but interdependent and, at times, indistinguishable categories.<sup>28</sup> When Hovenkamp analyzes the “design of antitrust rules” in the first section of the book, he considers a range of loosely procedural and remedial issues, and continues similarly later in the book when he assesses tools for analyzing market concentration in the merger context, and the ineffectiveness of the remedies in *Microsoft*. The “procedural” concerns that Hovenkamp addresses generally concern adjudicatory design in private litigation, merger review tools, standing, and remedies.

### A. Adjudicatory Design in Private Litigation

Much of Hovenkamp’s existential modesty with respect to antitrust arises from the adjudicatory design of antitrust litigation. In particular, Hovenkamp lacks faith in the performance of judges, economists, and juries, who all have a major role to play in antitrust trials. Since he is working under the premise that “[t]he basic rule should be nonintervention unless the court is confident that it has identified anti-competitive conduct and can apply an effective remedy,” it is not surprising that his distrust of the relevant institutional players translates into a relatively minimalist antitrust agenda (p. 47).

As between judges, juries, and expert economists, Hovenkamp is most willing to delegate responsibility to judges. Juries, in particular, he finds to be utterly incapable of addressing complex antitrust issues. He notes, with good reason, that “[j]ury trials in front of intelligent but nonspecialist judges is a truly miserable way to make economic policy” (p. 4). Hovenkamp recognizes that juries serve two important functions in the American legal system: “to determine whether a witness is speaking truthfully” and “to define the community’s moral boundaries” (p. 48). But neither of these functions applies much to antitrust. Antitrust cases do not typically require juries to decide personal facts, such as whether a witness is speaking truthfully about factual matters (e.g., whether the light was red or green or whether he pulled the trigger). Instead, they require judgment about economic facts, such as whether a firm had market power and whether a particular efficiency was realized in a particular way.<sup>29</sup> Further, if antitrust is not a moral endeavor, then the jury’s role as moral compass is inapplicable.

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28. See, e.g., Frank H. Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 112–13; Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 215–24 (2004).

29. On the distinction between economic and personal facts in antitrust cases, see Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. (forthcoming 2007).

Hovenkamp is similarly distrustful of economic experts. He disparages the Sixth Circuit's approval of the plaintiff's expert's testimony in *Conwood Co. v. U.S. Tobacco Co.*, which resulted in a \$1.05 billion judgment against U.S. Tobacco for monopolizing the moist snuff tobacco market.<sup>30</sup> Conwood's expert used a regression analysis that showed nothing more than consistency in Conwood's growth on a state-by-state basis, without offering any reason to believe that consistency in growth was correlated or even associated with anticompetitive conduct (pp. 87–88). Allowing such testimony to go to a jury of laypersons produces arbitrary results, since the jurors will merely decide based on the rhetorical skills of the experts and lawyers. Hovenkamp proposes to take technical aspects of antitrust analysis away from juries by strengthening the district court's gatekeeping function under *Daubert*<sup>31</sup> and by appointing neutral experts to decide technical matters (pp. 307–08).

Hovenkamp is quite correct that juries are singularly unqualified to resolve complex disputes over industrial organization matters and that economic experts sometimes take advantage of this.<sup>32</sup> It is questionable, however, whether the incompetence of antitrust juries and the charlatanry of some economic experts has as profound an influence as other adjudicatory design features do in antitrust cases. Indeed, the statistics suggest that trials are extraordinarily rare in private antitrust cases. Of the 707 federal antitrust cases that were terminated in 2005, 203 were terminated through voluntary dismissal or private settlement, 492 by court dismissal on a motion to dismiss or summary judgment, and only 12 cases, 1.7% of all cases terminated, reached a trial.<sup>33</sup> Of those 12 cases, only 9 were tried to juries.

If only nine antitrust cases are being tried to federal juries every year, one may wonder how much time it is worth spending on the defects of juries as antitrust adjudicators. Of course, even a small number of wild jury verdicts like the \$1.05 billion award against U.S. Tobacco and the \$1.28 billion judgment against Tyson Fresh Meats<sup>34</sup> shape the settlement calculus in the hundreds of cases that never reach trial. But far more frequent than the trial as adjudication mechanism is pretrial motion practice. The reality of private

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30. *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768 (6th Cir. 2002).

31. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court made clear that the *Daubert* gatekeeping role of the federal courts applies to all experts, even those whose area of expertise is not the hard sciences.

32. Arthur Austin's study of the performance of jurors in five antitrust cases concluded that the jurors "were overwhelmed, frustrated, and confused by testimony well beyond their comprehension." Arthur Austin, *The Jury System at Risk from Complexity, the New Media and Deviancy*, 73 DENV. U. L. REV. 51, 54 (1995).

33. The statistics reported here come from UNITED STATES COURTS 2005, TABLE C-4, U.S. DISTRICT COURTS—CIVIL CASES TERMINATED, BY NATURE OF SUIT AND ACTION TAKEN, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2005 (2005), <http://www.uscourts.gov/judbus2005/appendices/c4.pdf>. By contrast, the federal government initiates only twenty to thirty civil antitrust lawsuits per year and roughly the same number of criminal antitrust cases.

34. Elizabeth Becker, *Jury Awards Ranchers \$1.28 Billion from Tyson*, N.Y. TIMES, Feb. 18, 2004, at C1. The district judge subsequently threw out the jury's verdict and the case is presently on appeal.

antitrust litigation is that defendants have two shots to avoid trial—a motion to dismiss and a motion for summary judgment—or else risk aversion forces them to pay a substantial sum to avoid a trial, given the unpredictability of jury results and the vast damages awards that antitrust cases can generate.<sup>35</sup>

An institutional design issue equally important to trial roles, and one that Hovenkamp does not discuss much, is how courts should manage motion-to-dismiss and summary-judgment practice. The Supreme Court's *Matsushita*<sup>36</sup> decision encourages trial courts to play a gatekeeping role with respect to summary judgment in complex antitrust cases, summarily dismissing any claims that are not economically plausible.<sup>37</sup> The Court recently granted certiorari to review a Second Circuit decision rejecting a defendant's argument that courts should play a similar "economic plausibility" screening role with respect to motions to dismiss.<sup>38</sup> The resolution of this issue will have important implications for the structure of antitrust adjudication.

A tighter screening function at the motion-to-dismiss stage would diminish the value of antitrust claims by preventing plaintiffs from getting discovery necessary to create issues of fact at summary judgment and, thereby, force pretrial settlement. Further, since defendants often bear greater discovery costs than plaintiffs,<sup>39</sup> just surviving a motion to dismiss can give a plaintiff considerable settlement leverage. Given the rarity of jury trials and the aggressiveness of the federal courts in disposing of antitrust cases through pretrial motion practice, issues such as burdens of proof, legal presumptions, discovery management, and whether the "plausibility" analysis should occur at the motion-to-dismiss or summary-judgment stage merit at least as much attention as the defects of the jury system and the unreliability of some economic experts.

### B. Merger Review

Hovenkamp's concerns with misleading empiricism extend beyond the context of private litigation. He also criticizes the antitrust enforcement agencies' overreliance on market concentration indexes in merger review (pp. 212–14). Under the Merger Guidelines that the Federal Trade Commission ("FTC") and Justice Department Antitrust Division have adopted jointly, the agencies assess market concentration using the Herfindahl-Hirschman Index

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35. See Daniel A. Crane, *The Paradox of Predatory Pricing*, 91 CORNELL L. REV. 1, 13–15 (2005).

36. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

37. See Nikolai G. Levin, *The Nomos and Narrative of Matsushita*, 73 FORDHAM L. REV. 1627 (2005).

38. *Bell Atlantic Corp. v. Twombly*, 126 S. Ct. 2965 (2005); *Twombly*, 425 F.3d 99 (2d Cir. 2005).

39. Frank H. Easterbook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 34 (1984) (observing that defendants in antitrust cases often bear greater costs than plaintiffs because "[t]he defendant is apt to be larger, with more files to search, and to have control of more pertinent documents than the plaintiff").

("HHI"),<sup>40</sup> which requires summing the squares of the market shares of all participants in the relevant product and geographic markets both before and after the proposed merger. The agencies use both the post-merger concentration figure and the difference between the before and after figures as significant screens in deciding whether to challenge a merger. Hovenkamp criticizes the HHI approach for creating "an appearance of great rigor to merger analysis" and "superficially precise 'readouts' of market concentration," when in fact the numbers on which the computations are based are derived from "assumption, conjecture, and even speculation" (p. 213). Instead of relying on daunting concentration indexes, Hovenkamp would simply ask how many significant firms are in the market, and undertake a serious review if the proposed merger would result in the number dropping as low as four or five (p. 214).

Hovenkamp is surely correct that the lay observer could be easily fooled into over-crediting HHI results, given their appearance of expert rigor and precision, but his concern that the HHI calculation distorts the process of merger review may be overstated. As Hovenkamp notes, data reported by the FTC and DOJ suggest that the agencies do not zealously adhere to their own concentration zone presumptions.<sup>41</sup> In practice, the HHI calculation is simply one analytical tool employed during merger review, and probably does not distort overall outcomes any more than Hovenkamp's simplified, intuitive approach would. If the superficial rigor of the HHI fools anyone, it is the casual lay observer, not the agencies themselves or the potentially merging firms. Unless we are terribly concerned that the general public will be misled by the agencies' approach to merger review, there is probably not too much to worry about. Further, it is not clear that an approach that focuses on four or five major firms in the market improves much over the defects in the HHI approach. The difficult tasks of defining the relevant market, identifying which firms are participating in that market, and ascertaining each firm's share of the market are still necessary to that task.

### C. Standing

One quasi-procedural question Hovenkamp raises that *is* extremely important is the standing of various classes of purchasers when the defendant has raised prices above competitive levels. Under the current federal regime, only "direct" purchasers—those who purchased directly from the defendant—have standing to bring a claim.<sup>42</sup> Since many direct purchasers, such as wholesalers or retailers, often do not absorb much or any economic loss and merely "pass on" the overcharge to the ultimate consumers, the direct-

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40. U.S. DEP'T OF JUSTICE & FTC, HORIZONTAL MERGER GUIDELINES § 1.51 (rev. 1997), <http://www.usdoj.gov/atr/public/guidelines/hmg.pdf>.

41. P. 213; FTC & U.S. DEP'T OF JUSTICE, MERGER CHALLENGES DATA, FISCAL YEARS 1999–2003 (2003), <http://www.ftc.gov/os/2003/12/mdp.pdf>.

42. Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977); Hanover Shoe v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

purchaser rule often results in uninjured businesses recovering large settlements and injured consumers recovering nothing.<sup>43</sup> As a result, some states have passed “*Illinois Brick* repealer” statutes giving indirect-purchaser consumers the right to sue under state antitrust statutes.<sup>44</sup>

The upshot of this is yet more confusion and incoherence, including complicated layers of class action certification and settlement proceedings and vast overcompensation to purchasers as a class. Hovenkamp would cut through the Gordian knot of purchaser standing by awarding lost profits to any purchasers who resold the overcharged product and awarding overcharge damages to any end user of the product (p. 307).

While superficially appealing, Hovenkamp’s proposal might not simplify matters much. In many cases, the resellers/end-users dichotomy may be easier to identify in theory than in practice. For example, how would the law treat a manufacturer that purchased a price-fixed item that was a small component of a larger item that the manufacturer produced and then sold downstream through a complex distribution chain? The manufacturer would not be an “end user” with standing to claim an overcharge, and it would not be easy for the manufacturer to prove what profits it lost as a result of the price fix. The end user who purchased the final product from a retailer would theoretically have standing to assert the overcharge claim, but it would be extremely difficult to prove with reasonable certainty the impact of the price fix in the initial component, which was passed down to the manufacturer through an initial distribution chain, incorporated into the end product, and passed on down to the consumer through a second distribution chain. Whatever its faults, the direct purchaser rule has the virtue of limiting the damages chain at the level of the purchaser who bought from the wrongdoer. Sometimes efforts to simplify imperfect rules create greater complexity and more serious imperfection.<sup>45</sup>

#### D. Remedies

When it comes to remedies, Hovenkamp seeks both more and less aggressive intervention. On the “less” side of the equation, Hovenkamp notes that the treble damages remedy—which is automatic for any private party who establishes an antitrust violation<sup>46</sup>—lacks any justification in most

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43. See generally Roger D. Blair & Jeffrey L. Harrison, *Reexamining the Role of Illinois Brick in Antitrust Standing Analysis*, 68 GEO. WASH. L. REV. 1 (1999).

44. In *California v. ARC Am. Corp.*, 490 U.S. 93 (1989), the Court held that the Sherman Act does not preempt such statutes.

45. This is not to say that the current purchasers standing rules are the best that can be done. The Antitrust Modernization Commission has heard a variety of intriguing proposals, including one that would require consolidation of the claims of all aggrieved purchasers in a single action, disgorgement by the defendant of the total monopoly overcharge and other damages caused by the anticompetitive conduct, and some formula for allocating the recovery from the defendant between the various classes of purchasers. See ANTITRUST MODERNIZATION COMM., CIVIL REMEDIES—INDIRECT PURCHASER DISCUSSION OUTLINE, [http://www.amc.gov/pdf/meetings/CivRem-IndP\\_DiscOutline060504-fin1.pdf](http://www.amc.gov/pdf/meetings/CivRem-IndP_DiscOutline060504-fin1.pdf) (last visited Nov. 26, 2006).

46. 15 U.S.C. § 15 (2000).

cases (pp. 66–68). About this he is surely correct. The treble damages remedy is only economically justifiable as a means of making antitrust violations negative expected-value acts, given the probability of detection.<sup>47</sup> When the probability that an anticompetitive act will be discovered is near 100%, treble damages are unnecessary to supply correct incentives, can increase the incentives of rent-seeking firms to bring baseless antitrust lawsuits, and can chill beneficial competitive practices.<sup>48</sup> With the exception of hard-core price-fixing cartels, most antitrust violations are easily observed. Indeed, some strategic anticompetitive behavior, like predatory pricing, is only likely to work if a dominant firm succeeds in signaling its predatory commitment to rivals.<sup>49</sup>

Hovenkamp's proposal to limit antitrust damages to single damages in most cases would amount to a substantial change from the status quo, but it is by no means an off-center position. Scholars have been calling for detrebling antitrust damages for a long time.<sup>50</sup> Unfortunately, the Antitrust Modernization Commission's study of the issue appears to be headed toward a recommendation that the status quo be retained,<sup>51</sup> which will likely doom us to treble damages for the foreseeable future.

On the "more aggressive" side of the remedies equation, Hovenkamp sharply criticizes the final settlement in the Justice Department's case against *Microsoft*, which he believes failed to track the extent of Microsoft's wrongdoing, including Judge Jackson's holdings that were sustained on appeal.<sup>52</sup> In particular, Hovenkamp believes that the settlement did not go far enough in promoting future competition, and merely disallowed prospective conduct that had already entrenched Microsoft's dominant position in the PC-compatible operating systems market.

But then what remedy would have been appropriate? Here, Hovenkamp once again betrays a most modest ambition for antitrust law. Contrary to the initial position of the federal government and the preferences of many academics, Microsoft competitors, consumer groups, and industry observers, Hovenkamp would not have broken up Microsoft into separate platform and

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47. See Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

48. See Crane, *supra* note 35, at 60.

49. See *id.* at 39–43.

50. See, e.g., POSNER, *supra* note 5, at 272.

51. See ANTITRUST MODERNIZATION COMM., SUPPLEMENTAL CIVIL REMEDIES—DAMAGES DISCUSSION OUTLINE, <http://www.amc.gov/pdf/meetings/CivRem-DamagesSupplOutline060720circ.pdf> (last visited Nov. 26, 2006).

52. Pp. 298–304. After the United States Court of Appeals for the D.C. Circuit affirmed some of Judge Jackson's findings, reversed others, and remanded the case to a new district court judge for further proceedings (including on remedy), Judge Kollar-Kotelly entered a judgment that largely resembled the post-appeal settlement reached by the United States and nine of the state plaintiffs. The judgment required licensing of certain protocols necessary for interoperability, prohibited Microsoft from retaliating against customers that used products created by Microsoft's competitors, and required Microsoft to enable end users and original equipment manufacturers to use middleware products created by Microsoft's competitors. *New York v. Microsoft Corp.*, 231 F. Supp. 2d 203 (D.D.C. 2002).

applications divisions (p. 301). Indeed, drawing on failed divestiture approaches from Standard Oil to United Shoe to AT&T, Hovenkamp turns away from the Harvard school's structuralist bent and expresses skepticism about structural remedies in general (pp. 301–02).<sup>53</sup>

Here, at last, Hovenkamp departs from the cautious tone of most of *The Antitrust Enterprise*, and advocates a bold remedial program in cases like *Microsoft*. But, tellingly, the remedy he proposes is not an *antitrust* remedy at all. Indeed, it does not involve any formal legal sanction. Rather, Hovenkamp would have the federal government use its vast influence as a purchaser of goods and services to promote competition.<sup>54</sup> Here, Hovenkamp draws on the government's effective restructuring of the aluminum industry when it sold off its aluminum assets after World War II in a way deliberately calculated to break up Alcoa's monopoly (p. 302). Similarly, Hovenkamp says, the federal government could break up Microsoft's monopoly by requiring its departments and agencies to use open-source software as an alternative to Microsoft's products (p. 302).

Those who believe that many federal agencies are already ineffective will doubtlessly react with alarm at the prospect that, with the stroke of a pen, Windows could be banished from the computers of 2.7 million federal employees<sup>55</sup> in favor of Linux. (Personally, I hope that the federal abandonment of Windows would not take place on the day I am waiting in line for a new passport.) Hovenkamp would probably respond that sometimes competition policy requires bold governmental action to redress entrenched monopoly power. Bold governmental action, but not necessarily antitrust action. After all, antitrust is merely a residual regulator, a blunt instrument appropriate for only a narrow set of market failures.

And that pretty much sums up Hovenkamp's general approach to antitrust procedure and remedies. He is suspicious of both excessive theory and excessive empiricism. The antitrust procedure he advocates is that of simplicity and common sense—quiet, unassuming, and competent, rather than bold, ambitious, and complex. Hovenkamp believes that industrial competition is often too complicated a matter to be well regulated through adjudication, and that “confidence levels in antitrust cases are often unusually low” (p. 52). And, since the baseline rule is nonintervention unless there is a high degree of certainty in both the correctness of the liability determination and the efficacy of the remedy, Hovenkamp's doubts about antitrust's procedural effectiveness lead him to substantive modesty as well.

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53. Hovenkamp once proposed a structural remedy for persistent and severe antitrust violations by Microsoft: “A better solution [than injunctive relief] is a limited ‘divestiture’ decree, which in this case takes the form of a judicially supervised auction in which Microsoft is required to give non-exclusive licenses in all of its Windows software and the ‘Windows’ name to a predesignated number of winning bidders—say, five.” Herbert Hovenkamp, *Antitrust Remedies for “Private Intellectual Property Bottlenecks”*, in *EUROPEAN COMPETITION LAW ANNUAL 1998: REGULATING COMMUNICATIONS MARKETS* 131, 148 (Claus Dieter Ehlermann & Louisa Gotling eds., 2000).

54. Bruce Abramson makes a similar proposal in BRUCE ABRAMSON, *DIGITAL PHOENIX: WHY THE INFORMATION ECONOMY COLLAPSED AND HOW IT WILL RISE AGAIN* 190–96 (2005).

55. See Federal Jobs Net, <http://www.federaljobs.net/> (last visited Oct. 13, 2006).

## III. SUBSTANTIVE MODESTY

The opening paragraph of *The Antitrust Enterprise* tells us that the anti-trust community has reached a correct consensus on the goals of antitrust, but needs a better set of rules to implement those goals (p. 1). Hovenkamp follows up throughout the book with a series of observations about the way to design antitrust liability rules and about the defects in some of the current rules. The overall themes are to simplify liability rule-making, jettison outdated and overly interventionist rules, and correct misperceptions about which market actors are likely to give rise to particular kinds of market failures.

## A. Modes of Liability Rule-Making

A compact treatment of antitrust law like *The Antitrust Enterprise* cannot cover every substantive question in the field, and Hovenkamp mercifully spares us the technical detail that antitrust specialists find so useful about the *Antitrust Law* treatise. Instead, he addresses the general approach that courts should take in framing liability rules for both collaborative-conduct and exclusionary-conduct cases.

Both areas are in some transition, perhaps confusion, today. Not too long ago, the one thing the average lawyer probably knew about antitrust was that all collaborative restraints of trade are lumped into one of two categories: the per se rule, by which the conduct is absolutely condemned without considering its justifications or efficiency consequences, and the rule of reason, by which a wide range of issues, effects, and justifications must be considered, weighed, and balanced. In recent years, this dualism has begun to fray. First came the “quick look” cases, *NCAA*<sup>56</sup> and *California Dental*,<sup>57</sup> in which the Supreme Court suggested that there might be some third category intermediate to the per se rule and the rule of reason.<sup>58</sup> More recently, the Federal Trade Commission and the D.C. Circuit have suggested that the whole “dichotomous categorical approach” has given way “to a more nuanced and case-specific inquiry.”<sup>59</sup> Rules are out; standards are in.

Hovenkamp wisely seeks to bring some discipline to Section 1 analysis by stressing that it need not be as categorical as some interpretations of the per se rule nor as open-ended as the classic *Chicago Board of Trade*<sup>60</sup> formulation might suggest. On the one hand, Hovenkamp criticizes an

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56. *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984).

57. *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

58. See Stephen Calkins, *California Dental Association: Not a Quick Look But Not the Full Monty*, 67 ANTITRUST L.J. 495, 496–97 (2000).

59. *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 34 (D.C. Cir. 2005); see also *In re Polygram Holdings, Inc.*, No. 9298, 2003 WL 21770765 (F.T.C. July 24, 2003).

60. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (requiring analysis of “the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable[;] [t]he history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, [and] the purpose or end sought to be attained”).

approach that applies the per se rule as a binding principle of stare decisis rather than a mode of analysis (pp. 120–21). On the other hand, he repeatedly admonishes that courts are not very good at open-ended balancing, and that rule-of-reason analysis should not turn into an “anything goes” open-ended approach (pp. 30, 108, 148). Hovenkamp seeks to make the per se rule less rigid and the rule of reason less open-ended by suggesting a unified and disciplined methodology to Section 1 questions that proceeds through a series of questions, the answers to which entail shifting burdens and presumptions (p. 149).

The need for a more systematic and continuous approach to Section 1 analysis is apparent. Under the “dichotomous” system, business conduct tended to be too quickly tossed into either a per se illegality or virtual per se legality basket.<sup>61</sup> Nonetheless, Hovenkamp’s proposed approach may undervalue bright-line antitrust rules by requiring a more nuanced and searching adjudicatory mode. Even if such an approach would improve adjudicatory accuracy, it might diminish the predictability of antitrust results for businesses. Trading ex ante predictability for ex post accuracy is not necessarily desirable, particularly in an area like antitrust, which, Hovenkamp repeatedly reminds us, is designed to create efficient economic incentives, not to achieve distributive justice.

Hovenkamp is more receptive to bright-line rules when he turns to unilateral exclusionary conduct (the “monopolization” offense under Section 2 of the Sherman Act). Unlike in the Section 1 context in which he advocates an across-the-board, reticulated analytic mode, in the Section 2 context Hovenkamp jumps straight from the highly abstract question “what is an exclusionary act?” to specific liability rules (p. 152). The seeming inconsequence of the gap that Hovenkamp leaves between the theoretic definition and the conduct-specific rules leaves one feeling that perhaps too much ink is being spilled on the theoretic question.<sup>62</sup> Better just to get the rules as sharp as possible without worrying about their congruity with some metaphysical statement of principle.

Much of Hovenkamp’s attention to the substance of exclusionary conduct rules focuses on tweaking the existing rules governing price competition, rules that have been the subject of much recent discussion. Once again, Hovenkamp’s suggestions are generally to adjust the status quo incrementally. On predatory pricing, federal courts have been highly

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61. Frank H. Easterbrook, *Allocating Antitrust Decisionmaking Tasks*, 76 GEO. L.J. 305, 305 (1987) (asserting that “as a practical matter [this] meant that [practices challenged under the rule of reason] were declared lawful per se”); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1, 14 (1977) (“The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability.”).

62. Uncovering a generalized definition of exclusionary conduct has been the subject of extensive debate in antitrust circles in recent years. See, e.g., Daniel A. Crane, *Mixed Bundling, Profit Sacrifice, and Consumer Welfare*, 55 EMORY L.J. 423 (2006); Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253 (2003); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005); Thomas E. Kauper, *Section Two of the Sherman Act: The Search for Standards*, 93 GEO. L.J. 1623 (2005).

influenced by the views of Hovenkamp's predecessors, Areeda and Turner,<sup>63</sup> and Hovenkamp bolsters and explains the largely noninterventionist views they advocated (pp. 158–67). The Supreme Court's *Brooke Group*<sup>64</sup> decision receives mild criticism for underestimating a dominant firm's ability to use predatory pricing to discipline a maverick price-cutter, but one could not expect anything less from Hovenkamp (pp. 168–70). After all, Areeda argued the case for the losing plaintiff and Bork argued for the prevailing defendant. However small the gap between "new Harvard" and Chicago, Hovenkamp faithfully sides with Cambridge in any conflict.

### B. Old Rules That Need to Go

At times, Hovenkamp's ideological conservatism—his belief that markets usually operate best when left free from antitrust intervention—collides with his juridical conservatism—his respect for the incremental, common law process of American adjudication. When this occurs, his ideological conservatism usually prevails. Thus, Hovenkamp announces a substantive reform agenda that involves jettisoning several long-standing common law rules and even a statute, the oft-maligned Robinson-Patman Act.

On closer inspection, though, much that Hovenkamp proposes would cause little deviation from the status quo. One of Hovenkamp's proposals—reversing the seventy-year-old presumption that patents confer market power in tying cases (p. 261)—was achieved in 2006 in a Supreme Court opinion that relied on the same recommendation from the *Antitrust Law* treatise.<sup>65</sup> Although Congress has yet to repeal the Robinson-Patman Act, another Supreme Court case decided after *The Antitrust Enterprise* was published arguably followed Hovenkamp's alternative recommendation that the courts read a competitive injury requirement into the statute.<sup>66</sup> And, yes, the Court again relied extensively on Hovenkamp's treatise, bolstering Hovenkamp's status as the single most influential antitrust scholar in the United States.

In two additional areas, Hovenkamp's proposals for changes in common law antitrust rules enjoy considerable sympathy in the academic community and probably on the Supreme Court, and may see action in coming years. In the meantime, the lower courts continue to follow the older rules. First, Hovenkamp would do away with the essential facilities doctrine, which imposes on firms controlling "essential facilities" a duty to provide access to

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63. See Phillip Areeda, *Monopolization, Mergers, and Markets: A Century Past and the Future*, 75 CAL. L. REV. 959, 968 (1987); Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 711 (1975); Phillip Areeda & Donald F. Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976).

64. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

65. *Ill. Tool Works Inc. v. Independent Ink, Inc.*, 475 U.S. 574, 583 (2006) (citing 10 PHILLIP AREEDA, HERBERT HOVENKAMP & EINER ELHAUGE, *ANTITRUST LAW* ¶ 1737c (2d ed. 2004)).

66. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006). The Court asserted that it "would resist interpretation [of the Robinson-Patman Act] geared more to the protection of existing competitors than to the stimulation of competition." *Id.* at 872.

competitors (p. 247). Although the Supreme Court seemed to cast doubt on the theory in 2004,<sup>67</sup> more recent lower court decisions continue to suggest its viability.<sup>68</sup> Similarly, Hovenkamp would eliminate the rule of per se illegality for minimum retail price maintenance (p. 188), although lower courts continue to follow it in the absence of new guidance from the Supreme Court, which may be forthcoming shortly.<sup>69</sup> Hovenkamp and his *Antitrust Law* treatise are such bellwethers of future Supreme Court developments that last rites might as well be administered to these last two interventionist rules.

### C. Misperceptions about Market Dynamics

Bad antitrust precedent comes in two flavors: ideologically misguided, and economically ignorant. Hovenkamp complains about “antitrust’s overly ideological history,” but understands that very little of the bad ideology still lingers (p. 11). But economic ignorance abounds. Hovenkamp hopes to correct at least a few of the most pervasive errors. Here, we encounter Hovenkamp at his best, as the professor patiently correcting widespread misunderstandings.

Some of the lessons that Hovenkamp seeks to impart are merely refreshers from Chicago’s heyday.<sup>70</sup> But Hovenkamp also has some fresh emphases, perspectives that are not entirely new but that he elucidates plainly and more convincingly than others before him. In particular, in his chapter on antitrust and distribution, Hovenkamp strongly makes the case that courts evaluating vertical restraints are misguided to look askance at manufacturers. Manufacturers usually have nothing to gain from anticompetitive vertical restraints, which would have the effect of eliminating competition at the retail level, and, hence, increasing the manufacturer’s distribution cost. Instead, to the extent that a vertical restraint is anticompetitive, it is probably because a powerful retailer is coercing the manufacturer to disadvantage the retailer’s competitors (p. 183). With the growth of powerful big-box retailers like Wal-Mart, this last insight could have a profound impact on antitrust analysis of vertical restraints.

Hovenkamp also encourages courts to scrutinize more closely the regulatory activities of professional associations (p. 147). In *California Dental*, which Hovenkamp criticizes, the Supreme Court upheld a dental associa-

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67. *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

68. *See, e.g., Gregory v. Fort Bridger Rendezvous Ass’n*, 448 F.3d 1195, 1204 (10th Cir. 2006); *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1129 (9th Cir. 2004).

69. *See, e.g., PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 171 F. App’x 464 (5th Cir. 2006). The Supreme Court recently stayed the mandate in *PSKS* pending its decision on a petition for a writ of certiorari. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 28 (Aug. 28, 2006) (mem.).

70. For example, Hovenkamp dismantles the “leverage” fallacy that failed to understand that a monopolist cannot profitably leverage its monopoly into a second market since monopoly pricing in the second product would cause a loss of demand for the first product. P. 201. Chicago schoolers made this observation frequently in the 1970s and later. *See, e.g., Posner, supra* note 7, at 947 n.65.

tion's "ethical" rule prohibiting most member advertising about price and quality.<sup>71</sup> A believer in the general robustness of markets, Hovenkamp is more willing to believe that a market failure has occurred when it is prompted by a quasi-governmental association. In the Chicago school view, governmental corruption is the most likely and durable source of monopoly power.<sup>72</sup> Although Hovenkamp does not go that far, he does remind us that anticompetitive effects often lie in the shadow of regulatory enterprises advanced in the name of the public interest.

Still, Hovenkamp cautions that antitrust must not be used to challenge governmental regulation directly (pp. 233–34). Recognizing governmental manipulation as a problem is one thing; turning antitrust against governmental failure is another. Antitrust must never forget that it is a residual regulator, a modest enterprise.

#### IV. BEYOND MODESTY

The hallmark of Hovenkamp's antitrust is modesty, and Hovenkamp is the embodiment of the current antitrust epoch. With the wide consensus that consumer welfare is antitrust's sole normative goal, the enterprise has been almost entirely de-ideologized and depoliticized. At a recent symposium on antitrust at (where else?) the University of Chicago, two recent chairmen of the Federal Trade Commission—one a Bush-appointed Republican and the other a Clinton-appointed Democrat—lauded one another for the ideological and political neutrality that antitrust enforcement has assumed.<sup>73</sup> Antitrust has become a largely technocratic field for economic experts. The public pays it little attention, and the antitrust community has accepted the resulting trade-offs. Antitrust no longer lends itself to large political gestures or radical interventions—"trust-busting" is out of fashion, as we learned from the failure of the divestiture proposal in *Microsoft*.<sup>74</sup> In return for this loss of political grandeur and public saliency, the antitrust community contents itself with insulation from external political pressure and internal control over its institutions, resources, and direction.

Whatever its virtues, it is doubtful that the current equilibrium will last. The history of antitrust law is not one of incremental rationalization, but, rather, one of Hegelian opposition between conflicting ideals. Sharp clashes of competing paradigms result in the dominance of a particular school of thought until another clash produces a new winner. Antitrust history is a story of epochs, from the populism of the Progressive Era, to the first half of

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71. Cal. Dental Ass'n v. FTC, 526 U.S. 756, 780–81 (1999).

72. For example, the one place where Bork seemed to advocate more antitrust scrutiny rather than less was in his chapter on predation through government processes. ROBERT H. BORK, *THE ANTITRUST PARADOX* 347–64 (1978).

73. Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. CHI. L. REV. 165, 183–87 (2005); Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. CHI. L. REV. 209, 212 (2005).

74. United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).

the New Deal governed by the guild-oriented philosophy of the National Industrial Recovery Act, to the second half of the New Deal and Thurman Arnold's rigorous enforcement, to the structuralist paradigm of the Harvard school, to the Chicago school of the 1970s, and beyond.<sup>75</sup>

If history is a reliable teacher, we are once again in an antitrust epoch that will eventually be displaced rudely and abruptly by some new paradigm. What new paradigm will arise to challenge the epoch of modesty? *The Antitrust Enterprise* focuses on explaining, defending, and refining the status quo, and does not consider that question. However, at least two candidates come to mind.

First, behavioral law and economics is challenging the central rationality assumption that underlies the current paradigm. Hovenkamp assumes such rationality, noting that “[t]he entire antitrust enterprise is dedicated to the proposition that business firms behave rationally” (p. 134). The behavioralist model posits that human decision-making under uncertainty is systematically flawed by the use of various false heuristic shortcuts.<sup>76</sup> The broad implication for antitrust is that we cannot assume that market actors' behavior will produce efficient outcomes. Behavioralism—particularly as applied to business behavior—has many skeptics to answer. But, if behavioralism ever catches on, the era of antitrust modesty could see its demise as a much more interventionist regulatory agenda emerges.

A second and more radical challenge to the current antitrust paradigm might occur if the antiglobalization movement ever ascends politically. The vagueness and indeterminacy of the antitrust statutes coupled with their infinitely malleable legislative history provides ample room for antiglobalization advocates to reinterpret antitrust as a limitation on international corporate growth and a preference for locally owned and controlled industry. Already, one can see the emergence of antitrust themes in the increasingly popular anti-Wal-Mart campaign of many municipalities, scholars, and community activists.<sup>77</sup> Although Wal-Mart's U.S. growth has been mostly the product of internal expansion—which U.S. antitrust law generally protects—a popular reinterpretation of antitrust law to address unchecked corporate expansion and related concerns about cultural hegemony, labor practices, environmental impacts, and the loss of “moms and pops” is not far-fetched.

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75. See generally RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888–1992* (1996) (recounting over a hundred years of the history of economic competition policy, rhetoric, and law).

76. Cass R. Sunstein, *Introduction*, in *BEHAVIORAL LAW AND ECONOMICS* 1, 3 (Cass R. Sunstein ed., 2000) (“It is now well established that people make decisions on the basis of heuristic devices, or rules of thumb, that may work well in many cases but that also lead to systematic errors.”).

77. For example, former Labor Secretary Robert Reich has advocated “reinstat[ing] the first principle of antitrust,” preventing “companies [from] becoming so large [that] they distort[] the political process,” and going after Wal-Mart even though he recognizes that consumers are the “clear beneficiaries” of Wal-Mart's business model. Robert B. Reich, *Wal-Mart is Too Big*, <http://www.robertreich.org/reich/20040421.asp> (last visited Oct. 13, 2006); see also Barry Lynn, *Breaking the Chain: The Antitrust Case Against Wal-Mart*, *HARPER'S MAGAZINE*, July 2006, at 29.

Of course, to displace the current antitrust paradigm, behavioralism would need to capture the academy and antiglobalization the electorate. There is no telling whether either of those things will happen. But it is interesting to ponder where antitrust could go next. During every antitrust era, the prevailing paradigm seemed durable and inevitable, even as the seeds of the successor paradigm were being sown. Antitrust enforcement is highly dependent on broader political-economic currents, and it would be naïve to imagine that the era of antitrust modesty has captured antitrust's proper role once and for all. We do not know what will come next, but if history is a reliable guide, at some point there will be a sharp departure from the present paradigm.

Regardless of where the law heads next, *The Antitrust Enterprise* is valuable simply on its own terms—as a compact and authoritative exposition of U.S. antitrust law. It is most interesting, however, as the archetypal defense of this era of antitrust modesty. Only with the benefit of hindsight—perhaps forty or fifty years from now—will scholars be able to understand fully this epoch in context. It is a safe bet, however, that *The Antitrust Enterprise* will be considered the classic work of this era.