

The Antitrust Enterprise: Principle and Execution, Herbert Hovenkamp (Harvard University Press Cambridge, Massachusetts & London, England 2005)

Herbert Hovenkamp is the most influential antitrust scholar of our generation. His magisterial eighteen volume treatise is the standard reference work in the field and is virtually the only scholarly authority cited by most courts in antitrust decisions. He is prolific beyond belief and publishes a wide variety of other treatises, hornbooks, articles, reviews, and even student study aids in antitrust, property law, and legal history.¹

In *The Antitrust Enterprise*, Hovenkamp nonetheless does something new. He speaks in his own voice laying out a comprehensive vision of what antitrust law and enforcement is and should be. This is a breathtaking work of both scholarship and advocacy designed to move the antitrust field as Robert Bork's *Antitrust Paradox* moved antitrust a generation ago. Because of Hovenkamp's stature and the power of his ideas, it is very likely to succeed. It is also likely to succeed in moving courts and policy makers towards Hovenkamp's vision of the field because it is simple, understandable, and beautifully written. This may well be the best written book about antitrust.

It is a compelling argument for a vision of antitrust law and policy even more limited than it is today. Hovenkamp's central thesis is that antitrust should only address problems that it is institutionally capable of solving. He would define antitrust doctrine almost solely by the existence of a workable remedy. Even thing else would be the province of some other body of law or market forces.

In this compact 310 page monograph (plus notes and index), Hovenkamp lays out his world view in three parts. To quote the author: "The first considers the institutional enterprise of antitrust, looking at its history and ideology, its tendency to create overly complicated rules, the numerous problems attending private enforcement, and the uses of misuses of experts. Part II looks at substantive antitrust doctrine as developed in 'traditional' markets. Finally, Part III considers the role of the antitrust laws in regulated industries and networks, as well as the intersection between antitrust and the intellectual property laws." (10)

He ends with an epilogue which sets forth eight specific changes he would make to antitrust law and enforcement in the United States. Hovenkamp would limit the use of treble damage actions to naked price fixing agreements and similar per se offenses. He would further abandon the indirect purchaser rule, limit the role of juries in antitrust cases, make the rule of reason a method analysis with more structure rather than a barren classification of practices, overrule the Supreme Court's 1992 decision in *Kodak* dealing with the possibility of monopoly power in aftermarkets for parts and service of durable goods,² repeal or profoundly reinterpret the Robinson-Patman Act, and simplify the relationship between antitrust and regulation.

¹ An eleven page bibliography of Professor Hovenkamp's published work as of February 2006 is available at http://www.law.uiowa.edu/documents/faculty_bib/hovenkamp-bib.pdf.

² *Image Technical Services, Inc. v. Eastman Kodak Co.*, 504 U.S. 451 (1992).

While brilliant and often persuasive, Hovenkamp's vision is a sad one for those who believe in the transformative power of the antitrust law as a fundamental aspect of economic liberty, the Magna Carta of the free enterprise system. It is all the more sad that Hovenkamp has accurately described antitrust's present and probably predicted much of its future. In so doing, he has unfortunately validated an emboldened version of the Chicago School approach to antitrust that is very much in vogue, but still contested by proponents of post-Chicago and non-Chicago approaches. Hovenkamp himself is normally identified with the Harvard School of antitrust, but early on in the book he shows how those two schools of thought have all but merged in their basic policy prescriptions. The problem is that many thoughtful critics have introduced a high degree of complexity in antitrust over the past thirty years in the name of economic efficiency, and now use that complexity as a justification to eliminate the scope of antitrust beyond a tiny handful of areas that hardly justify the elaborate current enforcement mechanisms.

It is not as if contemporary antitrust is some fearsome beast that is ravaging the economy and destroying all plausible efficiencies in its path. If anything, it is already a toothless tiger outside the realm of cartel cases. To have a reasonable and eminent critic like Professor Hovenkamp seek to further tame it in the name of simplicity and institutional competencies is unfortunately the thinking man's death sentence for a field of law that was intended to play, and has played until recently, a far more robust role in the history and jurisprudence of the United States.

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