

A MODEST ENTERPRISE

Book review of *The Antitrust Enterprise: Principle and Execution* by Herbert Hovenkamp.

by
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This book review discusses The Antitrust Enterprise by Herbert Hovenkamp. While generally praising the book for its refreshing style, its recognition of antitrust's institutional limits, and its efforts to simplify antitrust doctrine, the book review ultimately criticizes it as unnecessarily wedded to neoclassical economics. The book review discusses similarities between Hovenkamp's ideas and Chicago school economics, as well as Hovenkamp's apparent skepticism of post-Chicago thinking. Ultimately, the book review calls for a more dramatic reimagination of antitrust's role, arguing that neoclassical economics should not be the frontline arbiter of competition policy. Instead, the author urges returning antitrust to its former prominence through the use of distributional and deontological goals, post-Chicago economic methods, and a willingness to contemplate antitrust and regulation as holistic bodies of law.

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I. INTRODUCTION

Herbert Hovenkamp's *The Antitrust Enterprise* is a well-written and thought-provoking book. Whether one agrees with Hovenkamp's approach or not, his book is likely to do for antitrust law in 2006 what Robert Bork's

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*Antitrust Paradox*¹ did in the 1970s: reframe the debate. One would, of course, expect nothing less from Professor Hovenkamp, a preeminent figure in the antitrust literature.

The book's approach can be simply summarized. Hovenkamp seeks "to identify antitrust's most fundamental and realistic aspirations."² The message that emerges from this inquiry is that antitrust's institutions are weak; as a consequence, antitrust needs to be streamlined in recognition of its modest role.³ This Review argues that while Hovenkamp's diagnosis and some of his suggestions for reform are superb, his thesis is overly pessimistic. Put simply, more imaginative economic and institutional analysis would yield a less anemic role for antitrust.

The Review proceeds in three parts. Part I offers a brief overview of the book. Part II explores the book's significant strengths, especially its focus on institutional analysis and its desire to simplify doctrine. Part III offers a critique by arguing that the book would have been even better had it not remained wedded to a conception of antitrust that is hemmed in by neoclassical economics and interpreted through federal common law.

II. OVERVIEW OF THE BOOK

The book is elegantly divided into three parts and comprises twelve chapters. Part I, entitled "Limits and Possibilities," sets the tone for the rest of the book. It "considers antitrust's surprisingly simple core economics, its disconcerting special interest origins and divergent schools, and the institutional scheme we have created for enforcing the antitrust laws."⁴ Chapter 1 surveys the neoclassical economic underpinnings of contemporary antitrust,⁵ and its key statutory provisions⁶ and vocabulary.⁷

Chapter 2 provides a discussion of the various antitrust "schools," some legislative history, and an overview of institutional imperfections. It begins by outlining the differences among the *laissez-faire* Chicago,⁸ structuralist

¹ See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

² HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* vii (2005) [hereinafter HOVENKAMP, *ANTITRUST ENTERPRISE*].

³ See, e.g., *id.* at 50 ("this entire book is dedicated to exploring the limitations of antitrust and developing simple rules for administering it").

⁴ *Id.* at 11.

⁵ See, e.g., *id.* at 19 ("The all-important difference between the competitor and the monopolist is that the competitor maximizes its profits by equating its marginal cost with the demand curve. The monopolist does so by equating its marginal cost with the marginal revenue curve, which is the point at which the additional revenue from a sale just equals the additional cost.").

⁶ See, e.g., *id.* at 21.

⁷ See, e.g., *id.* at 22–25 (discussing the differences among "horizontal restraints," "unilateral exclusionary practices," and "vertical practices").

⁸ See, e.g., *id.* at 32 ("Chicago School antitrust writers argued that in the long run markets tend to correct their own imperfections; that the history of aggressive judicial intervention has produced many indefensible results; that courts have often condemned

Harvard,⁹ and game-theoretic post-Chicago Schools.¹⁰ Hovenkamp identifies himself most closely with what he dubs the “new Harvard position,”¹¹ which first emerged in the early volumes of Donald Turner’s landmark treatise, *Antitrust Law*:

Those volumes reflect a greatly diluted concern with entry barriers, dismissed most of the claims that vertical integration was inherently anticompetitive, and proposed greatly relaxed merger standards. They also largely abandoned the view that anticompetitive conduct was a necessary consequence of structure, and aligned themselves with the Chicago School position requiring closer examination of conduct. . . . Today the Harvard School is modestly more interventionist than the Chicago School, but the main differences lie in details.¹²

His overarching approach identified, Hovenkamp then shifts gears to suggest that because the legislative history of the antitrust statutes reflects the special interests of small businesses,¹³ it should be given little, if any, weight:

The best justifications for ignoring the anticonsumer, pro-small business thrust of the legislative history are these: (a) the spare, malleable, and generally “economic” statutory language; (b) a century of case law; and (c) the need to make administration of the antitrust laws a rational enterprise.¹⁴

Finally, Chapter 2 begins to frame the need for “[s]imple (and [o]ften [u]nderdeterrent) [a]ntitrust [r]ules”¹⁵ that will be easily administrable.

Chapters 3 and 4 are more narrowly focused than the first two chapters. Chapter 3 depicts the problems of private enforcement through jury trial, makes the case that offenses need to be matched to remedy, and discusses the relative merits of consumer versus competitor suits. Chapter 4 is devoted to exploring why juries are ill-equipped to set competition policy. It focuses on the problem of expert testimony, and advocates stricter tests for the admissibility of expert evidence and greater use of neutral experts.

suspicious-looking business practices without understanding them, and when these practices were understood they were shown to have benign or procompetitive explanations.”).

⁹ See, e.g., *id.* at 35–36 (“Traditionally Harvard School economics was heavily ‘structuralist,’ which meant that it was apt to view markets as noncompetitive whenever they deviated from what were thought to be basic competitive conditions. . . . [T]he paradigm held that a given market structure dictated certain types of conduct, and that this in turn dictated performance.”).

¹⁰ See, e.g., *id.* at 38 (“[P]ost-Chicago theory typically models strategic behavior by use of game theory, with alternatives that reach far beyond the conventional Cournot oligopoly analysis.”). For a more detailed discussion of the post-Chicago school, see Reza Dibadj, *Saving Antitrust*, 75 U. COLO. L. REV. 745, 762–72 (2004).

¹¹ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 37.

¹² *Id.* at 37–38. It is of course no coincidence that the treatise has now become Professor Hovenkamp’s “life’s work.” *Id.* at vii.

¹³ See, e.g., *id.* at 42 (“So the Sherman Act was very likely passed at the behest of small businesses, injured by a technological revolution that left them on the sidelines.”).

¹⁴ *Id.* at 43. For an argument that greater weight should be placed on the legislative history, see Dibadj, *Saving Antitrust*, *supra* note 10, at 755–59.

¹⁵ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 45.

Part II, “Traditional Antitrust Rules,” “considers the role of antitrust in traditional well-established areas of the economy, including manufacturing, services, and distribution.”¹⁶ Chapter 5 sets the stage for the analysis to follow and discusses antitrust’s basics: how to measure market power,¹⁷ barriers to entry, and different approaches to unilateral versus multilateral conduct.¹⁸ Most cleverly, it uses joint-venture market division agreements, tying arrangements, and resale price maintenance as applications within which to introduce a vision of why “rule of reason” analysis is preferable to “per se” prohibitions.

The remaining chapters in Part II cover narrower ground. Chapter 6 treats agreements among competitors—notably price-fixing and joint ventures to conclude that, by and large, a balancing approach under the rule of reason analysis is most appropriate—to determine, for example, whether the agreement is “naked”¹⁹ or “reasonably ancillary to joint productive activity, which is activity that is profitable without regard to power.”²⁰ Chapter 7 is devoted to possible exclusionary conduct that might be challenged under section 2 of the Sherman Act, notably predatory pricing. Here, Hovenkamp feels that antitrust law has a very limited role to play:

The list of things condemned as unlawful monopolization is very poorly defined. Typically firms do not set out to violate section 2 in defined ways; a better way of characterizing their behavior is that they compete aggressively, sometimes even maliciously, and some of this conduct steps over the line and becomes an antitrust violation.²¹

Overall, Hovenkamp seems to feel that there is little antitrust *qua* antitrust can do to protect against monopoly, given his view that antitrust is not regulation.²²

Chapter 8 discusses the role antitrust can play in policing intrabrand and interbrand restraints in the context of distribution agreements.²³ It argues such contractual restraints rarely reflect threats to competition and that Robinson-

¹⁶ *Id.* at 93.

¹⁷ *See, e.g., id.* at 97 (discussing the neoclassical Lerner Index which assesses market power by comparing price to marginal cost).

¹⁸ *See, e.g., id.* at 111 (“So antitrust begins with a fairly benign attitude toward a firm’s unilateral conduct, and a more suspicious attitude toward multilateral conduct, with the degree of suspicion varying with the conduct itself.”).

¹⁹ “A naked agreement is not accompanied by any significant integration of production and its profitability depends on power over price.” *Id.* at 125.

²⁰ *Id.* at 149.

²¹ *Id.* at 179.

²² *See, e.g., id.* at 151 (“Failure to preserve the distinction between regulation and competition has explained many of the failures of §2 policy.”).

²³ The restraints are categorized as follows:

Resale price maintenance (RPM), vertical nonprice restraints, and the Robinson-Patman Act all deal with what we generally call “intra-brand” restraints—that is, restraints that affect the way a manufacturer’s own brand is distributed. By contrast, tying arrangements and exclusive dealing are called “inter-brand” restraints because they govern the relationship between one manufacturer’s brand and the brands of others.

Id. at 183.

Patman should be repealed.²⁴ Similarly, Chapter 9 advocates a rather lenient merger policy, even in the case of horizontal mergers. According to Hovenkamp, the “very ubiquity of merger-created efficiencies is why we evaluate mergers under a fairly benign set of rules.”²⁵

The third and final part is entitled “Regulation, Innovation, and Connectivity.” It “deals more particularly with problems of regulation, innovation, and new economy markets such as computers and telecommunications . . . [where] the role of antitrust is less clearly defined, and more ambiguity exists about how antitrust policy should relate to other forms of government intervention in the market.”²⁶ Chapter 10 discusses the relationship of antitrust and regulation, with a particular focus on the deregulatory trends of the past thirty years. The overall vision is one in which antitrust is conceptually distinct from regulation.

Chapter 11 is an exploration of the interface between intellectual property (IP) and antitrust. It first concedes that at an abstract level IP rights might be “fundamentally inconsistent with the procompetitive policies of the Sherman Act.”²⁷ Nonetheless, it tries to argue that “[u]pon closer examination, most of the conflicts either disappear or become quite manageable”²⁸ with “the only significant exception being cases that involve licensing agreements among competitors.”²⁹ Finally, Chapter 12 explores the competitive problems that networks might pose, with a particular focus on the Microsoft litigation. Here, Hovenkamp admits that “[n]etworks have some distinctive properties that explain both their value and some of the competitive problems they can cause.”³⁰ He focuses on the Microsoft litigation and—perhaps surprisingly given the tenor of earlier chapters—seems to admit a role for antitrust in that context, although even this stance is hedged by exploration of nonantitrust alternatives such as direct legislation and a more active role for government as a market participant who might refuse to purchase from monopolists.³¹

The overarching picture that emerges from the book is one that is pessimistic about what antitrust can do. The merits of this stance will be discussed in detail in Part IV of this Review. For now, it is worth pausing to

²⁴ “The Robinson-Patman Act makes it unlawful for a supplier to ‘discriminate’ in price between two of its dealers where the requisite injury to ‘competition’ is shown.” *Id.* at 192. Hovenkamp argues that it “often operates to harm consumers for the benefit of weaker or less efficient dealers. It moves antitrust policy in precisely the wrong direction.” *Id.*

²⁵ *Id.* at 219.

²⁶ *Id.* at 93. In turn, “‘new economy’ industries, [are] mainly computer technology and telecommunications, which are characterized by high rates of innovation, by costs that decline with output and over time, and often by a high degree of interconnection among market participants.” *Id.* at 225.

²⁷ *Id.* at 254.

²⁸ *Id.* at 256. *See also id.* at 255 (“when legal policy is not behaving myopically, then everyone should want the same thing, namely, the optimal balance between competition and protection for innovation”).

²⁹ *Id.* at 276.

³⁰ *Id.* at 279.

³¹ *See id.* at 302.

reflect the irony of such a narrow vision of antitrust from a brilliant scholar who has devoted much of his distinguished career to the subject. It is also worth stopping, in Part III, to savor the book's significant strengths.

III. STYLE, INSTITUTIONS, MINIMALISM

There is much to commend in *The Antitrust Enterprise*, both stylistically and substantively. To begin with, it is remarkably well-written: jargon is virtually nonexistent, useful sub-headings are provided to guide readers through each chapter, and the author beautifully frames much of the discussion by repeatedly contrasting the two fundamental antitrust claims: collusion and monopoly.³² It would be belaboring the obvious to point out that Hovenkamp, one of antitrust's most distinguished scholars, displays impressive mastery of the relevant statutory provisions and case law.³³

Professor Hovenkamp, of course, is also a noted legal historian, and readers are occasionally treated to informative, and appropriately brief, historical asides. Examples are as varied as they are delightful to read about: the evolution of antitrust from the Warren Court's protection of small business to the Chicago School's ascension;³⁴ the distinction between classical and neoclassical economics;³⁵ the development of the "law-fact distinction in jury trials";³⁶ the elaboration of monopoly claims at common law;³⁷ and even the history of railroad track gauge standardization to show the need for standard-setting in networks.³⁸ Not only do these digressions make for interesting reading, but they are a welcome change from the ahistorical approach so typical of conventional law and economics scholarship.³⁹

Beyond its refreshing style, the book makes substantial contributions along two interrelated dimensions: an emphasis on existing institutional realities and a concomitant desire to simplify doctrine. First, Hovenkamp insightfully focuses on institutions.⁴⁰ He repeatedly notes that neither judges⁴¹ nor juries⁴²

³² Which, of course, correspond to section 1 and section 2 of the Sherman Act, respectively. *See, e.g., id.* at 286.

³³ For instance, in one succinct paragraph, he is able to summarize how various antitrust laws have been applied in the context of anticompetitive distribution claims. *See id.* at 183.

³⁴ *See id.* at 1–2.

³⁵ *See id.* at 15 ("The great intellectual dividing line between classical political economy and what we now call 'neoclassical economics' was the development of the concept of marginalism and the construction of the marginal cost curve, which represents the cost of the next unit that a firm produces.").

³⁶ *Id.* at 62. *See also id.* at 84–85.

³⁷ *See id.* at 150.

³⁸ *See id.* at 284.

³⁹ *See, e.g.,* Ron Harris, *The Uses of History in Law and Economics*, 4 THEORETICAL INQUIRIES IN L. 659 (2003).

⁴⁰ *See, e.g.,* HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 55 ("The principal problem with these observations is not the theory, but the application."); *id.* at 312 (noting that perfect antitrust enforcement policy is not possible given that "our institutions are simply too limited"). On the importance of institutional analysis *see, e.g.,* NEIL K. KOMESAR,

are adequately equipped to be the arbiters of complex competition policy.⁴³ To make matters worse, the “current phenomenon of greatly overused private enforcement leads to the closely related problem of unprincipled experts, whose skills at persuading an untutored jury are often much greater than the quality of their economic or market analysis.”⁴⁴ Not to mention that lack of recent U.S. Supreme Court interest in antitrust cases has created “an increasingly balkanized antitrust policy dominated by the circuit courts, even though we nominally have a single set of statutes that govern the entire United States.”⁴⁵

Second and relatedly, *The Antitrust Enterprise*'s approach to antitrust's institutional limitations represents a relentless case for simplifying the law. Very early on, the book warns that:

Close parsing of the statutory language has led to many complicated and quite useless antitrust doctrines. An antitrust statute that read simply, “Unreasonable restraints on competition are hereby forbidden,” would do all the work that our current antitrust laws do without all the doctrinal baggage that has been developed along the way.⁴⁶

Indeed, much of the book is devoted to fleshing out this observation. For starters, given that “competitive and anticompetitive intent are so difficult to tell apart,”⁴⁷ less effort should be wasted on ferreting out intent evidence.⁴⁸

IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY (1994); R.H. COASE, *THE FIRM THE MARKET AND THE LAW* (1988).

⁴¹ See HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 46 (“[T]he court does not come close to having the analytic or fact-finding power that the econometrician has. The judge is typically a well-educated generalist trained mainly in law, as are counsel for both sides.”).

⁴² See *id.* (“If a trial is needed and the plaintiff is seeking damages, fact issues will be decided by a jury whose degree of education and sophistication in business or economics is no greater than that of the general population.”). See also *id.* at 63 (“But juries remain a very weak link in a system where most of the relevant evidence is economic and technical. Today the United States is virtually the only jurisdiction where competition policy issues are decided by lay juries in this fashion.”).

⁴³ For a similar conclusion based on a different approach, see Dibadj, *Saving Antitrust*, *supra* note 10, at 782–89.

⁴⁴ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 4. As Hovenkamp summarizes:

[P]arties seek out experts willing to speak most favorably to their side of a case, and if the case is weak this may entail the use of experts who are willing to “push the envelope,” so to speak. Pushing the envelope often means little more than engaging in a species of academic fraud. Then the courthouse becomes the site for a type of “junk science” that would never pass muster in the laboratory or the university classroom.

Id. at 78.

⁴⁵ *Id.* at 6. See also E. Thomas Sullivan & Robert B. Thompson, *The Supreme Court and Private Law: The Vanishing Importance of Securities and Antitrust*, 53 EMORY L.J. 1571 (2004).

⁴⁶ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 20.

⁴⁷ *Id.* at 51.

⁴⁸ After all, “[e]very firm intends to get all the business it can, and it will use means fair or foul, particularly when there is no bright line separating the two. Intent evidence is never

Additional proposals for streamlining abound. Hovenkamp argues for rationalizing regulatory immunity doctrines,⁴⁹ eliminating the indirect purchaser rule,⁵⁰ limiting calculations of market power,⁵¹ and simplifying anti-merger doctrine.⁵² He argues that tying and exclusive dealing, as well as vertical price and non-price restraints, should all be collapsed into the rule of reason.⁵³ Perhaps most tellingly—even though Hovenkamp devotes all of Part III to the difficult issues presented when antitrust intersects with regulation, intellectual property, and networks—he ends up arguing that existing rules can in most cases be effectively transposed to new economy industries.⁵⁴ All this, he notes with wry humor, is apparently a “concession to the brevity of life and the costliness of fact finding.”⁵⁵

an excuse for skipping proof of anticompetitive *conduct*.” *Id.* at 178. *See also id.* at 154 (“Indeed, the best way to deal with the intent problem is to assume the worst: every firm realistically capable of acquiring a monopoly intends to do so, and every monopolist intends to hang on to its monopoly position as long as possible.”). I have made a similar argument elsewhere. *See* Dibadj, *Saving Antitrust*, *supra* note 10, at 819–23. For a differing perspective, see Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 54 AM. U. L. REV. 151 (2004).

⁴⁹ *See* HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 236 (“If the conduct is of the state or a government subdivision, that is the end of the inquiry. However, if the conduct is by a private party, then we also need to know whether a government agency or official ‘actively supervised’ the conduct.”). *See also id.* at 311.

⁵⁰ The argument is fairly straightforward:

The principal impact of the indirect purchaser rule is to assign the damage action to the wrong person, and for no good reason. Typically, the final consumer is the one most seriously injured by cartel or monopoly prices, while retailers and other intermediaries have relatively minor injuries caused by lost volume of sales. In addition, direct purchasing wholesalers, who have ongoing business relationships with sellers, are often reluctant to sue.

Id. at 307.

⁵¹ More specifically, Hovenkamp wants to limit use of the Herfindahl-Hirshman Index (HHI):

The HHI gives superficially precise “readouts” of market concentration, and also of the amount by which the HHI is increased as a result of a merger. But this ostensible rigor belies the extent to which our merger analysis relies on assumption, conjecture, and even speculation. . . . We would do about as well in most cases if we simply queried how many significant firms a market contained.

Id. at 213–14.

⁵² *See id.* at 215 (“the number of significant firms in a market and the height of entry barriers would be the most important factors”).

⁵³ *See id.* at 200 (“the relationship between tying and exclusive dealing is much like the relationship between vertical price and nonprice restraints discussed earlier. . . . [W]e know that both practices are efficient and procompetitive most of the time, but there are a few exceptional cases where competitive harm is possible.”).

⁵⁴ *See, e.g., id.* at 276 (“anticompetitive innovation practices belong in the same classification as price-fixing, tying, and other practices that can be unlawful even though the underlying IP rights are perfectly valid.”). I similarly devote a section of a law review article to the problems of new economy industries, but reach different conclusions. *See* Dibadj, *Saving Antitrust*, *supra* note 10, at 776–81.

⁵⁵ HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 56.

As Part III will argue, while the book's focus on institutions and its desire to streamline doctrine are admirable, its ambitions for antitrust are too modest.

IV. QUIBBLES, NEOCLASSICISM, REIMAGINATION

A. *A Few Quibbles*

I begin my critique with a few quibbles, then move to more substantial concerns with Professor Hovenkamp's approach and thesis. To begin with, while he does an admirable job discussing the Chicago, Harvard, and post-Chicago schools,⁵⁶ he does not devote sufficient attention to the so-called Virginia School which is more extreme in its disdain for antitrust than the Chicago School.⁵⁷ Moreover, while he does discuss contestability theory near the end of the book in the context of regulation and deregulation,⁵⁸ he tends to conflate contestability with the Chicago School early in the book.⁵⁹

Another quibble is with the book's occasional tendency to make general statements without backing them up adequately. For instance, readers are matter-of-factly told that:

The antitrust enterprise accepts the premises that (1) all things being equal, the exercise of market power is usually a bad thing; but (2) not all exercises of market power are equally bad, and some are actually socially beneficial; and (3) the empirical and legal machinery we use for measuring market power and dealing with it is both costly and too crude for making fine adjustments.⁶⁰

Unfortunately, it is unclear why these premises must necessarily be true. Other examples abound. We are informed that “[m]ost instances of resale price maintenance are beneficial to consumers,”⁶¹ “[f]oreclosure is virtually never threatened by franchise tie-ins,”⁶² and that very few vertical restraints are anticompetitive.⁶³ Similarly, readers are reminded that “[m]ost mergers produce

⁵⁶ See *supra* notes 8–12 and accompanying text.

⁵⁷ See, e.g., Fred S. McChesney, *Be True to Your School: Chicago's Contradictory Views of Antitrust and Regulation*, reprinted in *THE CAUSES AND CONSEQUENCES OF ANTITRUST: THE PUBLIC-CHOICE PERSPECTIVE* 323–34 (Fred S. McChesney & William F. Shughart II eds., 1995). To his credit, Hovenkamp does debunk public choice myths in the context of regulation. See *infra* note 166 and accompanying text. For a discussion of the public choice fallacy as it applies to antitrust, see Dibadj, *Saving Antitrust*, *supra* note 10, at 793–802.

⁵⁸ See HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 244 (“While contestability theory has never produced the results it once promised, it has served to refocus antitrust thinking on the importance of competitive entry in disciplining monopoly.”).

⁵⁹ See, e.g., *id.* at 32.

⁶⁰ *Id.* at 95.

⁶¹ *Id.* at 123. See also *id.* at 120 (“Maximum resale price maintenance agreements rarely reduce output in any market. Nor do resale price maintenance or tying.”).

⁶² *Id.* at 202.

⁶³ See *id.* at 259.

efficiencies,”⁶⁴ “even exclusive dealing is completely harmless in most circumstances,”⁶⁵ and “[t]he great majority of discounts, bundled and otherwise, are procompetitive.”⁶⁶ Perhaps most jarring to those familiar with the epic struggles behind market definitions in antitrust, we are told that “[e]conometric methodologies can enable economists to assess market power directly, without the need for a market definition.”⁶⁷ Perhaps fleshing out assumptions and including more citations to the relevant literature would ease concerns that some of these assertions might be more than conjecture. Indeed, such blanket statements are reminiscent of Chicago School leaders, such as Richard Posner, trying to convince readers, among other startling claims, that the “small businessman usually is helped rather than hurt by monopoly.”⁶⁸

In the spirit of nit-picking, I will mention a few other issues. The book could have perhaps devoted more attention to explaining why in certain contexts, such as tying, antitrust has greater bite with respect to vertical practices, whereas in the context of mergers, review of vertical mergers is even more lenient than review of horizontal mergers. Naturally, *stare decisis*⁶⁹ and the promulgation of Merger Guidelines⁷⁰—discussed in different portions of the book—are part of the story, but is there more? Hovenkamp also devotes one precious sentence to the important notion that antitrust enforcement might vary depending on where a firm is in its lifecycle.⁷¹ Ironically, while he makes a convincing case for more nuanced remedies,⁷² he does not reconcile these subtleties with his overarching mantra of simplicity.

⁶⁴ *Id.* at 218.

⁶⁵ *Id.* at 172.

⁶⁶ *Id.* at 173.

⁶⁷ *Id.* at 97.

⁶⁸ RICHARD A. POSNER, *ANTITRUST LAW* 2 (2d ed. 2001).

⁶⁹ See HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 121 (“An unfortunate result of the history of *stare decisis* in antitrust rule making is a completely indefensible set of antitrust rules that are lenient toward cartel-facilitating restraints created by competitors . . . but hostile toward vertical practices such as tying and resale price maintenance that are procompetitive most of the time.”).

⁷⁰ See *id.* at 210–11 (“Merger guidelines issued by the Antitrust Division in 1968, when Donald F. Turner was the Division’s head, made clear that the principal concern of merger law was with exercises of market power by firms acting unilaterally or in conjunction with other firms.”).

⁷¹ See *id.* at 156 (“A common monopoly story is that of a firm that acquires a monopoly by efficient practices, mainly innovation, but later on uses anticompetitive practices to protect itself from new competitors.”). For a discussion of the importance of lifecycle issues, see Dibadj, *Saving Antitrust*, *supra* note 10, at 847–48.

⁷² Notably,

The full range of antitrust remedies is very broad. Going roughly from most to least severe, they include: (1) criminal punishment for guilty managers; (2) divestiture or other “structural” breakup; (3) broad mandatory orders such as compulsory dealing; (4) treble damages; (5) fines; (6) narrowly tailored injunctions in the form of “cease and desist” orders.” . . . The antitrust statutes provide almost no basis for differentiating an antitrust offense according to the remedy that is being sought.

HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 64. See also *id.* at 180.

Finally, Hovenkamp's attempt to avoid certain analytical problems leads him perhaps to create new ones. For example, one of the issues plaguing antitrust is what to do in new economy industries that cannot be mapped according to price and output.⁷³ He addresses the issue by defining "output" as "measured by either quantity *or innovation*."⁷⁴ This is, of course, very clever, but might simply serve to shift the issue onto the word "output." Similarly, he places weight on the distinction between "naked" and "ancillary" agreements,⁷⁵ arguing that "[w]hen a court confronts one of the latter there is no reason why it should not apply the per se rule."⁷⁶ But this merely moves the analytical debate to defining what is "ancillary."⁷⁷

Perhaps the best example of a suggestion for reform that in fact might simply shift the analytical burden is the book's desire to cabin the per se rule and emphasize the rule of reason. Hovenkamp suggests that the per se rule is overused⁷⁸ and unfriendly to economic analysis.⁷⁹ Instead, he advocates for the rule of reason, for example within the context of tying⁸⁰ and resale price maintenance.⁸¹ This may be fine as far as it goes and is consistent with Hovenkamp's simplification mantra. But it raises a host of problems. First, the rule of reason has the dubious distinction of being both vague⁸² and anemic⁸³ at the same time. This should not be surprising since, by definition, the rule of

⁷³ See Dibadj, *Saving Antitrust*, *supra* note 10, at 776–77.

⁷⁴ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 13 (emphasis added).

⁷⁵ See, e.g., *id.* at 125 ("Many agreements are reasonably 'ancillary' to other activities, such as coordinated research or production, and are profitable because they reduce firms' costs or improve their products. . . . A naked agreement is not accompanied by any significant integration of production and its profitability depends on power over price.").

⁷⁶ *Id.* at 288.

⁷⁷ A proposed four-step process designed to tease out "naked" from "ancillary" agreements seems to raise more questions than it answers. See *id.* at 127–28.

⁷⁸ See *id.* at 116 ("Today the per se rule is in disrepute, though not because of any fundamental flaw in the rule itself. Rather, we are experiencing a reaction to the flagrant overuse of the rule in the past.").

⁷⁹ See *id.* at 186 ("One of the costs of per se rules is that once they are created the courts lose much of their incentive to engage in an economic analysis of the challenged restraint; they need to know only whether it fits the definition under the rule.").

⁸⁰ See, e.g., *id.* at 262 ("all remaining tying claims should be addressed under the rule of reason"); *id.* at 201 ("The principal concern of tying law is anticompetitive foreclosure. But foreclosure can only be assessed by examining effects in the relevant market in which the foreclosure occurs. As a result foreclosure concerns can be assessed meaningfully only via the rule of reason.").

⁸¹ See, e.g., *id.* at 191 ("While price restraints have a statistically greater propensity to be anticompetitive, a well-formulated rule of reason would be able to identify specific anticompetitive restraints, in particular those compelled by powerful dealers or distributors."); *id.* at 119.

⁸² Hovenkamp admits as much. See *id.* at 105 ("Under [the rule of reason] courts have engaged in unfocused, wide-ranging expeditions into practically everything about the business of large firms in order to determine whether a challenged practice was unlawful.").

⁸³ See, e.g., *id.* at 8 ("[I]t has become something of a commonplace that rule of reason antitrust violations are almost impossible to prove, particularly in private plaintiff actions."); *id.* at 189 ("Since *Sylvania* overruled *Schwinn* and applied a rule of reason, very few purely vertical nonprice restraints have been condemned.").

reason rests on an analysis of “reasonableness” that might be fine for tort law, but not for national competition policy.⁸⁴

Likely having recognized this problem, and to cabin the rule of reason, the book attempts in various places to offer definitions and checklists. For example, readers are told, somewhat unhelpfully, that:

In antitrust “unreasonable” is a term of art and is simply another way of saying that a practice is unlawful. In order to be condemned under the antitrust laws a practice

- must create, increase, or prolong market power, or seriously threaten to do so; and
- cause injury to at least one group of market participants that is
- not offset by any justifications claimed for it; and
- be correctible through the antitrust enforcement system.⁸⁵

Similarly:

A rule of reason inquiry in tying cases would simply consider (1) whether the firm imposing the tie had sufficient power to force an anticompetitive arrangement, (2) whether the tie foreclosed a sufficiently large part of the tied market to force competitor exit or significantly increased costs, and (3) whether the arrangement was unnecessarily harmful to rivals in light of any proffered justifications.⁸⁶

Such guidance, while rhetorically impressive, presents more questions than it answers. Given the vagueness of the rule of reason, the book predictably has to hedge its bets and speak in terms of generalities. One wonders how useful it is, for instance, to be told that “antitrust policy must be careful to preserve maximum freedom for innovation consistent with the intellectual property . . . laws, while restraining anticompetitive practices that those laws do not protect.”⁸⁷ Similarly, readers are advised that “antitrust policy toward networks must simultaneously encourage all of the efficiencies that networks are capable of achieving, while eliminating ‘unreasonable’ restrictions on competition, which are restrictions that are not necessary to make the network operate efficiently.”⁸⁸

⁸⁴ Hovenkamp believes, quite consistently with his advocacy for the rule of reason, that antitrust’s overall “purpose is to remedy, within its abilities, unreasonable exercises of market power by dominant firms or groups of firms.” *Id.* at 93. For a different perspective, see Dibadj, *Saving Antitrust*, *supra* note 10.

⁸⁵ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 104.

⁸⁶ *Id.* at 123. *See also id.* at 106–07 (providing a lengthy 6-step process to determine whether the rule of reason has been violated in the context of unreasonable exercises of market power); *id.* at 149 (providing a similar 5-step list for applying the rule of reason to joint ventures); *id.* at 152 (monopolization offense defined, in part, based on whether the act “is reasonably capable of creating, enlarging or prolonging monopoly power by limiting the opportunities of rivals”).

⁸⁷ *Id.* at 285. *See also id.* at 259.

⁸⁸ *Id.* at 286.

Finally, Hovenkamp does go one step further by casting the rule of reason in a procedural light:

the rule of reason should be understood as a series of presumptions. At each stage, the burden of proof should be assigned to the party with the less plausible claim. In this sense applying the rule of reason depends on judicial experience with particular types of agreements, just as much as application of the per se rule does.⁸⁹

Readers might be forgiven for wondering whether burden-shifting will be enough to sidestep the fundamental issue of not being able to define “reasonableness” meaningfully.

B. *Neoclassicism's Allure*

My concerns, however, transcend quibbles. Overall, *The Antitrust Enterprise* seems unnecessarily wedded to neoclassical economics, popularized so well by the Chicago School. To be sure, Hovenkamp self-identifies with the Harvard School more than he does with the Chicago School.⁹⁰ He also at times is sensitive to the difference between social and private gain.⁹¹ Moreover, to his credit, he does warn that the:

Chicago view of antitrust was oversold. Many markets very likely are messier than Chicago theory assumes. People often lack good information. Often they are stuck by virtue of previous investments and face large “switching costs.” As a result investment may not flow toward competitive solutions as freely or as quickly as we hope. While the leverage theory never recovered very much from the Chicago critique, it also became clear that the Chicago School assumed fairly simple markets in which the only consideration was whether the firm could enlarge its monopoly price by relating two markets together. When the concerns are stated more broadly, the Chicago analysis loses much of its force.⁹²

Despite this convincing critique, the book remains in its details surprisingly sympathetic to neoclassical economics. The reason is most likely a desire to make antitrust easily administrable. Unfortunately, while an embrace of neoclassical economics might purport to provide certainty and simplicity,⁹³ it engenders a host of definitional problems and precludes application of new economic research to real-world antitrust problems.

⁸⁹ *Id.* at 309. *See also id.* at 146.

⁹⁰ *See supra* notes 11–12 and accompanying text.

⁹¹ *See, e.g., id.* at 136 (“Courts should also be less reluctant to condemn a business practice that has no obvious social (as opposed to purely private) benefits.”); *id.* at 154 (“A better question is not whether the conduct is capable of excluding a hypothetical ‘equally efficient’ rival, but whether the conduct produces insubstantial social benefits and is apt to exclude rivals who can realistically be expected to emerge under the circumstances.”). The classic exposition of the disparity between private and social welfare remains A.C. PIGOU, *THE ECONOMICS OF WELFARE* (4th ed. 1932).

⁹² HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 34–35.

⁹³ *Cf. id.* at 44 (“Whatever one thinks of neoclassical economics as a foundation for legal policy, it does provide a coherent vision of how the economic world should work.”).

1. *Facile Definitions*

For starters, the book's use of "consumer welfare," "efficiency," and "competition" is too facile. The bedrock of Hovenkamp's project rests on the goal of "consumer welfare."⁹⁴ In the abstract, this sounds like a wonderful objective.⁹⁵ Unfortunately, Hovenkamp does not define the term,⁹⁶ except to argue that "the rise of the Chicago School in the 1970s was a much needed corrective, restoring rigor that had been lost, and identifying a protected class—consumers—and some rules for assessing how they could best be protected."⁹⁷

This glosses over how the Chicago School, in an often overlooked sleight of hand, touted "consumer welfare" while really pushing allocative efficiency. Robert Bork, for instance, believes that the "closer the members of the industry come to maximizing their profits, the closer they come to maximizing the welfare of consumers"⁹⁸ since it is an "obvious fact that more efficient methods of doing business are as valuable to the public as they are to businessmen."⁹⁹ Indeed, for Bork, the "whole task of antitrust can be summed up as the effort to improve allocative efficiency without impairing productive efficiency so greatly as to produce either no gain or a net loss in consumer welfare."¹⁰⁰ As Robert Lande observes,

Judge Bork asserts that the sole purpose of the Sherman Act was enhancement of "consumer welfare," a term of art This view of "consumer welfare" includes maximum economic efficiency but excludes anything giving preference to consumers over monopolists or any concern with 'unfair' transfers of wealth from consumers to monopolists.¹⁰¹

Hovenkamp seems to appreciate that Bork misread the legislative history,¹⁰² though apparently views this shortcoming as innocuous, given that the legislative history is somehow simply "unhelpful."¹⁰³ One is left wondering to what extent the simple fact of redefining "consumer welfare" leads to

⁹⁴ See, e.g., *id.* at 154; *id.* at 196; *id.* at 305.

⁹⁵ See, e.g., *id.* at 1 ("Few people dispute that antitrust's core mission is protecting consumers' right to low prices, innovation, and diverse production that competition promises.").

⁹⁶ He does admit, however, that "the general prescription that antitrust must 'maximize consumer welfare' gives us very little guidance for developing specific antitrust rules that will facilitate the proper balance between competitiveness and progress." *Id.* at 14.

⁹⁷ *Id.* at 2.

⁹⁸ BORK, *supra* note 1, at 97.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.* at 91. See also *id.* at 109 ("[A]ntitrust should concern itself solely with allocative and productive efficiency.").

¹⁰¹ Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 84 (1982). See also Peter J. Hammer, *Antitrust Beyond Competition: Market Failures, Total Welfare, and the Challenge of IntraMarket Second-Best Tradeoffs*, 98 MICH. L. REV. 849, 858 n.21, 905 n.150 (2000).

¹⁰² See HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 40.

¹⁰³ *Id.* at 39. See also *supra* notes 13–14 and accompanying text.

pessimism toward antitrust's future: put simply, if what is good for industry is good for consumers, then why even bother with antitrust?

Similarly, neither "efficiency" nor "competition" is adequately defined. Readers are of course reminded that "efficiency" is good. After all, "the whole purpose of antitrust is to make markets work better, and 'better' means more efficiently."¹⁰⁴ But what is meant by "efficiency"? To the extent it means Pareto or Kaldor-Hicks efficiency, each is a problematic measure of consumer welfare.¹⁰⁵ Take merger policy. Hovenkamp believes that antitrust should tread lightly on mergers given that mergers are generally efficient.¹⁰⁶ The fact that the firm may benefit from economies of scale or scope, however, says precious little about whether these putative economies will be passed onto consumers. In fact, one is hard-pressed to find cases where industry concentration has actually helped consumers; it is no coincidence that consumer advocates tend to oppose mergers.¹⁰⁷

Finally, we are often reminded that antitrust's "purpose is to promote *competition*, which it does by encouraging *competitive* market structures and intervening selectively when practices pose a genuine threat to *competition*"¹⁰⁸ or that its "task is finished when it opens up the market so that *competition* can chart its course."¹⁰⁹ This noble purpose, however, suffers from one basic infirmity: what is meant by "competition"?¹¹⁰ On the one hand, the legislative history clearly suggests that the antitrust laws were designed at least in part to protect competitors, notably small businesses.¹¹¹ But the book despairs that reading "the antitrust laws as a kind of small business welfare prescription . . . would put us completely out to sea,"¹¹² and it even curiously equates "pro-small business" with "anti-consumer."¹¹³ While noting the inherent historical

¹⁰⁴ *Id.* at 48. *See also id.* at 28 ("[A]ntitrust should be particularly sensitive to efficiency gains and leave efficiency-producing collaborations alone, even if they threaten significant amounts of monopoly."); *id.* at 44; *id.* at 67.

¹⁰⁵ For a detailed discussion of the limits of Pareto and Kaldor-Hicks measures of efficiency, see Reza Dibadj, *Weasel Numbers*, 27 CARDOZO L. REV. 1325 (2006).

¹⁰⁶ *See supra* note 25 and accompanying text. *See also id.* at 207–08.

¹⁰⁷ *See, e.g., Deregulated*, CONSUMER REP., July 2002, at 30.

¹⁰⁸ HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 174 (emphasis added). *See also id.* at 96.

¹⁰⁹ *Id.* at 145 (emphasis added). *Cf. id.* at 175 ("A business tort becomes an antitrust violation only if there is a significant injury to competition.").

¹¹⁰ The term, of course, is not defined in the antitrust statutes. *See id.* at 43–44.

¹¹¹ *See, e.g., id.* at 210 ("Congress—just as the Supreme Court—understood 'competition' to refer to a situation where large numbers of small firms vied for business."); *id.* at 42 ("When the congressmen spoke of private lawsuits, they were thinking of competitor suits, adding further support to the argument that the welfare of small business rather than consumers was foremost on the mind of the Sherman Act's framers.").

¹¹² *Id.* at 44.

¹¹³ *See id.* at 43. Much innovation comes from small firms, who in turn could benefit from the protections of antitrust law. *See, e.g.,* Reza Dibadj, *Small Firms, Speak Up Loudly For Innovation*, SAN JOSE MERCURY NEWS, Jan. 30, 2005, at 5P.

revisionism,¹¹⁴ Hovenkamp is comfortable, much like the Chicago School, to ignore the legislative history and define competition according to the usual neoclassical bromides¹¹⁵—treating with disdain, for example, the Robinson-Patman Act.¹¹⁶

There is, however, at least one way to begin reconciling the “competition” versus “competitors” debate that would at the same time help address the definitional infirmities inherent in “consumer welfare” and “efficiency.” As I have explored elsewhere, antitrust might explore a “consumer monopsony” standard,¹¹⁷ which would ask how a downstream monopolist would behave. For example, in a proposed merger, the question becomes whether the “additional competitors are likely to reduce an industry’s prices”¹¹⁸ or even “whether a downstream monopsonist would be willing to subsidize upstream entry.”¹¹⁹ If so, the merger should not proceed. Such questions refocus the debate on the harms and benefits to consumers. The real reason to protect competitors would be to assure additional sources of supply for the monopsonist.

At a higher level of abstraction, facile definitions have a common thread. In line with conventional law and economics scholarship,¹²⁰ Hovenkamp suggests that distributional and moral concerns are unimportant to the antitrust enterprise.¹²¹ If so, then allocative efficiency should be the guiding standard. However, stated as such, and to the extent it can even be defined, it is at best curious to equate competition policy with efficiency. It is much more palatable,

¹¹⁴ See, e.g., HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 41 (“Although writers heaped scorn upon the Warren Court antitrust policy in the 1960s for its protection of small business, that policy was probably the most faithful to Congress in passing the Sherman Act.”); *id.* at 196 (“A great deal of revisionism has gone into our interpretations of the Sherman Act and §7 of the Clayton Act.”).

¹¹⁵ See, e.g., *id.* at 13 (“The antitrust laws are concerned with maintaining competition in private markets. ‘Competition’ refers to a state of affairs in which prices are sufficient to cover a firm’s costs, but not excessively higher, and firms are given the correct set of incentives to innovate.”).

¹¹⁶ See *id.* at 191–98.

¹¹⁷ See Dibadj, *Saving Antitrust*, *supra* note 10, at 814–19. A monopsony is a market where there is a single buyer. I build on work that Ayres and Braithwaite have developed in the context of partial industry regulation. See Ian Ayres & John Braithwaite, *Partial-Industry Regulation: A Monopsony Standard for Consumer Protection*, 80 CAL. L. REV. 13, 31 (1992) (proposing that governments “emulate what a monopsonist consumer would do”).

¹¹⁸ Ayres & Braithwaite, *supra* note 117, at 34.

¹¹⁹ *Id.* at 31. Cf. Spencer Weber Waller, *Antitrust As Consumer Choice: Comments on the New Paradigm*, 62 U. PITT. L. REV. 535 (2001) (advocating a consumer choice standard as the fundamental rule of antitrust).

¹²⁰ See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 997 (2001).

¹²¹ See, e.g., HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 47 (“Antitrust is not good at transferring wealth, and cannot be defended on that basis in any event. Nor does it have any moral content of its own, and it is not well designed to provide rules of business ethics.”); *id.* at 10 (“Antitrust is an economic, not a moral, enterprise.”); *id.* at 55 (“[b]ecause our only interest is in the overall size of the pie”). For the argument that distributional and deontological concerns cannot be avoided in economics, see Dibadj, *Weasel Numbers*, *supra* note 105.

as the Chicago School has brilliantly done, to push for efficiency under the guise of “consumer welfare” or “competition.”¹²² Hovenkamp no doubt recognizes this trick, but he somehow appears to acquiesce. Whether or not consumer monopsony is a persuasive standard or not is worth debating. The more important point is that it at least recognizes distributional and deontological concerns rather than try to obfuscate them beneath clever definitional rhetoric.¹²³

2. *Post-Chicago Blues*

The book’s facile definitions are symptomatic of a broader problem: overreliance on neoclassical economics. Reassuring supply and demand schedules fuel the putative quest for allocative efficiency.¹²⁴ Economics, however, has moved well beyond the Chicago School of law and economics.¹²⁵ In particular, post-Chicago models recognize that firm behavior may not necessarily be as benign as neoclassical models would suggest. This analysis—building on a rich tradition in industrial organization that studies imperfect competition, using tools such as game theory to model interactions over time¹²⁶—has recognized that firm behavior may not necessarily be as benign as neoclassical models would suggest.

Examples from predatory pricing, tying, and other exclusionary conduct illustrate the point. In the realm of predatory pricing, the familiar Areeda-Turner test has been the accepted wisdom: a price is predatory only if it is below the producer’s marginal cost.¹²⁷ While Hovenkamp correctly shows the problems with the Areeda-Turner test,¹²⁸ he ends up effectively acceding to its lax standard, presumably because “low prices are a principal goal of the antitrust laws”¹²⁹ and “[p]redatory pricing rules are technical and difficult for courts to administer.”¹³⁰ What is not discussed, however, is a wealth of research

¹²² See also Robert A. Skitol, *The Shifting Sands of Antitrust Policy: Where It Has Been, Where It Is Now, Where It Will Be in Its Third Century*, 9 CORNELL J.L. & PUB. POL’Y 239, 249 (1999) (“While Chicago School adherents trumpeted their support of ‘consumer welfare,’ they used that term in a counterintuitive manner to mean overall economy-wide efficiency rather than the protection of consumers as a class distinct from producers or a producer’s shareholding owners.”).

¹²³ On the power of rhetoric in law and economics, see Reza Dibadj, *Beyond Facile Assumptions and Radical Assertions: A Case for “Critical Legal Economics”*, 2003 UTAH L. REV. 1155 [hereinafter Dibadj, *Critical Legal Economics*].

¹²⁴ See, e.g., HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 17; *id.* at 141.

¹²⁵ For the argument that much contemporary law and economics too often reflects the state of welfare economics circa 1939, see Dibadj, *Weasel Numbers*, *supra* note 105.

¹²⁶ For an overview of industrial organization, see JEAN TIROLE, *THE THEORY OF INDUSTRIAL ORGANIZATION* (1988).

¹²⁷ See Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

¹²⁸ See HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 163–67.

¹²⁹ *Id.* at 159.

¹³⁰ *Id.* at 160. See also *id.* at 40. Part IV.C, *infra*, addresses institutional issues.

indicating the dangers of predatory pricing, and the inadequacy of the Areeda-Turner test¹³¹—not to mention the existence of other forms of predation.¹³²

Similarly, Hovenkamp notes approvingly of the “Chicago School’s demolition of the leverage theory”¹³³ given that “a firm that is already charging its monopoly price for one product cannot earn more in monopoly profits by tying a second, currently competitive, product, and hiking the price on that as well.”¹³⁴ This supposed “demolition” has its roots in a well-known paper written by Ward Bowman in the 1950s.¹³⁵ Since the 1960s, however, economists have challenged this naïve view of tying.¹³⁶ As Louis Kaplow has pointed out, the monopoly leverage problem is better examined within a class of “practices designed to affect market share and elasticity of market demand These practices do not increase short-run profits, and might even decrease them. The firm’s motivation is to change the structural conditions it faces in the future in order that it may receive greater profits in the future.”¹³⁷

Behind the dangers of predatory pricing and tying lies the broader issue of other exclusionary conduct. The classic example is a vertical agreement or merger where “a firm may gain the ability to raise price by contracting [or merging] with input suppliers for the suppliers’ agreements not to deal with the purchasing firm’s competitors on equal terms.”¹³⁸ Examples abound.¹³⁹ Input

¹³¹ See, e.g., William J. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979); Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979).

¹³² See, e.g., Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000). Examples include reputation effect predation (“predator reduces price in one market to induce the prey to believe that the predator will cut price in its other markets or in the predatory market itself at a later time, thereby enabling multimarket recoupment of predatory losses”), test market predation (“predator frustrates the prey’s market probe by openly cutting price in the test market to keep the prey ignorant about normal market conditions”), and cost signaling (“predator drastically reduces price to induce the prey to believe that the predator has lower costs, when in fact the predator has no cost advantage.”). *Id.* at 2248–49.

¹³³ HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 34.

¹³⁴ *Id.* at 201. Interestingly, Hovenkamp believes that tying is “anticompetitive only in the rare situations when tying denies rivals access to markets.” *Id.* at 263.

¹³⁵ See Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19, 20 (1957) (“Analysis of the situations in which sellers find tie-ins useful casts doubt upon the validity of the statement that the only purpose of tie-ins is monopolistic exploitation.”).

¹³⁶ See, e.g., James M. Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 LAW & CONTEMP. PROBS. 552 (1965); William James Adams & Janet L. Yellen, *Commodity Bundling and the Burden of Monopoly*, 90 Q. J. ECON. 475 (1976); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990); Jay Pil Choi & Christodoulos Stefandis, *Tying, Investment, and the Dynamic Leverage Theory*, 32 RAND J. ECON. 52 (2001).

¹³⁷ Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 524 (1985).

¹³⁸ Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power over Price*, 96 YALE L.J. 209, 223–24 (1986). See also Philippe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388

foreclosure might be “excluding rivals from high quality access to important inputs or raising rivals’ costs of inputs supplied by the monopolist or others.”¹⁴⁰ Customer foreclosure might include “using exclusive contracts and other strategies that exclude rivals from access to a sufficient customer base.”¹⁴¹ Yet, despite a plethora of new research, the book seems not to place much faith in antitrust’s ability to stem foreclosure.¹⁴²

Perhaps the best illustration of Hovenkamp’s skepticism over post-Chicago ideas is his repeated excoriation of the U.S. Supreme Court’s *Kodak* decision.¹⁴³ Here, he does not mince his words, calling *Kodak* “a failed experiment in a type of economic engineering where antitrust has no place”¹⁴⁴ and “probably. . . . the most useless and harmful antitrust decision of the Rehnquist Court.”¹⁴⁵ The core of his critique is that the case “blurs the distinction between economic market power and the wide range of practices that can lead to overcharges.”¹⁴⁶ More specifically, Hovenkamp is worried that *Kodak* “turns antitrust into a free-ranging engine for repair of any contract that either deceives or has not taken every possible contingency into account.”¹⁴⁷

There are several problems with such a harsh view. First, as post-Chicago ideas have shown, it is far too simplistic to draw a clear line between contract and antitrust¹⁴⁸—ironically, something which Hovenkamp seems to acknowledge in the context of the *Microsoft* litigation.¹⁴⁹ Second, even if we assume, arguendo, that such a line can be drawn, it is woefully unclear how private contracts can serve as a proxy for public law to set competition

(1987); Zvika Neeman, *The Freedom to Contract and the Free-Rider Problem*, 15 J.L. ECON. & ORG. 685, 686 (1999).

¹³⁹ For more extensive discussions of the infirmities of the neoclassical approach as applied to exclusionary agreements, see, e.g., Eric B. Rasmusen et al., *Naked Exclusion*, 81 AM. ECON. REV. 1137 (1991); B. Douglas Bernheim & Michael D. Whinston, *Exclusive Dealing*, 106 J. POL. ECON. 64 (1998).

¹⁴⁰ Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 GEO. MASON L. REV. 617, 626 (1999).

¹⁴¹ *Id.* at 627.

¹⁴² See HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 263–66.

¹⁴³ *Eastman Kodak Co. v. Image Technical Servs.*, 504 U.S. 451 (1992). The Court found Kodak to be acting anticompetitively in restricting the access of its repair parts to independent service organizations, given “the existence of significant information and switching costs.” *Id.* at 473.

¹⁴⁴ HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 310. See also *id.* at 98–100; *id.* at 157–58; *id.* at 269.

¹⁴⁵ *Id.* at 9.

¹⁴⁶ *Id.* at 98–99.

¹⁴⁷ *Id.* at 99. See also *id.* at 101; *id.* at 310.

¹⁴⁸ See *supra* notes 138–142 and accompanying text.

¹⁴⁹ See *id.* at 296 (“most of the challenged practices [in the *Microsoft* case] have been recognized in antitrust cases for a century: pressuring of third parties not to support rival technologies, and contracts with software developers encouraging them to forgo support for competitors.”).

policy.¹⁵⁰ Third, it is worthwhile to observe that the book gives cases in the Chicago tradition—notably *General Dynamics*,¹⁵¹ *GTE*,¹⁵² and *Matsushita*¹⁵³—a pass.¹⁵⁴ *Kodak*, moreover, is not an isolated case; rather, it is reflective of a deep tradition in antitrust that is uncomfortable with *laissez-faire* economics.¹⁵⁵ Rudolph Peritz articulates this basic tension:

One rhetoric has reflected a primary commitment to individual liberty, to competition free of government power, in appeals to freedom of contract, wealth maximization, private property rights, or freedom of speech. The other rhetoric has reflected a primary commitment to rough equality, to competition free of excessive economic power, in appeals to fair competition, consumerism, majoritarianism, or Jeffersonian entrepreneurialism.¹⁵⁶

Regardless of whether one prefers the former rhetoric, it is a bit disingenuous to single out *Kodak* as an anomalous, ill-conceived reflection of the latter.

An embrace of neoclassicism—whether through facile definitions or minimization of post-Chicago theory—needs some explanation. On one level, it reflects Hovenkamp's belief that an understanding of Chicago School economics somehow indicates an increasingly sophisticated judiciary.¹⁵⁷ This

¹⁵⁰ For a discussion of problems with a contractarian ethos, see Dibadj, *Saving Antitrust*, *supra* note 10, at 793–802. See also Reza Dibadj, *The Misguided Transformation of Loyalty Into Contract*, __ TULSA L. REV. __ (forthcoming 2006).

¹⁵¹ See *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974) (rejecting the argument that statistical evidence of increased concentration in the coal industry implies an anticompetitive effect).

¹⁵² See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) (deciding to relax the level of scrutiny for vertical restrictions from per se prohibition to rule of reason analysis).

¹⁵³ See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (viewing claims of predatory pricing with a high level of skepticism). For a brief discussion of *Matsushita*, see HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 134–35.

¹⁵⁴ Interestingly, *Kodak*'s losing argument, which one might imagine the book approves of, reflects classic Chicago School thinking:

Kodak argues that it could not have the ability to raise prices of service and parts above the level that would be charged in a competitive market because any increase in profits from a higher price in the aftermarkets at least would be offset by a corresponding loss in profits from lower equipment sales as consumers began purchasing equipment with more attractive service costs.

Eastman Kodak Co. v. Image Technical Servs., Inc. 504 U.S. 451, 465–66 (1992).

¹⁵⁵ See, e.g., *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Spirit Airlines v. Northwest Airlines*, 420 F.3d 190 (6th Cir. 2005).

¹⁵⁶ RUDOLPH J.R. PERITZ, *COMPETITION POLICY IN AMERICA, 1888–1992: HISTORY, RHETORIC*, LAW 301 (1996).

¹⁵⁷ He summarizes this position as follows:

Antitrust has not merely moved to the right, as the federal judiciary has in general. It has also become more coherent, more identifiable with a single economic model, and more trusting of the market to solve most competitive problems. Part of the credit for this lies with a federal judiciary that became increasingly sophisticated about economics in the 1980s and 1990s.

HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 7.

ignores, of course, the fact that neoclassical law and economics has been successful not necessarily for the power of its ideas, but because it has been cleverly marketed by energetic and brilliant leaders.¹⁵⁸ It would be unusual for a scholar of Hovenkamp's sophistication not to recognize this. Tellingly, he does suggest that there "is nothing inherently wrong with much of post-Chicago antitrust analysis. The problem is that in many cases the analysis has not yet been transformed into rules that a court can apply with confidence that it is making markets work better."¹⁵⁹ Institutional analysis—including the willingness to look beyond courts as frontline arbiters of antitrust policy—may thus hold the key to implementing better economics.

C. *Reimagining Institutions*

If institutional limitations preclude better economics, then what might be some proposals for reform beyond doctrinal simplification? To his credit, Hovenkamp does suggest a number of incremental reforms; notably, diminished use of treble damages¹⁶⁰ and greater use of "neutral-court appointed expert[s]."¹⁶¹ While these are good suggestions,¹⁶² they take as a given that courts should be the principal implementers of competition policy.¹⁶³

The book's institutional landscape is oddly constricted. Structures are limited:

When a particular form of behavior is too complex for reliable analysis, then the only defensible antitrust rule is to let the *market* rather than the *courts* control. Of course, *Congress* can always intervene, and further development in our tools of analysis may permit more definite conclusions later. But a *court* is in hazardous territory when it assumes that it can make society wealthier by condemning a practice whose competitive effects are poorly understood. The basic rule should be nonintervention unless the *court* is confident that it has identified anticompetitive conduct and can apply an effective remedy.¹⁶⁴

By limiting his institutional analysis to markets, courts, and legislatures, Hovenkamp misses the opportunity to discuss how administrative agencies

¹⁵⁸ See, e.g., Henry G. Manne, *How Law and Economics Was Marketed in a Hostile World: A Very Personal History*, in *THE ORIGINS OF LAW AND ECONOMICS: ESSAYS BY THE FOUNDING FATHERS* 309 (Francesco Parisi & Charles K. Rowley, eds.) (2005). Cf. Dibadj, *Critical Legal Economics*, *supra* note 123.

¹⁵⁹ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 49.

¹⁶⁰ See, e.g., *id.* at 66–68; *id.* at 305–06.

¹⁶¹ *Id.* at 85. See also *id.* at 307.

¹⁶² One possibility that the book does not discuss is the use of procedures that might resemble *qui tam* suits. Courts could collect treble damages from a losing defendant, but award only one-third of the bounty to the plaintiffs; the other two-thirds would be given to enforcement agencies. For details, as well as other reforms, see Dibadj, *Saving Antitrust*, *supra* note 10, at 840–43.

¹⁶³ Cf. HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 305 ("Most of these reforms could be implemented by the federal courts, with the Supreme Court leading the way.").

¹⁶⁴ *Id.* at 47 (emphasis added).

might play an integral role in enhancing antitrust.¹⁶⁵ The root of the oversight may simply be that administrative agencies are associated with regulation, and regulation is a dirty word within the lexicon of mainstream law and economics. To be sure, Hovenkamp correctly recognizes that public choice critiques of regulation are misleading,¹⁶⁶ that IP rights are a form of regulation,¹⁶⁷ and that antitrust can even be conceived of as a “residual regulator, filling in the lacunae among other regulatory and property regimes.”¹⁶⁸ But his overall view of regulation is too often negative.¹⁶⁹

To boot, the book simplistically characterizes regulation as a binary choice: either “command and control” edicts, or nothing.¹⁷⁰ It merely assumes that “competition is not regulation, and federal courts are not regulatory agencies.”¹⁷¹ This, of course, does not do justice to new advances in regulatory theory over the past forty years. Instead of trying to micromanage an industry through price controls, barriers to entry, and the like, new regulatory mechanisms are emerging that try to supplement, rather than supplant, the market.¹⁷² As Joseph Kearney and Thomas Merrill summarize in their study of

¹⁶⁵ On the importance of administrative agencies to social welfare theory, see Dibadj, *Weasel Numbers*, *supra* note 105.

¹⁶⁶ As Hovenkamp perceptively notes:

While public choice analysis is often used to support arguments against regulation, public choice is really an argument about why government sometimes makes decisions that favor one particular interest group rather than the interests of society as a whole. The theory explains both socially harmful decisions to regulate and socially harmful decisions *not* to regulate.

HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 240.

¹⁶⁷ *See id.* at 227 (“while extreme free marketers might rail at the excesses of regulation or antitrust, they tend to accept the system of intellectual property (IP) rights as if it were handed down from a mountaintop.”). For the argument that overprotective IP rights can constitute regulatory givings that create an anticommons, see Reza Dibadj, *Regulatory Givings and the Anticommons*, 64 OHIO ST. L.J. 1041 (2003).

¹⁶⁸ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 10. *See also id.* at 13 (antitrust’s “purpose is to promote competition to the extent that market choices have not been preempted by some alternative regulatory enterprise”); *id.* at 230.

¹⁶⁹ *See, e.g., id.* at 3 (“Regulation is costly, produces haphazard results, is not good at making firms minimize their costs, and impedes innovation.”); *id.* at 229.

¹⁷⁰ *See, e.g., id.* at 14 (“Fortunately, antitrust is not a positive administrative enterprise such as the regulation of retail electricity, where a government agency sets rates, decides when plants need to be built or modernized, and determines how much should be invested in developing new technologies.”); *id.* at 151; *id.* at 204. Curiously, the book seems amenable to remedies that lie far from antitrust. *See, e.g., id.* at 302 (“However, there are nonantitrust alternatives to the problem of computer platform monopoly. When it has the will the government can encourage competition through a variety of policies. One is through direct legislation Another is through its own participation in the market as a purchaser or seller.”).

¹⁷¹ *Id.* at 248.

¹⁷² For example, Stephen Breyer in the early 1980s laid out “a framework that sees classical regulation as a weapon of last resort and looks for less restrictive ways to deal with problems thought to call for regulation.” STEPHEN BREYER, *REGULATION AND ITS REFORM* 368 (1982). For a discussion of new research in regulatory theory, see REZA DIBADJ, *RESCUING REGULATION* (forthcoming 2006).

the transformation of regulated industries, “[u]nder the new paradigm, the regulator plays a far more limited role. Instead of comprehensively overseeing an industry in order to protect the end-user, *its principal function is to maximize competition among rival providers, in the expectation that competition will provide all the protection necessary for end-users.*”¹⁷³ While Hovenkamp does an admirable job recounting the history of regulation,¹⁷⁴ he does not discuss its new incarnations, and in doing so clings to a false dichotomy.

An alternative is to recognize that “[a]ntitrust is nothing if not economic regulation”¹⁷⁵ and that the “attempt to draw a sharp demarcation between antitrust and regulatory objectives is a mistake.”¹⁷⁶ William Baumol and Gregory Sidak summarize the benefits of harmonizing antitrust and regulation:

This harmony between regulation and antitrust has three important implications. First, the same basic tools of microeconomic analysis can be employed in one as in the other Second, changes in technology or other circumstances that permit natural monopoly to give way to competition impart continuity to the relationship between economic regulation and antitrust. Third, many of the thorniest problems in antitrust law . . . are fundamentally regulatory in nature, involving issues such as entry or the pricing of intermediate goods sold to competitors. Thus, the economic scholarship on regulation can in many instances enrich antitrust jurisprudence.¹⁷⁷

In addition, distributional goals are integral to economic regulation.¹⁷⁸ Treating antitrust and regulation holistically recognizes the distributional aspects of antitrust that cannot be sidestepped through facile definitions.¹⁷⁹

Perhaps the best example of the unfortunate consequences that stem from the false dichotomy between antitrust and regulation is Hovenkamp’s

¹⁷³ Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1361 (1998) (emphasis added).

¹⁷⁴ See HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 227–30.

¹⁷⁵ George Bittlingmayer, *The Economic Problem of Fixed Costs and What Legal Research Can Contribute*, 14 LAW & SOC. INQUIRY 739, 744 (1989).

¹⁷⁶ Glen O. Robinson, *On Refusing to Deal with Rivals*, 87 CORNELL L. REV. 1177, 1184 (2002). See also Thomas Gale Moore, *Introduction to Antitrust and Economic Efficiency: A Conference Sponsored by the Hoover Institution*, 28 J.L. & ECON. 245, 245 (1985) (“[t]he Sherman Act [is] the most encompassing regulatory statute and the second oldest federal regulatory law Only recently have economists begun to recognize that antitrust laws are regulatory statutes.”).

¹⁷⁷ WILLIAM J. BAUMOL & J. GREGORY SIDAK, TOWARD COMPETITION IN LOCAL TELEPHONY 27 (1994). Cf. JEAN-JACQUES LAFFONT & JEAN TIROLE, COMPETITION IN TELECOMMUNICATIONS 277 (2000) (“antitrust and regulation . . . strike the same rocks: lack of information about costs, demands, and competitive pressure; capture by interest groups; limited commitment ability.”).

¹⁷⁸ See, e.g., J. Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Network Industries*, 15 YALE J. ON REG. 117, 118 (1998) (“Economists may posture as purists and assert that regulators are misguided to pursue any goal other than economic efficiency. However correct that position may be as a matter of theory, it does not take the institutional setting of regulation as it really is.”).

¹⁷⁹ See *supra* notes 120–123 and accompanying text.

disparagement of the essential facilities doctrine.¹⁸⁰ Despite his desire for better remedies,¹⁸¹ Hovenkamp—in line with other distinguished commentators¹⁸²—believes that “antitrust would do well to jettison the essential facility doctrine.”¹⁸³ The doctrine can provide an elegant structural remedy by isolating bottlenecks that incumbents control, and making them available to competitors at a price that both encourages investment by the incumbent as well as new entry by competitors.¹⁸⁴ So why the harsh words?

The main reason behind his discomfort with the essential facilities doctrine is the worry that implementing the doctrine—notably, determining the scope of the bottleneck and setting an access price¹⁸⁵—smacks of regulation.¹⁸⁶ The critique, then, seems to be more about the administrative difficulties of the essential facilities doctrine than with its inherent incoherence. But if implementation of the doctrine is taken out of common law courts, and implemented within the institutional structure of administrative law, these issues should recede and it can enter the mainstream. Its use would limit

¹⁸⁰ The essential facilities doctrine carves out an exception to the general rule that a firm has no obligation to deal with its competitors by stating that under certain circumstances, a refusal to deal is subject to a monopolization claim under section 2 of the Sherman Act. *See, e.g., MCI Commc'ns Corp. v. A.T. & T. Co.*, 708 F.2d 1081, 1132–33 (7th Cir. 1983). For a detailed discussion of the essential facilities doctrine, see Dibadj, *Saving Antitrust*, *supra* note 10, at 831–39.

¹⁸¹ *See supra* note 72 and accompanying text. *See also* HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 300.

¹⁸² *See, e.g., Phillip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles*, 58 *ANTITRUST L.J.* 841, 841 (1990); Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 *GEO. L.J.* 395, 397 (1986).

¹⁸³ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 247. *See also id.* at 237; *id.* at 291.

¹⁸⁴ The doctrine is also consistent with post-Chicago methodologies, given that denying access to a bottleneck facility is at heart nothing but an example of foreclosure. *See, e.g., Patrick Rey & Jean Tirole, A Primer on Foreclosure* 1 (Jan. 30, 2006), <http://idei.fr/doc/by/tirole/primer.pdf> (“[F]oreclosure refers to a dominant firm’s denial of proper access to an essential good it produces with the intent of extending monopoly power from that segment of the market (the bottleneck segment) to an adjacent segment (the potentially competitive segment).”).

¹⁸⁵ *See, e.g.,* HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 102 (“In order to provide relief in *Kodak*-style refusal-to-deal situations, including the franchise lock-in cases, the court would have to determine the correct price and order the defendant to charge it.”); *id.* at 247–48. As I have explored elsewhere, these problems are tractable. *See* Reza Dibadj, *Competitive Debacle in Local Telephony: Is the 1996 Telecommunications Act to Blame?*, 81 *WASH. U. L.Q.* 1 (2003).

¹⁸⁶ *See, e.g.,* HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 292 (“forced sharing under these circumstances places the court in the position of a public utility regulator, a task for which it is very poorly suited.”). For a similar perspective, see Abbott B. Lipsky, Jr. & J. Gregory Sidak, *Essential Facilities*, 51 *STAN. L. REV.* 1187, 1195 (1999) (“mandatory access remedies, such as the essential facilities doctrine, do not fit comfortably within antitrust law. They are the stuff of regulatory bodies, not courts.”). *Cf. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004), (“Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited.”).

regulation only to where competition would not otherwise flourish.¹⁸⁷ More importantly, successful implementation of the essential facilities doctrine would serve as an example of what a holistic view of antitrust and regulation might achieve.¹⁸⁸

Beyond implementing the essential facilities doctrine, why not consider an administrative agency of limited powers to develop and implement competition laws across industries—using tools from both traditional antitrust and economic regulation? Elsewhere, I have proposed such an entity, calling it a Competition Office (CO).¹⁸⁹ It would bring several advantages, including: helping set competition policy *ex ante*, rather than *ex post* through common law; using agency experts to apply more accurate economic models; and unifying the Department of Justice’s Antitrust Division, and the Federal Trade Commission’s Competition Bureau.¹⁹⁰ Not to mention that administrative law makes the inevitable distributional tradeoffs more explicit than the common law might.¹⁹¹ While there are rare and fleeting references to the benefits of administrative law,¹⁹² Hovenkamp seems wedded to a conception of antitrust that is hemmed in by neoclassical economics interpreted through federal common law. By imposing this limitation, he misses an opportunity to join the debate.

In the end, the book’s institutional pessimism evokes defeatism. Readers are told, as a matter of course, that “the rather tolerant Chicago School rule may be the best one for policy purposes even though substantial anticompetitive

¹⁸⁷ See, e.g., Kearney & Merrill, *supra* note 173, at 1361–62 (“If one conceives of the regulator under the original paradigm as a sort of ice cap, covering all aspects of the regulated industry, then the objective under the new paradigm is to melt away the sphere of regulatory oversight to the smallest industry segment possible—the so-called bottleneck monopoly.”).

¹⁸⁸ Scholarly attitudes are slowly changing. Recent commentary seems significantly more favorable to the essential facilities doctrine. See, e.g., Robinson, *supra* note 176, at 1203 (“[A]cademics and practitioners ought to be searching for ways to define and limit the obligation to deal with competitors. Ultimately, the best way to accomplish this is to use a *narrowly defined* essential facilities doctrine as the sole foundation for imposing such a duty.”); Thomas A. Piraino, *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. REV. 65, 107–09 (2002); Jim Chen, *The Last Picture Show (On the Twilight of Federal Mass Communications Regulation)*, 80 MINN. L. REV. 1415, 1498 (1996).

¹⁸⁹ See Dibadj, *Saving Antitrust*, *supra* note 10, at 843–60.

¹⁹⁰ See *id.*

¹⁹¹ Cf. HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 2, at 45 (“As a general rule, the common law is an effective guarantor of the efficiency of markets for legal entitlements, but it is a very bad wealth redistribution device, and small business protection is ultimately a policy about how wealth should be distributed.”).

¹⁹² See, e.g., *id.* at 4 (“But antitrust’s record in these formerly regulated markets has been mixed. . . . In some cases we have simply replaced regulation-by-agency with regulation-by-antitrust-trial, which is far worse.”); *id.* at 65 (“The FTC is an administrative body that employs its own experts, and is not burdened by the jury trial requirements or strict procedural rules of courts.”); *id.* at 246–47 (“The *Trinko* case illustrates why some antitrust immunity is essential even in a partially deregulated industry. Here a government agency was intended by Congress to resolve interconnection disputes and was actually doing that job far more expeditiously than any court could do it [sic] through jury trials.”).

behavior goes undisciplined, simply because we cannot recognize and remedy it with sufficient confidence.”¹⁹³ After all, the reasoning goes, “the complexity of post-Chicago theories would force the federal courts to confront problems that they are not capable of solving.”¹⁹⁴ Yet the book’s proposed alternative—that of allowing anticompetitive behavior simply because it passes undetected under the facile assumptions of neoclassical economics—is simply unacceptable. As Steven Salop and Craig Romaine write:

[T]o the extent that it is concluded that judges or juries are not competent to deal with these issues in a judicial context, then that forum must be replaced with some other venue for deciding the case. The answer cannot be that the issues are too complicated for judges and juries so, therefore, monopolists should be unconstrained.¹⁹⁵

It is simply unsatisfactory to have an underdeterrent antitrust policy because we are not willing to improve our institutional machinery. Hovenkamp reminds us that today the “antitrust process is expensive, cumbersome, and not particularly accurate.”¹⁹⁶ If so, then much more effort needs to go into improving it. A streamlined administrative agency may be a good place to start.

V. CONCLUSION

In the end, Professor Hovenkamp’s thought-provoking book reminds us that antitrust “is a far humbler enterprise today than it was several decades ago.”¹⁹⁷ Yet, as increasingly concentrated industries pave the way for corporate behemoths¹⁹⁸ it is perhaps time to reconsider whether antitrust should be so demure. To be sure, there are institutional problems, and some doctrines may be fruitfully simplified, as Hovenkamp suggests. More importantly, though, it is time to revisit the notion that neoclassical economics, interpreted through federal courts, should be the frontline arbiter of competition policy. Distributional and deontological goals, post-Chicago economic methods, and a willingness to contemplate antitrust and regulation as holistic bodies of law—all can help save antitrust.¹⁹⁹ With a little more imagination, the antitrust enterprise could afford a little less modesty.

¹⁹³ *Id.* at 48. *See also id.* at 7 (“The sad fact is that economists are often convinced that a certain practice can be anticompetitive, at least part of the time. However, antitrust is forced to leave the practice alone because it has not developed rules that can reliably distinguish anticompetitive results or remedy them effectively.”); *id.* at 9–10; *id.* at 50.

¹⁹⁴ *Id.* at 39. *See also id.* at 2.

¹⁹⁵ Salop & Romaine, *supra* note 140, at 671.

¹⁹⁶ HOVENKAMP, *ANTITRUST ENTERPRISE*, *supra* note 2, at 104.

¹⁹⁷ *Id.* at 7.

¹⁹⁸ *See, e.g.*, Reza Dibadj, *Deregulation: A Tragedy in Three Acts*, WASH. POST, Sept. 13, 2003 at A21.

¹⁹⁹ The challenge is thus not to abandon antitrust, but to find ways to make it better, to go beyond and “create a regulatory superstructure that encourages the betterment of regulatory technology itself [F]or it is nothing less than the aspiration that government, like all things human, can improve.” John F. Duffy, *The FCC and the Patent System*:

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A MODEST ENTERPRISE

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