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Addressing the Divisions in Antitrust Policy

Herbert Hovenkamp*

This is the text of an interview conducted in writing by Professor A. Douglas Melamed, Stanford Law School. Reprinted by permission, *Concurrences Review* (Nov. 15, 2021). My thanks to Doug and to *Concurrences Review*. I am solely responsible for the responses.

How did it all begin? Or, to be more precise, how did you come to be an antitrust scholar, and how did you come to be a coauthor, and ultimately the author, of the treatise?

In the late 1970s I was a fresh PhD teaching history at the University of Texas. My boss, the late William H. Goetzmann, asked me to teach legal history and I agreed if I could attend some law school classes. I completed law school and was inspired by two strong but very different antitrust teachers, Lino Graglia and Richard Markovits. I met Phil Areeda in 1980 while I was on a postdoc at Harvard Law School. In 1983, when I was a tenure-track professor at Hastings, Areeda asked me to join him. He had split up with Donald Turner after they completed the first five volumes of the Antitrust Law treatise. In 1990 Phil was diagnosed with leukemia. He died in Dec., 1995, as we were working on volume 10. After that, I finished the treatise myself, although I have had coauthors. John Solow worked on market power and Einer Elhauge on tying in the first edition. For the past several years Roger D. Blair and Christine Piette Durance, two distinguished economists, have worked on damages and expert testimony. The fourth edition of the treatise, now 22 volumes, was completed in 2019 and I have begun the fifth edition.

Have you taken any position on antitrust law that you now regret or think was mistaken?

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Not many. I believe my views seem more pro-enforcement in relation to the federal courts than they were two decades ago. That occurred mainly because the court moved right, however, not because I moved left.

One area where I should have been more circumspect is the idea that we should assess exclusionary practices by reference to a hypothetical “equally efficient rival.” That is a complex concept because it has both an administrative and a substantive component. Administratively, the concept of the “equally efficient rival” in areas such as predatory pricing or exclusive dealing is valuable because it creates a baseline—namely, the dominant firm’s costs. An equally efficient rival has the same costs as the defendant has. This framework drives the Areeda–Turner rule for exclusionary pricing. As a matter of substance, however, the equally efficient rival predicate is excessively underdeterrent. Competitive markets contain firms with different costs. The costs of the marginal firm may be significantly higher than those of the dominant firm. Nevertheless, these less efficient firms are essential to competition. This was one thing that made the Stigler/Chicago School definition of entry barriers so perverse. It effectively punished new firms who had smaller scale or scope by finding that entry barriers were lacking. Fortunately, the courts have largely rejected it.

Sadly, most efforts to protect less efficient rivals, through such devices as pursuing above-cost predatory pricing, deteriorate into questions about intent. That is not a satisfactory resolution, particularly not in jury trials. High on antitrust’s agenda should be reformulation of sensible antitrust rules so as to protect less efficient but nevertheless important rivals. We may need to maintain the concept for pricing cases but jettison it in other areas.

“UNITED STATES ANTITRUST LAW NEEDS TO ESCAPE FROM AN “ERROR COST” ANTI-ENFORCEMENT BIAS THAT WAS ALREADY OBSOLETE WHEN IT WAS ARTICULATED” AND “HAS BECOME A SOCIALLY COSTLY FORM OF SPECIAL INTEREST CAPTURE.”

What are the biggest issues facing antitrust law today?

United States antitrust law needs to escape from an “error cost” anti-enforcement bias that was already obsolete when it was articulated in the twentieth century. The bias was built on the idea that markets work themselves pure and correct monopoly more quickly than courts correct judicial errors of overenforcement. It initially performed a useful function because so much of antitrust at the time was excessive. That time has long since passed. An empirical revolution in industrial economics that began in the 1970s and 1980s has thoroughly exploded the error cost view. Today it receives business support because it preaches reduced liability. It has become a socially costly form of special interest capture. Current case law reflects the bias in harsh pro-defendant standards for motions to dismiss and summary judgment, an underdeterrent merger policy, and a rule of reason that has become almost useless because it ignores fairly simple decision procedures.

Antitrust has become something of a piñata for folks outside the antitrust mainstream. It is criticized by the New Brandeisians on the left, largely for noneconomic reasons, and by those on the right who think it’s too focused on static analysis and gives short shrift to dynamic analysis and thus to innovation. What should antitrust law learn from these critics ?

We can learn from both, but often by negative example. Today both the antitrust right and the antitrust left are nostalgic for the past, although for different parts of it. The right is still stuck in the heyday

of neoliberalism, the Mont Pelerin Society, and the Chicago School. The left is equally stuck in the Progressive Era and New Deal.

Both sides speak disparagingly of current economics. The right prefers economics as it was prior to the rise of robust, testable, and usable models of imperfect competition. By contrast, some on the left would reject economics altogether—often because they incorrectly equate an anti-enforcement bias with the use of economics itself. They forget that the Progressives were highly creative and forward-looking economic thinkers who made important contributions to the marginalist revolution in economics, as well as behaviorism and cultural relativism in the social sciences. By contrast, much of the ideology of the New Brandeisians is reactionary, embracing cast-off relics such as the Robinson–Patman Act and extreme hostility toward vertical integration. This is a real opportunity lost : antitrust economics needs to be brought more to the center, not abandoned. Both extremes share a populist distrust of expertise and, in the process, a highly selective and self-serving view of the facts.

Both sides denigrate robust market output as a measure of antitrust welfare. Neoliberals, particularly Bork, did so by building producer profits into their conception of consumer welfare. They could proclaim a practice in the interest of consumer welfare even when it harmed consumers. Decisions such as California Dental, the Actavis dissent, American Express and Qualcomm all articulate “consumer welfare” while approving anticompetitive practices that reduce output and increase prices. By contrast, those on the left denigrate output by their opposition to bigness, in the process ignoring economies of scale and scope and even positive network effects. The result is that extremists on both sides are harmful to consumers, harmful to labor, which nearly always benefits from higher output, and harmful to great numbers of small businesses.

“TODAY BOTH THE ANTITRUST RIGHT AND THE ANTITRUST LEFT ARE NOSTALGIC FOR THE PAST, ALTHOUGH FOR DIFFERENT PARTS OF IT.”

Some say antitrust has become too technocratic and complex and too tethered to arcane and data-driven economic models. Would antitrust be better if it were simplified? Simpler rules would, of course, overlook relevant facts, but maybe there would be fewer mistaken applications.

Antitrust is technical, but not any more technical than, say, patent law, products liability, medical malpractice, or corporate finance. Antitrust seems to have more people who believe that it should not take any real investment in learning to do it. I don't see a lot of people without professional training acting as forensic pathologists or patent examiners. But in antitrust everyone wants to be an expert. One likely reason is that everyone is aware of his or her own economic interests and, thinking myopically, believes that antitrust is the tool to make things better.

Nevertheless, simpler rules in some areas could improve decision-making. Most particularly, the rule of reason has become unmanageable, largely because the Supreme Court has loaded all of the proof requirements into the plaintiff's opening case. Predatory and strategic pricing rules have become overly technical and complex. Merger analysis needs to be simplified and made more reliant on structure and empirical study of individual responses to price or cost changes. Its rules must also be less deferential to claimed efficiencies. Coase showed us that anything that can be done in a firm can also be accomplished by contract. Many efficiencies are attainable by contractual alternatives, and contractual arrangements can often be non-exclusive. Further, the bigger and more diverse is the acquiring firm, the less it needs a further acquisition in order to attain incremental efficiencies. Internal development or a non-

exclusive license will usually work. As a result, welfare would be improved by a simple but harsh rule against acquisitions of even small firms by large digital platforms.

Focusing solely on antitrust policy and economic welfare, what kinds of antitrust or regulatory interventions with respect to the big digital platforms (Apple, Amazon, Facebook, and Google) would you like to see?

As noted above, we need harsher rules limiting large platform acquisitions of smaller firms. President Biden has asked the agencies to consider revising the Merger Guidelines, and a revision should do two new things relevant to large digital platforms. One is coverage of non-horizontal mergers, and the other is treatment of mergers as exclusionary practices. Even an acquired firm with a market share of zero (because it has not yet launched its product) is a competitive threat that a preemptive acquisition can eliminate. One important purpose of many large firm acquisitions today is to prevent the acquired firms from growing into competitors. The value of an acquisition consists of its integration value (efficiencies) and its exclusion value. A non-exclusive license gives an acquirer everything it needs to integrate whatever technology the firm has to offer, but not the power to exclude.

Second, the most promising remedy for most platform practices is a carefully drafted injunction. However, minimum market share thresholds should be adjusted downward in networked markets with large firms. Further, we must make more use of econometric rather than market share methods of assessing power.

Third, even for proven dominance and unlawful exclusionary conduct, we should avoid remedies that do unnecessary harm to consumers, labor, and others who benefit from competitive markets. Interoperability, such as we were able to achieve in the telephone breakup in the 1980s and 1990s, provides a useful starting template. The trick is to develop solutions that take full advantage of scale

economies and network effects, but that facilitate competition inside the network.

“EVEN FOR PROVEN DOMINANCE AND UNLAWFUL EXCLUSIONARY CONDUCT, WE SHOULD AVOID REMEDIES THAT DO UNNECESSARY HARM TO CONSUMERS, LABOR, AND OTHERS WHO BENEFIT FROM COMPETITIVE MARKETS.”

The popular press calls for “breakups” or “regulation,” often without serious thought about consequences. Devising divestitures that do not harm economic performance is very difficult. Most spinoffs do not break up monopolies but simply transfer them to a different owner. That would be true, for example, of a forced divestiture of Google Search from its parent company. Some structural remedies might work, but applying them requires a clear-eyed assessment of effects. A more promising use of spinoffs is for acquired firms or assets, particularly those that are not yet fully integrated with the acquiring firm. Facebook’s acquisitions of Instagram and WhatsApp come to mind. Further, if “regulation” means *ex ante* control of product and price, it would be a miserable solution for highly innovative markets such as the large digital platforms. Among the likely outcomes would be much less innovation, a significant reduction in economic growth, but guaranteed and stable profit margins for the regulated firms.

Relatedly, forcing Amazon to segregate its own brand and third-party sales would simply make the retail market less competitive. Those arguing for segregation have simply not studied the problem carefully. Amazon has benefitted more small businesses than it has harmed, although the latter set is not empty. Amazon is not like the chain store of the 1930s, which faced small firms mainly as a rival. More than half of Amazon’s sales are made as broker for third-party firms of all sizes. Distribution has evolved from a mainly vertical

practice to a network practice. The most obvious impact of platform competition between Amazon's own brands and third-party sellers is lower prices and higher output. During the pandemic, the availability of Amazon as a sales platform became a lifeline for thousands of small sellers. Amazon's vendor selection and ranking processes, most-favored nation, and other exclusionary clauses are all potentially anticompetitive, but these are best remedied by an injunction.

What role should antitrust play in policy formulation in “non-antitrust” areas, such as labor and employment, climate change, viewpoint discrimination? How, if at all, should antitrust law be changed in light of those policy concerns?

Antitrust should not become a tool for achieving goals that belong in other areas. It is not a substitute for climate law, labor law, civil rights law, the First Amendment, or many other bodies of law.

On the other hand, concerns about competition can arise in non-antitrust areas. The obvious ones are intellectual property and communications law, but there are others. The answer is not to incorporate labor, environmental, or intellectual property concerns into antitrust law. Rather, we should take concerns about competition more seriously in making policy in other areas. Here, intellectual property law is one of the worst offenders because it is so myopic and does a particularly poor job of formulating doctrine that accommodates concerns for competition. To the extent there is an imbalance of power between capital and labor, and I believe there is, labor law, employment and tax law are better routes to a solution. Here, antitrust has the more limited goal of facilitating high output in product markets, which also leads to a healthy labor market. Antitrust should also become more aggressive about restraints on labor mobility, including noncompete clauses or anti-poaching agreements. As for climate change, antitrust cannot have a role in setting substantive public standards. However, it can police anticompetitive restraints that limit production or development in relevant areas.

“WHILE WE COULD IMPROVE ANTITRUST POLICY BY JETTISONING ITS ANTI-ENFORCEMENT BIAS, IP LAW COULD PROFIT FROM A STRONGER TILT AGAINST EXCESSIVE ENFORCEMENT.”

Is the relationship between antitrust policy and intellectual property law where it should be?

The struggle between IP and antitrust is over the balance between protection and dissemination. Information technologies have created a stress point here because they tilt the innovation balance strongly in favor of dissemination. Antitrust’s extreme right has not yet caught up with this fact.

Antitrust today is in a better place than intellectual property law is. It sympathizes with concerns about innovation, and is more realistic about remedies that accommodate them. IP law does not repay the favor and often treats competition as the enemy to be conquered. While we could improve antitrust policy by jettisoning its anti-enforcement bias, IP law could profit from a stronger tilt against excessive enforcement. An overly broad interpretation of patents or copyrights can do as much damage as any privately created monopoly. For example, pay-for-delay pharmaceutical settlements should be unlawful per se, with a small allowance for reasonably anticipated litigation costs. Market division settlements such as the one involving 1-800 Contacts earlier in 2021 should be dealt with severely as well. Antitrust should have a strong role in enforcing FRAND licensing systems, provided that market power and anticompetitive effects requirements are met.

One trouble-prone area is information technologies, which includes telecommunications networks, computers, autonomous vehicles, and collateral technologies. For these systems, cooperation is critical for

both development and dissemination. The FRAND system of voluntary commitments to license standard-essential patents to all users at fair, reasonable, and nondiscriminatory terms, has greatly facilitated the development of networks within a competitive environment. The system preserves a full range of direct and indirect network effects that large networks can provide, and limits the opportunities for unilateral anticompetitive behavior. Not all the problems have been worked out, particularly those involving royalties. Nevertheless, progress has been substantial.

“THE TRUMP ADMINISTRATION’S SO-CALLED “NEW MADISON” DOCTRINE, WHICH WOULD FORCE ANTITRUST TRIBUNALS TO STAY OUT OF NETWORK PATENT DISPUTES, MISUNDERSTANDS THIS PROBLEM IN PRACTICALLY EVERY WAY THAT IT CAN BE MISUNDERSTOOD”

The Trump administration’s so-called “New Madison” doctrine, which would force antitrust tribunals to stay out of network patent disputes, misunderstands this problem in practically every way that it can be misunderstood. On one view, this is just a tug of war between Republicans’ commitment to old technology patents and Democrats to information technologies, but the New Madison doctrine extends old technology ideas into new technology markets, where they are seriously counterproductive. The economics literature is clear. In markets where networking is essential, nondominant competitors want to network, but dominant firms want to exclude, capturing portions of the network for themselves. The problem resembles that of the telephone network when the Justice Department engineered the AT&T breakup four decades ago. AT&T resisted interconnection strenuously while nondominant firms needed it. By using antitrust law to force interconnection we were able to facilitate the emergence

of a competitive but unified network. The Antitrust Division should be ashamed and embarrassed about its intervention in the Ninth Circuit's Qualcomm litigation. The Division apparently has a short memory about its own successes.

That does not change the fact that the FRAND system is fundamentally contractual, and antitrust law has no place in simple contract disputes. But when power, exclusion, and higher prices are all present, as they were in the Qualcomm case, then antitrust should have a powerful role. Here, the FTC and the Justice Department need to get on the same page.

What do you think about President Biden's recent Executive Order on promotion of competition?

The Executive Order is a very helpful and positive document as long as readers understand that it is not all about antitrust. Indeed, the Order's only statement about the scope of antitrust is this quotation from the Supreme Court, observing that the Sherman Act "rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions." (Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) (Black, j.))

That states the correct balance. For antitrust, the principal concerns are the classic economic ones of maintaining competitive markets that achieve low prices, high output and quality, and high rates of innovation—but always in an environment conducive to preserving our political and social institutions. In non-antitrust areas, its principal role is to stay out of the way while interdicting anticompetitive practices within its reach. For example, antitrust has no role in setting environmental standards, but it can intervene when firms collude to suppress research in an environmentally sensitive

area. Likewise, antitrust law does not make labor or employment policy directly, but it can intervene when anticompetitive agreements limit wages or worker mobility.

“PRESIDENT BIDEN’S EXECUTIVE ORDER ON COMPETITION STATES THE CORRECT BALANCE. FOR ANTITRUST, THE PRINCIPAL CONCERNS ARE THE CLASSIC ECONOMIC ONES OF MAINTAINING COMPETITIVE MARKETS THAT ACHIEVE LOW PRICES, HIGH OUTPUT AND QUALITY, AND HIGH RATES OF INNOVATION—BUT ALL IN AN ENVIRONMENT CONDUCTIVE TO PRESERVING OUR POLITICAL AND SOCIAL INSTITUTIONS.”

Second, while the Executive Order was touted as a “progressive” document, I do not read it that way. It never speaks of turning the antitrust laws into some alternative tool for regulating the environment, civil rights, or labor. Nor does it suggest that antitrust should abandon economic concerns or break up big digital firms simply because they are too large. To the contrary, antitrust concerns are expressed in the quotation above from the Supreme Court. What the Executive Order does do, however, is urge that considerations for competition be addressed in non-antitrust areas. For example, while “right to repair” is not an antitrust doctrine, it is related to a variety of post-sale restraints on consumers’ use of their own products. Control of these comes from a number of areas, such as patent exhaustion and misuse, fair use of copyrighted software, the Digital Millennium Copyright Act, as well as antitrust.

Third, the Executive Order expresses concern that monopoly power is growing. I agree but am unclear why the Order relied exclusively on evidence about market concentration based on census data. Most of the new literature on this question uses tools of direct

measurement, determining the existence of monopoly power by assessing margins between price and cost. These measurements are more accurate, particularly where market boundaries are uncertain. Ultimately, however, the methodologies reach similar conclusions : since the 1980s the amount of market power in the economy has been growing and most of the benefits have gone to capital. By contrast, the rate of labor participation is much smaller than it used to be. These are macro conclusions and are rarely relevant in any particular antitrust case. However, they can tell us something at the more atmospheric level about whether antitrust enforcement is adequate.

“[BIDEN’S] EXECUTIVE ORDER EXPRESSES CONCERN THAT MONOPOLY POWER IS GROWING. I AGREE BUT AM UNCLEAR WHY THE ORDER RELIED SO HEAVILY ON EVIDENCE ABOUT MARKET CONCENTRATION BASED ON CENSUS DATA.”

The Executive Order would reinvigorate a concept of net neutrality that may result in common carrier obligations or something similar on internet providers. This issue has been a regulatory volleyball for some time, and this very likely represents the fact that Democrats are once again in power. One argument made by some opponents is categorically wrong : the idea that antitrust law is sufficient to intervene if an internet company unilaterally cuts off or discriminates against particular users. In its current state, the antitrust law of refusal to deal is simply not up to this task.

The Order also recommends that the Secretary of Agriculture reboot the Packers and Stockyards Act (PSA). That statute has fallen into disuse, mainly because the courts have incorrectly read into it a competitive effects requirement that is not present in the relevant parts of the statute. The PSA is not an antitrust law. Enforcement, which is mainly by the Department of Agriculture, could enable

smaller producers to obtain leverage against tortious business practices such as systematic under-weighting, by large purchasers. But these rarely present antitrust issues.

How would you compare teaching at Wharton with teaching at the Law School ? Which do you prefer?

I obtained my first joint appointment with an excellent business school fairly late in my career, and it has been both a dream job and a real eye-opener. At Wharton, I teach mainly very smart undergraduates, nearly all of whom are majoring in economics. I also use a modified business school “case study” approach whose readings consist of packets that combine judicial decisions, excerpts from economics journals, and also from history, social science or other sources. I believe this has enriched my law teaching as well. In law, we are often overly wed to case law. All of the leading antitrust casebooks including my own are dominated by appellate judicial decisions with some notes from other disciplines. This is a place where legal education could learn something from the business school approach. On the other side, business students are not accustomed to reading and analyzing judicial decisions; rather, they “read about” them. Legal education should not go that far.

What advice do you have for a young academic now entering the field of antitrust teaching and scholarship?

If you are able, get a PhD. For antitrust teachers, a PhD in economics is an obvious choice, but it is not the only one. Good PhD programs teach a variety of scholarly methodologies, all of which can be valuable, and require students to produce at least one publishable work under supervision. These programs go far beyond what even the better law schools offer. The typical JD graduate, even with a few years of clerking and practice, has relatively little training as a scholar ; this tends to give PhD-holding candidates an advantage at the front end.

I also recommend against an SJD or a PhD in law. One important advantage of PhDs in non-law subjects such as economics, history, philosophy, or social science is that they expose people to alternative disciplines and methodologies, and they will carry this through their careers. It also enriches the study of law.