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Herbert J. Hovenkamp

University of Pennsylvania Carey Law School

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Book Review

Reimagining Antitrust: The Revisionist Work of Richard S. Markovits

Herbert Hovenkamp*

ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW. By Richard S. Markovits. New York, New York: Springer. 2014. 1,466 pages. \$258.00.

Introduction

Richard Markovits's antitrust scholarship is nothing if not original and provocative, and his new two-volume book is no exception.¹ Markovits argues forcefully that the Sherman and Clayton Acts were intended to employ different tests of illegality. As a result, even when they cover the same practices—such as mergers, exclusive dealing, or tying—they address them under different tests. He then shows how he would analyze various practices under the two statutes, discussing virtually every practice that has been the subject of significant antitrust litigation. He also discusses, more briefly, the competition law of the European Union.²

I. The Differences Between the Sherman and Clayton Acts

In Markovits's framework for interpreting the antitrust laws, the Sherman Act employs a subjective intent test, in some cases combined with objective evidence that the intended consequences were achieved or are realistically achievable.³ By contrast, the Clayton Act focuses much more

* Ben V. & Dorothy Willie Professor, University of Iowa College of Law.

1. RICHARD S. MARKOVITS, *ECONOMICS AND THE INTERPRETATION AND APPLICATION OF U.S. AND E.U. ANTITRUST LAW* (2014). Volume I is subtitled *Basic Concepts and Economics-Based Legal Analyses of Oligopolistic and Predatory Conduct* [hereinafter MARKOVITS I]. Volume II is subtitled *Economics-Based Legal Analyses of Mergers, Vertical Practices, and Joint Ventures* [hereinafter MARKOVITS II]; see Timothy J. Brennan, *Ahead of His Time: The Singular Contributions of Richard Markovits*, 61 ANTITRUST BULL. 109, 109–10 (2016) (discussing Markovits's views).

2. See Pinar Akman, *The Tests of Illegality Under Articles 101 and 102 TEFU*, 61 ANTITRUST BULL. 84, 84–85 (2016) (discussing Markovits's views of European Union law).

3. See MARKOVITS I, *supra* note 1, at 80–81 (discussing the way that U.S. courts have referenced willfulness or intent in the context of the Sherman Act).

explicitly on effects.⁴ As a result, some covered conduct that violates the Sherman Act may not violate the Clayton Act, and vice versa.⁵

Because the Clayton Act expressly includes effects language, Professor Markovits has a relatively easy time arguing that the Clayton Act applies an effects-based test. All three substantive provisions of the Clayton Act use similar language, reaching practices “where the effect . . . may be substantially to lessen competition or tend to create a monopoly.”⁶ The language of the Sherman Act is more ambiguous, however. Section 1 makes “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade” illegal.⁷ Section 2 condemns “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize.”⁸

Markovits is correct that historically most of the intent-based analysis under the antitrust laws has emanated from Sherman Act case law, not from Clayton Act cases. For example, subjective intent is not typically an issue in a merger case.⁹ Tying and exclusive-dealing cases can both involve discussions of intent, but both tying and exclusive dealing are addressed under the Sherman Act as well as the Clayton Act.¹⁰ The Clayton Act

4. *See id.* at 88 (elaborating on how the Clayton Act’s illegality test should focus on the effects the act or practice had on customers of the perpetrators and their rivals).

5. *Id.* at 97.

6. 15 U.S.C. § 13(a) (2012) (defining price discrimination); *see also* 15 U.S.C. § 14 (concerning tying and exclusive dealing); 15 U.S.C. § 18 (concerning mergers).

7. 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

8. 15 U.S.C. § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$100,000,000 if a corporation, or, if any other person, \$1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

9. *See* *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 589 (1957) (noting that the Clayton Act’s merger and acquisition provisions may be violated regardless of whether anticompetitive effects are intended).

10. *See* *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 8 (1958) (reasoning that a tying provision violated the Sherman Act because “[s]o far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition”); *Bowen v. N.Y. News, Inc.*, 522 F.2d 1242, 1257–58 (2d Cir. 1975) (holding that in order to violate the Sherman Act, exclusive dealing must be accompanied by monopolistic intent).

largely addressed offenses that were not recognized at common law.¹¹ Prior to passage of the antitrust laws, corporate mergers were addressed almost exclusively under state corporate law, and intent was usually irrelevant.¹²

By contrast, the Sherman Act, particularly § 1, is thought to track the common law.¹³ The common law torts of unfair competition and contracts in restraint of trade both included heavy doses of intent.¹⁴ Even when the Sherman Act addressed more novel conduct, however, it focused heavily on intent. Good examples are early antitrust cases involving vertical integration, which neither economists nor courts understood very well at the time.¹⁵ The cases condemning it are replete with discussions of the defendants' intent.¹⁶

In Markovits's framework, this intent-based formulation for Sherman Act offenses requires that the defendants have an *ex ante* perception that the contemplated conduct would be profitable because it would reduce the absolute attractiveness of the offers against which the defendant must compete.¹⁷ Markovits would require this determination as part of the plaintiff's burden of proof, thus making some construction of intent relevant in every Sherman Act case, although intent can sometimes be established objectively.¹⁸ On the latter point, it seems clear that intent experienced a diminished role in antitrust as measurement tools became better and as antitrust policy began making more neoclassical rational-actor assumptions

11. See, e.g., *Henry v. A.B. Dick Co.*, 224 U.S. 1, 31–32 (1912) (holding, prior to the Clayton Act's enactment, that the Sherman Act did not reach patent ties), *overruled by* *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 517–18 (1917) (suggesting that the Clayton Act did reach patent ties); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 278–79 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211, 247–48 (1899) (holding that the Sherman Act applied to restraints on trade unenforceable at common law so long as they involved interstate commerce).

12. See HERBERT HOVENKAMP, *ENTERPRISE AND AMERICAN LAW: 1836–1937*, at 242–43 (1991) (noting that merger policy at the time largely was left to individual states, which tended not to regulate potentially anticompetitive practices within a single firm).

13. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, 1 *ANTITRUST LAW* ¶ 104 (4th ed. 2013) (“[T]he framers of the Sherman Act may have thought in some generalized fashion that they were ‘enacting’ the common law . . .”).

14. *Id.* ¶ 104b.

15. Cf. Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 *ANTITRUST L.J.* 983, 983–90 (2014).

16. E.g., *United States v. Am. Tobacco Co.*, 221 U.S. 106, 182 (1911) (“[T]he acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco . . .”); *United States v. Corn Prods. Ref. Co.*, 234 F. 964, 978 (S.D.N.Y. 1916), *cert. denied*, 249 U.S. 621 (1919) (“[I]ntent, . . . plays so large a part in the decisions of the court in cases of this sort . . .”); see also *FTC v. Eastman Kodak Co.*, 274 U.S. 619, 620 (1927) (considering the Federal Trade Commission Act).

17. MARKOVITS I, *supra* note 1, at 77.

18. *Id.* at 81, 90.

about business-firm behavior.¹⁹ As noted below, this has certainly been a factor in the law of predatory and other forms of strategic pricing.²⁰

One problem with intent evidence in antitrust cases is that so many of them are private damages actions before juries, and juries are highly likely to misinterpret evidence of intent, often exaggerating its role.²¹ The message here is that we should not be condemning the intent itself. Rather, intent is an additional requirement to be placed on top of conduct evidence suggesting dangers to competition.

To see how these differences play out in Markovits's framework, consider unilateral exclusionary conduct, addressed under § 2 of the Sherman Act as "monopoliz[ation]" or "attempt to monopolize."²² According to Markovits, the offenses of monopolization and attempt to monopolize require a showing of "*ex ante* perpetrator-perceived profitability," in that the conduct in question would deter "rivals from making as attractive offers to its perpetrator's customers as those rivals would otherwise have made."²³ Under this definition, predatory conduct must be *ex ante* intended to drive a rival out of business or force it to locate further away in product space, or else must involve horizontal mergers or acquisitions intended to free the merging parties from competition with one another and facilitating oligopolistic or unreasonably exclusionary practices.²⁴ By contrast, monopolizing conduct would not include a firm's attempts to improve its own product or reduce its own costs.²⁵ The requirement of *ex ante* perpetrator-perceived profitability could be established by subjective evidence, perhaps drawn from the defendant's documents or statements, but it could also be inferred from assessments about the actions of a profit-maximizing firm in similar circumstances.

Neither § 1 nor § 2 of the Sherman Act is specific about the intent that is required for illegality or even its relevance, and the judicial decisions

19. See, e.g., PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3A ANTITRUST LAW ¶¶ 728, 738 (4th ed. 2015) (explaining the diminished role of intent in exclusionary-pricing cases).

20. See *infra* pp. 7–11.

21. See Marina Lao, *Reclaiming a Role for Intent Evidence in Monopolization Analysis*, 34 AM. U. L. REV. 151, 157 ("The main objections to the use of intent evidence are that procompetitive intent and anticompetitive intent are supposedly impossible to distinguish, that intent evidence is too subjective and unreliable, that juries are prone to misconstrue employees' poor choice of sports and war metaphors for corporate anticompetitive intent, and that the presence or absence of intent evidence depends mostly on defendant's legal sophistication. These problems are all overstated.")

22. 15 U.S.C. § 2 (2012); see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3 ANTITRUST LAW ¶ 600–58 (4th ed. 2015) (covering monopolization); *id.* ¶ 800–10 (covering attempts to monopolize).

23. MARKOVITS I, *supra* note 1, at 70–71.

24. *Id.*

25. *Id.* at 70.

have not been consistent.²⁶ Whether a contract “restrains trade” for purposes of § 1 might easily be measured by considering intent, but it could also be measured by a purely objective test, such as whether the contract serves to raise prices by reducing output. The language of § 2 is somewhat clearer. The word “monopolize” seems to contemplate subjectively intentional conduct. As Judge Hand wrote in his important *Alcoa*²⁷ decision in 1945, “no monopolist monopolizes unconscious of what he is doing.”²⁸ Only a page earlier in the same opinion, however, he stated, “We disregard any question of ‘intent.’”²⁹ Judge Hand was strongly influenced by Justice Oliver Wendell Holmes, Jr., whose many contributions to American legal thought included elaboration and defense of the “external standard,” or the idea that conduct should be evaluated not by prying into someone’s subjective mind but rather by looking at the naturally expected consequences of one’s acts.³⁰ Nevertheless, in his *Swift*³¹ opinion in 1905, Justice Holmes himself defined the offense of attempt to monopolize as requiring both the intent to bring monopoly to pass, and a dangerous probability that monopoly would result from the challenged conduct.³² Speaking of attempt to monopolize under § 2, Judge Hand’s *Alcoa* decision required “specific intent.”³³ When interpreting § 1 of the Sherman Act in a criminal case, in 1913, the Supreme Court also required specific intent.³⁴ It additionally held, however, that the conspirators “must be held to have intended the necessary and direct consequences of their acts.”³⁵ In 1966, the Supreme Court defined the monopolization offense with intent as an element, requiring market power as well as the “willful acquisition or maintenance of that power as distinguished from [the power’s] growth or development as a consequence of a superior product, business acumen, or historic accident.”³⁶

The appropriate role of intent has been particularly problematic in cases alleging predatory and other forms of strategic pricing. Under today’s

26. See 15 U.S.C. §§ 1–2 (2012) (emphasizing the illegality of monopolization, but not specifying the type of intent required).

27. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416 (2d Cir. 1945).

28. *Id.* at 432.

29. *Id.* at 431.

30. O.W. HOLMES, JR., *THE COMMON LAW* 134 (1881) (“The standard of what is called intent is thus really an external standard of conduct under the known circumstances”); *id.* at 137 (noting that the law “works out an external standard of what would be fraudulent in the average prudent member of the community, and requires every member at his peril to avoid that”). On Holmes’ influence on Hand, see GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 137–38 (2d ed. 2011) (speaking of Hand’s “admiration, even idolatry, of Holmes” as “extreme”).

31. *Swift & Co. v. United States*, 196 U.S. 375 (1905).

32. *Id.* at 396.

33. *Alcoa*, 148 F.2d at 432.

34. *United States v. Patten*, 226 U.S. 525, 543 (1913).

35. *Id.*

36. *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966).

standards, the plaintiff must show a price below a relevant measure of cost and a market structure such that a reasonable person in the defendant's position at the onset of the predatory campaign could predict profitable recoupment of the predation investment.³⁷ One might say that this standard makes intent irrelevant. More plausibly, however, it assumes that the defendant is a rational, profit-maximizing actor and infers intent from that premise. *Brooke Group*,³⁸ the leading Supreme Court case on the issue, was not brought under § 2 of the Sherman Act where predatory pricing law chiefly resides, but rather under § 2 of the Clayton Act, amended in 1936 by the Robinson–Patman Act.³⁹ That statute uses the purely objective language “where the effect . . . may be substantially to lessen competition.”⁴⁰ The so-called “primary line” application of that statute, which is applied to predatory pricing, is based on language from the original 1914 Clayton Act, not from its 1936 amendments.⁴¹ Under Markovits's analysis, intent would not be relevant.

Historically, the Supreme Court had made anticompetitive intent central to antitrust analysis of unilateral pricing, even under the Clayton Act provision. For example, its *Utah Pie*⁴² decision in 1967 focused heavily on intent.⁴³ The *Brooke Group* majority did an about-face on that issue, however, concluding that “whatever its intent” may have been, illegality depended on below-cost pricing and a structural market analysis of the likelihood of recoupment.⁴⁴ Indeed, the district court had found evidence of anticompetitive intent “more voluminous and detailed than any other reported case.”⁴⁵ In its subsequent *Weyerhaeuser*⁴⁶ decision, which involved alleged predatory purchasing, the Court read the same standards into § 2 of the Sherman Act, never even discussing intent.⁴⁷

Markovits's distinction between the Sherman and Clayton Acts is also consistent with the fact that the Sherman Act is simultaneously criminal and civil, while the Clayton Act is only civil, although with one interesting and

37. See generally AREEDA & HOVENKAMP, *supra* note 19, ¶¶ 720–49 (discussing issues surrounding strategic and predatory pricing).

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

39. *Id.* at 216.

40. 15 U.S.C. § 13(a) (2012).

41. See AREEDA & HOVENKAMP, *supra* note 19, at ¶ 745e.

42. *Utah Pie Co. v. Cont'l Baking Co.*, 386 U.S. 685 (1967).

43. *Id.* at 696–97, 696 n.12 (applying an intent test to find unlawful predation under the Robinson–Patman Act).

44. *Brooke*, 509 U.S. at 232.

45. *Id.* at 248 (Stevens, J., dissenting) (quoting *Liggett Grp., Inc. v. Brown & Williamson Tobacco Corp.*, 748 F. Supp. 344, 354 (M.D.N.C. 1990)).

46. *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., Inc.*, 549 U.S. 312 (2007).

47. *Id.* at 318–20.

largely defunct exception.⁴⁸ Section 2a of the Robinson–Patman Act made it a criminal offense to employ price discrimination “for the purpose of destroying competition, or eliminating a competitor.”⁴⁹ That provision, unlike all others in the Clayton Act, includes intent language. It is not enforceable by private parties, but only by the government.⁵⁰ In any event, the government has not enforced it in a half century.⁵¹

One historically frustrating thing about the Sherman Act is that it defines unlawful conduct in sweeping, nonspecific terms, stating that this conduct is a felony.⁵² Then, in a separate provision (originally § 7 of the Sherman Act, but today § 4 of the Clayton Act),⁵³ the statute additionally makes this offense a civil violation, enforceable by private plaintiffs through treble damages actions.⁵⁴ Whatever the requirement of a civil provision, felonies have an independent mens rea requirement, as the Supreme Court required for criminal antitrust prosecutions in 1978.⁵⁵ This makes an intent requirement essential for criminal liability.

Markovits argues that the Sherman Act covers all manner of business conduct with one exception: namely, § 1 does not cover attempts to enter into anticompetitive agreements.⁵⁶ As he observes, § 1 does not contain an explicit attempt offense, while § 2 does condemn attempts to monopolize, although not attempts to conspire to monopolize.⁵⁷ Of course, this distinction might be unimportant to the extent that an attempt to enter into an anticompetitive agreement might also be characterized as an attempt to

48. Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 *FORDHAM L. REV.* 1113, 1174–82 (1983) (describing the disinclination of both the Federal Trade Commission and the Department of Justice to enforce the Robinson–Patman Act in recent years).

49. 15 U.S.C. § 13a (2012):

It shall be unlawful for any person . . . to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

50. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, 376 (1958).

51. 14 HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 2364 (3d ed. 2012) (noting that there have been no actions since the late 1960s).

52. 15 U.S.C. §§ 1–3.

53. 15 U.S.C. § 15.

54. *Id.* In addition, 15 U.S.C. § 26 grants equity relief to private plaintiffs “against threatened loss or damage by a violation of the antitrust laws.”

55. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978); *see also* PHILLIP E. AREEDA & HERBERT HOVENKAMP, 2 *ANTITRUST LAW* ¶ 303c3 (4th ed. 2014) (“The Supreme Court’s *Gypsum* decision held that mens rea must be separately established for a criminal antitrust offense.”).

56. MARKOVITS I, *supra* note 1, at 75.

57. *Id.*

monopolize. In the well-known *American Airlines*⁵⁸ case, Robert L. Crandall, American's president, telephoned Howard Putnam, president of Braniff Airlines, proposing that they fix ticket prices into and out of the Dallas–Fort Worth (DFW) airport.⁵⁹ Unbeknownst to Crandall, Putnam was recording the conversation, which he then turned over to the Justice Department.⁶⁰ The Fifth Circuit found that this solicitation, even though unaccepted, constituted an attempt to monopolize. The court noted that if the solicitation had succeeded, the cartel, rather than each firm individually, would dominate the DFW market.⁶¹ The court also made clear, however, that this attempt to form a cartel was not to be construed as an attempt offense under § 1 of the Sherman Act, but rather as an attempt to monopolize, expressly covered by § 2.⁶² Professor Markovits agrees with that analysis, concluding that attempts to form cartels are reachable under § 2 of the Sherman Act, but not § 1.⁶³

II. Antitrust's Sherman Act Tests for Exclusionary Pricing

Professor Markovits's approach to the Sherman Act often makes the legislation a more aggressive tool than the law has interpreted it to be today.⁶⁴ For example, under his analysis, so-called limit pricing, which is generally above-cost pricing intended either to exclude higher cost rivals or limit their growth, is a challengeable form of exclusionary pricing.⁶⁵ The antitrust case law today insists that an unlawful predatory price be one below a relevant measure of cost, typically marginal cost or average variable cost.⁶⁶ As a general matter, Markovits believes that predatory pricing is a far more plausible strategy than much of the literature today, as

58. *United States v. Am. Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).

59. *Id.* at 1116.

60. *Id.*

61. *Id.* at 1118, 1122.

62. *Id.* at 1117.

63. MARKOVITS I, *supra* note 1, at 502.

64. See, e.g., Jeffrey L. Harrison, *Comments on Richard Markovits' Claim That the Requirement of Possession of Pre or Post Market Power Is Unnecessary in Monopolization and Attempt to Monopolize Cases and a Proposed Second-Best Reconciliation of the Per Se and Conventional Approaches to Dangerous Probability*, 61 ANTITRUST BULL. 155, 157 (2016) (“[T]he gist of [Professor Markovits's] disagreement with conventional views of Section 2 are that (1) successful single firm anticompetitive conduct does not require the possession of market power at the outset and (2) the failure to achieve market power is not an indication that efforts did not manifest specific anticompetitive intent and should not be condemned under Section 2.”); Keith N. Hylton, *Markovits on Defining Monopolization: A Comment*, 61 ANTITRUST BULL. 105, 105–08 (2016) (describing Markovits's definition of monopolization).

65. MARKOVITS I, *supra* note 1, at 517–18.

66. AREEDA & HOVENKAMP, *supra* note 19, ¶¶ 735, 740.

well as current Supreme Court case law, maintains.⁶⁷ For example, limit pricing is customarily achieved by scale economies that permit a dominant firm to exclude smaller rivals while nevertheless keeping its own prices above its costs, or else by carrying excess capacity in such a way that it can threaten a steep price cut in response to rival entry.⁶⁸ As such, limit pricing is a sustainable strategy that might be profitable even if carried on indefinitely. Predatory pricing law today does not condemn such behavior. Rather, it requires prices below a relevant measure of cost, thus making the strategy nonsustainable.⁶⁹ The principal obstacle to using antitrust to pursue above-cost limit pricing is thought to be limitations on the fact-finding power of courts, which generally lack the tools to identify when above-cost prices are anticompetitive.⁷⁰ Determining when a price that is above cost is unreasonably exclusionary is far more difficult than determining when a price is lower than cost. Under a cost-based standard, one need only identify and compute relevant costs. In order to identify above-cost prices as anticompetitive, however, we must know something about the shape of the demand curve facing the dominant firm and the impact of a particular limit price on rival decision making.⁷¹

III. Relevant Markets and Market Definition

Markovits also rejects the law's current requirement of firm dominance of a relevant market, finding the correlation between structural firm dominance and potentially harmful incidents of predatory pricing to be "extremely low and weak."⁷² He also rejects the conventional conclusion that successful predation can occur only in markets subject to high entry barriers.⁷³ These conclusions are consistent with his belief that market

67. MARKOVITS I, *supra* note 1, at 265, 519–30, 563 (discussing, *inter alia*, Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981), and John McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958)).

68. For a good survey of the many alternative models, see Robert E. Hall, *Potential Competition, Limit Pricing, and Price Elevation from Exclusionary Conduct*, in 1 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 433, 434–40 (2008).

69. See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–25 (1993) (establishing that pricing below an appropriate measure of the producer's cost is a necessary element of predatory pricing).

70. See AREEDA & HOVENKAMP, *supra* note 19, ¶¶ 736–37, 741.

71. See Herbert Hovenkamp, *The Areeda–Turner Test for Exclusionary Pricing: A Critical Journal*, 46 REV. INDUS. ORG. 209, 217–19 (2015) (explaining the need to determine rival costs and market properties); Abraham L. Wickelgren, *The Necessary Complexity of Predatory Pricing Analysis: A Comment on Richard S. Markovits's Treatment of Predatory Pricing in Economics and the Interpretation and Application of U.S. and E.U. Antitrust Law*, 61 ANTITRUST BULL. 186, 186–97 (2016) (discussing tests for predatory pricing).

72. MARKOVITS I, *supra* note 1, at 528.

73. *Id.* at 528–29 (commenting primarily on Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979)).

definition is inevitably arbitrary.⁷⁴ Rather, a firm's ability to engage profitably in predation depends on the number and nature of situations in which it is a better placed competitor than others. Firms often operate in a number of such situations, which are really buyer–seller pairs, rather than in a single conventional market.⁷⁵ The real question for Markovits is the number of such situations and the degree of advantage that the firm in question has with respect to its own product offering.

The rise of “unilateral effects” analysis in merger policy is more consistent with Markovits's approach, for it acknowledges that competition is much more intense between relatively proximate firms in product space than any overall “relevant market” as defined by conventional antitrust tools.⁷⁶ If mergers between relatively adjacent firms that comprise a small subset of a traditionally defined relevant market can lead to harmful price increases, it would seem to follow that unreasonably exclusionary pricing in the same setting could do so as well.

In general, Markovits is highly critical of the “market definition” requirement that has dominated antitrust law since the middle of the twentieth century and that today controls all Sherman Act cases under the rule of reason, all unilateral practice cases, and nearly everything under the Clayton Act except for cases brought under the Robinson–Patman Act and some unilateral effects merger cases.⁷⁷

There is much to be said for Markovits's position, particularly in situations where antitrust law attempts to group sales that are differentiated in product or geographic space into a single market. The case that most damaged our understanding of market power and market definition was Judge Hand's 1945 *Alcoa* decision—mainly because of its highly influential reorientation of structural considerations around the concept of a “relevant market,” eventually elaborated into a “relevant product market” and

74. MARKOVITS I, *supra* note 1, at 165–67. For further development, see chapters 6 and 7 of Markovits's book in their entirety; Rupperecht Podszun, *The Arbitrariness of Market Definition and an Evolutionary Concept of Markets*, 16 ANTITRUST BULL. 121 (2016); and Daniel Zimmer, *The Emancipation of Antitrust from Market-Share-Based Approaches*, 16 ANTITRUST BULL. 133 (2016).

75. MARKOVITS I, *supra* note 1, at 257–58.

76. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 913 (Supp. 2015).

77. See, e.g., MARKOVITS I, *supra* note 1, at 165 (introducing a chapter with a “general criticism that can be made of all [market definition] approaches” and referring the reader to Volume II of his work for further examples of the flaws of the market approach and requirement); Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, B.E. J. THEORETICAL ECON., Jan. 2010, art. 9, 1, 4–6 (2010) (arguing that the market definition inquiry only indirectly addresses whether a merger is anticompetitive and fails to fit well with the economic way of thinking); Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437, 503 (2010) (noting that market definition “plays a central but unnecessary and affirmatively misleading role in evaluating horizontal mergers”).

“relevant geographic market.”⁷⁸ This approach was consistent with the emergent economic and antitrust structuralism of the day, which placed a heavy emphasis on market structure as assessed by market concentration (the number of firms in a relevant market and their size dispersion), as well as entry barriers, and de-emphasized conduct.⁷⁹ The structuralist approach generally assessed market concentration by summing the market shares of the firms in a market, whether differentiated or not.⁸⁰ As Edward S. Mason, a leading founder of antitrust structuralism, wrote in the late 1930s, while lawyers tend to see monopoly in terms of intent and conduct, economists tend to see it in terms of market control.⁸¹

Among the product market definition claims that Hand addressed was the district court’s conclusion that the relevant market included both “virgin” and “secondary” aluminum.⁸² Virgin aluminum, the only kind that Alcoa made, was smelted out of original inputs into aluminum ingot, which was then supplied to fabricators.⁸³ By contrast, “secondary” aluminum, produced by seventeen smaller companies, was reclaimed from old aluminum products that had been discarded, as well as the floor cuttings that aluminum fabricators left behind.⁸⁴ The most important difference between virgin and secondary ingot was that it was often difficult or impossible to determine the particular alloy, or combination of materials, in secondary aluminum.⁸⁵ By contrast, virgin aluminum was made to specification.⁸⁶ As a result, secondary aluminum was unacceptable for manufacturers of sensitive aluminum parts that required high performance standards respecting heat or torque, such as airplane components.⁸⁷ Secondary aluminum was perfectly good, however, for such things as kitchen cookware for which any alloy was acceptable.⁸⁸

78. Richard G. Price, Note, *Market Power and Monopoly Power in Antitrust Analysis*, 75 CORNELL L. REV. 190, 193 n.11 (1989) (“By far the most common method of assessing a firm’s market power or monopoly power is to examine its share of the properly defined product market. In probably the most famous example of the use of market share, Judge Hand ruled in *United States v. Aluminum Co. of Am.* that a market share of over ninety percent would be sufficient to support a finding of monopoly. Since that time, courts have used market share to determine if a firm has either monopoly power or market power.” (citation omitted)).

79. See HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 1.7 (5th ed. 2016).

80. On the development and collapse of structuralism, see HERBERT HOVENKAMP, *THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870–1970*, at 206–19 (2015).

81. Edward S. Mason, *Monopoly in Law and Economics*, 47 YALE L.J. 34, 34–36 (1937).

82. *United States v. Aluminum Co. of Am. (Alcoa)*, 148 F.2d 416, 424 (2d Cir. 1945).

83. *Id.* at 423–25.

84. *Id.* at 423.

85. *Id.*

86. *Id.*

87. See *id.* (highlighting the airplane and cable fabricators’ insistence on virgin aluminum).

88. *Id.*

The virgin/secondary issue created a rather unusual instance of product differentiation in production terms, although it was quite conventional in economic terms. The two products competed with one another for many customers, but different customers had different preferences depending on their needs, and some of the preferences were very strong. Nevertheless, the choice the district court posed and Judge Hand accepted was purely binary: the two products were either in the same market or else they were not.⁸⁹ Putting them in the same market, as the district court did, meant that they would be treated as perfectly competitive with each other—a conclusion expressed by simply summing the output of the two in order to compute a market share.⁹⁰ By contrast, excluding secondary, as Judge Hand’s opinion did, meant that secondary would be treated as if it did not compete with virgin aluminum at all.⁹¹ The first choice understated Alcoa’s power while the second choice exaggerated it.

The *Alcoa* decision more or less set the stage for further development of market definition in differentiated markets. For example, the *du Pont*⁹² (cellophane) case a few years later considered whether the relevant market was du Pont’s cellophane or a broader market of “flexible packaging materials,” including plain paper, wax paper, grease paper, metal foils, and glassine.⁹³ Many buyers used a variety of packaging, switching from one to another, while others had strong preferences for one.⁹⁴ The technologies of production for such alternatives as aluminum foil, grease paper, and cellophane differed considerably from one another, as did the inputs used.⁹⁵ Nevertheless, the choice was once again presented as binary. The government argued that the relevant market was “cellophane,” giving du Pont a dominant share.⁹⁶ Du Pont argued, and the Supreme Court agreed, that the larger market for all flexible packaging materials was the correct one, observing the extent of customer substitution.⁹⁷

Once again, both market definitions were clearly wrong as an estimate of power. Including noncellophane flexible packaging materials in the same market served to understate du Pont’s power by a wide margin, given the cost advantage and strong preferences of some consumers for

89. *Id.* at 424.

90. *Id.* at 423–25.

91. *Id.*

92. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

93. *Id.* at 394–404.

94. *See id.* at 401 (discussing buyers’ changing needs for various flexible wrappings).

95. *Id.* at 397.

96. *Id.* at 380.

97. This argument was probably incorrect, as it ignored the fact that high substitution rates at current market prices might show only that the defendant was already charging a monopoly price. This is commonly known as the “Cellophane fallacy.” *See* PHILLIP E. AREEDA, HERBERT HOVENKAMP & JOHN L. SOLOW, 2B ANTITRUST LAW ¶ 539 (4th ed. 2014).

cellophane. In Markovits's terms, cellophane was the best placed product for these buyers. However, completely excluding these materials would undoubtedly have exaggerated du Pont's power to the extent that interproduct substitution was significant and a large subset of customers seemed to be quite sensitive to price.⁹⁸ This error was exacerbated by the fact that, within this broader "market," production mobility was very difficult. That is, a firm currently producing aluminum foil could not readily reposition its production technology in order to produce higher margin cellophane, or vice versa.

In this area, Markovits was a voice crying in the wilderness for years.⁹⁹ Today, the economic case is emerging that market definition is no more than a second-best way to assess market power.¹⁰⁰ The modern movement generally away from conventional market definition and toward a form of analysis based on specific measurement of interfirm substitution comes closer to Markovits's analysis. For example, a great deal of so-called "unilateral effects" analysis in merger cases today does not depend on a market definition in the traditional sense, although the case law clings to market definition terminology.¹⁰¹ This is true not only because of history and *stare decisis* but also because the "line of commerce" and "section of the country" language in the antimerger provision, § 7 of the Clayton Act, has seemed to many courts to require a market definition.¹⁰²

Unilateral effects analysis proceeds by looking at the product-differentiated firm's relationships with its various competitors, focusing on

98. *E.I. du Pont de Nemours*, 351 U.S. at 400 (agreeing with the district court's conclusion that the "'sensitivity of customers in the flexible packaging markets to price or quality changes' prevented du Pont from possessing monopoly control over price" (citing *United States v. E.I. du Pont de Nemours & Co.*, 118 F. Supp 41, 207 (D. Del. 1953))).

99. Richard S. Markovits, *A Response to Professor Posner*, 28 STAN. L. REV. 919, 949 (1976) ("Professor Posner's assumption that a firm can prove that it enjoys substantial competitive advantages by showing that it possesses a substantial share of a carefully defined market manifests his refusal to deal with the realities of monopolistic competition. As we have seen, the concept of a 'careful market definition' is often inherently contradictory: under conditions of monopolistic competition, it often is impossible to define markets in anything but an arbitrary way. In fact, even if markets could be defined nonarbitrarily, market shares and competitive advantages might not be highly correlated. Thus, the only firm to make any American sales of a product that has no close substitutes would still have virtually no competitive advantages if a foreign competitor were only slightly worse placed to obtain the patronage of the relevant buyers or if a domestic producer of another good who could quickly switch his production to the good concerned would be only slightly worse placed to obtain the sales in question.").

100. See, e.g., Kaplow, *supra* note 77, at 440 (stating his desire to abandon the market definition process for assessing market power).

101. See, e.g., Farrell & Shapiro, *supra* note 77, at 1; Steven C. Salop, *The Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach*, 80 ANTITRUST L.J. 269, 276–77 (2015).

102. E.g., *United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 491 (1974) (discussing which markets are relevant); *FTC v. Whole Foods Mkts., Inc.*, 548 F.3d 1028, 1036 (D.C. Cir. 2008) (rejecting the FTC's market definition); see also Salop, *supra* note 101, at 324 (illustrating disputes over market definitions).

those that are closest by in product space.¹⁰³ Applying a version of monopolistic-competition theory, Markovits's important opening proposition is that every market is differentiated.¹⁰⁴ Even firms that make fungible commodities are differentiated in space. As a result, the time and cost of shipment differentiates them from their rivals.¹⁰⁵ As Piero Sraffa once observed, what we think of as markets are better conceived of as differentiated segments.¹⁰⁶ Within each of these arbitrarily defined regions, a particular firm may have an advantage in comparison to others in the same region.¹⁰⁷

In conventional manufacturing markets, differentiation is frequently obvious, notwithstanding the tendency of antitrust tribunals to treat products as perfectly fungible for purposes of market definition.¹⁰⁸ By contrast, unilateral effects analysis considers whether firms are closer or more remote than competitors and that pricing pressures reflect responses to one's more immediate rivals.¹⁰⁹ Or, to say it differently, cartel-like decisions need not be market wide.

The best known historical illustration is Harold Hotelling's model portraying competitors as arrayed along a line at various distances from the customer.¹¹⁰ For example, imagine a number of hot dog stands

103. PHILLIP E. AREEDA & HERBERT HOVENKAMP, 4 ANTITRUST LAW ¶ 914 (4th ed. 2016).

104. In particular, see Richard S. Markovits, *An Ideal Antitrust Law Regime*, 64 TEXAS L. REV. 251, 253, 255–66 (1985) (delineating “and then reject[ing] the traditional argument for the conclusion that procompetition policies always increase allocative efficiency [and] analyz[ing] the allocative efficiency of antitrust policies in a sophisticated way that takes into consideration both the general theory of second best and the fact that antitrust can affect allocative efficiency not only by altering the competitiveness of the economy but also by increasing various affected businesses' organizational allocative efficiency”); Richard S. Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEXAS L. REV. 41, 43, 44–48 (1984) (articulating the tests that Markovits thinks the Sherman and Clayton Acts contain and briefly explaining how “the courts should analyze the legality of different types of practices under the American antitrust laws”).

105. As a result, Markovits is severely critical of the Merger Guidelines approach to conventional market definition. MARKOVITS I, *supra* note 1, at 190–210.

106. Piero Sraffa, *The Laws of Returns Under Competitive Conditions*, 36 ECON. J. 535, 544–49 (1926) (speaking of buyer preferences and noting that “[w]hen each of the firms producing a commodity is in such a position the general market for the commodity is subdivided into a series of distinct markets”).

107. *Id.* (discussing causes of buyer preferences for one firm over another, placing the latter at a relative disadvantage as to that customer).

108. See, e.g., Deven R. Desai & Spencer Waller, *Brands, Competition, and the Law*, 2010 B.Y.U. L. REV. 1425, 1461 (analyzing differentiation among brands); Paul Krugman, *The Increasing Returns Revolution in Trade and Geography*, 99 AM. ECON. REV. 561, 564 (2009) (explaining the typical assumptions made regarding differentiated products within a manufacturing market); Richard Schmalensee, *Product Differentiation Advantages of Pioneering Brands*, 72 AM. ECON. REV. 349, 349–50 (1982) (analyzing how product differentiation and market entry affects market performance).

109. See AREEDA & HOVENKAMP, *supra* note 103, ¶ 914.

110. Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41, 45 (1929); see Steven C. Salop, *Monopolistic Competition with Outside Goods*, 10 BELL J. ECON. 141, 142–43 (1979)

approximately one hundred feet apart on a beach. Sunbathers can walk to any stand they choose, but prefer shorter walks to longer ones. As a result, each stand is better placed with respect to some sunbathers than others. Each stand's relative strength depends on such factors as the density of sunbathers in its proximity, as well as the distance to the next closest stands. Some sunbathers may lie equidistant between two stands and are thus in greater competitive play than a sunbather who is, say, thirty feet from the stand to his left and seventy feet from the stand to his right. For any particular customer, a stand that is one hundred feet away will have an advantage over a stand that is two hundred feet away, and an even greater advantage over one that is three hundred feet away.

Beginning with this insight, so-called unilateral effects in merger analysis suggests that a merger of two relatively adjacent stands is likely to have a more significant impact on the market price than a merger of two stands that are more widely separated from one another, such as the first and the fourth stand along the line. This is so because the merger of two adjacent stands makes a particular sunbather's second choice less attractive, given that the two adjacent stands have now become one. As a result, the new second choice was previously the third choice. At that point, we can model the price impact by considering such things as the extent to which customers in fact preferred the acquired firm as an alternative prior to the merger and the extent to which they will divert to their third or fourth choice. The theory works even if the two merging firms are not the closest possible rivals, although they have to be relatively close.

Richard Markovits's pioneering work in this area has been noted and appreciated by some of the formal developers of unilateral effects analysis.¹¹¹ He has not received the attention he deserves, however, largely because his nomenclature is so different from that which is used today.¹¹² Nonetheless, the more fundamental question Markovits's line of analysis suggests has acquired increasing importance: namely, while the rise of "relevant market" analysis in mid-twentieth-century antitrust law was ground shifting, it may also have been a serious misstep to the extent that its binary approach to market delineation inevitably under- or over-states market power.

The rise of unilateral effects theory has made the idea of assessing market power without market definition acceptable in some portions of

(relating competition to the extent of differences among individual firms and modelling them as arrayed around a circle).

111. E.g., David T. Levy & James D. Reitzes, *The Importance of Localized Competition in the 1992 Merger Guidelines: How Closely Do Merging Firms Compete*, 62 ANTITRUST L.J. 695, 697 n.10 (1994); Gregory J. Werden, *Simulating the Effects of Differentiated Products Mergers: A Practical Alternative to Structural Merger Policy*, 5 GEO. MASON L. REV. 363, 370 n.35 (1997).

112. Ian Ayres, *A Private Revolution: Markovits and Markets*, 64 CHI.-KENT L. REV. 861, 861-62 (1988) (providing a glossary of terms coined and used by Markovits).

merger policy today. Bringing it to other areas of antitrust law is likely to be a tougher sell. For example, the Supreme Court has insisted that relevant markets be defined in Sherman Act § 2 cases,¹¹³ as well as for § 1 cases under the rule of reason.¹¹⁴ No lower court today would be likely to find traditional market definition unnecessary in those areas without new Supreme Court guidance. The same thing is very likely true for tying or exclusive-dealing cases requiring assessment of market foreclosure.¹¹⁵

Nevertheless, one fact seems inescapable: if the logic of unilateral effects analysis applies to mergers—concluding that the union of adjacent competitors harms competition—then it should apply equally to other antitrust practices that serve to eliminate or blunt competition between reasonably adjacent firms. For example, a firm that predates its closest rival into bankruptcy may be able to induce a unilateral price increase just as much as the survivor of a merger between these same two firms. Indeed, the industrial-organization literature often treats merger and predation as alternative ways of eliminating a rival, or predatory pricing as a precursor to merger.¹¹⁶ Structurally, the two practices might amount to the same thing: eliminating one of the two firms. The same thing could be said of disciplinary price cutting directed against a firm's close rival in product space, intended not to destroy it but rather to encourage it to raise its prices back to a more accommodating level. *Brooke Group* itself involved such claims.¹¹⁷ The defendant was a nondominant firm with only 11%–12% of a conventionally defined market.¹¹⁸ The Supreme Court did not dismiss the complaint on that basis, however, but rather because in its judgment profitable recoupment of the investment in predation was not shown to be objectively likely.¹¹⁹ The same thing could also be true of tying or exclusive dealing intended to deny a relatively close rival access to a

113. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993).

114. *See Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006) (requiring that antitrust plaintiffs show that a particular contract is in fact anticompetitive and reserving per se rules for agreements that are so plainly uncompetitive that no elaborate study of the industry is needed); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 111–12 & n.48 (1984) (reviewing and approving the district court's market definition and analysis of whether college football broadcasts constitute a separate market).

115. *See, e.g., Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961) (holding that applying § 3 of the Clayton Act to an exclusive-dealing arrangement requires a court to determine carefully the area of effective competition and analyze a threatened foreclosure of competition in relation to the market affected).

116. *See, e.g., JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION* 374–76 (1988) (citing situations involving American Tobacco Company and Standard Oil Company as two famous examples of corporations that engaged in predatory pricing before acquisitions of competitors or mergers).

117. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 230–31 (1993).

118. *Id.* at 228.

119. *Id.* at 230–32.

market, as well as loyalty discounts.¹²⁰ All of these could be used in differentiated markets to exclude reasonably proximate rivals. Further, it is no answer to say that a practice affecting only two firms is *de minimis*. Such firms may be very large, while in other situations an entire relevant market as used in conventional antitrust analysis might be very small.

Ironically, giving legal recognition to the problem of eliminating competition in unilateral effects mergers while denying recognition in cases involving more exclusionary antitrust practices such as predatory pricing or exclusive contracting gives firms the incentive to employ the pricing or contractual-exclusion strategies rather than merger. One perverse result may be that the elimination of competition will occur, but without the offsetting efficiencies that at least some mergers can provide.

Economists generally find it much easier to accommodate these conceptual shifts than lawyers and judges do, largely because of the strong value that law places on precedent and the relative infrequency of Supreme Court decision making in specific antitrust areas. In addition, the tools we have developed for unilateral effects analysis of mergers in product-differentiated markets are more revisionist than would be required for Sherman Act § 2 cases, although they could easily have some application to analysis of joint ventures under § 1 of the Sherman Act.

Finally, the expansion of § 2 liability to product-differentiated firms considered to be nondominant under conventional analysis would result in a much bigger investment in antitrust and very likely in serious challenges to the fact-finding power of courts. Traditional market definition methodologies have been made at least superficially more accessible to juries than approaches that require direct measurement of residual demand. Private damages actions continue to account for the great bulk of federal civil antitrust cases aside from mergers. Significantly, unilateral effects merger analysis appears almost exclusively in government equity proceedings (Antitrust Division) or administrative proceedings (Federal Trade Commission), where juries are not used.¹²¹ As a result, whatever the merits of the change, one should not expect courts to drop market-definition and market-share measures in antitrust cases anytime soon.

120. See, e.g., *McWane, Inc. v. FTC*, 783 F.3d 814, 823–24 (11th Cir. 2015) (affirming FTC findings that a dominant firm used an exclusive-dealing arrangement to maintain monopoly power by making it prohibitively expensive for its customers to switch distributors).

121. Steven R. Gilford, Comment, *The Constitutional Rights to Trial by Jury and Administrative Imposition of Money Penalties*, 1976 DUKE L.J. 723, 723–24.

Conclusion

One of the things that has made Markovits's revisionism a tough sell is its completeness. His work has substituted a whole new vocabulary and way of thinking about competition, taking differentiation as a given and focusing on best placed and less well-placed competitors. One impact of this is to make anticompetitive practices plausible under conditions when traditional market definition suggests that the firms in question lack sufficient power. To that extent Markovits's analysis, if accepted, may lead to a significant expansion of antitrust enforcement. Nevertheless, it may very well lie in antitrust policy's future.