

University of Missouri School of Law Scholarship Repository

Faculty Publications

2006

Tweaking Antitrust's Business Model

Thom Lambert

University of Missouri School of Law, lambertt@missouri.edu

Follow this and additional works at: <http://scholarship.law.missouri.edu/facpubs>



Part of the [Antitrust and Trade Regulation Commons](#)

Recommended Citation

Thomas A. Lambert, Herbert Hovenkamp's Tweaking Antitrust's Business Model the Antitrust Enterprise: Principle and Execution, 85 Tex. L. Rev. 153 (2006)

This Book Review is brought to you for free and open access by University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Faculty Publications by an authorized administrator of University of Missouri School of Law Scholarship Repository.

Book Review

Tweaking Antitrust's Business Model

THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION. By Herbert Hovenkamp.[†] Cambridge, MA: Harvard University Press, 2005. Pp. 368. \$49.95.

Reviewed by Thomas A. Lambert^{*}

I. Introduction

Not too long ago, economically minded antitrust scholars were a gloomy bunch. In his famous 1978 antitrust critique, whose very title mocked antitrust's incoherence, Robert Bork remarked that "modern antitrust ha[d] so decayed that the policy [was] no longer intellectually respectable,"¹ and he cynically referred to then-prevailing antitrust rules as "an internal tariff against domestic competition and free trade."² About the time Bork's book was published, Richard Posner published *Antitrust Law: An Economic Perspective*.³ Posner's book, whose title indicated the prevalence of noneconomic perspectives on antitrust, similarly complained (albeit less polemically) that "[t]he conventional tools of antitrust analysis ha[d] not stood up well under the pressures of rapid expansion of the role and importance of antitrust enforcement."⁴

My, how times have changed. The years since Bork and Posner published their first editions have witnessed several developments that, from the perspective of economically minded antitrust scholars, have been quite salutary: the composition of the Supreme Court has changed to include more Justices possessing a "sympathetic understanding of the business world";⁵ a robust body of scholarship, produced largely by members of the Chicago School, has persuasively called for antitrust to be both more consumer

[†] Ben V. and Dorothy Willie Professor of Law and History, University of Iowa College of Law.

^{*} Associate Professor of Law, University of Missouri-Columbia; Senior Fellow, Contracting and Organizations Research Institute. Paul Stancil and Joshua Wright provided helpful comments on a draft of this review.

1. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 418 (1st ed. 1978).

2. *Id.* at 7.

3. RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1st ed. 1976).

4. *Id.* at vii.

5. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF*, at x-xi (Free Press ed. 1993) (1978).

focused and more economically rigorous;⁶ the antitrust enforcement agencies have altered their views in accord with this scholarship;⁷ and members of the federal judiciary—including lower court judges—have become more economically sophisticated.⁸ In subsequent editions of their classic antitrust works, both Bork and Posner have lauded these developments. Bork entitled the introduction to his 1993 second edition “The Passing of the Crisis,”⁹ and Posner went so far as to drop his first edition’s subtitle (*An Economic Perspective*) in recognition of the fact that “the other perspectives ha[d] largely fallen away.”¹⁰

But the work is not done. Despite the “passing of the crisis,” Bork acknowledges that “areas for improvement remain,”¹¹ and Posner remarks that the antitrust enterprise, though now based on “economically rational principles,” could still use some tweaking.¹² He observes that “[t]he chief worry at present is not doctrine or direction, but implementation.”¹³

Into this discussion enters renowned antitrust scholar Herbert Hovenkamp, with his wonderful new book, *The Antitrust Enterprise: Principle and Execution (The Antitrust Enterprise)*. Like Bork and Posner, Hovenkamp rejoices that antitrust law has (generally) shed its Warren Court era focus on protecting competitors rather than competition and has properly defined competition in a manner that focuses not on the number of firms in a market but on the degree to which the market generates low prices, high output, and innovation.¹⁴ Rather than criticizing contemporary antitrust’s fundamental objectives, Hovenkamp sets out to tackle Posner’s “chief worry” about antitrust implementation, proposing a number of substantive and procedural reforms that would make the antitrust enterprise work better.

6. See *id.* at xi–xiii (discussing the Chicago School’s influence).

7. See *id.* at 438–39 (“Much of the improvement in antitrust policy over the past decade and a half has come not from the courts but from the enforcement agencies.”); Richard A. Posner, *Introduction to Baxter Symposium*, 51 STAN. L. REV. 1007, 1007–09 (1999) (explaining how the Department of Justice’s enforcement philosophy changed in the 1980s under the leadership of William Baxter, who embraced Chicago School theories and endorsed an economic analysis of antitrust law); Richard Schmalensee, *Bill Baxter in the Antitrust Arena: An Economist’s Appreciation*, 51 STAN. L. REV. 1317, 1323–30 (1999) (lauding William Baxter’s focus on economics while he ran the Department of Justice Antitrust Division).

8. See HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 7 (2005) (discussing the increased economic sophistication of the federal judiciary).

9. BORK, *supra* note 5, at ix.

10. RICHARD A. POSNER, *ANTITRUST LAW*, at vii (2d ed. 2001).

11. BORK, *supra* note 5, at xiv.

12. POSNER, *supra* note 10, at viii.

13. *Id.*

14. HOVENKAMP, *supra* note 8, at 2. Hovenkamp contends that:

Antitrust is a defensible enterprise only if intervention into the market is economically justified. That entails that the market be “bigger” in some sense as a result of intervention—whether “bigger” is measured by higher output, improved quality, lower prices, or more innovation. Furthermore, the increase must be enough to justify the high cost of operating the antitrust machinery.

Id. at 10.

This Review evaluates Hovenkamp's ideas for tweaking antitrust's business model, concluding that most of his proposed changes are sound, that a few might be slightly revised to enhance their effectiveness or administrability, and that a couple are downright unwise. Because Hovenkamp's implementation-focused discussion necessarily covers a number of specific antitrust topics rather than hammering a single general theme, this Review addresses his prescriptions for numerous antitrust doctrines. Part II summarizes *The Antitrust Enterprise*, offering a number of "shorter" criticisms of Hovenkamp's arguments and proposals. Part III then provides longer, more detailed critiques of two of Hovenkamp's suggestions: his proposal that the Supreme Court abandon the indirect purchaser rule and his proposed test for identifying exclusionary conduct. Part IV concludes the Review.

II. Summary and Analysis

Hovenkamp's book is divided into three parts: Part I examines "the institutional enterprise of antitrust" at a relatively high level, considering what the body of law is trying to accomplish and how its procedures should be tailored to achieve that end. Part II examines the primary substantive antitrust doctrines as they have been developed in "traditional" markets. Part III then turns to the role of antitrust in markets involving regulated industries, heavy intellectual property components, and network effects.

A. Part I: Possibilities and Limits

In examining the institutional enterprise of antitrust, Hovenkamp considers antitrust's "core economics, its disconcerting special interest origins and divergent schools, and the institutional scheme we have created for enforcing the antitrust laws."¹⁵

1. *Antitrust's Core Economics, Origins, and Divergent Schools.*—While the primary focus of Hovenkamp's book is antitrust implementation, he does, as the book's subtitle suggests, devote some attention to underlying principles. His consideration of antitrust's core economics, origins, and divergent schools constitutes most of the "principle" part of the book. Because antitrust's ultimate target is the negative economic effects stemming from market power, Hovenkamp begins by considering exactly what those effects are.¹⁶ He thus explains the familiar monopoly pricing model,¹⁷ which

15. *Id.* at 11.

16. For the uninitiated, Hovenkamp's lucid discussion of basic antitrust economics will prove quite useful. While Hovenkamp's explanations will be familiar to readers versed in antitrust economics, even seasoned antitrust scholars may be enlightened by his account of the monopoly pricing model's historical origins, *id.* at 15–16, and his discussion of the limits of Oliver Williamson's welfare trade-off model, *id.* at 28–29.

17. The monopoly pricing model is reproduced as Figure 1 in Part III, *infra* p. 189.

demonstrates how market power can generate both a transfer of surplus from consumers to producers and a deadweight social loss,¹⁸ and the welfare trade-off model,¹⁹ which demonstrates the effects of practices that simultaneously increase market power and create productive efficiencies.²⁰ Antitrust, however, is ultimately law, and Hovenkamp therefore shifts quickly to questions of legal interpretation. In particular, he considers (1) the extent to which courts should rely on legislative history in interpreting the remarkably sparse and vague antitrust statutes; (2) the ultimate criterion by which challenged practices should be evaluated; and (3) the degree to which courts should intervene in private markets in order to protect competition.

The legislative history of the antitrust laws is voluminous, and one could likely find some support for just about any purported “congressional intent.”²¹ Bork, for example, once attempted to cobble together snippets of legislative history to support his view that the antitrust laws are ultimately concerned with ensuring high output, low prices, and maximum innovation for consumers.²² Robert Lande has argued that legislative history shows that the antitrust laws were principally aimed at preventing transfers of surplus from consumers to business firms.²³ Hovenkamp rejects both of these readings of the legislative history.²⁴ The better view, he contends, is that Congress was seeking to protect small businesses from larger, more efficient competitors.²⁵

But this does not mean, Hovenkamp says, that courts should interpret the antitrust laws to protect small businesses from larger, more efficient firms. He offers three reasons for adhering to the consumer welfare principle in interpreting the antitrust laws, despite their “discomfiting legislative history.” First is the language of the statutes themselves. Hovenkamp

18. In the monopoly pricing model, wealth is transferred from consumers to producers as consumers pay higher prices for the goods or services at issue, and social utility is reduced (i.e., there is a “deadweight loss”) as price-sensitive consumers switch from the monopolized product to less desirable substitutes. HOVENKAMP, *supra* note 8, at 18–20.

19. The welfare trade-off model is reproduced as Figure 2 in Part III, *infra* p. 190.

20. HOVENKAMP, *supra* note 8, at 15–30. In the welfare trade-off model, a business practice (usually a collaboration or unilateral exclusionary practice) transforms a competitive market to monopoly but simultaneously produces cost savings for the producer. Generally speaking, the collaboration will be economically efficient if the productive/distributional efficiencies outweigh the allocative inefficiencies resulting from the participants’ enhanced market power. Unfortunately, Hovenkamp notes, courts are ill-equipped to balance these various effects. *Id.* at 30.

21. *Cf.* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., dissenting) (disparaging the indeterminacy of legislative history and noting Judge Leventhal’s famous description of the use of legislative history “as the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends”).

22. Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 11–30 (1966).

23. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 68 (1982).

24. HOVENKAMP, *supra* note 8, at 40–42.

25. *Id.* at 42.

observes that “Congress picked economic words [e.g., ‘competition’ and ‘monopoly’] and chose not to tie its own idiosyncratic meanings to them,” thereby indicating that the law should evolve along with prevailing economic theory.²⁶ Second, “the very spareness of the statutes” suggests that Congress intended the courts to create a “common law” of antitrust, and just as economics has dictated the formulation of tort and contract doctrines, it should similarly do so with antitrust.²⁷ Finally, Hovenkamp argues, administrability concerns call for jettisoning the protectionist legislative history in favor of an interpretive approach focused on consumer welfare. If the antitrust laws are a “small business welfare prescription,” courts are “completely out to sea.”²⁸ By contrast, a consumer welfare criterion provides antitrust courts with relatively definite guidance.

Once courts have freed antitrust from its troubling legislative history and settled on an ultimate criterion for evaluating practices challenged as anticompetitive, they must determine the extent to which they should intervene in markets in an attempt to control antitrust violations. On this point, scholars have diverged. Those identified with the Chicago School, dedicated to the twin propositions that markets are relatively simple and robust and that government is not very good at improving on market outcomes, have been relatively noninterventionist—generally advocating that government stay its hand except in cases of blatantly anticompetitive practices like price-fixing, market division, or mergers to monopoly.²⁹ While Hovenkamp has some kind words for the Chicago School—for example, he agrees that it demolished the leverage theory of tying³⁰ and helpfully drew attention to the degree to which new entry would undermine many attempts at monopolization³¹—he ultimately aligns himself with the competing Harvard School, which he says is “modestly more interventionist” than the Chicago School.³² As Hovenkamp describes it, the Harvard School developed out of Cournot oligopoly theory,³³ evolved substantially in the late 1970s,³⁴ and became “the position most followed by the federal courts today.”³⁵ Hovenkamp distances himself from “post-Chicago” antitrust, which starts with the assumption that markets are messier and more complex than the Chicago School imagined and attempts to model strategic, anticompetitive

26. *Id.* at 43.

27. *Id.* at 44.

28. *Id.*

29. *Id.* at 32–35.

30. *Id.* at 34; *see infra* note 171 (discussing Hovenkamp’s treatment of tying).

31. HOVENKAMP, *supra* note 8, at 32.

32. *Id.* at 38.

33. *Id.* at 35.

34. *Id.* at 37.

35. *Id.*

behavior using game theory.³⁶ While Hovenkamp credits post-Chicago antitrust for recognizing “that markets are more varied and complex than the orthodox Chicago School was willing to admit,” he ultimately concludes that “the complexity of post-Chicago theories would force the federal courts to confront problems that they are not capable of solving.”³⁷

One might quibble here with Hovenkamp’s treatment of the Chicago School. He confines the Chicago School to the early “polemical works” of its adherents,³⁸ even though a prominent adherent, Judge Posner, has explicitly distanced himself from some of those polemical works.³⁹ By contrast, he affords the Harvard School great freedom to evolve. Indeed, he acknowledges that the Harvard School all but abandoned its structuralist roots and “underwent a significant transformation in the late 1970s” into something that looks much more, well, Chicagoan.⁴⁰ It is not entirely clear why the Harvard School is permitted to evolve while the Chicago School is not, but there is little point in arguing over bragging rights. The two originally distinct schools have converged significantly,⁴¹ and, as Hovenkamp repeatedly acknowledges, prevailing antitrust doctrine is coated with Chicago’s fingerprints. Moreover, the noninterventionist “[p]rinciples of [a]ntitrust [a]dministration” Hovenkamp advocates in his discussion of the design of antitrust rules suggest that Hovenkamp is more of a Chicagoan than he might care to admit.⁴²

2. *Antitrust’s Enforcement Scheme.*—Having briefly outlined his views on antitrust’s underlying principles, Hovenkamp quickly shifts his focus to

36. *Id.* at 38–39 (describing post-Chicago antitrust); e.g., ROGER D. BLAIR & DAVID KASERMAN, LAW AND ECONOMICS OF VERTICAL INTEGRATION AND CONTROL 5 (1983); Michael Katz, *Vertical Contractual Relations*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION 655 (Richard Schmalensee & Robert Willig eds., 1989); Martin K. Perry, *Vertical Integration: Determinants and Effects*, in 1 HANDBOOK OF INDUSTRIAL ORGANIZATION, *supra*, at 183; Michael A. Salinger, *Vertical Mergers and Market Foreclosure*, 103 Q.J. ECON. 345 (1988); Michael Waterson, *Vertical Integration, Variable Proportions and Oligopoly*, 92 ECON. J. 129 (1982).

37. HOVENKAMP, *supra* note 8, at 39.

38. *Id.* at 37.

39. See, e.g., POSNER, *supra* note 10, at 194 (“Some economists believe that it is virtually impossible for a firm or group of firms ever to exclude competitors or potential competitors from the market, other than by buying them out or paying them off in some other fashion, unless they have lower costs or obtain the aid of the government in the form of a grant of a patent or other exclusive right. I do not agree.”).

40. HOVENKAMP, *supra* note 8, at 37.

41. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 933–44 (1979) (describing “the growing convergence of the two schools” (typeface altered)).

42. HOVENKAMP, *supra* note 8, at 50–56. The principles are: “not every anticompetitive practice can be condemned”; “intent evidence should be used sparingly”; “whether intervention is justified may depend on the remedy”; “an antitrust rule that cannot be administered effectively is worse than no rule at all”; and “administrative and compliance costs count.” *Id.* at 50–54 (typeface altered). As Hovenkamp admits, “[T]he 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.” *Id.* at 48.

execution by considering antitrust's enforcement scheme. He focuses primarily on private enforcement, defending private enforcement actions and advancing some proposals for enhancing their effectiveness.

a. Defending Private Enforcement Actions.—Private enforcement actions, particularly those initiated by competitors of the defendant, can be troubling. Automatic trebling of damages invites marginal, frivolous lawsuits,⁴³ and the prospect of treble damages actions can lead firms to forego practices that are efficient on the whole but might be mischaracterized in litigation as anticompetitive.⁴⁴ Competitor lawsuits are especially prone to abuse because competitors are injured both by a defendant's anticompetitive conduct and by its business practices that reduce its costs, improve the quality of its products and services, or both.⁴⁵ For these reasons, some have argued for the curtailment of private enforcement actions, especially those initiated by a defendant's competitors.⁴⁶

Hovenkamp, however, defends both private enforcement in general and competitor actions in particular. In what he labels "the delicate case for private enforcement,"⁴⁷ he asserts two arguments against a system of purely public antitrust enforcement. First, such a system would require "much larger enforcement agencies than we currently have."⁴⁸ Second, purely public enforcement is undesirable because "government enforcement agencies . . . tend to place most of their enforcement resources into prosecuting a relatively small range of violations."⁴⁹ Hovenkamp observes that the enforcement agencies, which expend most of their efforts on evaluating and prosecuting horizontal mergers and various forms of horizontal collusion, virtually ignore the price discrimination provisions of the Robinson-Patman Act and rarely challenge vertical practices or,

43. *Id.* at 57.

44. See Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 266–67 (2003) (observing that vague standards for legality and the possibility of massive treble damages awards "cannot help but chill investments to create product offerings with a sufficient quality or cost advantage over preexisting market options").

45. HOVENKAMP, *supra* note 8, at 57, 70.

46. See, e.g., Edward A. Snyder & Thomas E. Kauper, *Misuse of the Antitrust Laws: The Competitor Plaintiff*, 90 MICH. L. REV. 551, 563–67 (1991) (identifying the core conditions necessary for anticompetitive exclusion and recommending that courts use these conditions to exclude frivolous suits filed by competitor-plaintiffs); cf. Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 331–33 (1981) (contending that only consumers—not competitors—should have the right to challenge predatory business practices); William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 MICH. L. REV. 2151, 2162–65 (1990) (suggesting that businesses should have only a limited right to sue competitors for exclusionary practices).

47. HOVENKAMP, *supra* note 8, at 58 (typeface altered).

48. *Id.* at 59–60.

49. *Id.* at 60.

*Microsoft*⁵⁰ notwithstanding, unilateral practices by dominant firms.⁵¹ With respect to competitor actions in particular, Hovenkamp maintains that such actions should be retained because competitors, generally the immediate victims of anticompetitive conduct, are “early detectors” of exclusionary conduct⁵² and are thus well-positioned to prosecute antitrust violations “before they cause significant consumer harm.”⁵³

Hovenkamp’s defense of private enforcement in general, and competitor lawsuits in particular, is one of the weakest parts of the book. Neither of his arguments in favor of retaining private enforcement actions is convincing. As Hovenkamp concedes, the bigger budgets required for a purely public enforcement system could be attained by allowing the enforcement agencies to finance their operations via fines or surrogate damage recoveries from defendants.⁵⁴ And the fact that enforcement agencies focus disproportionately on horizontal mergers and collusion is entirely proper: competition-threatening mergers and horizontal collusion are precisely the practices that are most likely to damage competition and injure consumers, “where there is a strong consensus finding competitive danger.”⁵⁵ Indeed, Hovenkamp’s concern that the enforcement agencies do not vigorously enforce the Robinson–Patman Act or pursue vertical practices is ironic given that he later argues for Robinson–Patman’s repeal⁵⁶ and insists that the vast majority of vertical practices are efficient.⁵⁷ Perhaps a purely public enforcement system would generate fewer monopolization actions, but, as Hovenkamp repeatedly acknowledges, the law generally *should* be more tolerant of unilateral practices than concerted behavior,⁵⁸ and the enforcement agencies have certainly indicated a willingness to pursue what they perceive to be monopolization.⁵⁹ Finally, Hovenkamp himself notes a key reason for limiting private enforcement actions: the prevalence of jury trials in such lawsuits.⁶⁰ Hovenkamp is rightfully adamant that juries are ill-equipped to make the fact determinations required to decide complex

50. *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000), *rev’d in part*, 253 F.3d 34 (D.C. Cir. 2001).

51. HOVENKAMP, *supra* note 8, at 60. The government’s monopolization action against Microsoft demonstrates that the enforcement agencies do sometimes challenge unilateral practices by dominant firms. *See Microsoft*, 87 F. Supp. 2d 30.

52. *See* HOVENKAMP, *supra* note 8, at 68.

53. *Id.* at 70.

54. *Id.* at 60.

55. *Id.*

56. *Id.* at 191–98.

57. *Id.* at 181–90, 198–206.

58. *Id.* at 108–11.

59. *See, e.g.*, *United States v. Dentsply Int’l, Inc.*, 399 F.3d 181, 184 (3d Cir. 2005) (discussing government action alleging monopolization based on exclusive dealing arrangements by artificial teeth manufacturer with 75%–80% market share on a revenue basis); *United States v. Microsoft Corp.*, 253 F.3d 34, 54 (D.C. Cir. 2001) (discussing government action challenging allegedly exclusionary practices of a computer operating system manufacturer with 80%–95% market share).

60. HOVENKAMP, *supra* note 8, at 61.

antitrust cases.⁶¹ While most public antitrust actions (except for criminal actions) do not involve juries, the vast majority of private actions do. Hence, Hovenkamp's "delicate case for private enforcement" is delicate indeed.

Hovenkamp's "early warning" argument for retaining private competitor lawsuits is similarly unconvincing. There is no reason that the comparative advantages of competitors—the speed with which they perceive anticompetitive conduct and their knowledge of the market at issue⁶²—cannot be harnessed in a purely public enforcement scheme. Even if treble damages were unavailable, competitors have incentives to ensure that their rivals are punished for anticompetitive practices, making it likely that they would report misbehaving rivals to the public enforcement agencies and cooperate in prosecuting the violators.⁶³ To the extent competitors were not adequately motivated to report violations and provide the information necessary for successful prosecution, they could be so motivated if the enforcement scheme were modified to reward reporters or cooperators with a bounty, much the way the False Claims Act rewards *qui tam* relators for reporting fraud against the government.⁶⁴ In short, it is entirely possible to structure a purely public enforcement scheme that would encourage reporting and cooperation by "early detector" competitors, while giving the enforcement agencies the power to stop lawsuits that are frivolous, likely to deter procompetitive practices, or both. Recent successful competitor lawsuits that have resulted in consumer-unfriendly precedents suggest that such an enforcement scheme would represent a substantial improvement on the status quo.⁶⁵

Finally, Hovenkamp's position on private enforcement fails to acknowledge a possible "middle ground" position in which private actions pursuing horizontal collusion are permitted, but actions challenging vertical

61. See, e.g., *id.* at 80 ("Not only will the jury be less technically competent [than the judge]; it will also be less skilled in listening to experts, and more likely to be persuaded by things that are irrelevant to the issue.").

62. See *id.* at 69 (noting that "[competitors'] losses occur as soon as the predator cuts its price" and "[c]ompetitors are likely to be familiar with the dominant firm's technology and costs, perhaps because their own technology and costs are similar").

63. Since competitors generally do not stand in a vertical relationship to their rivals (i.e., do not purchase from or sell to their rivals), they have no incentive to hold their punches in order to protect the business relationship. Assuming that their expected costs of reporting and cooperation are less than the expected benefits of seeing their rivals punished, competitors should provide enforcement authorities with the "early warning" benefits they would provide in a private lawsuit.

64. See 31 U.S.C. § 3730(d)(1) (2000) (providing for an award to a *qui tam* relator pursuing an action under the False Claims Act, 31 U.S.C. §§ 3729–3731 (2000)).

65. See, e.g., *LePage's Inc. v. 3M*, 324 F.3d 141, 169 (3d Cir. 2003) (en banc) (affirming that 3M's strategies that benefited consumers but disadvantaged LePage's, an admittedly less efficient competitor, were in violation of § 2 of the Sherman Act, 15 U.S.C. § 2 (2000)); *Conwood Co. v. U.S. Tobacco Co.*, 290 F.3d 768, 795 (6th Cir. 2002) (finding that the defendant's business tactics "rose above isolated tortious activity and [were] exclusionary without a legitimate business justification"). For criticisms of these cases, see HOVENKAMP, *supra* note 8, at 81–82, 89–91 (criticizing *Conwood*), and Thomas A. Lambert, *Evaluating Bundled Discounts*, 89 MINN. L. REV. 1688, 1718–26 (2005) (criticizing *LePage's*).

and exclusionary practices are relegated to public enforcement. Courts have developed fairly sophisticated tools for identifying anticompetitive horizontal restraints of trade,⁶⁶ and they have formulated procedural devices (such as the *Matsushita*⁶⁷ summary judgment standard) that facilitate quick disposal of meritless lawsuits.⁶⁸ In addition, the parties most likely to challenge horizontal restraints—purchasers who pay a higher price or suffer from reduced innovation because of the restraint—are likely to face the “right” set of incentives: challenge the practice if it is output-reducing but not if it enhances efficiency. By contrast, courts are not very adept at recognizing when vertical and exclusionary practices are procompetitive,⁶⁹ and those practices are much more likely to be challenged by plaintiffs with a perverse incentive to challenge a competitor’s practice if it affords the competitor a cost advantage. In short, the antitrust challenges in which courts are most likely to make “bad” decisions that chill procompetitive conduct are those involving vertical and exclusionary practices. Accordingly, an optimal private enforcement policy might seek to posit two screening devices for such challenges: one at the enforcement agency level (prosecutorial discretion) and another at the adjudication level. Hovenkamp’s all-or-nothing discussion of private enforcement fails to acknowledge this middle ground possibility.⁷⁰

b. Improving Private Enforcement Actions.—While he is vigorous in his defense of private enforcement actions, Hovenkamp is not satisfied with the status quo. He proposes several adjustments to the scheme of private remedies—most notably, that treble damages be reserved for clandestine offenses that are clearly anticompetitive and that the indirect

66. See generally HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 5.6, at 253–68 (3d ed. 2005) (describing the analytical tools courts employ to identify when horizontal restraints are anticompetitive).

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

68. See, e.g., *id.* at 588 (“To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently.” (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 764 (1984))).

69. See, e.g., HOVENKAMP, *supra* note 8, at 181–206 (describing courts’ failure to identify procompetitive vertical practices); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 73, 73 (2005) (observing that while “[e]conomics and experience provide a strong presumption that certain coordinated practices are harmful,” leading to relatively standard evaluative approaches, “the welfare effects of unilateral practices are inherently difficult to assess,” resulting in significant variation in courts’ analytical approaches); William J. Michael, *Holmes and the Bald Man: Why Rule of Reason Should Be the Standard in Sherman Act Section 2 Cases*, 4 PIERCE L. REV. 359, 359–62 (2006) (describing courts’ inability to develop workable tools for evaluating unilateral exclusionary practices).

70. Of course, this could be due to the fact that the middle ground position would require amending the antitrust statutes, but several of Hovenkamp’s other proposals would similarly require legislative intervention.

purchaser rule be abolished.⁷¹ I defer analysis of the latter suggestion to subpart III(A) of this Review.⁷²

The trebling of antitrust damages is designed to account for the fact that many violations (in theory, one-third) are not successfully prosecuted and punished.⁷³ Trebling thus makes sense, Hovenkamp concedes, for challenged practices that are likely to be concealed and are unquestionably worthy of punishment.⁷⁴ By contrast, “Treble damages make no sense at all when they are assessed for public acts and reasonable minds can differ about substantive illegality”;⁷⁵ in such cases, damage-trebling likely deters practices that are procompetitive on the whole but difficult to characterize and might, if challenged, be deemed to violate some provision of the antitrust laws.⁷⁶ Hovenkamp therefore suggests that trebling be limited to actions involving practices, such as naked price-fixing, that are generally concealed and are unquestionably output reducing.⁷⁷ For public, potentially efficiency-enhancing practices like “mergers, most joint ventures, many exclusionary practices, and nearly all vertical contract practices,” the remedy should be single damages.⁷⁸

Hovenkamp's proposal resembles, but is probably superior to, Judge Posner's proposal that damages multipliers be assessed on a case-by-case basis according to the difficulty of detecting the offense at issue.⁷⁹ While Posner's approach would provide more precision and could correct the underdeterrence resulting from the fact that many concealed violations have less than a one-in-three chance of successful detection and prosecution, it would be more difficult to administer and would inevitably spark drawn out, wasteful disputes over the probability of concealment. Hovenkamp's approach would be much cleaner: practices could fall only into the single-

71. In addition, Hovenkamp proposes (quite sensibly) that the burden of proving an offense be tailored to the severity of the remedy (i.e., the more severe the remedy, the greater the proof burden for the plaintiff), HOVENKAMP, *supra* note 8, at 65–66, and that private plaintiffs be denied structural remedies (e.g., divestiture, break-up, etc.), *id.* at 63. He also offers a number of sensible recommendations for improving fact-finding in cases involving expert testimony, which would include most private antitrust suits. In particular, he recommends (1) that judges scrupulously apply the admissibility standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), HOVENKAMP, *supra* note 8, at 80–81; (2) that courts treat factual disputes over technical expert theories as though they were questions of law, *id.* at 84–85; and (3) that judges make more liberal use of neutral experts, *id.* at 89–90.

72. See *infra* notes 229–58 and accompanying text.

73. HOVENKAMP, *supra* note 8, at 66.

74. *Id.*

75. *Id.* at 67.

76. *Id.*

77. *Id.*

78. *Id.*

79. See POSNER, *supra* note 10, at 272. Posner proposed that the jury “be asked to assess (1) compensatory damages and (2) the probability of concealment separately, with the judge assigned to make the ultimate damages calculation by dividing (1) by (2).” *Id.*

damages bin or the treble-damages bin.⁸⁰ Thus, Hovenkamp's proposal offers much of the benefit of Posner's suggested approach but at a substantially lower administrative cost.

B. Part II: Traditional Antitrust Rules

The second part of *The Antitrust Enterprise* analyzes the substantive rules of antitrust dealing with restraints of trade, exclusionary practices, vertical practices, and business mergers. While much of the ground Hovenkamp covers is fairly well trodden, a number of his reform suggestions are novel and would substantially improve antitrust's substance. One of the suggestions—his proposed test for exclusionary conduct—is the subject of an extended criticism in subpart III(B).⁸¹

1. *Restraints of Trade.*—Hovenkamp's discussion of restraints of trade⁸² proposes helpful reforms for both the per se rule and the rule of reason. In addition, Hovenkamp suggests that courts alter the way they determine whether there has been the sort of "agreement" necessary to make out an illegal restraint of trade under § 1 of the Sherman Act.

a. *Improving the Per Se Rule.*—Hovenkamp offers two helpful suggestions for improving the application of the per se rule:⁸³ first, he proposes that the rule be restricted to "naked" restraints and provides a workable test for identifying such restraints; second, he suggests that courts alter the stare decisis effect they afford per se rules.⁸⁴

80. Of course, policymakers would have to determine the boundaries of the two bins, but that administrative difficulty does not seem too burdensome.

81. See *infra* notes 259–93 and accompanying text.

82. One way firms create market power is by agreeing to "restrain trade"—that is, to refrain from engaging in certain transactions on particular terms, say, at a price below some fixed level (price-fixing) or within some geographic region (market division). To combat market power created by agreement, § 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1 (2000).

83. The "per se rule" condemns automatically those restraints of trade that are virtually always unreasonable (i.e., output-reducing). While the language of § 1 condemns "every" concerted restraint of trade, *see id.*, the Supreme Court realized early on that § 1 cannot mean what it literally says because all commercial contracts restrain trade. *See Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence."). Accordingly, the Court long ago adopted the rule that only "unreasonable" restraints of trade are prohibited. *See Standard Oil Co. v. United States*, 221 U.S. 1, 59–62 (1911).

84. In addition to these two reforms, Hovenkamp calls on courts to characterize per se conduct early in litigation. Because the entire point of the per se rule is to minimize administrative costs, it is important that the process of characterizing a restraint be less costly than a full rule of reason analysis. To ensure that plaintiffs do not unnecessarily prepare costly rule of reason cases "just to be safe," Hovenkamp sensibly proposes the following:

A plaintiff who believes that it has a good per se case should be able to identify the facts it needs for per se condemnation and obtain judicial approval to proceed to discovery of those facts. . . . [I]f the per se record is inconclusive, then further discovery under the rule of reason will be necessary.

i. Identifying "Naked" Restraints.—Courts and commentators often remark that the per se rule applies to particular behaviors (e.g., price-fixing, market division, or bid-rigging)⁸⁵ and that it is not properly applied to competition-limiting agreements that are included in otherwise efficient joint ventures.⁸⁶ Both remarks, Hovenkamp says, are troubling. Automatically applying the per se rule to particular behaviors like price-fixing is improper because it is easy to conceive of instances of the suspect behavior that should not be per se illegal.⁸⁷ Many joint ventures, for example, include literal agreements to fix prices or divide markets, yet they are not the type of agreements for which per se treatment is appropriate.⁸⁸ Automatically withholding per se treatment from competition-limiting agreements that are included in otherwise efficient joint ventures is inappropriate because many such restraints are not essential to the joint venture's effectiveness.⁸⁹ Hovenkamp argues that both errors could be avoided by reserving per se treatment for "naked" restraints such as price-fixing or market division, which are restraints that "[are] not accompanied by any significant integration of production and [whose] profitability depends on power over price."⁹⁰

Antitrust would benefit tremendously from courts' express adoption of Hovenkamp's test. Literal price-fixing agreements that are necessary for efficient ventures would be protected from automatic illegality, and courts could easily parse joint venture agreements to retain the restraints that enhance efficiency while suppressing those that are patently anticompetitive. Moreover, embracing the test would lead courts to abandon their approach of applying the per se rule to clearly ancillary vertical practices, such as tying and resale price maintenance.⁹¹

HOVENKAMP, *supra* note 8, at 116.

85. *See, e.g.*, *Blue Cross & Blue Shield United of Wis. v. Marshfield Clinic*, 152 F.3d 588, 591 (7th Cir. 1998) (stating that "divisions of markets are per se illegal, just like price-fixing agreements"); *United States v. A. Lanoy Alston, D.M.D., P.C.*, 974 F.2d 1206, 1210 (9th Cir. 1992) (approving a jury instruction stating, "Under the Sherman Act, price fixing is per se illegal. . . . [I]t does not matter why the fees were fixed or whether they were too high or low; reasonable or unreasonable; fair or unfair").

86. *See, e.g.*, *Augusta News Co. v. Hudson News Co.*, 269 F.3d 41, 48 (1st Cir. 2001) (defining "naked" agreements, to which the per se rule is applicable, as "those that are not part of a larger pro-competitive joint venture"); *Paycom Billing Svcs. v. MasterCard Int'l Inc.*, No. CIV03CV6150DGT, 2005 WL 711658, at *3 (E.D.N.Y. Mar. 29, 2005) ("Because MasterCard is organized as a joint venture, its policies must be analyzed under the rule of reason.").

87. HOVENKAMP, *supra* note 8, at 115.

88. *See, e.g.*, *Broad. Music, Inc. v. CBS*, 441 U.S. 1 (1979) (approving an efficient blanket licensing arrangement that required competitors to agree on price).

89. *See, e.g.*, *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (condemning a naked output restriction that was adopted as part of a larger, efficiency-enhancing venture).

90. HOVENKAMP, *supra* note 8, at 125.

91. *See infra* notes 164–71 and accompanying text.

ii. *Rethinking the Role of Stare Decisis.*—In the past, the Supreme Court overused the per se rule, applying it to practices that we now understand to be efficiency enhancing.⁹² Because the Supreme Court has warned the lower courts not to ignore its precedents in anticipation that it will overrule its own decisions,⁹³ but reviews very few antitrust decisions,⁹⁴ these bad per se precedents tend to languish. Hovenkamp observes that the rule of stare decisis exacerbates this problem, for when the Court finally does have occasion to reject earlier decisions wrongly applying the per se rule, it is hindered by stare decisis concerns.⁹⁵ Moreover, the Court's use of stare decisis is irrationally asymmetric: when, after conducting numerous rule of reason analyses of a challenged practice, courts determine that the practice deserves per se treatment, stare decisis is not a factor.⁹⁶ Because of this asymmetry, "Stare decisis has effectively created a ratchet for the per se rule, permitting courts to move in one direction but not the other."⁹⁷

The solution to this problem, Hovenkamp wisely argues, is to afford stare decisis effect to the "method of analyzing antitrust restraints" (i.e., the practice of applying the rule of reason to challenged restraints unless convinced, based upon substantial experience, that the sort of restraint at issue is output reducing), and not to judgments regarding particular practices.⁹⁸ Such an approach would provide the stability stare decisis aims to ensure, while permitting antitrust law to improve as courts improve their understanding of various business practices. In particular, the rule would permit the Supreme Court to jettison its outmoded per se rules against joint venture ancillary market division agreements, tying arrangements, and minimum resale price maintenance.⁹⁹

92. See, e.g., *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408–09 (1911) (holding that vertical resale price maintenance is per se illegal); see also *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 15–18 (1984) (reiterating per se rule against tying).

93. See *Agostini v. Felton*, 521 U.S. 203, 237 (1997) ("We reaffirm that '[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989))).

94. See HOVENKAMP, *supra* note 8, at 6 (discussing the decline in Supreme Court review of antitrust decisions).

95. *Id.* at 118. In *Jefferson Parish*, for example, five Justices invoked stare decisis to uphold the per se rule against tying. *Jefferson Parish*, 466 U.S. at 9–10 ("It is far too late in the history of our antitrust jurisprudence to question the proposition that certain tying arrangements pose an unacceptable risk of stifling competition and therefore are unreasonable '*per se*.'").

96. HOVENKAMP, *supra* note 8, at 118; see, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 433 (1990) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable." (quotation marks omitted) (quoting *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 344 (1982))).

97. HOVENKAMP, *supra* note 8, at 118 (typeface altered).

98. *Id.* at 120–21 (typeface altered).

99. *Id.* at 121–23. Section 11(B)(3) explains why some vertical practices should not be subject to a per se rule. See *infra* notes 164–71 and accompanying text.

b. Focusing and Structuring the Rule of Reason.—While the per se rule figures prominently in antitrust analysis, courts evaluate most restraints of trade under the rule of reason, which was most famously articulated by Justice Brandeis in *Chicago Board of Trade*:

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable.¹⁰⁰

This version of the rule of reason, Hovenkamp contends, “created one of the most costly procedures in antitrust practice.”¹⁰¹ Because the Brandeis rule “never defines what it is that courts are supposed to look for,” it has led courts to “engage[] in unfocused, wide-ranging expeditions into practically everything about the business of large firms in order to determine whether a challenged practice was unlawful.”¹⁰²

In what is perhaps the most helpful section of his book, Hovenkamp attempts to focus and structure the rule of reason. First, he states precisely what courts should look for when conducting a rule of reason analysis: they “must determine whether a particular practice reduces marketwide output (measured by quantity or quality) and thus leads to higher prices or inferior products.”¹⁰³ To assist courts in answering this outcome-determinative question, Hovenkamp proposes the following “sequence of questions and proof”:¹⁰⁴

1. The court should begin by asking whether the practice at issue arguably threatens to either reduce output or raise price. If not, the challenge should be dismissed immediately.¹⁰⁵
2. If it is arguable that the practice at issue could raise price or reduce output, then the court should ask whether the challenged practice is naked (rational only if the participants have market power) or ancillary to an arrangement that is itself plausibly efficient. If the practice is naked, it is illegal; otherwise, further analysis is necessary.¹⁰⁶

100. *Chi. Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

101. HOVENKAMP, *supra* note 8, at 105.

102. *Id.*

103. *Id.* at 105–06.

104. *Id.* at 106.

105. *Id.*

106. *Id.* at 106–07.

3. At this point, the court should examine the market power held by the parties to the challenged restraint.¹⁰⁷ If this analysis suggests that the exercise of market power is not plausible, the challenge should be dismissed.¹⁰⁸
4. If the exercise of market power is plausible, the court should ask whether there is persuasive evidence that the challenged practice reduces participants' costs or improves the quality of their products or services. Absent such evidence, the practice should be declared illegal.¹⁰⁹
5. If substantial efficiencies result from the practice, the court should ask whether those efficiencies could be achieved using reasonably available alternatives posing less danger to competition. If so, the practice should be declared illegal.¹¹⁰
6. Finally, if no less restrictive alternatives are available, the court should balance the allocative inefficiencies threatened by the practice against the productive or distributional efficiencies it offers.¹¹¹ In cases of equipoise, courts should fall back on the presumption that "free contracting produces beneficial results" and should reject the plaintiff's challenge.¹¹²

A key question raised by this structured rule of reason is who should bear the burden of proof in each step? Because evidence in antitrust cases is costly to procure and difficult to evaluate, the danger of evidentiary failure is high. Consequently, the assignment of proof burdens (i.e., who wins if the evidence fails?) is crucial. Hovenkamp therefore proposes that the burden of proof be allocated to the party with the least plausible claim.¹¹³ He criticizes the Supreme Court's *California Dental Association* decision,¹¹⁴ in which the Court effectively saddled the plaintiff with the burden of proving an anticompetitive effect when the facts suggested that the plaintiff's theory of

107. To assess market power, the court should consider the concentration of the market and the existence (and "height") of barriers to entry. *See id.* at 97, 102–04. In addition, it should consider how the restraint would affect the market structure, asking whether there is a substantial competitive market outside the arrangement and whether participants in the venture are free to offer the covered product or service outside the restraints imposed by the arrangement. *See id.* at 142.

108. *Id.* at 107.

109. *Id.*

110. *Id.* If the practice is declared illegal at this point, any injunctive remedy should be limited to condemning the current form of the practice or ordering the less restrictive alternative. *See id.*

111. *Id.*

112. *Id.* at 149.

113. *Id.* at 146–47.

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

anticompetitive collusion was more plausible on its face than the defendants' theory that the restraint at issue was procompetitive.¹¹⁵

c. Reconceiving the "Agreement" Requirement.—An essential element of any § 1 claim is an agreement between two or more economic entities.¹¹⁶ Hovenkamp complains that courts have taken too "lawyerly" an approach when determining whether this agreement requirement has been satisfied.¹¹⁷ By requiring proof of an express agreement of some sort—one using words or conduct that is tantamount to words—courts have placed a significant amount of harmful, tacit collusion beyond the reach of the antitrust laws.¹¹⁸ Echoing a similar proposal advanced by Judge Posner,¹¹⁹ Hovenkamp advances a more "economic" understanding of the § 1 agreement requirement.¹²⁰ That economic understanding derives from George Stigler's observation that oligopolies work poorly when information is not rapidly communicated among participants¹²¹ and Posner's later observation that poorly functioning oligopolies can be "improved" by the adoption of various facilitators—chiefly, devices for enhancing communication.¹²² Although Hovenkamp makes a persuasive argument that courts should adopt an economic understanding of the agreement element, his discussion of how they should practically implement that understanding is a bit disappointing.

Hovenkamp argues that judicial inference of an agreement, despite the absence of any words or expressive conduct signifying such agreement, is entirely proper because courts regularly "reconstruct" agreements among parties who have not fully expressed their intentions.¹²³ When, for example, sales contracts omit prices, courts routinely fill in such terms according to what is objectively reasonable (i.e., the prevailing market price).¹²⁴

115. See HOVENKAMP, *supra* note 8, at 147 ("In fact, [the evidence] cuts very strongly in the opposite direction, showing a market where customers are vulnerable and suppliers can be trusted mainly to act in their own best interest.").

116. JULIAN O. VON KALINOWSKI ET AL., *ANTITRUST LAWS AND TRADE REGULATION* § 2.02 (2d ed. 2004).

117. HOVENKAMP, *supra* note 8, at 126–27.

118. See *id.* at 127 ("In concentrated markets with fungible products and observable prices firms may reach a tacit understanding about output, and thus price, without ever engaging in verbal communication with one another.").

119. See POSNER, *supra* note 10, at 69–93 (proposing an economic approach to identifying collusion).

120. HOVENKAMP, *supra* note 8, at 126–36.

121. George J. Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44, 45–46 (1964).

122. Richard A. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 STAN. L. REV. 1562, 1582–83 (1969); see also POSNER, *supra* note 10, at 60–69 (detailing the necessity of effective communication for collusive practices to succeed).

123. HOVENKAMP, *supra* note 8, at 130.

124. *Id.*; see, e.g., U.C.C. § 2-305(1) (2005) (stating that where the contract price is "not settled," the price should be "a reasonable price at the time for delivery"). Courts generally refuse to fill in a missing quantity term, because there is no sufficiently definite answer to what constitutes

Hovenkamp asserts three reasons courts should engage in similar “gap-filling” when tacit collusion seems to be occurring. First, they should do so because “[c]artel contracts are highly likely to be incomplete for the simple reason that they are illegal.”¹²⁵ In addition, the terms of a cartel contract, like the price terms of incomplete sales contracts, are relatively easy to infer.¹²⁶ Finally, courts should not hesitate to fill in the gaps of cartel contracts because the purpose of doing so is not to enforce the contracts but simply to identify them.¹²⁷ Term precision is therefore less important.¹²⁸

Having persuasively argued that it is proper for courts to infer competitor agreements when tacit collusion appears to be occurring, Hovenkamp turns to the issue of how courts should go about doing so. On this point, he is a bit fuzzy. Judge Posner proposed that courts determine the existence of tacit collusion by: (1) analyzing the structure of the market at issue to see if it is “propitious for the emergence of collusion”; (2) examining various pieces of economic evidence that indicate whether tacit collusion is in fact occurring; and (3) making, on the basis of these two examinations, a gestalt-like determination as to whether collusion is occurring.¹²⁹ This approach is rather complicated; Posner suggests that courts consider seventeen factors in their examination of market structure (step one),¹³⁰ and he lists fourteen factors that would suggest the existence of actual collusion (step two).¹³¹ This complexity leads Hovenkamp to distance himself from

an objectively reasonable quantity. HOVENKAMP, *supra* note 8, at 130; *see, e.g.*, U.C.C. § 2-201(1) (2005) (“[A] contract is not enforceable . . . beyond the quantity of goods shown.”).

125. HOVENKAMP, *supra* note 8, at 131.

126. *See id.* (observing that “when we move from buyer-seller relationships to relationships among competitors, both price and quantity can become relatively determinate numbers, particularly if the market contains few sellers”).

127. *Id.*

128. Note, though, that courts might have to determine the terms of the “agreement” at issue in order to fix a remedy. Hovenkamp may therefore, have overstated this “enforcement versus identification” distinction.

129. POSNER, *supra* note 10, at 69.

130. The seventeen factors are: (1) whether the “[m]arket [is] concentrated on the selling side”; (2) whether there is a “fringe of small sellers”; (3) whether there is “[i]nelastic demand at [the] competitive price”; (4) whether “[e]ntry takes a long time”; (5) whether the “[b]uying side of [the] market [is] unconcentrated”; (6) whether the product is standardized; (7) whether the product is durable; (8) whether “[t]he principal firms sell at the same level in the chain of distribution”; (9) whether “[p]rice competition [is] more important [in the relevant market] than other forms of competition”; (10) whether there is a “[h]igh ratio of fixed to variable costs”; (11) whether the firms face “[s]imilar cost structures and production processes”; (12) whether “[d]emand [is] static or declining over time”; (13) whether “[p]rices can be changed quickly”; (14) whether “[s]ealed bidding” is used; (15) whether the “[m]arket is local”; (16) whether the firms in the market employ “[c]ooperative practices”; and (17) “[t]he industry’s antitrust ‘record.’” *Id.* at 69–79 (typeface altered).

131. The fourteen factors are: (1) whether the firms in the market have “[f]ixed relative market shares”; (2) whether there is “[m]arketwide price discrimination”; (3) whether the firms exchange price information; (4) whether there are “[r]egional price variations”; (5) whether the firms have submitted “identical sealed bids”; (6) whether there has been an abrupt change of price, output, or capacity in the market; (7) whether there is “[i]ndustrywide resale price maintenance”; (8) whether

Posner's suggested approach.¹³² Hovenkamp fails, however, to offer a workable alternative. While he maintains that it would be easy to reach tacit collusion involving "facilitators created by explicit agreement" (e.g., agreements to exchange price information),¹³³ courts already condemn such arrangements on a routine basis, reasoning that the agreement element of § 1 is satisfied by the agreement to employ the facilitator.¹³⁴ When it comes to the more difficult situations—those involving "practices that may be facilitators, but appear to be imposed unilaterally"¹³⁵—Hovenkamp has nothing to offer. He rejects Judge Posner's multifactor test on grounds that it would "pose formidable administrative difficulties,"¹³⁶ but he offers no alternative. It seems that Hovenkamp is caught between his desire for accurate characterization of highly subtle behavior and his generally laudable desire to craft antitrust rules that are easily administrable. When it comes to tacit collusion, he cannot have his cake and eat it too: he must either approve the sort of complicated inquiry Posner proposes or fall back on the "lawyerly" understanding of agreement, which is admittedly inaccurate but easy to work with.

2. *Exclusionary Practices.*—Antitrust scholars are currently engaged in a vigorous and fascinating debate over how courts should identify "exclusionary" conduct—i.e., practices designed to eliminate existing competition, deter new entry, or prevent output expansion by existing firms.¹³⁷ In his discussion of exclusionary practices, Hovenkamp proposes a

the market shares of industry leaders are declining; (9) the "[a]mplitude and fluctuation of price changes"; (10) the elasticity of demand at the market price; (11) the "[l]evel and pattern of profits" among market participants; (12) whether "[m]arket price [is] inversely correlated with [the] number of firms or elasticity of demand"; (13) the use of "basing-point pricing"; and (14) the existence of "exclusionary practices." *Id.* at 79–93 (typeface altered).

132. See HOVENKAMP, *supra* note 8, at 133 (observing that Posner's approach toward identifying markets conducive to collusion is "more difficult for courts to manage"); *id.* at 134 (arguing that Posner's approach to identifying the existence of tacit collusion would "pose formidable administrative difficulties").

133. *Id.* at 133.

134. See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 650 (1980) (condemning an agreement that fixed credit terms); *Sugar Inst., Inc. v. United States*, 297 U.S. 553, 603 (1936) (condemning an agreement to post prices and adhere to them during published period); *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 493–94 (9th Cir. 1952) (condemning a product standardization agreement used to facilitate collusion); cf. *Todd v. Exxon Corp.*, 275 F.3d 191, 214 (2d Cir. 2001) (denying a motion to dismiss a claim based on exchange of salary information).

135. HOVENKAMP, *supra* note 8, at 133.

136. *Id.* at 134.

137. See, e.g., Elhauge, *supra* note 44; Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005); A. Douglas Melamed, *Exclusive Dealing Agreements and Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375 (2006); Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 ANTITRUST L.J. 435 (2006); Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311 (2006); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 73 ANTITRUST L.J. 413 (2006).

test for identifying such conduct and criticizes the other leading proposals. Subpart III(B) of this Review addresses both his proposed test and his criticisms of alternative tests.¹³⁸

Having set forth a general test for identifying exclusionary conduct, Hovenkamp turns to the specific issue of strategic pricing. In particular, he describes and defends existing rules on predatory pricing, criticizes extension of those rules to cover so-called “limit” pricing, and sets forth a lenient approach for evaluating “structured” discounts.¹³⁹

a. Predatory and Limit Pricing.—Hovenkamp’s discussion of predatory and limit pricing reflects a key theme that runs throughout *The Antitrust Enterprise*: that antitrust rules should be easily administrable, even if that means they must permit some anticompetitive practices to go unpunished.¹⁴⁰ Hovenkamp thus defends the easily administrable Areeda–Turner test for illegal predatory pricing (i.e., the price must be below the seller’s average variable cost (“AVC”), and there must be a likelihood that the seller could eventually recoup its losses from charging below-cost prices by charging supracompetitive prices),¹⁴¹ even though he concedes the test is somewhat underdeterrent.¹⁴²

Administrability concerns similarly lead Hovenkamp to reject predation theories based on so-called “limit” pricing, which occurs when a firm with market power (the power to set its prices in excess of its costs) sets its prices below the profit-maximizing level so as to deter entry.¹⁴³ When the dominant

138. See *infra* notes 259–93 and accompanying text.

139. Hovenkamp’s discussion of strategic pricing also highlights the particular danger of using predatory pricing to maintain an oligopoly. He maintains that using predatory pricing to support an oligopoly is “inherently more plausible” than a predatory pricing strategy designed to monopolize a market by destroying rivals. HOVENKAMP, *supra* note 8, at 168. In an oligopoly, below-cost pricing may be employed as a device for punishing maverick firms that increase output or cut price. Such a strategy has a greater chance of success than a monopolization strategy, Hovenkamp says, because the perpetrator is not seeking the victim’s destruction, which the victim would tenaciously resist, but is instead seeking its compliance with a mutually beneficial collusive scheme, which the victim is far less likely to oppose. *Id.* at 169.

140. See, e.g., *id.* at 50, 53 (listing, among five general principles for antitrust administration, the principles that “not every anticompetitive practice can be condemned” and that “an antitrust rule that cannot be administered effectively is worse than no rule at all” (typeface altered)).

141. Philip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 703–09 (1975).

142. HOVENKAMP, *supra* note 8, at 163–68. The Areeda–Turner test may be underdeterrent for two reasons. Because marginal cost will always exceed AVC at a high level of output, which is likely when there is actual predation, prices just above AVC, and thus legal under the Areeda–Turner test, may be below marginal cost and thus capable of driving out equally efficient rivals. See Oliver E. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284, 287–306 (1977) (criticizing the test for affording defendants too much leeway). In addition, any variable cost-based test will be quite lenient in industries with high fixed costs and relatively low marginal costs (e.g., airlines, public utilities, or markets with a high intellectual property component). HOVENKAMP, *supra* note 8, at 164.

143. HOVENKAMP, *supra* note 8, at 162.

firm has lower costs than potential rivals, which will frequently occur because of economies of scale, it can set its prices at a level above its costs—and therefore above predatory levels—but low enough to deter new entrants, perhaps indefinitely. While such pricing may impose competitive harm and injure consumers in the long run, Hovenkamp maintains that it is simply too difficult for antitrust tribunals to police. First, “No court has ever developed a workable test for determining when an above-cost price is anticompetitive.”¹⁴⁴ In addition, there is the problem of fashioning a remedy.¹⁴⁵ Forcing the defendant to raise its price to the monopoly level to invite new entry poses serious risks to consumers (what if entry never occurs or takes a long time?). Alternatively, forcing the defendant to lower its price to competitive levels (i.e., to cost) would make eventual entry even less likely and would “put the court in the position of a regulatory agency, constantly monitoring the dominant firm’s prices to ensure that they stayed near the competitive level.”¹⁴⁶ Hovenkamp therefore concludes that antitrust law should not prohibit nonpredatory limit pricing.

b. Structured Discounts.—“Structured” discounts are discounts that are conditioned upon something other than mere payment of the purchase price. Hovenkamp discusses several types of structured discounts: slotting fees (fixed discounts the manufacturer provides retailers in exchange for shelf space), quantity or market share discounts (discounts conditioned upon purchasing a certain quantity or percentage of one’s requirements from the seller), and bundled discounts (discounts conditioned upon purchasing products from multiple product lines).¹⁴⁷

While a number of antitrust scholars have argued that various forms of structured discounts are anticompetitive,¹⁴⁸ Hovenkamp would treat such

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 171–73. Hovenkamp also discusses discounts resulting from package pricing, which occurs when a seller “throw[s] in some extra component or service at less than the incremental cost of supplying it.” *Id.* at 173. For example, a car dealer selling a \$20,000 car without a fancy stereo might offer to include the stereo for an additional \$100, even though the additional cost of the fancy system is \$350. *See id.* at 173–74. While one might argue that the stereo is being sold below cost, Hovenkamp concludes that this sort of pricing should be legal as long as the package price exceeds the cost of the transferred package of goods and services *as a whole*. *Id.* at 174. Package pricing, Hovenkamp observes, is a useful device for secretly competing on price in an oligopoly, so banning such pricing might strengthen oligopolies. *Id.* Moreover, “[t]here is no useful way of disaggregating components and assigning a lawful minimum price to each one separately.” *Id.*

148. *See, e.g.,* Einer Elhauge, Statement for DOJ–FTC Hearing on GPOs 38–39 (Sept. 26, 2003), <http://www.ftc.gov/os/comments/healthcarecomments2/elhauge.pdf> (arguing that bundled and loyalty discounts to GPOs have anticompetitive effects that are not offset by buyer or seller efficiencies); Robert A. Skitol, Comments for FTC Hearing on Small Business Issues (Nov. 8, 1995), <http://www.ftc.gov/opp/global/skitol2.htm> (explaining that slotting fees could result in higher cost of new product introduction and suggesting that existing statutory law exists to challenge slotting fees); Willard K. Tom et al., *Anticompetitive Aspects of Market Share Discounts*

discounts fairly leniently. Recognizing that all discounts resulting in an above-cost price provide immediate consumer benefit and push prices toward competitive levels, Hovenkamp takes the position that each of these types of structured discounts should be permitted as long as the discount at issue does not result in a below-cost price for the product or package of products being sold. Slotting fees, he maintains, aim to “transfer risk from the retailer to the manufacturer”; “show[] the merchant that the manufacturer’s promise of good sales is more than empty words”; and, unless resulting in below-cost prices, can always be matched by an equally efficient rival.¹⁴⁹ Similarly, any single product quantity or market share discount resulting in an above-cost price could be matched by an equally efficient competitor.¹⁵⁰ Although one might dispute Hovenkamp’s explanation of why firms pay slotting fees (Joshua Wright and Benjamin Klein have observed that the risk-transferral explanation cannot explain the widespread practice of paying slotting fees on well-established, non-risky products like Coca-Cola¹⁵¹), the legal rule Hovenkamp advocates for slotting fees and quantity or market share discounts seems sensible. Both practices should be legal as long as they do not drive prices below cost and are thus incapable of excluding an equally efficient rival.

Bundled discounts, Hovenkamp concedes, are a different competitive animal. Unlike slotting fees and quantity or market share discounts, a bundled discount that results in above-cost pricing (for the bundle) may exclude equally efficient rivals if they sell a narrower line of products.¹⁵² Consider, for example, a manufacturer (*A*) that sells both shampoo and conditioner and competes against another manufacturer (*B*) that sells only shampoo.¹⁵³ *B*, the more efficient shampoo manufacturer, can produce a bottle of shampoo for \$1.25. It costs *A* \$1.50 to produce a bottle of shampoo and \$2.50 to produce a bottle of conditioner.¹⁵⁴ If purchased separately, *A*

and Other Incentives to Exclusive Dealing, 67 ANTITRUST L.J. 615, 627–30 (2000) (arguing that quantity and market share discounts are anticompetitive).

149. HOVENKAMP, *supra* note 8, at 171.

150. *Id.* at 172.

151. See Benjamin Klein & Joshua D. Wright, *The Economics of Slotting Contracts*, 50 J.L. & ECON. (forthcoming 2007) (manuscript at 35), available at <http://ssrn.com/abstract=773464> (observing that risk transferral theory “is inconsistent with the fact that slotting fees and other promotional allowances often are paid by manufacturers on established products with predictable demand, and that slotting contracts are often renewed after supermarkets have market experience with a particular new product”); cf. Joshua D. Wright, *Slotting Contracts and Consumer Welfare*, 74 ANTITRUST L.J. (forthcoming 2007), available at <http://ssrn.com/abstract=897394> (presenting an empirical study utilizing a set of slotting contracts consisting entirely of incumbent products).

152. HOVENKAMP, *supra* note 8, at 172–73.

153. This example is based on a hypothetical discussed in *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 467 (S.D.N.Y. 1996).

154. This example may appear unrealistic, for it is unclear why *A* would persist in producing shampoo when it could presumably negotiate an agreement to buy the shampoo from *B* at a price lower than its (*A*’s) own cost of production. The parties’ ignorance of their relative efficiencies, or the costs of negotiating a favorable supply agreement, might account for such a situation.

charges \$2.00 for shampoo and \$4.00 for conditioner (\$6.00 total), but if the consumer purchases both products at once, *A* will sell the combination for \$5.00. That \$1.00 bundled discount results in a price that is \$1.00 greater than *A*'s cost for the two products (\$4.00). Nonetheless, the above-cost bundled discount could exclude *B*. *B* could stay in the market only if it charged no more than \$1.00 for shampoo (so that a consumer's total price of *B*'s shampoo and *A*'s conditioner would not exceed \$5.00, *A*'s package price), but *B*'s marginal cost of producing shampoo is \$1.25. Accordingly, *A*'s bundled discount could eliminate *B* as a competitor even though *B* is the more efficient producer and *A*'s discounted price is above its cost of producing the bundle.¹⁵⁵

Although he acknowledges the possibility that above-cost bundled discounts may result in the exclusion of rivals that are as efficient as the discounter, Hovenkamp ultimately concludes that bundled discounts should be legally permissible as long as the discounted price exceeds the cost of the bundle.¹⁵⁶ Administrative concerns motivate his position. Hovenkamp states that “[t]he great majority” of bundled discounts are procompetitive, and that any approach that seeks to identify the few anticompetitive outliers “presumes that the court has much greater cost-measuring capacity than it has in fact.”¹⁵⁷ Accordingly, “[A]n administratively prudent rule might insist on a showing that the discounted package is priced below average variable cost.”¹⁵⁸

This is a notable departure from, and improvement upon, the position advocated by the *Antitrust Law* treatise, of which Hovenkamp is a co-author. The treatise takes the position that the determinative question in evaluating bundled discounts is whether the discount at issue could have excluded an equally efficient, single-product rival.¹⁵⁹ Exclusion would be possible, of course, anytime a single-product rival could not match the entire amount of the bundled discount without offering a below-cost price on its single product. The treatise would therefore condemn the shampoo-conditioner

Regardless of its plausibility, the example is presented because it is very similar to an example appearing in the case law on bundled discounts. *See id.* at 467.

155. *See generally* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 749, at 333–36 (Supp. 2006) (explaining how an above-cost bundled discount could exclude a rival that was as efficient as the discounter).

156. HOVENKAMP, *supra* note 8, at 172–73.

157. *Id.* at 173.

158. *Id.*

159. The treatise states:

The relevant question [in evaluating the legality of a bundled discount] is . . . whether the challenged bundling practices would have excluded an equally efficient rival, without reasonable justification. . . . A requirement that the bundling practice be sufficiently severe so as to exclude an equally efficient single-product rival, and without an adequate business justification, seems to strike about the right balance between permitting aggressive pricing while prohibiting conduct that can only be characterized as anticompetitive.

AREEDA & HOVENKAMP, *supra* note 155, ¶ 749, at 322.

bundled discount discussed above because a hypothetical shampoo-only seller that was at least as efficient as seller *A* (e.g., seller *B*) could not match, and would thus be excluded by, *A*'s bundled discount. By contrast, the "administratively prudent rule" Hovenkamp advocates in *The Antitrust Enterprise* would approve *A*'s bundled discount—despite the theoretical possibility that it could exclude sellers like *B*—because the discount results in a price above the bundle's average variable cost.

While I have elsewhere criticized,¹⁶⁰ and offered an administrable alternative to,¹⁶¹ this cost-based test for evaluating bundled discounts, the approach suggested in *The Antitrust Enterprise* is superior to that proposed by the *Antitrust Law* treatise. The treatise's approach would permit less efficient rivals to condemn bundled discounts, and thereby create a price umbrella for themselves by concocting some theory under which a hypothetical equally efficient rival might be excluded by the discount.¹⁶² In addition, the treatise's approach would prevent multiproduct sellers from "cross-subsidizing" discounts (i.e., from funding a discount on one product by giving up margin on other supracompetitively priced products) and would thereby reduce consumer welfare. Suppose, for example, that the defendant discounter sells products *A*, *B*, and *C* in concentrated markets that are subject to oligopolistic pricing but are not actually cartelized (i.e., there are no actual price agreements). Assume that the plaintiff competes with the defendant in the market for product *A* but does not sell either product *B* or *C*. The defendant's cost of producing each of products *A*, *B*, and *C* is \$4.00 per unit. Sold separately, the defendant charges \$5.00 per unit for each of *A*, *B*, and *C*, but it sells the *A–B–C* package for \$13.50. This package pricing more closely aligns the defendant's prices and costs and will tend to destabilize the coordinated supracompetitive pricing in each of the *A*, *B*, and *C* markets. From the standpoint of consumers and competition, this is a good thing: prices have been pushed toward costs (where they would be in a perfectly competitive market), oligopolistic pricing has been disrupted (and nondiscounting rivals are likely to respond with discounts of their own), and consumers are paying less.¹⁶³ The *Antitrust Law* approach, however, would condemn this arrangement because a hypothetical *A* seller whose per unit cost is \$4.00 would have to lower its *A* price to \$3.50 in order to compete and would thus be driven out of business. The approach may therefore condemn

160. Lambert, *supra* note 65, at 1700–05.

161. *Id.* at 1739–53.

162. See, e.g., *LePage's Inc. v. 3M*, 324 F.3d 141, 177 (3d Cir. 2003) (en banc) (Greenberg, J., dissenting) (observing that the expert witness presented by the prevailing plaintiff had admitted that the plaintiff was a less efficient producer than the defendant).

163. Ironically, the *Antitrust Law* treatise elsewhere recognizes the benefits of permitting the sort of discount cross-subsidization that its approach to bundled discounting would forbid. See 10 PHILLIP E. AREEDA ET AL., *ANTITRUST LAW* ¶ 1758, at 334–35 (2d ed. 2004) (explaining the "closer to the competitive level" benefit of package pricing); *id.* ¶ 1758, at 335 (explaining the "disrupting oligopolistic collaboration" benefit of package pricing).

cross-subsidization that would be good for consumers and competition in the long run. The “administratively prudent rule” Hovenkamp suggests in *The Antitrust Enterprise* is a significant improvement.

3. *Vertical Practices.*—Hovenkamp begins his discussion of vertical restraints¹⁶⁴ by observing that such restraints can provide producers with a middle ground between distributing their products or services themselves (self-distribution) and effectively purchasing such distribution services on the open market (contract distribution).¹⁶⁵ Just as Ronald Coase famously observed that entrepreneurs seek to minimize costs in determining whether to bring functions within the firm or secure them on the open market,¹⁶⁶ Hovenkamp observes that producers seek to minimize costs in choosing among self-distribution, contract distribution, or some middle-ground form of distribution involving a vertical restraint. In short, they “have every incentive to make their distribution systems operate as efficiently as possible.”¹⁶⁷ The upshot of this is that producer-imposed vertical restraints should generally be efficient.

But that does not mean that vertical restraints can never be anticompetitive. Sometimes powerful dealers or dealer cartels may seek to reduce competition in their markets by persuading their suppliers to impose such restraints. Thus, Hovenkamp concludes, “The principal focus of anti-trust should be protection of the distribution market from the occasional situation where excessive dealer power rather than manufacturer policy explains a distribution restraint.”¹⁶⁸ Building on these twin propositions that producer-imposed vertical restraints are generally output enhancing but that dealer-imposed vertical restraints may not be, Hovenkamp analyzes the rules governing intrabrand and interbrand restraints and proposes several sensible changes that would increase the degree of analysis afforded to vertical practices and require plaintiffs to prove that the practices are, in fact, output reducing. His primary recommendations are (1) that minimum resale price maintenance be afforded rule of reason treatment;¹⁶⁹ (2) that the Robinson—

164. Vertical restraints are trade-restraining agreements between parties at different levels in the distribution chain.

165. HOVENKAMP, *supra* note 8, at 181–82.

166. Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 394–95 (1937).

167. HOVENKAMP, *supra* note 8, at 182.

168. *Id.* at 183.

169. *Id.* at 190–91. Hovenkamp observes that manufacturers may use minimum resale price maintenance to spur their dealers to compete with one another on point-of-sale services rather than price. Because manufacturers have an incentive to maximize sales, they are unlikely to set minimum resale prices unless they have determined that doing so leads to increased output. Accordingly, vertical minimum resale price maintenance schemes should not be per se illegal, as they are under current law, *see* *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408–09 (1911), but should instead receive rule of reason treatment. The Supreme Court may soon move in the direction Hovenkamp recommends. On August 28, 2006, the Court stayed the mandate pending disposition of a petition for writ of certiorari in *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 171 Fed. App'x 464 (5th Cir. 2006), in which the Fifth Circuit followed *Dr. Miles's*

Patman Act be repealed or interpreted to require plaintiffs to show a genuine injury to competition;¹⁷⁰ and (3) that tie-ins, like exclusive dealing arrangements, be analyzed under the rule of reason.¹⁷¹

4. *Business Mergers.*—When it comes to evaluating horizontal business mergers,¹⁷² the antitrust enterprise has come a long way. Antitrust now recognizes that most mergers create substantial productive efficiencies, that this is a good thing (even though the efficiency gains might injure less efficient rivals), and that mergers of competitors with relatively small market shares are virtually never harmful.¹⁷³ It was not always so.¹⁷⁴

Hovenkamp's discussion of business mergers lauds these developments and offers three proposals. First, Hovenkamp argues for simplification of the method of analyzing collusion-facilitating mergers.¹⁷⁵ He asserts that the current merger guidelines, with their focus on precise calculation of the Herfindahl–Hirschman Index (“HHI”), are overly complicated and lend

per se rule against vertical minimum resale price maintenance. *See* *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, No. 06A179, 2006 WL 2466835 (U.S. Aug. 28, 2006).

170. HOVENKAMP, *supra* note 8, at 197–98. The Robinson–Patman Act makes it unlawful for a supplier to discriminate in price between dealers when doing so results in a harm to competition. 15 U.S.C. § 13(a) (2000). To “discriminate” is to charge different prices for the same thing, and injury to “competition” has been interpreted, quite unfortunately, to include disadvantaging, and thus “hurting,” a dealer. HOVENKAMP, *supra* note 8, at 192. The upshot is that the Robinson–Patman Act makes it difficult for manufacturers to charge different prices to their wholesalers. Hovenkamp contends that this rule is economically senseless, for manufacturers have every incentive to maximize the efficiency of their distribution systems and will price discriminate among wholesalers only when doing so enhances output by, for example, incentivizing dealers to pursue sales aggressively. *Id.* at 193. Accordingly, Hovenkamp concludes, the Robinson–Patman Act should be repealed or should be read so that its “harm to competition” element requires a genuine harm to the competitive system, not simply some disadvantage to a competitor. *Id.* at 198.

171. HOVENKAMP, *supra* note 8, at 198–206. Reiterating familiar economic arguments, Hovenkamp contends that both exclusive dealing and tying are usually output-enhancing, *see id.* at 202–06 (illustrating procompetitive benefits of both practices with reference to franchise arrangements), but may occasionally lead to anticompetitive market foreclosure, *id.* at 199, 201. Given that both practices are generally efficient but pose the same sort of competitive concern, Hovenkamp argues that both should be analyzed under the rule of reason. *Id.* at 201, 206. Tying's per se treatment, Hovenkamp says, “can be explained *only* as a relic of the leverage theory,” which assumed that a monopolist in one product market could enlarge its monopoly by tying a second product, and thus monopolize both product markets together. *Id.* at 201. Hovenkamp correctly explains that “[e]conomically, the leverage theory has been discredited” (by the Chicago School, incidentally, *see, e.g.,* Ward S. Bowman, Jr., *Tying Arrangements and the Leverage Problem*, 67 *YALE L.J.* 19 (1957)) because “a firm that is already charging its monopoly price for one product cannot earn more in monopoly profits by tying a second, currently competitive, product and hiking price on that as well.” HOVENKAMP, *supra* note 8, at 201.

172. Whereas antitrust used to regulate vertical and conglomerate mergers, which almost never present the sorts of anticompetitive threats with which antitrust is concerned, today it focuses almost exclusively on horizontal mergers, which may sometimes be anticompetitive. HOVENKAMP, *supra* note 8, at 207.

173. *Id.* at 211.

174. *See id.* at 208–09 (discussing Warren Court era antipathy toward business mergers).

175. *Id.* at 214–15.

merger analysis an unwarranted appearance of rigor and precision.¹⁷⁶ Next, he argues that regulators should reject theories of harmful unilateral effects when the merger at issue is not a merger to monopoly.¹⁷⁷ He identifies two problems with unilateral effects analysis, which asks whether a merger could permit a unilateral price increase by a postmerger firm that would not be a monopolist but would compete in a product-differentiated market.¹⁷⁸ First, such analysis frequently relies on retail pricing data (i.e., scanner data), which are highly persuasive (because of the volume of data) but may be misleading (because they reveal only demand-side effects).¹⁷⁹ Second, such analysis is unnecessary because, if product differentiation creates the power to increase prices, the differentiated products are likely not in the same relevant market to begin with, and the merger at issue may be analyzed more simply as a merger to monopoly in a narrower market.¹⁸⁰ Finally, Hovenkamp argues that regulators and courts should recognize an efficiencies defense to merger challenges but only when the merger creates “unusual, measurable, and extraordinary efficiency gains.”¹⁸¹ On this point, he differs from Judge Posner, who would craft lenient merger rules to account for the general efficiencies created by mergers but would then ignore those efficiencies in particular cases.¹⁸²

C. Part III: Regulation, Innovation, and Connectivity

The final part of *The Antitrust Enterprise* considers the interface between antitrust and industry regulation, the relationship between antitrust and the intellectual property laws, and the role of antitrust in network industries.¹⁸³

1. *Simplifying the Regulation–Antitrust Interface.*—Because natural monopoly is a classic market failure and is frequently the subject of government regulation, antitrust issues often arise within regulated industries. When they do, courts are required to determine antitrust's domain. Hovenkamp's chief contribution in his chapter entitled “Antitrust under Regulation and Deregulation” (Chapter 10) is to set forth a single,

176. *Id.* at 213–14.

177. *Id.* at 216–18.

178. *Id.* at 216–17.

179. *Id.* at 217.

180. *Id.* at 218.

181. *Id.* at 220.

182. See POSNER, *supra* note 10, at 132–33.

183. The focus of Part III is antitrust's role in markets that are thought to deviate from traditional economic norms—specifically, those “characterized by high rates of innovation, by costs that decline with output and over time, and often by a high degree of interconnection among market participants.” HOVENKAMP, *supra* note 8, at 225. While such markets are frequently referred to as “new economy” markets, Hovenkamp observes that the issues they present are not novel and have been addressed by antitrust for decades. *Id.*

simple rule for determining when antitrust will apply to activities that are subject to regulation.¹⁸⁴

Traditionally, courts have recognized three different forms of antitrust immunity, each with its own unique doctrinal formulation. Federal regulatory immunity, intended to prevent antitrust law from interfering with regulators' various objectives, applies if expressly provided by statute or if necessary to avoid conflicts between regulatory and antitrust requirements.¹⁸⁵ Courts typically find implied immunity if either an antitrust suit would interfere with the agency's operations or the agency has considered, though not necessarily expressly approved of, the particular behavior at issue.¹⁸⁶ State action immunity, a "creature of federalism" designed "to give appropriate recognition to state sovereignty,"¹⁸⁷ applies if (1) the state has "clearly articulated" and "affirmatively expressed" its intent to displace normal competitive processes with some form of regulation covering the conduct at issue, and (2) when the conduct at issue is by a private party, the conduct is "actively supervised" by a state agency or official.¹⁸⁸ Finally, *Noerr-Pennington* petitioning immunity, a product of the First Amendment, creates immunity for petitioning the political branches for anticompetitive regulation or asking the courts or regulatory agencies to punish one's rivals.¹⁸⁹ Notably, this broad doctrine does not create immunity for "sham" petitioning—i.e., petitioning that "is intended not to obtain from the government a response favorable to the petitioner, but rather to harass or suppress a rival."¹⁹⁰

In an analysis that is sure to simplify the administration of the antitrust laws, Hovenkamp explains that these three immunity doctrines can be combined into "[a] [u]nified [r]ule for [a]ntitrust [r]egulatory [i]mmunity."¹⁹¹ That unified rule would be based on two key principles: that antitrust is the "residual regulator," which applies when more direct forms of regulation do not,¹⁹² and that antitrust is designed to regulate *private* conduct, not government action.¹⁹³ Under the unified rule, conduct is immune from antitrust scrutiny if two requirements are met:

First, the regulatory regime must be lawful and have jurisdiction over the conduct that is the subject of the antitrust complaint. "Jurisdiction" means the authority to evaluate conduct, including its

184. *Id.* at 236.

185. *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 148 (2d Cir. 2003).

186. HOVENKAMP, *supra* note 8, at 233.

187. *Id.* at 233–34.

188. *Id.* at 233; *see, e.g.*, *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

189. *See, e.g.*, *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

190. HOVENKAMP, *supra* note 8, at 235.

191. *Id.*

192. *Id.* at 230.

193. *Id.* at 236.

competitive consequences, and approve or disapprove it. Second, if challenged private conduct is discretionary—that is, if a private firm could have done something in a different way that causes less competitive harm—that conduct must either have been reviewed and approved by the agency, must be under ongoing study, or the agency must have manifested its ability and will to evaluate the conduct if asked.¹⁹⁴

Hovenkamp persuasively explains that this unified rule addresses all concerns previously addressed by the three disparate immunities.¹⁹⁵

2. *Exposing the Myth of IP–Antitrust Conflict.*—Hovenkamp's discussion of the relationship between the intellectual property (IP) and antitrust laws is primarily devoted to demonstrating that the two bodies of law are not in conflict. Antitrust and IP admittedly seek to enhance output in different ways. Antitrust does so by promoting competition, which “squeezes monopoly out of the economy.”¹⁹⁶ The IP laws do so by preventing free riding on (and thereby encouraging) innovation.¹⁹⁷ Nonetheless, Hovenkamp maintains, the two bodies of law do not create genuine conflicts. The various conflicts courts have purported to find, he says, have generally resulted from legal misinterpretations. To demonstrate this point, he considers how IP law interacts with the antitrust rules governing horizontal restraints and vertical practices; antitrust's treatment of fraudulent infringement suits and refusals to license IP rights; the antitrust rules on patent nonuse and “misuse”; and the antitrust rules on product designs that create incompatibility.¹⁹⁸ Throughout this examination, he finds only one “true antitrust/IP conflict”: that between the antitrust laws prohibiting naked price-fixing and the IP rules permitting a patent licensor to specify its licensee's prices, even if the two are competitors.¹⁹⁹ This largely descriptive section of the book persuasively debunks the notion that antitrust and IP are

194. *Id.* at 236–37.

195. *Id.* at 236. The unified rule addresses federal regulatory immunity concerns, for if the harm is caused by something the federal government is doing there is no antitrust claim, nor is there such a claim if (1) the harm is caused by a private party after that party's conduct has been reviewed and approved by a disinterested federal agency; or (2) a federal agency is active and has the power to review the harm-causing conduct. *Id.* The unified rule addresses state action immunity concerns, for there is no antitrust claim if (1) the state authorized the challenged conduct by passing a statute that mandated it, contemplated that it would occur, or specifically permitted it; or (2) that harm was caused by a private party that was “actively supervised” by a state agency or official. *Id.* *Noerr–Pennington* concerns are addressed by the unified rule: if the ultimate harm would occur because of petitioned state action, then there would be no antitrust claim, but if the ultimate harm was inflicted by the petitioning itself (i.e., the petitioning is a sham), then there would be an antitrust claim. *Id.* In the latter scenario, “the injury to competition [would] result[] from private conduct that ha[d] not been effectively supervised.” *Id.*

196. *Id.* at 254.

197. *Id.* at 255.

198. *Id.* at 256–76.

199. *Id.* at 257.

fundamentally in conflict and offers some helpful suggestions for mitigating the tensions between the two bodies of law.

3. *Antitrust and Networks*.—The final chapter of *The Antitrust Enterprise* discusses “[n]etwork [i]ndustries and [c]omputer [p]latform [m]onopoly.”²⁰⁰ Hovenkamp first describes in general the peculiar antitrust concern presented by networks and then focuses on anticompetitive concerted behavior within “collaborative” networks and unilateral exclusionary practices by network monopolists.

a. *The General Problem*.—A network, Hovenkamp states, is “a market subject to economies of scale in consumption,”²⁰¹ meaning that the product or service being sold becomes more valuable to consumers (so that they are willing to pay higher prices for it) as more consumers use it.²⁰² While some networks are natural monopolies²⁰³ (e.g., real estate brokers’ multiple listing service, which perpetually grows in value as more properties are added), many are not (e.g., sports leagues, which eventually become unmanageable),²⁰⁴ and Hovenkamp observes that it is possible to have rather vigorous competition and innovation *within* a network (e.g., competition among makers of VHS format video players).²⁰⁵ He observes, though, that networks have a distinctive property that makes them particularly susceptible to anticompetitive concerns. That characteristic is “path dependence,” which means that once a network is fairly well established, anyone offering an alternative—even a better one—faces significant market resistance.²⁰⁶ Networks thus present antitrust with yet another mixed bag: they convey benefits because of the economies of scale in consumption, yet they impose costs (allocative inefficiencies) to the extent path dependence creates market power for their controllers. Hovenkamp offers some suggestions for how antitrust should deal with both “collaborative networks” (those controlled by groups of competitors) and “monopolized networks” (those controlled by a single entity).

b. *Collaborative Networks*.—Collaborative networks may involve two types of anticompetitive arrangements: first, network participants may “agree to reduce their own collective output and raise price”; second, they might “agree to exclude competing firms from the network, either to

200. *Id.* at 277.

201. *Id.*

202. For example, telephone service on a network becomes more valuable as more consumers utilize the network and thus can receive calls from a subscriber. *See id.* at 277–78.

203. In networks that are natural monopolies, “costs decline or the network becomes more desirable as it grows larger, to the point that a single network dominates the market.” *Id.* at 278.

204. *Id.* at 278–79.

205. *Id.* at 280–81.

206. *Id.* at 279–80.

facilitate a price increase or else to suppress rival technologies.”²⁰⁷ Hovenkamp recommends that courts police the first type of restraint by parsing the arrangements between the network controllers agreement-by-agreement, asking whether they plausibly restrain trade, and if so, whether it is necessary for the efficient production of some product or service that the venturers could not produce independently.²⁰⁸ With respect to exclusionary arrangements, which will frequently involve the adoption of standards that exclude innovators, courts should pay close attention to whether the venturers' decision regarding a standard would maximize the output of the venture collectively. When the controllers of collaborative networks select a standard that bars an innovation whose adoption would likely enhance the venture's output,²⁰⁹ anticompetitive exclusion is likely afoot.

c. *Monopolized Networks (the Microsoft Case)*.—When it comes to networks controlled by a single firm, Hovenkamp's suggestions are less concrete. Antitrust contains no “monopolization without fault” doctrine that would permit challenges to a unilaterally set monopoly price.²¹⁰ Moreover, antitrust generally (and wisely) rejects claims based on unilateral refusals to deal because fashioning a remedy for such claims would require courts to act as de facto public utility regulators (setting prices, etc.), a task for which they are poorly suited.²¹¹ Actions against network monopolists must therefore be based on something other than monopoly pricing or unilateral refusals to deal, and Hovenkamp suggests that the governing standard should be the market-wide balancing test he advocates for monopolization claims generally.²¹² Subpart III(B) of this Review criticizes that test.²¹³

The bulk of Hovenkamp's discussion of monopolized networks is devoted to explaining (quite lucidly) the *Microsoft* case,²¹⁴ disparaging the consent decree that brought an end to the government's challenge,²¹⁵ and exploring various possible antitrust remedies and “nonantitrust alternatives” that might bring competition to the computer platform market.²¹⁶ Hovenkamp believes that Microsoft did engage in illegal monopolization and that the consent decree the government negotiated will ultimately fail to bring competition to the market for personal computer operating systems.²¹⁷

207. *Id.* at 286.

208. *Id.* at 287–88.

209. *See, e.g., Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492 (1988) (involving an exclusionary standard adopted by members of the National Fire Protection Association).

210. HOVENKAMP, *supra* note 8, at 291.

211. *Id.* at 291–92.

212. *Id.* at 292.

213. *See infra* notes 259–93 and accompanying text.

214. HOVENKAMP, *supra* note 8, at 292–98.

215. *Id.* at 298–300.

216. *Id.* at 301–04.

217. *Id.* at 298–300.

He recognizes, though, the difficulty of fashioning an effective remedy in this sort of case. Structural remedies (breakups, etc.) have traditionally proven ineffective, and the risks created by such remedies are particularly great when, as in *Microsoft*, the firm at issue is a unitary firm that is not the product of historical mergers.²¹⁸ On the other hand, he argues that “our experience with conduct remedies has also not been satisfying.”²¹⁹ He therefore offers some “nonantitrust alternatives to the problem of computer platform monopoly.”²²⁰

Perhaps the most interesting—certainly the most novel—part of Hovenkamp’s *Microsoft* discussion concerns one of these “nonantitrust alternatives”—namely his proposal that the government attempt to create competition in the computer platform market by wielding its power as a purchaser.²²¹ Hovenkamp argues that the government could generate competition in the computer platform market “by requiring its departments and agencies to use open-source software as an alternative to Microsoft products.”²²² Software that is “open-source” is distributed “subject to a license that makes it royalty-free and freely able to be copied, provided that those who modify it and pass it on make it royalty-free as well.”²²³ Firms that produce open-source software make money by charging for distribution, technical, and support services.²²⁴ They face a major shortcoming, however, because their installed bases (and, thus, their network advantages) are “excessively small.”²²⁵ This problem could be overcome, Hovenkamp says, if governmental purchasers switched over to open-source software. Moreover, Microsoft need not be precluded from supplying the government; it could offer its own open-source products if it wished.²²⁶ In the end, Hovenkamp maintains, “[T]here would continue to be a significant market both for innovation and for collateral services such as support, except that it would be competitive rather than monopolized.”²²⁷

218. *Id.* at 300–01.

219. *Id.* at 302.

220. *Id.*

221. *Id.* at 302–04. Hovenkamp points to the breakup of the aluminum monopoly as precedent for this sort of governmental effort to affect the structure of markets by its participation in them. He explains that after World War II, the federal government, which owned roughly half the productive capacity for aluminum in the United States, sold its plants “under provisions of the Surplus Property Act, which required the government to consider the impact on competition whenever it sold a significant piece of government property to a private firm.” *Id.* at 302. In light of this requirement, Alcoa’s small competitors (Kaiser and Reynolds) were permitted to bid for the government facilities, but Alcoa was not. According to Hovenkamp, “The resulting market was considerably more competitive than it had been prior to the war.” *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 303.

226. *Id.*

227. *Id.* at 304.

Hovenkamp's idea, while intriguing, raises difficult questions: Do government purchases represent enough of the market to bring about the structural changes Hovenkamp envisions? Would government agencies, at least for a significant period of time, find themselves saddled with open-source platforms that were either technically inferior or for which necessary software was not available? Are profits from distribution, technical, and support services sufficient to motivate continued innovation of platform software that must be distributed royalty-free? There are, of course, only speculative answers to these questions. But two things are clear: the proposed strategy would involve tremendous start-up costs on the part of the government, and there is a substantial risk that the strategy could fail to create the competition Hovenkamp envisions. In light of these obvious costs and risks (and the remarkable degree of innovation that continues to exist in the operating systems market, despite its apparent monopolization),²²⁸ I am highly skeptical of the wisdom of this sort of massive industrial policy. Nevertheless, Hovenkamp deserves credit for proposing a creative and at least plausible solution to the difficult problem of what to do about Microsoft's computer platform monopoly.

III. Two Major Criticisms

Having summarized and offered a number of fairly abbreviated criticisms of *The Antitrust Enterprise*, I turn now to more extensive criticisms of two of Hovenkamp's proposals. The troubling proposals relate to the indirect purchaser rule and the standard for identifying exclusionary conduct under § 2 of the Sherman Act.

A. *The Indirect Purchaser Rule*

Among Hovenkamp's suggestions for improving antitrust enforcement is a proposal to abolish the indirect purchaser rule. The Supreme Court's famous *Illinois Brick*²²⁹ decision held that those who purchase only indirectly from a monopolist or cartel may not recover overcharge damages;²³⁰ instead, the direct purchaser may collect the entire amount of any overcharge, even if that purchaser has passed some of the overcharge on to downstream (i.e.,

228. Hovenkamp's discussion of Microsoft's business strategy explains why such innovation persists: Microsoft confronts the "monopoly durability" problem (i.e., the fact that its used products compete with the new products it is creating) by aggressively innovating. *Id.* at 293.

229. *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

230. *See id.* at 728–29 (declining "to abandon the construction given § 4 [of the Clayton Act] in *Hanover Shoe*—that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the section—in the absence of a convincing demonstration that the Court was wrong in *Hanover Shoe* to think that the effectiveness of the antitrust treble-damages action would be substantially reduced by adopting a rule that any party in the chain may sue to recover the fraction of the overcharge allegedly absorbed by it").

indirect) purchasers.²³¹ As Hovenkamp notes, the primary rationale for the Court's holding in *Illinois Brick* was the tremendous difficulty of accurately determining, in a judicial proceeding, the proportion of an overcharge passed on to downstream purchasers.²³² The Court observed that the need to apportion an overcharge among purchasers would "transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge"²³³ and would thereby "greatly complicate and reduce the effectiveness" of antitrust damages actions.²³⁴

While agreeing that computing passed-on damages is extraordinarily difficult, Hovenkamp maintains that that difficulty does not justify the rule precluding indirect purchaser actions. He asserts that *Illinois Brick* relied on two false assumptions: first, that overcharge is the proper measure of damages for every firm in the defendant's distribution chain; and second, that calculating downstream damages requires tracing and apportionment of the initial overcharge among the direct purchaser and the various downstream purchasers.²³⁵ Once these two mistaken assumptions are rejected, Hovenkamp says, the indirect purchaser rule lacks justification.

With respect to the first assumption, Hovenkamp argues that overcharge is not the proper measure of damages for intermediary purchasers (e.g., assemblers, distributors, or retailers), who will generally respond to supracompetitive pricing by passing along at least some of the price increase and suffering reduced sales as a result of their higher prices.²³⁶ An overcharge measure, Hovenkamp observes, "never captures the losses resulting from lost volume."²³⁷ By contrast, a "lost profits" measure would do so and would account for the degree to which middlemen are able to pass overcharge on to downstream purchasers.²³⁸ Hovenkamp thus concludes that "the prevailing rule today that measures middlemen's damages by the overcharge

231. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 489 (1968) (holding that "the buyer is equally entitled to damages if he raises the price for his own product").

232. HOVENKAMP, *supra* note 8, at 74; accord *Ill. Brick Co.*, 431 U.S. at 731-32 (holding that the Court's focus in *Hanover Shoe*, 392 U.S. at 494, on the difficulties of applying pass-on theories, "applies with no less force to the assertion . . . by plaintiffs than it does to the assertion by defendants").

233. *Ill. Brick Co.*, 431 U.S. at 737.

234. *Id.* at 732.

235. HOVENKAMP, *supra* note 8, at 74-75.

236. *Id.* at 75-76. For example, if a cartel of liquor manufacturers raises the price of a bottle of liquor from \$10 to \$14, retailers may respond by raising the retail price of a bottle from \$13 to \$16. Their losses will consist of an absorbed overcharge of \$1 per bottle sold *plus* the profit losses resulting from reduced sales at a \$16 retail price (less any incremental profits from increased sales of alternative liquors). *Id.* at 74-75.

237. *Id.* at 75.

238. *Id.* at 75-76.

is economically incorrect"; the proper measure of damages should be lost profits.²³⁹

With respect to the second assumption, Hovenkamp asserts that indirect purchaser actions do not require tracing and apportionment of the overcharge.²⁴⁰ Rather than calculating what percentage of an overcharge was absorbed by middlemen and what percentage was ultimately paid by indirect purchaser plaintiffs, courts could use the familiar "yardstick" or "before-and-after" methods to determine the amount of overcharge paid by indirect purchaser plaintiffs. The yardstick method calculates damages by comparing the price the plaintiff paid to the prevailing price in some different but similar market in which the anticompetitive practice at issue is not occurring.²⁴¹ The before-and-after method compares the plaintiff's price to those prevailing in the same market prior to and subsequent to the violation period.²⁴² Neither method would require determination of pass-on percentages.²⁴³ Hovenkamp therefore contemplates a system in which injured middlemen would recover lost profits and consumers would recover overcharges, with both lost profits and overcharges measured using either the yardstick or before-and-after method.

In terms of optimal deterrence of anticompetitive conduct, Hovenkamp's proposed abrogation of the indirect purchaser rule is undesirable. The indirect purchaser rule likely provides a closer to optimal level of deterrence than Hovenkamp's proposed approach, and at a lower cost of administration. To see why this is so, consider the optimal deterrence model of antitrust damages and compare how the two approaches fare at achieving optimal deterrence.

1. *The Optimal Deterrence Model.*—The optimal deterrence model of antitrust damages begins with the assumption that the goal of a damages remedy should be to discourage competitive practices that are wealth-destroying, while encouraging conduct that creates wealth.²⁴⁴ In addition, the model assumes that the sole purpose of damage-trebling is to account for the likelihood that violations will not be successfully detected and prosecuted; in other words, the model assumes that the probability of detection and successful prosecution is precisely one-in-three.²⁴⁵ Based on these assumptions, the model concludes that base (pre-trebled) damages should be set so that they

239. *Id.* at 73. Hovenkamp would calculate the lost profits measure through "an amalgamation of the losses caused by [intermediate purchasers'] lost sales volume, plus any reduction in markup that they may have been forced to take." *Id.* at 75–76.

240. *Id.* at 74–75.

241. *Id.* at 74.

242. *Id.* at 75.

243. *Id.*

244. See generally HOVENKAMP, *supra* note 66, § 17.2, at 657–63 (describing the optimal deterrence model).

245. *Id.* § 17.2b, at 658.

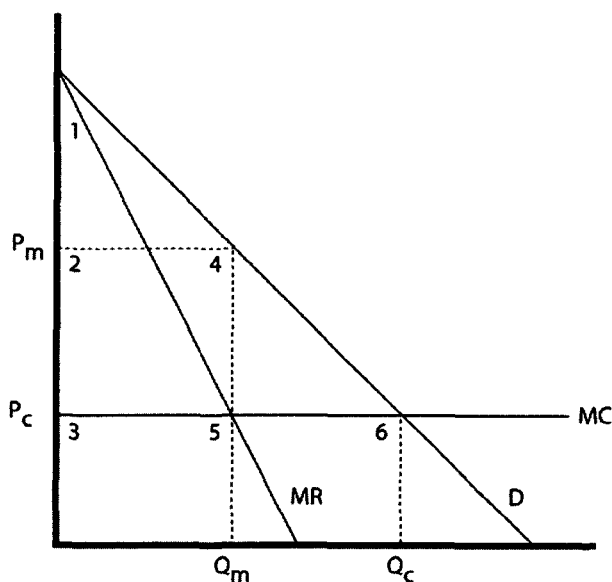
exceed the defendant's gain from engaging in the conduct at issue when that conduct involves a net social loss, but not when the conduct enhances total social wealth. If base damages are so determined, defendants will be incentivized to engage in efficient conduct but to avoid inefficient conduct.²⁴⁶

It is first necessary, then, to determine how antitrust defendants gain from anticompetitive conduct. In essence, they do so by restricting output (via either collusion or exclusionary practices) so that buyers bid prices up above competitive levels. As depicted in the classic monopoly pricing model (Figure 1), this output restriction has two primary effects on social wealth. First, a measure of wealth is transferred to sellers from consumers, who have to pay higher prices for the products at issue. This wealth transfer is depicted by square 2-4-5-3 in Figure 1. Second, a number of consumers—those with the “most elastic” demand—substitute away from the product at issue and toward consumption alternatives (including perhaps forbearance from consumption) that create less total wealth. This inefficient substitution is depicted by the so-called “deadweight loss” triangle created by points 4-5-6. The “surplus transfer” (square 2-4-5-3) represents a gain for the defendant; the deadweight loss (triangle 4-5-6) does not.²⁴⁷

246. *Id.* § 17.2b, at 660. I am referring, of course, to Kaldor–Hicks efficiency. See generally Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 190–91 (1999).

247. For a more thorough discussion of this analysis, see HOVENKAMP, *supra* note 66, § 17.2b, at 657–60.

Figure 1: The monopoly pricing model



MC =	Marginal Cost	Q_m =	Monopoly Output
MR =	Marginal Revenue	Q_c =	Competitive Output
P_m =	Monopoly Price	D =	Demand
P_c =	Competitive Price		

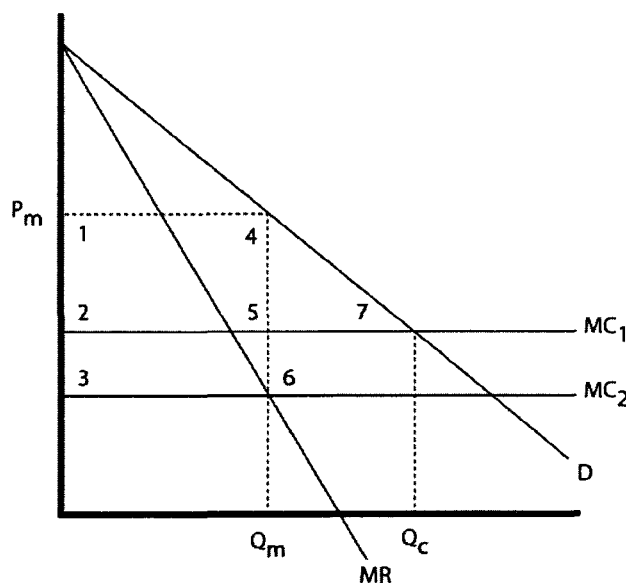
In light of this model, it is easy to state the optimal deterrence rule for practices that do not create any efficiencies (e.g., a naked cartel): Damages should be set at an amount equal to or exceeding the amount of the overcharge, square 2-4-5-3. In such cases, the only benefit the defendant receives from his anticompetitive conduct is a supracompetitive price, so forcing him to pay an amount of damages equal to the increment of the price that is above competitive levels (i.e., to the overcharge) will render the behavior at issue unprofitable for him. While other areas of law (e.g., torts) typically calculate damages according to the loss occasioned by a defendant's behavior, a damages rule requiring the defendant to pay only the deadweight loss caused by his anticompetitive conduct would underdeter because deadweight loss will generally be less than the amount of wealth transfer from consumers to defendants. Instead, the damages amount should be determined on the basis of the defendant's gain, which, absent any efficiencies created by the defendant's conduct, should be equivalent to the overcharge.²⁴⁸ A damages figure in excess of that amount will provide

248. If, for example, a defendant's conduct transferred \$1,000 from consumers to defendants and produced \$500 in social loss, a rule requiring the defendant to pay merely the social cost of his conduct (\$500) would not motivate him to forego the conduct. To deter the conduct, damages would have to be at least \$1,000 (the benefit to the defendant).

optimal deterrence because there is no need to worry about overdetering conduct that produces no efficiencies.²⁴⁹

When the defendant's conduct also creates some efficiencies, the situation becomes more complicated. Figure 2 depicts the effects of this sort of conduct: The practice causes the defendant's costs to drop from MC_1 to MC_2 , creating wealth represented by area 2-5-6-3; wealth is transferred from consumers to the defendant in an amount depicted by rectangle 1-4-5-2; and there is a deadweight loss in an amount depicted by triangle 4-5-7. Once again, the wealth transfer is, from an efficiency standpoint, irrelevant; the harm it causes consumers is precisely offset by the benefits to producers. Whether the practice is efficient or inefficient, then, turns on the relative magnitudes of the defendant's cost-savings and the deadweight loss. If the defendant's cost-savings (rectangle 2-5-6-3) exceed the deadweight loss (triangle 4-5-7), then the practice is Kaldor-Hicks efficient and should not be deterred. By contrast, if the deadweight loss exceeds the defendant's cost-savings, deterrence is proper.

Figure 2: Conduct creating both market power and productive efficiency



Of course, it would be virtually impossible for courts to conduct this sort of “cost-savings versus deadweight loss” balancing in litigation. They could, however, adopt a damages rule that would motivate potential defendants to take their best stab at such balancing.²⁵⁰ If businesses considering potentially violative conduct knew they would have to pay (1) the overcharge

249. See HOVENKAMP, *supra* note 66, § 17.2b, at 661.

250. *Id.* § 17.2b, at 659.

amount and (2) the amount of any deadweight loss occasioned by their conduct (and if the damages multiplier were properly set to account for the likelihood of detection), optimal deterrence would be achieved.²⁵¹ Businesses would stand to gain from Kaldor–Hicks efficient conduct because their expected benefits (overcharge plus efficiency gains) would exceed their expected liability (overcharge plus deadweight loss). For Kaldor–Hicks inefficient conduct, businesses would expect to pay more in liability (overcharge plus deadweight loss) than they would collect in benefits (overcharge plus efficiency gains). The optimal deterrence model thus posits that antitrust damages should be set to equal the overcharge amount plus the amount of the deadweight loss occasioned by the behavior at issue.²⁵² For practices that create no efficiencies, such as naked price-fixing, the damages award would be larger than necessary to motivate efficient behavior (simple overcharge disgorgement would suffice), but overdeterrence is not a concern in such cases.²⁵³

In practice, courts do not award overcharge damages according to the optimal deterrence formula. Given the difficulty of measuring deadweight loss in litigation, courts typically ignore it altogether in overcharge cases and set base (pre-trebled) damages equal to the amount of the overcharge only—that is, the difference between the price actually paid to the defendant and that which would have prevailed under competitive conditions.²⁵⁴ As noted, courts typically determine the latter amount by using the yardstick or before-and-after methods.

2. *The Indirect Purchaser Rule and Optimal Damages in Overcharge Cases.*—The optimal deterrence model suggests that Hovenkamp's proposed abandonment of the indirect purchaser rule is undesirable. In overcharge cases involving naked practices, it would increase administrative costs without providing any benefit in terms of added deterrence. In overcharge cases involving practices that create efficiencies, it would both increase administrative costs and exacerbate overdeterrence.

a. *Overcharge Cases Involving Naked Practices.*—If a business's only benefit from adopting a practice is an overcharge, and the business knows it must disgorge that overcharge, then the business will not spend resources to adopt the practice. Accordingly, optimal deterrence can be achieved in overcharge cases involving practices that do not create efficiencies for the defendant simply by requiring the defendant to disgorge the amount of any overcharge (square 2-4-5-3 in Figure 1). The defendant does

251. *Id.* § 17.2b, at 660.

252. *Id.* § 17.2b, at 661.

253. *Id.*

254. *See id.* § 17.2d, at 663–66 (contrasting the optimal deterrence model with the actual practice of courts).

not care whether it pays the overcharge to the direct purchaser or to the ultimate consumers of its products; all that matters is that it be forced to disgorge the overcharge. The indirect purchaser rule permits that outcome in only a single lawsuit. By contrast, Hovenkamp's proposed approach would require at least two lawsuits: one by the direct purchaser and at least one by downstream purchasers. Hovenkamp's proposed approach thus increases administrative costs without providing any incremental benefits in terms of deterrence; a single overcharge lawsuit by the direct purchaser would suffice.

b. Overcharge Cases Involving Practices That Enhance Defendants' Efficiency.—The optimal deterrence model suggests that mere disgorgement of the defendant's overcharge may not provide a sufficient level of deterrence in cases in which the defendant's practice creates efficiencies. If deadweight loss exceeds the cost-savings occasioned by the practice at issue, the practice will be inefficient but will not be deterred by a rule requiring merely the disgorgement of the overcharge to the direct purchaser. In this context, Hovenkamp's proposed approach (a lost profits action by middlemen and an overcharge action by final consumers) might seem desirable because it would bring damages closer to the "overcharge plus deadweight loss" figure recommended by the optimal deterrence model.

This assumes, though, that damage-trebling is equally irrelevant in cases involving naked practices and those involving practices that create cost savings for defendants. Recall that the optimal deterrence model assumes away the effect of trebling by assuming that the chances of detecting and successfully prosecuting an overcharge-causing offense are precisely one-in-three.²⁵⁵ Adopting that assumption, the model can focus on setting base damages so that inefficient conduct is rendered unprofitable but efficient conduct is not. If the likelihood of successful detection and prosecution is greater than one-in-three, then the damages measure recommended by the optimal deterrence model will be overdeterrent.

As Hovenkamp himself acknowledges,²⁵⁶ the likelihood of detection and successful prosecution is significantly greater when the anticompetitive practices are "public acts" like "mergers, most joint ventures, many exclusionary practices, and nearly all vertical contract practices" than when they are clandestine practices like naked price-fixing.²⁵⁷ Moreover, these public practices are precisely the sorts of practices that create cost savings for defendants. In short, it is likely that the damages measure that applies under the indirect purchaser rule is already overdeterrent because three times the overcharge occasioned by a public practice likely exceeds the overcharge plus the deadweight loss occasioned by the practice at issue. Hovenkamp's proposal to increase damages further (lost profits for middlemen plus the

255. See *supra* notes 244–46 and accompanying text.

256. HOVENKAMP, *supra* note 8, at 67.

257. *Id.* at 66.

overcharge to consumers) would exacerbate this overdeterrence *and* would increase administrative costs by requiring multiple lawsuits rather than just one.²⁵⁸ From a deterrence standpoint, then, Hovenkamp's proposal to abandon the indirect purchaser rule seems unwise.

B. *The Exclusionary Conduct Standard*

As noted above, Hovenkamp proposes a marketwide balancing test for exclusionary conduct. Under his test, which is also the test set forth in the *Antitrust Law* treatise,²⁵⁹ an act is exclusionary if it:

1. is reasonably capable of creating, enlarging, or prolonging monopoly power by limiting the opportunities of rivals; and
2. either [2a] does not benefit consumers at all, or [2b] is unnecessary for the particular consumer benefits produced, or [2c] produces harms seriously disproportionate to the resulting benefits.²⁶⁰

Hovenkamp maintains that his proffered test is preferable to the other leading contenders: the "profit sacrifice" test;²⁶¹ tests that focus on whether the practices at issue "raise rivals' costs or impair their efficiency";²⁶² and Judge Posner's test, which asks whether the practice at issue is "likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor."²⁶³ In actuality, Hovenkamp's proposed test would be exceedingly difficult for courts to administer and would provide businesses with little *ex ante* guidance on the legality of novel practices. At least two of the approaches Hovenkamp rejects (or versions of them, at least) would likely prove superior.

1. *Shortcomings of Hovenkamp's Marketwide-Balancing Approach.*—Hovenkamp never refers to his proposed test as a "marketwide-balancing"

258. Of course, if Hovenkamp's proposal to limit treble damages to actions based on clandestine practices were adopted, this overdeterrence problem would not exist. To the extent Hovenkamp recommends his trebling limitation and abandonment of the indirect purchaser rule as a "package deal," the latter recommendation is less troubling. As a stand-alone suggestion, however, it seems unwise.

259. See 3 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 651a, at 72 (2d ed. 2002).

260. HOVENKAMP, *supra* note 8, at 152.

261. See, e.g., Melamed, *supra* note 137, at 389–95 (arguing for a variation on the profit sacrifice test that focuses on whether an alleged monopolist's conduct "would make no business or economic sense but for its likelihood of harming competition"); Werden, *supra* note 137, at 422–25 (same).

262. HOVENKAMP, *supra* note 8, at 153; see, e.g., Elhauge, *supra* note 44, at 315 (proposing a test that focuses on whether monopoly power is furthered by "impairing rival efficiency" regardless of whether it "enhances monopolist efficiency").

263. POSNER, *supra* note 10, at 194–95.

approach, but that must be what the test contemplates. In practice, all the “action” in the test occurs in part 2c (as labeled above). Challenges involving conduct that fails to meet the first prong will generally be dismissed quickly, and prongs 2a and 2b “concern the conceptually easy case of harm without benefit.”²⁶⁴ Thus, in the only cases in which courts actually need some sort of test to guide their decisionmaking—i.e., challenges to mixed bag conduct that creates both efficiency benefits and anticompetitive harm—the outcome will turn entirely on the balancing required by part 2c.

Douglas Melamed has recently identified two significant problems with this approach.²⁶⁵ First, marketwide balancing of the various effects of mixed bag conduct is extremely difficult for courts and enforcement agencies and would likely exceed their competence.²⁶⁶ As Melamed observes, balancing the benefits and harms of efficiency-creating but exclusion-causing conduct would require courts to (1) “quantify[] both welfare effects by estimating price, cost, and quantity of output under two conditions—before and after exclusion of rivals”; (2) “deal[] with the time dimension (both duration and discounting to present value) of each”; and (3) “compare[] both to a hypothetical but-for world in which the conduct did not take place.”²⁶⁷ Of course, courts could make educated guesses about welfare effects or limit their consideration to static, rather than dynamic, welfare effects, but such shortcuts “would move the analysis . . . toward arbitrary decision.”²⁶⁸

A second problem with Hovenkamp’s test for exclusionary conduct is that it provides businesses with little *ex ante* guidance regarding the legality of proposed courses of conduct and is therefore likely to deter efficiency-enhancing, but novel, practices. Melamed explains:

The balancing test would require a firm to determine, before it embraces new competitive strategies, not just the impact of the

264. Melamed, *supra* note 137, at 380 (describing and criticizing the marketwide-balancing test proposed in the *Antitrust Law* treatise).

265. *Id.* at 381–82. Melamed articulates a third objection in addition to the two discussed herein: that the balancing test “flies in the face of . . . the notion that firms are entitled to benefit from success achieved by ‘competition on the merits,’ even if the success includes monopoly power.” *Id.* at 382. For purposes of brevity, I concentrate on Melamed’s first two criticisms, which I believe are his most persuasive objections.

266. *See id.* at 381 (arguing that precise comparisons of the various effects of alleged monopolists’ actions with hypothetical situations in which the actions did not occur are beyond the competence of courts and enforcement agencies); *see also* Werden, *supra* note 137, at 431 (observing that welfare balancing in “[a] case that entails both consumer benefits, as from new or better products, and consumer harms, as from higher prices, may overtax the quantitative tools of economics”).

267. Melamed, *supra* note 137, at 381; *see also* Werden, *supra* note 137, at 431 (“Even if economists could perfectly sort out the relatively short-run economic consequences of all marketplace conduct, they still could not accurately account for the important long-term effects of any remedial action on incentives for innovation and risk taking—the twin engines of our prosperity.”).

268. Melamed, *supra* note 137, at 381 (discussing the likely effect of shortcuts such as “substituting intuition or educated guesses for precise calculation”).

strategies on its business, but also the impact on rivals and to weigh the benefits to its consumers against the long-run harm to consumers if the firm's less-inventive rivals are weakened or driven from the market as a result. Assessing the long-run harm would require, among other things, calculating the duration of the harm in light of responses by competitors, new entry, and future innovation.²⁶⁹

Given the near impossibility of this inquiry and the high cost of making a mistake (i.e., an adverse treble damages judgment), firms would likely forego aggressive new methods of competition to the detriment of consumers.

Of course, any test that purports to identify exclusionary conduct is likely to be difficult to apply to mixed bag conduct, to generate some false positives or false negatives, and to chill some procompetitive practices. Hovenkamp's test thus need not be perfect, just better than the alternatives. While Hovenkamp contends that his test is preferable to the other standards theorists have articulated,²⁷⁰ the test is likely inferior to both the profit-sacrifice test and a revised version of Judge Posner's test.²⁷¹

2. *Defending (a Version of) the Profit-Sacrifice Approach.*—As Hovenkamp construes the profit-sacrifice test, which the Department of Justice has advocated in a number of monopolization cases,²⁷² the test deems conduct exclusionary “when the defendant sacrifices immediate profits as part of a strategy whose profitability depends on the exclusion of rivals.”²⁷³ Hovenkamp criticizes this test for being both over- and underinclusive.²⁷⁴ The test is “too broad,” he says, because it would condemn certain competitive activity, such as new product development.²⁷⁵ He offers the example of

269. *Id.*

270. HOVENKAMP, *supra* note 8, at 152–53 (criticizing tests based on profit sacrifice, raising rivals' costs, and excluding equally efficient rivals).

271. Hovenkamp's test is superior to approaches that focus on whether the practice at issue has raised rivals' costs or impaired their efficiency. As Hovenkamp correctly observes, these tests are “helpful but incomplete” because they would condemn output expansions that cause rivals to lose economies of scale and would fail to condemn predatory pricing campaigns that deprive rivals of revenue but do not necessarily increase their costs or reduce their efficiency. *Id.* at 153; *see also* Lambert, *supra* note 65, at 1712–17 (similarly criticizing a leading “raising rivals' costs” theory).

272. *See, e.g.*, Brief for the United States and the FTC as Amici Curiae Supporting Petitioner at 16–19, Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) (No. 02-682), available at <http://www.ftc.gov/os/2003/05/trinkof.pdf> (arguing that “conduct is exclusionary where it involves a sacrifice of short-term profits or goodwill that makes sense only insofar as it helps the defendant maintain or obtain monopoly power” and stating that if a refusal to deal “involves a sacrifice of profits or business advantage that makes economic sense only because it eliminates or lessens competition, it is exclusionary”); *see also* Werden, *supra* note 137, at 413 (observing that “[i]n recent years, the Department of Justice has consistently advocated the no economic sense test in all its Section 2 cases”).

273. HOVENKAMP, *supra* note 8, at 152.

274. *Id.* (“Th[e] test is both too broad and too narrow.”).

275. *Id.* Note that Hovenkamp is echoing a criticism made by Einer Elhauge. *See* Elhauge, *supra* note 44, at 274–75.

a firm that invests heavily in designing a new mousetrap that, when marketed, will drive out the competition. Such innovation, which appears to involve an immediate profit sacrifice that leads to monopoly, obviously should not be condemned under the antitrust laws.²⁷⁶ On the other hand, Hovenkamp asserts, the test is “too narrow” because it would fail to condemn conduct, such as various acts of monopoly maintenance, that “may be profitable the instant they are in place yet also anticompetitive.”²⁷⁷

Both of Hovenkamp’s arguments are based on a misunderstanding of the profit-sacrifice test (at least the version the government has advocated). The government’s proposed profit-sacrifice test is perhaps better construed as a “no economic sense” test,²⁷⁸ which holds that “conduct is not exclusionary or predatory *unless* it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition.”²⁷⁹ Construing the test in this manner eliminates Hovenkamp’s concerns about its over- and underinclusivity. Hovenkamp’s argument that the test is “too broad” because it would condemn investments in innovation assumes that it is sufficient to ask whether the defendant’s conduct entails a short run profit sacrifice. It is not; if the answer to that question is “yes,” the test further queries why it would be rational to make that sacrifice.²⁸⁰ If there is some profit-enhancing rationale for doing so besides a lessening of competition, then the test is not satisfied. Hovenkamp’s mousetrap example therefore fails. While “invest[ing] heavily in designing a better mousetrap”²⁸¹ may entail a short run profit sacrifice, that sacrifice would be economically rational if it were expected to result in a superior mousetrap for which consumers would be willing to pay a higher price; its rationality does not depend on the elimination of rivals.²⁸²

276. HOVENKAMP, *supra* note 8, at 152.

277. *Id.* As an example of immediately profitable exclusionary devices, Hovenkamp points to “tying and exclusive dealing contracts, such as Microsoft’s insistence that Windows users also take Internet Explorer.” *Id.*

278. Werden, *supra* note 137, at 413–14 (describing the version of the test the Department of Justice has articulated in recent § 2 cases).

279. Brief for the United States and the FTC as Amici Curiae Supporting Petitioner, *supra* note 272, at 15.

280. See Werden, *supra* note 137, at 424 (“When the defendant’s conduct entails a short-run profit sacrifice, the no economic sense test further asks why it is rational to make that sacrifice.”).

281. HOVENKAMP, *supra* note 8, at 152.

282. Melamed offers another response to Hovenkamp’s mousetrap example. He says the example is unpersuasive because it “overlooks the fact that only conduct that excludes rivals is subject to the sacrifice test.” Melamed, *supra* note 137, at 395. Development of a better mousetrap could not possibly exclude rivals; only *commercialization* of that development could do so. Thus, the relevant conduct is the mousetrap’s commercialization. If the terms of that conduct would not be profitable for the firm but for the exclusion of rivals (e.g., if the terms on which the mousetrap was sold were not themselves profitable, so that the commercialization efforts would become profitable only after rivals had exited the market and the firm was able to switch to more favorable terms of trade), then the commercialization terms would be exclusionary. Otherwise, they would not be. In any event, the development efforts themselves could not be exclusionary because they could not exclude rivals. *Id.* at 395–96.

Hovenkamp's argument that the test is "too narrow" because it would fail to condemn immediately profitable anticompetitive acts similarly rests on a misunderstanding of the profit-sacrifice test. Hovenkamp mistakenly assumes that the test requires two time periods: a short run period in which there are losses followed by a later period in which there is monopoly recoupment.²⁸³ Instead, the test focuses on the *nature* of the conduct and asks whether it would reduce profits but for its tendency to eliminate competition.²⁸⁴ The key question is not *when* the conduct will be profitable but *why* it is (or is expected to be) profitable. So construed, the test condemns practices, such as acts of monopoly maintenance, that "may be profitable the instant they are in place, yet also anticompetitive."²⁸⁵

Thus, the leading version of the profit-sacrifice test (or, more accurately, the "no economic sense" test) does not suffer from the defects Hovenkamp claims to identify. The test is likely superior to the marketwide balancing approach Hovenkamp advocates. It promises to condemn most cases of exclusionary conduct, and, unlike Hovenkamp's proposed approach, it is relatively easy for courts to administer and provides clear, reliable guidance to business firms considering novel competitive practices.

3. *Defending (a Version of) Judge Posner's Approach.*—Hovenkamp's proposed marketwide balancing test is also inferior to a version of Judge Posner's test for exclusionary conduct. Posner has proposed that exclusionary conduct be defined as acts "likely in the circumstances to exclude from the defendant's market an equally or more efficient competitor."²⁸⁶ Hovenkamp maintains that this test is "too narrow" because (1) it would not reach some clearly anticompetitive conduct, such as an infringement suit based on a fraudulent patent claim,²⁸⁷ (2) there is value in preventing socially useless practices that are likely to exclude rivals "who can realistically be expected to emerge under the circumstances," even if those rivals are not as efficient as the perpetrator;²⁸⁸ and (3) the test would not reach conduct that prevents rivals from achieving minimum efficient scale and thereby becoming as efficient as the perpetrator.²⁸⁹

Examined closely, each of these criticisms either fails or at best calls for no more than a modest revision of Judge Posner's standard. The first

283. *See id.* at 391 (observing that it is "incorrect" to interpret the profit-sacrifice test to suggest that "conduct is anticompetitive only if it entails losses in the short run followed by monopoly recoupment in some later period").

284. *See id.* ("As the Justice Department has long recognized, the test depends, not on the timeline, but rather on the nature of the conduct—on whether it would make no business or economic sense but for its likelihood of harming competition.").

285. HOVENKAMP, *supra* note 8, at 152.

286. POSNER, *supra* note 10, at 194–95.

287. HOVENKAMP, *supra* note 8, at 153.

288. *Id.* at 154.

289. *Id.*

criticism fails because the test for identifying exclusionary conduct is applicable only to mixed bag conduct; it need not reach injurious practices with no redeeming virtues, for such practices are easy to condemn without reference to any exclusionary conduct standard.²⁹⁰ The second criticism should be rejected because it assumes that courts can identify practices that, in Hovenkamp's words, "confer no significant social benefits,"²⁹¹ and should thus be condemned if they exclude the only rivals likely to appear on the scene. If the history of antitrust law (e.g., tying doctrine) has taught us anything, it is that courts are bad at recognizing when novel, exclusion-causing conduct has beneficial properties. Finally, Hovenkamp's third criticism—that Posner's test fails to condemn practices that prevent the achievement of minimum efficient scale—could be dealt with by revising the Posner test to condemn practices likely to exclude "competitive rivals," defined as rivals who are as efficient as the perpetrator *or* are likely to become so if permitted to achieve minimum efficient scale. I have elsewhere argued for such a revised version of the Posner test and have applied it to the difficult issue of bundled discounts,²⁹² which are a classic mixed bag practice.²⁹³

IV. Conclusion

The Antitrust Enterprise is an important book. Unlike its most notable predecessors,²⁹⁴ the book is more concerned with execution than principle. But, as Judge Posner has remarked, that is where the challenge now lies for economically minded antitrust scholars.²⁹⁵ Like so many of the business practices with which antitrust tribunals have grappled, *The Antitrust Enterprise* is a mixed bag—some good, some troubling. Yet, as with the famous *NCAA* joint venture,²⁹⁶ the good far outweighs the bad. Above all, Hovenkamp is a marvelous teacher. His impressive grasp of law, economics, and history is matched only by the lucidity of his explanations and the clarity of his prose. While some of its suggestions are troubling, *The Antitrust Enterprise* is a wonderful book that will benefit generations of antitrust scholars and students alike.

290. Cf. Melamed, *supra* note 137, at 399 (observing that "conduct [that] has no efficiency properties and serves only to harm rivals . . . can be readily condemned without application of either a balancing test or a sacrifice test," for such conduct "does not raise the issue at which these tests are directed: what to do about conduct that both has efficiency benefits and excludes rivals").

291. HOVENKAMP, *supra* note 8, at 153.

292. Lambert, *supra* note 65, at 1740–53.

293. See *supra* notes 160–63 and accompanying text.

294. BORK, *supra* note 1; POSNER, *supra* note 3.

295. See POSNER, *supra* note 10, at viii ("The chief worry at present is not doctrine or direction, but implementation.").

296. See *NCAA v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85 (1984) (recognizing that most agreements between members of the NCAA were necessary for the creation of college football and thus output-enhancing but holding that one agreement, which limited television broadcasts, was anticompetitive).