

Nicolas Charbit  
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*Editors*

# Herbert Hovenkamp

## The Dean of American Antitrust Law *Liber Amicorum*

Foreword by The Hon. Bill Baer  
Introduction by David J. Gerber

Roger D. Blair, Thomas F. Cotter, Daniel A. Crane,  
Thomas J. Horton, Maria Ioannidou, Thomas A. Lambert,  
Marina Lao, Christopher R. Leslie, Daryl Lim, John E. Lopatka,  
Mariateresa Maggolino, Richard S. Markovits, Gabriella Muscolo,  
John M. Newman, Jane O'Connell, Barak Orbach, William H. Page,  
Christine Piette Durrance, D. Daniel Sokol, Christopher S. Yoo



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# Foreword

THE HON. BILL BAER\*

Brookings Institution

Long before I met him, Herb Hovenkamp was my antitrust lifeline. I turned to his writing countless times as I sought to understand the many areas of antitrust law and analysis that had eluded me – or I had avoided – during my career as a practitioner and government enforcer. He has never let me down.

In more recent years he has become both colleague and friend, always available to work through an issue and offer sage counsel. A highlight of my time in the Antitrust Division during the Obama Administration was visiting him in Iowa City, attending his class and later paying tribute to him at a well-attended Iowa Law Review symposium in his honor. (I have not yet forgiven him, however, for turning his antitrust class over to me without warning, forcing me to drone on unprepared in his presence).

I know my admiration for and reliance on Herb is far from unique. Practitioners, enforcers, academicians, and judges turn to Professor Hovenkamp to present a three-dimensional perspective on antitrust jurisprudence. The seminal treatise *Antitrust Law* is but one of his many contributions to our understanding. In all his work, Herb presents the issue fairly, incorporates economic principles in a manner understandable to lawyers, summarizes the caselaw and then, most importantly, critiques it. He shows us where courts have gone astray, what industrial organization economics can teach us and how to get antitrust jurisprudence back on a coherent, predictable, and productive path. It is a rare antitrust opinion that does not cite his work.

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\* This foreword is inspired from a previous publication, *Connecting the Antitrust Dots: In Praise of Herb Hovenkamp*, in 100 IOWA L. REV. BULL. 1 (2014), <https://ilr.law.uiowa.edu/online/volume-100/connecting-the-antitrust-dots-in-praise-of-herb-hovenkamp/>.

## Foreword

Most recently Herb has questioned the more extreme aspects of Chicago School orthodoxy, including its rigid focus on price effects and its unsubstantiated tenet that courts should always error on the side of underenforcement. No wonder that the current bipartisan Congressional call for antitrust reform looks to Herb for guidance.

This Concurrences tribute to the exceptional scholarship of “The Dean of Antitrust Law” is well deserved. But we need to keep our eyes forward. We face a challenging future, as market concentration increases across the economy, powerful tech platforms seem impervious to competition and socio and economic disparities grow larger. We need guidance on how to make a free-market economy work for us all. We need more of my friend and mentor, Herb Hovenkamp.

# Introduction

DAVID J. GERBER

Chicago-Kent College of Law

“Could any collection of essays do justice to the enormous range, depth and influence of Herbert Hovenkamp’s work?” This question came to mind when I was asked to write an introduction to this volume of essays in his honor. Hovenkamp’s remarkable capacity to enlist history, economics and legal theory to create effective and practicable legal analysis presents a challenge for any collection dedicated to him.

Fortunately, this set of articles meets the challenge. It treats many of the areas in which his influence on antitrust law has been greatest, and each contribution reflects his influence. Contributors include outstanding scholars and thinkers. Most are US-based, but the list also includes several contributors from outside the US. His influence in many countries has been of much importance in providing non-US scholars and officials with insights into US antitrust law, and this has helped to forge better communication and greater cooperation across national borders.

The volume appears at a time of uncertainty in antitrust law. Questions about the impact at home and abroad of the US-based antitrust orthodoxy abound. Efforts to alter the antitrust laws have generated conflict, as new forms of power created and wielded by Google, Facebook and other “tech giants” challenge the current analytical framework of antitrust law. “Can it effectively respond to the challenges or must it be significantly altered to address them?” Responses differ, often in fundamental ways, leading to conflicts that polarize and obstruct constructive thinking about the issues. These conflicts make Professor Hovenkamp’s approach to antitrust especially timely and valuable. It represents careful, tightly-reasoned analysis in the light of economics, history and legal effectiveness, offering many insights into the conflicts and valuable guidance for moving beyond them.

It is an honor to introduce this volume of essays. I have admired Professor Hovenkamp’s work for decades, and it has been of great value to me in my own research and writing. I provide below some comments that readers may find useful in using the book. The contributions have been placed in six categories.

### *Hovenkamp's Role and Impact*

The first two articles provide a framework for the remaining articles. Christopher Yoo analyzes Hovenkamp's influence within US antitrust law, focusing on his central role in developing the New Harvard School of antitrust. He then maps the relationships between New Harvard, the Chicago school, often seen as the core of modern antitrust orthodoxy, and post-Chicago challenges to that orthodoxy. Barak Orbach, Daniel Sokol and Jane O'Connell use quantitative tools to analyze Hovenkamp's "dominant position" in US antitrust law. Their findings reveal much about the course of antitrust development since the 1970s.

### *Hovenkamp and Antitrust Reform*

A second group of articles explores Hovenkamp's work in the context of current debates about legislative reform of the antitrust laws. Thomas A. Lambert argues that the "House that Hovenkamp Built" – i.e., a nuanced and balanced version of consumer welfare analysis – is solid and worth preserving. He reviews calls for legislative reforms and finds them generally unpersuasive, concluding that Hovenkamp's methodology should remain at the center of US antitrust law. John M. Newman urges the antitrust community to take current calls for reform seriously and engage with critics of Chicago school orthodoxy. He coins the label "reactionary antitrust" for the use of epithets such as "hipster antitrust" to refer to calls for reform, and he shows the potential value of Hovenkamp's methodology in assessing reform proposals. Maria Ioannidou reviews related issues in the context of private litigation, focusing on standing rules after the decision in *Apple v. Pepper*.

### *The Role of Economics*

Hovenkamp's capacity to incorporate economics into legal doctrine in measured and insightful ways has been central to his role in antitrust law. He is not a PhD economist, but his knowledge of economics is deep and well-honed, and he combines it with history and legal theory to inform antitrust analysis. Dan Crane analyzes the central role of the Chicago school in generating and institutionalizing an antitrust "orthodoxy". He foresees changes to that orthodoxy, but he sees a continuing central role for economics in antitrust law. As he puts it, "Chicago invited economics to the party, and it seems likely to stay even after Chicago goes home". Richard Markovits demonstrates the ways in which a more self-conscious use of economics can identify what is "legally correct" in the application of antitrust law.

### *Collective Bargaining: EU and US*

Professor Hovenkamp's breadth of vision and his social justice concerns are reflected in his attention to the impact of antitrust doctrine in related areas of law such as labor law. The two articles in this part examine elements of that impact. Marina Lao proposes a separate antitrust labor exemption to supplement the existing Clayton Act exemption. It would exempt from the Sherman Act collective bargaining by those who rely primarily on their personal labor for their livelihoods,

thereby increasing their capacity to share in productivity gains. Mariateresa Maggiolino views a related issue in the European context, and notes Hovenkamp's relevance to EU discussions. She analyzes claims that competition law interferes with the capacity of employees to conclude collective agreements in the EU.

### *The Interface of Innovation, Intellectual Property & Antitrust*

The largest set of papers deals with the interplays between innovation, intellectual property and antitrust law, another area in which Hovenkamp's work has been exceptionally influential. Thomas Cotter argues that decision-makers should question the assumption that stronger IP rights and weaker antitrust laws would necessarily promote innovation. He demonstrates why the issue calls for careful analysis of specific facts, and he sets out principles that can sharpen that analysis. Thomas Horton brings an historical perspective to the relationship between intellectual property, antitrust and innovation. Using the work of Joseph Schumpeter as a reference point, he analyzes innovation from the intertwined perspectives of economic theory, history and evolutionary biology. Daryl Lim highlights Hovenkamp's insights into the interface between antitrust and intellectual property and applies them in formulating suggestions about how to improve the "design" of that relationship. Gabriella Muscolo adds three important dimensions to the discussion of innovation and competition law. She relates innovation to sustainability, locates it in the context of the current pandemic, and makes particular reference to European experience and literature.

### *Collusion: Case Analysis*

The final set of contributions focuses on the treatment of collusion. Hovenkamp's insights into this area are central, and each contribution examines collusion issues in particular types of cases. Roger Blair and Christine Piette Durrance analyze the collusion issue as a tool of price reduction, using examples from the market for eggs. Christopher Leslie examines the role of so-called "plus factors" in identifying collusion. The legality of potentially collusive agreements often depends on these markers of collusion. He identifies and evaluates their roles in the analysis, paying particular attention to the administrability of this analytical framework. John Lopatka and William Page urge a rethinking of the analysis of "hybrid" and "unilateral" restraints within the state action exemption from the Sherman Act. They use the Second Circuit's recent decision in *Connecticut Fine Wine v. Seagull* to illustrate the issues.

\*\*\*

The overall quality of the papers collected here is very high. Such volumes often contain papers that are somewhat "uninspired" and to which the authors have obviously not devoted excessive attention. Not this group of articles! I cannot recall ever having seen such a uniformly high standard for a volume of this type. It represents a very high form of praise and respect for a revered colleague and friend.

# Contributors

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Dubbed “The Dean of American Antitrust Law” by the New York Times, Herbert Hovenkamp is almost universally recognized as the most cited and the most authoritative US antitrust scholar. Contemporary US antitrust doctrine has been forged in large part by his scholarship, which covers every aspect of competition law, and has been cited in more than three dozen US Supreme Court opinions and well over 1,000 lower court decisions. This tribute book honors Professor Hovenkamp’s rich career and lasting influence by gathering contributions from his friends, from fellow academics to civil servants. Divided over six chapters, these contributions address areas of Professor Hovenkamp’s scholarship: antitrust reform, the role of economics in antitrust law and innovation and intellectual property. Through these articles, the reader can delve into the history of competition law as elucidated by Professor Hovenkamp, and thus chart a path for its future.

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” *How do you write a tribute to international antitrust superstar Prof. Hovenkamp? A gigantic task. To do so, this book brings together antitrust thought-leaders from the world over. Its chapters discuss Prof. Hovenkamp’s important contributions and highlight their relevance today, when basic assumptions relating to antitrust enforcement, such as where to err and how to define market power and abusive conduct, are being challenged. In line with Prof. Hovenkamps immense contributions, the book combines legal, economic and policy analysis, which are essential for the road to come.* “

**Michal S. Gal**, Professor and Director of the Forum on Law and Markets at the Faculty of Law, University of Haifa

” *For the first time in years, antitrust leads the news cycle. What role should the consumer welfare standard play? What to make of aggressive proposals to break up Big Tech? Amidst these gale-force winds buffeting antitrust, one anchor stands tall: the Dean of Antitrust, Herb Hovenkamp. Herb’s views, as elaborated in his 20-volume treatise and current articles, serve as the starting point for thinking about these issues. Concurrences has put together a fabulous collection of many of the leading lights in antitrust today to weigh in on his lifetime contributions. In understanding where antitrust is today, and where it may be headed in the future, the collection is not to be missed!* “

**Michael A. Carrier**, Distinguished Professor, Rutgers Law School

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