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Herbert Hovenkamp as Antitrust Oracle: Appreciating the Overlooked Contributions of the New Harvard School

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Abstract

My colleague, Herbert Hovenkamp, is almost universally recognized as the most cited and the most authoritative US antitrust scholar. Among his many honors, his status as the senior author of the authoritative Areeda and Hovenkamp treatise makes him the unquestioned leader of the New Harvard School, which has long served as the bellwether for how courts are likely to resolve emerging issues in modern antitrust doctrine. Unfortunately, its defining tenets and its positions on emerging issues remain surprisingly obscure. My contribution to this festschrift explores the core commitments that distinguish the New Harvard School from other approaches to antitrust. It then explores Hovenkamp's scholarship on key issues, including tying, the neo-Brandeisian/hipster antitrust movement, and digital platforms. A better understanding of Hovenkamp's work and the New Harvard School should prove invaluable to anyone wishing to understand antitrust's likely future.

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I. Introduction

Finding enough superlatives to describe my colleague, Herbert Hovenkamp, is a nearly impossible task. Recognized as "the dean of American antitrust law" by the *New York Times*,[1] even scholars critical of Hovenkamp's conclusions recognized him as "the most influential antitrust scholar of our generation."[2] Studies confirm that he is cited more often in both academic commentary[3] and judicial opinions[4] than any other antitrust scholar by a wide margin. In short, as Daniel Crane notes, "Hovenkamp speaks with oracle-like authority on antitrust matters."[5]

Academic and governmental organizations have honored Hovenkamp for his contributions to antitrust as well. For example, in 2007, Hovenkamp was named a Fellow of the American Academy of Arts & Sciences. In 2008, the US Justice Department's Antitrust Division honored Hovenkamp with its John Sherman Award (awarded only 10 times over the past 23 years) for his lifetime contributions to the teaching and enforcement of antitrust law and the development of antitrust policy, during which Antitrust Division Assistant Attorney General Thomas Bartlett observed, "Professor Hovenkamp sets the standards for antitrust scholarship today."[6] In 2015,

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1 James B. Stewart, *Antitrust Suit Is Simple Calculus*, N.Y. TIMES, Sept. 10, 2011, at B1. For observations in the scholarly literature sounding a similar note, see Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 IOWA L . REV. 2025, 2025 (2015); Lina M. Khan, *The End of Antitrust History Revisited*, 133 HARV. L. REV. 1655, 1677 (2020) (reviewing TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)); John R. Woodbury, *Paper Trail: Working Papers and Recent Scholarship*, ANTITRUST SOURCE, (Dec. 2012), at 1, 4.

2 Spencer Weber Waller, *Book Review*, 29 WORLD COMPETITION: L. & ECON. REV. 505, 505 (2006).

3 *See* Brian Leiter, *10 Most-Cited Antitrust Faculty in the U.S. for the period 2013–2017*, BRIAN LEITER'S LAW SCHOOL REPORTS (Oct. 2, 2018), https://leiterlawschool.typepad.com/leiter/2018/10/10-most-cited-antitrust-faculty-in-the-us-for-the-period-2013-2017.html; Brian Leiter, *Ten Most-Cited Antitrust Faculty, 2010–2014 (inclusive)*, BRIAN LEITER'S LAW SCHOOL REPORTS (July 21, 2016), https://leiterlawschool.typepad.com/leiter/2016/07/ten-most-cited-antitrust-faculty-2010-2014-inclusive.html.

4 *See* Bill Baer, *Connecting the Antitrust Dots: In Praise of Herb Hovenkamp*, 100 IOWA L. REV. BULL. 1, 5 (2014), https://ilr.law.uiowa.edu/assets/Uploads/ILR-Vol-100-Baer.pdf; Thomas G. Hungar & Ryan G. Koopmans, *Appellate Advocacy in Antitrust Cases: Lessons from the Supreme Court*, ANTITRUST (Spr. 2009), at 53, 55. For analyses of citations of the Areeda/Hovenkamp treatise, see Hillary Greene & D. Daniel Sokol, *Judicial Treatment of the Antitrust Treatise*, 100 IOWA L. REV. 2039, 2046, 2049 (2015); Rebecca Haw Allensworth, *The Influence of the Areeda-Hovenkamp Treatise in the Lower Courts and What It Means for Institutional Reform in Antitrust*, 100 IOWA L. REV. 1919 (2015).

5 Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1193 (2007).

6 Press Release, US Department of Justice, *Professor Herbert Hovenkamp Receives Justice Department's 2008 John Sherman Award* (July 28, 2008).

Global Competition Review honored Hovenkamp with its Academic Excellence Award, given to the worldwide antitrust scholar of the year.[7]

He is the senior author of what is universally recognized as "the most influential treatise" on antitrust law.[8] Justice Breyer famously observed that "most practitioners would prefer to have two paragraphs of [the Areeda–Hovenkamp] treatise on their side than three Courts of Appeals or four Supreme Court Justices."[9] Lower courts have been similarly lavish in their praise for the treatise, making it "the starting point—and in many case the final analysis—for antitrust practitioners and judges."[10] Scholars have aptly called it "the most accurate bellwether of Supreme Court sentiment" on antitrust.[11]

Anyone seeking to understand the contours of current US antitrust jurisprudence and anticipate the future directions it is likely to take would gain a lot from a better appreciation of Hovenkamp's scholarship. My contribution to this *liber amicorum* seeks to provide just that by briefly exploring his core commitments and his positions on emerging issues in antitrust law.

II. New Harvard's Core Commitments

Hovenkamp associates himself with the New Harvard School of antitrust scholarship,[12] of which he is widely recognized as "reigning dean."[13] Understanding the significance of this self-

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7 D. Daniel Sokol, *GCR 2015 Award Winners*, ANTITRUST & COMPETITION POL'Y BLOG (Apr. 16, 2015), http://lawprofessors.typepad.com/antitrustprof_blog/2015/04/gcr-2015-award-winners.html.

8 Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 176 (2d Cir. 1984).

9 Stephen Breyer, *In Memoriam: Phillip E. Areeda*, 109 HARV. L. REV. 889, 890 (1996).

10 Allensworth, *supra* note **Error! Bookmark not defined.**, at 1923.

11 Daniel A. Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1920 (2009) (reviewing HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (Robert Pitofsky ed., 2008)).

12 HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLES AND EXECUTION 37 (2005) [hereinafter HOVENKAMP, ANTITRUST ENTERPRISE].

13 Daniel A. Crane, *A Neo-Chicago Perspective on Antitrust Institutions*, 78 ANTITRUST L.J. 43, 45 (2012). For other representative statements recognizing Hovenkamp's consensus status as the current academic leader of the Harvard School, *see*. *e.g.,* Max Huffman, *Marrying Neo-Chicago with Behavioral Antitrust*, 78 ANTITRUST L.J. 105, 113–14 (2012); Thomas A. Lambert & Joshua D. Wright, *Antitrust (Over-?) Confidence*, 20 LOY. CONSUMER L. REV. 219, 220 (2008); Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 ANTITRUST L.J. 649, 652 n. 15 (2014); Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 863 n. 149 (2016); Spence Weber Waller, Microsoft *and* Trinko*: A Tale of Two Courts*, 2006 UTAH L. REV. 741, 756.

identification is best understood by the contrasts that Hovenkamp draws with three other movements.

First, the inclusion of the word "new" reflects Hovenkamp's recognition that "the Harvard school underwent a significant transformation in the late 1970s," driven by "the unacknowledged conversation experience of Donald F. Turner."[14] This led to a rejection of many of the commitments associated with the original Harvard school associated with scholars such as Edward Chamberlin, Edward Mason, Joe Bain, Derek Bok, and the early work of both Turner and Phillip Areeda.[15]

Second, he carefully contrasts his views and those of the Chicago school. On the one hand, he regards the Chicago school as providing "a much needed corrective" to the excesses of the Warren Court, "restoring rigor that had been lost, and identifying a protected class—consumers—and some rules for assessing how they could best be protected."[16] At the same time, some parts of the Chicago counterrevolution "went too far," condoning "complex forms of anticompetitive behavior [that] might be anticompetitive" because "courts generally were thought to lack the ability to develop rules for these problems without doing more harm than good."[17]

Third, Hovenkamp has simultaneously distanced himself from the post-Chicago movement, notwithstanding the fact that he is credited with coining the term.[18] Although he credits it for recognizing "that markets are more varied and complex than the orthodox Chicago school was willing to admit," he warns that post-Chicago antitrust has been "oversold" and "has wandered too

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[14] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 37. For the seminal writings exploring the overlooked importance of the New Harvard School, see William H. Page, *Areeda, Chicago, and Antitrust Injury: Economic Efficiency and Legal Process*, 41 ANTITRUST BULL. 909 (2006); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1; Crane, *supra* note 11.

[15] Herbert Hovenkamp, *The Rationalization of Antitrust*, 116 HARV. L. REV. 917, 920 (2003) (reviewing RICHARD A. POSNER, ANTITRUST LAW (2d ed. 2001)) [hereinafter Hovenkamp, *Rationalization of Antitrust*].

[16] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 2.

[17] *Id*.

[18] Scholars typically trace the term to Herbert Hovenkamp, *Antitrust Policy After Chicago*, 84 MICH. L. REV. 213 (1985) [hereinafter Hovenkamp, *After Chicago*]. *See, e.g.*, Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C.L. REV. 219, 222 n. 13 (1995); Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147, 147 n. 3 (2012); Barak Orbach, *The Present New Antitrust Era*, 60 WM. & MARY L. REV. 1439, 1457 (2019).

far to the opposite extreme."[19] Specifically, he harbors considerable doubts over the administrability of antitrust rules based on "highly technical" models based on "the mathematics of marginalism and game theory."[20] In addition, many post-Chicago models "are not testable in the conventional positivist sense," a flaw that "can prove fatal" by leaving plaintiffs able to do nothing more than adduce evidence that a defendant's conduct was consistent with a theory of anticompetitive behavior, without being able to demonstrate the net impact of that conduct on economic welfare.[21] The result is "solutions that are beyond the competence of the court system to comprehend and correct."[22]

Particularly telling is Hovenkamp's criticism of the Supreme Court's opinion in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[23] widely recognized as the Supreme Court's leading (if not its only) post-Chicago decision.[24] He regards *Kodak* as "the most useless and harmful antitrust decision of the Rehnquist Court."[25] In his eyes, the "problems of fact-finding and implementation under a *Kodak*-style rule are completely unmanageable."[26] As a result, "the gap between high economic theory and antitrust practice is larger than it has ever been."[27]

The inability to provide implementable rules has led post-Chicago economics to have "only limited success."[28] Although he holds out the possibility that post-Chicago may evolve into more administrable rules, particularly in the areas of raising rivals' costs and unilateral effects of horizontal mergers, even those areas "still confront significant problems of administrability," "may not be quite ready for primetime," and "pose a significant risk of being overused if their limitations are not kept in mind."[29] In short, "the complexity of post-Chicago theories would force the federal

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[19] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 2, 39. For further details, see *id.* at 34–35, 49.
[20] Herbert Hovenkamp, *United States Competition Policy in Crisis: 1890–1955*, 94 MINN. L. REV. 311, 366 (2009) [hereinafter Hovenkamp, *Competition Policy in Crisis*]
[21] Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 271–72 [hereinafter Hovenkamp, *Post-Chicago*]; *accord* HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 39.
[22] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 3.
[23] Eastman . Co. v. Image Tech. Servs., Inc., 504 U.S. 541 (1992).
[24] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 9, 98.
[25] *Id.* at 9.
[26] Hovenkamp, *Post-Chicago*, *supra* note 21, at 292; *accord* HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 98–101 157–58, 309–10.
[27] Hovenkamp, *Competition Policy in Crisis*, *supra* note 20, at 367.
[28] Hovenkamp, *Post-Chicago*, *supra* note 21, at 336.
[29] *Id.* at 274, 321, 326, 337; *accord* HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 34–35, 49.

courts to confront problems that they are not capable of solving."[30] Although the Chicago school may have swung too far toward nonintervention, "at the same time much of the so-called 'post-Chicago' antitrust … has wandered too far to the opposite extreme, identifying problems and solutions that are beyond the competence of the court system to comprehend and correct."[31]

What then distinguishes Hovenkamp and New Harvard from these other schools of thought? Since the 1970s, "Chicago and Harvard positions on competition policy have converged on most, but not all, issues."[32] Hovenkamp acknowledges that "there is certainly much truth" to statements that Harvard and Chicago "are now almost indistinguishable on many issues"[33] and that he "would not decide very many cases differently from the way the Chicago school would decide them."[34]

To say that the views of the two schools are close is not to say they are the same. Hovenkamp notes that "today the Harvard school is modestly more interventionist than the Chicago school, but the main differences lie in details."[35] Hovenkamp regards the differences among the schools as stemming from "contrary assumptions about the complexity and robustness of markets, as well as divergent assessments of the abilities of courts and other government agencies to correct market failures."[36] Understanding these key differences sheds light on their impact on key issues in antitrust. Where such differences exist, the courts have generally chosen New Harvard over Chicago.[37]

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[30] Hovenkamp, *Post-Chicago*, *supra* note 21, at 337.

[31] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 2.

[32] Hovenkamp, *Competition Policy in Crisis*, *supra* note 20, at 366; *accord* Herbert Hovenkamp, *Whatever* Did *Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. 583, 598 (2018) [hereinafter Hovenkamp, *What* Did *Happen*] (noting how Harvard and Chicago "began to converge in the late 1960s and 1970s").

[33] Hovenkamp, *Rationalization of Antitrust*, *supra* note 15, at 927; *accord* Herbert Hovenkamp, *Harvard, Chicago, and Transaction Cost Economics in Antitrust Analysis*, 55 ANTITRUST BULL. 613, 617–18 (2010) [hereinafter Hovenkamp, *Transaction Cost Economics*] (observing that "today the[] differences [between Harvard and Chicago] on many issues are not all that considerable").

[34] Herbert Hovenkamp, *Chicago and Its Alternatives*, 1986 DUKE L.J. 1014, 1021.

[35] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 38.

[36] *Id.* at 31–32, 38; Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 FORDHAM L. REV. 2471, 2474–75 (2013) [hereinafter Hovenkamp, *Welfare Goals*]. For similar statements, see Crane, *supra* note 11, at 1919–20; Crane, *supra* note 13, at 45–46, 48; Page, *supra* note 14, at 923.

[37] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 37–38 (observing that the "New Harvard position is the one most followed by the federal courts today" and that rather than embracing Chicago, antitrust "has adopted

1. The complexity of markets

One of the distinguishing characteristics of New Harvard is its acknowledgement of the complexity of markets. It joined the Chicago school critique of the structuralism of the original Harvard school embodied in the structure-conduct-performance (S-C-P) paradigm, which regarded market concentration as the only relevant consideration and assigned no importance to different types of conduct.[38] Areeda and Turner's metamorphosis in this regard was a bit of a work in progress, as evidenced by their continued endorsement of no-fault monopolization in the first edition of the treatise in 1978.[39] Hovenkamp rejected that position as early as 1985[40] and dropped it from the treatise in 1996, retaining the original discussion only for historical purposes.[41] By 2012, Hovenkamp could declare that "today, structuralist orthodoxy and the S-C-P paradigm are dead and not likely to rise again."[42]

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middle-of-the-road positions more reflective of the current Harvard position than any other"); Hovenkamp, *Welfare Goals*, *supra* note 36, at 2475 (concluding that "where there are differences, the Supreme Court has almost uniformly followed the Harvard rather than the Chicago school approach"); Hovenkamp, *Rationalization of Antitrust*, *supra* note 15, at 927 (arguing that "judicial doctrine … has tracked the Harvard treatise more closely than it has tracked the Chicago School literature"); Herbert Hovenkamp, *The Harvard and Chicago Schools and the Dominant Firm*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 11, at 109, 102 [hereinafter Hovenkamp, *Harvard and Chicago Schools*] (finding that New Harvard "has captured antitrust decision making in the courts" instead of Chicago and that "antitrust law as produced by the courts today comes much closer to representing the ideas of a somewhat chastised Harvard School than of any traditional version of the Chicago School"). Other scholars concur. *See, e.g.*, Einer Elhauge, *Harvard, Not Chicago: Which Antitrust School Drives Recent Supreme Court Decisions*, COMPETITION POL'Y INT'L, 59 (Autumn 2007); Thomas E. Kauper, *Influence of Conservative Economic Analysis on the Development of the La of Antitrust*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK, *supra* note 11, at 40, 42.

[38] For Hovenkamp's most detailed discussion of New Harvard's rejection of structuralism, see Hovenkamp, *Competition Policy in Crisis*, *supra* note 20, at 359–62, 366–67. For other discussions, see HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 35–38; Hovenkamp, *Rationalization of Antitrust*, *supra* note 15, at 925.

[39] 3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 629c, at 45–47 (1978). This echoed proposals Turner had advanced in earlier writings. *See* CARL KAYSEN & DONALD F. TURNER, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS 110–19, 266–72 (1959): Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 663–73 (1962).

[40] HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 140–42 (1985).

[41] 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 630a, at 43–46 (rev. ed. 1996). For single-authored discussions by Hovenkamp, *see*, *e.g*., HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 156–57; Hovenkamp, *Rationalization of Antitrust*, *supra* note 15, at 935.

[42] Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 75 (2012) [hereinafter Hovenkamp, *Costs of Movement*].

New Harvard also broke with the original Harvard school by welcoming the use of price theory as a tool of economic analysis.[43] Unlike the Chicago school, which seeks to generate simple, static models of competition applicable to all market structures and industries, New Harvard antitrust embraces more nuanced principles that can account for a broader range of variation among industries, firms, and conduct.[44] William Page has offered the trenchant observation that the Chicago school's approach is more conceptual, while New Harvard's approach is more contextual.[45] What this means is that rather than following Chicago's preference for general economic models that describe economic behavior in all industries, New Harvard opts instead for more nuanced models that take variations in the details of particular markets into account.[46] In so doing, New Harvard reflected the economics profession's move away from large cross-sectional studies searching for generalizations applicable to all market structures.[47] At the same time, New Harvard's contextualism made it more sympathetic to case-by-case analysis tailored to the specifics of particular industries.[48]

Areeda and Turner's landmark article on predatory pricing provides a prime example.[49] Its advocacy for a test asking whether price fell below some measure of cost is, in Posner's words, "pure textbook price theory unadorned by any of the concepts of industrial organization," such as

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[43] For an earlier overview, see Christopher S. Yoo, *The Post-Chicago Antitrust Revolution: A Retrospective*, 168 U. PA. L. REV. 2145, 2153–60 (2020) [hereinafter Yoo, *Post-Chicago*]. For other sources noting how both New Harvard and Chicago embraced price theory, see Richard N. Langlois, *Contract, Competition, and Efficiency*, 55 BROOKLYN L. REV. 831, 836 (1989); Alan J. Meese, *The Market Power Model of Contract Formation: How Outmoded Economic Theory Still Haunts Antitrust Doctrine*, 88 NOTRE DAME L. REV. 1291, 1293 (2013).

[44] Herbert Hovenkamp & Fiona Scott Morton, *Framing the Chicago School of Antitrust Analysis*, 168 U. PA. L. REV. 1843, 1851 (2020).

[45] Page, *supra* note 14, at 912.

[46] *Id.* at 912, 924; *accord* Kovacic, *supra* note 14, at 40–41 (quoting and citing Page, *supra* note 14, at 912–16).

[47] Hovenkamp & Scott Morton, *supra* note 44, at 1854.

[48] Page, *supra* note 14, at 912.

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

strategic behavior.[50] The test "assumed that the conditions and practices producing anticompetitive outcomes are uncommon and require clear proof based on objective criteria."[51]

Another prime example is the rule of reason, which Hovenkamp has correctly characterized as "a joint enterprise of the Chicago and Harvard schools."[52] For example, New Harvard criticized the jurisprudence treating all vertical restraints as illegal per se.[53] In terms of what principle should replace it, "the Harvard school position was that anticompetitive outcomes were infrequent but possible, and that vertical restraints should be addressed under the rule of reason, requiring case-by-case evaluation of power and anticompetitive effects."[54] The debate over tying followed a similar same pattern, with the Harvard school abandoning its previous support for per se illegality[55] in favor of advocating for the rule of reason.[56] Areeda even produced a Federal Judicial Center training manual to educate judges on how to apply the burden-shifting approach used to implement the modern rule of reason[57] that the Supreme Court would later cite with approval.[58]

In so doing, New Harvard's agreement with early Chicago school called for eliminating per se illegality in favor of the rule of reason[59] but stopped short of endorsing the more extreme calls for

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[50] Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 940 (1979) [hereinafter Posner, *Chicago School*]; *accord* Kenneth G. Elzinga & David E. Mills, *Predatory Pricing and Strategic Theory*, 89 GEO. L.J. 2475, 2476 (2001) (noting that Areeda and Turner's article injected price theory into the analysis of predatory pricing); Nicola Giocoli, *Games Judges Don't Play: Predatory Pricing and Strategic Reasoning in US Antitrust*, 21 SUP. CT. ECON. REV. 271, 279–80 (2014) (noting that Areeda & Turner's predatory pricing test "came directly from price theory").

[51] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 597.

[52] *Id.* at 611.

[53] *Id.* at 607 (calling per se illegality for vertical restraints "ill-conceived"); Hovenkamp & Scott Morton, *supra* note 44, at 1851 (noting that "the Supreme Court wisely overruled the per se rules against nonprice restraints and RPM").

[54] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 602.

[55] KAYSEN & TURNER, *supra* note 39, at 157–60.

[56] Phillip Areeda, *The Rule of Reason—A Catechism on Competition*, 55 ANTITRUST L.J. 571, 587 (1986); *see also* Phillip Areeda, *Antitrust Violations without Damage Recoveries*, 89 HARV. L. REV. 1127, 1137 nn. 50–51 (1976) (discussing how most consumer harms from tying are inherently offset by consumer benefits).

[57] PHILLIP AREEDA, THE "RULE OF REASON" IN ANTITRUST ANALYSIS: GENERAL ISSUES (FJC-ETS-81-1 1981), www.fjc.gov/sites/default/files/2012/Antitrust.pdf. For further discussion Areeda's embrace of the rule of reason, *see* Hovenkamp, *What* Did *Happen*, *supra* note 32, at 611; Alan J. Meese, *Reframing Antitrust in Light of Scientific Revolution: Accounting for Costs in Rule of Reason Analysis*, 62 HASTINGS L.J. 457, 481–82 (2010).

[58] NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 109 n. 39 (1984).

[59] Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. CHI. L. REV. 1 (1977) [hereinafter Posner, *Rule of Reason*]; *see also* Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153–68 (1984) (arguing for a rule of reason channelled by presumptions).

per se legality for predatory pricing,[60] vertical restraints,[61] and tying.[62] One consideration that Chicagoans offered in support of these proposals was the complexity of the factual inquiries needed to determine the impact of a particular practice, which often required courts to define markets, calculate costs and project future monopoly profits, and measure elasticities to determine the likely distribution of those profits.[63] Rather than abandon such inquiries as too complicated, New Harvard addressed the theoretical ambiguity of certain practices by using the rule to entertain proof of both potential competitive harm and potential offsetting explanations while accommodating the rarity of net anticompetitive effects by holding both to strict standards of proof.[64]

Interestingly, the difference between the rule of reason and per se legality may be more about ideology than reality. As Hovenkamp has recognized, even though "the Supreme Court has nearly always followed the Harvard approach," the "results do not differ all that much. Under existing predatory pricing law, plaintiffs rarely win cases."[65] Other commentators noted that the Areeda and Turner test "has made it especially difficult for plaintiffs to establish liability for predatory pricing—a rough, but not complete, equivalent to a no rule result."[66] One of their Harvard colleagues suggested that such an outcome was intentional, claiming that Areeda and Turner believed that predatory pricing "is so seldom found and so much effort has been spent looking for it … that you ought to set a test—as a managerial rule for the courts—so stiff that you would never

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60 ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 154–55 (1978); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 265, 333–37 (1981).

61 BORK, *supra* note 60, at 288, 297; Richard A. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 24 (1981).

62 BORK, *supra* note 60, at 380; Posner, *Chicago School*, *supra* note 50, at 935–36; Posner, *Rule of Reason*, *supra* note 59, at 11; *see also* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 182 (1976) (concluding that the prohibition of tying should be eliminated but dismissing that outcome as unattainable).

63 Easterbrook, *supra* note 60, at 333–35.

64 Hovenkamp, *What* Did *Happen*, *supra* note 32, at 597, 601–02, 607; Hovenkamp & Scott Morton, *supra* note 44, at 1872.

65 Hovenkamp, *What* Did *Happen*, *supra* note 32, at 597; *accord* Herbert Hovenkamp, *The Areeda-Turner Test for Exclusionary Pricing: A Critical Journey*, 46 REV. INDUS. ORG. 209, 211 (2015) (observing that "it quickly became clear that proving predatory pricing under [the Areeda and Turner] test is extremely difficult").

66 Kovacic, *supra* note 14, at 78.

find it anyway … You define it for judicial purposes out of existence."[67] Even Posner called the test "toothless."[68]

The rule of reason has been only slightly more permissive when applied to vertical restraints. In Hovenkamp's words, "it has become something of a commonplace that rule-of-reason antitrust violations are almost impossible to prove, particularly in private plaintiff actions."[69] Posner concurred, noting that "in practice, [the rule of reason] is little more than a euphemism for nonliability."[70] Empirical analyses largely confirm these conclusions. A 1999 study of 495 reported rule-of-reason cases from 1977 to 1999 found that plaintiffs won only 6.3% of the time.[71] A follow-up study of 222 reported rule-of-reason cases from 1999 to 2009 found that plaintiffs won only 0.5% of the time.[72]

2. The robustness of markets

Another distinguishing feature of New Harvard is that it has greater confidence than the original Harvard school in markets' ability to self-correct. As Hovenkamp notes, the first edition of the Areeda antitrust treatise "departed significantly from Harvard orthodoxy" by "reflect[ing] a greatly diluted concern with entry barriers, dismiss[ing] most of the claims that vertical integration was inherently anticompetitive, and proposing greatly relaxed merger standards."[73] As a result, New Harvard "rejects the notion that the practices" that the original Harvard school condemned "are inherently suspicious," recognizing that "most of the time they are beneficial because they reduce their production or transaction costs."[74]

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67 *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932–1970*, 26 J.L. & ECON. 163, 209 (Edmund W. Kitch ed., 1983) (statement of Harvard Business School Professor Jesse Markham).

68 POSNER, *supra* note 15, at 219 (calling the Areeda and Turner test "toothless").

69 HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 8; *see also* Hovenkamp, *What* Did *Happen*, *supra* note 32, at 597 (noting that defendants only "occasionally" lose vertical restraint cases).

70 POSNER, *supra* note 15, at 14; *see also* Crane, *supra* note 11, at 1912 (calling vertical restraints subject to the rule of reason "de facto legal").

71 Michael A. Carrier, *The Real Rule of Reason: Bridging the Disconnect*, 1999 BYU L. REV. 1265, 1275–93.

72 Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 830 (2009).

73 HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 37.

74 Hovenkamp, *Transaction Cost Economics*, *supra* note 33, at 619.

At the same time, New Harvard "did not fully embrace the Chicago position either."[75] In short, "many markets very likely are messier than Chicago Theory assumes" due to asymmetric information, previous investments, and switching costs that prevent "investment … [from] flow[ing] toward competitive solutions as freely or a quickly as we hope."[76] In addition, New Harvard finds that Chicago too easily assumes the existence of efficiencies and that firms will pass the benefits of those efficiencies on to consumers.[77] In short, New Harvard "finds markets to be more robust than the old Harvard position did, although not as robust as the Chicago school proclaimed, at least in its heyday."[78]

New Harvard thus settled into a "somewhere in the middle" between the original Harvard and Chicago schools, "although somewhat closer to the Chicago 'benign' position than to the inherent hostility position reflected by structuralism and the traditional leverage theory."[79] With the 2008 Great Recession rattling their faith in markets,[80] the Chicago school appears to have surrendered some ground in the face of this critique, exemplified by calls for a "New Chicago school" that adopts a "narrower, more cautious, and less categorical perspective" and makes a greater commitment to empiricism,[81] although some would claim that these features were hallmarks of the Chicago school all along.[82]

3. The likely efficacy of legal intervention

Another key difference between Chicago and New Harvard is with respect to the likely effectiveness of government intervention. The Chicago school incorporates public choice skepticism that argues that legal interventions tend to reflect politics instead of attempts to address

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75 HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 37.

76 *Id.* at 34–35; *accord* Hovenkamp, *Transaction Cost Economics*, *supra* note 33, at 619 (noting that New Harvard "rejects many assumptions about costless and instantaneous entry, easy resource mobility, and limitlessly rational market participants … attributed to Chicago School antitrust analysis"); Hovenkamp, *Costs of Movement*, *supra* note 42.

77 Hovenkamp, *What* Did *Happen*, *supra* note 32, at 620.

78 HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 38.

79 Hovenkamp, *Transaction Cost Economics*, *supra* note 33, at 623.

80 *See, e.g.*, RICHARD A. POSNER, A FAILURE OF CAPITALISM: THE CRISIS OF '08 AND THE DESCENT INTO DEPRESSION (2009).

81 Crane, *supra* note 13, at 47–48.

82 Kobayashi & Muris, *supra* note 18, at 155.

market failures.[83] As a result, it has traditionally taken a fairly dim view of every antitrust enforcement institution.[84]

New Harvard takes a more nuanced view of enforcement that focuses on the institutional competency of different types of actors.[85] As William Page has noted, Areeda had longstanding connections with the Legal Process School, which focused on distributing decision-making authority to the actor best suited to the task.[86] For example, taking a page out of the longstanding critique that antitrust courts are poorly suited to setting prices, Areeda's well-known article on the essential facilities doctrine argued in favor of allocating that task to regulatory agencies instead.[87] The Supreme Court embraced that interpretation in *Trinko*[88] and in subsequent decisions, such as *linkLine*[89] and *Credit Suisse*.[90]

In addition, the likely efficacy of antitrust law turns as much on the administrability of the particular rule being applied as on the competence of institution applying it.[91] Simply put, some rules are too complex for courts to apply no matter how well founded in economic theory they may be. As Hovenkamp has noted,[92] Areeda and Turner often rejected calls for more complex models on administrability grounds.[93]

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[83] *See. e.g.*, Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3 (1971).

[84] Crane, *supra* note 13, at 49–53.

[85] Crane, *supra* note 11, at 1919–20; Kovacic, *supra* note 14, at 75.

[86] Page, *supra* note 14, at 912–14.

[87] Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 ANTITRUST L.J. 841 (1989).

[88] Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[89] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009).

[90] Credit Suisse Secs. (USA) LLC v. Billing, 551 U.S. 264 (2007).

[91] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 50–56.

[92] Hovenkamp, *Costs of Movement*, *supra* note 42, at 69.

[93] 3A AREEDA & HOVENKAMP, *supra* note 41, ¶ 736; Phillip E. Areeda & Donald F. Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337, 1348 (1978); Phillip Areeda & Donald F. Turner, *Scherer on Predatory Pricing*, 89 HARV. L. REV. 901 (1976).

Concerns about administrability help explain Hovenkamp's reservations about the post-Chicago school, which he describes as "oversold."[94] Such ambivalence is remarkable given that his 1986 *Michigan Law Review* article is credited with coining the phrase.[95]

As Hovenkamp notes, "antitrust is a defensible enterprise only if it can make markets more competitive," and "this constraint places a premium on administrability."[96] Unfortunately, post-Chicago economics employs "the mathematics of marginalism and game theory in a highly technical fashion, in many cases far beyond the ability of any court to administer in the context of legal regulation."[97] In addition, many post-Chicago models "are not testable in the conventional positivist sense," a flaw that Hovenkamp notes "can prove fatal."[98] Plaintiffs can adduce evidence that a defendant's conduct was consistent with a theory of anticompetitive behavior, but the inability to rule out alternative explanations provides no guidance as to that conduct's net impact on economic welfare.[99]

Exhibit A is Hovenkamp's criticism of the Supreme Court's opinion in *Eastman Kodak Co. v. Image Technical Services, Inc.*,[100] widely recognized as the leading (if not the only) post-Chicago decision.[101] Although Hovenkamp subjects the Court's reasoning to some important conceptual criticism, he also offers negative comments relating to administrability, noting that "problems of fact-finding and implementation under a *Kodak*-style rule are completely unmanageable."[102] Fashioning a remedy to this violation requires courts to set the price and nonprice terms under which Kodak must sell aftermarket parts.[103] Using reasoning similar to that that the Court would later follow in *Trinko*, Hovenkamp concludes that such "public utility style regulation of aftermarket prices is not merely administratively impossible, it is not an 'antitrust solution' to the

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94 HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 39.
95 Hovenkamp, *After Chicago*, *supra* 18.
96 Hovenkamp, *Post-Chicago*, *supra* note 21, at 269.
97 Hovenkamp, *Competition Policy in Crisis*, *supra* note 20, at 366.
98 Hovenkamp, *Post-Chicago*, *supra* note 21, at 272.
99 *Id.* at 272.
100 Eastman . Co. v. Image Tech. Servs., Inc., 504 U.S. 541 (1992).
101 HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 98.
102 Hovenkamp, *Post-Chicago*, *supra* note 21, at 292.
103 *Id.* at 292.

problem at hand, which is to make markets competitive."[104] In other words, "*Kodak*-style injunctions effectively take a 'public utility' rather than an 'antitrust' approach to the problem of aftermarket monopolies – that is, rather than forcing competition, they turn the putative monopolist into a price-regulated common carrier or public utility. The result is to prolong the very monopoly that the Court's decree was intended to discipline."[105] He offers similar critiques of the use of post-Chicago economics to analyze long-term franchise arrangements and predatory pricing.[106]

This inability to reduce game theoretic insights into implementable rules has led post-Chicago economics to have "only limited success."[107] He does hold out the possibility that post-Chicago may evolve into more administrable rules,[108] particularly in the areas of raising rivals' costs and unilateral effects of horizontal mergers, but even those areas "still confront significant problems of administrability,"[109] "may not be quite ready for primetime,"[110] and "pose a significant risk of being overused if their limitations are not kept in mind."[111]

In short, "the complexity of post-Chicago theories would force the federal courts to confront problems that they are not capable of solving."[112] The result is that "the gap between high economic theory and antitrust practice is larger than it has ever been."[113] This leads Hovenkamp to conclude that "when a particular form of behavior is too complex for reliable analysis within a reasonable time, then the only defensible antirust rule is to let the market—rather than state intervention—control that behavior, at least for the time being."[114]

The inability to fashion administrable rules may force regulators to leave potential anticompetitive conduct unremedied. Hovenkamp notes, "at all times we must remember that if we believe that

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[104] *Id.* at 293.
[105] *Id.* at 294.
[106] *Id.* at 304–17.
[107] *Id.* at 336.
[108] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 49; Hovenkamp, *Post-Chicago*, *supra* note 21, at 274.
[109] Hovenkamp, *Post-Chicago*, *supra* note 21, at 321.
[110] *Id.* at 326.
[111] *Id.* at 337.
[112] *Id.*
[113] Hovenkamp, *Competition Policy in Crisis*, *supra* note 20, at 367.
[114] Hovenkamp, *Post-Chicago*, *supra* note 21, at 273.

markets generally work well when left alone, then intervention is justified only in the relatively few cases where the judiciary can fix the problem more reliably, more cheaply, or more quickly than the market can fix itself."[115] When intervention cannot assure that is the case, "some deviations [from perfect competition] must simply be tolerated,"[116] and "the rather tolerant Chicago school rule may be the best one for policy purposes even though substantial anticompetitive behavior goes undisciplined, simply because we cannot recognize and remedy it with sufficient confidence,"[117] despite the fact that "it does not do the best job of expressing what we know about economic theory."[118]

That said, the comparative institutional framework adopted by New Harvard represents a substantial challenge to the Chicago school's tendency to disparage both judicial and regulatory enforcement.[119] Proponents have urged the emerging New Chicago school to develop a more constructive theory of institutions to prevent its position from devolving into a de facto call for nonenforcement.[120] At the same time, Hovenkamp's doubts about the administrability of game theoretic approaches lead him to stop short of embracing post-Chicago antitrust as well.

III. Implications for Emerging Issues

These conceptual foundations in general and Hovenkamp's scholarship in particular can provide important guides to the New Harvard School's position on key emerging issues in antitrust law. This section will briefly analyze three key issues: tying, the consumer welfare standard, and digital platforms. New Harvard's historical role as the harbinger of what courts are likely to do gives this analysis doctrinal importance.

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[115] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 124.
[116] Hovenkamp, *Competition Policy in Crisis*, *supra* note 20, at 367.
[117] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 48
[118] Hovenkamp, *Post-Chicago*, *supra* note 21, at 271.
[119] Crane, *supra* note 13, at 46, 49–53; Crane, *supra* note 11, at 1919–20; *see also* Fred. S. McChesney, *Antitrust and Regulation: Chicago's Contradictory Views*, 10 CATO J. 775, 780–83, 792–93 (1991) (arguing that the Chicago critique of regulation applies with equal force to antitrust judging).
[120] Crane, *supra* note 13, at 58–65.

1. Tying

Tying has long served as one of the central focal points of debates over antitrust policy. The Warren Court decisions that erected a per se rule that permitted liability without any showing of market power or market exclusion[121] prompted a furious critique from Chicago school scholars, who challenged claims that tying would give a monopolist leverage over the tying product market[122] and would allow firms to foreclose the emergence of competition in the tied product market.[123] They argued for replacing the rule of per se illegality not with the rule of reason but rather with per se legality.[124]

The New Harvard position on tying is best regarded as a qualified embrace of the Chicago school.[125] For example, Areeda abandoned the original Harvard school's endorsement of per se illegality[126] and openly argued that tying should be governed by the rule of reason.[127] Hovenkamp agreed that failing to require a showing of market power and a threat of monopolization turned the law of tying into a "competitive travesty."[128] In addition, Hovenkamp recognized that "Bork's chapter on tying thoroughly eviscerated the Supreme Court's per se rule against ties, particularly its failure to take market power requirements seriously."[129]

More specifically, Hovenkamp regards the leverage theory of tying to be "discredited."[130] New Harvard continues to accept the foreclosure theory of tying, however,[131] and accepts the notion

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[121] BORK, *supra* note 60, at 366–72; Herbert Hovenkamp, *The Law of Vertical Integration and the Business Firm: 1880–1960*, 95 IOWA L. REV. 863, 905–6 (2010).
[122] Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 YALE L.J. 19 (1957).
[123] POSNER, *supra* note 62, at 176; Richard A. Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506, 510 (1974); *see also* BORK, *supra* note 60, at 231–38 (offering a more extended critique of the foreclosure argument in the related context of vertical integration).
[124] BORK, *supra* note 60, at 380.
[125] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 604.
[126] KAYSEN & TURNER, *supra* note 39, at 157–60.
[127] Areeda, *supra* note 56, at 587.
[128] Hovenkamp, *supra* note 121, at 905–6.
[129] Herbert Hovenkamp, *Robert Bork and Vertical Integration: Leverage, Foreclosure, and Efficiency*, 79 ANTITRUST L.J. 983, 1000 (2014).
[130] HOVENKAMP, ANTITRUST ENTERPRISE, *supra* note 12, at 201.
[131] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 604–5; Hovenkamp, *Harvard and Chicago Schools*, *supra* note 37, at 111.

that anticompetitive harms are unlikely, but possible.[132] As a result, it advocates applying the rule of reason to tying, "making violations difficult to prove but not ruling them out altogether."[133] This position regards tying as presumptively legal but permits condemnation "if market power and anticompetitive harm are proven under clearly articulated theories."[134]

The courts have "chipped away" at the per se rule since the 1980s.[135] For example, *Jefferson Parish* adhered to the per se rule as a matter of precedent but proceeded to recognize a market power requirement and conducted an analysis reminiscent of the rule of reason.[136] *Independent Ink* overruled prior decisions, holding that market power may be inferred from the existence of a patent without a showing of market power, in the process recounting the Court's decisions moving away from the per se rule.[137] The *Microsoft* case created an exception to the per se rule for tying arrangements for software operating system platform ties.[138]

Hovenkamp has called the demise of the per se rule for tying "all but inevitable."[139] At the same time, Hovenkamp has documented numerous scenarios in which the impact of tying on consumer welfare is ambiguous, including variable proportion ties, ties causing interproduct price discrimination, and tying and bundled discounts of imperfect complements.[140] Although the Chicago and New Harvard schools agree that courts should not treat tying as per se illegal, courts show no sign of embracing the Chicago school's call for per se legality for tying.[141] Instead, "notwithstanding Chicago school efforts to write 'foreclosure' out of the list of worthwhile antitrust concerns, the case law continues to recognize a concept of market foreclosure that has been a mainstay of Harvard school antitrust policy since Joe Bain's writing on entry barriers in the 1950s, although it has been considerably disciplined in subsequent years."[142] Hovenkamp

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[132] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 602.
[133] Hovenkamp, *Welfare Goals*, *supra* note 36, at 2475.
[134] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 604.
[135] *Id*. at 605.
[136] Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 9 (1984).
[137] Ill. Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 35–37, 43, 46 (2006).
[138] United States v. Microsoft Corp., 253 F.3d 34, 89–91 (D.C. Cir. 2001).
[139] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 605.
[140] Hovenkamp, *Welfare Goals*, *supra* note 36, at 2480–89.
[141] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 605; Hovenkamp, *Welfare Goals*, *supra* note 36, at 2475.
[142] Hovenkamp, *Harvard and Chicago Schools*, *supra* note 37, at 111.

concludes, "The economic thinking of the two schools is much closer today … than it was in the 1960s and earlier. Where there are differences, the Supreme Court has almost uniformly followed the Harvard rather than the Chicago school approach."[143]

Tying illustrates the impact of New Harvard's core commitments on antitrust doctrine. Instead of relying on a reductionist approach built around models applicable to all markets and industries in the manner favored by the Chicago school, the New Harvard School prefers approaches to tying that reflect the greater complexity and variation across markets. The institutional limitations of courts may prevent them from fully assessing the economic impact of particular types of ties on all actors. "For example, if a tying arrangement produces significant producer gains but impacts different consumers differently and net harm or benefit is impossible to determine, then the law should be reluctant to intervene."[144]

2. Neo-Brandeisian/hipster antitrust

One of the areas where New Harvard has the most to say is with respect to what is called neo-Brandeisian[145] or hipster antitrust.[146] movement. Its core tenets include the abandonment of consumer welfare as the goal of antitrust in favor of a more structuralist approach and more vigorous enforcement in blocking mergers and in breaking up large companies.[147]

This movement amounts to a revival of the populist school that dominated antitrust during the Warren Court before being abandoned during the 1970s.[148] Although the Chicago school is often given primary credit for the rejection of populist goals in favor of the consumer welfare standard, the New Harvard School also played a critical role.[149] For example, the first edition of the Areeda

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[143] Hovenkamp, *Welfare Goals*, *supra* note 36, at 2475.
[144] *Id.* at 1496.
[145] *See, e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131 (2018).
[146] The term was coined by Kostya Medvedovsky in response to a tweet by Joshua Wright, who popularized the term. *Hipster antitrust hits the Senate: The Tipline for 4 August 2017*, GCR (Aug. 4, 2017), https://globalcompetitionreview.com/hipster-antitrust-hits-the-senate-the-tipline-4-august-2017.
[147] *See, e.g.*, WU, *supra* note 1, at 127–37; Lina M. Khan, Note, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 737–46 (2017).
[148] For an overview, see Yoo, *Post-Chicago*, *supra* note 43, at 2147–50.
[149] *Id.* at 2151–52 & nn. 29–32 (citing sources)

and Turner treatise (published in 1978) embraced the consumer welfare standard, concluding that the case law "support[s] the priority of competition and its efficiency goals" and that promoting non-efficiency goals would be "excessively costly, futile, or unadministrable."[150] In the process, the treatise rejected populism, noting that "the contribution to populist goals from rules specially created to promote them would be far too small to warrant the inevitable legal difficulties, uncertainties, and enforcement costs they would involve" and cautioning that a "large, powerful, and highly visible firm can also be a scapegoat for political demagoguery."[151]

Hovenkamp has expressed similar critique of neo-Brandeisianism, which he regards as "mak[ing] expansive claims … that are technically undisciplined, untestable, and even incoherent."[152] As a result, "often movement participants lack a serious understanding of economics and have wildly unrealistic expectations about what competition policy can accomplish, as well as inconsistent and even incoherent goals."[153]

He reiterated and expanded on this position in a subsequent article defending consumer welfare as the touchstone of antitrust. He notes that neo-Brandeisianism shares with the prior populist school a hostility toward large firms as a concern divorced from exclusionary conduct or anticompetitive effect,[154] but surpasses its processor in terms of hostility toward economic efficiency and low prices.[155] He also invoked considerations of administrability and institutional competency characteristic of New Harvard when cautioning about the indeterminacy of trading off low prices and high output against overtly political goals and the dangers of special interest capture in the absence of specific rules, remedies, metrics, and rules of causation.[156] Although he finds consumer welfare to be more amenable to judicial resolution than the type of balancing required to calculate

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[150] 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THE APPLICATION 7, 24 (1978).

[151] *Id.* at 22, 30; *accord* Donald F. Turner, *The Durability, Relevance, and Future of American Antitrust Policy*, 75 CALIF. L. REV. 797, 798 (1987) (concluding the goal of antitrust law "is to promote consumer welfare" and that "there is no reasonable basis for presuming that courts must give priority or even weight to populist goals where ethe pursuit of such goals might injure consumer welfare").

[152] Hovenkamp, *What* Did *Happen*, *supra* note 32, at 597.

[153] *Id.* at 585.

[154] Herbert Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled?*, 45 J. CORP. L. 65, 67, 82, 92, 93 (2019).

[155] *Id.* at 82, 89.

[156] *Id.* at 89–92.

total welfare,[157] he makes clear that the type of balancing required by the neo-Brandeisian rejection of economic welfare altogether would be far more problematic.[158]

Hovenkamp's rejection of neo-Brandeisian antitrust follows from the fundamental principles on which New Harvard is built. Its acknowledgement of the complexity of markets rejects penalizing firms simply because of their large size and underscores the need to evaluate the economic impact of particular conduct in a specific context. He strikes a middle ground on the robustness of markets, noting on the one hand that "economies of scale, network economies, or other cost savings may create economic preferences for larger firms or collectives,"[159] while still recognizing the potential existence of problems that markets cannot solve.[160] It is further informed by institutional considerations that render populist concerns judicially unenforceable.

3. Digital platforms

A better understanding of the New Harvard School may also provide insight into how enforcement authorities are likely to resolve what has emerged as the most important antitrust issue of our time: digital platforms. Digital platforms are the subject of major enforcement actions and investigations by the US, the UK, Australia, and the European Commission,[161] as well as major reports by enforcement agencies,[162] legislative staff,[163] and scholarly commentators.[164] Hovenkamp recently published a major article on *Antitrust and Platform Monopoly* that avoids the excesses of the

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[157] *Id.* at 71–72, 92.
[158] *Id.* at 92–93.
[159] *Id.* at 92.
[160] *Id.* at 93–94.
[161] Michael Sweeney & Paulina Zawiślak, *Antitrust Investigations and Lawsuits Against Google, Apple, Facebook, and Amazon (GAFA)*, CLEARCODE (Mar. 22, 2021), https://clearcode.cc/blog/antitrust-investigations-gafa/.
[162] AUSTRALIAN COMPETITION & CONSUMER COMMISSION, DIGITAL PLATFORMS INQUIRY: FINAL REPORT 66–68 (2019), www.accc.gov.au/system/files/Digital%20platforms%20inquiry%20-%20final%20report.pdf. For reports produced by experts at the request of enforcement authorities, see DIGITAL COMPETITION EXPERT PANEL, UNLOCKING DIGITAL COMPETITION 35 (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; JACQUES CRÉMER ET AL., COMPETITION POLICY IN THE DIGITAL ERA: FINAL REPORT 20–24 (2019), https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.
[163] STAFF OF THE SUBCOMM. ON ANTITRUST, COMMERCIAL & ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS (Comm. Print 2020).
[164] GLOBAL ANTITRUST INST., REPORT ON THE DIGITAL ECONOMY (Joshua D. Wright & Douglas H. Ginsburg eds., 2020), https://gaidigitalreport.com/; STIGLER COMM. ON DIGITAL PLATFORMS, FINAL REPORT (2019), https://research.chicagobooth.edu/stigler/media/news/committee-on-digital-platforms-final-report.

extreme positions taken by some in this debate by advancing a characteristically thoughtful and nuanced position that takes the possibility of consumer harm seriously in a way that accommodates the economic and institutional ambiguities.[165]

For example, Hovenkamp criticizes the tendency to presume without analysis that digital markets are exceptional.[166] Specifically, he rejects blanket assertions that digital markets are inherently monopolistic, correctly noting that platforms frequently compete with non-platforms[167] in markets that are often two-sided[168] and in which products are differentiated[169] and users tend to multi-home.[170] In addition, the scale economies and network effects that characterize many digital markets arise with respect to particular inputs and services, and not to entire companies.[171] This makes the proper boundaries of relevant markets and whether those markets are winner-take-all fact-intensive questions that must be analyzed empirically and not simply be asserted.[172] Importantly, Hovenkamp notes that to date such claims have "little empirical support."[173] Quite the contrary, he finds it "rarely true" that markets for digital platforms are winner-take-all[174] and that "few platforms are natural monopolies."[175]

Hovenkamp also eschews claims for addressing digital platforms through regulation, preferring the traditional tools of antitrust. Regulation "rarely comes close to mimicking competitive behavior" and "necessarily generalizes and applies the same rules to several firms in an area."[176] Equally problematic is regulation's tendency to "entrench[] existing technologies and, in so doing,

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[165] Herbert Hovenkamp, *Antitrust and Platform Monopoly*, 130 YALE L.J. 1901, 1933, 1950 (2021) [hereinafter Hovenkamp, *Platform Monopoly*].
[166] *Id.* at 1933, 1950.
[167] *Id.* at 1943–45.
[168] *Id.* at 1910–14, 1917–18.
[169] *Id.* at 1945–50.
[170] *Id.* at 1922–27.
[171] *Id.* at 1920–21.
[172] *Id.* at 1945, 1950.
[173] *Id.* at 1927.
[174] *Id.* at 1952.
[175] *Id.* at 1920.
[176] *Id.*

bolster[] existing incumbents."[177] Antitrust is better suited to the fact-specific inquiry needed to protect consumers when firms are pursuing diverse technological and business strategies.[178]

In terms of remedies, Hovenkamp attempts to strike a middle ground. On the one hand, Hovenkamp is skeptical about imposing radical structural remedies, such as the breakup of a firm in the absence of a merger.[179] He notes, "Too often, well-intended divestitures or structural separations end up harming customers by reducing output."[180] Compelling a divestiture risks harming consumers by preventing firms from realizing the benefits of network effects, systems integration, and economies of scale.[181] The same is true for line-on-business restrictions, which can prevent firms from achieving economies of scope and network effects, particularly in industries such as digital platforms that involve significant fixed and joint costs.[182] "To the extent these breakups interfere with a firm's production and distribution, they can produce harmful results such as increased costs or loss of coordination," particularly when production is integrated, as is often the case with digital platforms.[183]

Separating lines of business that do not directly compete with one another into independent companies also does nothing to increase competition. As he cogently notes, "If a manufacturer makes 80% of the world's toasters and 75% of the world's blenders, compelling divestiture of one will yield one firm that makes 80% of the world's toasters and a second firm that makes 75% of the world's blenders."[184] Moreover, "divestiture is also a blunt instrument" that requires the severing of all connections instead of targeting those contracts that harm competition.[185] As a result, "divestitures often end up being either too broad or too narrow in relation to the harm they seek to rectify."[186]

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[177] *Id.*
[178] *Id.* at 1905, 1920.
[179] *Id.* at 1958.
[180] *Id.* at 1966.
[181] *Id.* at 1959, 1960.
[182] *Id.* at 1964.
[183] *Id.* at 1971.
[184] *Id.* at 1959.
[185] *Id.* at 1967.
[186] *Id.*

Hovenkamp sees more room for divestitures of lines of business acquired by merger so long as both units have continued to operate separately.[187] Similarly, line-of-business restrictions are less invasive when they prevent entry into new lines of business instead of mandating the spinoff of existing operations.[188] Such divestitures are more problematic when the combined firm has integrated operations or when most of the growth has occurred after the merger.[189]

He sees greater promise in targeted behavioral remedies that do not require restructuring existing companies, focusing primarily on two alternatives. The first is to restructure the governance of a digital platform into a cooperative in which competing entities share ownership and management of the platform, with motivating examples being the Chicago Board of Trade, the NCAA, the NFL, real estate boards, and the association that gave rise to the Supreme Court's decision in *Terminal Railroad*.[190] The second is a system of mandatory interoperability or pooling, with motivating examples being the Insurance Services Office (ISO), Journal Storage (JSTOR), and the antitrust decree that mandated blanket licensing of digitized music.[191]

Finally, Hovenkamp addresses the digital platforms' practice of acquiring nascent competitors. Again, he calls for a balanced approach. On one hand, such acquisitions can create social value by allowing the integration of synergistic enterprises.[192] On the other, eliminating a competitor can create social costs in much the same manner as a cartel.[193] He offers two potential solutions to this conundrum. First, he suggests limiting any acquisition of intellectual property in such a transaction to a nonexclusive license, which would allow the realization of the integration value while minimizing the exclusion value of the merger.[194] Second, he argues that mergers that lead to the removal of the assets of the acquired firm from the market be prohibited.[195] While mergers that lead to joint operations can create efficiencies, "economically, a merger-plus-shutdown is no

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[187] *Id.* at 1958.
[188] *Id.* at 1964.
[189] *Id.* at 1958–59.
[190] *Id.* at 1971–82.
[191] *Id.* at 1984.
[192] *Id.* at 1994.
[193] *Id.*
[194] *Id.* at 1994–96.
[195] *Id.* at 1996–97.

different than the out-put reduction that attends a cartel."[196] This rule must take into account that not all mergers work out, which can lead to complete or partial shutdowns of the acquired company notwithstanding initial intentions to operate it.[197] As a result, Hovenkamp argues against a per se rule prohibiting post-acquisition shutdowns so long as the acquiring firm has made a good-faith effort to put the acquired assets to productive use.[198]

Hovenkamp's position bears all of the hallmarks of the New Harvard School. Rather than accepting simplistic price-theoretic claims that digital platforms are not inherently monopolistic, he explores features that make these markets more complex and differentiated[199] and recognizes the incentives for digital platforms to engage in strategic behavior. Nor does he take for granted that markets for digital platforms will be self-correcting. Finally, he takes institutional considerations into account, concluding somewhat contrary to Areeda and *Trinko* that remedies for this conduct are best overseen by antitrust courts instead of regulatory agencies. He also advances a series of provocative remedial proposals that, given his stature and the prominence of the publication venue of this article, are sure to garner serious consideration. His call for barring killer acquisitions that cannot possibility yield efficiency benefits is similar to the law's hostility toward naked exclusion.[200]

That said, many of his proposals are likely to promote controversy. For example, requiring a unitary company to reorganize itself into a system of shared ownership and management and information pooling would undoubtedly be difficult, and the resulting governance structure would be vulnerable to multiple types of opportunistic and strategic behavior, as Hovenkamp recognizes.[201] Moreover, the costs of reconfiguring data and the deep link between data structures and functionality is likely to make mandating interoperability quite difficult.[202] Hovenkamp's

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[196] *Id.* at 1997.
[197] *Id.* at 1997–98.
[198] *Id.* at 1998.
[199] For my own work on how product differentiation can make markets more competitive, see Christopher S. Yoo, *Beyond Network Neutrality*, 19 HARV. J.L. & TECH. 1 (2005); Christopher S. Yoo, *Copyright and Product Differentiation*, 79 N.Y.U. L. REV. 212 (2004).
[200] *See, e.g.*, FTC v. Actavis, Inc., 570 U.S. 136, 146 (2013) (noting judicial hostility toward paying a competitor not to enter a market).
[201] Hovenkamp, *Platform Monopoly*, *supra* note 165, at 1987.
[202] Christopher S. Yoo, *Modularity Theory and Internet Policy*, 2016 U. ILL. L. REV. 1.

supposed success story, the Telecommunications Act of 1996, is widely regarded as a failure.[203] Indeed, the Supreme Court has questioned the antitrust court's ability to implement such a mandate.[204]

On the other hand, the scale advantages that Hovenkamp recognizes already provide strong incentives for platforms to make their operations interoperable.[205] Tellingly, the motiving cases to which Hovenkamp points involved voluntary decisions to adopt a collective governance structure more reminiscent of Robert Merges's *Contracting into Liability Rules* than government intervention.[206] The key question is whether some wedge exists to cause private incentives to deviate from social incentives. Hovenkamp in essence infers the existence of such deviation from the persistence of dominance, which in the absence of natural monopoly must come from strategic behavior.[207] The other possibility, acknowledged by Hovenkamp but given less weight,[208] is that durable market leadership may be the result of innovation and investment. Lastly, remedies may have unexpected secondary consequences. Consider, for example, potential limitations on acquiring nascent competitors. The history of the FCC's financial interest and syndication rules (finsyn) reveals how regulations limiting dominant firms' ability to acquire interests in smaller, independent actors backfired, limiting their markets in ways that ultimately harmed the entities the regulation was intended to protect.[209]

IV. Conclusion

This volume represents a fitting honor for the preeminent antitrust scholar of his generation. I can think of no one more deserving of a *liber amicorum*. Despite Hovenkamp's preeminence, a lack of understanding of the core commitments underlying his scholarship and the New Harvard School that he champions has obscured the precise nature of their contributions. I hope that this paper

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[203] *Id.* at 39–42.
[204] Verizon Commc'ns Inc. v. .Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).
[205] Hovenkamp, *supra* note 165, at 1987.
[206] Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organization*, 84 CALIF. L. REV. 1293 (1996).
[207] Hovenkamp, *supra* note 165, at 1990.
[208] *Id*.
[209] Schurz Commc'ns, Inc. v. FCC, 982 F.2d 10943 (7th Cir. 1992).

helps provide a greater appreciation for what Hovenkamp has meant to antitrust law and some indications about the directions it will likely take in the future.